MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-CA-00357

FRANK LEE GADDY

APPELLANT

VERSUS

ITT INDUSTRIES, INC.

APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Frank Lee Gaddy, Appellant;

2. Jim Waide, Esq., Attorney for Appellant;

3. Waide & Associates, P.A., Attorneys for Appellant;

4. ITT Industries, Inc., Appellee;

5. John Hill, Esq., Attorney for Appellee; and

6. Mitchell, McNutt & Sams, P.A., Attorneys for Appellee.

This the 7 day of September, 2007.

JIM WAIDE

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STATEMENT OF THE ISSUES

1. Whether the trial court erroneously granted Defendant's motion for a directed verdict based on an improper interpretation of the public policy exception announced in *McArn v. Allied Bruce Terminix Co.* when there were genuine factual disputes as to why the Plaintiff was terminated from his employment.

STATEMENT REGARDING ORAL ARGUMENT

Because this case raises an issue of the proper application of an important public policy exception to the employment at will rule, oral argument will be helpful.

STATEMENT OF THE CASE

A. Statement of the Proceedings

On February 12, 2004, Frank Lee Gaddy (hereinafter "Gaddy") filed a complaint in Monroe County Circuit Court seeking to recover actual and punitive damages for discharge in violation of public policy and malicious interference with employment relations. Complaint, R. 8-12.

Gaddy's Complaint named ITT Industries, Inc. (hereinafter "ITT") and Kathy Ray (hereinafter "Ray"), Human Resources Manager for ITT, and alleged both Appellees were liable for retaliatory discharge in violation of Mississippi public policy, and that Ray was personally liable for malicious interference with employment relations. *Id.*

On August 21, 2006, ITT's motion for summary judgment was denied. R. 19. Also on August 21, 2006, the circuit court granted Ray's motion for summary judgment and dismissed Ray from the case with prejudice.[1] R. 20. Trial before a jury was had January 29, 2007 through January 30, 2007. On February 8, 2007, following the close of Gaddy's case in chief, the circuit court granted ITT's motion for directed verdict in favor of ITT. T. 204-05. Final Judgment, R. 21-22. Gaddy filed timely notice of appeal. Notice of Appeal, R. 23.

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[1]Gaddy does not appeal the dismissal of Ray.

B. Statement of the Facts

Accepting as true all evidence favorable to the non-moving party and all reasonable inferences flowing therefrom, *Lynch v. State*, 877 So.2d 1254 (Miss. 2004), the facts are as follows:

On April 1, 1976, Gaddy began working for ITT Industries, Inc. ("ITT"). Trial Transcript (Tr.) 46. Gaddy originally worked various jobs in the plant, including: deburr operator, press and rollers, wire welding, shear operator and maintenance. Tr. 47. Because of good job performance, Gaddy was eventually promoted to the position of a salaried supervisor, where he remained for approximately twenty years. *Id.*

In 2000, Gaddy became a supervisor on the night shift. Tr. 48. The original plan was to allow the four supervisors, Gaddy, Mike Todd (hereinafter "Todd"), Larry Slade (hereinafter "Slade") and Robert Brown (hereinafter "Brown"), Tr. 49, to rotate the night shift assignment for one month at a time. Tr. 48. However, Gaddy subsequently requested to remain on the night shift on a permanent basis. Tr. 49. No one objected to his request and Gaddy was informed by Mike Steele (hereinafter "Steele"), Production Manager, that if he wished to return to the day shift Steele would accommodate that request as well. *Id.* As part of that arrangement, Steele indicated that Todd, the least senior supervisor, would be reassigned to the night shift

if Gaddy desired to return to the day shift. *Id.*

Gaddy indicated he wished to remain on the night shift because the group that worked night shift was a good, hard-working group that got along well. Tr. 50. Steele also noticed the quality of work performed by the night shift and wrote in an evaluation dated February 4, 2002, "[Gaddy] has done a great job with second shift. His work force has become very versatile, which has continued (sic) to our success over the past year." Tr. 95. It was while working on the night shift that Gaddy got to know Johnny Walden (hereinafter "Walden"). Tr. 52-53.

Walden testified that he was injured on the job, on January 14, 2003, while picking up iron gates. Tr. 8. Gaddy testified that he remembered Walden reporting this injury to him on January 14, 2003. Tr. 57. Gaddy was walking by Walden's work station when Walden stopped Gaddy and said, "I have messed up my back." Tr. 58. Gaddy asked Walden if he wished to go to the doctor and Walden indicated he wanted to give it some time and get off his feet to see if that would help alleviate the pain. *Id.* According to Gaddy, Walden finished his shift though when he observed Walden leaving the plant, he noticed Walden appeared to be in physical discomfort. Tr. 58-59.

Later that afternoon, Walden called Gaddy at his home and requested to take a couple of days vacation to rest his back. Tr. 59. Gaddy indicated he would take

care of the details if he could get it approved. *Id.* Gaddy informed Ray, Human Resources Manager for ITT, of the conversation. Tr. 59-60. Ray responded and told Gaddy the reason Walden did not want to go to a doctor is that he would fail a drug test and she would fire him. Tr. 60.[2] Gaddy testified that Ray stated that Walden was not injured at work and that Gaddy was not telling the truth about what had happened. Tr. 61. Ray also told Gaddy that he was not to have any further communication with Walden. Tr. 88.

Following the injury, Gaddy would call Walden to check on him. Tr. 69. On one call Gaddy testified that Walden asked him if the company was "putting pressure" on him. *Id.* Walden indicated that the workers' compensation representative informed him that his supervisor, Gaddy, had stated that Walden was not injured on the job. *Id.* Gaddy denied this statement as a lie and stated, "[i]f it goes to court, I won't say that I said that then." *Id.*

Gaddy notified Ray that Walden told him about the false statement attributed to Gaddy. Tr. 70. Ray indicated that she did not know who told the workers' compensation representative that Gaddy had said that. *Id.* However, she did not deny

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[2] Gaddy testified that Walden had asked for help with his addiction to pain medication from his employer. Tr. 53. Gaddy indicated that outside of Walden's confession to his employer he had no reason to suspect that Walden ever used drugs. Tr. 54. Moreover, there was no evidence presented that anyone had any reason to suspect Walden was under the influence of drugs at the time of the injury. In fact, the only positive drug test Walden ever had was when he tested positive for Viagra. Tr. 14.

that she told the workers' compensation representative that. *Id.*

On October 24, 2003, Gaddy reported to the plant in order to meet with Ray and Taylor Smith (hereinafter "Smith"), an attorney for ITT, to prepare for his deposition regarding Walden's workers' compensation claim. Tr. 65. When he met Smith and Ray, Gaddy testified the following exchange took place:

> Ray: Mr. Smith, this is Frank Gaddy. He is one of the old-timers. He was on the other side back during the union.
>
> Smith: You mean we ain't (sic) fired you yet?
>
> Gaddy: No, not yet. Probably will before all of this is over.

Tr. 65.

When Gaddy was asked why he made this comment, he testified that he based it on Ray's attitude toward the injured worker. According to Gaddy, Ray "had been making the little slurs toward [Walden], that he didn't het hurt on the job, that he was faking, he didn't . . . want to go have a drug test . . . . [I]t was her opinion that he didn't get hurt on the job . . . . " *Id.*

Gaddy sensed he was being rehearsed for his deposition and was being pressured to testify in accordance with Ray's beliefs regarding the injury. Tr. 66.[3] Contrary to Ray, Gaddy's opinion was that Walden was injured at work. *Id.* Gaddy

[3] Gaddy based this on a previous experience when Smith had rehearsed other witnesses at another company, Fibervalve. *See* Tr. 64, 66.

commented, "[a]ll [Walden] is asking for is to get back, get fixed and get back to work." *Id.* Gaddy further stated, "I think the company owes him that much." *Id.* Shortly after these comments favoring the injured employee, company attorney Smith indicated that he did not have any other questions for Gaddy. *Id.*

Five days later, Gaddy gave his deposition. Tr. 70. In the deposition Gaddy reaffirmed his position that Walden was hurt while on the job. Tr. 73. During his testimony Gaddy observed Ray's reactions to his testimony. *Id.* Gaddy described Ray as "rolling her eyes up, making faces, and shaking her head, like, you know, she didn't believe I was answering the questions that way . . . . " *Id.* Walden also testified that Ray's gesturing in the deposition led him to believe "the answers that [Gaddy] was giving wasn't what [Ray] was wanting him to say." Tr. 16.

During his testimony, Gaddy asserted that his sworn testimony at his deposition was true. Tr. 73. Gaddy testified that he knew it is against the law to lie at a deposition. Tr. 73-74. Gaddy indicated that after he gave his deposition he "really felt like [he] was going to lose [his] job over [his testimony]." Tr. 74. When Gaddy later reported back to work he told Ray that he hoped "what I said today don't (sic) cost me my job." *Id.* Ray responded that Gaddy had his opinion of Walden and that she had her opinion. *Id.*

Gaddy spoke with Steele about his concerns over his job after his conversation

with Ray. Tr. 74. Steele indicated that he didn't think Gaddy's testimony would cost him his job; however, he also indicated to Gaddy that "he couldn't say for sure it wouldn't." Tr. 75. Gaddy also spoke with Brown and Slade about his concerns as well as his family. *Id.*

On November 10, 2003, less than two weeks after Gaddy gave his deposition, Steele called Gaddy at home and informed his wife that Gaddy needed to report to the plant at 3:30 p.m. instead of his usual starting time of 4:00 p.m. Tr. 76. A meeting took place between Gaddy, Ray and Steele. Gaddy was told that since things were going slow, the plant would have to lose a supervisor. Tr. 77. At the meeting Steele commented that the termination "had nothing to do with [Gaddy's] work." *Id.* Additionally, Ray commented that Gaddy's termination was a result of being "at the wrong place at the wrong time." *Id.*

SUMMARY OF THE ARGUMENT

McArn v. Allied Bruce Terminix Co., 626 So. 2d 603 (Miss. 1993), provides a public policy exception to the employment at-will rule for employees who are terminated for refusing to participate in illegal acts. Gaddy testified at a workers' compensation hearing on behalf of a co-worker. ITT attempted to influence or discourage Gaddy's testimony, and Gaddy was subsequently terminated following his sworn deposition. If Gaddy refused to testify he would have been subject to criminal sanctions for contempt of court.

Since Gaddy was fired as a result of testifying truthfully at a deposition and refusing to testify in Defendant's favor, the trial court erroneously granted Defendant ITT's motion for a directed verdict. The conduct of ITT falls within the public policy exception to the employment at-will rule.

STANDARD OF REVIEW

"When determining the propriety of a motion for a directed verdict, this Court, like the circuit court, is required to consider the evidence in a light most favorable to the plaintiff, giving her the benefit of every favorable inference which reasonably may be drawn from the evidence." *Wallace v. Thornton*, 672 So. 2d 724, 727 (Miss. 1996). "When 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.'"

Id. In considering a defendant's motion for directed verdict, the trial judge must accept as true all evidence favorable to the non-moving party and all reasonable inferences flowing therefrom; evidence favorable to the moving party must be disregarded. *Lynch*, 877 So.2d 1254. As long as questions of fact exist, a directed verdict is inappropriate. *Jones v. U.S. Fidelity & Guar. Co.*, 822 So.2d 946 (Miss. 2002).

ARGUMENT

TERMINATING AN EMPLOYEE FOR TESTIFYING AT A LEGAL PROCEEDING RUNS AFOUL OF THE PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT AT-WILL RULE, AS ANNOUNCED IN *MCARN v. ALLIED BRUCE TERMINIX CO.* THEREFORE, THE TRIAL COURT ERRONEOUSLY GRANTED ITT'S MOTION FOR DIRECTED VERDICT.

In *McArn v. Allied Bruce Terminix Co.*, 626 So.2d 603 (Miss. 1993), this Court grafted a public policy exception to the employment at-will rule, holding that an employee may be entitled to damages if he is terminated as a result of his reporting an employer's illegal act or *refusing to participate in* an illegal act. *Id.* at 607. This exception applies "even . . . where the illegal activity either declined by the employee or reported by him affects third parties . . . . " *Id.* In *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539 (Miss. 1996), the Court defined the contours of *McArn* broadly enough to hold that employees were entitled to retaliatory discharge and

punitive damages instructions for employees discharged for reporting possible malfeasance by a hospital administrator. 681 So.2d 539 (Miss. 1996). Thus, the facts presented in the case *sub judice* fall within the existing public policy exception to the employment at-will rule.

Pursuant to the Mississippi Rules of Civil Procedure, in legal proceedings "[t]he attendance of witnesses may be compelled by subpoena." Miss. R. Civ. P. 30(a). Under the Mississippi Rules of Civil Procedure, "[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued." Miss. R. Civ. P. 45(g). Therefore, if Mr. Gaddy had refused to testify, the court could have held him in contempt of court. This Court has recognized a strong public policy underlying the crime of contempt of court. *See In re Hoppock*, 849 So.2d 1275, 1278 (Miss. 2003) ("The contempt power is an important tool for keeping order and maintaining an efficient court system") (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). Thus, by encouraging and pressuring Gaddy to not testify, or to testify in accordance with the employer's opinion, and firing him when he refused to do so, the employer terminated him for refusing to commit an illegal act. By interfering with Gaddy's obligation to testify, the employer has acted in a manner that contravenes public policy.

Apparently, the basis of the trial court's directing of a verdict was that while ITT could not fire an employee who refused to commit perjury, Gaddy had not proved this was the reason for the firing. The trial court stated:

> "The Court, having heard all the evidence offered on behalf of the Plaintiff, is of the opinion that the Plaintiff has established beyond any and all doubt that Mr. Gaddy was a good, decent man, and that he was an outstanding supervisor at ITT. I don't think anyone at ITT would, or even attempt to, dispute that fact...However, there is not a scintilla of direct or circumstantial evidence, in the Court's opinion, to support Mr. Gaddy's claim that he -- that the Defendant, ITT, requested, encouraged or expected him to perjure himself in his deposition testimony."

T. 204-05.

Contrary to the circuit judge's opinion, there is credible evidence, from which a jury, drawing all inferences in Gaddy's favor, could find that Gaddy was being fired for refusing to commit perjury.

It is true that the employer never actually admitted that it was firing Gaddy because he refused to commit perjury. However, such evidence is not required. As the United States Court of Appeals for the Fifth Circuit explained in *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985), direct evidence is not required. "Unless the employee is a latter day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree." *Id.* at 638. It is familiar law that a jury may base its verdict on circumstantial evidence

alone, and the employer need not actually admit it was motivated by illegal reasons. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (recognizing circumstantial evidence as probative on issue of intentional discrimination by employer). Indeed, in terms of evidentiary value "circumstantial evidence is not only sufficient, but may be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. V. Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n.17 (1957)). Thus, the trial court's argument that Plaintiff must offer direct proof of improper conduct on the part of the employer is clearly in error.

Furthermore, the Court must give the non-moving party "benefit of all favorable inferences that reasonably may be drawn." *Tharp v. Bunge Corp.*, 641 So.2d 20, 23 (Miss. 1994). A jury may draw favorable inferences to Gaddy, by concluding that the combination of ITT's expressing an adverse opinion about the worker to Gaddy before his conference with the attorney, ITT's personnel manager then disagreeing with Gaddy by shaking her head during Gaddy's deposition, the fact that ITT's personnel manager stated Gaddy was fired for "being at the wrong place at the wrong time," and ITT's plant manager's stating that Gaddy's job performance was not the reason for his discharge, all provide circumstantial evidence that Gaddy's truthful testimony was the reason he was fired. It is for the jury, not the Court, to

decide what inferences to draw. "The very essence of (the jury's) function is to select from among conflicting inferences . . . that which it considers the most reasonable." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944). Time and again, this Court has stated that the drawing of inferences from the facts is a jury function. *Goodwin v. Derryberry Co.*, 553 So.2d 40 (Miss. 1989); *Wilson v. General Motors Acceptance Corp.*, 883 So.2d 56 (Miss. 2004).

As stated in *Carlize v. Richards*, 216 So.2d 422 (Miss. 1968), "in determining whether the defendant is entitled to a directed verdict, the evidence must be treated as proving every fact favorable to the plaintiff's case which is established either directly or by reasonable inference." *Id.* at 423 (quoting *Hawkins v. Hillman*, 245 Miss. 385, 389 (1963). A reasonable inference in this case is that ITT fired Gaddy because he gave truthful testimony, and the trial judge erred in himself drawing a contrary inference.

Indeed, the fact that Gaddy was fired less than two weeks after he gave his testimony is sufficient in itself to allow a jury to draw the conclusion that the reason for his firing was his testimony. *See Swanson v. General Services Admin.*, 110 F.3d 1180 (5th Cir. 1997) (indicating close timing between employee's protected activity and adverse action against him may provide the 'causal connection' necessary to establish a *prima facie* case of retaliation); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d

869, 881 (9th Cir. 1989) ("timing of a discharge may in certain situations create the inference of reprisal"). Since the trial judge has himself stated the testimony overwhelmingly established Gaddy was an outstanding supervisor, T. 204, since he was fired only two weeks after he gave his testimony, and since the personnel manager had given strong opinions disagreeing with Gaddy's opinion that the worker was hurt on the job, a reasonable factfinder could conclude that the reason Gaddy was fired was because he gave his testimony.

The trial judge's opinion appears to be that Gaddy could not be fired because he refused to commit perjury, but that he could be fired because he gave truthful testimony. This is a distinction without a difference. Gaddy's proof established that he was fired because he appeared at his deposition and testified truthfully. Had Gaddy refused to do so, he would have been guilty of the criminal act of contempt. Moreover, he would have been derelict in his duty as a citizen. Whether fired because of refusal to commit perjury or fired because of truthful testimony, the firing violated public policy.

Other jurisdictions have held that any interference with an employee's rights under Workers' Compensation laws is itself a violation of public policy.[4] This Court need not go that far in order to conclude that it violates public policy to fire an employee because his truthful testimony disagrees with the employer's opinion. This Court should agree with a California court, which first recognized a public policy exception to the employment at-will rule in *Petermann v. International Broth. of Teamsters*, 174 Cal. App. 2d 184, 189 (Cal. App. 1959):

> The public policy of this state . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare.[5]

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[4]See *Paolella v. Browning-Ferris, Inc.*, 158 F.3d 183 (3d 1998); *Gonzalez v. Ingersoll Mill. Mach. Co.*, 133 F.3d 1025 (7th Cir. 1998); *Hein v. All America Plywood Co., Inc.*, 232 F.3d 482 (6th Cir. 2000); *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23 (1st Cir. 2001); *Sanjuan v. IBP, Inc.*, 275 F.3d 1290 (10th Cir. 2002). *See also Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978); *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682 (Iowa 1988); *Bailey v. Martin Brower Co.*, 658 So.2d 1299 (La. App. 1st Cir. 1995).

[5]The circuit judge's opinion seemed to imply that Gaddy had to prove that he was told to commit perjury because of the allegations of his complaint. However, ¶ 11 of the complaint was not so narrowly drawn. The complaint makes it clear that Gaddy was fired because he testified truthfully. For example, ¶ 11 of the complaint states: "By giving his accurate testimony and telling the truth about what he knew and giving his truthful opinion about what had occurred, Plaintiff was abiding by the laws of Mississippi which prohibit perjury and which also require persons to appear and testify when lawfully required to do so." Thus, the complaint was plain in alleging that Plaintiff was fired, in part, because he obeyed those laws which required that he "appear and testify truthfully when required to do so." Complaint, R. 10. In any event, once the proof was in, the complaint became immaterial, since the pleadings were automatically amended to confirm to the proof at trial. Miss. R. Civ. P. 15(c).

CONCLUSION

For the foregoing reasons, the order of the Monroe County Circuit Court granting Defendant's motion for directed verdict should be vacated and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a 3.5 WP Disk, to the following:

John Hill, Esq.
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THIS the 7 day of September, 2007.

JIM WAIDE

MISSISSIPPI SUPREME COURT
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FRANK LEE GADDY

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CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32(c), the brief contains:

A. 3,741 words in proportionally spaced typeface.

2. The brief has been prepared:

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This, the 7 day of September, 2007.

BY: Jim Waide
JIM WAIDE