IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 70,394

OTIS ELEVATOR COMPANY,

Appellant/Cross-Appellee,

-vs-

WILLIAM SCOTT,

Appellee/Cross-Appellant.
_____/

REPLY BRIEF ON CROSS-APPEAL

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INDEX

CITATIONS OF AUTHORITY

STATEMENT OF THE FACTS

There is no evidence that the vehicle in which the bullet casings and clips were found belonged to Scott's son rather than Scott. The arresting officer denied that that was true (R390). Scott incorrectly states that the record is unclear as to whether he was receiving worker's compensation benefits at the time of trial. It was not unclear. The court asked Otis' attorney whether a worker's compensation claim was pending or whether the worker's compensation carrier had been paying and the answer was "he has been receiving benefits". The record is clear that at the time of trial Scott was receiving worker's compensation benefits.

Scott's contention that he tried to reach Mitchell on the date of his injury is solely his unsupported self serving testimony. Additionally, he states that Mitchell was designated by Otis as the person to whom all on-the-job injuries were reported, citing no record support for that statement. Scott says he did not remember whether Mitchell asked him if he wanted to fill out an accident report. In fact, Mitchell admitted "he might have" (R275).

Scott's brief sets forth a chronology of events, and then states that Mitchell told Scott to take some time off on September 25, 1980. That is an incorrect date. The Burdines' incident occurred Friday, September 19, 1980. Scott returned to work the following Monday, September 22, 1980 and Mitchell told him to take a few weeks off without pay (R498-500, 311-12). Mitchell then investigated the incident and terminated Scott on September 25, 1980 (R501). Scott incorrectly states that Mitchell admitted when he told Scott to take time off that he mentioned Scott's injury. Mitchell merely stated that <u>if</u> the injury was mentioned, it was only mentioned casually (R508-9).

Scott argues that his and Mitchell's testimony as to the insurance form given Mitchell was directly contradictory. It was not. Mitchell initially testified that he had asked Mitchell to fill out a mortgage insurance form which his doctor had already signed (R351). It is undisputed that Scott did not see a doctor until October 17, 1980, almost a month <u>after</u> he was terminated. On rebuttal Scott testified that the form that he presented Mitchell concerned mortgage insurance,

not unemployment insurance, and applied in case he got sick or hurt. Notwithstanding that testimony, Scott was unequivocal that this form had been signed by his doctor. Since Scott did not see a doctor until a month after he was terminated, it was impossible for this form to have been presented to Mitchell on the day he was terminated. At page 4 of his brief Scott states that he testified on rebuttal that he gave the form to Mitchell prior to the time he was terminated, citing to R533. Scott never testified that this occurred prior to his termination. In fact, he testified that there was confusion in his mind as to when this occurred (R351).

Mitchell did not admit that unfounded allegations were the basis for firing Scott. His testimony was that he considered everything in Scott's personnel file, but there is no dispute that the specific reason Mitchell fired Scott was because of the gun incident. Whether other complaints in Scott's personnel file over the years were unfounded or not is irrelevant. Otis was not sued for firing Scott for these other "unfounded allegations". Rather, Otis was sued for firing Scott for filing a worker's compensation claim. It is misleading for Scott to state that he was told to take time off by Mitchell because of the Burdines' incident and his injury, citing to R319. When questioned about whether Mitchell actually said anything about his injury, Scott responded "I think he implied that" (R319).

ARGUMENT

POINT IV - DIRECTED VERDICT

FRAMPTON v. CENTRAL INDIANA GAS CO., 297 N.E. 2d 425 (Ind. 1973) did nothing more than create for the first time in Indiana a cause of action where an employee was terminated for filing a worker's compensation claim. This case does not concern whether a cause of action exits in Florida, but rather whether Scott's evidence was sufficient to prove a prima facie case.

Scott argues that there was "substantial evidence" that he was discharged because of filing a worker's compensation claim and that he was intimidated and threatened by Otis for pursuing the claim. Scott cites to no pages of the transcript to support these statements. There was no evidence, much less

substantial evidence, that Scott was discharged for filing a worker's compensation claim that he filed a month after he was discharged. All we have is speculation on Scott's part that was supported by nothing.

Scott cites AXEL v. DUFFY-MOTT CO., INC., 47 N.Y. 2d 1, 389 N.E. 2d 1075 (1979) for the proposition that normally employers who fire an employee for retaliatory reasons do not broadcast their intentions to the world. AXEL is distinguishable on its facts. Two days after Axel testified at her worker's compensation hearing she was terminated. The employer claimed this was because of a deterioration of her job performance. However, it was only after receipt of a letter from the employee's lawyer that adverse statements began to appear in the employee's personnel file. The court found that the employer was attempting to build a case so that it would have an excuse to discharge the employee.

Unlike AXEL, Scott presented no evidence from which a reasonable conclusion could be drawn that Otis terminated him for filing a worker's compensation claim. The claim was filed a month after he was terminated and Scott failed to prove any connection between the claim and his termination. Unlike AXEL, here Scott never introduced evidence of "retaliation" and therefore the burden never shifted to Otis to show a legitimate reason for the discharge, although it did so. And Scott never thereafter met his burden of proving that the gun incident was a "pretext" for his discharge. Although evidence relied upon to prove wrongful discharge may of necessity be circumstantial in nature, that evidence must have sufficient probative value to constitute the basis for a legal inference, rather than mere speculation, and the circumstances proven must lead to that conclusion with reasonable certainty and probability. THOMPSON v. MEDLEY MATERIAL HANDLING, INC., 732 2d 461 (Okl. 1987).

In SOUTHLAND DISTRIBUTING CO. v. VERNAL, 497 So.2d 1240 (Fla. 2d DCA 1986) the Second District held that the circumstance of an employee's discharge upon his return from jury duty was insufficient circumstantial evidence to support a finding that the employee was terminated because of serving jury duty, where all the other evidence pointed to the fact that the employee was terminated due to a disagreement

with his employer that occurred prior to commencement of jury duty. Likewise in this case the circumstances that Scott was terminated after reinjury of an old leg injury was insufficient circumstantial evidence to lead to a conclusion that he was terminated because of the leg injury, where all the other evidence showed he was terminated because he assaulted a co-employee with a gun.

Scott cites HANSOME v. NORTH WESTERN COOPERAGE CO., 679 S.W.2d (Mo. 1984) for the proposition that the testimony of an employee alone is sufficient to submit the case to a jury. But it depends on the testimony. In HANSOME, the employee sustained an injury and then exercised his compensation right to receive medical treatment and was terminated. His testimony, which went undisputed, was that he was told he was being discharged because "you got hurt on the job; you drew your workman's compensation, and went back and forth to the doctor's office". The present case differs. Here Scott presented no evidence that Otis had any reason to believe he was going to file a worker's compensation claim. There was simply no proof of any causal connection whatsoever. Scott was terminated because of the gun incident, a month later he filed a worker's compensation claim, and his only testimony was that he "thought" there "probably" was some relationship with his injury, and that he "thought" his injury had a bearing on his discharge. That was total and absolute speculation on Scott's part, and constituted no proof of a causal relationship whatsoever.

The employee's testimony in A.J. FOYT CHEVROLET, INC. v. JACOBS, 578 S.W.2d 445 (Tex. Civ. App. 1979) is distinguishable. He testified that his manager told him after being injured on the job and having surgery "I would put you back to work, but I would be a damned fool to hire you when you have a lawyer". His testimony was confirmed by his employer's general manager. Scott's testimony is nothing close to that testimony and was totally insufficient to get this case to a jury.

Scott cites REED v. SALE MEMORIAL HOSPITAL AND CLINIC, 698 S.W.2d 931 (Mo. App. 1985) for the proposition that proof in retaliatory discharge cases is necessarily indirect. In the present case there was no evidence of a causal

connection, whether direct or indirect. Scott also argues that in REED the court rejected the employer's argument that the employee has to establish that he filed a worker's compensation claim prior to being discharged in order to have a cause of action. As stated by the court in REED, the employer knew "the claim was imminent". That is not true here. There was no evidence that when Scott was terminated Otis had any reason to anticipate that a worker's compensation claim was going to be filed by Scott.

Scott states that in REED the court found that proximity in time between the termination to the plaintiff's decision to make a claim "was some indication of retaliatory motive". In fact, the court referred to the proximity in time between the filing of the worker's compensation claim, or evidence of the intent to do so, and the employee's subsequent termination. In this case, the firing came first at a point where there was no evidence that Scott intended to file a worker's compensation claim, much less that this intent was communicated to Otis.

Scott's reliance upon KELSAY v. MOTOROLA, INC., 384 N.E.2d 353 (Ill. 1978) is misplaced. In that case the plaintiff's attorney sent notice of an impending claim to her employer. The employer told her she would be more than adequately compensated for her injury by the company and there was no reason for her to file a claim, and that it was the company's policy to terminate employees who pursued worker's compensation claims. The plaintiff decided to proceed with her claim and was discharged.

The facts in KELSAY cannot be compared to the facts in this case. Scott filed no worker's compensation claim before being terminated. He was not warned that if he filed a claim he would be terminated. His only reference was to Mitchell's statement that there were too many accidents and that the next person who had an accident and filed a claim would lose a week of work. There was never any threat to discharge any employee if a claim was filed and never any evidence that any employee had been fired for filing a claim. In fact, Otis presented other employees who had been injured on the job. They testified they had filed worker's compensation claims, and were never fired nor threatened in regard to losing their

job (R225-26).

Scott cites HENDERSON v. TRADITIONAL LOG HOMES, INC., 319 S.E.2d 290 (N.C. Ct. App. 1984) for the proposition that even if there is evidence supporting a valid termination by the employer, where reasonable men can differ as to its import, a directed verdict should not be granted. In HENDERSON the employee informed his employer that his compensation claim was pending. He was subsequently "laid off" while employees with less seniority were retained. Certainly that evidence was sufficient to allow reasonable men to conclude a retaliatory discharge. The evidence in the present case was insufficient.

Scott cites SCHRADER v. ARTCO BELL CORP., 579 S.W.2d 534 (Tex. Civ. App. 1979) for the proposition that as long as there is a scintilla of evidence a directed verdict should not be granted. In SCHRADER there was unrebutted testimony of the employee that his foreman told him he could not work for the company as long as he had an attorney representing him in a compensation case, and testimony of the personnel officer that settlement of the compensation claim was a factor in the termination decision. In the present case it can be said without any hesitation that there was not a scintilla of evidence that Scott was terminated because of a worker's compensation claim.

In HENDERSON v. ST. LOUIS HOUSING AUTHORITY, 605 S.W.2d 800 (Mo. Ct. App. 1979) a directed verdict for the employer was denied since the employee testified that he was told he was being discharged because he filed a worker's compensation claim. That type evidence was totally lacking here.

SCHUBBE v. DIESEL SERVICE UNIT CO., 692 P.2d 132 (Ore. 1984) cannot be likened to this case. The supervisor had complained on several occasions to the employee about his filing a compensation claim. The plaintiff was fired the day he returned to work after an absence due to his injury. The employer claimed he was being discharged because of a poor attitude and because four to six months earlier he had allegedly worked some small amounts of unauthorized overtime. The court held that the employee would not have been discharged but for the employer's retaliatory motive for filing the worker's compensation claim. The same is not true here.

Scott would not have been terminated but for the fact that he was arrested on the job for assaulting a co-employee with a gun.

Scott cites TEXAS STEEL CO. v. DOUGLAS, 533 S.W.2d 111 (Tex. Civ. App. 1976) for the proposition that an employee is not required to show that he was fired only after he filed a claim for compensation. However, in that case although the employee had not instituted a formal claim when he was discharged, he had sustained an on-the-job injury, had been furnished medical treatment and had been paid worker's compensation benefits for several weeks. The court held that by receiving the benefits the plaintiff had in fact instituted a claim prior to being fired pursuant to the Texas statute. That is not true here. Scott had received no medical attention and received no compensation benefits, when he was terminated.

Scott argues that proof of "coercion, threats or intimidation by the employer" can be by inference. But, the court refused to instruct the jury on coercion, threats and intimidation because Scott failed to prove any (R450-51). The only instruction given the jury was that it should determine whether Plaintiff proved that he was actually discharged by reason of his claim or attempted claim for worker's compensation (R582). Scott did not cross-appeal the refusal to give such an instruction. His attempt to convert this case at the appellate level into a "coerce, threaten and intimidation" case is simply not supported by the record.

Scott states that the only question was why he was terminated after 19 1/2 years. There is an easy answer. He was terminated because he assaulted a co-employee with a gun.

Scott makes the incredible statement that the undisputed evidence supports his position that his termination was retaliatory in light of the fact (Petitioner's Brief p. 20):

> that Otis through its agent Mitchell was aware that Mr. Scott had been injured on the job and would be filing a workers' compensation claim, and that the Burdines' incident was not the substantial reason for Mr. Scott's discharge.

There was absolutely no evidence that Mitchell was aware that Scott would be filing a workers' compensation claim (R520). As a matter of fact, there was no evidence that prior to his discharge Scott had an inclination to file such a claim, or had

indicated he would be doing so, or was even thinking about it. In addition, how Scott can say the Burdines' incident was not a substantial reason for his discharge is incredible.

Scott states that although Otis claimed he was fired because of customer complaints, there was no documentation in the file of customer complaints, only a notation on his termination notice that that was why he was being fired. Mitchell testified that up until 1979 they kept no personnel files on employees whatsoever (R521). Even in 1980, Otis did not have a personnel office or a person in charge of keeping personnel files or paperwork in South Florida (R528-29). The responsibility was his, the district manger's and their secretary's (R529). However, documentation or no documentation, it is not disputed that Scott was arrested for assaulting a co-employee with a gun on Otis' jobsite, that he pled nolo contendere to the charges arising out of that incident, and that Burdines had insisted that Scott not be allowed back on the jobsite. While Scott testified that in years past Burdines had requested that he do all their jobs, this was not after the gun incident (R244).

Scott argues that incidents of tardiness and customer complaints, which Mitchell had knowledge of, were insufficient to allow Otis to terminate him. Whether they were or not is irrelevant. Scott did not sue Otis for firing him for these other incidents claiming they were insufficient to terminate him. If that had been the case, Scott could have filed a grievance contesting his discharge. Rather, Scott sued Otis claiming that he had been fired <u>because</u> he filed a worker's compensation claim.

Scott refers to his testimony that the men were instructed to hold down "lost time accidents". In simple language he testified "we were always told to hold the accidents down" (R265), and admitted that it was fairly normal for an employer to want to hold the accidents down (R264). He admitted Otis always emphasized that they should be careful, work safely and maintain a safe working area (R264). Scott said that at some point Otis had a "rash of accidents" (R252), which resulted in Otis making the workers meet every Friday morning for a safety meeting (R252).

That is when Scott claims Mitchell told them that the next workman who got injured was going to lose a week's work. Scott admitted he did not feel Mitchell was saying anything that should not be said by an employer (R264).

Scott also admitted that Mitchell's alleged statement was not made within a short time of his accident, and could have been years before (R265). Scott had no criticism of Mitchell's wanting to hold down accidents. Scott never claimed Mitchell said that if workmen filed a worker's compensation claim they would be fired. He simply claimed Mitchell said they would lose a week's work if they got injured, obviously in an attempt to try to get the workmen to be more careful. Scott produced no other workmen to testify that Otis had, in fact, made them lose a week's work because of an injury claim, much less terminated them as a result. Moreover, Scott did not relate Mitchell's statement about losing a week's work to his own firing because, of course, Scott was terminated, not laid off for a week, and this occurred a month before he filed a worker's compensation claim.

Scott states that a couple of weeks after his accident, Mitchell told him to take several weeks off but did not give him any specific reason, and that Scott "felt" he was probably being asked to take time off because of his injury. Scott wishes to make it appear that this conversation just occurred one day unrelated to anything. In fact, Scott admitted that this conversation occurred the day he returned to work after being arrested (R311-12), and that the gun incident was "probably" discussed (R314). On deposition Scott clearly testified that Mitchell had told him to take some time off because one of the vice presidents for Burdines had requested that he not work on this jobsite anymore, and admitted that this conversation took place the day he returned to work after his arrest (R316).

While Scott continues to argue that he did not assault the co-employee with a weapon, in fact he pled nolo contendere.

Scott states that he felt intimidated because of the delay in receiving his vacation pay while out of work (R329). First, he is talking about vacation pay he was to receive after he was terminated (R328-29). Second, there was no delay because he admitted receiving the vacation pay about October 12, 1981, only two

weeks after his termination (R257). Third, whether Scott "felt" intimidated or not is irrelevant. Otis clearly did nothing to intimidate him.

Scott states that he "felt" that his accident had a bearing on his termination but he could substantiate this feeling with no evidence. Scott also states that he believed the Otis employee who completed his accident report was fired. This was simply more of Scott's speculation and conjecture since he prefaced this so-called belief with "I believe, but I'm not sure, I cannot substantiate with fact" (R330). At page 24 Scott attempts to give other examples of "intimidation" which not only do not constitute "intimidation" but also had nothing to do with his firing. In addition, the jury was not instructed upon "coercion, threats or intimidation" (R582), and therefore this evidence had no bearing on the issues in this lawsuit.

Scott states that Detective Kaye did not find a weapon or bullets in his vehicle. In fact, Detective Kaye testified that on the floor board of Scott's vehicle he found 22 caliber bullet casings and in the glove compartment he found a clip belonging to a 30 caliber military type carbine, the type weapon which was allegedly used to accost the co-employee (R388).

Scott argues that Mitchell admitted Scott asked him to fill out a mortgage disability insurance form (R528). In fact Mitchell testified that the form was an unemployment form to provide Scott with house payments while he was unemployed, not a disability form (R525). Scott's own testimony made it clear that it was only after he was under a doctor's care that he obtained an insurance form for his mortgage, which he asked Mitchell to fill out (R351). It is undisputed that Scott only started seeing a doctor for this knee injury after he filed the worker's compensation claim on October 22, 1980, and that was a month after he was terminated. Accordingly, pursuant to Scott's own testimony the form, whatever its nature, only came about after his termination, and therefore could not have been the cause of his termination, as he now implies. Although Scott has changed his position before this Court, before the Fourth District he admitted that the form was presented to Mitchell after he was discharged (A1):

> Mr. Scott, while he was under the doctor's care and off from work, asked Mitchell to complete a mortgage disability

insurance form which Scott had taken out on his home to guarantee payment of his mortgage should he be out of work.

Scott unsuccessfully attempts to distinguish the cases cited by Otis. As in those cases, Scott totally failed to present sufficient evidence that he was unjustly discharged because of a worker's compensation claim.

Scott argues that Otis failed to establish that the reasons given for his termination were substantiated in his personnel file "or ever actually existed". First of all, what was contained in his personnel file was totally irrelevant in light of the undisputed evidence that Scott was arrested on the job for assaulting a co-employee with a gun and pled nolo contendere to that charge. Nobody disputes that the arrest occurred, not even Scott.

Much of what is discussed in Scott's brief has no bearing on the issues. Importantly, Scott does not demonstrate that he presented any evidence to support his claim that he was fired because of his knee injury. He admitted that Mitchell told him he was being fired because of the gun incident. He admitted that at the time he was terminated he had not missed a day of work because of his leg injury, nor had he advised Mitchell that he needed medical care, nor that he intended to file a compensation claim. There was no evidence that Otis knew that a claim was imminent. All the evidence demonstrated Otis had no reason to believe Scott was going to file a claim, and therefore his termination could not have been in anticipation of such a claim.

Scott's case was nothing more than unsupported, and unjustified speculation on his part. He simply testified that when he was fired he concluded it was "probably" because of his knee injury (R278) and that he "felt" the injury had a bearing on it (R329). Scott has cited to no facts to create an issue in this regard except his sheer speculation and guess work which did not rise to the level of creating an issue of fact.

Contrary to Scott's assertion, there was no conflicting evidence that could lead the jury to believe that he was terminated because of filing a compensation claim or attempting to do so. Even Scott acknowledged that he never led Mitchell to believe he was going to file a claim. It was only after he was arrested that he

was terminated. A month later he filed a compensation claim. Scott simply could prove no connection whatsoever between his discharge and the compensation claim.

POINT V - PAST DAMAGES

Scott argues that prior to this injury he was able to perform the work of a foreman or superintendent even though he had a 20% disability. That helps Otis, not Scott. Despite his 20% disability Scott had been able to work for Otis as an elevator mechanic/foreman. The evidence is undisputed that he could not do so after this injury.

Scott states that he testified that he could do the work of a foreman or superintendent or perhaps even a service person, citing to R346. However, his testimony was in regard to the fact that prior to this accident he had been able to work with a 20% disability without difficulty as a foreman or superintendent. Scott never testified that he was presently able to do that work. In fact, all of the evidence was to the contrary, as admitted by Scott (R344), and by his new employer (R86-89, 91).

Scott argues that in addition to the higher union scale which he had received at Otis he had been entitled to three weeks vacation, medical coverage and a pension plan, which he was not entitled to at his new employment. There was absolutely no monetary value given to any of these benefits. In fact, Scott's economist based his testimony upon a loss of net earnings and did not factor in any loss of benefits (R173-90). Without proof as to the value of the benefits Scott had with Otis, the jury could not award money for their loss. During closing argument counsel for Scott told the jury repeatedly that the figure they were asking to recover was "without benefits" (R545-47). The jury was not entitled to add any amount for loss of benefits because Scott chose not to place before the jury the value of those benefits.

Moreover, this point-on-appeal has to do with Scott's entitlement to past lost wages, not with the amount of his recovery. Benefits or no benefits, the lost wages Scott sustained from his discharge until he was rehired by Mowry were a result of his knee injury and not a result of being unable to find a comparable

job. And the diminution in wages Scott sustained after he went to work for Mowry was a result of his inability to perform a comparable job because of his knee injury, and not because of an inability to find a comparable job. Accordingly, Scott's discharge did not cause him any past lost wages for which he was entitled to recover under a wrongful discharge action.

Scott argues that Otis has waived this argument by taking the position at trial that the only appropriate remedy he might have would be back pay. In fact, Otis' position was that Scott had failed to prove a prima facie case, both as to liability and damages. In addition, Otis argued that the proper measure of damages did not allow Scott to recover for future lost wages and that the only recoverable damages were past lost wages. However, Otis never admitted that Scott had proven his entitlement to past damages. Scott states that Otis never argued in its pretrial motions that he was not entitled to past lost wages, but that was all a matter of proof.

Scott contends that the burden was upon Otis to establish that there was comparable employment available. Otis did not have to prove this because Scott admitted he could not perform comparable employment. Scott also argues that the burden was on Otis to prove that he was not entitled to recover for the benefits he lost when he left Otis, and that Otis must demonstrate that the damages awarded him did not include loss of pension and other benefits. The damage award clearly did not because Scott failed to prove the value of any lost benefits. He chose to put on proof at trial solely as to his loss of income.

POINT VI - FUTURE DAMAGES

Otis relies upon the argument in its main brief. Moreover, at page 32 of his brief Scott acknowledges that future lost wages are only appropriate where the employee can establish "with reasonable certainty" that their loss was occasioned by wrongful discharge. That was not proven, and could not be proven in this case. The diminution of future wages in this case was the result of Scott being physically unable to perform a comparable job paying the same wages and benefits that he had been making with Otis. His physical condition relegated him to a

lesser paying job with no benefits. Otis is not responsible for that diminution in income.

Scott states that when he tried to return to work with Otis he was told there was no work available. However, that was after he was terminated and he simply called and told Otis that he wanted to come back to work (R350). After being terminated for a justifiable reason, Otis had no obligation to rehire Scott.

POINT VII - JURY INSTRUCTIONS

Scott's argues that the jury instructions did not mislead the jury or prejudice Otis' right to a fair trial. Otis does not know how it could be otherwise when the jury was never charged on the elements of wrongful discharge, and was not charged on who had the burden of proof, or upon the shifting of the burden of proof, or the necessity of proving a causal link between the discharge and the damages and so forth. The instruction set forth at page 44 of Otis' main brief was wholly inadequate.

POINT VIII - FERGUSON'S TESTIMONY

Scott argues that the trial court did not err in excluding Ferguson's testimony because Scott should have been given the opportunity to subpoena Ferguson's helper, Mr. Noon; and that to have permitted Ferguson to testify would have resulted in "trial by ambush". However, the Florida Supreme Court's holding in BINGER v. KING PEST CONTROL, 401 So.2d 1310 (Fla. 1981) and the record in this case clearly reveal that neither of those contentions have merit.

Initially it should be noted that Scott has made no contention that Otis failed to list Ferguson's name intentionally or in bad faith or that Ferguson's testimony would have disrupted the trial. Rather, Scott relies on the third factor noted in BINGER as justifying the exclusion of a witness, i.e. the objecting party's inability to cure the prejudice and lack of independent knowledge of the existence of the witness, 401 So.2d at 1314.

It is clear from the record in this case that Scott had knowledge of the existence of Ferguson and therefore no prejudice was demonstrated to justify the exclusion of his testimony. Otis' pre-trial stipulation listed as an exhibit list

the police and court records relating to Scott's arrest and sentencing (R730). The criminal file in that case included Ferguson's deposition. Additionally, defense counsel informed Scott's counsel of his intention to call Ferguson two weeks prior to trial (R408-9). Therefore, there is absolutely no basis for concluding that Scott suffered any prejudice, defined in BINGER as "surprise in fact".

Scott relies heavily on the trial court's conclusion that Scott should have been entitled to subpoena Noon, Ferguson's helper. However, nothing in the BINGER case supports this as a justification for excluding a witness. This Court in BINGER specifically stated that prejudice is not "dependent on the adverse nature of the testimony" (R401 So.2d at 1314). Apparently, the trial court overlooked that statement in the opinion and concluded that because Ferguson's testimony was so adverse to Scott's case, Scott should have had an opportunity to subpoena the corroborating witness, Noon, to test the credibility of Ferguson's testimony. But, Scott had an adequate basis for testing the credibility of Ferguson through his deposition taken in the criminal case. Furthermore, it appears that Noon was unavailable as defense counsel stated to the court that he had attempted to locate him but was unable to (R417). Basing the exclusion of Ferguson's testimony on the basis that Scott should have been given the opportunity to subpoena an unavailable witness is unpersuasive.

In conclusion, none of the three factors to be considered in determining the use of an undisclosed witness at trial justified the exclusion of Ferguson's testimony. Otis' counsel did not intentionally or in bad faith fail to disclose Ferguson's name, but in fact disclosed his name two weeks prior to trial. Nor has it been suggested that there would have been any disruption of the orderly and efficient trial of the case by permitting his testimony. The trial court's conclusion that Scott should have been entitled to subpoena another witness bears no relation to the question of prejudice since that relates solely to surprise in fact and not to the adverse nature of the undisclosed witnesses' testimony. Since there was no legal justification for the trial court's rationale or ruling there was an abuse of discretion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to EARLE L. BUTLER, ESQ., 1995 E. Oakland Park Blvd., Ste. 100, Ft. Lauderdale, FL 33306; CATHY J. BURRIS, ESQ., P.O. Box 030067, Ft. Lauderdale, FL 33303; and EDWARD J. DEMPSEY, United Technologies Corp., United Technologies Bldg., Hartford, CT 06101, by mail, this 18th day of August, 1987.

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