[Cite as *Reo v. Allegiance Admr.*, 2018-Ohio-2464.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

BRYAN ANTHONY REO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2017-L-112
- vs -	:	
ALLEGIANCE ADMINISTRATORS LLC,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2017 CV 00363.

Judgment: Affirmed.

Bryan Reo, pro se, 7143 Rippling Brook Lane, Mentor, OH 44060 (Plaintiff-Appellant).

Robert Huff Miller, Robert Huff Miller LLC, 100 East Broad Street, 16th Floor, Columbus, OH 43215 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Bryan Anthony Reo, appeals the August 22, 2017 judgment of the Lake County Court of Common Pleas, granting appellee, Allegiance Administrators LLC's, motion for summary judgment. For the following reasons, the trial court's judgment is affirmed.

{¶2} On October 6, 2016, appellant filed a complaint against appellee in the Lake County Court of Common Pleas, claiming he received phone calls from telephone marketers on behalf of appellee, despite his phone number being listed on the Federal

Trade Commission's ("FTC") Do-Not-Call registry (case No. 16CV001703). The parties executed a Settlement and Release Agreement. In exchange for appellee's payment of $6,000.00, appellant agreed to dismiss the case with prejudice. Appellant further agreed to

> [waive] any and all claims against Allegiance or any Allegiance Affiliates, relating to events occurring after the dates of the alleged Disputed Calls or after the signing of this Agreement, for any alleged future acts giving rise to civil claims, specifically including for alleged violations of the TCPA [Telephone Consumer Protection Act, 47 U.S.C. §227] or the OCSPA [Ohio Consumer Sales Practices Act, R.C. 1345 et seq.].

The action was dismissed with prejudice.

{¶3} On March 8, 2017, appellant filed another complaint against appellee in the Lake County Court of Common Pleas. Appellant alleged: (1) appellee made phone calls to him on February 14 and February 17, 2017, for the purpose of selling appellant an extended warranty for his car; (2) appellant's phone number was listed on the FTC's Do-Not-Call registry; (3) appellee used an Automated Telephone Dialing System during the calls; (4) appellee "regularly, on behalf of itself and others, engages in telephone solicitation as a matter of business practice"; (4) and appellee obtained appellant's personal and vehicle information for the purpose of commercial solicitation. Appellant further alleged appellee violated the TCPA, the OCSPA, the Ohio Telephone Solicitation Sales Act, and the Driver's Privacy Protection Act, and he claimed he had suffered damages. Appellant requested general damages in an amount not to exceed $30,000.00, statutory damages, treble damages, and attorney's fees in the event he retained legal counsel.

{¶4} On March 31, 2017, appellee filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6) & (7). Appellee argued appellant failed to state a claim upon which relief could be granted because the complaint was barred by the Settlement and Release Agreement of case No. 16CV001703. Appellee further argued appellant failed to join a necessary party, maintaining it had not made the phone calls at issue, and appellant failed to allege facts to make appellee liable under a theory of vicarious liability. Appellee attached a copy of the Settlement and Release Agreement and the affidavit of Hytham Elzayn, President and CEO of Allegiance Administrators, LLC. Appellant filed a brief in opposition on April 24, 2017, and appellee responded.

{¶5} On April 27, 2017, the trial court issued an order converting appellee's motion to dismiss into a motion for summary judgment. The trial court ordered all parties to submit materials pursuant to Civ.R. 56 within 30 days.

{¶6} On May 12, 2017, appellant filed a brief in opposition to summary judgment and a cross-motion for summary judgment. Appellant attached his affidavit, a disc containing the audio files of the phone calls, transcripts of the phone calls, a copy of the requests for admission sent to appellee, and a copy of an e-mail sent to appellee requesting discovery. Appellant maintained appellee failed to respond to the requests for admissions. Appellant maintained that "Request #32 provides- Admit to all allegations, factual and legal, in Plaintiff's complaint" (emphasis deleted). Appellant argued appellee's failure to respond served as an admission, and, therefore, appellee admitted to all the allegations in the complaint, leaving no genuine dispute of material fact to be litigated.

{¶7} On May 17, 2017, appellant filed a motion to compel discovery, maintaining "Plaintiff served upon Defendant, electronically and via USPS, Plaintiff's First Request for

Production of Documents, Plaintiff's First Set of Interrogatories Propounded upon Defendant, and Plaintiff's Second Set of Interrogatories Propounded Upon Defendant." Appellant maintained he did not receive any response to his discovery requests. On May 22, 2017, appellee filed a motion requesting an extension of time to respond to appellant's requests for admissions and to withdraw and amend any item deemed admitted. Attached to the motion was appellee's response to appellant's requests for admissions. On May 23, 2017, appellant filed a brief in opposition.

{¶8} On June 2, 2017, appellee filed a motion to stay discovery until the pending dispositive motions were resolved.

{¶9} Appellee filed a motion for summary judgment on June 8, 2017. In a June 26, 2017 judgment entry, the trial court deemed appellee's June 8, 2017 motion for summary judgment to be properly filed. The trial court also allowed appellee to withdraw and amend admissions and ordered appellant could file new briefing considering the amended admissions. The trial court ordered that appellant had until July 10, 2017, to respond to "defendant's motion to dismiss (converted to a motion for summary judgment by court order filed April 27, 2017) and motion for summary judgment filed June 8, 2017." Further, the trial court granted appellant's motion for leave to file a brief opposing appellee's motion to stay discovery. Appellant did not file anything subsequent to this order.

{¶10} The trial court entered an order on August 22, 2017. The trial court granted summary judgment in favor of appellee. The trial court "considered: (1) the defendant's motion to dismiss, filed March 31, 2017 [converted to a motion for summary judgment]; (2) the plaintiff's brief in opposition to the motion to dismiss, filed April 24, 2017; (3) the

defendant's reply in support of the motion to dismiss, filed May 2, 2017; (4) the plaintiff's brief in opposition to the motion for summary judgment, filed May 12, 2017; (5) the plaintiff's motion to compel discovery, filed May 17, 2017; (6) the defendant's motion to stay discovery, filed June 2, 2017; and (7) the defendant's motion for summary judgment, filed June 8, 2017."

{¶11} The trial court found that in the Settlement Agreement from case No. 16CV001703, appellant waived certain claims against appellee for any alleged future acts giving rise to civil claims, specifically including alleged violations of the TCPA or the OSPA. The trial court determined there was no evidence to support appellant's contention that there was no meeting of the minds as to that provision of the Settlement Agreement. The trial court also determined the Settlement Agreement was not void as contrary to public policy. The trial court further determined the provision was not barred pursuant to R.C. 4719.09, 4719.07, and 4719.15 because appellant's complaint had not alleged he purchased anything from appellee, and it also failed to allege any injury.

{¶12} Appellant filed a timely notice of appeal.

{¶13} Appellee argues appellant's appellate brief should be disregarded pursuant to App.R. 12(A)(2) because he fails to cite to the record in support of his assignments of error. We find appellant did cite to the record in support of his assignments of error. Therefore, appellee's position that we should disregard appellant's brief is not well taken.

{¶14} Appellee further argues appellant waived his arguments on appeal. Appellee maintains none of appellant's assignments of error were raised before the trial court because he did not file a brief in opposition to appellee's June 8, 2017 motion for summary judgment. Although appellee did not file any additional briefing pursuant to the

trial court's June 26, 2017 judgment entry, the trial court considered appellant's brief in opposition to the motion to dismiss filed April 24, 2017, and appellant's brief in opposition to summary judgment filed May 12, 2017, in reaching its decision. Appellant's arguments on appeal were raised in those briefs. Therefore, appellee's argument in this regard is not well taken.

{¶15} Appellant asserts five assignments of error for our review, which we address together. The assignments of error state:

> [1.] The trial court committed prejudicial error in finding that the Appellant cannot, and does not, qualify as a 'Purchaser' pursuant to R.C. 4719.01(A)(5) because Appellant was only solicited to become financially obligated as a result of telephone solicitation and did not actually become financially obligated as the result of the solicitation, and that therefore the entire Telephone Solicitation Sales statute is inapplicable to Appellant's case, and that Appellant is not entitled to any of the remedies provided by that statute, and that Appellee was entitled to summary judgment on that basis.
>
> [2.] The trial court committed prejudicial error in finding the provision in previous agreement between Appellant and Appellee that resolved the claims arising from the first lawsuit bars liability against Appellee for claims arising from conduct that occurred after the execution of the release to be enforceable and valid, when that provision is properly void by statute.
>
> [3.] The trial court committed prejudicial error in finding that an exculpation clause can exculpate a party from future intentional tort liability, or liability greater than mere negligence, despite the overwhelming case precedent in Ohio that such provisions are void and unenforceable if they seek to exculpate intentional torts or other willful or wanton conduct.
>
> [4.] The trial court committed prejudicial error in finding that statutory damages are not available to a plaintiff whose statutory rights are violated, despite the relevant statutes assigning minimum statutory damages which must be awarded, even absent a 'concrete' out of pocket injury.

> [5.] The trial court committed prejudicial error in granting summary judgment to Appellee despite the existence of genuine disputes of material fact.

{¶16} Appellant argues the trial court improperly granted summary judgment in favor of appellee. Appellant maintains the provision in the Settlement and Release Agreement barring appellant from filing civil claims against appellee based on any alleged future acts is unenforceable because, pursuant to Ohio law, exculpation agreements cannot release a party from future intentional torts or negligence.

{¶17} Civ.R. 56(C) provides that summary judgment is proper when

> (1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court [e.g., pleadings, depositions, answers to interrogatories, etc.] which demonstrate the absence of a genuine issue of fact on a material element of the moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996), citing Civ.R. 56(C) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies this burden, the nonmoving party has the burden to provide evidence demonstrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Id.* at 293.

{¶18} On appeal, we review a trial court's entry of summary judgment de novo, i.e., "independently and without deference to the trial court's determination." *Brown v.*

Cty. Commrs. of Scioto Cty., 87 Ohio App.3d 704, 711 (4th Dist.1993) (citation omitted); *see also Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶19} "An agreement between a plaintiff and a defendant that the plaintiff will compromise a claim for relief and release the defendant from liability upon the defendant's payment of an amount of money is a contract[.]" *Garrison v. Daytonian Hotel*, 105 Ohio App.3d 322, 325 (2d Dist.1995), citing *Noroski v. Fallet*, 2 Ohio St.3d 77, 79 (1982). "A release is an absolute bar to a later action on any claim encompassed within it, absent a showing of fraud, duress, or other wrongful conduct in procuring it." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, ¶48 (citations omitted).

{¶20} "Releases from liability for future tortious conduct are generally not favored by the law and are narrowly construed." *Brown-Spurgeon v. Paul Davis Sys. of Tri-State Area, Inc.*, 12th Dist. Clermont No. CA2012-09-069, 2013-Ohio-1845, ¶50, citing *Glaspell v. Ohio Edison Co.*, 29 Ohio St.3d 44, 46-47 (1987). "[W]hile the execution of a release may bar claims of negligence, it cannot bar claims of willful and wanton conduct." *Id.* (citations omitted). "Nonetheless, courts routinely apply such releases to bar future tort liability as long as the intent of the parties, with regard to exactly what kind of liability and what persons and/or entities are being released, is stated in clear and unambiguous terms." *Id.* at ¶51, citing *Hague v. Summit Acres Skilled Nursing & Rehab.*, 7th Dist. Noble No. 09 NO 364, 2010-Ohio-6404, ¶21.

{¶21} Pursuant to the Settlement and Release Agreement between appellant and appellee, appellant waived "any and all claims * * * for any alleged future acts giving rise to civil claims, specifically including for alleged violations of the TCPA or the OCSPA" against appellee. Although the release specifies the entity being released, it does not

specify what kind of liability is released other than indicating appellant waives claims for future violations of the TCPA or the OCSPA. This language is too broad and indicates appellant waives *all* civil claims, including those alleging willful and wanton misconduct. Therefore, the release cannot be used to bar appellant's current claims for willful or knowing conduct.

{¶22} Appellant further argues the release provision is void under the Ohio Telephone Solicitation Sales Act because R.C. 4719.09 provides that any waiver of a purchaser's right to bring a civil action against a telephone solicitor is void and unenforceable.

{¶23} In his complaint, appellant alleged appellee willfully and knowingly violated the Ohio Telephone Solicitation Sales Act. Because we have determined the release could not bar appellant's claims for willful conduct, we need not consider whether R.C. 4719.09 applies in this case to render the Settlement and Release Agreement void and unenforceable as to that claim.

{¶24} Although appellant's claims were not barred by the Settlement and Release Agreement, on appeal, appellee argues an alternative ground under which this court can affirm the trial court's grant of summary judgment in its favor. Appellee maintains it cannot be held liable because appellant failed to meet his burden and demonstrate a genuine dispute of material fact regarding whether appellee made the telephone calls in question.

{¶25} Appellant argues the trial court did not specifically address the issue of whether the calls were made by appellant, so this court cannot consider that issue on appeal as an alternative ground for granting summary judgment. However, "this court applies the same summary judgment standard as the trial court and must affirm the trial

court's judgment if any valid grounds are found on appeal to support it, even if the trial court failed to consider those grounds." *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995); *see also Ludwigsen v. Lakeside Plaza, LLC*, 12th Dist. Madison No. CA2014-03-008, 2014-Ohio-5493, ¶39; and *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶51 ("We have consistently held that a reviewing court should not reverse a correct judgment merely because it is based on erroneous reasons."). *But see Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 89 (1992) (where the trial court *specifically* declined to address an alternative ground for its decision to grant summary judgment in favor of appellees, the issue was not properly before the court of appeals), and *B.F. Goodrich Co. v. Commercial Union Ins.*, 9th Dist. Summit No. 20936, 2002-Ohio-5033, ¶38. Further, because appellee specifically raised this alternative ground in its appellate brief, appellant responded in his reply brief.

{¶26} Both in the trial court and on appeal, appellee argued it is not a telemarketer and did not make the telephone calls at issue. In support of its argument, appellee referenced the affidavit of its President and CEO, which was attached to its March 31, 2017 motion to dismiss that was converted to a motion for summary judgment. That affidavit asserted the following: (1) Allegiance is not a telemarketing company and does not make outgoing sales calls to consumers; (2) the company has never assigned employees to make telemarketing sales to consumers; (3) employees of the company do not perform any telemarketing to consumers; (4) the telephone number appellee alleged the calls were coming from in his complaint is not owned by, used by, or associated with the company in any manner.

{¶27} This was sufficient evidentiary material to shift the burden to appellant to produce evidentiary material regarding this issue. Appellant failed to meet his reciprocal burden to provide evidence demonstrating a genuine issue of material fact exists as to whether appellee is a telephone solicitor and made the phone calls at issue. In his briefs in opposition, appellant included his affidavit, in which he stated that during the calls "[t]he caller identified itself as 'Allegiance' and 'Allegiance Administrators.'" Appellant argued the transcripts of the calls demonstrate appellee either directly, or by engaging another entity, called appellant "to advance its business interests." However, in those transcripts the caller states he is "with the Vehicle Services Department * * * calling about the Toyota Tacoma." The caller further states the warranty he is selling would "be through Allegiance Administrators." The caller did not identify himself as calling from or on behalf of appellee. The statements made by the caller do not demonstrate appellee made the calls, that it engaged a third party to make calls on its behalf, or that it is a telephone solicitor. Viewing the evidence in the light most favorable to appellant, there is no evidentiary material that rebuts the evidence put forth by appellee. This evidence is necessary to create a genuine dispute of material fact whether appellee made the calls in question.

{¶28} At oral argument, appellant maintained that the "Vehicle Services Department" does not exist. He also explained how the solicitations work and how the caller got his information. These assertions, however, are not supported by evidence in the record. Appellant further maintained that the trial court did not allow discovery and never granted any of appellant's motions to compel discovery. The information appellant requested may have been necessary for him to establish, at a minimum, a genuine issue of fact. However, the failure to allow discovery has not been assigned as error.

Therefore, that argument has been waived. *See In re Burton*, 12th Dist. Warren No. 2015-12-110, 2016-Ohio-2683, ¶8 fn. 1 (citations omitted).

{¶29} Appellant argues appellee cannot rely on the self-serving affidavit of its President and CEO to meet its burden on a motion for summary judgment. "However, a moving party's self-serving affidavit is adequate evidence under Civ.R. 56 to demonstrate the absence of any genuine issue of material fact." *Belknap v. Vigorito*, 11th Dist. Trumbull No. 2003-T-0147, 2004-Ohio-7232, ¶28. "Unlike the nonmoving party's self-serving affidavit, the moving party's self-serving affidavit may be refuted by evidence demonstrating a genuine issue of material fact." *Id.* Appellant's argument is not well taken.

{¶30} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.