IN THE
SUPREME COURT OF MISSOURI

No. 87023

JOHN STEHNO,

Respondent,

v.

SPRINT SPECTRUM, L.P.,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Hon. Frank D. Connett, Jr., Senior Judge

SUBSTITUTE REPLY BRIEF FOR APPELLANT

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INTRODUCTION

A. Based on the Undisputed Facts, Stehno Failed to Make a Submissible Case as a Matter of Law.

This appeal is governed by three cases. Rhodes Eng'g Co. v. Public Water Supply Dist. No. 1, 128 S.W.3d 550 (Mo. App. 2004), and Hartbarger v. Burdeau Real Estate Co., 741 S.W.2d 309 (Mo. App. 1987), hold that a business expectancy that is contrary to the terms of a contract on which the expectancy depends is unreasonable as a matter of law. Eggleston v. Phillips, 838 S.W.2d 80, 83 (Mo. App. 1992), holds that "absence of justification requires that the [corporate] officer interfere with the contract for personal, as opposed to corporate, interest plus that the officer employed improper means." Stehno's claim fails for both of these reasons.

Under Rhodes and Hartbarger, Stehno's alleged expectancy was without basis because the Master Agreement that defined the rights and duties of Amdocs and Sprint gave Sprint the unqualified legal right "to reasonably require removal of a subcontractor" from Sprint (L.F. 479). Stehno's alleged expectancy was further without basis because the Service Agreement between Modis and Amdocs provided that "Amdocs may terminate a Service Order upon the provision of seven (7) days' written notice to [Modis] for any reason" (L.F. 420). Stehno

could not have a reasonable expectancy of indefinite employment contrary to the terms of the contracts on which his temporary contracting work depended.

Under Eggleston, Sprint was justified in its actions. No evidence supports Stehno's claim of lack of justification. All evidence shows that Richert attempted to protect her employer's interest in having its own employees – and not a temporary contractor – work on the Sprint data base for the Sprint project. Further, Stehno's admissions both at trial (Tr. 693) and on appeal (Br. 68) that he was involved in conflicts while at Sprint support Richert's assertion that Stehno was a "magnet for conflict" (L.F. 532). These are corporate interests, not personal to Richert. Richert was justified in protecting the interests of her employer. In any case, Stehno introduced no evidence whatsoever of any possible personal motivation on Richert's part nor any evidence of improper means.

For these two reasons, therefore, either of which is independently sufficient for outright reversal, the order granting a new trial should be reversed and the case against Sprint dismissed.

B. Stehno's Attempt to Confuse the Facts Is Beside the Point.

Rather than squarely address the plainly applicable law, Stehno's strategy is to create as much confusion about the facts as possible. Because Rhodes, Hartbarger, and Eggleston control this case, and because the facts relevant

to them are undisputed, however, it is unnecessary for this Court to wade through Stehno's confusing array of irrelevant and, in some instances, misstated, facts.[1/]

Disposition of this case, Sprint reiterates, is a matter of law. Whether or not Stehno subjectively believed he had a business expectancy, and whether or not there was evidence to support that subjective belief, is beside the point. Stehno could not have a *reasonable* business expectancy in future work with Amdocs on Sprint's Rodeo project when that expectancy is contrary to the contract that governed the Rodeo project in the first place. Stehno was a temporary worker who had no control over where he was assigned and when. Stehno's placement at

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[1/] One correction is necessary. Stehno states that Sprint's statements about Stehno's resume are not accurate (Br. 6 n.1). To the contrary, Exhibit A-3 (L.F. 593), the application submitted to Dice.com (Tr. 598), which Stehno himself described as a resume (Tr. 473), and which Modis reviewed (Tr. 421), stated his education level as "Bachelor's" (Tr. 599). Stehno admitted at trial that he had no Bachelor's degree (Tr. 599). As to Exhibit A-4, (L.F. 595), the resume Stehno submitted to Modis (Tr. 600-604), Stehno admitted that his representation of his employment history "is not accurate" (Tr. 604-605).

Sprint necessarily depended on the contractual relationships between Sprint, Amdocs, and Modis, which permitted Stehno no reasonable expectancy at all.

II.

THE TRIAL COURT ERRED IN DENYING SPRINT'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON STEHNO'S CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT OR VALID BUSINESS EXPECTANCY WITH AMDOCS BECAUSE STEHNO'S PROOF OF A CONTRACT OR REASONABLE BUSINESS EXPECTANCY AND OF AN ABSENCE OF JUSTIFICATION FAILED IN THAT BOTH AMDOCS AND SPRINT RETAINED THE CONTRACTUAL RIGHT TO REMOVE STEHNO AND HAD AN ECONOMIC INTEREST IN DETERMINING WHO WORKED ON ITS SYSTEMS AND PROJECTS.

A. Stehno Could Not Have a Reasonable Expectancy Contrary to the Terms of the Contracts that Governed His Retention as a Temporary Contractor with Amdocs.

Stehno was a temporary contractor. He worked for Amdocs for four days. He had no more than a mere hope of long-term employment with Amdocs on the Sprint project. That hope was expressly subject to and dependent upon the contracts between Modis, Amdocs, and Sprint. Both Amdocs and Sprint had an unqualified legal right to end Stehno's assignment on the project. Stehno cannot

have a reasonable expectancy of employment where the expectancy ignores the plain terms of the agreements under which he was retained.

Stehno attempts to distinguish Hartbarger and Rhodes by arguing that his claims are independent of the contracts. Stehno is wrong. But for the Service Agreement between Modis and Amdocs, Stehno could not have been placed as a temporary contractor with Amdocs. But for that Agreement's conversion clause, Stehno could have had no expectancy in permanent employment with Amdocs (L.F. 419-420). Under that Agreement, Amdocs could terminate a Service Order (i.e., dismiss a temporary contractor) "for any reason" (L.F. 420). Amdocs' Igor Ivensky testified that he retained Stehno on the understanding that the first week was nothing but "an extended interview" during which Amdocs could send Stehno back to Modis (Tr. 791-792). Amdocs acted under the Agreement when it returned Stehno to Modis. Stehno's claims – based on four days of temporary computer work without a computer – are not independent of the Service Agreement, and they cannot survive its plain language.

The terms of a second contract – the Master Agreement between Amdocs and Sprint – further defeat Stehno's alleged expectancy. His claim is also dependent on the Master Agreement, which governed the relationship between Amdocs and Sprint. The Master Agreement gave Sprint the unqualified legal right to reasonably require Stehno's removal at any time (L.F. 479). Stehno could have

no reasonable expectancy in permanent employment on the Sprint project when Sprint had the right to require his removal and did not want him.[2/] As in Service Vending Co. v. Wal-Mart Stores, Inc., 93 S.W.3d 764, 770 (Mo. App. 2002), a case for which Stehno has no response, Stehno's "claimed expectancy was, as a matter of law, neither reasonable nor valid in view of the terms of the contract."

Stehno attempts to convince this Court to apply Hensen v. Truman Medical Ctr., 62 S.W.3d 549 (Mo. App. 2001). Hensen does not apply. The claimed expectancy with which Sprint is accused of interfering – Stehno's alleged expectancy of employment with Amdocs – was nothing more than a pipe dream based on four days of "work" as a temporary contractor. The expectancy in Hensen, on the other hand, was a full blown employment relationship. Extending

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[2/] Stehno attempts to cast doubt on the undisputed fact that Richert had rejected him for a job just weeks before he applied to work on the Sprint project. Stehno argues that Richert said only that "Stehno left her department because of the environment and 'it hasn't changed'" (Br. 9). Stehno ignores the context: Richert was responding to Solutions Point's inquiry about whether Richert would "be interested in him for any of [her] current needs" (L.F. 393; Tr. 592). Solutions Point certainly understood what Richert meant when it informed Stehno that "Richert said no to [the] offer to return to her department" (Tr. 592-593).

Hensen to apply to alleged interferences with temporary workers would significantly undercut the central point of temporary work. That would be a detriment to both employers – who rely significantly on the availability of temporary workers – and to individuals, such as Stehno, who prefer temporary contracting (Tr. 525, 529, 573-574).

In an attempt to fall within Hensen's narrow confines, Stehno points to his employment relationship with Modis (Br. 51-52). Stehno's employment with Modis, however, is irrelevant. As Sprint pointed out in its opening brief (Sprint Br. 26 n.1), Sprint had absolutely no knowledge of the Consultant Employment Agreement between Stehno and Modis, which is why the trial court correctly concluded that Modis should be left "out of it as far as Sprint's concerned" (Tr. 874). Stehno also argues that Hensen applies despite the fact that no one at either Amdocs or Modis promised Stehno a specific assignment (Br. 52-53). For support, Stehno takes a single quote out of context in an effort to argue that the defendant did not know about the nature of the plaintiff's employment relationship in Hensen (Br. 53). Stehno, however, ignores Hensen's holding that "[s]ubstantial evidence existed from which the jury could have inferred reasonably that Truman had knowledge of Hensen's employment relationship with REN." 62 S.W.3d at 554. Finally, Stehno's claim that evidence of improper purpose exists here (Br. 54-55) is simply not supported by the record. See supra Part II.C.

B. Sprint Was Justified in its Actions Because All of the Evidence Is Consistent with Sprint's Valid Business Concerns.

As discussed above, Stehno's alleged expectancy was unreasonable. His status was temporary and completely dependent upon contracts. This Court need proceed no further in the matter. Nevertheless, Stehno's claim fails for the independent reason that Sprint was justified in its actions. Sprint has an economic interest in determining who works on its systems and projects. That interest is embodied in the Master Agreement between Amdocs and Sprint, which gave Sprint the contractual "right to require the removal of a Subcontractor's personnel" (L.F. 479). Even absent that, however, Sprint has an economic interest in ensuring the proper conduct of its business.

Stehno's primary rebuttal is waiver (Br. 48). The issue is whether Sprint's actions were justified. Sprint did not waive its position that its actions were justified. Sprint argued throughout the case that it was justified in its actions (L.F. 74-75, 82-83). Specifically, in both of Sprint's motions for directed verdict, Sprint argued that "plaintiff has not proven the absence of justification (L.F. 74, 82). In support of those arguments, Sprint referred to its "contract with Amdocs" in each instance. An appellant is not required to refer to every piece of evidence below in support of its argument that its actions were justified in order to preserve the issue for appeal. See, e.g., In re A. A. R., 39 S.W.3d 847, 851 (Mo. App. 2001)

("appellate court will presume the trial court considered all of the evidence before it in making its determination"); Simkims v. Nevadacare, Inc., 229 F.3d 729, 736 (9th Cir. 2000) ("general issue is properly before us on appeal, and we are not precluded from considering any reasonable interpretation of the Plan").

Stehno implicitly admits that Sprint had the right under the Master Agreement to require his removal but argues that that right was not absolute (Br. 48-50). The argument fails. First, Stehno cannot rely on a provision in a contract to which he was neither a party nor an intended beneficiary. See Aufenkamp v. Grabill, 112 S.W.3d 455, 458 (Mo. App. 2003) ("Generally, an individual must be a party to a contract or a third party beneficiary in order to have standing to enforce the agreement."). Second, the fact is that Amdocs did not invoke the notice and cure to which Stehno points. Amdocs dismissed Stehno on its own initiative. In any case, the point is that Sprint had the perfect right to suggest to Amdocs that Stehno was not appropriate for the job because it had the right under the Master Agreement to require his dismissal directly. Sprint cannot be found liable for doing indirectly what it had the undisputed right to do directly under the contract.

To support his claim, Stehno relies heavily upon a single bit of testimony from Derek Sherry, who was asked whether Sprint had "an economic interest in telling Amdocs who they could hire for his project" (Tr. 779). It is obvious from Sherry's response – "Not an economic, no." – that he interpreted the

question very literally (i.e., Sprint would not have to pay more or less depending on the identity of the particular contractor) and that he believed Sprint had an interest in who worked on the project. Of course, the concept of economic interest is not so literal. See, e.g., Francisco v. Kansas City Star Co., 629 S.W.2d 524, 534-535 (Mo. App. 1982) (newspaper's "economic interests are obviously interrelated with the ability and competency of its carriers to deliver newspapers and service a route"). Sprint has an economic interest in anything linked to the ability of Sprint to perform its work – such as the performance of the individuals working on a new Sprint billing system as part of the Rodeo project. Furthermore, when asked whether Sprint had an economic interest in the project itself, Sherry answered, "Absolutely" (Tr. 776).

Stehno also points to testimony that Sprint had no policies regarding release of information regarding former contractors to support his contention that Sprint had no economic interest in Stehno's relationship with Amdocs (Br. 57). This misses the point. Sprint has an economic interest in protecting its business. Stehno did not carry his burden to eliminate "any business justification at all for the termination – a level of proof close to impossible to achieve." Eggleston, 838 S.W.2d at 83. Ultimately, Stehno failed to adduce any evidence that Sprint and Richert acted for a reason other than the best interests of Sprint. As the court in Eggleston stated, "absence of justification requires that the [corporate] officer

interfere with the contract for personal, as opposed to corporate, interest plus that the officer employed improper means." 838 S.W.2d at 83. Without such evidence – and Stehno points to none – his case must fail as a matter of law.

Attempting to bring himself within Eggleston's requirement, Stehno asserts that Richert could not have been acting to protect Sprint's business interests. He attacks Richert's well-supported concern that Sprint "had four DBAs already assigned to the Rodeo project and Amdocs "didn't need to hire their own folks and then bill Sprint for that work" (L.F. 323). Stehno argues that because Amdocs allegedly retained Stehno as an ADBA, Richert "did not subjectively believe that there was a legitimate economic interest that was threatened by Stehno's relationship with Amdocs" (Br. 65).

Stehno's assertion is without merit. Even if one were to accept the proposition that Amdocs retained Stehno as an ADBA (which is highly questionable (Sprint Br. 45 n. 3)), there is no evidence that Richert knew of Stehno's alleged position. To the contrary, all of the evidence supports Richert's testimony that she believed Stehno was retained as a DBA. Indeed, in the first e-mail on the issue, Richert specifically says, "I have also heard that you are looking at the resume of John Stehno to hire as an Amdocs DBA" (L.F. 531).

Whether Amdocs retained Stehno as an ADBA or a DBA is just a red herring in any event. Amdocs was effectively using its so-called ADBAs as

DBAs. Sprint tried but failed to get the Amdocs ADBAs "to release [the] DBA function into [the Sprint] data management [department]" (Tr. 729), a business "issue between Sprint and Amdocs over their roles and responsibilities on the Rodeo project" that went from "day one to day 99" (Tr. 723). In light of the undisputed evidence of these constant "disagreements," Richert's belief that hiring Stehno was problematic – whether as an ADBA or DBA – exemplifies Sprint's business interests.

Stehno asserts that Richert and her team did not work "directly on the project" and had "little to no involvement with third party vendors like Amdocs" (Br. 13). In fact, Richert testified only that her team was not currently working directly on the project (L.F. 316). She testified consistently that Sprint DBAs were working on the project (L.F. 323-324, 531) and that "just about her entire team was affected by it" (L.F. 316-317). Richert was very concerned that DBAs working on the project must come from her group (L.F. 531), and she told Ivensky that Amdocs "would not be allowed to have DBAs work on the project" (L.F. 325). Contrary to Stehno's representations, Richert's concerns had everything to do with Stehno's job titles and duties. That is why the two issues – DBA work and Stehno – are linked throughout all of the relevant correspondence and testimony (L.F. 323-324, 531-533; Tr. 787-788).

Stehno's assertion that Eggleston should be "specifically limited to a situation involving an at-will employee and her employer" (Br. 59) ignores the underlying rationale of that case. A business has an economic interest in determining who works on its facilities whether the worker is a full time employee or a temporary contractor. The business has an economic interest in accomplishing its work and in ensuring that those who do the work are appropriate for the assignment. As stated in Sprint's opening brief, to distinguish Eggleston as the court of appeals sought to do (Op. 7-8) on the basis of Stehno's status as a temporary worker disregards an essential economic interest and effectively eviscerates the absence of justification element in claims of tortious interference. If a business can fire an employee because it believes that person to be "high maintenance," then the business should be able to refuse to allow a temporary contractor to work on its projects and with its employees on the same basis.

Stehno also attempts to distinguish Eggleston on the ground that Richert did not have the power to fire Amdocs' contractors (Br. 60). While it is true that Richert did not have that power, Richert, acting on behalf of Sprint, had the power under the Master Agreement to "to reasonably require removal of a subcontractor" from Sprint (L.F. 479). That is exactly what Richert did here.

Stehno also attempts to cast doubt on Richert's concerns about Stehno's working on the Sprint project (Br. 64-65). At most, Stehno points to

circumstantial evidence from which he would have the Court infer that Stehno was a model contractor (Br. 66-68). But Stehno admits in his brief that Sprint "may have had some difficulty interacting with Stehno" (Br. 68). Stehno further admitted at trial that "he was involved in some conflicts" at Sprint (Tr. 704). Given these admissions, as well as Stehno's total failure to cite even one legitimate personal, non-business reason for Sprint's actions, Stehno failed to make a submissible case of absence of justification.

C. Stehno Did Not Adduce Any Evidence of Improper Means.

Stehno's original theory on improper means was that Sprint had made up a "resource policy" in order to have Amdocs dismiss Stehno (L. F. 3-4). The trial court, however, correctly noted that "there's no evidence Sprint ever said" anything "about this Sprint resource thing" (Tr. 829). Because Eggleston requires Stehno to show both personal interest and improper means, Stehno now posits on appeal that Richert somehow must have "misrepresented facts related to Stehno" (Br. 75).

In support of his new theory, Stehno points to alleged "inconsistencies between Richert's testimony and her written communications with Amdocs" about Stehno's performance as a contractor (Br. 73). Stehno's argument, however, is defeated by his own admission at trial that "he was involved in some conflicts related to [the] Blue Martini project" (Tr. 693), as well as his admission on appeal

that Sprint "may have had some difficulty interacting with Stehno" (Br. 68). Stehno's claim of misrepresentations is contradicted by his own admission at trial and on appeal.

Stehno then argues that "Richert's e-mail also conveyed a thinly veiled threat regarding the Sprint contract to Amdocs" (Br. 74). It stretches the imagination, however, to believe that the use of "we" in an e-mail and the copying of relevant people involved in the Sprint project on that e-mail (see id.) could somehow be construed as a threat, much less an improper one. Even if the inference is correct that Richert intended to put the Amdocs relationship with Sprint in play on this issue, there is nothing in the least improper about a customer's (Sprint) informing its vendor (Amdocs) about the customer's preferences.

There is no evidence of improper means here. The trial court has already rejected Stehno's original theory of improper means, and this Court should do the same with Stehno's new-found theories on appeal.

III

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL BECAUSE THE JURY'S VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT STEHNO FAILED TO INTRODUCE SUFFICIENT SUBMISSIBLE EVIDENCE TO SUPPORT HIS CLAIM OF A VALID BUSINESS EXPECTANCY AND NONE TO SUPPORT THE ELEMENT OF ABSENCE OF JUSTIFICATION, AND SPRINT ACTED IN GOOD FAITH TO PROTECT ITS ECONOMIC INTERESTS.

For all the reasons discussed above and in Sprint's opening brief – and particularly the undisputed evidence that Richert believed Amdocs retained Stehno to perform DBA work – the trial court's analysis, that Stehno was entitled to a new trial because Richert may have been mistaken about the position for which Stehno was retained, was legal error under Eggleston and an automatic abuse of discretion. The order granting the new trial should be reversed and the matter remanded with instructions to either reinstate the jury's verdict or dismiss the case.

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CERTIFICATION

I certify that this brief complies with the limitations contained in Rule 84.06(b). This brief contains 3,908 words. I further certify that the floppy disk provided to the Court has been scanned for viruses and is virus-free pursuant to Rule 84.06(g).

_____

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief, along with a floppy disk (scanned for viruses pursuant to Rule 86.06(g)) was sent by First Class U.S. Mail, postage pre-paid, on this 10th day of November 2005 upon counsel of record, as follows:

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