IN THE SUPREME COURT
OF FLORIDA

CASE NO. 66,799

HARRY LAMAR TEDDER,

Petitioner,

vs.

VIDEO ELECTRONICS, INC., PORTER M. MOORE , individually; and ALTON L. TURNER and DANIEL L. LINDSAY as Executors of the Estate of REX H. MOORE,

Respondents

First District Court of Appeal
State of Florida
Docket No. AW-248

ANSWER BRIEF OF RESPONDENTS

JOHN F. CALLENDER
2105 Gulf Life Tower
Jacksonville, Florida
(904) 398-8833

TABLE OF CONTENTS

TABLE OF CITATIONS

Court Rules

STATEMENT OF THE CASE

Defendants appealed the final judgment (R59-60, A 11-12) of the circuit court entered upon a jury verdict (R42), following the circuit court's denial of their motions for directed verdict (Tr. p.408), judgment notwithstanding the verdict, and new trial (R56). The District Court of Appeal, First District, reversed and remanded for a new trial, certifying as of great public importance the question:

> IN THE ABSENCE OF SUBSTANTIAL REASONS ARISING FROM EXCEPTIONAL CIRCUMSTANCES SHOWN TO EXIST IN THE PARTICULAR CASE, IS IT AN ABUSE OF DISCRETION FOR A TRIAL COURT TO EMPLOY A JURY SELECTION PROCEDURE IN WHICH SOME BUT NOT ALL PROSPECTIVE JURORS ARE SWORN FOR THE PURPOSE OF PROHIBITING THE EXERCISE OF PEREMPTORY CHALLENGES TO BACKSTRIKE SUCH JURORS?

STATEMENT OF FACTS

Video states the facts necessary for the consideration of the lower courts' decisions denying its motion for a directed verdict, which facts are omitted from Mr. Tedder's brief.

Video was begun by Rex H. Moore and his son Mike Moore. As an operator of coin-operated amusement machines, its business involved the placement of machines in locations such as convenience stores, the raising of capital for new machines, the servicing of machines, the rotation of machines from one location to another, and the resale of unproductive machines. (Testimony of R. Moore, Tr. p.298; 354f). Rex Moore testified that Video hired Mr. Tedder as general manager to get locations, to get investors, to rotate machines and to resell machines (Tr. p.359; A 22). On November 16, 1981, Video, then with six employees, began the employment Mr. Tedder by terms of a written contract prepared by Mr. Tedder's attorney (Testimony of Tedder, Tr. p.109; A 24). The contract provided:

> "A-Scope of Duties - *** The primary duty of the General Manager shall be to function under the direction of the owners of the Company ***
>
> "At any time *** Tedder may be terminated by the Company in the event that he fails to perform his duties as set forth in this contract. ***
>
> E-Expenses: During the term of this Agreement, the Company shall pay all reasonable expenses of the General Manager in accordance with the general policy of the company, including entertainment and promotional expenses and travel expenses and the employee agrees to submit to this company such documentation as may be necessary to substantiate such expenses. *** (emphasis supplied (Pl. Ex.1; A 16-17).

On August 20, 1982, Rex Moore terminated Mr. Tedder's employment by Video (R. 12, 18; A 14, 19).

To the plaintiff's claim that he was wrongfully terminated (R. 11-17; A 13-18), the defendants pled that the termination was justified on the grounds that Mr. Tedder was not satisfactorily performing his duties and that by double billing on his expense account, he had taken the company's money (R 18-20; A 19-20).

There was no factual dispute that Mr. Tedder double billed his expense account on several occasions. Rex Moore, the company's vice president and co-founder, testified this was the "last straw" in the trial of his patience with an unproductive employee:

> "Mr. Tedder did not do any of the things that we had a contract for him to do. He had done zero of them, except -- let me say some of the rotations, he rotated, otherwise, there was nothing done by Mr. Tedder. And besides that, he took my money. That was the final straw that broke the camel's back" (Tr. p.365-66; A 22-23).

Mr. Tedder admitted on the witness stand that he had on a number of occasions submitted double billings for his expenses and had been paid twice for them (Tr. p.154; A 24). Mr. Tedder also admitted that the summary of these double payments introduced as Defendants' Exhibit 6 was accurate (Tr. p.242; A 25).

Rex Moore testified that the defendants were not satisfied with Mr. Tedder's work (Tr. p.365-66, 371; A 22-23). Conflicting evidence was produced concerning the general level of Mr. Tedder's performance. There was evidence also that the company reduced Mr. Tedder's authority and territory and failed to pay him a bonus based on operations within his former territory.

Based on the language of the contract (quoted above) and based on Mr. Tedder's admission concerning his expense account, Video moved for a directed verdict at the close of the evidence (Tr. p.404; A 27). The trial judge denied the motion (Tr. p.408; A 27), holding that Mr. Tedder's repeated practice of double billing his expenses was trivial if unintentional but grounds for discharge if deliberate. The case was submitted to the jury on instructions consistent with this ruling (Tr. p.498-500) to which instructions defendants preserved their objections (Tr. p.504).

The cause was tried before a jury selected in a manner designed to prevent the parties from intelligently exercising their peremptory challenges with the full panel in view. The trial court permitted only one round of backstrikes by the device of swearing the jurors piecemeal. The defendants were denied a specific peremptory challenge remaining when they attempted to strike a juror who had been prematurely sworn when there were only four prospective jurors in the jury box and

peremptory challenges remained (Tr. p.61-63; A 30-31). The defendants objected to the procedure and to the composition of the jury (Tr. 54-55; A 28-29).

Chosen and instructed as shown, the jury returned a verdict for the Plaintiff (R42; A 35), and the trial court entered Final Judgment (R59-60; A 11-12).

SUMMARY OF ARGUMENT

I. In the absence of substantial reasons arising from exceptional circumstances shown to exist in the particular case, it is an abuse of discretion for a trial court to employ a jury selection procedure in which some but not all prospective jurors are sworn for the purpose of prohibiting the exercise of peremptory challenges to backstrike such jurors.

In Florida, a party litigant is entitled to consider the panel as a whole at any time that litigant has peremptory challenges remaining, and to exercise those challenges at any time until the jury is sworn.

This right has developed gradually through opinions of this Court and of the lower appellate courts of Florida, and has recently been reaffirmed and emphasized by this Court.

Petitioner's argument that the common law of other times, other places, and other courts has been otherwise, serves only to illustrate that the right is one within the scope of common law development. While the precise mechanics for the exercise of this right could at some time come within this Court's rule-making jurisdiction, that aspect of this Court's work is not necessarily involved in the instant decision. Enforcement of this right can be left to the sound discretion of the trial courts.

II. This Court should reverse in part the decision of the district court of appeal and remand the cause for entry of judgment on Video's motion for a directed verdict.

The entire case, not merely the certified question, is properly before this Court.

The employment contract provided that Mr. Tedder would submit documentation to substantiate his business expenses. By his own admission, Mr. Tedder on repeated occasions double billed and twice received payment for the same expenses.

By requiring Video to prove not only that Mr. Tedder breached this provision of the contract on repeated occasions, but that he did so deliberately, the courts below have in effect rewritten the contract of the parties rather than giving effect to its terms.

ARGUMENT

I. IN THE ABSENCE OF SUBSTANTIAL REASONS ARISING FROM EXCEPTIONAL CIRCUMSTANCES SHOWN TO EXIST IN THE PARTICULAR CASE, IT IS AN ABUSE OF DISCRETION FOR A TRIAL COURT TO EMPLOY A JURY SELECTION PROCEDURE IN WHICH SOME BUT NOT ALL PROSPECTIVE JURORS ARE SWORN FOR THE PURPOSE OF PROHIBITING THE EXERCISE OF PEREMPTORY CHALLENGES TO BACKSTRIKE SUCH JURORS.

As the district court of appeal held, the trial court abused its discretion in employing a jury selection procedure by which the parties were limited to one round of backstrikes before jury members were sworn piecemeal. This had its intended effect of denying the parties the right to examine and consider the panel as a whole so as to make intelligent and effective use of their peremptory challenges. Because Video moved to challenge a prematurely sworn juror, prejudice was shown and the point preserved for appellate review.

In Florida Rock Industries, Inc. v. United Building Systems, Inc., 408 So. 2d 630 (Fla. 5th DCA 1981)(A 36), the trial court's voir dire procedure denying backstrikes was reviewed. In Florida Rock, twenty four prospective jurors were examined and then considered one at a time. Once consideration had passed from a particular prospective juror, the trial court denied the parties the opportunity to backstrike. Judge Cobb, reversing, said:

> "A party litigant . . . is entitled to consider the panel as a whole at any time that litigant has peremptory challenges remaining, and exercise those challenges at any time until the jury is sworn. The denial of this right was error, and the error was preserved by the defendants' motion to peremptorily challenge a juror, which was denied." 408 So.2d at 632 (A 38).

To the same effect is Eastern Airlines, Inc. v. Gellert, 438 So.2d 923 (Fla. 3rd DCA 1983) (Gellert II). In Gellert II, the trial court adopted a procedure of seating twelve prospective jurors, completing their examination by the Court and by counsel and then requiring all peremptory challenges to be made at once. With eight prospective jurors remaining after challenges for cause, the parties there were forced to exercise all peremptory challenges against the eight. No opportunity was afforded the parties to hold back any strikes for those still to be seated and examined after the exercise of peremptory challenges. The Third District Court of Appeal reversed:

> "Thus, the court, while granted discretion over the manner in which challenges are exercised, must exercise that discretion so as not to violate the litigant's right to have a fair opportunity to make an intelligent judment as to exercise of peremptory challenges ... (citations omitted). Here, by whatever manner the initial peremptory challenges were exercised, once the number of prospective jurors who had been examined on voir dire was reduced to less that the six required for the trial of this case, additional prospective jurors should have been seated and subjected to voir dire, after which further opportunity for exercise of peremptory challenges should have been permitted, and the process continued until counsel either exhausted their respective peremptory challenges or, having challenges left, voluntarily relinquished them and accepted the jury" 438 So.2d at 931.

As in Gellert II, the defendants below were required to exercise or waive their last peremptory challenge as to the four prospective jurors seated in the box before they had the

opportunity to examine the two prospective jurors who would be called to the box to round out the jury panel.

As Judge Cobb noted in Florida Rock, "...[A]nthing can change with further questions and even further attorney contemplation, all of which may continue up until that terminal moment when the jury is sworn" 408 So.2d at 631 (A 37).

In Jackson v. State 10 FLW 95 (Fla. Jan. 31, 1985)(A 47) this Court emphasized the same right:

> "We again emphasize that a party may challenge any juror at any time before the jurors are sworn. A trial judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn." 10 FLW at 95(A 47).

The twist in the case at bar is that the trial court caused some prospective jurors to be sworn piecemeal before the entire panel had been chosen. The issue is whether the trial court has authority by such a facile device to infringe upon a party's right by removing prospective jurors from consideration before the composition of the entire panel can be known, or whether the right so recently emphasized by this Court and upheld by the decision here reviewed, is substantial.

In the case at bar, the trial court apparently relied on criminal precedents, including Mathis v. State 45 Fla. 46. 34 So. 287 (1903); and King v. State 125 Fla. 316, 169 So. 747 (1936) (King I) which said that the "better practice" was to

postpone the swearing of the jurors until the full panel was obtained but that the right involved was insubstantial. Expressly rejecting the better practice without stating any reason but his own perception of his own power, the trial judge declared, "I have the right to swear the jury piecemeal." (Tr. p. 55; A. 29).

The district court of appeal reversed. It observed that the better practice, the practice which confirms to parties their right to exercise their challenges intelligently with the full panel in view, had been described long ago in Mathis, repeated in King I, flagged in Bocanegra v. State 303 So. 2d. 429 (Fla.2d DCA 1974) and Denham v. State 421 So. 2d. 1082 (Fla. 4th DCA 1982) as a potentially reversible abuse of discretion if the better practice were disregarded; and held to be error, though not fundamental error, in Grant v. State 429 So.2d 758 (Fla.4th DCA 1983)(A 39); which was followed in King v. State 461 So.2d. 1370 (Fla.4th DCA 1985)(King II)(A 43), where the point had been preserved for review.

Acknowledging that exceptional circumstances could require a departure from the recognized better practice in the exercise of sound judicial discretion, the district court of appeal noted the absence of any such factors from the instant record. The only effect of the procedure under review was to deny the parties the effective and intelligent use of their peremptory challenges by considering the jury panel as a whole.

In his argument, Mr. Tedder seeks to direct the attention of the Court to the practices of other lands, other times, and other courts within the common law tradition. This argument will hold the interest of those who derive pleasure and instruction from such studies.

With no little erudition, Mr. Tedder has taken his readers on a colorful tour including among others a misdemeanor abandonment of a mail bag, in which the United States Supreme Court found itself unable to express any opinion on the certified question whether the defendant was entitled to any peremptory challenges, United States v. Shackleford 59 U.S.(18 How) 488, 15 L.Ed. 464 (1855); two murders on Indian reservations in Arkansas, Lewis v. United States 146 U.S. 355, 13 S.Ct. 186, 36 L.Ed. 1003 (1892); and Pointer v. United States 151 U.S. 407, 14 S.Ct. 410, 38 L.Ed. 208 (1894); a murder on a United States vessel on the high seas, St. Clair v. United States 154 U.S. 134, 14 S.Ct. 1002, 38 L.Ed. 936 (1894); a murder in a lady's apartment over a bank in Reno, State v. Hartley 22 Nev. 342, 40 P. 372 (1895); and a conspiracy to defraud a common carrier, McDonald v. State, 172 Ind. 393, 88 N.E. (1909).

Mr. Tedder's cases do make the point that the right of the parties to use their peremptory challenges intelligently and effectively with the whole panel in view has reached different stages in different common law courts. In some courts, particulary trial courts of the United States, it is

largely unrecognized; see, e.g. United States v. Mackey 345 F.2d 499 (7th Cir. 1965); St. Clair v. United States, supra; Pointer v. United States, supra.

Some development of the right may be detected in Carr v. Watts 597 F.2d. 830 (2d Cir. 1979), reversing a procedure which required parties to use their challenges on original jurors only, as a denial of the parties' right to save peremptory challenges for replacement jurors yet to be examined. The Second Circuit distinguished Mackey and so did not reach its corollary issue of a party's right to backstrike original jurors after examining the replacements of challenged jurors.

That the right of the parties to use their peremptory challenges intelligently and effectively with the whole panel in view has reached different stages in different common law courts serves to illustrate that the right is one within the scope of common law development.

Whatever stage other courts have reached, in the courts of Florida and particularly in this Supreme Court, the right at issue is recognized and emphasized.

Mr. Tedder's suggestion that the rule-making authority of this Court has been usurped by the decisions in which the right at issue has developed overlooks the proposition that rule-making can codify the mechanics of exercising a right developed through case-by-case decisions. See e.g. Florida Rule of

Appellate Procedure 9.110 (k), noted as codifying Mendez v. West Flagler Family Association 303 So.2d 1 (Fla. 1974); Florida Workers' Compensation Rule of Procedure 4.141 (b), noted as codifying established practice implicitly approved by the majority in Drexel Properties, Inc. v. Brown 443 So.2d 150 (Fla. 1st DCA 1983); and Florida Rule of Criminal Procedure 3.216 (a), noted as based on Pouncy v. State 353 So.2d 640 (Fla 3d DCA 1977).

Florida's common law development of the right of intelligent exercise of peremptory challenges with the full panel in view will be upheld or destroyed by the decision in this case. If this right is illusory and insubstantial, then it may be readily infringed by any trial court which arbitrarily departs from the well known "better practice" of allowing challenges to any prospective juror at any time until the jury is sworn, precisely for the sole purpose of denying the parties this right. If the right is real and substantial, then trial courts do not have the authority to infringe upon it. Jackson v. State 10 FLW 95 (Fla. Jan. 31, 1985) (A 47).

II. WHERE THE WRITTEN EMPLOYMENT AGREEMENT PROVIDED GENERAL MANAGER WOULD SUBMIT SUCH DOCUMENTATION AS MAY BE NECESSARY TO SUBSTANTIATE REASONABLE ENTERTAINMENT, PROMOTIONAL AND TRAVEL EXPENSES, AND HE ON REPEATED OCCASIONS TWICE SUBMITTED AND RECEIVED REIMBURSEMENT FOR THE SAME EXPENSES: THE COURT ERRED IN FAILING TO DIRECT A VERDICT THAT THE GENERAL MANAGER'S DISCHARGE WAS JUSTIFIED.

The trial court's denial of Video's motion for a directed verdict, although approved by the district court of appeal, is properly here for review. This Court's review encompasses the decisions of the courts below, not merely the certified question. Rupp v. Jackson 238 So.2d 86 (Fla. 1970).

The contract prepared by Mr. Tedder's attorney provided:

> "E-Expenses: During the term of this Agreement, the Company shall pay all reasonable expenses of the General Manager in accordance with the general policy of the company, including entertainment and promotional expenses and travel expenses and the employee agrees to submit to this company such documentation as may be necessary to substantiate such expenses."

In the course of settling the jury instructions, the trial court found that such a requirement was reasonable as a matter of law. (Defendants' Requested Instruction No.5, otherwise modified over objection and given. Tr. p. 499).

Mr. Tedder's double billing of certain expenses is shown by his own testimony:

> "Q (by Mr. Richardson) Were you, in fact, paid twice for any of your travel expenses? A (Mr. Tedder) Well, in all of the many months since the time of my dismissal, in looking over all of the records and everything, yes, I was." (Tr. p.154; A 24).

Mr. Tedder further admitted (Tr., p.242; A 25), that Defendants' Exhibit No. 6 accurately summarized the records indicating the double billing. (Defendants' Exhibit No. 6 is reproduced in the Appendix at A 26).

Because the requirement of documentation was reasonable, and the required documentation was not submitted by Mr. Tedder, reasonable minds could not differ as to whether the requirement of the contract was satisfied. Because Mr. Tedder breached this term of his contract, Video was entitled to a directed verdict on the issue of wrongful discharge.

In Haiman v. Gundershaimer 130 Fla. 109, 177 So. 199 (1937), with facts close to the present case, the employer required expense reports for all items of expense from the petty cash account. As this Court noted, "This was a reasonable requirement and one which any successful business man would expect an employee in the management of any part of his business to comply with." 177 So. at 200.

In Haiman, judgment for the employee was reversed because the circuit court erroneously submitted the case to the jury to decide whether the employee's failure to account for her employer's petty cash was a material or trivial departure from her duties. This Court held that it was for the trial court to interpret the employment contract.

In the instant case, there was no jury question whether the plaintiff employee had failed, at least negligently, to document his expenses and had double billed his expenses in violation of the contract.

It was a question of law whether such violation was meterial or trivial. Addressing that question, the trial judge held that the repeated failures to account for the company's money and the receipt of double payment for the same business expenses were trivial as a matter of law if they were unintentional (Tr. p.425-426).

The flaw in the reasoning of the trial court is that the correct legal question was not whether Mr. Tedder breached his duty to account to the employer and substantiate his reasonable business expenses intentionally or merely carelessly; rather the question was whether he breached his duty to account to his employer for his reasonable expenses.

The employer was entitled to a directed verdict if there was no evidence whatever that could support a legal verdict for the employee on this issue. Applying the standard of Strahm v. Aetna Casualty & Surety Co. 285 So.2d 679 (Fla. 3d DCA 1973), there was no evidence, and no reasonable inference from any evidence, tending to show otherwise than that Mr. Tedder repeatedly double billed his expenses and failed to account for a travel advance in violation of his contract

Only by rewriting the pertinent portion of the contract which says:

> "E-Expenses: During the term of this Agreement, the Company shall pay all reasonable expenses of the General Manager in accordance with the general policy of the company, including entertainment and promotional expenses and travel expenses and the employee agrees to submit to this company such documentation as may be necessary to substantiate such expenses." (emphasis supplied) (R 6; A 16)

to say something along the lines of:

> "...[T]he employee agrees that he will not intentionally fail to submit to the company such documentation as may be necessary to substantiate such [reasonable business] expenses."

could the trial court define an issue on which conflicting evidence had been introduced.

However, it is a well settled rule that the court may not rewrite the contract of the parties. Home Development Company of St. Petersburg v. Bursani 178 So.2d 113 (Fla. 1965).

In the case at bar, the employment contract was in effect rewritten by the trial court to place on the employer the burden of proving an intentional failure of performance on the part of the employee.

It will be startling news to the employers of this state, should this denial of a directed verdict be reaffirmed, that they can no longer discharge any employee who repeatedly double bills his expense account, unless they are willing to risk going to trial with the burden of proving that the double billings were deliberate.

Neither the trial court nor the district court of appeal cite authority for the proposition, that a breach of contract such as the one involved here must be intentional.

Any suggestion that Mr. Tedder was immune to discharge for breaching a specific provision of his employment agreement if he was in general performing his duties in a satisfactory manner is directly counter to the authority of Austin's Rack, Inc. v. Austin 396 So.2d 1161 (Fla. 3d DCA 1981). There, although the employer did not have in general terms "good grounds" to discharge the employee, the cause was remanded for the entry of a directed defense verdict on the uncontroverted fact that the employee breached a specific obligation under the written agreement.

Because there was no factual question that Mr. Tedder twice billed and twice was paid for the same expenses repeatedly over the term of his employment in violation of the written agreement of the parties; the employer was entitled to a directed verdict that his discharge was justified. This Court should therefore

reverse in part the decision of the First District Court of Appeal to remand for the entry of a directed verdict for the employer.

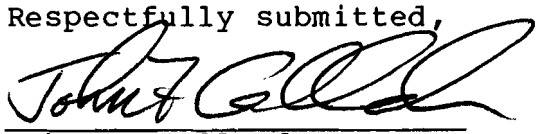
CONCLUSION

The jury, selected with arbitrary disregard of Video's right to exercise its peremptory challenges intelligently with the full panel in view, awarded the substantial sum of $67,700 to Mr. Tedder for not working for fourteen months, after it decided for him on two close questions: whether Video had met the burden of proving that Mr. Tedder had deliberately doubled billed his expense account on repeated occasions; and whether a "reasonable man" would have been satisfied with Mr. Tedder's performance. With such close facts on these issues, no abuse of discretion in jury selection can fairly be regarded as harmless, and justice in the cause requires at least a new trial before a properly selected jury.

Because the district court of appeal correctly decided that the trial court abused its discretion in employing the jury selection procedure under review, its decision should be affirmed on this point.

However, because Mr. Tedder undisputedly failed to meet his employer's reasonable requirement that he account for his travel expenses, but repeatedly double billed and twice received payment for the same expenses, the decision remanding the cause for a new trial should be modified to remand for entry of judgment for Video on a directed verdict.

Respectfully submitted,



John F. Callender
Attorney for Respondents