IN THE SUPREME COURT
OF FLORIDA

CASE NO. 66,799
1st DISTRICT COURT OF APPEAL
CASE NO.: AW-248

HARRY LAMAR TEDDER,

Petitioner,

vs.
VIDEO ELECTRONICS, INC., et al.

Respondents.

REPLY BRIEF OF PETITIONER

HARRY LAMAR TEDDER

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STATEMENT OF THE FACTS

Because Video has chosen to appeal a non-certified issue from the District Court of Appeal, it is necessary to set forth additional facts related to that issue.

On October 16, 1982, Harry Lamar Tedder, Video Electronics, Inc., Porter M. Moore, and Rex H. Moore signed an employment contract which provided that Harry Lamar Tedder would work as General Manager of Video Electronics, Inc., for a two-year period. (A1, T 110-114) Porter M. Moore (also known as Mike Moore) was the thirty-three year old president of Video Electronics and his father, Rex H. Moore, was the Vice-President. The corporation had begun business about six months prior to their contacting Harry Tedder regarding employment. Mr. Tedder had been the General Manager of the Jacksonville Branch of Rowe International, Inc., a world-wide manufacturer and distributor of video and other coin-operated amusement machines. (T-106)

Mr. Tedder began working for Video Electronics, Inc. on November 16, 1982 with a base salary of $36,000.00 per year plus other benefits including an automobile and a monthly bonus equal to two percent (2%) of all gross income of the company which exceeded $160,000.00 per month. (A1) During his nine month tenure

with the company, Video Electronics' gross revenue rose from $160,000.00 per month to $312,508.00 per month. (T 126, A-5, Graph of Corporation Income during employment of Harry Tedder) Between January, 1982 and August, 1982 every month had higher revenue than the month before. (T 126) Mr. Tedder's monthly bonus rose from zero dollars to $1,991.95 in July, 1982. (T 129) Shortly after Tedder's termination on August 20, 1982, the company began a downward trend. (T 270) By the time of trial, it was noted that the revenue for August, 1983 was down to $233,254.45. (T 126)

After his termination and before the term of his Employment Contract expired, Harry Tedder brought suit againt Video Electronics, Inc., Porter M. Moore, and Rex H. Moore. Count I alleged damages resulting from the breach of contract by the employers running from the date of the termination through the end of the contract period. The Second Count alleged damages which had accrued up until the date of termination which were never paid by the employers. The jury awarded damages in the amount of $67,700.00 for Count I and $3,600.00 for Count II. The Defendants had filed a Counterclaim for funds allegedly misappropriated from the company and Mr. Tedder acknowledged overpayment in the amount of $219.35. The Plaintiff's judgment was reduced by the amount owed to the Defendants.

The employers defended Mr. Tedder's claim by alleging and attempting to prove that (1) Harry Tedder misappropriated money from them and (2) that he was not performing his duties under the terms of the contract. Harry Tedder acknowledged that he was overpaid in the amount of $219.35 but denied that he failed to perform his duties under the terms of the written contract agreement.

Video Electronics, Inc. was just one of several similar corporations owned and/or operated by Rex Moore out of Montgomery, Alabama. (T 353) Before and after Harry Tedder's employment with Video Electronics, Mike Moore acted as General Manager of the company. (T 115, 387) When Mr. Tedder came to Video Electronics, Mike Moore was single and lived a transient life between Jacksonville, Montgomery, and parts unknown. (T 118, 119) Mike Moore is credited by his father with generating capital investment into the firm during his absence from the Jacksonville operation. (T 366) He was not, however, available to run the business and did not make himself available until he married in July of 1982 and settled down in the Jacksonville area. (T 183) Harry Tedder was fired one week after Mike Moore's return from his honeymoon on August 20, 1982.

Even during Mr. Tedder's tenure with Video Electronics, Video Electronics did not honor the

Employment Agreement. The Employment Contract expressly provided that the entire State of Georgia was part of Mr. Tedder's territory along with Alabama, South Carolina, North Carolina, and Florida. (T 114) Approximately three months before his termination, however, Video Electronics summarily discontinued crediting Harry Tedder with income from Georgia because another family member, Craig Moore, had started his own business in Georgia and had taken over the Georgia accounts. (T-132-135) In the summer of 1982, immediately prior to Tedder's termination, thirteen members of the Moore family divided up the southeast portion of the United States among their personal companies and interests without regard to Mr. Tedder's written contract. (T 301-306, A-6)

Harry Lamar Tedder was characterized by the Defendants as a thief. (T-460) Indeed, the jury was instructed that if they believed Harry Tedder stole money from his employer that they should find for Video Electronics. (T-498) The jury, however, did not so find. At the time of his discharge, Harry Lamar Tedder was charged with having stolen $119.35. Specifically, he was overpaid by that amount in traveling expenses. During discovery an additional $100.00 was found by the bookkeeper which had not been accounted for. There was no issue raised that the expenses were not actually incurred in the first instance on behalf of the

corporation. The expenses represent five tanks of gas and one lunch. (Defendant's Exhibit 6) All items had been charged on credit cards and receipts had been submitted for all expenditures. The bookkeeper, Margie Bryant, was with the company from the time Harry Tedder arrived through the date of the trial. (T 320) The office procedure required Harry Tedder and the other traveling employees to submit their travel receipts to Mrs. Bryant and it was her job to check the receipts, prepare checks for reimbursement of travel expenses, and to co-sign said checks along with Mr. Tedder. (T 151, 152, 322)

Because they were charged items, two receipts were generated with each purchase, i.e. a hard carbon copy and a soft tissue copy. (T 151-152) Normally, the two copies would be stapled together before reimbursement after the hard copy was received in the mail. (T 151-152) However, in the particular cases which resulted in overpayment, the bookeeper credited the receipts for payment with a tissue copy shortly after the purchase and then again when the unconnected hard copy came in. (T 154-156) Mr. Tedder testified that he relied upon Margie Bryant to check his receipts and that the overpayment was simple human error. (T 156) Upon first discovery of the problem in late June, 1982, (T 315-316) Mrs. Bryant reported her findings directly to the owners of the

company rather than to Mr. Tedder for resolution. (T 315-316) Upon learning of the matters, however, the owners took no immediate action against Mr. Tedder, took no action to restrict his check-signing authority, (T 331, 382) did not request an immediate explanation, did not make a police report, (T 382) and did not even stay in close contact with the Jacksonville company. Indeed, for the intervening fifty days between discovery and discharge, both owners of the company spent the large majority of their time in Alabama. (T 382) Further, they never did request their money back and did not deduct the $119.35 from Mr. Tedder's final paycheck upon his discharge.

After hearing all of the evidence, the Court was called upon by defense counsel to make a ruling regarding the overpayment. The Court ruled that if the overpayment was unintentional, then it was trivial and not sufficient, standing alone, to support a directed verdict for the Defendants. (T-425-426) The jury was directed that if they found the overpayment was unintentional, then they could consider it, along with the other facts of the case, to determine whether or not Harry Tedder was performing his duties under the contract. (T 498-499) The jury obviously concurred with the Court's appraisal of the significance of the acknowledged overpayment.

THE CERTIFIED ISSUE

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 PREMPTORY CHALLENGES TO BACKSTRIKE SUCH JURORS?

As stated by the Appelate Court below, it is well settled that the Court would have committed reversible error had the Court denied Video Electronics an opportunity to backstrike a juror prior to that juror being sworn. Decision on appeal, page 6. The key fact in this case, however, is that the trial court did swear a portion of the jury during the selection process. With that key factual difference comes the obligation to consider the dual principles of law as set forth in the initial brief of Petitioner. That key fact made all the difference in Mathis v. State, 45 Fla. 46, 34 So. 287 (1903); King v. State, 125 Fla. 316, 169 So. 747 (1936); and Bocanegra v. State, 303 So.2d 429 (Fla. 2d DCA 1974). Any case which does not deal with attempted backstrikes after the jury is sworn can not be controlling upon the issue before this Court.

A. REVIEW OF FLORIDA CIVIL CASES

Video Electronics has relied on two key civil cases in Florida to support it's position, namely, Florida Rock Industries, Inc. v. United Building Systems, Inc., 408 So.2d 630 (Fla. 5th DCA 1981) and Eastern Airlines, Inc. v. Gellert, 438 So.2d 923 (Fla. 3rd DCA. 1983) Florida Rock was argued to the trial court at the moment the second backstrike was denied, (T61) and will be the first considered herein.

In Florida Rock the trial court denied all backstriking without a "special reason". The Court did not swear the jury prior to the denial of the request to backstrike. The Fifth District Court of Appeal noted that the Florida Rule of Civil Procedure which deals with premptory challanges contains no requirement that a "reason" be established for the exercise of a premptory challange. Florida Rock at 632.

> A party litigant, whether Plaintiff or Defendant, is entitled to consider the panel as a whole at any time that litigant has premptory challenges remaining, and exercise those challenges at any time until the jury is sworn. (emphasis added)

The obvious factual difference between Florida Rock and the instant case is the fact that the Court in this case swore four of the jurors after the fourth side bar

conference. Florida Rock did not address that situation. The issue in this case involves the nature of the right to use premptory challenges after a juror or jury is sworn and that issue did not arise in Florida Rock. That case is not, therefore, on point.

The second civil case cited by Video in support of it's position also misses the mark. In Eastern Airlines, Inc., v. Gellert, 438 So.2d 923 (Fla. 3rd DCA 1983) the Third District Court of Appeal considered a situation in which the parties were required to exercise all of their premptory challenges at one time, leaving them defenseless when less than six remained in the box after the strikes had been exercised. No premptory challenges were allowed for the replacements.

Again, the facts did not deal with backstriking of sworn jurors v. unsworn jurors. At best, the case is helpful in a general way. The case recognized the "broad" discretion vested in the trial court to control the manner in which premptory challenges are exercised. Eastern at 930. It also notes that the litigant has a right to have a "fair opportunity" to make intelligent judgment as to the manner in which it should exercise premptory challenges. Eastern at 930. It does not relate "fair opportunity" to the facts of the instant case. "Fair opportunity" seems to relate to the more basic matters such as the opportunity to save premptory

challanges for replacement jurors, (See Eastern) the opportunity to question prospective jurors regarding mercy recommendations, (See Poole v. State, 194 So.2d 903 (Fla. 1967) the opportunity to resume questioning after the other side has questioned the prospective juror. (See Barker v. Randolph, 239 So.2d 110 (1st DCA 1970) All of those protected opportunities relate to the litigants' primary review of the prospective juror as opposed to the reconsideration process. Video would argue that the uninterrupted right to backstrike is essential to the fair opportunity to make an intelligent judgment as to the manner in which to exercise premptory challenges. No civil precedent is cited for that proposition. The proposed continuing right of reconsideration seems related more to preference and strategy than to the protection of the fundamental right to an impartial jury. After all, the true test is whether the limitation of backstriking after a portion of the jury is sworn interferes with the selection of an impartial jury. According to the United States Supreme Court, the answer is no. St. Clair v. United States, 154 U.S. 134, 148 14 S. Ct. 1002, 1008, 38 L. Ed. 936 (1894)

B. STAGES OF DEVELOPMENT

Video has suggested that the alleged right at issue in this cause has "reached different stages in different common law courts." Answer Brief of Respondents, page 13. Where are the "stages" referred to? Tedder set forth precedent from the U.S. Supreme Courts, U.S. Federal District and Circuit Courts, and Florida Supreme Court which are united in the position that once the trial court has sworn a juror to try the case, after opportunity for vior dire, the right to exercise a premptory challenge ceases. The only renegade authority from that very substantial line of precedent on this issue is the "Short Progression of Cases" outlined in Tedders Initial Brief, page 6. Such a thin line of decisions hardly constitutes "common law development". Video states that "whatever stage other courts have reached, in Courts of Florida and particularly in this Supreme Court, the right at issues is recognized and emphasized" Answer Brief of Respondants, page 13. But no authority is cited. Indeed, Video has failed to cite any authority from this Court that is on point factually and which is in support of its position.

There are no stages that common law courts are progressing through. There is no new awareness that enlightened Courts see while others do not. This is an old issue. It is one that has been settled for a long

time. While there is an apparent recent effort on the part of two Florida Circuits to change the Florida Rules of Civil Procedure on this issue, their campaign is outside the mainstream of judicial and legislative authority.

Video has cited several cases in support of it's decision which miss the mark factually. The recent case of Jackson v. State, 10 FLW 95 (Fla. January 31, 1985) is an example. Although it dealt with backstriking, it did not have a situation where the Court had sworn the jurors to try the case. Although that question was not at issue in Jackson it is interesting to note that on the issue of backstriking this Court reaffirmed the law of O'Connor v. State, 9 Fla. 212 (1860) in which this Court stated:

> If the prisoner at any time before any juror was or jurors were sworn had retracted his election of such juror or jurors and expressed his desire to challenge him or them, it was his right to do so until the whole of his premptory challanges were exhausted. (emphasis added)

Note that O'Connor anticipated individual juror swearing by saying that "at any time before any juror was or jurors were sworn". Clearly the O'Connor Court anticipated that jurors might be individually sworn as was done in the instant case. Neither Jackson nor O'Connor limited the right of the trial court to individually swear

the jurors and neither required the trial judge to establish good cause in order to do so. The rule established by O'Connor is clear. It gives a definitive time for ending the reconsideration process. It allows the Court the flexability to maintain basic control over the selection process. The trial judge in the instant case adopted the established rule of O'Connor and exercised his discretion in a reasonable and understandable manner. There was no error as alleged.

C. PREMATURE ACTION

In the instant case, the trial judge did not select the exact time that the jurors seated would be sworn. That decision was prompted by the first round of backstriking exercised by Video Electronics. The rule established by the court was that those seated after the first round of backstriking would be sworn to try the case and no further backstriking of those sworn would be permitted. Tedder never attempted to backstrike. It was Video Electronics who prematurely exercised it's right to one round of backstriking. Video could have waited until the parties had narrowed the selection process to the final panel of six and then had the right to backstrike to remove both jurors it sought to backstrike in the same

round. This could have been done in the sixth side bar conference since Tedder exhausted all of his premptory challenges in the fifth round.

The selection of a jury always requires choices and decisions. There are no guarantees that a favored juror will survive after the opponents challange. There are no guarantees that the next juror called will be an improvement for the cause. The best of strategies gets lost and chance is perhaps the largest single factor. Even if the judge had granted the backstrike challenge of Video in round five, the Court would then have had to replace two jurors (final strike by Plaintiff and final strike by Defendant) which means that 1/3 of the "whole panel" would have subsequently been seated sight unseen and with no premptory challanges remaining. Apparently Video is arguing that given a choice it would rather use it's last premptory challenge on a juror it had already thoroughly reviewed and accepted, and receive two jurors sight unseen without further challenges, than to face the final juror with a premptory challenge remaining. The wisdom of such a choice is clearly debatable. Had the final juror recently experienced a job termination because he too was an outsider in a family run business, I am sure that Video would have been happy to have had a remaining premptory challenge!

Books have been written on jury selection techniques. It is the effort of the litigants to get the most favorable jury possible for their cause. It is the more basic task of the Trial Court, however, to get a fair and impartial jury. The alleged right demanded by Video, to have absolute right to uninterrupted backstriking, is well removed from those legitimate rights which belong to a litigant that are essential ingredients to Courtroom justice. Indeed, after reviewing this very issue in 1936 in the case of King v. State, 169 So.2d 747 (Fla. 1936), This Court concluded as follows:

> In this case there is no showing of an abuse of discretion or that the defendants in the court below, Plaintiff's in error here, suffered the denial of a substantial right. King at 748.

II. DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE EMPLOYER?

The employers herein, Video Electronics, Inc., Porter M. Moore, and Rex H. Moore moved for a directed verdict upon the theory that the written Employment Contract, Provision E, "Expenses", had been violated by Harry Tedder, and, therefore, justified his termination. It is important to review the subject clause within the context of the entire contract. (A 1) First, the provision related to expenses is not incorporated into Paragraph A, "Scope of Duties". Sub-paragraphs (C), "Base Salary", (D), "Bonus", and (F), "Fringe Benefits", all deal with payments to the employee. Obviously, Paragraph E, "Expenses" is also a statement of Mr. Tedder's right to travel and promotional expenses and entertainment expenses as part of his employment package. The employee also agreed to submit documentation necessary to substantiate his business expenses. There is no question but that Mr. Tedder submitted documentation. The bookkeeper had receipts for every expenditure. The problem arose in the handling of the receipts that were submitted. The bookkeeper paid some expenses twice because she failed to have both the hard and soft copies of the credit charges at the time of payment.

It is also important to put the amount of discrepancy into perspective. Although Video Electronics only had approximately six employees, it handled between $200,000.00 and $300,000.000 of income per month. Because the income was in the form of quarters placed into video game machines, there was a great deal of cash moving through the company's books as well as it's offices. The Court held that if the overpayment was unintentional then it was trivial. Errors amounting to $119.35 over a seven month period by a General Manager in a company generating $1,868,693.00 over the same seven month period does, indeed, appear trivial.

At the time the Court made its determination, it had heard all of the facts of this case. The Court had heard that Mr. Tedder was earning well over $60,000.00 per year as General Manager at the time he was terminated. The Court had the opportunity to hear the testimony of bookkeeper Margie Bryant and to evaluate her very substantial level of competence. The Court had heard Mr. Tedder's explanation for the error in payment and was able to fully evaluate the Defendants' reaction to the discrepancy when they first heard of it. As noted earlier, the company took no action, suggesting that they too took it as a trivial matter until it served their purposes to consider it otherwise. The court also considered, no doubt, that the company continued to employ

Margie Bryant and to rely upon her abilities, even though she co-signed all of the checks which resulted in the overpayment to Mr. Tedder.

A Court should not direct a verdict for a defendant unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the Plaintiff. Strahm v. Aetna Casualty and Surety Company, 285 So.2d 697 (3rd DCA 1973, Whitman v. Red Top Sedan Services, Inc., 218 So.2d 213 (3rd DCA 1969), Mullis v. City of Miami, 60 So.2d 174 (Fla. 1952) Mr. Tedder presented evidence supporting his position that the overpayment was the result of unintentional human error. Further, the evidence clearly indicated that Harry Tedder did submit to the company documentation necessary to substantiate the $119.35 in expenses which he incurred. Literally speaking, that is exactly what the contract required. The evidence of the case suggested that the difficulty arose in the treatment of the receipts once received. That difficulty was compounded by the trusted bookkeeper's accounting of travel expenses and her subsequent repayment of those expenses at a later date. The jury was instructed to find for the employer in the event that they concluded that Harry Tedder intentionally misappropriated money from his employer. The jury, however, found for Harry Tedder.

In support of its argument that the Court should have directed a verdict or the employer, the Appellant herein cites Haiman v. Gundersheimer, 130 Fla 109 177 So. 199 (Fla. 1937). Contrary to the argument of the Appellants, the facts of the two cases are vastly different. In Haiman, the employee failed to properly account for company income for eighty five of the one hundred thirty-six days of employment. The figures available showed gross mismanagement with the result that the company was operated at a net loss for the owners. The employer had prepared a daily report sheet which the employee failed to keep "though repeatedly requested and warned to do so". In the instant case, Video Electronics experienced phenomenal growth during the term of Mr. Tedder's employment. Indeed, gross revenues almost doubled! (A-5) There were no allegations of directly tampering with cash funds or failure to report company revenues. There was no evidence that Mr. Tedder was warned regarding payments for business expenses. Indeed, he was terminated the day after the matter was first discussed (even though the company had known of the matter for approximately fifty days). In Haiman, the company showed a remarkable recovery after the termination of the employee. In the instant case, the company suffered dramatically with revenues declining every quarter after Tedder's discharge.

In Haiman, the Court determined that "it was for the Court to determine as a matter of law whether or not the Plaintiff's failure to make reports in the manner and form requested by the employer would constitute a breach of duty which would, if found to be true, warrant the employer in discharging the employee."

In the instant case the Court gave the following instructions:

> The Court has determined and now instructs you, as matter of law, that the requirement that an employee render correct reports and attach and furnish receipts for amounts paid out as items of business expense for reimbursement by the employer is a reasonable requirement. If the greater weight of the evidence indicates that Video Electronics, Inc. required, and Harry Lamar Tedder deliberately failed to make such reports, that's Mr. Tedder, then your verdict must be that Video Electronics, Incorporated and the two Mr. Moores were justified in terminating his employment. (T 500)

The Court further found, as a matter of law, that if the incidents of overpayment were inadvertent, then they would be trivial and certainly not grounds for discharge. (T 426) Therefore, as required by the Haiman case, the Court did determine exactly what was required by the Contract and what would constitute a breach thereof and it was left to the discretion of the jury to determine whether or not Mr. Tedder had deliberately double-billed his employer. Further, the jury was advised that if they

found that Mr. Tedder was overpaid and that his overpayment of travel expenses was the result of his error or negligence rather than his intentional misappropriation, then they could consider the evidence of that error or negligence in their determination of whether or not Harry Tedder was performing his duties under the contract. (T 498-499) The jury was not precluded, therefore, from further considering the matter of overpayment if they determined it was the result of error or negligence. They were entitled to consider that evidence in their separate determination of whether Harry Tedder was performing his duties under the contract since the employer also claimed, as a matter of defense, that Harry Tedder was not performing under the contract and that they were thereby entitled to terminate him.

The error requiring reversal in the Haiman case was that the jury charge submitted to the jury a question of law which should have been determined by the Court. In the instant case the Court properly determined the legal issues before it. The Appellate Court below has upheld the Trial Court by concluding:

> "We hold that the trial court followed the proper procedure and did not erroneously construe the contract." Decision on appeal, page 6.

Video continues to argue, however, that even the unintentional failure to do a trivial act warranted term-

ination in reliance upon Austin 's Rack, Inc. v. Austin, 396 So.2d 1161 (Fla. 3d DCA 1981). In that case the parties had expressly agreed that the employment contract could be terminated if Austin made false warranties or representations when he sold the corporation to the new owners. The Court found that the misrepresentation of the assets "and decrease of liabilities made the company's worth on paper nearly $100,000.00 more than it's actual worth, and, under the circumstances of this case, including the modest size of the company, necessarily constituted a material and significant misrepresentation in the financial statement. Austin at 1162, (emphasis added) The Court in the instant case ruled that the employee's errors were trivial under the circumstances of the case. That makes the facts of the two cases vastly different. Further, the Austin court ruled that the parties to an employment agreement are free to contract with one another that the employee may be terminated for the commission of a specific act. Austin at 1162. In Austin the parties included such a provision. In Tedder they did not.

The trial Court did not erroneously interpret the contract. The Motion For Directed Verdict was properly denied.

CONCLUSION

The parties in this action have had a fair trial of the issues. During the voir dire the parties were given a full opportunity to direct questions to the proposed jurors. The appropriate number of premptory challenges was granted to the parties. Video failed to cite any precedent which is binding on this Court which is on point and in support of it's position. The former decisions of this Court are clear and unambiguous, and were relied upon by the trial Court. Just as there was no showing of an abuse of discretion in King v. State, 169 So.2d 747 (Fla. 1936), there was no showing of abuse of discretion in the instant case. The facts of the two cases are remarkably similiar. Those Circuits that have now found otherwise, are using the "abuse of discretion" approach to circumvent a clear and established rule of law.

The Trial Court properly construed the employment contract. There is nothing shocking about a conclusion that the unintentional failure to do a trivial act is not adequate to terminate a written employment contract. This is especially true where the failure to do the specific act is not expressly listed as a grounds for termination in the written document. Both the judge and the jury were unimpressed with Video's strained arguments. The

Appellate Court has concurred. This Court should uphold the judgment for Tedder. The remand related to the certified issue should be reversed.