

**RECEIVED**  
ATTORNEY GENERAL OF OHIO

NOV 06 2014

**CONSUMER PROTECTION SECTION  
PUBLIC INSPECTION FILE**

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO EX REL ATTY GENERAL  
MICHAEL DEWINE,

Plaintiff,

-VS-

DAVID D ROSE,

Defendants.

CASE NO. 2014 CV 01678

JUDGE FRANCES E. MCGEE  
MAGISTRATE DAVID H. FUCHSMAN

**JUDGMENT ENTRY ADOPTING  
MAGISTRATE'S DECISION**

This matter came on for the Court's review and analysis of the Magistrate's Decision, dated AUGUST 12, 2014, filed in this case pursuant to Civ. R. 53 (D) (3).

The Court first finds that the parties in this case have not caused to be filed any objections to the Magistrate's Decision pursuant to Civ. R. 53 (D) (3) (b).

The Court next proceeds to determine whether or not there is any error of law, or defect on the face of the Magistrate's Decision and the Court finds neither to be present.

Therefore, the Court adopts the Magistrate's Decision, its findings, conclusions and decision as the Court's own, and this entry shall serve and be the final judgment entry and order of the Court.

The judgment is hereby entered as follows:

- A. Plaintiff's request for Declaratory Judgment be GRANTED, and it is therefore DECLARED that the acts and practices set forth above violate the CSPA, R.C. 1345.01 et seq., the O.A.C. 109:4-3-05 et seq., and the HSSA, R.C. 1345.01 et seq. in the manner set forth therein.
- B. Defendant, under his own name or any other name, his agents, representatives, salespeople, employees, successors, and assigns, and all persons acting on behalf of Defendant directly or indirectly, through any corporate or private device, partnership or association, be PERMANENTLY ENJOINED from engaging

in the acts or practices of which Plaintiff complains and from further violating the CSPA, R.C. 1345.01 et seq., the O.A.C. 109:4-3-01 et seq., and the HSSA, R.C. 1345.01 et seq.

- C. Defendant be PERMANENTLY ENJOINED from engaging in business in the State of Ohio as a supplier until all judgment ordered remuneration is paid, including any outstanding unsatisfied judgments arising out of a prior consumer transaction.
- D. Defendant be ORDERED to maintain in his possession and control for a period of five (5) years all business records relating to Defendant's solicitation or effectuation of business in Ohio and to permit the Ohio Attorney General or his representative, upon reasonable, twenty-four (24) hour notice, to inspect and/or copy any and all of said records, however stored, and further be ORDERED that copies of such records be provided at Defendant's expense to the Ohio Attorney General upon request of the Ohio Attorney General or his representatives;
- E. Pursuant to the above finding that Defendant committed unfair and deceptive acts and practices in violation of the CSPA, Defendant is ORDERED to pay a civil penalty to the Ohio Attorney General in the amount of Five Thousand Dollars (\$5,000.00), with Three Thousand Five Hundred dollars (\$3,500) of that civil penalty suspended on condition that Defendant fully comply with the Court's Final Judgment in this matter.

SO ORDERED:

---

JUDGE FRANCES E. MCGEE

**THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST REASON FOR DELAY FOR PURPOSES OF CIV.R.54 PURSUANT TO APP.R.4. THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.**

**To the Clerk of Courts:**

**Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal**

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

BRITTANY STEELE  
(614) 466-9529  
Attorney for Plaintiff, State Of Ohio Ex Rel Atty General Michael Dewine

Copies of this document were sent to all parties listed below by ordinary mail:

DAVID D ROSE  
UNKNOWN ADDRESS  
Defendant

Magistrates' Office (937) 225-4168



General Division  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

**Type:** Judgment Entry Adopting Magistrate Decision  
**Case Number:** 2014 CV 01678  
**Case Title:** STATE OF OHIO EX REL ATTY GENERAL MICHAEL DEWINE  
vs DAVID D ROSE

So Ordered

*Frances E. McGee*

IN THE COURT OF COMMON PLEAS  
MONTGOMERY COUNTY, OHIO

STATE OF OHIO, ex rel.  
ATTORNEY GENERAL  
MICHAEL DEWINE

CASE NO. 2014 CV 01678

JUDGE FRANCES E. MCGEE  
MAGISTRATE DAVID FUCHSMAN

PLAINTIFF,

**MAGISTRATE'S DECISION**

v.

DAVID D. ROSE  
D/B/A ALL-STAR POWERHOUSE  
DISCIPLES LANDSCAPING  
AND TREE CARE LLC

DEFENDANT.

This matter is currently before the undersigned Magistrate pursuant to Rule 53 of the Ohio Rules of Civil Procedure and a specific Order of Reference filed by the Court on July 1, 2014.

The Plaintiff commenced this action on March 24, 2014 by filing its Complaint and Request for a Declaratory Judgment, Injunctive Relief, Consumer Restitution, and Civil Penalties against Defendant David D. Rose ("Defendant"). The Complaint alleged violations of the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq. and its Substantive Rules, the Ohio Administrative Code ("O.A.C.") 109:4-3-01 et seq., and the Home Solicitation Sales Act ("HSSA"), R.C. 1345.01 et seq. Service was perfected on Defendant on May 14, 2014, but Defendant failed to answer.

Plaintiff filed a Motion for Default Judgment, and this Court issued a Default Judgment Entry and Order against Defendant on June 19, 2014. The Default Judgment included an order for Defendant to pay civil penalties and restitution to consumers that suffered damages as a result of Defendant's conduct.

On August 8, 2014, Plaintiff filed a Memorandum in Support of Damages and Other Requested Relief ("Damages Memo"), in which Plaintiff submitted evidence supporting the amount of civil penalties and consumer damages that Plaintiff was requesting at that time. A Damages Hearing was held on August 11, 2014.

At the damages hearing it was disclosed that Defendant had made restitution to all alleged aggrieved consumers. Therefore, the Court finds there are no outstanding consumer damages for which to order restitution.

In its Damages Memo, Plaintiff explained the basis for the amount of civil penalties requested (i.e. \$5,000). Plaintiff's request was made pursuant to the CSPA, R.C. 1345.07(D). Plaintiff provided evidence of the Defendant's violations of the CSPA which, pursuant to R.C. 1345.07(D), permit the imposition of a civil penalty.

The Court restates below the relevant Findings of Facts, Conclusions of Law, and Orders that were originally included in the Court's Default Judgment, as well as additional pertinent facts, and also recommends new orders based on the evidence presented via the Plaintiff's Damages Memo, the Damages Hearing, and oral arguments presented by the parties.

#### **FINDINGS OF FACT**

1. The actions of Defendant occurred in Montgomery County, Ohio and other counties in Ohio.
2. Defendant acquired the family business that provides tree cutting and lawn services to consumers.
3. Defendant used the fictitious name "All-Star Powerhouse Disciples Landscaping and Tree Care LLC" while conducting business in Ohio, including Montgomery County, and all references to Defendant throughout this Complaint include any actions taken by others on behalf of All-Star Powerhouse Disciples Landscaping and Tree Care LLC.
4. Defendant is and has been, at all relevant times, engaged in the business of advertising, soliciting, offering, and selling tree cutting and lawn services at consumers' homes in the State of Ohio, including Montgomery County.
5. Defendant advertised his tree cutting and lawn services by going to consumers' residences.
6. Defendant accepted money from consumers as full payments for the ordered services, which often included tree cutting, grinding out tree stumps, and collecting and disposing of debris.

7. Defendant failed to inform and provide consumers with a notice of their three day right to cancel the contract.
8. Defendant failed to provide all the services for which he received payment.
9. In many instances, Defendant provided shoddy or unworkmanlike services by failing to grind out the tree stumps and collect and dispose of the debris after cutting down trees.
10. When consumers contacted Defendant about his partial work, Defendant promised to return to complete the work, but he never completed the services for which he received payment or returned any of the money.
11. Defendant conducted business in the State of Ohio using a fictitious business name that Defendant never registered with the Ohio Secretary of State.
12. Defendant David D. Rose, somewhat by default, took over the subject family business in 2012.
13. Defendant has made restitution to all known alleged aggrieved consumers.
14. David D. Rose has attempted to continue doing business under a different business name, but the notification of his troubles in the case at bar has deterred some potential consumers from employing Defendant.
15. Mr. Rose is the father to two minor children over which he has legal custody and receives no child support on their behalf. The childrens' mother's whereabouts is unknown.
16. Based upon Mr. Rose's having made full restitution to all known alleged aggrieved consumers in this matter, his lack of financial resources his apparent genuine remorse, and the State's failure to offer evidence of any extraordinary costs incurred in enforcement of the law in this matter; a \$5,000 civil penalty, with \$3,500 of that civil penalty suspended on condition of Defendant's full compliance with the Court's Final Judgment in this matter should act as an effective deterrent to future violations by Defendant.

### CONCLUSIONS OF LAW

1. Jurisdiction over the subject matter of this action lies with this Court pursuant to R.C. 1345.04 of the CSPA.
2. This Court has venue to hear this case pursuant to Ohio Civ. R. 3(B)(3), in that Montgomery County, Ohio is the county in which Defendant conducted activity that gave rise to the claim for relief.
3. The Ohio Attorney General is the proper party to commence these proceedings under the authority provided him under the CSPA, R.C. 1345.07.
4. Defendant is a “supplier” as the term is defined in the CSPA, R.C. 1345.01(C), as Defendant was, at all times relevant herein, engaged in the business of effecting consumer transactions by soliciting and providing services to individuals for purposes that were primarily for personal, family, or household use, within the meaning specified in R.C. 1345.01(A) and (D).
5. Defendant committed unfair and deceptive acts and practices in violation of R.C. 1345.02 of the CSPA and the Failure to Deliver Rule, O.A.C. 109:4-3-09(A)(2), by accepting money from consumers for services and permitting eight weeks to elapse without delivering the promised services or issuing a full refund.
6. Defendant committed unfair and deceptive acts and practices in violation of R.C. 1345.02(A) of the CSPA, by performing shoddy and unworkmanlike tree cutting and lawn services and then failing to correct such work within a reasonable time.
7. Defendant committed unfair and deceptive acts and practices in violation of R.C. 1345.02(A) of the CSPA, by failing to register with the Ohio Secretary of State his use of a fictitious business name, as required by R.C. 1329.01.
8. Defendant violated the Home Solicitation Sales Act, R.C. 1345.23 and R.C. 1345.02(A) of the CSPA, by failing to provide notice to consumers of their right to cancel their contract by a specific date.
9. The Ohio Supreme Court has held that consumer protection laws must be interpreted in a manner that is calculated to provide courts with flexibility in fashioning remedies intended by the General

Assembly to redress the wrong committed. See *Celebrezze v. Hughes* (1985), 18 Ohio St. 3d 71, 18 OBR 102, 479 N.E. 2d 886. In light of the Supreme Court's explicit policy statement, it is evident that R.C. 1345.07(D) vests courts with broad discretion. *Motzer Dodge Jeep Eagle v. Ohio Allen Court*, 95 Ohio App 3d 183.

10. To be an effective deterrent to violations, civil penalties should be large enough to hurt an offender but not cause bankruptcy. However, the State of Ohio has no burden to produce evidence of a defendant's financial condition; it has the right to seek the maximum penalty allowed. Factors a court may consider in assessing the penalty include: the defendant's recalcitrance, defiance, or indifference to the law; the financial gain that accrued to defendant; the environmental harm that resulted; and the extraordinary costs incurred in enforcement of the law. *State ex rel. Dewine v. Ashworth*, 2012 Ohio 5932.

The Magistrate hereby recommends the following:

- A. Plaintiff's request for Declaratory Judgment be GRANTED, and it is therefore DECLARED that the acts and practices set forth above violate the CSPA, R.C. 1345.01 et seq., the O.A.C. 109:4-3-05 et seq., and the HSSA, R.C. 1345.01 et seq. in the manner set forth therein.**
- B. Defendant, under his own name or any other name, his agents, representatives, salespeople, employees, successors, and assigns, and all persons acting on behalf of Defendant directly or indirectly, through any corporate or private device, partnership or association, be PERMANENTLY ENJOINED from engaging in the acts or practices of which Plaintiff complains and from further violating the CSPA, R.C. 1345.01 et seq., the O.A.C. 109:4-3-01 et seq., and the HSSA, R.C. 1345.01 et seq.**
- C. Defendant be PERMANENTLY ENJOINED from engaging in business in the State of Ohio as a supplier until all judgment ordered remuneration is paid, including any outstanding unsatisfied judgments arising out of a prior consumer transaction.**



**D. Defendant be ORDERED to maintain in his possession and control for a period of five (5) years all business records relating to Defendant's solicitation or effectuation of business in Ohio and to permit the Ohio Attorney General or his representative, upon reasonable, twenty-four (24) hour notice, to inspect and/or copy any and all of said records, however stored, and further be ORDERED that copies of such records be provided at Defendant's expense to the Ohio Attorney General upon request of the Ohio Attorney General or his representatives;**

**E. Pursuant to the above finding that Defendant committed unfair and deceptive acts and practices in violation of the CSPA, Defendant is ORDERED to pay a civil penalty to the Ohio Attorney General in the amount of Five Thousand Dollars (\$5,000.00), with Three Thousand Five Hundred dollars (\$3,500) of that civil penalty suspended on condition that Defendant fully comply with the Court's Final Judgment in this matter.**

The parties are referred to Civil Rule 53 and Rule 2.31 of the Rules of the Montgomery County Common Pleas Court regarding the filing of objections to the Magistrate's Decision. Pursuant to Civil Rule 53, either party may file objections to this Magistrate's Decision within fourteen (14) days of the time-stamped date of this entry.

Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions, whether or not specifically designated as a finding of fact or conclusion of law under Civil Rule 53 (D) (3) (a) (ii), unless the party has objected to that finding or conclusion as required by Civil Rule 53 (D) (3) (b).

---

MAGISTRATE DAVID H. FUCHSMAN

**To Montgomery County Clerk of Court:**

Please serve signed copies of the FINAL JUDGMENT ENTRY AND ORDER to:

Brittany M. Steele  
Assistant Attorney General  
Consumer Protection Section  
30 E. Broad Street, 14<sup>th</sup> Floor  
Columbus, Ohio 43215

David D. Rose  
P.O. Box 174  
Springfield, Ohio 45501



General Division  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

**Type:** Magistrate Decision  
**Case Number:** 2014 CV 01678  
**Case Title:** STATE OF OHIO EX REL ATTY GENERAL MICHAEL DEWINE  
vs DAVID D ROSE

So Ordered