[Cite as *Cardinal Partners, Ltd. v. Fernandez Discipline, L.L.C.*, 2010-Ohio-5642.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Cardinal Partners, LTD.	Court of Appeals No. L-10-1180
Appellant	Trial Court No. CI08-7058
v.	
Fernandez Discipline, LLC	**DECISION AND JUDGMENT**
Appellee	Decided: November 19, 2010

* * * * *

Joseph R. Compoli, Jr., James R. Goodluck and D. Jeffrey Rengel, for appellant.

Wayne Pearsall, for appellee.

Matthew P. McCue, for amicus curiae Telemarketing, Spam & Junk Fax Litigation Group of the American Association for Justice.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals a summary judgment issued by the Lucas County Court of Common Pleas in favor of a defendant accused of sending junk faxes. For the reasons that follow, we affirm.

{¶ 2} On May 11, 2006, appellee, Fernandez Discipline, LLC, a Florida marketing consulting firm, sent a two page telephone facsimile ("fax") message to a telephone number that appellee maintains it was provided for Toledo chiropractor Dr. William J. Houttekier II. The first page of the fax advertised an upcoming two day Atlanta seminar on chiropractic marketing. The second page listed other seminars scheduled during the year.

{¶ 3} On or about September 29, 2006, appellee received a letter from appellant's counsel that characterized appellee's May 11 fax as a violation of the Federal Telephone Consumer Protection Act ("TCPA") and offered to settle a private claim for violation of the act for $3,000, the amount counsel asserted that his client would be entitled to as statutory compensation for a willful violation of the act. Attached to the letter was an as of yet unfiled complaint with William Houttekier, 652 Eleanor Avenue, Toledo, described as the plaintiff and appellee as the defendant.

{¶ 4} The next event of record is a September 25, 2008 complaint with appellant, Cardinal Partners, LTD., 652 Eleanor Avenue, Toledo, as the plaintiff. Fashioned as a class action, the complaint alleged a violation of the TCPA, "as amended by the Junk Fax Prevention Act (JFPA) on July 9, 2005." Appellee answered, denying liability on the grounds that it had an existing business relationship with appellant and express consent to send faxes to the business. Appellee subsequently moved to dismiss appellant's class action claim.

{¶ 5} When the trial court dismissed the class action claim, appellant appealed. While the appeal was pending, the parties interposed cross-motions for summary judgment. The trial court stayed consideration of these motions pending the outcome of the appeal. When appellant dismissed its appeal, the trial court rendered its decision.

{¶ 6} The court concluded that, on the undisputed facts submitted, appellee had an established business relationship with Dr. Houttekier, who co-used the telephone number at which appellee's fax was received. An "established business relationship" is excluded by the terms of the TCPA and an opt out notice required by the JFPA (effective July 9, 2005) did not become mandatory until the Federal Communications Commission ("FCC") published rules conforming to the act on August 1, 2006, two months after the fax at issue was sent. On these conclusions, the court granted appellee's motion for summary judgment and denied appellant's.

{¶ 7} From this judgment, appellant now brings this appeal. Appellant sets forth the following single assignment of error:

{¶ 8} "The trial court erred in granting the defendant-appellee's motion for summary judgment, and denying the plaintiff-appellant's motion for summary judgment on the issue of liability."

{¶ 9} Appellant identifies two issues in need of consideration. First it suggests that the trial court grafted an "existing business relationship" exception onto the TCPA where none exists and such an exception conflicts with the language of the law as enacted. Second, appellant maintains that appellee's reliance on the affidavit of its

comptroller to support admissibility of business records is misplaced because the document was riddled with hearsay for which there exists no exception.

{¶ 10} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 11} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 12} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. * * *." Civ.R. 56(E).

{¶ 13} When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. *Riley v.*

Montgomery (1984), 11 Ohio St.3d 75, 79; Civ.R. 56(E). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

I. Established Business Relationship

{¶ 14} Congress enacted the TCPA, Section 227, Title 47, U.S.Code, in 1991 as an amendment to the Communications Act of 1934, Section 201, et seq., Title 47, U.S.Code. The act prohibits, inter alia, any person from sending an "unsolicited advertisement to a telephone facsimile machine." Section 227(b)(1)(C), Title 47, U.S.Code. The 1991 act defined an "unsolicited advertisement" as "* * * any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Biggerstaff v. Federal Communications Commission* (2007), 511 F.3d 178, 181, 379 U.S.App.D.C. 149, 152, quoting Pub.L. No. 102-243, 105 Stat. 2394 at 2395. The act created a private right of action for injunctive relief and monetary damages in state court. Id. citing 105 Stat. at 2396.

{¶ 15} The act directed the FCC to prescribe regulations to implement the requirements set forth. 105 Stat. at 2396. On September 17, 1992, the Commission adopted *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752. The most familiar construct to come out of this

rulemaking was the creation of the "do-not-call list" by which consumers may opt out of unsolicited calls.

{¶ 16} The 1991 act also created an apparent disparity in the manner in which exceptions to telephone solicitations and fax advertisements are treated. This purported disparity is at issue in this case.

{¶ 17} The TCPA provided that a prohibited "telephone solicitation" does not include "* * * a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization." 105 Stat. at 2395; Former Section 227(a)(3), Title 47 U.S.Code. For an "unsolicited advertisement" as it relates to a fax transmission, the only stated exemption occurs when there is "prior express invitation or permission." *Biggerstaff*, supra.

{¶ 18} When the FCC issued its rules and regulations it obscured any perceived distinction. Of telephone solicitation it stated:

{¶ 19} "We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, supra, at para. 34.

{¶ 20} With regard to fax advertisements, the commission observed that unsolicited fax advertisements are prohibited by the act, but noted:

{¶ 21} "In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition; thus, such transmissions are banned in our rules as they are in the TCPA. We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra." (Citations omitted.) Id. at 8779, fn. 87.

{¶ 22} An established business relationship for purposes of sending facsimile advertisement is defined as:

{¶ 23} "* * * a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." Section 64.1200(5), Title 47, C.F.R.

{¶ 24} The commission reaffirmed its recognition of an established business relationship exemption for fax advertisements in 1995. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 F.C.C.R. 12,391, 12,408 (1995); *Biggerstaff*, 511 F.3d at 181. In 2003, however, the commission altered its conclusion on this issue, finding instead that "permission to send fax

advertisements must be provided in writing." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14,014, 14,128 (2003). The commission made clear that the change was to be prospective only. Id. at 14,127, fn. 699.

{¶ 25} In fact, the new rule never went into effect. The commission extended its effective date several times. *Biggerstaff*, 511 F.3d at 182. In 2005, Congress enacted the JFPA which codified, with certain requirements, the established business relationship exemption as an exemption to the bar on unsolicited fax ads. Section 227(b)(1)(C)(i).[1]

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[1]"It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States * * *

"(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

"(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

"(ii) the sender obtained the number of the telephone facsimile machine through—

"(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

"(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

"(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a

The commission extended its stay of the 2003 rule change while rulemaking on the JFPA amendments was pending. Id.; *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005,* 20 F.C.C.R. 19,758, 19,772 (2005). In April 2006, the commission issued rules incorporating the established business relationship exception to the junk fax rules with the statutorily mandated notice of opt out regulations. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005,* 21 F.C.C.R. 3887 (2006).

{¶ 26} In this matter, the fax at issue was sent on May 11, 2006, after the enactment of the JFPA, but prior to the issuance of the FCC rules and regulations. Citing *Grady v. Progressive Business Compliance*, 8th Dist. Nos. 89350, 89636, 2007-Ohio-6078, appellant argues that there was no established business relationship exception for faxes under the TCPA, because that statute expressly included such an exception for telephone calls, but was silent as to such an exception for faxes. This silence, by application of the standard rules of statutory construction, precluded such an exception, appellant insists. According to appellant, after the enactment of the JFPA, which contains an express established business relationship exception, the exception was not effective until the FCC issued its rules and regulations, after the fax at issue was sent.

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sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine * * *."

{¶ 27} In its brief, appellant insists that *Grady* is controlling authority and dispositive of the pre-JFPA exception existence question. The reason, according to appellant, that *Grady* controls is the 2002 amendment of S.Ct.R.Rep.Op. 4. This change abolished any distinction between "'controlling' and 'persuasive' opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports * * *."

{¶ 28} We reject the proposition that this change demands that we consider the decisions of another Ohio appellate district controlling law in this district. The rule was changed to negate the prior rule that unpublished decisions "shall not be considered controlling authority in the judicial district in which it was decided except between the parties thereto * * *." Former S.Ct.R.Rep.Op. 2(G)(1). See *Gil Lieber Buick-Oldsmobile v. State* (1984), 16 Ohio App.3d 124, 126. Appellant has provided no authority, nor are we aware of any, that the rule change effected any change in relations between the various Ohio courts of appeals. Consequently, *Grady* provides only persuasive authority, and we are not persuaded by *Grady* and the other decisions from inferior Ohio courts upon which appellant relies.

{¶ 29} What does control our consideration are the rules and regulations promulgated by the F.C.C. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for

a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 843-844; *Charvat v. Dispatch Consumer Serv.*, 95 Ohio St.3d 505, 2002-Ohio-2838, ¶ 23. Such substitution of interpretation is exactly what the *Grady* court engaged in.

{¶ 30} As we have stated, the original TCPA rules and regulations promulgated by the F.C.C. included a note declaring that those who have an established business relationship with a fax recipient "can be deemed to be invited or permitted by the recipient." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7* F.C.C.R. at 8779, fn. 87. Of this *Grady* stated, "We will not elevate this comment to the status of a regulation, and we could not give it effect even if we did. The comment contradicts the language of the statute. §227(b)(1)(C) requires a sender to obtain a 'prior express invitation or permission' to send an advertisement by facsimile transmission. If the invitation or permission must be express, it cannot be 'deemed to be invited or permitted,' as the FCC's commentary suggests." *Grady* at ¶ 12.

{¶ 31} It is clear from the original regulations and confirmed in subsequent reports on administrative challenges to the rule that the commission intended that there be an established business relationship exception applied to unsolicited fax advertisements. Moreover, this is the interpretation of the regulation by the federal court that ordinarily reviews decisions of federal regulatory agencies, including the F.C.C. Roberts, J. What Makes The D.C. Circuit Different? (2006), 92 Va.L.Rev. 375, 389; *Biggerstaff*, supra, at

180-182; see, also, *CE Design Ltd. v. Prism Business Media, Inc.* (2010), 606 F.3d 443. Accordingly, we conclude that there existed an established business relationship exception from the inception of the regulations issued for the TCPA.

{¶ 32} Moreover, Congress included an express exception of established business relationships in the JFPA, which was enacted prior to transmission of the fax at issue. Appellant's assertion that the statutory exception was not effective until the F.C.C. issued rules on the act is a distortion of administrative law jurisprudence.

{¶ 33} "It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. U.S.* (1991), 498 U.S. 395, 404. In this matter, Congress tasked the F.C.C. with "prescrib[ing] regulations to implement the requirements of this subsection." Section 227(b)(2), Title 47, U.S.Code. With respect to faxes, Congress directed the commission to provide rules mandating clear and conspicuous notice of a cost-free mechanism to opt out of receiving further advertisements. Section 227(b)(2)(D), Title 47, U.S.Code. The commission was also granted authority to "* * * limit the duration of the existence of an established business relationship * * *."

{¶ 34} It would appear that, by the plain language of Section 227, Title 47, U.S.Code, Congress gave clear direction to the F.C.C., in its discretion, to make specific rules and regulations concerning junk faxes and specific conditions relating to the established business relationship exception to the ban on junk fax advertisements. It is also clear from the language of the act, that Congress intended that there be an

established business relationship exception. As a result, while the regulatory rules could not be enforced until promulgated after rulemaking, the exception existed when the law was enacted. Indeed, had no established business relationship regulation existed at the time the JFPA was enacted, the law created such an exception.

{¶ 35} Whether we apply the commission rules extant from the time of the TCPA or look to the law as established by the JFPA, an established business exception to the junk fax advertisement ban existed at the time appellee sent its fax. The trial court must be affirmed on that issue.

II. Civ.R. 56 (E)

{¶ 36} The next question is whether the affidavit of appellee's comptroller was sufficient to establish the undisputed facts necessary to prove that its faxes are exempt from the law because of the established business exception.

{¶ 37} Civ.R. 56(E) provides:

{¶ 38} "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶ 39} In support of its motion for summary judgment, appellee submitted pages from an on-line directory showing the fax number for "Back and Neck Relief Center – William J. Houttekier II, D.C." as "(419) 476-4684." A second directory entry shows the number for appellant, "Cardinal Partners Limited," as "(419) 476-4684." Appellee also submitted the affidavit of Valerie Carbonneau, appellee's comptroller, who averred that she is familiar with appellee's records concerning this proceeding. Carbonneau stated that appellee employed Julia Sandefur, "whose job it is to contact doctors to see if they are interested in attending seminars" on marketing chiropractic practices.

{¶ 40} Carbonneau then lists what she characterizes as "an annual history" of Dr. Houttekier's relationship with appellee, beginning with his 1999 paid attendance at an Atlanta seminar. This, according to Carbonneau, was followed by a 2000 Atlanta seminar, attended by both Dr. Houttekier and Patty Houttekier, and a 2000 Ashville, North Carolina seminar. Carbonneau maintains that later in 2000, Dr. Houttekier signed a five seminar contact, under which he attended a December 2000 Atlanta seminar and a 2001 Orlando seminar.

{¶ 41} Carbonneau next enumerates a series of contacts between Julia Sandefur and Dr. Houttekier's office staff, concerning a booked, then cancelled, 2001 Atlanta seminar and a 2002 call by Sandefur to Dr. Houttekier's office staff, seeking and

receiving permission to send a fax with information about a February 2002 seminar. According to Carbonneau, Sandefur's next contact was in 2006 when she called and received permission from Dr. Houttekier's office staff to send the fax that underlies this case.

{¶ 42} In opposition to appellee's summary judgment motion and in support of its own cross-motion, appellant submitted the affidavit of Patrizia Houttekier, who identifies herself as the owner of appellant company. Patrizia Houttekier avers that telephone number (419) 476-4684 "was subscribed by Cardinal Partners throughout the year 2006 * * *." Moreover, Patrizia Houttekier insists she never gave appellee permission to send her a fax, nor did she authorize her staff or anyone else to give such permission. Also accompanying the motion was the affidavit of Dr. William Houttekier who averred that he never granted appellee permission to fax him, never wanted any faxed advertisement and never authorized his staff, or anyone else, to give such permission.

{¶ 43} Appellant insists that the affidavits it submitted establish, at the least, a question of material fact as to whether its agents ever gave appellee permission to send it a fax advertisement. Appellant also maintains that the Carbonneau affidavit is riddled with inadmissible hearsay for which there exists no cognizable exception. Consequently, the Carbonneau affidavit does not contain the admissible evidence that Civ.R. 56(E) demands and, therefore, fails to support appellee's summary judgment motion.

{¶ 44} Hearsay is an out of court statement offered to prove the truth of the matter asserted and, generally, is inadmissible. Evid.R. 801(C), 802. Appellee argued, and the

trial court concluded, that Carbonneau's account, based on notes of telephone calls between Dr. Houttekier's office staff and Julia Sandefur, is admissible under the business records exception to the rule excluding the admission of hearsay, Evid.R. 803(C). Appellant insists that this exception is unavailable, because Carbonneau's affidavit contained no records, business or otherwise.

{¶ 45} Appellant is correct in this respect. As we have recently stated:

{¶ 46} "Evid.R. 803(6) provides, in part, that '*[a] memorandum, report, record, or data compilation* * * * if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation * * * ' is an exception to the hearsay exclusion. (Emphasis added.) The rule sets out an exception for the record itself to be admitted into evidence. A witness's testimony of the contents of the record does not carry the same trustworthiness that makes the record itself admissible. Thus, while the record was hearsay with an exception, the [witness's] statements asserting the contents of the * * * record was a second level of hearsay for which no exception was offered." *State v. Kirk*, 6th Dist. No. H-09-006, 2010-Ohio-2006, ¶ 24. Thus, Carbonneau's averments that are based on Sandefur's contemporaneous notes of telephone calls were inadmissible absent submission of the notes themselves.[2]

[2]Whether there is another level of hearsay in the notes themselves is a question beyond the scope of this decision.

{¶ 47} Unfortunately for appellant, this is not the end of our consideration. As appellee points out, the Sandefur statements alluded to in the Carbonneau affidavit are directed to the "prior express invitation or permission" statutory language of the TCPA rather than "established business relationship" regulatory and JFPA language. The Carbonneau affidavit also enumerates numerous instances of business intercourse between Dr. Houttekier and appellee for a number of years. This testimony is founded on Carbonneau's knowledge of the business between the parties, not the notes of a subordinate and is, therefore, from her personal knowledge. The relationship described meets the definition of an established business relationship as defined in Section 64.1200(5), Title 47, C.F.R.

{¶ 48} There remains the question of whether the established business relationship between appellee and Dr. Houttekier also acts to effect an exception between appellee and appellant. In the Carbonneau affidavit and with the submission of publicly available telephone listings, appellee effectively submits evidence that the businesses of Dr. Houttekier and Mrs. Houttekier are essentially alter egos of each other. With the submission of this evidence, the burden of evidence shifted to appellant to negate this assertion. The responsive affidavit submitted by Patrizia Houttekier avers only that the telephone number at issue was "subscribed" to Cardinal Partners during the year 2006. She does not maintain that the number was never used by the apparently co-located business of Dr. Houttekier. Absent such a denial, appellee's evidence that the businesses were alter egos of each other is unrefuted.

{¶ 49} Consequently, the trial court properly concluded that the established business exception applied in this case, that the unrefuted evidence demonstrated the existence of such a relationship between Dr. Houttekier and appellee and that this relationship encompassed appellant. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 50} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE