[Cite as *Boehm, Kurtz & Lowery v. Interstate Ins. Servs. Agency*, 2010-Ohio-5432.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BOEHM, KURTZ & LOWRY,	:	APPEAL NO. C-100033 TRIAL NO. A-0509968
Plaintiff-Appellant,	:	*D E C I S I O N.*
vs.	:	
INTERSTATE INSURANCE SERVICES AGENCY, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 10, 2010

Montgomery, Rennie & Jonson, George D. Jonson, and *Mathew E. Stubbs,* for Plaintiff-Appellant,

Rendigs, Fry, Kiely & Dennis, Joseph W. Gelwicks, Felix Gora, and *William H. Fry,* for Defendant-Appellee.

WILLIAM L. MALLORY, JR., Judge.

{¶1} Defendant-appellee Interstate Insurance Services Agency, Inc., ("Interstate") advertised in a facsimiled publication entitled Fax News, which consisted of news, jokes, and other trivial items, as well as advertisements from local businesses. Cincinnati Fax Publishing created and published Fax News, and Interstate paid Fax Publishing to advertise in the publication. From 2004 to 2005, plaintiff-appellant Boehm, Kurtz & Lowry ("BKL") received Fax News along with Interstate's advertisements. BKL began to save the Fax News publications, and it then sued under the Telephone Consumer Protection Act ("TCPA"),[1] alleging that it had received unsolicited facsimiles. BKL later moved to certify a class that included all persons who had received similar advertisements without express permission. The trial court denied BKL's motion. In this appeal, BKL challenges the trial court's denial of class certification. We affirm.

I. Interstate Advertises in Fax News

{¶2} Cincinnati Fax Publishing sought and retained subscribers to Fax News and compiled each subscriber's information in a "master list" that included fax numbers, some recipient names, the number of publications that had been "missed" by the machines, and the date that the last "missed" transmittal had taken place. According to one of Cincinnati Fax Publishing's partners, the Fax News subscriber list was generated from business listings from the Cincinnati and Northern Kentucky Chambers of Commerce, entries at trade shows, and subscriber requests. The parties do not dispute both that BKL actually received the advertisements in question and that Interstate had never sought authorization to transmit its advertisements; the

[1] Section 227 et seq., Title 47, U.S.Code.

record, however, does not reflect the circumstances surrounding BKL's addition to the master list.

{¶3} Following a summary-judgment hearing in 2007, the trial court ruled that BKL's claims were barred by the doctrine of laches, and it then entered judgment for Interstate and denied BKL's class-certification motion as moot. When BKL appealed, this court held that laches did not apply, and we accordingly reversed the entry of summary judgment and remanded the case for the trial court to consider BKL's motion for class certification.[2]

{¶4} On remand, the parties did not engage in additional discovery, but the trial court did hold a hearing in September 2009 on the class-certification motion. After hearing testimony and reviewing the submitted documents, the trial court ruled that BKL had failed to meet the Civ.R. 23 requirements for class certification. In its sole assignment of error, BKL now challenges the trial court's denial of its motion for class certification.

II. Clarification of Our Prior Decision

{¶5} We begin by clarifying that our previous holding—that Interstate could not rely on permission given to Fax Publishing—does not foreclose Interstate from defending against this suit based on Fax Publishing's established business relationship ("EBR") with Fax News recipients. Our reading of the relevant case law leads us to conclude that the defense of permission is a separate legal concept requiring an analysis distinct from that of Fax Publishing's EBR with Fax News recipients.

[2] *Boehm, Kurtz & Lowry v. Interstate Ins. Servs. Agency, Inc.*, 179 Ohio App.3d 147, 2008-Ohio-5761, 900 N.E.2d 1075.

{¶6} In clarifying our previous ruling, we note that Fax News's purported EBR may provide a complete defense to Interstate, as well as to other similar TCPA claims where the alleged violation occurred before the 2005 enactment of the Junk Fax Protection Act.[3] Although we are aware of authority to the contrary,[4] the TCPA explicitly empowered the Federal Communications Commission ("FCC") to promulgate TCPA-related rules and regulations.[5] We are convinced that the FCC's acknowledgment in its rules and regulations of the existence of an EBR defense that existed before the JFPA was enacted is reasonable, and we will not substitute a different construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[6]

III. The Law and Standard of Review for Civ.R. 23 Determinations

{¶7} We review a trial court's ruling on a motion to certify a class under Civ.R. 23 by using an abuse-of-discretion standard. An abuse of discretion suggests that a decision is unreasonable, arbitrary, or unconscionable.[7]

{¶8} Civ.R. 23 requires that the following be shown by the plaintiff "before an action may be maintained as a class action under Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties

[3] See *CE Design Ltd. v. Prism Business Media, Inc.*, (C.A.7, 2010), 606 F.3d 443, affirming *CE Design Ltd. v. Prism Business Media, Inc.* (Aug. 12, 2009), N.D.Ill. No. 07C5838; *Charvat v. Dispatch*, 95 Ohio St.3d 505, 2002-Ohio-2838, 769 N.E.2d 829. But, see, *Grady v. Progressive Business Compliance*, 8th Dist. Nos. 89350 and 89636, 2007-Ohio-60781, and *Cicero v. U.S. Four Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600.
[4] *Grady* and *Cicero*, supra.
[5] See *CE Design Ltd.*, supra, N.D.Ill. No. 07C5838.
[6] *Charvat*, supra.
[7] *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 201, 509 N.E.2d 1249.

must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met."[8]

{¶9} In determining the viability of a class, a court must exercise its discretion within the boundaries of Civ.R. 23, and a class-certification determination outside those boundaries or a decision that suggests that the trial court failed to conduct a rigorous analysis of the Civ.R. 23 requirements constitutes an abuse of discretion.[9]

{¶10} The trial court concluded that BKL had failed to meet its burden on the requirements of identifiability, numerosity, commonality, fair and adequate representation, and predominance and superiority. It stated that BKL had only met its burden with regard to the requirements of representative membership and typicality.

{¶11} We are satisfied that, in reaching its decision, the trial court conducted the rigorous Civ.R. 23 analysis required under *Hamilton v. Ohio Sav. Bank*,[10] so we must now determine whether the trial court abused its discretion in denying class certification. It did not.

IV. An Unidentifiable and Indefinite Class

{¶12} In *Cicero v. U.S. Four Inc.*, the Tenth Appellate District upheld a trial court's denial of a class-certification motion because the class was not identifiable.[11] In that case, the plaintiff had received a series of allegedly unsolicited faxes, as prohibited by the TCPA, from a defendant advertising an adult-entertainment venue.

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[8] *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 71, 1998-Ohio-365, 694 N.E.2d 442.
[9] See id.; *Dunkelman v. Cincinnati Bengals, Inc.*, 170 Ohio App.3d 224, 2006-Ohio-6825, 866 N.E.2d 576.
[10] 82 Ohio St.3d 67, 1998-Ohio-365, 694 N.E.2d 442.
[11] *Cicero v. U.S. Four Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600.

The plaintiff attempted to certify a class consisting of all "persons located within the telephone area code of 614 or 740 who, at any time * * * were sent an unsolicited facsimile by or on behalf of any defendant."[12]

{¶13} The plaintiff based its class-certification motion on lists (some handwritten) provided by the defendant in discovery. The trial court had denied class certification because the class description was indefinite. On appeal, the Tenth Appellate District held that there was no evidence that any of the listed recipients had *actually* received the faxes in question. The *Cicero* court then noted that, to satisfy the identity requirement, the "description of the class [must be] sufficiently definite such that it is *administratively feasible* for the court to determine whether or not a particular individual is a member of the class."[13] The court concluded that the evidence presented (the handwritten lists) failed because it did not show "whether any of these entities indeed received the fax, or whether any fax sent to these entities was unsolicited."[14]

{¶14} BKL contends that the master list sufficiently identifies putative members because the list identifies the fax number, the entity associated with that fax number (if any), when the fax number was added, and how many times each fax number missed a copy of Fax News. But BKL has failed to show how the master list allowed the trial court to identify which machines had in fact received faxes that included advertisements from Interstate—other than by the implication of receipt based on the facsimile number's presence on the list. In that same vein, the trial court stated that the determination of membership in the proposed class required an *individualized assessment* of whether each purported member had in fact received

[12] Id. at ¶5.
[13] Id. at ¶14 (emphasis ours).
[14] Id. at ¶19.

the faxes at issue, as well as who actually owned each facsimile number; and it then went on to note that "[n]o competent testimony was presented to explain which purported class member on the list actually received the advertisement."

{¶15} The record supports the trial court's conclusion that the only way to determine class membership is to analyze the master list on an entry-by-entry basis and then to contact each entry on the list to determine who in fact owns the number, whether that person owned the number on the dates in question, and whether that person actually received a transmission on the dates in question. Each entry on the master list of 13,000 facsimile numbers will require a unique and individual assessment of its class eligibility; the *inference of inclusion* in the class from an entry's mere presence on the master list is insufficient to certify a class under Civ.R. 23. As Interstate correctly points out, there are numerous reasons why a specific fax may not have been received by its intended recipient (such as a lack of ink or paper). The master list contains no compilation of *all dates* on which a particular machine was out of paper, lacked ink, or otherwise was prevented from receiving a specific fax transmittal. We are, therefore, convinced that the multitude of individualized factual assessments required for each entry makes class certification inappropriate.

{¶16} It is likely that some numbers on the list never even received the transmissions at issue, but the trial court has no way to make this determination without an individual assessment of each number on the list. We again note that the trial court found that there was no competent method to identify potential class members, and this determination must be taken as true because BKL has failed to include a transcript of the class-certification hearing. In the absence of a transcript, we have no way to determine whether BKL may have presented an "administratively

feasible"[15] method to identify potential class members. In addition, the parties had ample opportunity to conduct discovery and introduce evidence concerning the significance of the master list. The trial court concluded, from all the evidence filed and the hearing conducted, that there was no method to identify potential class members. The trial court clearly made this decision based on the merits of the evidence presented.[16] Furthermore, the record does not otherwise disclose such an administratively feasible method to ascertain class membership based on the master list.

V. No Adequate Class Representative

{¶17} The trial court also declined to certify the class because the representative parties would not fairly and adequately protect the interests of the class. The court stated that the adequate-representation requirement contained two parts: one regarding the adequacy of the counsel for the parties, and the other regarding the actual adequacy of the representative parties.[17] The court found that the law firm representing the class was adequate, but concluded that BKL was an inadequate representative because it had previously held an antagonistic interest toward other putative class members.

{¶18} A representative will generally be deemed adequate so long as his interests are not antagonistic to the interests of other class members.[18] Here, BKL had sued a putative class member, Carpets Direct. The trial court made the determination that BKL's attempt both to represent Carpets Direct in the class action

[15] Id.
[16] *Begala v. PNC Bank* (2001), 142 Ohio App.3d 556, 559, 756 N.E.2d 215.
[17] *Warner v. Waste Management, Inc.* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091.
[18] *Marks* at 203, 509 N.E.2d 1249.

and to proceed against it in a separate law suit involving the same factual and legal issues posed a "prohibited conflict and antagonistic relationship."

{¶19} BKL argues that Carpets Direct is not on the master list, which Interstate disputes. But the trial court found that Carpets Direct is on the master list, and that finding of fact must be taken as true because the record does not reflect otherwise, and because no hearing transcript has been filed. Consequently, Carpets Direct is a potential class member, and BKL's lawsuit against Carpets Direct, which involved the same publication at issue here, is antagonistic. Therefore, BKL is not an adequate representative.

VI. Predominance

{¶20} The trial court also concluded that BKL had failed to meet one of the three Civ.R. 23(B) requirements, specifically applying Civ.R. 23(B)(3) to the instant case. The parties do not disagree with the trial court's determination that only Civ.R. 23(B)(3) applied. Civ.R. 23(B)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, *and* that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[19] (Emphasis added.)

{¶21} The rule requires that, in a significant portion of the case, questions common to the class predominate over questions pertaining to individual members. Here, the most significant questions involve an individualized assessment of each entry's membership in the putative class, whether each received the faxes at issue, and whether each had an existing EBR with Interstate through Cincinnati Fax Publishing. Furthermore, it is also apparent that the rule requires both predominance *and* superiority to satisfy its terms. BKL argues that superiority alone

[19] Civ.R. 23(B)(3).

satisfies the rule. Not so. The rule plainly requires that both elements be satisfied for the class action to be viable. And the trial court concluded that there was no administratively feasible way to maintain this case as a class action.

{¶22} In this case, since it is clear that questions involving individualized assessments of putative class members overwhelmingly predominate over any common questions of law or fact, BKL cannot satisfy the requirements of Civ.R. 23(B)(3).

VII. Conclusion

{¶23} We conclude that the trial court did not abuse its discretion in denying BKL's motion for class certification. Although the trial court may have had grounds to reach the opposite conclusion on the matter of class certification, given its inherent power to manage its own docket, we must defer on this record to its assessment of whether the requirements of Civ.R. 23 had been satisfied.[20] BKL's sole assignment of error is overruled, and the trial court's judgment is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and **HENDON, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

[20] *Hamilton*, supra.