IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
STATE OF MISSOURI

ALL AMERICAN PAINTING, L.L.C.,
CONSOLIDATED CONSTRUCTION GROUP, INC.,
GOODLAND FOODS, INC.,
and TITAN TUBE FABRICATORS, INC.,

Appellants/Plaintiffs,

v.

FINANCIAL SOLUTIONS AND ASSOCIATES, INC.,

Appellee/Defendant

Appeal No. ED91916

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Appellant / Plaintiffs All American Painting, L.L.C., Consolidated Construction Group, Inc., Goodland Foods, Inc., and Titan Tube Fabricators, Inc., ("Plaintiffs") appeal from a final judgment entered in favor of Respondent / Defendant Financial Solutions and Associates, Inc. ("Financial Solutions") in the Circuit Court of the County of St. Louis. This case involves a suit by Plaintiffs against Financial Solutions for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. This Court has jurisdiction pursuant to Article V, Section 3 of the Constitution of the State of Missouri because the subject matter of this action, as discussed above, is not within the exclusive jurisdiction of the Missouri Supreme Court. A timely notice of appeal was filed pursuant to Missouri Supreme Court Rule 81.08(a).

SUMMARY OF THE CASE

In 2005, Defendant Financial Solutions, Inc. ("Financial Solutions") hired a fax broadcaster, Activecore Technologies, Inc., to send faxes promoting Defendant's financial services. Plaintiffs who were businesses in St. Louis ("Plaintiffs") received those faxes. Plaintiffs filed a Motion for Summary Judgment which was denied by the Court. Pursuant to Rule 74.04(d) of the Missouri Rules of Civil Procedure the trial court ruled certain material facts were not reasonably in dispute and existed without substantial controversy.

At trial, each Plaintiff testified that was that it received the faxes in question and that it owned both the telephone line and the fax machine on which the fax was received. Each fax had both the Plaintiff's company name and the name of an individual at the company to whom it was sent. For each fax, the name of the company stated on the fax, as the intended recipient, was either the named Plaintiff or a d/b/a of the named Plaintiff. Each Plaintiff testified that the individual's name stated

on the fax was an officer or employee of the Plaintiff. Plaintiffs at the close of all testimony made a Motion for a Directed Verdict which was denied by the Court. The jury found for the Defendant. Plaintiffs filed a Motion for Judgment Not Withstanding the Verdict, which was denied by the Court. Final judgment was entered and Plaintiffs filed a timely appeal.

STATEMENT OF FACTS

Plaintiffs All American Painting, L.L.C., Consolidated Construction Group, Inc., Goodland Foods, Inc., and Titan Tube Fabricators, Inc., filed suit pursuant to the Federal Telephone Consumer Protection Act (TCPA), (see Petition R 18 - 30) alleging that unsolicited advertising faxes were sent by or on behalf of Financial Solutions and Associates, Inc. to the named Plaintiffs. An original Motion for Summary Judgment was filed on March 24, 2006 by Plaintiffs. That Motion was then Amended (see R 34 - 71) after the Defendant was given Leave to File his Responses to Plaintiffs' Request for Admissions. Plaintiffs' Amended Motion for Summary Judgment was denied by Judge Sherry in Division 35, St. Louis County Circuit Court (see R 97 - 98). Plaintiffs then took the deposition of the Defendant (see Notice of Deposition R 99 - 104) and filed a Second Motion for Summary Judgment (see R 105 - 169) incorporating additional facts elicited from Defendant's deposition. Plaintiffs also filed a Motion for Findings of Fact and Conclusion of Law (see R 188). Judge Kendrick in Division 17, St. Louis County Circuit Court denied Plaintiffs' Second Motion for Summary Judgment in an order dated March 25, 2008 (see R 189 - 190). On April 15, 2008 Judge Kendrick issued an Order of Finding of Facts that Exist without Substantial Controversy (see R 194 - 196) and ordered a jury trial which had been requested by the Defendant.

On May 19-20, 2008 a jury trial was held. During the Defendant's Counsel voir dire he asked the Jury pool "Would everyone, or most of you, agree that there are too many lawsuits filed these

days by lawyers and by parties? That we're a litigious society and there's too many lawsuits filed?" (see T pg 30, line 1-4)

At Trial, Defendant's President, Michael G. Grimes testified that Defendant Financial Solutions and Associates, Inc., hired Activecore to send out faxes for them. (see T p 101, l 1-4) He also testified that Plaintiffs' Exhibits 1, 2, 3, 4, and 6 were the faxes he designed and were sent out by Activecore. (See T pg 100, line 18-25 ; pg 101, line 1 ; pg 123, line 2-6)

Mr. Grimes also testified that he did not ask any of the recipients of the faxes for prior express invitation or permission and did not have an established business relationship with any of the Plaintiffs in this law suit. (see T pg 111, line 25 ; pg 112, line 1-7)

After Mr. Grimes testimony Mr. Dickhaus read to the Jury the statement of uncontested facts that was marked as Plaintiffs' Exhibit 13. (T pg 138 line 12 to pg 140 line 21) (R194 - 196.) Portions of the depositions of the Plaintiffs were read into testimony and each of the Plaintiffs Corporate Representatives confirmed that they had received the faxes at issue in this case, All American Painting, LLC (see T pg 145 line 3-7), Consolidated Construction Group, Inc. (see T pg 151, line 9-24), Goodland Foods, Inc. d/b/a Coronado Ballroom and Lazy Suzan Imaginative Catering (see T pg 153, line 12-20) and Titan Tube Fabricators, Inc. d/b/a Gateway Rack Corporation (see T pg 159, line 1-9)

After the close of Plaintiffs' and Defendant's case, Plaintiffs moved for a directed verdict and the Court entertained argument by Plaintiffs' Counsel and Defendant's Counsel (see T pg166, line 14 through pg176, line 17). The Court then denied the Motion for Directed Verdict (see T pg 173, line 18-20).

Plaintiffs' Counsel presented Jury Instructions which were approved by the Court (see R 197 -

215). Defendant's Counsel proposed an affirmative converse instruction after each of the verdict directors based on an affirmative defense of whether Financial Solutions controlled the actions of Activecore in sending out the faxes at issue. (see T pg 179, line 7-15). Plaintiffs' Counsel argued that agency issues of control of the agent was not plead as an affirmative defense and is not a defense under the TCPA. (see T pg 179, line 24 - pg 180 line 1). The Court refused Defendant's proposed instruction (see T pg 180 line 18-19).

During closing argument Defense Counsel stated:

> What we've got going on here, ladies and gentlemen, you look through the facade and you look through the smoke that the plaintiffs have tried to throw out -- the plaintiffs attorneys because, as I say, the plaintiffs didn't even bother to show up in this case. What you've got here is an abuse of the legal system, an abuse of what may be a good law, to make money. (see T pg 198, line 20 - pg 199 line 3)

Plaintiffs' Counsel objected to this closing argument as amounting to a request for jury nullification. (see T pg 199, line 5-6) The Court overruled Plaintiffs' objection. (see T pg 199 line 7) After overruling the objection the Court permitted Defendant's Counsel to continue his argument.

> It's lawsuit abuse. Counsel for the plaintiffs talked about these faxes in voir dire as being junk faxes. I say this is a junk lawsuit. And it's these kinds of junk lawsuits that need to be stopped. If you've ever had that feeling, that there are too many frivolous lawsuits filed this day, this is your opportunity, this is your chance on behalf of the community that you're here to represent, to do something about it. It's entirely in your hands to try to stop it or to at least let your voice be heard. You can send a clear message that this kind of junk lawsuit filing, this assembly-line type of justice and this clogging up of your time and the Court's time with this kind of case needs to come to an end. (See T pg 201, line 25 - pg 202, line 15)
>
> That verdict will send a clear message to the plaintiffs who aren't here. They'll hear about it. They're not here to hear about it, but they'll hear about your message and your verdict loud and clear and stop filing these kinds of junk lawsuits. Stop clogging up the court system. Stop wasting our times as members of the community. Stop wasting the judge's time who has more important cases and more important matters to deal with. If you send a verdict otherwise, if you award plaintiffs the verdict that they want, you'll just be feeding the beast. You'll be encouraging this.

> You'll be wanting -- encouraging them to come back and file more and continue the assembly-line operation to make some money. That's the message that you want to send. That's going to be the result of it. I say, do the right thing. Send a clear message to stop these kinds of junk lawsuits. And you do that by entering your verdict on behalf of the defendant, Financial Solutions and Associates. (see T pg 208, line 16 - pg 209, line 11)

After deliberations the jury found for the Defendant (see R 216).

On June 18, 2008 Plaintiffs filed a timely Motion for Judgment Not Withstanding the Verdict and in the Alternate a Motion for a New Trial (see R 218 - 223). On June 27, 2008 the Court granted Defendant until July 30, 2008 to file a written response (see R 224). No response was filed by the Defendant. On September 15, 2008 Judge Kendrick issued an Order and Judgment denying both Plaintiffs' Motion for Judgment Not Withstanding the Verdict and Plaintiffs' Alternate a Motion for a New Trial (see R 225). Plaintiffs filed Notice of Appeal on September 23, 2008 (see R 226 - 229).

POINTS RELIED ON

Point I. The trial court erred in denying Plaintiff's motion for a new trial, because Defendant was allowed to argue jury nullification over Plaintiff's objection, and such arguments entitle the opposing party to a new trial.

Point II. The trial court erred in denying Plaintiff's motion for a directed verdict, because all the material facts necessary to recover under the TCPA were proven and un-rebutted and Defendant did not present any legally cognizable defense, so that no facts remained to be submitted to the jury.

Point III. The trial court erred in denying Plaintiff's motion for a judgment notwithstanding the verdict, because all the material facts necessary to recover under the TCPA were proven and Defendant did not present any legally cognizable defense.

ARGUMENT

This is a case where all the facts relevant to Plaintiffs' claims were proven before trial began.[1] Defendant did not raise a legally cognizable defense to Plaintiffs' claims. Plaintiffs' Motion for a Directed Verdict and Motion for Judgment Not Withstanding the Verdict should have been granted.

In addition, Defendant's attorney openly argued for jury nullification in his closing argument. As a result, Plaintiffs are entitled to a new trial if the Court were to rule against Plaintiffs' on their Motion for a Directed Verdict and their Motion for Judgment Not Withstanding the Verdict.

POINT I. The trial court erred in denying Plaintiffs' motion for a new trial, because Defendant was allowed to argue jury nullification over Plaintiffs' objection, and such arguments entitle the opposing party to a new trial.

The standard of review for an order denying a motion for new trial is abuse of discretion. Bowan v. Express Med. Transporters, Inc., 135 S.W.3d 452, 456 (Mo. Ct. App. 2004).

A. Defendant's arguments were improper as a matter of law and entitle Plaintiffs to a new trial.

Defendant's attorney argued to the jury that they should "send a message."[2] Missouri law is crystal clear that Defendant's use of this argument to a jury in this context "entitle[s] the opposing party to a new trial." Fisher v. McIlroy, 739 S.W.2d 577, 582 (Mo. Ct. App. 1987) citing Smith v. Courter, 531 S.W.2d 743, 747 (Mo. 1976) (en banc)[3] (the argument by defendant's attorney for the jury to "send a message to the young people in this city" held improper). When a court allows this

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[1] In accordance with Rule 74.04(d) of the Missouri Rules of Civil Procedure, the trial court ruled certain material facts existed without substantial controversy. (See R194 - 196.)

[2] T pg 202 line 12

[3] The only context in which such an argument is permissible in a civil lawsuit, is when 1) the party making that argument has properly plead and is seeking punitive damages and 2) the jury will determine the quantity of those punitive damages. Id.

type of improper argument, there is a "presumption that the error was prejudicial." Tune v. Synergy Gas Corp., 883 S.W.2d 10, 21 (Mo. 1994) (en banc).[4] The trial court abused its discretion by denying Plaintiffs a new trial after this improper argument to the jury.

In response to Plaintiffs' motions in limine, the trial court ruled that the damages sought by Plaintiffs were set by statute and the quantity of trebled damages available under the statute, if any, were to be decided by the trial court and not the jury. The jury thus had no role in determining the amount of damages. The jury's sole responsibility was to determine the facts. By definition, a jury can not "send a message" by determining the facts. To ask them to do so is an improper appeal for animus and prejudice to be injected into the determination of facts.

Defendant presented no legitimate defense (see discussion in Pont II, infra). Instead, counsel for Defendant brazenly argued jury nullification, which was evident not only in closing arguments, but also from the voir dire questions from Defendant's counsel: "Would everyone, or most of you, agree that there are too many lawsuits filed these days by lawyers and by parties? That we're a litigious society and there's too many lawsuits filed?"[5] Defense counsel's repeated references to "too many lawsuits" and to "frivolous"[6] claims by greedy attorneys were improper and prejudicial. This was an improper *ad hominem* attack not only on plaintiffs and their attorneys, but also an attack on the law itself.

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[4] While there have only been a handful of cases in Missouri regarding attorney arguments for jury nullification, Missouri law is in accord with federal courts on this issue. "[D]efense counsel may not argue jury nullification during closing argument." United States v. Funches, 135 F.3d 1405, 1409 (11th Cir. 1998).

[5] T pg 30, line 1-4

[6] T pg 202, line 6

POINT II. The trial court erred in denying Plaintiffs' motion for a directed verdict, because all the material facts necessary to recover under the TCPA were proven and un-rebutted and Defendant did not present any legally cognizable defense, so that no facts remained to be submitted to the jury.

"On appeal of the denial of a motion for a directed verdict, we review evidence and reasonable inferences therefrom in the light most favorable to jury's verdict and disregard evidence to the contrary." Gorman v. Wal-Mart Stores, Inc., 19 S.W.3d 725, 732 (Mo.App. W.D. 2000). "The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law." Crockett v. Polen, 225 S.W.3d 419, 419-20 (Mo. Banc 2007).

A. Plaintiffs were entitled to judgment and should be granted a directed verdict.

Plaintiffs moved for a directed verdict[7] which was denied by the Trial Court.[8] This case should have never been submitted to a jury as the relevant facts were not in dispute. There was no substantial evidence to support the verdict, the verdict was against the weight of the evidence, and the verdict erroneously applied the law. Every "defense" invoked by Defendant was either an issue of law, an un-plead affirmative defense, or not a legally valid defense to Plaintiffs' claims. "A plaintiff is entitled to a directed verdict when its claim is established as a matter of law with no factual questions remaining for a jury to determine and the defendant fails to establish any affirmative defenses." Utley Lumber Co. v. Bank of the Bootheel, 810 S.W.2d 610, 611 (Mo. Ct. App. 1991). Where facts establish a prima facie right of recovery in the plaintiff, and "the defendant relies upon matters which do not constitute a good defense in point of law, the trial court should

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[7] T pg166, line 14 through pg176, line 17

[8] T pg 173, line 18-20

direct the jury to return a verdict for the plaintiff." Hoster v. Lange, 80 Mo. App. 234 (1899).

B. The elements of Plaintiffs' claim were met and undisputed.

As set out in the verdict director, the sole elements of Plaintiffs' claim under the TCPA were:

> First, that plaintiff [plaintiff name] was sent one or more fax transmissions by or on behalf of defendant, Financial Solutions and Associates, Inc.; and
>
> Second, that the fax transmission(s) sent to [plaintiff name] contained any material advertising the commercial availability of any property, goods, or services; and
>
> Third, that the fax transmission(s) sent to [plaintiff name] were received on equipment which has the capacity to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

Affirmative defenses claimed by Defendant were struck from the verdict director by the Court as not sufficiently plead or supported by the law.[9]

1. First Element (sending of a fax)

Each Plaintiffs' testimony was that they received the faxes in question and that they owned both the telephone line and the fax machine on which the fax was received. Each fax had both a company name and the name of an individual at the company to whom it was sent. For each fax, the name of the company stated on the fax as the intended recipient was either the named Plaintiff or a d/b/a of the named Plaintiff. Plaintiffs each testified that the individual's name stated on the fax was an employee of Plaintiff. In the Order of Finding Facts that Exist without Substantial Controversy, it was determined by the Court that the faxes were true and correct copies of the faxes, and that Defendant hired Activecore to send those faxes.[10]

Defendant's only argument on this element was that the individual employees should have been

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[9] T pg 180 line 18-19

[10] R 194 - 196 - Fact 4, 6, 8, 12

the named plaintiffs rather than the corporate plaintiffs. This "defense" constitutes a question of law (standing) and not a jury question. Thus this elements should not have been submitted to the jury.

2. Second Element (the fax was an advertising fax)

It was set forth in the Order of Finding Facts that Exist without Substantial Controversy that the faxes were sent "to generate business and advertise products that Financial Solutions sells."[11] True and correct copies of the faxes were in evidence. The uncontroverted facts and the documentary evidence are unrebutted and unchallenged. Defendant made no argument and introduced no evidence whatsoever on this element. No "reasonable juror, properly instructed on the operative law" could fail to find in the affirmative on element two. Defendant made no argument and presented no evidence on this element.

3. Third Element (was the receiving device a fax machine)

Each Plaintiffs' testimony was that they received the faxes on equipment that printed the faxes in question and that each fax was printed out. Those printed faxes were in evidence. Three of the four plaintiffs testified that they received the faxes on "stand alone" fax machines. The fourth plaintiff, Consolidated Construction, testified that it received the fax on a computer with a printer. This evidence and testimony was uncontroverted by Defendant. Indeed, Defendant made no argument and introduced no evidence whatsoever on this element.

There were no facts left for the jury to determine. Plaintiff was entitled to judgment as a matter of law.

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[11] R 194 - 196 - Fact 26

POINT III. The trial court erred in denying Plaintiffs' motion for a judgment notwithstanding the verdict, because all the material facts necessary to recover under the TCPA were proven and Defendant did not present any legally cognizable defense.

The standard of review for a denial of a motion for JNOV and the denial of a motion for directed verdict are essentially the same. Clevenger v. Oliver Ins. Agency, Inc., 237 S.W.3d 588, 590 (Mo. Banc 2007). In determining whether the evidence was sufficient to support the jury's verdict, we view the evidence in the light most favorable to verdict, we give the [defendant] the benefit of all reasonable inferences, and we disregard conflicting evidence and inferences. Id. "As to denials of motions for judgment notwithstanding the verdict based on a conclusion of law, our review is de novo." Horner v. FedEx Ground Package Sys. Inc., 258 S.W.3d 532, 535 (Mo. App. W.D. 2008). "Whether a particular inference drawn from a given state of facts is reasonable is a question of law." Wills v. Whitlock, 139 S.W.3d 643, 654 (Mo. App. W.D. 2004).

A. Plaintiffs should be granted judgment notwithstanding the verdict.

As discussed supra under Point II, all of the elements of Plaintiffs' TCPA claims were met. Given the undisputed facts that the jury was required to accept as true (T pg 138 line 12 to pg 140 line 21) and (R194 - 196.) , a reasonable juror, properly instructed on the operative law could only reach one reasonable conclusion if they followed the verdict director.

On the record, there are no reasonable inferences that allow Defendant to avoid judgment. There are no reasonable inferences that support the jury's verdict. Whether such inferences exist is a question of law that is reviewed de novo. Wills, 139 S.W.3d at 654. In this case, there are no inferences (reasonable or otherwise) that support the verdict. In this de novo review, the absence of reasonable inferences supporting the verdict requires Plaintiff's motion for JNOV be granted.

CONCLUSION

There were no disputed facts in this case. The only defenses raised by Defendant were purely questions of law or irrelevant arguments that did not constitute valid defenses. This case was ripe for summary judgment, which should have been granted on Plaintiffs' earlier motion. After further narrowing of the issues by the verdict director, this case was even more ripe for a directed verdict.

The sole purpose of this trial was to provide Defendant a platform to argue jury nullification and raise legally insufficient "defenses." The jury unfortunately succumbed to the prejudice incited by Defendant's attorney and ignored the facts and the verdict director.

Plaintiffs request that the Court direct the trial court to enter a judgment notwithstanding the verdict in favor of Plaintiffs, to enter a directed verdict in favor of Plaintiffs, or in the alternative, to grant Plaintiff's motion for a new trial.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

COMES NOW, Max G. Margulis, and states the following with respect to Appellant's Brief:

1. Said brief contains the required elements of Rule 55.03.

2. Said brief complies with the limitations contained in Rule 84.06(b).

3. Said brief contains 3,768 words.

4. I have relied on the word count of Word Perfect used to prepare said brief.

5. I certify that the floppy disk filed with this Court, containing Appellant's Brief has been scanned for viruses on this 9th day of February, 2009, and it is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to the Attorney for Defendant, Steven W. Koslovsky (#29183), 2458 Old Dorsett Road, Ste 230, Maryland Heights, MO 63043, P: (314) 222-4066, F: (314) 770-9330, Email: swk@koslaw.net by U.S. Mail Postage pre-paid this 11th day of February, 2009.