

IN THE COURT OF APPEALS 04/23/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00526 COA

**GARLAND MCLEMORE, GENERAL PARTNER OF BREADWINNER EQUITY PLAN, A
MISSISSIPPI LIMITED PARTNERSHIP**

APPELLANT

v.

MANAGEMENT AND MARKETING CONSULTANTS, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT L. GOZA

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

DON A. MCGRAW, JR.

PATRICK M. RAND

ATTORNEY FOR APPELLEE:

CLAY L. PEDIGO

NATURE OF THE CASE: CONTRACTS

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF/APPELLEE

BEFORE McMILLIN, P. J., COLEMAN AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

This is an appeal from a judgment rendered in the Circuit Court of Madison County in favor of Management and Marketing Consultants, Inc. (MMC) and against Garland McLemore as general partner of a limited partnership known as Breadwinner Equity Plan. The suit involves certain contractual damage claims asserted by MMC against McLemore arising out of the transfer of a business operation from McLemore to MMC. McLemore raises four issues on appeal. He claims that the trial court erred in assessing him with responsibility for unpaid trade association membership

fees. He also attacks on several grounds the admission of certain accounting summaries to substantiate the amount of MMC's claim, which jointly make up his second and third issues. Finally, he claims error in the assessment of punitive damages against him. Upon review, we do not find the alleged errors merit reversal and we, therefore, affirm the trial court's judgment.

I.

Preliminary Background

In order to fully understand what this Court believes to be the critical issues of this case, it is important to have some degree of familiarity with exactly how the business in question was designed or intended to operate; therefore, at the risk of appearing somewhat tedious, the following discussion appears essential.

Garland McLemore had, for a number of years, operated a business known as Breadwinner Equity Plan. The business consisted of a trading stamps operation whose clients were primarily a number of truck stops located throughout the country. Under the business plan, Breadwinner would sell trading stamps in bulk to the truck stops at a fixed price. The truck stops would then dispense the stamps to their customers at the time of purchase of petroleum products or other purchases, with the number of stamps dispensed being directly related to the amount of the customer's purchase. The customers were given booklets to hold the stamps, and a book, once full, was redeemable for cash from Breadwinner.

The business produced gross profits to Breadwinner in two ways:

(a) The redemption value of the stamps, once distributed to the truck stops, was less than the price paid for the same number of stamps when the truck stop purchased them from Breadwinners. By way of example, a roll of 1,000 stamps would normally be sold by Breadwinner to a truck stop for \$28; however, those same 1,000 stamps, had a redemption value in the hands of the truck stop's customers of only \$20; thereby producing a minimum gross profit to Breadwinner from such sale of \$8 per thousand stamps sold.

(b) Historically, business experience had shown that a certain percentage of stamps, once distributed by the truck stops, would never be presented by the customer for redemption. Since Breadwinner, and not the truck stop, was responsible for paying for customer redemption, these unredeemed stamps represented additional profit potential for Breadwinner in addition to that set out in (a) above.

The stamps were distributed by the truck stops simply as an incentive to potential customers to trade with that particular business as opposed to another not offering such stamps. The cost of purchasing

the stamps from Breadwinner was a non-recoverable business expense to the truck stop, hopefully to be indirectly recovered by the increased volume of sales this promotional activity would produce.

In order to assure potential truck stop clients of the integrity of the program, Breadwinner had historically represented that sufficient funds were always on hand to cover potential redemptions of stamps. The internal policy of Breadwinner had been, for a number of years, to deposit \$18 from each sale of 1,000 stamps into an interest-bearing account styled a trust account, to be held to cover potential redemptions. As stated earlier, if all stamps were ultimately presented for redemption, it would have required a \$20 deposit into the account from each sale of 1,000 stamps; however, historical experience had shown that something less than \$16 in redemptions per 1,000 stamps sold could reasonably be expected, so that the \$18 deposit actually provided a safety cushion. Redemptions were handled out of an account called the redemption account, which was replenished as necessary out of the trust account. Company practice permitted an annual review of balances on hand in the trust account and redemption account compared with records reflecting outstanding unredeemed stamps, such that any amounts in the account deemed in excess of reasonably anticipated redemption needs could be withdrawn as profit to the company. In its earliest history, the handling of the trust account had been done by an independent trustee; however, after the trustee's death, McLemore had taken over the handling of both the trust and redemption accounts.

Truck stops participating in the Breadwinner program were authorized to act as redemption agents for their customers, redeeming full books of stamps in exchange for cash. This on-site redemption method was promoted as one of the more attractive features of the program, in that a customer could redeem a full stamp booklet for cash at the same place he was buying products and did not need to take or send the booklet to a separate redemption center. The truck stop was reimbursed by Breadwinner for these cash redemptions in one of two ways. Some truck stops had authority to draft directly on the redemption account and were given blank checks for that purpose. These truck stops then were required to send in a report along with the actual stamp books as after-the-fact documentation for their authority to draw these reimbursement drafts. Other truck stops sent in the report and supporting booklets and were issued a reimbursement draft from the Breadwinner home office out of the redemption account.

One final item of information is necessary to understand some of the issues of this case. The Breadwinner stamps themselves contained an expiration date. They also contained a series number comprised of a letter and a number. The apparent practice was to sell stamps in one year that had an expiration date of January 1 two years distant. By way of example, during the year 1991, the year the business was transferred to MMC, the company was selling stamps with an expiration date of January 1, 1993. During the year, the stamps were intended to be sold in order by the series number, *i.e.*, Series A stamps would be exhausted before beginning sale of Series B, and so on.

II.

Facts Leading to Litigation

McLemore, due to ill health, was desirous of getting out of the day-to-day operation of the Breadwinner business. In furtherance of this purpose, he was ultimately successful in entering into an agreement with Jackie Gardner that Management and Marketing Consultants, Inc. (MMC), a closely held corporation principally operated by Gardner and his wife, Ann, would take over the operation of

the business as of November 1, 1991. In exchange for the right to operate the business, MMC agreed to pay McLemore a commission of 7% of the first one million dollars in annual sales and 5% of annual sales in excess of one million dollars.

The details of the agreement were contained in a contract entered into between the parties, entitled "Lease Contract." In addition to the monthly commission due to McLemore, MMC agreed to purchase certain items of inventory in a transaction referred to in the contract as a lease-purchase. Though the agreement itself is difficult to understand on this point, the parties appear to be in agreement that their intent was that, in any month that gross sales met or exceeded \$25,000, MMC would pay an additional 2% of gross sales to McLemore as a credit against the amount due for the items of inventory purchased.

The agreement provided that McLemore would retain title to and control of his redemption account and that he would also be responsible for the redemption of all stamps sold prior to the effective date of the transfer of business operations to MMC. MMC was to establish new accounts to handle the required escrow deposits from its sales to cover redemption costs.

There appears to be no genuine dispute that, as of MMC's takeover of the business on November 1, 1991, the company had sold stamps having a January 1, 1993, expiration through Series B-640. Therefore, under the contract, stamp booklets coming in for redemption after November 1, 1991, containing 1993 stamps of Series B-640 or earlier, or any stamps containing an expiration date prior to January 1, 1993, would be the obligation of McLemore, and stamps after the 1993 Series B-640 would be the responsibility of MMC to redeem.

Within less than two months from the time MMC took over the operation of the Breadwinner business, substantial problems began to surface. Insufficient funds were on deposit in McLemore's accounts to cover drafts drawn by truck stops or to cover reimbursement requests sent in by other truck stops for stamps sold by McLemore prior to the transfer. As a result, it became necessary, in order to maintain customer relations and prevent serious damage to the integrity of the business, for MMC to advance its own funds to cover redemptions of stamps sold by McLemore prior to November 1, 1991. The proof at trial showed that MMC took steps to demand that McLemore deposit the sums necessary to cover redemptions chargeable to him under the contract, but that, other than some small sums in the first few weeks, no such funds were advanced by McLemore.

In response, MMC suspended payments to McLemore of the percentage of gross sales due him under the contract and, instead, undertook to keep a running total by way of a contemporaneous accounting, which charged to McLemore those amounts advanced by MMC to redeem stamps sold by McLemore prior to the transfer, and which credited him for those amounts that were due him for his monthly lease payment and for inventory purchase.

In addition, this accounting charged McLemore for \$1,075 for annual dues for a truck stop trade organization that had been due in July of that year, but which were unpaid, and charged McLemore for \$4,497 for 1994 Breadwinner stamps that McLemore had ordered prior to November 1, 1991, but which were delivered shortly after MMC took over the business. MMC's justification for these charges to the accounting was a provision of the contract that provided that McLemore "assumes payment for any and all outstanding bills, debts and tax liabilities of the Breadwinner Equity Plan prior to the effective date of this agreement."

This case was tried before the circuit judge as a bench trial. At the conclusion of the proof, the trial court requested proposed findings of fact and post-trial briefs from the parties and took the matter under advisement. He subsequently entered judgment for MMC in the amount of \$37,798.48 in contractual damages for McLemore's failure "to pay for certain obligations thereunder," and separately for the \$1,075 trade association membership that was past due at the time of the transfer of operation. The total damage award was, therefore, \$38,873.48. We note that the accounting sheets offered into evidence by MMC indicated a total amount due of \$39,786.03, which is \$912.55 more than the actual judgment. No explanation appears in the record for this variance. We can only assume that, based upon some consideration, the trial judge disallowed some item or items in the accounting summary introduced into evidence. In any event, neither party makes an issue of this point, and we have considered the case on the proposition that the accounting record introduced as Plaintiff's Exhibit 16 at trial was the evidentiary basis upon which the trial judge assessed contractual damages. The trial judge additionally assessed McLemore with \$16,500 in punitive damages upon a finding that the "breaches of the defendant in failing to honor the redemption agreement, in failing to cooperate on copyright matters and by failing to be available for consultation were willful, and intentional and oppressive."

We will address the issues raised by McLemore in his appeal in the same order in which he asserted them in his brief.

III.

National Truck Stop Association Dues

The proof showed that Breadwinner was a dues-paying member of this association, and that it was advantageous from a business standpoint to belong, since membership permitted attendance at the association's annual convention, with the attendant opportunity to meet and associate with present and prospective customers. These dues had fallen due prior to the transfer date of November 1, but were delinquent and unpaid until paid by MMC and charged back to McLemore on the accounting records. McLemore argues in his brief that these dues "were voluntary membership dues . . . not properly classified as an outstanding bill [or] debt" of the business. He cites no authority for this proposition. Memberships in professional associations are a legitimate business expense. There is no proof in the record that McLemore affirmatively canceled the membership in the association prior to the turnover date, and Gardner testified that McLemore had told him of the importance of maintaining the membership. We are unconvinced that the trial court erred in determining that these unpaid dues were a legitimate business expense and, thus an outstanding bill or debt of the business for which McLemore assumed payment under the contract.

IV.

The Trial Court's Reliance on the Accounting Ledger

McLemore seeks to set aside the judgment, or at least the great bulk of it, based upon an attack upon the accounting records we described earlier in this opinion, which were introduced at trial without objection. In fact, at the time of introduction, counsel for McLemore stated into the record the following:

We have been made available all of the original documents maintained by Mr. Gardner. We have checked them against this ledger card and we find no errors in the account as stated and therefore we have no objection to the introduction of this document.

This failure to interpose some contemporaneous objection to the introduction of the document is fatal to all of the errors asserted before this Court on appeal. It is elemental law that a party will not be heard to urge error in the introduction of evidence to which the party interposed no timely objection at trial. *Stewart v. Stewart*, 645 So. 2d 1319, 1322-23 (Miss. 1994) (citing M.R.E. 103).

McLemore attempts now to attack the records on four different theories. First, he suggests that the record is not the best evidence of the obligation of the parties, apparently contending that the redeemed stamps, canceled checks, redemption reports, and related documentation were required to establish the accuracy of MMC's claim. Records such as these accounting sheets, so long as they meet certain threshold criteria, are admissible as independent evidence, based upon the general proposition that "[u]nusual reliability is regarded as furnished by the fact that in practice regularly kept records have a high degree of accuracy . . ." and, on a more practical level, "in actual experience the entire business of the nation and many other activities function in reliance upon records of this kind." Kenneth S. Brown, et al., *McCormick on Evidence* § 306 (Edward W. Cleary ed., 3d ed. 1984). In Mississippi, the issue is now governed by the "business records" exception to the hearsay rule as set out in Mississippi Rule of Evidence 803(6). Certainly business ledgers, journals and similar records have long been admissible on issues such as this without the necessity of actually introducing the underlying invoices, checks, bank deposit records, reports, memoranda, and similar instruments that substantiate the accounting entries. Such underlying documentation (or its absence) is, certainly, admissible to refute the accuracy or trustworthiness of the record, but the obligation to go forward with that evidence rests with the party challenging the business records, not the proponent.

Second, McLemore suggests, for the first time on appeal, that the accounting records are not trustworthy, or at least that their trustworthiness cannot be verified, because the evidence is undisputed that some of the redeemed stamp books have been destroyed. This challenge to the admission of the records was not advanced at trial, and is procedurally barred from consideration by this Court. *Stewart*, 645 So. 2d at 1322-23. Procedural bar aside, this evidence alone would not appear to unquestionably result in the exclusion of the record. There was nothing to suggest that the destruction of the stamp booklets was undertaken by MMC for improper motives. To the contrary, there was shown to be a substantial business risk in having large numbers of previously redeemed stamp booklets on hand since, if they fell into the wrong hands, they were subject to being redeemed a second time. The burning of redeemed stamp booklets was undertaken, therefore, as a prudent business practice to prevent the possibility of an unauthorized re-redemption, not as an attempt to destroy evidence for this trial. In fact, it is uncontradicted that the practice of destroying stamps was suspended after it became apparent to MMC that there was a substantial likelihood of this litigation. While the circumstances regarding the destruction of the underlying documentation may permit an attack on the trustworthiness of the records, its mere absence alone does not accomplish the purpose.

McLemore's third challenge arises out of the second issue raised in his brief. McLemore claims reversible error in the fact that Ann Gardner was permitted to testify on rebuttal even though "the

Rule" had been invoked and she had been present in the courtroom during a portion of the testimony. No contemporaneous objection was made when Mrs. Gardner was called as a rebuttal witness, though she had been barred from testifying during MMC's case in chief upon the timely objection of McLemore's counsel. Without a contemporaneous objection and an opportunity to rule thereon by the trial court, we may not consider the issue on appeal. *Turner v. Temple*, 602 So. 2d 817, 823 (Miss. 1992). A violation of the rule against witnesses being present in the courtroom, as now embodied in Mississippi Rule of Evidence 615, does not automatically result in the exclusion of the witness's testimony, since other less severe sanctions may be found appropriate. *Douglas v. State*, 525 So. 2d 1312, 1317 (Miss. 1988). Even were we to find this to be error, it would be harmless, since the harm alleged by McLemore on appeal is strictly that, without Mrs. Gardner's testimony, the authenticity and accuracy of the accounting records cannot be said to have been established. The problem, of course, with this argument is that McLemore stipulated to the admission of the document into evidence. Therefore, even assuming Mrs. Gardner's testimony in rebuttal should not have been allowed, it was totally unnecessary for the limited purpose of establishing the trustworthiness of a document whose admissibility had already been stipulated.

Finally, McLemore attacks the reliability of the accounting records by pointing out a series of apparent discrepancies between entries in the records and the supporting reports. No such demonstration was made to the trial court at the time the document was introduced at trial. Counsel for McLemore stated that he found "no errors in the account as stated and therefore we have no objection to the introduction of this document." These discrepancies, which might have been relevant in an attack against the initial admission of the document based upon its demonstrated "lack of trustworthiness" under the Rule 803(6), may not be raised for the first time on appeal. *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359, 371 (Miss. 1992).

V.

Punitive Damages

McLemore urges this Court to find that the trial court erred in assessing punitive damages. He suggests that this litigation is, at best, a breach of contract action, and that normally punitive damages are not recoverable in a contract case. *South Cent. Bell v. Epps*, 509 So. 2d 886, 892 (Miss. 1987). Under established Mississippi jurisprudence, exemplary damages are allowed in a contract breach case only if "such breach is attended by intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort." *Polk v. Sexton*, 613 So. 2d 841, 845 (Miss. 1993) (quoting *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 465-66 (Miss. 1983)).

The ultimate decision to assess punitive damages and, if assessed, the amount allowed, is a question for the trier of fact. *McGowan v. Estate of Wright*, 524 So. 2d 308, 310 (Miss. 1988). Though the trier of fact in *McGowan* was the jury, the Mississippi Supreme Court indicated that the fact-finder "has very wide latitude in determining whether punitive damages should be granted and, if so, the amount of those damages." *Id.* at 310. Sitting as the trier of fact in a bench trial, the trial judge must be seen as having that same latitude. We must, therefore, in our review search for an abuse of discretion in the award of punitive damages in order to disturb the trial court's award.

The trial court based its award of punitive damages on three considerations: (a) McLemore's failure to provide copyright information; (b) McLemore's failure to provide consulting services as required

under the contract; and (c) McLemore's failure to redeem stamps sold by him prior to MMC's takeover of the business operation.

(A)

The Copyright Information

We can find no justification for the award of punitive damages against McLemore on this basis. It is true that the contract required McLemore to furnish all available copyright information, and it is undisputed that this was not done. Nevertheless, there is a complete absence of credible evidence in the record that the lack of this information hindered MMC in the business operation in any way. The only conceivable way that MMC could have been damaged would have been if an outside competitor was unlawfully duplicating copyrighted material and using it in competition with MMC. In that event, the copyright data would have been valuable in attempting to halt the practice. There is absolutely no indication in the record that any competitor was using, or was threatening to use, any of the printed materials of the business that might have been subject to copyright protection. In fact, other than perhaps nominal damages for a technical breach, it does not appear that McLemore's failure to provide copyright information in any way damaged MMC in the operation of the business. That being the case, there does not appear to be any basis to award punitive damages for this breach. It appears perhaps, that MMC has confused the copyright protection contracted for with something more resembling a patent or similar protective law regarding the business's general scheme of operation. Copyright law provides no such protection. 17 U.S.C.S. § 102 (Lawyer's Co-op. 1995). A copyright of any of the promotional material merely provided the holder, "for a specified period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them." *Black's Law Dictionary* 336 (6th ed. 1990).

(B)

Failure to Consult

We further have serious reservations about relying on McLemore's failure to consult regarding the operation of the business to support the punitive damage award. It appears beyond dispute from the record that McLemore was in poor health. The fact that he left for a Mexico vacation immediately after closing does not, of itself, subject him to punitive damages. He testified that the trip was for health-related purposes, and that assertion was not contradicted. The specifics of his duties to consult were not set forth in any detail in the contract and were made contingent upon McLemore's health. The record also reflects that, within just a few weeks of the closing, the parties had become antagonistic, and that many of MMC's contacts which were rebuffed by McLemore could as easily be characterized as attempts to confront McLemore on perceived problems as to seek his consultation within the meaning contemplated in the contract. McLemore made available to MMC for consultation during the changeover period two persons with a high degree of familiarity with the business operation. The problems experienced by MMC after the takeover, though very real, appear to arise out of other considerations than McLemore's failure to consult. This evidence does not, in

the opinion of this Court, make this the "extreme case" in which an award of punitive damages is appropriate. *Tideway Oil Programs Inc. v. Serio*, 431 So. 2d 454, 560 (Miss. 1983).

(C)

Failure to Redeem

There is a different question, however, in consideration of McLemore's failure to redeem stamps sold by him prior to the changeover date. It is evident that the integrity of the redemption process was crucial to the success of the business. The business's promotional literature touted the fact that truck stops need not worry about the availability of redemption funds. The very concept of the procedure requiring an escrow into trust out of stamp sale proceeds of sufficient funds to meet redemption costs was designed to secure the reliability of the program.

While normally, the mere failure to pay an obligation, standing alone, would not seem to merit the imposition of punitive sanctions absent a showing of both capacity to pay and wilful refusal, this case must be viewed differently. Capacity to redeem, had McLemore followed his business plan in the manner he represented to his clients, and therefore, at least indirectly to MMC, would not have been an issue. The proof strongly indicates that McLemore did not, at the closing date, have anywhere nearly sufficient funds available to handle his reasonably expected redemptions. This fact most certainly was known to him. The proof also indicated that one certificate of deposit supposedly earmarked for redemptions was cashed in by McLemore, and the bulk of it was used to pay a bank note he owed.

McLemore attempts to justify his failure to redeem by saying there was "a good faith dispute as to the liability of the parties for stamps redeemed." This dispute is said to be based upon McLemore's feeling that "MMC was selling stamps out of sequence . . ., altering his copyrights, failing to pay for inventory items, failing to properly credit his outstanding receivables, and failing to operate the business in substantially the same manner as before MMC took control." No credible proof was offered by McLemore to substantiate any of these contentions, other than his own statements of concern. Even were these concerns legitimate, they all arose after the closing, and they do nothing to explain the significant shortfall of funds that should have been on deposit in McLemore's redemption accounts at closing.

We conclude that McLemore's failure to have on deposit sufficient funds to meet his reasonably anticipated redemption expenses and his failure to disclose this absence of funds, which must be seen as material, is an "intentional wrong . . . as amounts to an independent tort" within the meaning of *Polk v. Sexton*, 613 So. 2d 841, 845 (Miss. 1993). Therefore, the imposition of punitive damages on this ground would not appear to constitute an abuse of discretion. Nevertheless, we find ourselves faced with a dilemma which we proceed to resolve in the following subsection.

(D)

The Effect of Improper Considerations in Awarding Punitive Damages

We have concluded that the punitive damage award is based, in part, upon considerations that are without merit. The extent that these improper factors weighed on the trial court's decision is a

determination this Court cannot make. In these circumstances, we would be substituting the judgment of this Court for that of the trial court to conclude that, based upon consideration of permissible factors alone, an award of \$16,500 on punitive damages was still proper. Appellate courts are often reminded (or remind themselves) that it is not their duty to interpose their opinions as to how a case should be decided for that of the trial court. *See, e.g., Catholic Diocese v. Jaquith*, 224 So. 2d 216, 225-26 (Miss. 1969). We conclude that the proper course in this instance is to affirm the verdict of actual damages and remand the issue of punitive damages for reconsideration, said reconsideration to be limited, initially to the propriety of, and, secondarily to the amount of, a punitive damage award based solely upon McLemore's unwillingness to meet his contractual obligation to redeem stamps sold by him prior to the business transfer. Remand on the issue of punitive damages alone was sanctioned by the Mississippi Supreme Court in *Royal Oil Co., Inc. v. Wells*, 500 So. 2d 439, 450 (Miss. 1986). While *Royal Oil* required a new trial on that limited issue since it was a jury trial, our decision does not compel the trial court to reopen the case for receipt of additional evidence in this instance, since the pertinent facts were fully developed at the original bench trial. We leave that decision to the sound discretion of the trial court.

THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT IS AFFIRMED AS TO ACTUAL DAMAGES AND REVERSED AND REMANDED FOR RECONSIDERATION ON THE ISSUE OF PUNITIVE DAMAGES CONSISTENT WITH THE TERMS OF THIS OPINION. COSTS ARE ASSESSED TO THE APPELLANT.

THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., AND BRIDGES, P.J., NOT PARTICIPATING.