IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ALL AMERICAN PAINTING, LLC, ET. AL.,	)	
Plaintiffs/Appellants,	)	
v.	)	Appeal No. ED91916
FINANCIAL SOLUTIONS AND ASSOCIATES, INC.,	)	
Defendant/Respondent.	)	

On Appeal from the Circuit Court of St Louis County
Honorable Larry L. Kenrick, Division 17

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Much of the recitation of "facts" by Appellants (as well as many of the pleadings contained within Appellants' Legal File) refers to matters which are in no way relevant to the issues on this appeal and should have been omitted. For example, Appellants refer to their multiple Motions for Summary Judgment which they filed below, all of which were denied. Excepting the trial court's order finding certain "Facts Appearing Without Substantial Controversy" (L.F. 194-6), discussion of these Motions has no bearing here.

Appellants also highlight one *voir dire* question asked by Respondent's counsel relating to "our litigious society". A closer examination of the transcript reveals that Respondent's counsel also asked the prospective jury members whether they could put aside any such feelings in determining the merits of the case, which they all agreed they could. (T. 30) More to the point, Appellants made no objection to the single *voir dire* question they now cite as improper. (T. 30)

None of the Appellants appeared at trial or testified in person. Rather, their testimony was only by deposition. In summarizing the testimony of Michael Grimes, Appellants omitted that portion of his testimony where he explained that he had specifically discussed the issue of complying with all laws relating to the sending of such faxes and was assured by ActiveCore, the company he employed to send the faxes, that it followed all legal requirements, and particularly that *all recipients on its lists had consented to the receipt of such faxes.* Only after receiving those assurances did Grimes authorize ActiveCore to send the faxes. (T. 102-3, 104-6, 115-6,122) After Grimes received a demand letter from Appellants' attorneys demanding

money for allegedly unsolicited faxes, Grimes received an additional e-mail from ActiveCore documenting how plaintiffs had consented to receive such faxes. (Exhibit F)

Grimes also testified that the faxes at issue were not addressed to the named plaintiffs, but to certain individuals at those businesses. Specifically, Exhibit 1 was addressed to Rick Phillips at All American Painting, not to plaintiff All American Painting. (Exhibit 1, T. 123-4) Likewise, Exhibits 2 and 3 were addressed to Kevin Franklin at Consolidated Construction GRP, not to plaintiff Consolidated Construction Group, Inc. (T. 124-5) Exhibit 4 was addressed to Stephen Becker at "Lazy Susan Imaginative CTRNG", not to plaintiff Goodland Foods. (T. 125) Finally, Exhibit 5 was addressed to Dave Mill at Gateway Rack, not to plaintiff Titan Tube Fabricators, Inc. (T. 126)

There is *absolutely no evidence* in the record to support Appellants' reference to plaintiff Goodland Foods, Inc. "doing business as Coronado Ballroom and Lazy Susan Imaginative Catering" or to plaintiff Titan Tube Fabricators, Inc. "doing business as Gateway Rack Corporation" as suggested in Appellants' Brief at 5.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR NEW TRIAL BASED UPON ALLEGED IMPROPER CLOSING ARGUMENT BECAUSE THE ARGUMENT THAT THE JURY SHOULD SEND A MESSAGE TO PLAINTIFFS WAS NOT IMPROPER AND WAS SUPPORTED BY EVIDENCE THAT (1) THE FAXES AT ISSUE WERE NOT SENT TO PLAINTIFFS AND (2) PLAINTIFFS HAD CONSENTED TO RECEIVE SUCH FAXES

McGraw v. Andes, 978 S.W.2d 794, 801 (Mo. App. 1998).

Duckett v. Troester, 996 S.W.2d 641 (Mo. App. 1999).

Fisher v. McIlroy, 739 S.W.2d 578 (Mo. App. 1987).

Smith v. Courter, 531 S.W.2d 743 (Mo. banc 1976).

Tune v. Synergy Gas Corp., 883 S.W.2d 10 (Mo. banc. 1994).

U.S. v. Funches, 135 F.3d 1405 (11th Cir. 1998).

II. THE TRIAL COURT WAS CORRECT, AND DID NOT ERR, IN DENYING APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE PRESENTED JURY ISSUES CONCERNING (1) WHETHER THE FAXES WERE SENT TO THE PLAINTIFFS AND (2) WHETHER PLAINTIFFS HAD CONSENTED TO RECEIVE SUCH FAXES

Seitz v. Lemay Bank & Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998).

Gregory v. Robinson, 338 S.W.2d 88, 91 (Mo. banc 1960).

47 U.S.C.A. § 227(b)(1)(c).

Hinman v. M & M Rental Center, 2009 WL 188452, at 7 (N.D. IL 2009).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR NEW TRIAL BASED UPON ALLEGED IMPROPER CLOSING ARGUMENT BECAUSE THE ARGUMENT THAT THE JURY SHOULD SEND A MESSAGE TO PLAINTIFFS WAS NOT IMPROPER AND WAS SUPPORTED BY EVIDENCE THAT (1) THE FAXES AT ISSUE WERE NOT SENT TO PLAINTIFFS AND (2) PLAINTIFFS HAD CONSENTED TO RECEIVE SUCH FAXES

Standard of Review

A trial court has great discretion in determining whether to grant or deny a new trial. *McGraw v. Andes*, 978 S.W.2d 794, 801 (Mo. App. 1998). Its decision is presumed to be correct and will be reversed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs where the trial court's ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. *Duckett v. Troester*, 996 S.W.2d 641 (Mo. App. W.D. 1999).

Argument

Appellants contend that the argument of Respondent's counsel that the lawsuit was a "junk lawsuit" and that the jury should "send a message" to Plaintiffs to stop wasting judicial time and resources by filing such lawsuits was an argument for "jury nullification", and therefore improper. This contention is unsupported by law from this or any other jurisdiction, and ignores the substantial evidence supporting Respondent's defenses to Appellants' claims.

Appellants cite not a single case where any Missouri or foreign jurisdiction has applied the concept of "jury nullification" to a civil jury trial. Rather, the Missouri cases cited by Appellants regarding the improper use of "send a message" arguments in closing all relate to attempts by parties seeking to inject an issue of punitive damages into a case where such damages are not appropriate.

For instance, in *Fisher v. McIlroy*, 739 S.W.2d 578 (Mo. App. 1987), cited by Appellants, this court held improper a "send a message" argument in closing by Defendant on its counterclaim for damages arising from an auto accident, because it improperly sought punitive damages which had not been pled. Likewise, in *Smith v. Courter*, 531 S.W.2d 743 (Mo. banc 1976), plaintiff attempted to inject punitive damages into a medical malpractice case where they had not been pled and there was no evidence to support such an award. In *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. banc 1994), also cited by Appellants, the alleged improper argument was not an attempt to inject punitive damages, but rather a request for damages argued in plaintiff's reply which went beyond those mentioned in plaintiff's initial closing argument.

In *none* of these cases cited by Appellants do the words "jury nullification" even appear. Nor do any of them suggest that a defendant may not argue that plaintiff's case is "junk" and the jury should deliver a verdict that says so.

Appellants cite only one case which even discusses "jury nullification". In *U.S. v. Funches,* 135 F.3d 1405 (11th Cir. 1998), a federal criminal case, the court noted that it was improper to ask a jury to ignore the law and the evidence where there is no "viable defense" to the charges presented. *Id* at 1405. Appellants fail to cite the court to a single civil case

from any jurisdiction which even discusses jury nullification in the context of a civil jury trial.

Even if there were support for Appellants' attempt to extend the jury nullification doctrine to civil litigation, such an argument has no application here where, unlike *U.S. v Funches*, there were substantial defenses raised by the evidence, and those defenses were argued to the jury along with the request to send Appellants a message about their "junk lawsuit". As set forth more fully hereafter, there were two significant issues of fact for the jury to determine: (1) were the faxes in question sent to plaintiffs, and (2) did plaintiffs consent to the receipt of the faxes. There was certainly evidence to support a reasonable jury's conclusion that one or both of these elements was not supported by the evidence.

In light of that evidence, it can hardly be said that the trial court abused its discretion in denying Appellants' Motion for New Trial.

II. THE TRIAL COURT WAS CORRECT, AND DID NOT ERR, IN DENYING APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE PRESENTED JURY ISSUES CONCERNING (1) WHETHER THE FAXES WERE SENT TO THE PLAINTIFFS AND (2) WHETHER PLAINTIFFS HAD CONSENTED TO RECEIVE SUCH FAXES

Standard of Review

On appeal of the denial of a motion for a directed verdict, this court should review the evidence and reasonable inferences therefrom in the light most favorable to jury's verdict and disregard evidence to the contrary. *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998). A "case may not be withdrawn from the jury unless there is no room for reasonable minds to differ[.]" *Gregory v. Robinson*, 338 S.W.2d 88, 91 (Mo. banc 1960).

Argument

As set forth above, there was substantial evidence adduced of at least two issues on which a reasonable jury could have found for Respondent.

First, there was a substantial issue concerning whether Appellants were the persons or entities to whom these faxes were sent. The 5 faxes at issue were identified as Exhibits 1 though 5. In each instance, the so-called fax "header" at the top of each page was addressed to an individual first, and a corporate or trade name thereafter. Specifically, these headers read as follows:

Exhibit 1-"To: RICK PHILLIPS ALL AMERCAN PAINTING CO"

Exhibits 2 and 3- "To: KEVIN FRANKLIN CONSOLIDATED CONSTRUCTION GRP"

Exhibit 4-"To: STEVEN BECKER LAZY SUZAN IMAGINATIVE CTRNG"

Exhibit 5-"To: DAVE MILL GATEWAY RACK"

The named Plaintiffs in this action (Appellants here) were All American Painting, LLC, Consolidated Construction Group, Inc., Goodland Foods, Inc., and Titan Tube Fabricators, Inc..

Even though Appellants testified otherwise through deposition, clearly there was substantial evidence on which the jury could have concluded that plaintiffs Goodland Foods and Titan Tube were not the entities to which Exhibits 4 and 5 were sent.

Likewise, as to Exhibits 1, 2, and 3, although All American Painting Co. (not LLC) and Consolidated Construction GRP (not Group Inc) appear as part of the header, in each instance the addressee is an individual, either Rick Phillips or Kevin Franklin. It is unclear from the record why these individuals were not named as plaintiffs since the faxes were clearly sent to them. Regardless, once again there was substantial evidence on which the jury could have concluded that plaintiffs All American Painting LLC and Consolidated Construction Group Inc. not the entities to which Exhibits 1, 2 and 3 were sent.

The second substantial issue of fact which precluded a directed verdict was that of Appellants' consent to receive faxes. In order to prevail under the Act, plaintiffs must prove that they did not give prior express invitation or permission to send the faxes. 47 U.S.C.A. § 227(a)(3); *Hinman v. M & M Rental Center*, 2009 WL 188452, at 7 (N.D. IL 2009) (copy included in Appellants' Appendix to Brief at A19). In this case, there was substantial evidence from the testimony of Grimes about his dealings with ActiveCore on which the jury could have determined that each of the Appellants had in fact given prior consent to the receipt of such faxes, even though they denied having done so in their depositions.

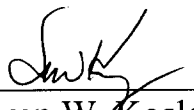
Both of these fact issues were argued at length to the trial court at the time of the presentation of Appellants' Motion for Directed Verdict. (T. 166-73) Viewing this evidence and the reasonable inferences therefore in the light most favorable to the jury's verdict, this court cannot fairly conclude that there was no basis on which to submit these claims to the jury and to deny Appellants' Motion for Directed Verdict.

CONCLUSION

The trial court's denial of Appellants' Motion for Directed Verdict and Motion for New Trial were properly denied by the trial court in light of substantial evidence adduced by Respondent undermining Appellants' claims. Therefore, the Judgment below should be affirmed.

RESPECTFULLY SUBMITTED,

STEVE KOSLOVSKY, LLC



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed two copies of this Brief to Max G. Margulis, Esq., Margulis Law Group, 14236 Cedar Springs Dr., Chesterfield, MO 63017 on the 11th day of March, 2009.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

I hereby certify that this brief complies with Rules 84.06(b) and 55.03, is proportionately spaced, using Times New Roman, 14 point type, and contains 2135 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), and the signature block.

I also certify that the computer disk that I am providing has been scanned for viruses and has been found to be virus-free.