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.,

Respondent/Defendant

Appeal No. ED91916

90275

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

REPLY BRIEF OF APPELLANTS

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STATEMENT OF FACTS

Respondent objected to Plaintiffs' jury instructions on the elements of the TCPA claim, on the ground that it did not "posit all the necessary elements of a violation." (T p 176, line 22-25 - p 177 line 1-5) That objection was overruled. (T p 177, line 17-18) Respondent has not raised this overruled objection on appeal.

Respondent referred to Mr. Grimes' testimony relying on Activecore "...that it followed all legal requirements, and particularly that *all recipients on its lists had consented to the receipt of such faxes.*" (emphasis in original) Response Brief p 2-3. Nowhere in the testimony of Mr. Grimes in the trial transcript pages cited by Respondent is the consent of recipients mentioned (T p 102-103, p 104-106, p 115-116, p 122) (Appendix A 1 - 12). In fact in Respondent's offer of proof concerning Defendants reliance on Activecore, Mr. Grimes testified only about the opt out notice on the faxes as allowing the faxes to be sent and being legal under the TCPA. (T p 82 line 25 - p 83 line 1-19) (Appendix A 13 - 14)

Respondent's brief also stated:

> "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." (Respondent's Br. at 3)

but the record speaks for itself. In the Order of Finding of Facts that Exist without Substantial Controversy, Fact #4, 6, 8 and 12, (R p195) the Court determined that the faxes at issue were true and accurate copies of the facsimiles transmitted by Activecore on behalf of Financial Solutions. The Plaintiffs testified that the faxes were sent to fax machines

owned by the Plaintiffs and to fax numbers subscribed to by the Plaintiffs. Goodland Foods testified that it did business as Coronado Ballroom and Lazy Susan Imaginative Catering. (T p 153 line 21-25, p 154 line 1-12 and p 156 line 1-15.) Titan Tube Fabricators testified that it did business as Gateway Rack Corporation. (T p 158 line 23-25 and p 159 line 1-5)

Respondent did not seek to submit an instruction on the affirmative defense of "express permission." The only instruction Respondent proposed was an affirmative converse instruction going to whether Respondent controlled the actions of the fax broadcaster Activecore. (Appendix A 15 - Defendant's proposed instruction) The trial court refused that proposed instruction of Respondent (T p 179-180 - Appendix A 16 - 18) Defendant did not offer any additional instructions. (T p 183 line 24-25, p 184 line 1 - Appendix A 18) The issue of consent, which was an affirmative defense, was excluded from the jury consideration and the verdict director. Respondent has not preserved, as legal issues for this appeal, the fact that the trial court refused Respondent's instruction and approved the verdict director of Plaintiffs' over the objection of defendant.

Respondent's brief also refers to "Exhibit F" (Appendix A 19 - 20) but that exhibit was excluded from evidence by the trial court. (T p 166, line 1-11 - Appendix A 21 -22) Respondent has not challenged the trial court's ruling in the Court of Appeals and thus has waived any challenge to the trial court's ruling on Exhibit F. This Court should take no notice of that document.

ARGUMENT

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.

Lioce v. Cohen, 174 P.3d 970 (Nev. 2008)

Will v. Comprehensive Acct. Corp., 776 F.2d 665, 677 (7th Cir. 1985)

Contrary to Respondent's brief, jury nullification certainly can be found in civil cases. For example just last year the Nevada Supreme Court held that closing arguments, similar to those made by Respondent in this case, "amounted to impermissible jury nullification." *Lioce v. Cohen*, 174 P.3d 970, 983 (Nev. 2008):

> Essentially, [defense counsel] asked the jury to "send a message" about frivolous lawsuits. His arguments were directed at causing the jurors to harbor disdain for the civil jury process – a defining, foundational characteristic of our legal system – and at perpetuating a misconception that most personal injury cases are unfounded and brought in bad faith by unscrupulous lawyers. These arguments were irrelevant to the cases at hand and improper in a court of law and constitute a clear attempt at jury nullification.

Respondent's brief in the instant case admits that counsel argued to the jury "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." Respondent's Br. at 6. Incredibly, Respondent suggests that such arguments are not improper. *Id.* The Court should take this opportunity, like the Nevada Supreme Court, to expressly declare otherwise.

Respondent ignores much of Appellant's brief regarding the closing argument. Instead,

Respondent refers to the *voir dire* which was not objected to at the time. Appellants mention the *voir dire* because it evinces that a strategy to inflame the jury with improper considerations of a "junk lawsuit" was Defendant's plan from the start.

Jury nullification is not tolerated in civil cases.

Without making this brief a treatise on jury nullification, it is important to note that jury nullification in the civil context is very different from the criminal context. Jury nullification is an affront to the court and a violation of the juror's oath to follow the court's instructions. As Justice Holmes once said, "The man who wants a jury has a bad case."[1] It is tolerated in the criminal context because the government is the one that enacted the law, and the consequence of the government enacting an "unjust" law is laid upon the party responsible for that law – the government. Ever since the jury was jailed for refusing to convict William Penn, jury nullification in criminal cases has been a check against corruption of courts and governments.

However, jury nullification is decidedly not tolerated in civil cases. "The civil jury has no power to dispense clemency, and verdicts in the teeth of the evidence may be set right." *Will v. Comprehensive Acct. Corp.*, 776 F.2d 665, 677 (7th Cir. 1985). "While the jury in criminal trials is relatively unfettered, the same cannot be said of juries in civil trials." *Jury Nullification: Legal And Psychological Perspectives*, 66 Brooklyn Law Review 1207, 1219 (2001). In civil cases, many options are at the disposal of the court to remedy jury

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[1]Letter from Oliver Wendell Holmes to Lady Pollock (Apr. 11, 1897), in 1 Holmes-Pollock Letters 74 (Mark DeWolfe Howe ed., 1941).

nullification: remittur, additur, JNOV, directed verdicts, etc., are all used to correct juries in civil cases. This is necessary because, unlike in criminal cases where the government wrote the law, the parties in civil cases are equal. A civil jury's animus to the law or to the court's instruction is not visited upon the maker of the law, but instead, discriminates against the citizen who had nothing to do with making the law and who can not alter it.

"Jury nullification" is defined as "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." Black's Law Dictionary 875 (8th ed. 2004). It is uncommon to call it jury nullification in a civil context because the courts have numerous methods of correcting it so its final impact is of much less importance.[2] But nevertheless, whether it is called animus, prejudice, or nullification, it must be corrected in the civil context when it occurs, and it is unethical for a attorney to suggest it to a jury.

Respondent's brief admits it made a direct appeal to the jury to "send a message to Plaintiffs to stop wasting judicial time and resources by filing such lawsuits." Appellants are entitled to a new trial.

POINT II AND POINT III

POINT II

The trial court erred in denying Plaintiff's motion for a directed verdict, because all the

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[2] Double jeopardy prevents re-litigation of criminal cases, even in the event of jury nullification. Furthermore, criminal prosecutors can not seek summary judgement or a directed verdict, and have a higher burden of proof.

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.

Crichfield Physical Therapy v. Taranto Group, Inc., 2009 TCPA Rep. 1863, 2009 WL 346954 (Kan. Dist. Feb. 6, 2009)

Press v. Penny, 114 S.W. 74 (Mo. App. 1908)

Shepard v. Harris, 329 S.W.2d 1 (Mo. banc 1959)

Travel Travel, Kirkwood, Inc. v. Jen N.Y. Inc., dba Discount Tickets, 206 S.W.3d 387 (Mo. App. E.D. 2006)

Virgil v. Riss & Co., 241 S.W.2d 96 (Mo. App. 1951)

Weaver v. African Methodist Episcopal Church, Inc., 54 S.W.3d 575 (Mo. App. W.D. 2001)

Rather than address Plaintiffs' evidence with legally valid arguments, Respondent instead relies on insufficient defense and defenses that were waived or denied by the trial court.

The affirmative defense of express consent was both waived and unavailable.

Respondent restates the improper "express consent" argument that the trial court made unavailable to Defendant, and which Defendant failed to submit as an instruction. The trial court expressly denied to the jury the ability to consider this affirmative defense by leaving

it out of Plaintiffs' verdict director and the jury instructions. Respondent chose not to appeal the trial court's decisions on Plaintiffs' jury instructions and verdict director, and thus has waived any challenge based on the exclusion of express permission or any other affirmative defenses from the verdict director.

An affirmative defense must be "pleaded, supported, and *submitted*" by a defendant with a jury instruction. *Shepard v. Harris*, 329 S.W.2d 1, 6 (Mo. banc 1959) (emphasis in original). If defendant does not submit a defense by a jury instruction, it is deemed abandoned "even though it has been pleaded and supported by evidence." *Id. See also Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 587 (Mo. App. W.D. 2001) ("Inexplicabl[e]" failure of defendant to offer affirmative defense instruction was waiver of that defense.)

Respondent has a basic misunderstanding of the law – it claims that "plaintiffs must prove that they did not give prior express invitation or permission to send the faxes." Respondent's Br. at 11. Respondent made this argument repeatedly to the trial court, but it is patently wrong. "Express invitation or permission" as used in the TCPA is an affirmative defense and it is *Defendant* which bears the burden of proof. "The burden of proof rests on the sender [of the fax] to demonstrate that permission was given." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 FCC Rcd 3787 at ¶ 47 (2006). "The F.C.C. and several courts have specifically found that a junk fax defendant 'ultimately has the burden of proof regarding [the EBR] defense." *Crichfield Physical Therapy v. Taranto Group, Inc.*, 2009 TCPA Rep. 1863, 2009 WL 346954 (Kan.

Dist. Feb. 6, 2009). "Sender" is defined in the law as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(8).[3]

The issue of whether express permission was an affirmative defense and the burden of proof for the express permission affirmative defense was fully argued in the trial court. The trial court obviously understood the law and overruled Defendant on it's objections to Plaintiffs' verdict director.

A defense of reliance on Activecore was both unavailable and legally insufficient

Respondent fails to recognize that merely having testimony in the record on an issue does not automatically constitute a defense. A defense that is not *legally* valid is no defense, regardless of how much evidence there is to support it. Even accepting Respondent's mis-characterization of Mr. Grimes' testimony, that testimony was in support of legally invalid and unavailable defenses. As such, Plaintiffs were entitled to a directed verdict.

The testimony of Michael Grimes regarding "consent" to receive junk faxes is of no consequence because "express consent" to receive junk faxes is an affirmative defense which was excluded from the jury's consideration and abandoned by Defendant's failure both to plead it and to submit it. But even if it were not abandoned, it does not satisfy the law or Defendant's burden of proof.

Mr. Grimes' testimony regarding alleged "express consent" of Plaintiffs to receive the

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[3] The result of the statutory language, the CFR, and various FCC orders is that, like many consumer protection statutes, the TCPA imposes strict vicarious liability on the advertiser (Respondent).

faxes consisted of two basic facts: 1) that Activecore told him that it complied with the law and had an opt out notice on the fax and 2) that Defendant and Plaintiffs were members of some common organizations as evidenced by SIC codes of plaintiffs. In *Travel Travel, Kirkwood, Inc. v. Jen N.Y. Inc., dba Discount Tickets*, 206 S.W.3d 387 (Mo. App. E.D. 2006) this court held that as a matter of law, merely being members of the same organization does not constitute express consent to receive advertising faxes.

With respect to any reliance Defendant placed on Activecore, the trial court denied Defendant's jury instruction on this point (T p 179 line 1-25, p 180 line 1-19. Appendix A 16 - 18), thus removing this argument from consideration by the jury. While Respondent has failed to preserve this issue for appeal, the trial court's decision was proper because compliance with the law is a non-delegable duty.[4] "The law does not permit a person to cast off a duty resting upon him by operation of law upon an independent contractor, so as to exonerate himself from the consequences of its nonperformance." *Press v. Penny*, 114 S.W. 74, 75 (Mo. App. 1908); "It is also settled that even if in a given case the general relationship of independent contractor exists, a non-delegable duty cannot thereby be delegated to the independent contractor." *Virgil v. Riss & Co.*, 241 S.W.2d 96, 99 (Mo. App. 1951).

Respondent's argument with respect to the text at the top of the fax is simply absurd. If the text at the top of the fax controlled who had a cause of action, any junk fax broadcaster could send its faxes with "Sent to: John P. Smith" at the top and no one other than "John P. Smith" would have a claim. Each Plaintiff was the proper party, evidenced by their

[4] Non-delegable duty arguments were also fully briefed to the trial court.

testimony that the text at the top of each fax was either 1) the Plaintiff's name, 2) a DBA of the Plaintiff, or 3) the name of an employee of the Plaintiff.

Plaintiffs all proved the elements of their TCPA claims. Defendant's rebuttal "evidence" was either legally insufficient (the text at the top of the faxes), did not constitute legally valid defenses (reliance on Activecore), or was in support of defenses that were either waived or denied submission to the jury (reliance on Activecore and express consent). Plaintiffs were entitled to a directed verdict.

This case cried out for summary judgment in the trial court. As the Court of Appeals noted in *Jen NY id*, there was no dispute as to the facts in the case but only as to the legal interpretation of those facts. That is why so many TCPA cases result in summary judgment. The disputes between the parties do not relate to the facts of the case but to the legal interpretation of those facts which it is the court's function to determine.

CONCLUSION

This Court should order a directed verdict to Plaintiffs or in the alternative a judgment notwithstanding the verdict, and the case should be remanded to the trial Court for it to determine any trebling of the $500 statutory damages for a "wilful or knowing" violation of the TCPA. (T p 86, line 17-19.)

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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 2,769 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 Reply Brief has been scanned for viruses on this 25th day of March, 2009, and it is virus-free.

Max G. Margulis

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CERTIFICATE OF SERVICE

I hereby certify that two copies 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 30th day of March, 2009.

Max G. Margulis