

Genuine Issue of Facet: Court Denies a Plaintiff's Motion for Summary Judgment Due to Questions as to the Existence of an Agency Relationship

Article By:

Tori Guidry

Good morning TCPAWorld! The Dame here with an update on a case out of the Middle District of Tennessee.

In *Faulk v. Knoxville HMA Holdings, LLC*, No. 3:21-CV-00755, 2023 WL 6276436 (M.D. Tenn. Sept. 26, 2023), the court adopted the Magistrate Judge's Report and Recommendation, which recommended granting the defendants' motion for partial summary judgment and denying the plaintiff's motion for partial summary judgment.

To provide some background, this lawsuit originated from a mix-up at Dyersburg Hospital. The hospital mistakenly linked Mr. Faulk's phone number to Ms. Trumble's account due to a clerical error. Consequently, Mr. Faulk started receiving voicemails from a company named Firstsource, which were meant for Ms. Trumble. These messages offered assistance in obtaining insurance/bill assistance. Mr. Faulk further alleges that he requested these calls to cease, but they persisted. A few months later, the plaintiff filed suit against Knoxville Holdings, LLC, Jackson Madison County General Hospital District ("JMCGHD"), and Dyersburg Health. And a little over a year later, both parties filed their motions for summary judgment.

Now, when a magistrate judge issues a report and recommendation on a dispositive pretrial matter, a district court judge can review that report and recommendation where a party objects. If those objections are properly

made, that review is *de novo*. In conducting its review, the Court may accept, reject, or modify the R&R, receive further evidence, or return the matter to the Magistrate Judge with instructions.

Plaintiff **only** filed objections as to **Count I** and **Count III**. As such, the Court only reviewed the Report and Recommendation as to those two counts.

The plaintiff's summary judgment was only for Count I, which alleged violations 47 U.S.C. §227(b)—pertaining to calls using regulated technologies (i.e., ATDS and prerecorded voice calls).

To begin, for there to be a violation 47 U.S.C. §227(b), the plaintiff needs to prove that an unauthorized call was made using automated systems or prerecorded voices. But the parties did not dispute that Firstsource made calls to the plaintiff using prerecorded voice messages without consent.

What was disputed is whether Firstsource was an agent for the defendants. The plaintiff pointed to the Master Services Agreement (MSA) as evidence of an agency relationship. JMCGHD countered this argument by highlighting that the MSA explicitly stated that Firstsource is an independent contractor and that nothing in the agreement 'shall create or be deemed to create an ... agency ... relationship between' the parties."

The Report and Recommendation acknowledged that this language was sufficient to indicate the absence of a formal agency relationship, leading the Court to conclude that there was indeed a 'genuine issue of fact' in this regard.

It's worth noting that the Court emphasized the plaintiff's failure to raise Lucas' argument regarding the totality of the circumstance as it pertains to agency relationships until his reply brief. Consequently, this argument was considered waived. This is a crucial point to highlight because this is yet another confirmation that an argument not made is an argument waived.

Now, the defendants, JMCGHD and Dyersburg Health, moved for summary judgment on the following counts:

- Count II: Violations of 47 U.S.C. §227(c).
- Count III: Harassment as outlined in Kentucky Revised Statute § 525.070.
- Count IV: Invasion of privacy under Tennessee common law.

The Court only addressed Count III, considering the other counts as unopposed due to the plaintiff's failure to raise objections.

As to Count I, since it was Firstsource calling, the Court found it unreasonable to impute knowledge from two of the Defendant's employees to the Defendants and then back to Firstsource. The Court went on to determine that moreover, even if such knowledge was attributed to the defendants, it doesn't automatically mean that a jury could reasonably determine there was intent by the defendants to "harass or annoy [the p]laintiff or to call without a genuine purpose."

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