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MISSISSIPPI RULES

IN THE SUPREME COURT OF MISSISSIPPI

JAMES ERIC HARRISON — **APPELLANT**

V. — **CAUSE NO. 2009-CA-01851**

MACK WALKER, STAN VARNER, AND TYSON BREEDERS, INC. — **APPELLEES**

I.

SUMMARY OF THE REPLY

The Appellant, James Eric Harrison, rests on the arguments submitted to this Court in his *Brief of Appellant*, filed on June 30, 2010, as sufficient counterargument to the Appellees' *Brief of Appellees-Cross Appellants*, with the following specific rebuttals.

First, Tyson is incorrect in its argument that its evidence of Harrison's bad character as a farmer did not violate Rule 404 of the Mississippi Rules of Evidence. The bar against character evidence does not yield to convenience, and the fact that Tyson developed its theory of defense based around character evidence does not absolve its violation of Rule 404.

Second, Tyson is incorrect in its suggestion that an improperly adduced photograph should not require reversal when it could have been introduced for a more limited and benign purpose. In the case at bar, Tyson introduced a photograph of Harrison's farm and described it as an accurate depiction thereof at both a time relevant to the dispute and an earlier, irrelevant time. If Tyson had not gone so far as to use this photograph as evidence of prior bad acts, then Rule 404 would not have been violated. However, because Tyson used the photo to show previous behavior with the intent of demonstrating later conformity therewith, it violated the command of Rule 404.

Third, as a matter of cross-appeal, Tyson is incorrect in its argument that the trial court should have granted its Motion for Judgment Notwithstanding the Verdict. Harrison presented evidence that, if believed by the jury, could have supported its determination that he suffered damages amounting to a year's pay. Under the broad discretion afforded to jury determinations, that question ends the inquiry.

II.

ARGUMENT

A. THE BAR AGAINST CHARACTER EVIDENCE DOES NOT YIELD TO SIMPLE CONVENIENCE.

If the case at bar were one involving the distribution of cocaine, then the Court would not permit prosecutors to prove that the defendant previously had been convicted for drug sales if that evidence served no purpose but to suggest that the defendant acted similarly at a later date. And if this matter involved an allegation of medical malpractice, then the Court would not allow the aggrieved patient to describe previous plaintiffs' claims of negligence against the doctor if he meant only to suggest that a leopard never changes his spots.

Likewise, in the case at bar, the Appellees were not entitled to defend against Harrison's allegations – including a breach of the implied covenant of good faith and fair dealing – by attempting to demonstrate that he was a bad chicken farmer because he had been a bad chicken farmer at earlier points in time. Rule 404(a) of the Mississippi Rules of Evidence states unambiguously that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ."

Nevertheless, the Appellees repeatedly adduced evidence of Harrison's prior bad acts because, in the words of defense counsel at trial, such evidence was "extremely relevant to our

theory of the case, which is a course of conduct that went on for a long time and finally resulted in [Tyson's] decision to terminate him." R.E. at 5:246. The introduction of evidence of past farming habits to demonstrate "conformity therewith" during the period relevant to the contract at issue amounts to a plain violation of Rule 404.

On appeal, the Appellees take the position that, despite the fact that the relationship between Harrison and Tyson existed through a series of separate contracts (i.e., separate transactions), Harrison's past farming habits were "so inter-connected" with the farming habits during the contractual period relevant to his lawsuit "as to be considered part of the same transaction." Miss. R. Evid. 404(b), cmt. That argument fails for two reasons. First, Harrison's behavior during the contractual period relevant to his lawsuit was not part and parcel to his actions during previous contracts; they occurred during different contractual transactions. Second, the portion of the official comment to Rule 404(b) on which the Appellees rely relates only to criminal law. In full, the relevant portion of the comment reads:

> All of the exceptions in Rule 404(b) have been recognized and applied on numerous occasions by the Mississippi Supreme Court. *Evidence of another crime*, for instance, is admissible where the offense in the instant case and in the past offense are so inter-connected as to be considered part of the same transaction.

Miss. R. Evid. 404(b), cmt. (emphasis added). Obviously, no crime is at issue in Harrison's allegations or Tyson's theory of defense. This provision, therefore, is irrelevant to the case at bar.

Ultimately, despite its attempts to narrow the purpose of the evidence at issue, even Tyson cannot avoid the Rule 404 violation inherent to evidence of Harrison's past conduct. In its brief to this Court, Tyson writes:

> Here, evidence of Plaintiff's poor performance prior to December 2001 was not offered as "character" evidence to prove that Plaintiff was a poor farmer after December 2001. . . . Evidence of Plaintiff's long history of poor performance was offered by Tyson to show . . . its motive for terminating Plaintiff in 2002.

Brief of Appellees at 17. In other words, Tyson used evidence of Harrison's past farming habits to demonstrate that his more recent practices must have conformed therewith and, therefore, that its contract termination was not improper. Rule 404 does not allow such an effort. Because Tyson introduced such evidence nevertheless, Rule 404 stands violated.

B. THE ADMISSION OF PHOTOGRAPHS FOR THE PURPOSE OF DEPICTING HARRISON'S CONDUCT IN 1999 VIOLATED RULE 404.

In response to Harrison's contention that the introduction of undated photographs violated Rule 404, Tyson argues that the evidence was not improper because the pictures were not used for the sole purpose of addressing earlier behavior.

Tyson is incorrect. It is true that undated photographs may be admitted notwithstanding the lack of a specific origin, so long as they are "fair and accurate representations of the scene at the time" of the dispute's materialization. ***Lowery v. Illinois Cent. Gulf R.R.***, 356 So. 2d 584, 585 (Miss. 1978). However, like any other piece of evidence, they are subject to the rigors of Rule 404 of the Mississippi Rules of Evidence, and therefore, such photographs are not admissible to demonstrate that behavior during an irrelevant period of time later went repeated.

On appeal, Tyson concedes that it used photographs to demonstrate Harrison's behavior during a time prior to that addressed by the instant litigation, but it argues that the admission was not improper because it also addressed a relevant period of time. In its brief to this Court, Tyson recounts Stan Varner's testimony regarding the photographs:

> Q. [I]f you could review the pictures in front of you, tell me, do these pictures accurately depict the conditions you observed on Mr. Harrison's farm in 1999 and in 2001. I would like to know if those pictures reflect the problems you've detailed to us.
>
> . . .
>
> A. Yes.

Brief of Appellee at 22.

In other words, Tyson takes the position that an improper use of a photograph is absolved by a contemporaneous, proper use. The Rules of Evidence offer no support for such an argument. A violation is a violation.

Whatever Harrison's farming habits were in 1999, they undoubtedly did not occur during the period of time relevant to the disputed contract. Therefore, Varner's attestation that the photo depicted Harrison's farm during an earlier and irrelevant timeframe served no goal other than "the purpose of proving that [Harrison] acted in conformity therewith on a particular occasion" – namely, in 2001. Miss. R. Evid. 404(a). Indeed, by asking whether the photographs "depict[ed] the conditions [Varner] observed on Mr. Harrison's farm *in 1999 and in 2001*," defense counsel's question plainly sought to demonstrate a degree of continuity in the state of Harrison's farm between a relevant period of time and an earlier, irrelevant period of time. *Brief of Appellee* at 22.

If defense counsel had asked merely whether the photographs accurately depicted the state of Harrison's farm during a period of time relevant to the contract, then their admission would not have violated Rule 404. But because counsel for Tyson delved into an earlier and irrelevant date, the photographs amounted to evidence that is inadmissible under the Rules of Evidence.

C. HARRISON PRESENTED SUBSTANTIAL EVIDENCE THAT SUPPORTS THE JURY'S VERDICT IN HIS FAVOR.

Finally, as a matter of cross-appeal, Tyson argues that the jury's damages award should be overturned because the trial court should not have denied Tyson's motion for judgment

notwithstanding the veredict because no evidence supports the jury's conclusion. Tyson is incorrect.

When reviewing a trial court's denial of a Motion for JNOV,

> th[e] Court will consider the evidence in the light most favorable to the [non-moving party], giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [the Court is] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Steele v. Inn of Vicksburg, Inc., 697 So. 2d 373, 376 (Miss. 1997) (quoting ***Sperry-New Holland, a Div. of Sperry Corp. v. Prestage***, 617 So. 2d 248, 252 (Miss. 1993)).

In its brief to this Court, Tyson apparently concedes that Harrison presented substantial evidence of damages but takes issue with its credibility. At trial, as Tyson recounts, Harrison testified that by failing to provide written notice of his contract termination, Tyson deprived Harrison of an instrument that he could have "went straight on to an attorney with to try and salvage and tried to force them to keep birds on the farm and uphold their word that they had give me." Tr. at 496-97 (cited by *Brief of Appellee* at 28). As was the case at trial, Tyson clearly remains unconvinced by this evidence and argues that its oral notice of terminations "g[ave] [Harrison] more time to make arrangements for his future plans than he was entitled under the contract." ***Id.*** Notwithstanding its dissatisfaction with the jury's conclusion on this point, Tyson's argument is a jury argument. Fundamentally, whether a party suffered damages is a question of fact properly left to a jury. *See* ***Alldread v. Bailey***, 626 So. 2d 99, 102 (Miss. 1993). In the case at bar, the jury heard evidence (namely, Harrison's aforementioned testimony) that, if believed, would support the conclusion that the lack of written termination precluded Harrison's

pursuit of a remedy that would have saved a year's income. Therefore, under the deferential standard by which this Court views Motions for JNOV, reversal is inappropriate.

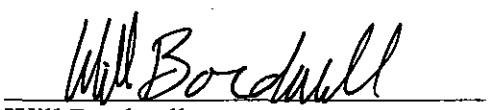
III.

CONCLUSION

The arguments raised by Tyson in its brief to the Court are without merit. First, Rule 404 of the Mississippi Rules of Evidence does not permit evidence of prior bad acts simply because a party's theory of the case revolves around such acts. Second, a photograph introduced into evidence for a purpose that violates Rule 404 is not admissible simply because it also could have been used for a more limited and proper purpose. And third, Tyson's cross-appeal has no merit because the trial court properly declined to overturn the portion of the jury's verdict in Harrison's favor.

THEREFORE, PREMISES CONSIDERED, James Eric Harrison reiterates his prayers for relief previously stated.

RESPECTFULLY SUBMITTED this THIRTEENTH day of October 2010,



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CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that I have, on this day, served true and correct copies of the foregoing *Reply Brief of Appellant and Brief of Cross-Appellee* on the following interested parties via United States Postal Service mail, postage prepaid:

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