

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 1999-CA-01896-COA**

BOBBIE IRWIN BAINÉ

APPELLANT

v.

**RIVER OAKS CONVALESCENT CENTER AND GINGER CAMIRE
MITCHELL**

APPELLEES

DATE OF JUDGMENT: 09/03/1999
TRIAL JUDGE: HON. JOHN L. HATCHER
COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: NANCY ALLEN WEGENER
ATTORNEY FOR APPELLEE: JOE D. PEGRAM
NATURE OF THE CASE: CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION: JURY VERDICT FOR DEFENDANT IN ACTION FOR
WRONGFUL TERMINATION OF EMPLOYMENT
DISPOSITION: AFFIRMED - 03/27/2001
MOTION FOR REHEARING FILED: 4/10/2001; denied 5/29/2001
CERTIORARI FILED: 6/8/2001; denied 8/9/2001
MANDATE ISSUED:

BEFORE SOUTHWICK, P.J., LEE, AND THOMAS, JJ.

LEE, J., FOR THE COURT:

¶1. Bobbie Irwin Baine filed a complaint against River Oaks Convalescent Center and Ginger Camire Mitchell in the Circuit Court of Coahoma County for breach of contract, intentional infliction of emotional distress, and defamation after she was terminated from her position at River Oaks Convalescent Center. The jury returned a verdict in favor of River Oaks and Mitchell. Baine now appeals and raises the following issues:

I. WHETHER THE CIRCUIT COURT COMMITTED ERROR WHEN IT EXCLUDED EVIDENCE OF MITCHELL'S 1997 EMBEZZLEMENT CONVICTION.

II. WHETHER THE CIRCUIT COURT COMMITTED ERROR WHEN IT EXCLUDED EVIDENCE OF MITCHELL'S 1981 CONVICTION OF BREACH OF FIDUCIARY TRUST AND EMBEZZLEMENT.

III. WHETHER THE CIRCUIT COURT COMMITTED ERROR WHEN IT EXCLUDED THE TESTIMONY OF NANCY BOOK CONCERNING STATEMENTS MADE BY MITCHELL.

Finding no error, we affirm.

FACTS

¶2. In December of 1995, Bobbie Baine was terminated from her position as dietary manager at River Oaks Convalescent Center. Based on her termination, Baine subsequently filed a complaint against River Oaks and her supervisor, Ginger Camire Mitchell, for breach of contract, intentional infliction of emotional distress, and defamation.

¶3. During trial, River Oaks and Mitchell contended that Baine had been fired for stealing food and mismanaging the kitchen which resulted in River Oaks being three to four thousand dollars over budget each month. River Oaks and Mitchell established this contention through the testimony of several employees at River Oaks, as well as the owner and the administrator. The employees testified that Baine had been observed stealing food from the kitchen. The theft was reported to Baine's supervisor, Mitchell, who then reported the theft to River Oak's administrator. Mitchell then fired Baine after being instructed to do so by the administrator.

¶4. River Oaks and Mitchell made an *ore tenus* motion *in limine* to exclude evidence of Mitchell's two prior convictions of embezzlement if Mitchell were called as a witness by Baine based on the theory that a witness cannot be impeached by the party calling the witness. During a pre-trial hearing, this motion was granted by the judge. The trial judge also excluded testimony of a witness, Nancy Book, concerning statements made by Mitchell about excessive personal expenditures made by the owner of River Oaks.

¶5. By a nine to three vote, the jury returned a verdict in favor of River Oaks and Ginger Mitchell.

LAW AND ANALYSIS

I. WHETHER THE CIRCUIT COURT COMMITTED ERROR WHEN IT EXCLUDED EVIDENCE OF MITCHELL'S 1997 EMBEZZLEMENT CONVICTION.

¶6. Baine argues that the trial court committed error when it granted River Oaks's and Mitchell's motion *in limine* to prevent her from introducing evidence of Mitchell's prior convictions when called as an adverse witness. The trial court granted the motion under the misapprehension that a party cannot impeach its own adverse witness. Under M. R. E. 607, "the credibility of a witness may be attacked by any party, including the party calling him." M. R. E. 609 (a) states,

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment.

Also, it is prejudicial to allow a party to make a tactical decision to decline to call a witness and then subsequently refuse to allow the opposing party to call the witness adversely and pursue his or her theory. *Hall v. State*, 546 So. 2d 673, 676 (Miss. 1989). However, under M. R. E. 103, the judge has considerable discretion when determining the relevancy of proffered evidence. As stated in *Peterson v. State*, 671 So. 2d 647, 658 (Miss. 1996), "[t]he relevancy and admissibility of evidence is largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." Furthermore, "a party must do more than simply show some technical error has occurred before he will be entitled to a reversal on the exclusion or admission of evidence; there must be some showing of prejudice."

Pham v. State, 716 So. 2d 1100, 1101 (Miss. 1998).

¶7. Here, the trial court did err in not allowing Baine to use Mitchell's 1997 conviction as evidence for impeachment purposes. The 1997 conviction directly fits the definition of a crime that may be used for impeachment purposes found in M. R. E. 609. Furthermore, embezzlement is listed in the comments to the Mississippi Rules of Evidence as one of the crimes involving dishonesty. Despite the fact that the judge erred in excluding the evidence of Mitchell's 1997 conviction, the error was harmless. River Oaks and Mitchell introduced ample evidence to show that Baine was fired for stealing food and mismanaging the kitchen. Mitchell's testimony could only have reiterated the testimony of the witness who observed and reported Baine's theft to Mitchell and the testimony of the administrator who instructed Mitchell to fire Baine. The error was harmless and does not warrant reversal.

II. WHETHER THE CIRCUIT COURT COMMITTED ERROR WHEN IT EXCLUDED EVIDENCE OF MITCHELL'S 1981 CONVICTION OF BREACH OF FIDUCIARY TRUST AND EMBEZZLEMENT.

¶8. Baine argues that Mitchell's 1981 conviction could have been admitted under the trial judge's discretion. The decision of a trial judge to admit or exclude evidence is reviewed under abuse of discretion. *Rushing v. Rushing*, 724 So. 2d 911, 914 (Miss. 1998). M. R. E. 609 (b) states,

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. . . .

The comments to M. R. E. 609 (b) reflect that the rationale for this rule is based on fairness, "A person's past should not be able to haunt him for the duration of his life." The comments go on to state that where the probative value of the conviction substantially outweighs the prejudice, the judge *may* allow evidence of a conviction over ten years in age.

¶9. It was well within the trial court's discretion to exclude Mitchell's 1981 conviction due to the time limitation under M. R. E. 609 (b). We find no merit in this assignment of error.

III. WHETHER THE CIRCUIT COURT COMMITTED ERROR WHEN IT EXCLUDED THE TESTIMONY OF NANCY BOOK CONCERNING STATEMENTS MADE BY MITCHELL.

¶10. Baine asserts that the trial court erred in excluding the testimony of Nancy Book, an employee of River Oaks, about statements made by Mitchell concerning the owner of River Oaks money spending habits. Book testified outside the presence of the jury that Mitchell told her that River Oaks was over budget due to the owner spending the Center's money for personal reasons. Baine argues that this testimony falls under the definition of non-hearsay in M. R. E. 801 (d) (2) which states,

[If] the statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment,

made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The Mississippi Rules of Evidence clearly reflect that an admission by a party-opponent, by definition, is not hearsay.

¶11. Under this definition of what is not hearsay, it is clear that Book should have been permitted to testify about the statements made by Mitchell concerning River Oaks owner's spending of the Center's money. However, this error is harmless in light of the bulk of evidence presented which established credible reasons for Baine to be terminated. This assignment of error is also without merit.

¶12. THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

**McMILLIN, C.J., SOUTHWICK, P.J., THOMAS AND MYERS, JJ., CONCUR.
CHANDLER, J., DISSENTS WITH A SEPARATE WRITTEN OPINION JOINED BY
KING, P.J., PAYNE, BRIDGES AND IRVING, JJ.**

CHANDLER, J., DISSENTING:

¶13. The majority finds that the trial judge erred in ruling that Baine could not call defendant Mitchell and impeach her with evidence of her 1997 conviction for embezzlement. The majority also finds that the trial judge erred in refusing to allow testimony of the River Oak's bookkeeper linking the budgetary problems of the corporation to the sole shareholder of River Oaks rather than Baine. Despite the omission of this highly probative evidence that the majority agrees is admissible, the majority views the judge's errors as harmless. I respectfully dissent.

¶14. But for these two errors, the jury in this case might have reached a different verdict. *Kaiser Investments, Inc. v. Linn Agriprises, Inc.*, 538 So. 2d 409, 417 (Miss. 1989). For that reason, I believe we should reverse the lower court decision and afford a jury an opportunity to render a verdict after hearing all of the evidence with probative value in this case.

¶15. "Exclusion of evidence of probative value constitutes reversible error where the substantial rights of the appellant are prejudiced." *Id.*; *See Transcontinental Gas v. State Oil & Gas Board*, 457 So. 2d 1298 (Miss. 1984); *Planters Bank v. Garrott*, 122 So. 2d 256 (Miss. 1960). The Supreme Court reversed a lower court ruling in *Kaiser*, stating that evidence which was omitted was highly probative and "a different verdict *might* have been reached had the jury" heard that evidence. *Kaiser*, 538 So. 2d at 417 (emphasis added).

¶16. It is not this Court's function to second guess the jury and speculate as to what evidence would cause a jury to arrive at a different verdict. Our duty is to assure that the jury has all of the facts before it, prior to rendering its verdict. A party has a right to present all competent evidence to the jury that might cause the jury to arrive at a different verdict. In this case, however, the most compelling evidence supporting Baine's theory was erroneously kept from the jury.

¶17. Mitchell, who is a defendant in this case, was the acting administrator of River Oaks. Mitchell was the person who fired Baine. Baine is a certified dietitian and was in charge of the kitchen at River Oaks. Mitchell, allegedly, fired Baine for stealing. Mitchell's credibility was crucial, if the jury were to return a

verdict for the defendants. Despite the fact that Mitchell was under house arrest at the time of trial for embezzlement, Baine was not allowed to use evidence of Mitchell's conviction to impeach her.

¶18. River Oaks used the fact that the kitchen was over budget to support its allegation that Baine was stealing from the corporation. Even though Mitchell had admitted to River Oak's bookkeeper that the sole share holder of River Oaks was the culprit who was misappropriating corporate assets and causing the kitchen to go over budget, that evidence was also kept from the jury. The jury, by a vote of nine to three, returned a verdict for the defendants.

¶19. The majority relies on *Pham* for the proposition that a case may be reversed only when the omitted evidence adversely affects a substantial right of a party. *Pham v. State*, 716 So.2d 1100, 1102 (Miss. 1998), (quoting *Terrain Enter Inc. v. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995)). The majority, then, concludes that the omitted evidence in this case did not affect Baine's substantial rights. I reach a different conclusion.

¶20. Had the jury known of Mitchell's prior conviction for embezzlement, and had the jury been aware of the evidence linking the River Oaks's sole shareholder to the budgetary problems, the jury would have certainly viewed the credibility of these key players in a totally different light. If this highly probative evidence had been available to the jury, the nine to three verdict might have been different.

¶21. Omitting this compelling evidence caused substantial harm to Baine. I believe Baine is entitled to a decision by a jury who has heard all of the highly probative evidence in this case.

KING, P.J., PAYNE, BRIDGES, AND IRVING, JJ., JOIN THIS SEPARATE WRITTEN OPINION.