IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ORANGE SPRINGS SPECIALTY WATER AND BEVERAGE COMPANY, LLC,

Appellant,

v. Case No. 5D18-2014

LARRY DELK,

Appellee.

_____/

Opinion filed May 3, 2019

Appeal from the Circuit Court
for Marion County,
Edward L. Scott, Judge.

William P. Cassidy, Jr., and Christopher L. Decort, of Johnson & Cassidy, P.A., Tampa, for Appellant.

Henry G. Ferro, of Ferro and Gourley, P.A., Ocala, for Appellee.

EDWARDS, J.

Appellant, Orange Springs Specialty Water and Beverage Co., LLC, asserts that the trial court erred in amending the jury's original verdict to reflect what the judge believed to be the verdict the jury had intended to return. We agree that the judge erred in relying upon an informal, post-discharge, ex parte, off-the-record conversation with some of the

jurors as a basis for altering the monetary outcome of this trial by setting aside the jury's unanimous verdict, entering an amended verdict, and basing the final judgment on the amended, rather than the original, verdict. We reverse the final judgment and remand with instructions to vacate the amended verdict, reinstate the jury's original verdict, and enter final judgment consistent with the original verdict.

The parties chose not to hire a court reporter, so there is no trial transcript. Furthermore, the parties chose not to prepare a statement of evidence and proceedings as permitted by Florida Rule of Appellate Procedure 9.200(b)(5). Our review is further hampered because there is very little that the parties agreed about in their briefs or during oral argument regarding details of what happened below to lead to this unusual circumstance.

Delk had been the general manager for an Orange Springs water-bottling facility. He sued claiming that Orange Springs had breached their employment agreement by prematurely discharging him, failing to pay bonuses he earned, and failing to transfer any ownership interest in the company to him. Orange Springs answered and counterclaimed, asserting that Delk breached the company's operating agreement. During the four-day trial, witnesses testified and exhibits were presented.

The jury received the following instructions on damages:

> a. Compensatory damages:
>
> > Compensatory damages is that amount of money which will put LARRY DELK in as good a position as he would have been if ORANGE SPRINGS SPECIALTY WATER AND BEVERAGE, LL.C., had not breached the contract and which naturally result from the breach.

> 504.9 Mitigation of Damages
>
> If ORANGE SPRINGS SPECIALTY WATER AND BEVERAGE, LL.C., breached the contract and the breach caused damages, LARRY DELK is not entitled to recover for those damages which ORANGE SPRINGS SPECIALTY WATER AND BEVERAGE, LL.C., proves LARRY DELK could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of LARRY DELK'S efforts in light of the circumstances facing him at the time, including his ability to make the efforts or expenditures without undue risk, burden or humiliation.

During deliberations the jury sent out a note asking:

> Are we responsible for determining whether [Mr. Delk] owns 5% or 10% of the company?
>
> And if so are we responsible for assigning a monetary amount to that percentage? And if so, will this amount be included in the damages?
>
> Can we have the salary projection table [Mr. Delk's counsel] presented?

In response, the jury was told to rely on its memory regarding any salary projections. As a result of the jury's question, the attorneys realized that the verdict form they agreed to use did not provide the jury with the opportunity to return a verdict related to ownership issues. While the attorneys were attempting to create an amended verdict form, the jury continued deliberating and then announced that it had reached a verdict.

By its verdict, the jury found that Orange Springs had breached the employment contract, resulting in $181,106.44 in damages suffered by Delk. The verdict also stated that Delk had mitigated his damages in the amount of $313,399. Finally, the jury found that Delk had not breached the company's operating agreement, and that Orange Springs

had suffered no damages. The jury's verdict was read in open court and the jurors confirmed through polling that it was a unanimous verdict. While there may have been some discussion between counsel and the court about the jury's verdict, there is no record and there is no agreement about the who, what, or when of any concern about possible inconsistencies in the jury's verdict, requests for further deliberations, or objections.

The jury was apparently discharged and returned to the jury room to gather their possessions, while the lawyers left the courthouse and headed for the parking lot. During this time, the judge went back to the jury room to thank the jurors for their service and to provide them with certificates. The parties generally agree that the judge called the attorneys back to the courtroom whereupon he informed them that the jury foreman asked how much money Delk would receive. Supposedly, when the judge advised them that Delk would get nothing because the verdict's mitigation figure was larger than the compensatory damages figure, one or more of the jurors told the judge that they were confused as they had intended for Delk to be compensated for the breach of contract. None of the jurors were formally interviewed and none testified about this off-the-record, informal, ex parte conversation with the judge. The judge advised counsel to submit briefs addressing this situation; both sides filed briefs, motions, and responses.

Ultimately, the trial court issued an "order correcting and amending the verdict form." The order stated that there was "no dispute that the jury found in favor of [Delk] on his Breach of Contract claim and against [Orange Springs] on its breach of contract counter claim." The order continued by stating that the "jurors advised the court that, it was [their] intent to award [Mr. Delk] $181,106.44, as filled out on the verdict form and

that they were confused by the verdict as to how to enter the mitigation of damages." The order stated that the verdict form was "confusing as it did not provide a space for the jury to indicate the difference of the actual damages and minus [Mr. Delk's] mitigation." The trial court granted Delk's motion to amend the "verdict form," and entered final judgment in the amount of $181,106.44 in favor of Delk and against Orange Springs.

A trial court's decision to correct a verdict so that it conforms with the apparent intent of the jury is reviewed for an abuse of discretion. *Cory v. Greyhound Lines, Inc.*, 257 So. 2d 36, 41 (Fla. 1971). Generally, if the jury's intent is clear, a trial court has the discretion to amend a verdict to conform to the jury's apparent intent. For example, where "the jury incorrectly apportions damages or transposes the amounts in a consolidated case, the trial court should correct the verdict if the jury's intent is clear." *Balsera v. A.B.D.M. & P. Corp.*, 511 So. 2d 679, 681 (Fla. 3d DCA 1987); *see also Cory*, 257 So. 2d at 41 ("Even after the reception of a verdict, a party may move the Court to mould or amend it so as to make it conform with the jury's apparent, but unexpressed, intention.").

If it appears that jurors have "misunderstood the effect of their verdict," the judge should notify counsel and "entertain[] a motion to interview jurors." *Fitzell v. Rama Indus., Inc.*, 416 So. 2d 1246, 1248 (Fla. 4th DCA 1982). If the juror interviews lead the trial court to determine "that the jury 'incorrectly apportioned damages, erroneously transposed the amounts in consolidated action, or made other clerical errors in rendering the verdict,'" it may correct the verdict to conform to the jury's intent. *Cont'l Assurance Co. v. Davis*, 538 So. 2d 542, 544 (Fla. 1st DCA 1989) (quoting *Cory*, 257 So. 2d at 40). If, on the other hand, the verdict is "'the result of misconceptions of the jury as to the facts and law

involved, or confusion, and [does] not reflect the true intent of the jury,' then the court cannot correct the verdict." *Id.*; *Latner v. Preusler & Assocs., Inc.*, 11 So. 3d 388, 392 (Fla. 5th DCA 2009) (Monaco, J., concurring) ("[I]f confusion is apparent and the verdict does not appear to reflect the true intention of the jury, then a court cannot correct the verdict.").

Here, nothing in the verdict itself suggests that the jury had any alternative intent. Nor was the jury formally interviewed. Instead, the "different intent" was derived solely from the judge's posttrial, informal, ex parte, off-the-record conversation with some of the jurors. However, post-discharge "conferences may not be used to delve into the factual basis for the jury's decision or to . . . cause the jury to alter its verdict." *Fitzell*, 416 So. 2d at 1247. In *Kirkland v. Robbins*, the trial judge expressed doubts about whether sufficient evidence supported one aspect of the damages awarded to plaintiff in the verdict, and he indicated that he was strongly considering the defendant's motion for remittitur or new trial. 385 So. 2d 694, 696 (Fla. 5th DCA 1980). In *Kirkland*, the trial court denied a motion to formally interview the jurors. *Id.* However, the judge then informally interviewed all jurors once, following which he spoke for a second time to the foreperson and another juror. *Id.* Based on the information supposedly learned during these informal conversations with the jurors, the trial court by letter advised the parties that he had decided to deny the motions for remittitur and new trial. *Id.* This Court held that a trial judge has no authority at all to conduct post-discharge, informal, ex parte, off-the-record interviews of jurors nor can he rely upon information thus gathered as a factual basis for deciding a motion for remittitur or for new trial. *Id.*

Accordingly, we reverse the final judgment and remand with instructions to vacate the amended verdict, reinstate the jury's original verdict, and enter final judgment consistent with the original verdict.

REVERSED, REMANDED WITH INSTRUCTIONS.

BERGER and HARRIS, JJ., concur.