IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00516 COA

PINE BELT ASSOCIATION FOR COMMUNITY ENHANCEMENT (P.A.C.E.), AND PEGGY BUTLER, BOTH OFFICIALLY AND INDIVIDUALLY

APPELLANTS

v.

GAYE NEWSOME

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: CIRCUIT COURT OF FORREST COUNTY

ATTORNEYS FOR APPELLANTS:

JAMES K. DUKES

R. CHRISTOPHER WOOD

ATTORNEY FOR APPELLEE:

KIM T. CHAZE

NATURE OF THE CASE: EMPLOYMENT TERMINATION

TRIAL COURT DISPOSITION: JURY VERDICT FOR NEWSOME

MANDATE ISSUED: 5/29/97

BEFORE MCMILLIN, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Gaye Newsome sued Pine Belt Association of Community Enhancement (P.A.C.E.), her former employer, and Peggy Butler, P.A.C.E.'s Executive Director, for (1) damages as a result of P.A.C.E.'s failure to perfect an appeal of a judgment against Newsome, and (2) damages for unlawful dismissal. The jury returned verdicts in favor of Newsome totaling $82,700. P.A.C.E. and Butler appeal assigning the following errors:

I. THE COURT ERRED AS A MATTER OF LAW IN NOT GRANTING DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

II. THE COURT ERRED AS A MATTER OF LAW IN ALLOWING THE INTRODUCTION INTO EVIDENCE OF DEPOSITION TESTIMONY CONTRARY TO COMMON LAW, THE RULES OF EVIDENCE AND THE RULES OF CIVIL PROCEDURE, WHICH TESTIMONY SERVED ONLY TO INFLAME THE JURY AND AROUSE SYMPATHY FOR THE PLAINTIFF.

III. THE VERDICT OF THE JURY IS SO EXCESSIVE AS TO APPEAR TO HAVE BEEN BASED ON PREJUDICE OR PASSION; THE EVIDENCE IN THE RECORD DOES NOT SUPPORT THE VERDICT; THE VERDICT INDICATES THAT IT COULD NOT HAVE BEEN BASED ON ELEMENTS OF DAMAGE PROVED AT TRIAL, THERE HAVING BEEN NO ELEMENTS OF DAMAGE PROVED AT TRIAL; AND THE EXCESSIVENESS RESULTED, IN PART, FROM THE FAILURE OF THE COURT TO PROPERLY INSTRUCT THE JURY.

IV. THE COURT ERRED AS A MATTER OF LAW IN NOT ORDERING THAT THE VERDICT OF THE JURY BE REDUCED IN AN AMOUNT AT LEAST EQUAL TO ANY SUMS NEWSOME RECEIVED FROM P.A.C.E. AND BUTLER'S FORMER CO-DEFENDANT, CHARLES E. LAWRENCE, JR., ESQ., AND IN NOT ALLOWING THE JURY AN EXPLANATION OF WHY CHARLES E. LAWRENCE WAS NO LONGER A DEFENDANT.

V. SUBSTANTIAL RIGHTS OF THE DEFENDANTS WERE PREJUDICED BY THE JURY DELIBERATING AT AN UNREASONABLE LATE HOUR WHEN THEY WERE FATIGUED.

Finding error in the trial court, we reverse and render in part and reverse and remand in part.

STATEMENT OF THE FACTS

Gaye Newsome was employed by P.A.C.E. since 1983 and served as Parent Community Involvement Coordinator at the time of her dismissal. Peggy Butler served as P.A.C.E. Executive Director at

P.A.C.E.. Newsome was involved in an altercation which led to a lawsuit filed against Newsome and P.A.C.E. Originally Newsome retained her own attorney to represent her. In October

1991, Charles E. Lawrence, attorney for P.A.C.E., represented both P.A.C.E. and Newsome at the trial which resulted in a $40,000 judgment against Newsome, individually (referred to as the *Plum* judgment). No appeal was filed on the *Plum* judgment.

In January 1992, Newsome was suspended by Peggy Butler, for failure to produce minutes from a meeting which were allegedly in Newsome's possession. This suspension lasted from January 27, 1992, until her ultimate dismissal on April 22, 1992. During that period of time, Newsome testified that she made numerous requests for P.A.C.E. and Butler to follow the grievance procedures set out in the employee manual. Newsome was eventually instructed to return to work on April 17, 1992, and was subsequently terminated for her failure to return to work.

Newsome filed suit alleging two basic claims (1) that P.A.C.E. and Butler failed to appeal the *Plum* judgment after assuring Newsome that her appeal would be filed (referred to as the appeal claim), and (2) that P.A.C.E. and Butler failed to afford her due process resulting in Newsome's wrongful dismissal (referred to as the wrongful dismissal claim). Newsome's amended complaint pleads four counts: Count I - Breach of Contract; Count II - Breach of Contract, Fraud, Deceit, Misrepresentation, and/or Faudulent Inducement; Count III - Infliction of Emotional Distress; and in the alternative, Count IV - Negligence. The jury returned a vedict finding in favor of Newsome and awarding the following: Count I - Breach of Contract damages of $2,500.00; Count II - Fraud, Deceit, Misrepresentation and/or Fraudulent Inducement damages of $200.00; Count III - Infliction of Emotional Distress damages of $40,000.00; and Count IV - Negligence damages of $40,000.

ARGUMENT AND DISCUSSION OF THE LAW

A. DIRECTED VERDICT

P.A.C.E. and Butler moved for a directed verdict at the close of Newsome's case and again at the close of all the evidence. P.A.C.E. and Butler argue that it had no duty to appeal the personal judgment against Newsome, and that Newsome was, in fact, afforded due process regarding her dismissal. P.A.C.E. and Butler conclude that they were entitled to a directed verdict on both claims as a matter of law.

A directed verdict challenges the legal sufficiency of the evidence. *First United Bank v. Reid*, 612 So. 2d 1131, 1135-36 (Miss. 1992) (citations omitted). This Court must consider:

> The evidence in a light most favorable to the [appellee], giving her the benefit of every favorable inference which reasonably may be drawn from the evidence . . . [and] "[w]hen contradictory testimony exists, this Court will 'defer to the jury, which determines the weight and worth of testimony and credibility of the witness at trial.'"

Wallace v. Thornton, 672 So. 2d 724, 727 (Miss. 1996) (citations omitted).

1. DIRECTED VERDICT AS TO PUNITIVE DAMAGES

First, we note that the trial court granted a partial summary judgment as to punitive damages at the

close of Newsome's proof. Neither the Appellants nor the Appellee raise any question on appeal as to the partial summary judgment on punitive damages, and we need not address it here.

2. DIRECTED VERDICT AS TO THE WRONGFUL DISMISSAL CLAIM

We next consider the motions for a directed verdict as they pertain to Newsome's wrongful dismissal claim. Newsome testified that she made repeated written requests for the manual procedure to be followed, and she requested a hearing as provided for in the manual. A copy of the employee manual was entered into evidence as were copies of the various correspondence between Newsome and others. If we take all the evidence in the light most favorable to Newsome, we cannot say that the trial court erred in denying the motion for a directed verdict on Newsome's claim for wrongful dismissal. There was sufficient evidence to make Newsome's wrongful dismissal claim a question for the jury.

3. DIRECTED VERDICT AS TO CLAIM FOR FAILURE TO APPEAL THE *PLUM* JUDGMENT

Lastly, we address the motions for a directed verdict as they pertain to Newsome's claim on the failure to appeal the *Plum* judgment. Upon careful review of the record, we note that the trial court did grant P.A.C.E. and Butler's motion for a directed verdict made at the close of all the evidence as to the issue of P.A.C.E.'s failure to prosecute the appeal on the *Plum* judgment. It escapes this Court as to why neither party brings this to our attention. Notwithstanding the directed verdict, the trial court went on to grant jury instructions which allowed the jury to consider the issue of the *Plum* appeal. At least five jury instructions, in whole or in part, address the issue of the *Plum* appeal and are completely inconsistent with the trial court's granting of the directed verdict on that claim. Further compounding the error is the fact that the jury returned a verdict against P.A.C.E. and Butler on the appeal claim. We are compelled to reverse and render that portion of the jury's verdict which found Newsome to be entitled to damages for the appeal issue.

It is clear that the directed verdict on the appeal claim removes Count II - Fraud, Deceit, Misrepresentation and/or Fraudulent Inducement from consideration by the jury. However, in reviewing the jury verdict, we are unable to further separate the verdict from those considerations

eliminated by the directed verdict on the appeal claim from the damages awarded for wrongful dismissal. Thus, we must reverse and remand for a new trial on the issue of the wrongful dismissal claim.

Because we are reversing and rendering on the issue of the directed verdict on the appeal claim, we need not address P.A.C.E. and Butler's third and fourth assignments of error as they pertain to alleged errors on that claim.

B. CHALLENGE OF THE AMOUNT OF THE JURY'S VERDICTS AND SUPPORT IN THE RECORD FOR THE JURY'S VERDICTS

P.A.C.E. and Butler argue that because the dollar figure of the jury's verdicts match the amount of the *Plum* judgment against Newsome, the jury must have considered the $40,000 *Plum* judgment despite the trial court's instructions to the contrary. P.A.C.E. and Butler also point to the trial court's

instruction on scope of employment, concluding that it conflicts with the trial court's ruling that the issue of scope of employment was determined in the *Plum* case because the judgment was against Newsome individually, and thus, could not be considered by the jury. P.A.C.E. and Butler argue that the record fails to support the amount of damages awarded by the jury.

Because we have addressed the conflicting instructions and the issue of the *Plum* judgment, we will focus our discussion on Newsome's wrongful dismissal claim. Newsome testified that she was suspended from work in January 1992 and was subsequently terminated in April 1992. She also testified that she was earning approximately $1,400 a month while employed at P.A.C.E. She further testified as to her alleged suffering during the time of her suspension. Her testimony provides some basis from which the jury could determine damages. It is clear that the trial court instructed the jury not to consider the $40,000 *Plum* judgment. While the jury's subsequent award of two $40,000

awards could possibly suggest that the jury disregarded the trial court's instructions, we must assume that the jurors followed the instructions given to them by the trial court. *See Brent v. State*, 632 So. 2d 936, 942 (Miss. 1994); *Johnson v. Fargo*, 604 So. 2d 306, 311 (Miss. 1992) (citation omitted); *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938, 943 (Miss. 1992) (citation omitted). However, we seize upon this opportunity to discuss the apparent pyramiding of damages in the present case. The pleadings clearly indicate that Count IV - Negligence was pled in the alternative. However, the jury returned its verdict finding in favor of Newsome on all four counts and made damage awards on each of the four counts. Put very simply, there is clear error in the court below because Newsome was awarded a double recovery. *See Peoples Bank & Trust Co. v. Cermack*, 658 So. 2d 1352, 1364 (Miss. 1995); *Long v. Magnolia Hotel Co.*, 111 So. 2d 645, 667-68, (Miss. 1959) . We bring this to the attention of the trial court upon remand for a retrial on the wrongful dismissal claim so as to insure that a similar error does not occur again.

C. THE INTRODUCTION INTO EVIDENCE OF THE DEPOSITION TESTIMONY OF CHARLES E. LAWRENCE

P.A.C.E. and Butler argue that the deposition testimony is hearsay and that the trial court erred in allowing it to read and witness Lawrence to be questioned about his deposition testimony. Our review of the record, however, reveals that P.A.C.E. and Butler failed to object at trial on the grounds of hearsay. Thus, P.A.C.E. and Butler's argument fails because the trial court was not presented with hearsay as a basis for their objection at trial. *See Ballenger v. State*, 667 So. 2d 1242, 1266 (Miss. 1995). This Court cannot review matters on appeal which were not presented to the trial court for consideration. *Ditto v. Hinds County*, 665 So. 2d 878, 880 (Miss. 1995); *see also Bender v. North Meridian Mobile Home Park*, 636 So. 2d 385, 389 (Miss. 1994). While this Court "retains

the inherent authority to notice error, despite trial counsel's failure to preserve the error" we need not do so in this case in light of the fact that we are reversing and rendering on the issue of the appeal of the *Plum* judgment. We cannot foresee a means by which this testimony would be admissible upon retrial. *Johnson v. Fargo*, 604 So. 2d 306, 311 (Miss. 1992) (citations omitted).

D. THE HOURS OF THE JURY'S DELIBERATIONS

P.A.C.E. and Butler argue that their right to a fair trial was prejudiced by the jury's late hours of deliberation in that the jury retired to deliberate at 10:00 P.M. and returned its verdict at 1:05 A.M.

after a day exceeding sixteen hours.

First, P.A.C.E. and Butler have failed to point out that they ever asked the trial court for a recess or objected to the lateness of the jury deliberations. Thus, P.A.C.E. and Butler waived any argument on this point. *See King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (citations omitted). Furthermore, considering the merits of the underlying assignment of error, their arguments fail. P.A.C.E. and Butler rely on *Grimsley v. Tyner*, 454 So. 2d 482 (Miss. 1984) where the jury retired at 11:00 P.M. and returned its verdict at 4:30 A.M., and the Mississippi Supreme Court reversed recognizing that verdicts rendered under such circumstances are "suspect." *Id.* at 485. P.A.C.E. and Butler also rely on *Isom v. State*, 481 So. 2d 820 (Miss. 1985), where the Mississippi Supreme Court reversed because the jury deliberated from 3:21 P.M. until 10:38 P.M. and three jurors expressed interest in a recess, and the trial court sent them back for further deliberation, ultimately confining the jury until 11:35 P.M. for a special interrogatory. *Id.* at 824. We find, however, that these cases are distinguishable from the present case in that the time the jury returned the verdict while late, does not reach the level presented in *Grimsley*, and unlike *Isom*, the trial court consulted the jury as to the hour of deliberations. In the present case, the trial judge noted:

> The jury in this case was specifically queried by the Court if it wished to recess the proceedings on February 17, 1995 and either return for deliberations on February 18 or February 20, 1995. The jury informed the Court in very clear terms that it wished to continue its deliberations until it had completed them. The Court informed counsel for both sides as to the jury's desires and the jury did complete its deliberations and returned its verdict.

We find the case of *Fairley v. State*, 483 So. 2d 345 (Miss. 1986) to be dispositive on this issue. In *Fairley*, the jury retired to deliberate at 9:03 P.M. and returned its verdict at 11:03 P.M after the trial court overruled the defendant's motions for a recess. "[T]he judge noted that he was cognizant of and sensitive to the well-being of the jury. There were no expressions or indications of discomfort or distress on the part of counsel, the jury or any others involved in this proceeding." *Id.* at 347. In affirming, the Mississippi Supreme Court concluded: "We have little trouble finding that here the trial judge was responsive to the situation and acted in a manner best calculated to preserve the rights of the defendant." *Id.* at 348. Likewise, in the present case, we are presented with the situation in which the trial court consulted the members of the jury as to their wishes in regard to the deliberation hours and provided them with refreshments. We cannot, under the facts of the present case, conclude that the trial court erred in allowing the jury to deliberate as it did. Accordingly, this issue is without merit.

CONCLUSION

We reverse and render as to Newsome's claim of failure to appeal the *Plum* judgment and reverse and remand on Newsome's claim of wrongful dismissal. Upon remand, the new trial will be limited to the issue of Newsome's wrongful dismissal claim and any damages which might ensue from that claim.

THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT IS REVERSED AND RENDERED AS TO THE FAILURE TO APPEAL THE *PLUM* JUDGMENT CLAIM

AND REVERSED AND REMANDED ON THE WRONGFUL DISMISSAL CLAIM. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.