

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 3, 2008 Session

**MIKE MILLS, and wife, MARY ANN MILLS v. RICHARD PARTIN, and  
wife, PEGGY PARTIN, ET AL.**

**Direct Appeal from the Chancery Court for Moore County  
No. 2181 James B. Cox, Chancellor**

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**No. M2008-00136-COA-R3-CV - Filed November 4, 2008**

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This appeal involves a dispute about the poor construction of a modular home. The purchasers brought a lawsuit alleging, among other things, that the manufacturer violated the Tennessee Consumer Protection Act. After a bench trial, the trial court found that certain representations made by the manufacturer were “unfair and deceptive” under the Act. Because the trial court found that these violations were made knowingly and willfully, it awarded the purchasers treble damages. The manufacturer appeals. We find that the trial court did not err in determining that the manufacturer’s representations were unfair and deceptive. We also find that the trial court did not err in assessing treble damages. Therefore, we affirm the judgment of the trial court.

**Tenn. R. App. P.3; Appeal as of Right; Judgment of the Chancery Court Affirmed**

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

James C. Bradshaw, III, Nashville, TN, for the Appellant

Michael D. Hornback, Nashville, TN, for the Appellant

Gregory L. Cashion, Nashville, TN, for the Appellee

Kenneth S. Schrupp, Nashville, TN, for the Appellee

**OPINION**

Facts and Procedural History

Mike and Mary Ann Mills (“the Mills”) wanted to build a new house for their family in Moore County. In August 2000, they visited the Premier Southern Homes (“PSH”) office in Coffee County. PSH is an authorized dealer for All American Homes (“AAH”), which specializes in modular home construction. PSH is owned by Peggy and Richard Partin (“the Partins”).

At PSH, Ms. Partin explained how the Mills could purchase a modular home. The home would be built at the All-American plant in Springfield, Tennessee. Then, the pieces of the house (the “modules”) would be taken on trucks to the Mills’ site in Moore County. Once there, the modules would be put together to make the finished house.

As a part of her sales presentation, Ms. Partin gave the Mills several brochures promoting homes built by AAH. One of the brochures was entitled “A Construction Walk Through of All American Homes” (“Walk Through Brochure”). The Walk Through Brochure explained how AAH constructs a home at its plant. It contained the following statements:

1. As you can see below, [AAH] builds entirely indoors. This controlled environment keeps materials safe and dry so high quality is insured;
2. The [building] plans are carefully checked to make sure they match the specifications of your order;
3. Lumber is moisture tested before it is received;
4. Jigs help make walls solid and true;
5. Much the same as the walls, floors are built in jigs. Outer beams are solidly secured with both glue and power nails;
6. Plumbing lines are pressure tested to check for leaks;
7. An exterior covering such as this vinyl siding is installed indoors;
8. The drywall is sanded to a smooth, even finish so painting can begin;
9. Cabinets and Counters are a perfect fit;
10. Our custom made crane gently carries your home to the waiting delivery truck;
11. Houses are sold through a network of nearly 300 authorized All American builders in 19 states from Minnesota to Georgia.

Ms. Partin also gave the Mills a brochure entitled “Better Built. The All American Way” (“Better Built Brochure”). It contained the following representations:

1. Every All American Home is built to meet or exceed all local building codes and standards, whatever your locality;
2. Because of our quality construction, your new home will appreciate in value like any other to give you full resale value, should you ever decide to move;
3. An All American Home comes together without all the potential for cost overruns and delays of on-site construction with high quality materials and more painstaking practices...;
4. An All American Home can commonly be delivered to your site in as little as eight to ten weeks;
5. Home building the All American way simply means you get more home for your money: in less time, usually for a lower cost, and always with less hassle, waiting and anxiety;
6. Professionally installed and finished cabinetry;
7. Expertly installed electrical and plumbing systems...;
8. Climate-controlled factory environment eliminates delays and damage due to weather;
9. Design, construction and materials meet or exceed all local standards;
10. Gypsum wallboard on walls using assembly jigs to insure walls are solid and true;
11. Tongue and groove Oriented Strand Board subfloor for added strength, stability and joint integrity.

After the initial meeting, the Mills toured the AAH plant in Springfield, Tennessee to observe the manufacturing process. The Mills considered their options for several more months before deciding to purchase a modular home from AAH.

On August 31, 2001, the Mills completed the AAH order form at the PSH office, and paid a \$2,000 deposit toward their order. On October 16, 2001, the Mills and PSH entered into a contract, in which PSH agreed “to furnish all materials and labor necessary for the construction” of the Mills’ home. The agreed upon price was \$167,502.00 to be paid in three installments. At the same time, the Mills also approved the final floor plan submitted by AAH. After receiving the order form, AAH began construction.

The Mills visited the AAH plant to see the construction of their home on October 27, 2001, and again, on November 3, 2001. The Mills expressed some minor concerns about the unfinished

house to Robert Noordas, an AAH representative. Mr. Noordas reassured the Mills, and AAH subsequently fixed the problems.

While AAH constructed the modules for the house, PSH laid the foundation and built the garage, as required by the contract. Following the payment schedule in the contract, the Mills paid PSH \$6,000 for its work on the garage and foundation. On December 10, 2001, the Mills paid their second installment. They paid \$96,177.55 directly to AAH and \$46,774.45 directly to PSH. Having made these payments, the Mills prepared for the delivery of their home. In December 2001, AAH finished the house and shipped it to PSH. The home remained on the PSH lot until December 18, 2001, when the Mills came to inspect it.

The Mills were deeply disappointed with the house they found. Mr. Mills described his inspection:

We stopped by [PSH] model home where our models were sitting in their parking area there. We were able to go in. The doors were unlocked and we were able to go in to one or two of the modules, I don't recall if it was all of them. But we noticed a lot of damage to the sheetrock inside. The walls had been—[t]he sheetrock was cracked significantly and you could actually see lumber protruding through. It looked like something had hit from the outside, yet the siding outside didn't have any visible damage to it. But it just looked like—uh, very rough—I can't explain it I guess. But it was full of damaged places. Not just one or two, walls were damaged in several places.

AAH delivered the house to the Mills site on December 19, 2001, and began putting the modules together.

The Mills noticed problems from the outset. When AAH began installation, the modules sat exposed to the elements without the protective siding and cover the Mills had been promised. The problems persisted throughout the winter and spring of 2002. In February 2002, the Mills presented their complaints—i.e., wavy, cracked walls and uneven headers—to PSH. On February 19, 2002, an AAH crew arrived to repair some of the defects that the Mills had identified in the house. An AAH crew returned again on March 1, 2002. The Mills, however, remained unsatisfied.

On March 19, 2002, the Mills met with AAH representatives, Jim Richards and Chad Ringger, to discuss the remaining defects. After a detailed inspection, Mr. Ringger identified 51

defects in the Mills' home. AAH crews sporadically visited the Mills' home throughout March and April, but the Mills still found that the home had not been adequately repaired.

Finally, in May 2002, the Mills changed the locks on the house and prepared for litigation. On May 20, 2006, the Mills filed a complaint in the Chancery Court for Moore County against AAH, PSH, and the Partins. The complaint raised a number of claims including the allegation that the defendants violated the Tennessee Consumer Protection Act ("TCPA"). At trial, the Mills presented evidence showing the defects in the home. This evidence included the expert report of Bob Warren. Mr. Warren identified 33 structural, finish, plumbing, moisture control, ventilation, and general workmanship defects within the Mills home that were attributable to AAH and/or PSH.

After a bench trial in August 2007, the trial court found that AAH and the Partins had violated the TCPA. The trial court awarded the Mills a \$69,883.31 judgment against the Partins and a \$151,883.31 judgment against AAH.<sup>1</sup>

The trial court also awarded the Mills attorney's fees and expenses. After some argument about the form of the judgment, the trial court entered its Final Order on December 17, 2007, adopting the Order of Judgment of October 15, 2007 in its entirety. The Order stated that "AAH knowingly and willfully engaged in unfair and deceptive acts in its dealings with the Mills in violation of the Tennessee Consumer Protection Act." The trial court did not, however, name the specific provisions of the TCPA that had been violated.<sup>2</sup> AAH appeals. The Partins do not.

#### Issues

AAH appeals and raises three issues for review as stated in its brief:

1. Whether the Trial court erred in applying the Tennessee Consumer Protection Act to the facts of this case given that the acts at issue in this case are governed by the Tennessee Modular Building Act and therefore exempted from the Tennessee Consumer Protection Act pursuant to Tenn. Code Ann. § 47-18-111(a)(1).

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<sup>1</sup>To reach these dollar amounts, the trial court trebled the actual damages suffered by the Mills. The damages were apportioned between the defendants according to an agreed upon ratio.

<sup>2</sup>The trial court did not make written findings of fact, and neither party requested that it do so under Tenn. R. Civ. P. 52.01. Furthermore, at trial, the parties addressed several additional issues concerning the Mills' claims and damages. On appeal, however, our review is limited to the issues presented by the parties. Tenn. R. App. P. 13(b).

2. Whether the Trial Court erred in finding that All American Homes violated the Tennessee Consumer Protection Act.
3. Whether the Trial Court erred in assessing treble damages against All American Homes pursuant to the Tennessee Consumer Protection Act.

## Law and Analysis

### A. Applicability of the TCPA

AAH contends that the TCPA is not applicable in the present case. Instead, AAH argues that the TCPA is preempted by the Tennessee Modular Building Act (“TMBA”), Tenn. Code Ann. §§ 68-126-301–310. We disagree.

Since Tennessee adopted the TCPA in 1977, it has been commonly used to challenge certain sales transactions. Modeled in part on the Federal Trade Commission Act, the TCPA “was not intended to be a codification of the common law.” *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005). The TCPA is explicitly remedial and “Tennessee courts are therefore required to construe it liberally to protect consumers in Tennessee.” *Id.*; Tenn. Code Ann §§ 47-18-102, 115.

Under Tenn. Code Ann. § 47-18-111(b), the party claiming an exemption to the TCPA has the burden of proving that the exemption applies. AAH argues that it is exempt under Tenn. Code Ann. § 47-18-111(a), which states that the TCPA does not apply to:

Acts or transactions required or specifically authorized under the laws administered by, or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States.

Tenn. Code Ann. § 47-18-111(a)(1). AAH argues that the “transaction” in this case is governed by the TMBA. The relevant section of the TMBA states that:

Any modular building unit bearing an insignia of approval issued by the commissioner, the commissioner’s designee, or an approved inspection agency pursuant to this part, shall be deemed to comply

with any local standard relating to the construction of modular building units.

Tenn. Code Ann. § 68-126-304(b)(2). AAH maintains that, because it complied with this section of the TMBA, it is exempt from the TCPA.

The General Assembly has specifically listed particular trade areas as exempt from the TCPA, but it has not specifically exempted modular homes. AAH relies heavily on *Smith v. First Union Nat'l Bank of Tenn.*, 958 S.W.2d 113 (Tenn. Ct. App. 1997), to support its exemption argument. In *Smith*, the plaintiff alleged that a bank had violated the TCPA by paying multiple checks drawn on the customer's account and presented for payment on the same banking day in a manner convenient to the bank. *Id.* at 114. The court found that the TCPA was preempted because "the bank is acting under laws administered by the State of Tennessee and is expressly authorized to do the acts of which the Plaintiff complains." *Id.* at 116. Here, the TMBA authorizes the sale and installation of modular homes that bear the Commissioner's seal of approval. Tenn. Code Ann. § 68-126-304(b)(2). The TMBA does not, however, regulate the builder's statements about the quality of those modular homes. Finally, the court, in *Smith*, found that applying the TCPA would "undermine the fundamental purposes of the [banking] statute." *Smith*, 958 S.W.2d at 116. In the present case, however, we conclude that the application of the TCPA would not undermine, or even affect, the purposes of the TMBA.

The matter before us more closely resembles *Skinner v. Steele*, 730 S.W.2d 335 (Tenn. Ct. App. 1987). In *Skinner*, the court considered whether certain transactions were "specifically authorized" by the insurance code, Tenn Code Ann. §§ 56-8-101 *et seq.*, and thus exempt from the TCPA. *Skinner*, 730 S.W.2d at 337. The court found no exemption and held that:

[the TCPA exemption section] is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Virtually every activity is regulated to some degree. The defendants' interpretation of the exemption would deprive consumers of a meaningful remedy in many situations.

*Id.* (internal citations omitted). Similarly, in this case, we do not find that the TCPA is preempted simply because the construction of modular homes is otherwise regulated.

We conclude that AAH did not meet its burden to show that it is exempt from the TCPA. Therefore, we find that the trial court did not err by applying the TCPA.

## B. TCPA Violation

To recover damages under the TCPA, the plaintiff must prove: “(1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant’s conduct caused an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity or thing of value wherever situated....” *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2003) (citing Tenn. Code Ann. § 47-18-109(a)(1)). In *Tucker*, the court explained that “the concept of deceptiveness is a broader, more flexible standard of actionable merchant misconduct than the traditional remedy of common law fraud.” *Id.* at 116. The court also defined a “deceptive” act or practice as “one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact.” *Id.* The *Tucker* court, following the history of the federal consumer protection act, defined an “unfair” act as “an act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Id.* at 116-17. While these standards are legal matters for the courts to determine, “whether a specific representation in a particular case is ‘unfair’ or ‘deceptive’ is a question of fact.” *Id.* at 116; *Helton v. Glenn Enterprises, Inc.*, 209 S.W.3d 619, 629 (Tenn. Ct. App. 2006).

The TCPA lists specific acts or practices that constitute violations. Tenn. Code Ann. § 47-18-104(b). The specific prohibited acts, however, are not exclusive as Tenn. Code Ann. § 47-18-104(b) explicitly states that it does not limit “the scope of subsection (a).” *Id.* Tenn. Code Ann. § 47-18-104(a) is a broad catch-all prohibition of “unfair or deceptive acts affecting the conduct of any trade or commerce.” *Id.* Therefore, a trial court may find a violation of a specific act or practice prohibited in subsection (b) or it may find a general violation of subsection (a).

Here, the trial court concluded that AAH violated the TCPA, but the court did not state which part of the TCPA was violated. Instead, the trial court vaguely found that certain representations made by AAH violated the TCPA:

Do I think there’s a Consumer Protection Act violation here based on the representations that were made? Yes....

When you say that we provide you a superior product that is better because it has moisture controlled wood, and that it’s straight and true because it’s built on jigs, and it meets all building code requirements, not just the ones in effect at the time...[t]hose are representations that were clearly not met.



In its Order of Judgment, the trial court found that these representations were “unfair and deceptive.” Because the trial court did not specify which TCPA provisions were violated, we conclude that the trial court’s decision was based upon a violation of the “catch-all” provision of Tenn. Code Ann. § 47-18-104(a).

We base this determination upon the trial court’s oral findings. In *Koch v. Koch*, 874 S.W.2d 571 (Tenn. Ct. App. 1993), the court found that “the oral pronouncement by the court subsequently transcribed should suffice in this instance rather than sending this prolonged, hotly contested case back to the trial court solely for the purpose of written findings.” *Id.* at 578. Therefore, in this case, we will consider the trial court’s oral conclusions as findings of fact and give them the required presumption of correctness. Tenn. R. App. 13(d).

AAH contends that the representations found unfair and deceptive by the trial court were accurate and therefore do not violate the TCPA. AAH employees testified at trial that AAH followed the construction process guaranteed in its brochures. For example, AAH argues that the modules of the home were, in fact, built on jigs. AAH does not dispute that its final product contained serious flaws. The Mills maintain that AAH’s representations guaranteed the quality of the finished product. They were not concerned with whether AAH set the modules on jigs. They wanted walls that were not wavy and cracked. Considering this conflicting evidence, it was proper for the trial court, as the fact finder, to conclude that the representations were unfair or deceptive.

Because the evidence does not preponderate against the trial court’s factual findings, we find that the trial court did not err in finding that AAH’s representations about the Mills’ modular home were unfair and deceptive. Tenn. R. App. P. 13(d).

### C. Treble Damages

We turn now to the issue of whether the trial court erred in awarding the Mills treble damages. Under the TCPA, a trial court has the authority to award treble damages in certain circumstances:

If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.

Tenn. Code Ann. § 47-18-109(a)(3). In order to award treble damages, the trial court must first find that the TCPA violation was made willfully or knowingly. *Id.* The TCPA defines “knowing” as “actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a reasonable person would have known or would have had reason to know of the falsity or deception.” Tenn. Code Ann. § 47-18-103(6). The TCPA does not define “willful,” but courts have construed it to mean “intentional.” *Akers v. Bonifasi*, 629 F.Supp. 1212, 1223 (M.D. Tenn. 1984).

The question of whether an act or practice was “willful or knowing” is a question of fact. *Smith Corona Corp. v. Pelikan, Inc.*, 784 F. Supp. 452, 484 (M.D. Tenn. 1992) (citing *Brandel v. Moore Mortgage & Inv. Co.*, 774 S.W.2d 600, 607 (Tenn. Ct. App. 1989)). Accordingly, our review of the trial court’s finding on this issue is “de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d).

In reaching its decision that the acts complained of were done “willfully and knowingly,” the trial court made the following conclusions:

Do I believe that the parties intended for this result to incur? No.

Do I believe they intended to do or omit what they did to sell a product to these people? Yes.

AAH maintains that there is no evidence in the record to support the trial court’s finding. The Mills, however, point persuasively to the testimony of David Kurth, an AAH employee, who conceded that some of AAH’s representations were potentially misleading. From the record as a whole, we conclude that the evidence does not preponderate against the trial court’s conclusion that AAH’s violation of the TCPA was “willful and knowing.”

After finding that there was a “willful or knowing” violation, the decision to award treble damages is within the sound discretion of the trial court. *Wilson v. Esch*, 166 S.W.3d 729, 731 (Tenn. Ct. App. 2004). In deciding whether to award treble damages, a court may consider, among other things, the following factors:

- (A) The competence of the consumer or other person;
- (B) The nature of the deception or coercion practiced upon the consumer;
- (C) The damage to the consumer or other person; and

(D) The good faith of the person found to have violated the provisions of this part.

Tenn. Code Ann. § 47-18-109(a)(4). Therefore, we review this issue under the demanding abuse of discretion standard. Under this standard, we will find that a trial court abused its discretion only when it “applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). We find nothing in the record, or in AAH’s argument, indicating that the trial court abused its discretion in issuing this ruling. Therefore, we affirm the trial court’s decision to award treble damages to the Mills.

#### Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed against the Appellant, All American Homes, and its surety.

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J. STEVEN STAFFORD, J.