

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1532
September Term, 2006

BROOK POWERS, ET AL.

v.

ROBERT BATTAGLIA, ET AL.

Eyler, James R.,
Barbera,
Kenney, James A., III,
(Retired, specially assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: June 19, 2007

Appellants, a group of individuals and a corporation who allegedly received unsolicited facsimile advertisements from appellees, former employees or associates of the business entity Fax.com, brought suit in the Circuit Court for Montgomery County alleging violations of the Federal and Maryland Telephone Consumer Protection Acts. Appellants challenge the sufficiency of damages awarded pursuant to default judgments entered against two defendants who are not parties to this appeal, the grant of summary judgment to appellees, and the denial of two discovery motions. For the reasons set forth below, we shall affirm in part and reverse in part.

Factual and Procedural History

Appellants, seven individuals and one corporation,¹ filed suit in circuit court against seventeen defendants,² four of whom are relevant to the appeal at hand, for violations of the federal Telephone Consumer Protection Act ("TCPA")³ and the Maryland Telephone Consumer Protection Act ("MTCPA"),⁴ based on

¹Appellants are Brook Powers, L.W. Powers, Fred Fulton, Martin Pasco, Atomic Engineering Corporation, William Jacobs, David C. Phelan, and Robert Dillon.

²Two defendants, Fax.com and Global Communications Consulting Corp., were served with the complaint but did not participate in the proceedings below. Pursuant to our authority under Md. Rule 8-602(1)(e), we enter a final judgment on our own initiative as to those defendants and will treat the appeal as properly filed. It also appears that several of the defendants were not served and, therefore, were not participants in the case below.

³ 47 U.S.C. § 227 (2002).

⁴Maryland Code (2005 Repl. Vol.), §§ 14-3201-3202 of the Commercial Law Article.

appellants' receipt of unsolicited fax advertisements.

Appellants were granted default judgments against defendants Timothy R. Roth and Jeffrey Dupree. Neither Roth nor Dupree is participating in this appeal; appellants, however, have contested the sufficiency of the damages awarded by the circuit court pursuant to the default judgments.

Two defendants, Robert Battaglia and Matthew Beucler, participated in the circuit court proceedings and are parties to this appeal. In their complaint, appellants alleged that Battaglia worked for a company called Fax.com, which was "in the business of obtaining fax numbers through electronic means and sending unsolicited fax ads to those numbers," and other companies associated with Fax.com.⁵ According to appellants, Battaglia assisted Fax.com by helping to create a "Faxcaster" network of computers and other electronic equipment "which systematically dials phone numbers to test whether a fax machine is connected to the phone line, and then adding each fax number identified to a database for future fax broadcasts to those numbers."

Appellants alleged that "Battaglia contracted with Verizon Maryland, Inc. to take out many phone accounts in his name to facilitate the Faxcasting," and Battaglia paid for the service. Additionally, appellants stated that the "[d]efendants' Faxcaster

⁵Appellants also alleged that "Battaglia ran a website called www.moneyforfax.com, but later used a California company called Telcom Tech Support."

computer network was used to send faxes" to appellants and others in Maryland.

Appellants alleged that Beucler was a "top sales person[]" at Fax.com, and "conspired to and [was] responsible for arranging Fax.com to send millions of unsolicited fax [sic] for clients, including into Maryland." According to appellants, "Beucler . . . personally initiated sending thousands of faxes into Maryland," and was one of the "[p]rimary and possibly only sales persons at Fax.com to handle travel fax clients, and thus primarily or wholly responsible for approving the travel faxes received by Plaintiffs."

Appellants asserted five claims against each defendant, including Battaglia and Beucler: (1) that the defendants violated the TCPA by sending unsolicited fax advertisements, (2) that the defendants violated the TCPA and Federal Communication Commission ("FCC") regulations by failing to properly identify the sender or sending number of the faxes, (3) that the defendants violated the MTCPA by sending unsolicited fax advertisements, (4) that the defendants were part of a civil conspiracy to send the unsolicited faxes, and (5) that the defendants aided and abetted the conduct necessary to send the unsolicited faxes. Battaglia and Beucler each filed a motion for summary judgment, which the circuit court granted. The grant of these motions will be discussed in greater detail in section II, *infra*.

At the hearing on appellees' motions for summary judgment,

the circuit court also resolved a discovery dispute between appellants and Verizon and a request by appellants to extend the discovery deadline. Appellants alleged that Verizon, in response to subpoenas, had failed to provide documentation related to complaints lodged against Battaglia for calls made from Verizon telephone numbers. Additionally, appellants alleged that they had learned of "a treasure trove of documents located in the Fax.com depository in California about one month before discovery closed," which necessitated additional time to conduct discovery. The circuit court denied appellants' motions to compel further discovery from Verizon and to extend discovery.

Contentions

Appellants present three contentions, reproduced here:

I. The Circuit Court's Judgments against Thomas Roth and Jeffrey Dupree erred as a matter of law in awarding only a single sum of statutory damages per [appellant] regardless of the number of illegal faxes each had received where the federal and Maryland Telephone Consumer Protection Acts both provide for a separate award of statutory damages for each illegally sent fax ad received by each [appellant].

II. The Circuit Court erred in granting summary judgment to [appellees] Robert Battaglia and Matthew Beucler on unstated or unclear grounds, where disputed questions of material fact existed on whether phone lines Battaglia subscribed to in Maryland were used to send the fax ads to [appellants], [appellant] David Phelan saw Battaglia's name on his Caller ID, and Matthew Beucler was an admitted fax salesperson for Fax.com during the relevant time period.

III. The Circuit Court's denial of discovery or to compel Verizon was an abuse of discretion because [appellants] only learned of the Fax.com document depository one month before discovery closed, and the information was not reasonably available anywhere else.

We will address each of appellants' contentions.

I. Damage Awards Pursuant to Default Judgments

The circuit court entered default judgments against two defendants, Thomas R. Roth and Jeffrey Dupree, who are not parties to this appeal, in favor of each of the eight appellants. While appellants' complaint contained five counts, the circuit court awarded damages with respect to counts one and three. Count I alleged violations of the TCPA, while count III alleged violations of the MTCPA.

The circuit court's judgment in favor of appellant, Atomic Engineering Corp., and against Thomas R. Roth, mimics each of the fifteen other default judgments, and states:

This Court having determined that the Federal and Maryland statutory schemes each allow five hundred dollars (\$500.00) per facsimile or actual damages sustained as a result of the violation of those statutory schemes, which allow treble damages under appropriate circumstances, and

With respect to Count II, this Court having determined that the governing scheme does not allow or afford a private cause of action, even though there was a Judgment of Default entered against defendant Thomas R. Roth, no damages are awarded Plaintiff Atomic Engineering Corporation for Count II, and

This Court having acknowledged that the facsimiles received caused an aggravation,

the Court finds that to translate that aggravation into economic injury does not approximate and is distinguishable from the actual injury and damages sought, and that awarding five hundred dollars (\$500.00) per facsimile would be excessive and inappropriate and therefore the Court denies Plaintiff Atomic Engineering Corporation's proposed compensatory scheme, and

The Court having therefore determined that Plaintiff Atomic Engineering Corporation is entitled to five hundred dollars (\$500.00) for actual damages sustained as a result of all facsimiles received in violation of each governing statutory scheme, and as a matter of equity grants treble damages where allowed under the statutory scheme, it is this 10th day of August, 2006, by the Circuit Court for Montgomery County, Maryland hereby,

ORDERED, that with respect to Count I as to the Judgment by Default entered against Defendant Thomas R. Roth on December 15, 2005, Judgment be and is hereby Entered for treble damages in the amount of one thousand and five hundred dollars (\$1,500.00) assessed by the Court for numerous and burdensome facsimiles sent in favor of Plaintiff Atomic Engineering corporation and against Defendant Thomas R. Roth, and it is further

ORDERED, that with respect to Count III as to the Judgment by Default entered against Defendant Thomas R. Roth on December 15, 2005, Judgment be and is hereby ENTERED for actual damages sustained in the amount of five hundred dollars (\$500.00) assessed by the Court for numerous and burdensome facsimiles sent in favor of Plaintiff Atomic Engineering Corporation and against Defendant Thomas R. Roth, and it is further

ORDERED, that with respect to reasonable attorney's fees and costs of this suit, this Court having considered the complexity of the above-captioned case, the length of time devoted to the case as well as court appearances, and counsel's fees awarded in

similar cases to competent counsel addressing similar matters, Plaintiff Atomic Engineering Corporation be and is hereby AWARDED prorated reasonable attorney's fees of three hundred twenty-seven dollars and thirty-eight cents (\$327.38) and prorated costs of suit of fifteen dollars (\$15.00).

Like Atomic Engineering Corporation, three other appellants who received default judgments, William Jacobs, Martin Pasco, and L.W. Powers, also allegedly received faxes after the effective date of the MTCPA, June 1, 2004, and therefore were awarded damages for both counts I and III against Roth and Dupree, in addition to costs and attorneys fees. The remaining four appellants, David Phelan, Brook Powers, Robert Dillon and Fred Fulton, did not receive a fax after the above date, and were awarded damages of \$1,500.00 for count I only, as well as fees and costs. Thus, two judgments were awarded to each appellant, with damages for each judgment totaling \$1,500 for count I, alleging a violation of the federal act, and \$500.00 for count III, for those appellants alleging a violation of the Maryland act.

Count II alleged an additional violation for sending faxes without the identification required by FCC regulation 47 C.F.R. 68.318. The court did not award any damages pursuant to this claim, finding that 47 C.F.R. 68.318 did not create a private right of action for failure to properly identify. We will examine appellants' contentions regarding counts I and III together, and count II separately.

A. *Counts I and III - Failure to Award Damages as Mandated by
the TCPA and MTCPA*

Appellants contend that the circuit court erred in awarding damages equal to one violation of the TCPA and, where applicable, one violation of the MTCPA. According to appellants, the TCPA and the MTCPA mandated, at a minimum, that the trial court award the greater of \$500 or actual damages for each unsolicited fax sent by the defendants. Appellants produced evidence that, combined, Roth and Dupree sent appellants 840 faxes. Thus, in appellants' view, based on the minimum mandatory award under the TCPA, the circuit court should have collectively awarded appellants \$420,000.00 for the violations alleged in count I alone. Additionally, appellants produced evidence that the defendants together sent them 106 unsolicited faxes after the effective date of the MTCPA, such that the court was required to award them \$53,000.00 for count III.

The Federal TCPA, 47 U.S.C. 227(b)(3) provides that:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State -

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

The Maryland TCPA likewise provides:

A person may not violate:

* * *

(2) The Telephone Consumer Protection Act, 47 U.S.C. 227, as implemented by the Federal Communications Commission in the restrictions on Telemarketing and Telephone Solicitations Rule (47 C.F.R. Part 64, Subpart L).

(b) . . . an individual who is affected by a violation of this subtitle may bring an action against a person that violates this subtitle to recover:

- (1) Reasonable attorney's fees; and
- (2) Damages in the amount of the greater of:
 - (i) \$500 for each violation; or
 - (ii) Actual damages sustained as a result of the violation.

Based on the language above, appellants claim that the circuit court lacked discretion to award less than \$500 per violation. The circuit court found "actual damages," per each appellant, to be \$500 total for all violations listed in count I, of the TCPA, and in Count III, of the MTCPA.⁶ Thus, if

⁶Appellants sought only statutory damages.

appellants are correct, the circuit court did not comply with the mandatory damage award, as each appellant claimed receiving more than one unsolicited fax, and would be entitled to statutory damages in excess of \$500.

The language at issue is certainly less clear than appellants contend. The statutes listed above authorize an award of \$500 per violation, but do not affirmatively mandate that the state court hearing the claim award the specified damages if the individual's claim succeeds. The greater weight of the decisions of other jurisdictions is supportive of appellants' position, however, and lacking any argument to the contrary, we will follow those decisions.

Thus, in Lary v. Work-Loss Data Institute, the appellate court determined that the trial court improperly awarded damages of \$500 to the plaintiff following the grant of summary judgment on plaintiff's TCPA claim, where plaintiff's affidavit asserted the receipt of three unsolicited faxes. 911 So.2d 18 (Ala. Civ. App. 2005). The appellate court determined that plaintiff "at a minimum, would necessarily be entitled to recover no less than a total of \$1,500." Id. at 21. Additionally, in Kenro, Inc. v. Fax Daily, Inc., the Federal District Court for the Southern District of Illinois noted that § 227(b)(3)(B) "provides for a minimum penalty" of \$500 for each violation of the TCPA. 962 F. Supp. 1162, 1167 (S.D. Ind. 1997).

The case law contains other similar references to the \$500

statutory penalty in § 227(b)(3)(B) as constituting a "minimum" penalty. See Texas v. American Blastfax, Inc., 121 F. Supp. 2d 1085 (W.D. Tex 2000) (discussing the constitutionality of the TCPA's \$500 minimum penalty per violation); Livingston v. U.S. Bank, N.A., 58 P.3d 1088, 1090 (Colo. Ct. App. 2002) (noting that § 227 (b)(3)(B) of the "TCPA creates a private right of action for violations of its provisions and provides that for each violation, a person is entitled to the greater of the actual damages or \$500 in statutory damages"); Edwards v. Direct Access, LLC, 124 P. 3d 1158 (Nev. 2005) (noting that where no actual damages are claimed in TCPA claim, computation of damages at \$500 per violation is required in computing jurisdictional threshold); Grady v. OTC Investor's Edge, 2003 WL 22828294 at 1 (Ohio Com. Pl. 2003) (noting that the "TCPA provides for minimum damages of \$500 per violation").

Therefore, the circuit court erred in limiting the damages awarded to "actual damages," where the statutorily prescribed \$500 per violation would have resulted in a greater award. On remand, the circuit court should award \$500 for each violation of the TCPA, which the court finds was committed by each defendant against whom a default judgment was entered, with respect to each appellant, and \$500 for each violation of the MTCPA, which the court finds was committed by each defendant against whom a default judgment was entered, with respect to each appellant. On the other hand, an award of treble damages for the TCPA violations pursuant to § 227(b)(3) is within the court's

discretion.

We wish to note, however, that based on the language of the MTCPA, this Court is skeptical that a plaintiff is entitled to recover damages under both the MTCPA and the TCPA for the same unsolicited fax. As Judge Moylan pointed out in a recent unreported opinion:

The MD-TCPA does not spell out in any way what conduct might be a violation of Maryland law. It simply makes reference to whatever would be a violation of the federal TCPA. It might well be argued that Maryland's 2004 enactment of what is now § 14-3201 (2) is no more than the modality by which Maryland manifested its approval of treating violations of the federal TCPA as private rights of action in Maryland.

Worsham v. Integrated Credit Solutions, Inc., No. 0815, September Term, 2006, at 4-5 fn. 3.

Citing Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd., 156 F. 3d 432, 438 (2d Cir. 1998), Judge Moylan noted that "'The TCPA does not provide a 'federal protection' but a permissive authorization to bring actions in state courts.'" Id. Thus, the "state action would not be a new and distinct violation subjecting the violator to sanctions for two violations instead of one, [but] . . . nothing more than a doubling of the permissible sanction." Id.

As Chapter 437 of the 2004 Maryland Laws makes clear, the MTCPA was meant to "prohibit[] a person from violating the federal Telemarketing and Consumer Fraud and Abuse Prevention Act or the federal Telephone Consumer Protection Act." Rather than providing double damages for a single violation, it seems more

likely that the legislature simply intended to enable a private right of action pursuant to the federal TCPA. Passing the MTCPA may have appeared necessary in the wake of this Court's decision in R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc., 149 Md. App. 219 (2003), in which we held that the General Assembly had not accepted the jurisdiction conferred through the TCPA, and thus, no private right of action could be brought in state courts under that act. The Court of Appeals' decision overturning that ruling and recognizing a private right of action under the TCPA, R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc., 382 Md. 689 (2004), was not issued until August 26, 2004, nearly three months after the effective date of the MTCPA.

As neither Roth, nor Dupree chose to file an appeal, this issue is not before us and we decline to review it *nostra sponte*. Based on the foregoing, however, we have serious doubts as to the availability of double damages for an identical violation of both acts.

B. Count II - Refusal to Award Damages for the Failure to Identify

Appellants brought a separate TCPA claim against Roth and Dupree for sending faxes without the identification required by 47 C.F.R. § 68.318(d). That provision states that:

It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending

the message and the telephone number of the sending machine or of such business, other entity, or individual. If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name. . .

The circuit court did not award damages to appellants on that count, finding that this provision did not create a private right of action. We agree.

As noted in Adler v. Vision Lab Telecommunications, Inc., "Based on the plain language of the [TCPA] . . . [t]he private right of action established by § 227(b)(3) limits the right to 'an action based on a violation of *this subsection* [*i.e.*, subsection (b)] or the regulations prescribed under *this subsection*.'" 393 F. Supp. 2d 35, 38 (D. D.C. 2005) (quoting 47 U.S.C. § 227(b)(3)) (emphasis in original). The C.F.R. regulations cited by appellants, however, "were issued pursuant to a directive in 227(d)."⁷ "Section 227(b) deals with unsolicited faxes, not improperly identified faxes. A private

⁷§ 227 (d)(1)(B) makes it unlawful for any person:

to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

It does not, however, contain language similar to that in § 227(b)(3), creating a private right of action.

right of action exists only with respect to the former." Id. at 39. Therefore, the circuit court correctly refused to award damages with respect to count II.

II. Summary Judgment for Battaglia and Beucler

The circuit court granted appellees' motions for summary judgment, stating:

Reviewing the pleadings in this record and considering the arguments of counsel, the Court is persuaded that summary judgment should be granted

With respect to defendant Beucler, I'm rendering the same judgment. I find that his status as an employee only, and consequently everything else is sort of inconsequential.

* * *

And with respect to defendant Battaglia, the evidence, or the pleadings or the arguments taken collectively or individually, are not sufficient to withstand the defendant's motion for summary judgment.

Appellants contend that the circuit court erred in granting summary judgment to appellees Battaglia and Beucler. Regarding Battaglia, appellants allege that a material dispute of fact existed as to whether phone lines to which Battaglia subscribed were used to send faxes to appellants, and as to whether Battaglia was guilty based on civil conspiracy and aiding and abetting theories for his relationship with Fax.com. Appellants allege that summary judgment in favor of Beucler was likewise inappropriate, as he was an "admitted fax salesperson" for Fax.com during the time period in which the alleged violative faxes were sent to appellants. Appellants' arguments regarding Beucler focus almost entirely on the validity of the dismissal of

appellants' civil conspiracy and aiding and abetting claims.

A. Summary Judgment for Battaglia

Prior to trial, Battaglia filed a motion to dismiss count II of appellants' complaint and a motion for summary judgment as to all remaining counts. For the reasons set forth above, the circuit court correctly dismissed count II, as no separate private right of action exists for the failure to adequately identify pursuant to 47 C.F.R. § 68.318(d).⁸

With regard to the remaining counts, Battaglia argued that appellants had "conceded that they have no personal firsthand knowledge showing nor any personal firsthand knowledge tending to show that Mr. Battaglia ever used a facsimile machine or other device to send any of the alleged unsolicited facts." According to Battaglia, rather than providing any proof that he had sent a fax, appellants attempted "to expand the statutes' meaning," to find violations not only for those who "send" an unsolicited fax but, quoting from appellants' complaint, also for those who "allegedly 'arranged for,' 'initiated sending,' or 'approved' such a fax." In Battaglia's view, such an expansion violates the plain meaning of the statute.

Regarding appellants' claims for civil conspiracy and aiding and abetting, Battaglia argued that no evidence existed demonstrating that he encouraged or incited Fax.com to engage in unlawful conduct, and that appellants have failed to set forth proof of actual damages, a prerequisite for finding guilt based on

⁸Additionally, as discussed in greater detail below, appellants have failed to provide any evidence that Battaglia sent them a fax.

civil conspiracy.

Appellants responded that it was not a "surprise" that appellants failed to see Battaglia's name on the unsolicited faxes they received, since they were alleging violations for failure to identify in their complaint. Appellants emphasized, however, that one appellant, David Phelan, saw Battaglia's name on his Caller ID display "during the period when they were receiving the unsolicited faxes alleged herein." Appellants also noted that the Faxcaster systems Battaglia allegedly set up "were or could have been used to send faxes to Plaintiffs, or trigger their Caller ID to show his name." Additionally, appellants attempted to refute Battaglia's interpretation of "send" under the TCPA, by pointing to FCC regulations which apply identification requirements to fax broadcasters with a "high degree of involvement" in sending faxes.

Finally, appellants argued that Battaglia has indeed participated in a civil conspiracy, as evidenced by his "getting paid well for several years to help set up and maintain a nationwide network of Faxcasters to send up to millions of unsolicited and illegal fax ads per day," and that his status as an employee of Fax.com, or the founder/employee of an independent contractor of Fax.com should not shield Battaglia from liability. Appellants contended that actual damages need not be proven, since appellants were seeking statutory damages provided by the TCPA and MTCPA. The circuit court agreed with Battaglia and granted his motion for summary judgment.

On appeal, appellants contend that a material dispute of

fact existed as to whether Battaglia sent faxes to appellants. Specifically, appellants note that "of particular importance" in showing a dispute of fact "[i]s that one of Battaglia's numbers, 410-665-2350 was affirmatively seen⁹ by Plaintiff David Phelan on his Caller ID." Appellants also argue as follows:

. . . Battaglia may also be arguing that even though his business partner and defacto employer Fax.com was responsible for initiating the fax transmissions at the California end, and he was responsible for setting up the equipment with local Maryland hosts at the other end through which the faxes were sent through a computer dialer as local and cheaper calls, he should not be held responsible. This argument should be rejected, both on its face, and also under the civil conspiracy and aiding and abetting Counts which Plaintiffs have alleged [L]iability is not contingent on proving a specific fax was sent to a specific phone line to a specific Plaintiff. That is the nature of civil conspiracy and aiding and abetting.¹⁰

1. Appellants' Direct TCPA and MTCPA Claims Against Battaglia

Ignoring for the moment appellants' claims for civil conspiracy and aiding and abetting, the circuit court properly

⁹We note that, in addition to claiming that they had "affirmatively identified at least one Battaglia number linked to fax ad transmissions," appellants claim that they "have also identified other phone numbers, exchanges, and indeed, the entire 301 area code." It would appear from this phrasing that appellants have identified "the entire 301 area code" as "Battaglia number[s] linked to fax ad transmissions." The Court will consider this claim to be nothing more than an unintended gaffe.

¹⁰Appellants also argue that "Battaglia's admitted throwing out of records of his company Telcom Tech Support, LLC used in the fax operation was intentional destruction of evidence," and therefore the "trial court should take into consideration any spoliation by Battaglia and the adverse instruction to which the Plaintiffs are entitled to, including in determining summary judgment. Summary judgment should be reversed, and an adverse inference instruction should be given at trial." It would thus appear that appellants are alleging that they are entitled to an adverse inference to defeat summary judgment, and as a jury instruction at trial.

Although appellants referenced Battaglia's lost records in their opposition motion, they did not ask or argue for an adverse inference below, and have therefore, waived this argument. See Md. Rule 8-131.

dismissed appellants' TCPA and MTCPA claims for Battaglia's actions in "sending" faxes to appellants.

We agree with Battaglia's assessment of the plain language of the TCPA. The TCPA, 47 U.S.C. § 227 (b)(1)(C), makes it illegal "to use any telephone facsimile machine, computer, or other device to *send*, to a telephone facsimile machine, an unsolicited advertisement" (Emphasis added). As noted above, the MTCPA prohibits violation of the federal act. Therefore, to survive summary judgment as to their claims that Battaglia directly violated the TCPA and MTCPA, appellants must have provided evidence that Battaglia did, in fact, actually send one or more unlawful faxes to appellants, sufficient to create a material dispute of fact.

Pursuant to Md. Rule 2-501, summary judgment is appropriate where there is no genuine dispute as to any material fact, and a party is entitled to judgment as a matter of law. The standards for an appellate court's review of the circuit court's grant of summary judgment are well settled:

The question of whether a trial court's grant of summary judgment was proper is a question of law subject to de novo review on appeal. In reviewing a grant of summary judgment under Md. Rule 2-501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party.

Myers v. Kayhoe, 391 Md. 188, 203 (2006) (internal citations omitted).

For summary judgment purposes, the averments contained within a party's complaint will ordinarily not be sufficient to prove the existence of material facts in dispute. A complaint "serves merely as an outline of the suit and its office is to advise an adverse party of the nature of the claim against him Upon this basic skeleton, further development in the case should add muscle and flesh." Wyand v. Patterson Agency, Inc., 266 Md. 456, 459 (1972). The plaintiffs-appellants, as the parties responding to a motion for summary judgment, must augment the allegations contained in their complaint with evidence, which would be admissible at trial, showing the existence of a material dispute of fact, or that they are entitled to judgment as a matter of law, to prevent summary judgment in appellees' favor. As the Maryland Rules Commentary puts it, "The response to a motion for summary judgment must contain specific facts that controvert facts contained in the motion Thus, a response must be supported by the same type and quality of evidence as is necessary to support a judgment at trial. . . ." P.V. Niemeyer & L.M. Richards, *Maryland Rules Commentary* 357 (3d ed. 2003)).

Appellants rely principally on the affidavit of David Phelan to provide evidence that Battaglia was the sender of a fax to Phelan, sufficient to create a genuine dispute of material fact. Appellants have failed to fill in the basic skeleton of their complaint and have, therefore, failed to meet this burden.

The affidavit supplied with their opposition to Battaglia's motion for summary judgment provides, with reference to Battaglia, that:

During the time period when I received the unsolicited faxes . . . on at least one occasion I received a unsolicited telephone call to my phone line for which the Caller ID read a partial name of Robert Battaglia, with part of the name cut off because the Caller ID display was not long enough.

From the text of this affidavit, it is impossible to tell whether Phelan is alleging that his Caller ID revealed the name Robert Battaglia at a time when he actually received an unsolicited fax or simply that Phelan received an unsolicited telephone call. Appellants have not alleged a violation of the TCPA based solely on the receipt of a telephone call from Battaglia.

In their brief, appellants also allege that they have "affirmatively identified at least one Battaglia number linked to fax ad transmissions to one of the [appellants], 410-665-2350." It is unclear, however, based upon our review of appellants' opposition motion to Battaglia's motion for summary judgment and appellants' brief on appeal, how appellants have "linked" that number to "fax ad transmissions."

The Phelan affidavit, provided in support of appellants' opposition to summary judgment, stated: "I am a Plaintiff in this suit, and received the faxes Bate-stamped for this case as Bates 364-408 at my fax number at the time during 2002, 410-665-2350."

From this statement it would appear that Phelan is alleging that 410-665-2350 is his own personal phone number at which he received faxes, rather than Battaglia's number from which faxes were sent. Even if we were to conclude that the confusion was simply a consequence of careless drafting, examining the Bates numbered faxes referenced in the affidavit does not clarify the issue. Those faxes do not show the sender number, or the receiver number, to be 410-665-2350, but instead show two completely different numbers.¹¹

Because appellants failed to generate a genuine dispute of material fact as to whether Battaglia sent unsolicited faxes to appellants, the circuit court properly granted summary judgment as to counts I and III, alleging direct violations of the TCPA and MTCPA.

2. Appellants' Civil Conspiracy and Aiding and Abetting Claims Against Battaglia

In Maryland, a claim for civil conspiracy requires proof of a "combination of two or more persons by an agreement or

¹¹Appellants', in their brief, attempt to tie unsolicited faxes to Battaglia by referencing an affidavit composed by Battaglia's wife, and included in the record extract, stating that 410-665-2350 was Battaglia's home telephone number. We note that this affidavit was not attached to appellants' opposition motion below, and even if it were, does not provide evidence that appellants received an unsolicited fax from that number. As noted above, the Phelan affidavit attached to appellants' opposition motion did not claim that Phelan had received a fax from 410-665-2350, and the Bates-numbered faxes cited, likewise do not contain any reference to that number as the sending or receiving number.

On appeal, appellants cite to an additional Phelan affidavit, not attached to their opposition motion below, which is similarly unhelpful. That affidavit states that "On one time the name 'Battaglia Robert' and # 410-665-2350 appeared on my Caller ID." Phelan does not, however, claim that this number appeared concurrently with the arrival of a fax.

understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff." Green v. Washington Suburban Sanitary Comm'n, 259 Md. 206, 221 (1970). An action for civil conspiracy requires proof of actual damages. Thus, the Court of Appeals has stated that "it is equally well-established, that no such action can be maintained unless the plaintiff can show that he has in fact been aggrieved, or has sustained actual legal damage by some overt act, done in pursuance and execution of the conspiracy." Kimball v. Harman, et al., 34 Md. 407, 409 (1871).

Here, even if Battaglia, as an employee of Fax.com or the founder/employee of an independent contractor employed by Fax.com, engaged in a civil conspiracy with Fax.com to violate the provisions of the TCPA and MTCPA, it must be shown that the act or means employed by Battaglia and Fax.com resulted in actual damages to appellants.

Appellants have not, however, alleged actual damages, instead relying on the \$500 statutory penalty per TCPA and MTCPA violation. That statutory penalty is available separate and apart from the existence of any actual damages, and acts to punish only those who "send" unsolicited fax advertisements.

Even if we were to conclude that appellants could move forward on their conspiracy claim without proof of actual

damages, appellants' claims that Battaglia was guilty of conspiracy and aiding and abetting Fax.com's violation of the TCPA and MTCPA were correctly dismissed, as appellants did not prove Battaglia's involvement to a degree sufficient to hold Battaglia personally liable.¹²

Generally, tort liability in Maryland for aiding and abetting a tortious action is "predicated upon the wrongdoer's engaging in acts of encouragement or assistance to the person actually committing the wrongful act. To be liable in the tort, the aider or abettor must have engaged in assistive conduct that he would know would contribute to the happening of the act." Saadeh v. Saadeh, 150 Md. App. 305, 328 (2003). Here, however, appellants are alleging assistance with violating the TCPA and MTCPA, rather than a recognized tort. In essence, they are claiming that Battaglia should, in addition to Fax.com, face liability for his assistance to Fax.com in violating the provisions of the acts at issue.

¹²We also note that, even if we were to conclude that appellants did suffer some actual damages, appellants have not provided any evidence that the acts of a civil conspiracy between Battaglia and Fax.com caused those damages. As noted above, appellants provided no evidence that Battaglia directly caused a fax to be sent to appellants. Nor did appellants provide evidence that the assistance given by Battaglia directly resulted in faxes being sent to appellants. According to appellants' complaint, several defendants assisted in obtaining fax numbers through the use of the Faxcaster network, and several defendants and entities unrelated to Battaglia sent unsolicited faxes. As such, appellants have failed to create a genuine dispute of material fact that they were damaged by the acts or means employed by Battaglia in his alleged conspiracy with Fax.com.

Were the plaintiffs in the case below the FCC, Battaglia's participation with Fax.com may have been sufficient to create TCPA liability generally, however, appellants are not the regulatory agency tasked with enforcing the TCPA. As private parties, they are entitled to damages only for TCPA and MTCPA violations for which they are the victims.

Relevant to Battaglia's liability for conspiracy, aiding and abetting, and directly sending faxes as well, is Battaglia's status as an employee of Fax.com or as the employee/founder of an independent contractor who provided services for Fax.com, Telcom Tech Support, LLC. Based on that status, Battaglia may only be found "personally liable under the TCPA if he had direct, personal participation in or personally authorized the conduct found to have violated the statute, and was not merely tangentially involved." Texas v. American Blastfax, Inc., 164 F. Supp. 2d 892, 898 (W.D. Tex. 2001).¹³

In finding the co-owners and founders of a company similar to Fax.com liable, the court in American Blastfax noted that the corporate officers:

were the "guiding spirits" and the "central figures" behind the TCPA violations. They were the two persons who controlled all of Blastfax's day-to-day operations. They both had direct, personal involvement in and ultimate control over every aspect of Blastfax's wrongful conduct that violated the TCPA and/or directly controlled and authorized this conduct.

Id. Here, on the other hand, appellants presented no evidence that Battaglia or Telcom Tech Support sent the faxes at issue, or directed or controlled the conduct which resulted in the faxes

¹³Corporate officers may be personally liable in Maryland for violations of consumer protection statutes when those violations are in the nature of a tort action. MaryCLE, LLC v. First Choice Internet, Inc., 166 Md. App. 481, 528 (2006). "If an officer either specifically directed, or actively participated or cooperated in the corporation's tort, personal liability may be imposed." T-Up, Inc. v. Consumer Prot. Div., 145 Md. App. 27, 72-73, cert. denied, 369 Md. 661 (2002) (internal quotation marks and citation omitted).

being sent. Battaglia's participation did not rise to a level where personal liability under the TCPA and MTCPA is available.

B. Summary Judgment for Appellee Beucler

Appellants have alleged that the circuit court improperly granted summary judgment to Beucler, as to appellants' claims for civil conspiracy and aiding and abetting. Although the circuit court granted summary judgment to Beucler for each count in appellants' complaint, including for directly violating the TCPA and MTCPA, it appears that appellants have abandoned any arguments as to the validity of granting summary judgment with regard to those claims.

Appellants' arguments as to why granting summary judgment in favor of Beucler was incorrect are at times hard to follow. Principally, it would appear that appellants are arguing that Beucler may be guilty of civil conspiracy and aiding and abetting based on his position as a salesman for Fax.com, because, according to appellants, "no defendant has argued that fax.com was not responsible for sending the fax ads to Plaintiff [sic]." Additionally, appellants argue that Beucler gave unclear answers to appellants' deposition questions, even forgetting very simple details of his client interactions and job duties, such that it is impossible to trace Beucler's influence on a specific fax to a specific plaintiff. Therefore, appellants contend this Court should not allow Beucler to escape liability, and find that the circuit court prematurely granted summary judgment as to

appellants' civil conspiracy and aiding and abetting claims. In support of a finding that the circuit court acted prematurely, appellants point out that "in his deposition testimony Beucler did admit his supervisor was Jeff Dupree, against whom judgment has been entered in the instant case, and against whom the FCC's \$5.4M Forfeiture has been entered."

1. Appellants' Civil Conspiracy and Aiding and Abetting Claims
Against Beucler

The circuit court correctly granted Beucler's motion for summary judgment. In Maryland, "It is established law that there can be no conspiracy between a principal and an agent where the agent acts within the scope of his or her employment." Fraidin v. Weitzman, 93 Md. App. 168, 235 (1992). Beucler is not liable for civil conspiracy absent some showing that he conspired with another party, outside of Fax.com.

Thus, the circuit court's decision with respect to Beucler was correct, regardless of whether Beucler was a "top salesperson" at Fax.com. It is his very nature as an employee of Fax.com which precludes liability. Likewise, whether the FCC assessed liability to Beucler's supervisor, Jeffrey Dupree, has no affect on Beucler's liability for civil conspiracy. That his supervisor may have been guilty of TCPA violations does not extend liability for conspiracy to Beucler where he was acting within the scope of his employment as a salesperson of Fax.com. Also, as with Battaglia, appellants have not alleged any actual

damages sufficient to sustain a civil conspiracy claim.

Additionally, and determinative of appellants' claims that Beucler aided and abetted Fax.com in violating the TCPA, appellants did not create a material dispute of fact that Beucler's level of participation in Fax.com's TCPA violations rose to a level at which he may be held personally liable. Appellants have alleged that Beucler was a "top sales person" at Fax.com, responsible for "arranging for Fax.com to send millions of unsolicited fax [sic] for clients." Appellants alleged at the hearing on Beucler's motion for summary judgment that he made agreements with Fax.com clients to send out faxes on their behalf, stating that "He's a salesperson. He gets the order. He puts it in a box."¹⁴

While appellants note that Beucler's supervisor, Dupree, was included in the FCC's forfeiture notice, appellants have not alleged that Beucler was a director, an officer, or in control of Fax.com's day to day operations. He was not alleged to have "personally authorized the conduct found to have violated the TCPA." American Blastfax, 164 F. Supp. 2d at 898. As a salesperson, he was not alleged to be a "guiding spirit" in Fax.com's TCPA violations, or to have "ultimate control" over Fax.com's wrongful conduct. Id. Appellants did not provide any evidence from which it could be inferred that Beucler had a sufficient impact or participation in Fax.com's enterprise to be

¹⁴Appellants have not provided any evidence demonstrating that Beucler personally sent appellants faxes.

held personally liable, and the circuit court was correct to grant him summary judgment.

III. Motion to Compel Verizon and Extend Discovery

At the hearing on Beucler's and Battaglia's motions for summary judgment, the circuit court heard argument on appellants' motion to reconsider the denial of a motion to extend discovery, and also heard argument on appellants' motion to compel Verizon to release documents related to Battaglia's phone accounts with Verizon.

Regarding the extension of discovery, appellants argued that they only recently discovered a "treasure trove" of Fax.com documents stored in California as part of other litigation pending against Fax.com. As for their motion to compel, appellants alleged that Verizon had not provided the documents requested pursuant to a subpoena duces tecum that appellants had issued roughly six months before the hearing.

Counsel for Beucler argued that discovery had then been pending nearly thirteen months, and appellants should have discovered the public repository far earlier. Beucler's counsel also raised the possibility that appellants had, for a long period of time, been aware of the repository and simply not acted upon that knowledge.

Following argument, the court denied appellants' motion to reconsider, noting that "I think as a natural and practical time limitation, I think that essentially has been met. I see no evidentiary or other reason for extending discovery; so the

motion to extend is denied, or request for reconsideration is denied."

As to appellants' motion to compel Verizon, appellants sought documentation of complaints made against phone numbers held in Battaglia's name, which they had not, according to appellants, received. Counsel for Verizon responded that all documentation requested had been turned over to appellants' counsel two months prior to the hearing on the motion to compel. Counsel for Verizon alleged that appellants' counsel was under the mistaken belief that thousands of pages of documents memorializing complaints against Battaglia existed, when in fact, there were only twelve such pages. Therefore, appellants' counsel was seeking to compel discovery for documents which did not exist.

The circuit court denied appellants' request to compel Verizon, finding that in light of "the representation by counsel that compliance has been had, I'm not persuaded that the further relief, compelling further discovery in this matter with respect to your motion, as it relates to Verizon, is appropriate."

In this appeal, appellants have essentially ignored the denial of their motion to compel, and focused almost exclusively on the circuit court's denial of their motion to extend discovery. Regarding Verizon, they note only that it would be in Verizon's best interest to withhold documentation of complaints against Battaglia, as Verizon may itself be liable for TCPA violations. With regard to the circuit court's denial of their

motion to reconsider extending the time of discovery, appellants refer to the circuit court's action in denying their request as an abuse of discretion, but provide no argument as to why. They simply ask that, if summary judgment in favor of Beucler or Battaglia is reversed, they be given a reasonable time for additional discovery.

Obviously, we have not reversed the summary judgment granted in favor of either appellee, Beucler or Battaglia, but, nevertheless, we conclude that the circuit court did not abuse its discretion. As noted in Mahler v. Johns Hopkins Hosp., Inc.:

"In administering the discovery rules, trial judges are vested with a reasonable, sound discretion in applying them, which discretion will not be disturbed in the absence of a showing of its abuse." E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 405 (1998) (quotation marks and citation omitted). In fact, in exercising that discretion, "[t]he court may at any time order that discovery be completed by a specified date or time, which shall be a reasonable time after the action is at issue." Maryland Rule 2-401(b); see also Maryland Rule 2-504(b).

170 Md. App. 293, 315 (2006). Appellants filed their complaint on January 14, 2005. During the pendency of the suit, the discovery period was extended several times, from the original deadline of October 26, 2005 to April 1, 2006. As such, appellants had well over a year in which to conduct discovery. The "treasure trove" of documents was located at a public repository, which appellants could have accessed prior to the conclusion of the discovery period. The court did not,

therefore, abuse its discretion in denying appellants a further time extension.

Pursuant to Md. Rule 2-432(b), a party may move for a an order to compel discovery if "a nonparty deponent fails to produce tangible evidence without having filed written objection" Here, we see no abuse of discretion in the trial court's denial of appellants' motion to compel, as the circuit court determined that Verizon had provided all requested documentation, and appellants provided no evidence refuting that conclusion.

**JUDGMENT AFFIRMED IN PART AND
VACATED IN PART; CASE REMANDED TO
THE CIRCUIT COURT FOR BALTIMORE
CITY FOR FURTHER PROCEEDINGS NOT
INCONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLANTS.**