

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of December, 2008.*

Shane Schmidt, et al., Appellants,

against Record No. 072556  
Circuit Court No. CL-2006-0009565

Triple Canopy, Inc., Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is error in the judgment of the trial court.

Shane Schmidt and Charles L. Sheppard, III ("Schmidt and Sheppard") filed suit against Triple Canopy, Inc. claiming they were wrongfully terminated for reporting the alleged criminal activity of their supervisor. Specifically, Schmidt and Sheppard maintained that their termination was wrongful because it violated Virginia's public policy underlying Code § 18.2-462. They asserted that if they had concealed this alleged criminal activity, they would have committed a criminal offense themselves.

After a seven-day jury trial, a verdict was returned in favor of Triple Canopy. The trial court had given instructions S and 9 to the jury, over Schmidt's and Sheppard's objections. Instruction S read:

Plaintiffs must prove by the greater weight of the evidence that Triple Canopy fired

Plaintiffs just because they reported Jacob Washbourne's alleged misconduct.

Plaintiffs were "at-will" employees of Triple Canopy. As at-will employees, Plaintiffs were free to leave their employment with Triple Canopy for any reason or no reason at all. Likewise, Triple Canopy was free to terminate Plaintiffs' employment for any reason or no reason at all.

Virginia law recognizes only a narrow exception to the at-will employment doctrine and Plaintiffs must prove that they fall within this narrow exception to prevail on their retaliatory discharge claim. If Triple Canopy had any reason to fire Plaintiffs - other than for reporting Jacob Washbourne's alleged misconduct - you must find for Triple Canopy.

Instruction 9 read:

Plaintiffs allege that Triple Canopy Inc. wrongfully terminated their employment, in violation of public policy.

Triple Canopy claims that Plaintiffs were fired for failing to timely report their supervisor's misconduct and because it doubted the honesty and integrity of Plaintiffs.

It is a violation of public policy to fire an employee for refusing to engage in criminal conduct. It is not a violation of public policy, and therefore is not illegal, to fire an employee for other reasons.

If you find by a preponderance of the evidence that Plaintiffs were fired because they refused to engage in criminal conduct, then you should return a verdict in favor of Plaintiffs. If, however, you find that Triple Canopy fired Plaintiffs for reasons other than a refusal to engage in criminal conduct, even if you believe Triple Canopy made the wrong decision, you shall find for Triple Canopy.

We awarded Schmidt and Sheppard an appeal on the following assignment of error: "The trial court erred in instructing the jury contrary to this Court's holding in Shaw v. Titan Corporation, failing to state public policy violated by the wrongful termination, and erred in denying plaintiffs' post-trial motion, ignoring the note the jury returned with the verdict stating that it was compelled to rule in favor of the defendant because of the trial court's instructions."

This court's "'sole responsibility in reviewing [jury instructions] is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.'" Molina v. Commonwealth, 272 Va. 666, 671, 636 S.E.2d 470, 473 (2006) (quoting Swisher v. Swisher, 223 Va. 499, 503, 290 S.E.2d 856, 858 (1982)).

In wrongful termination cases, we have held that "[a] plaintiff is not required to prove that the employer's improper motive was the sole cause of the wrongful termination." Shaw v. Titan Corporation, 255 Va. 535, 543, 498 S.E.2d 700 (1998). However, in this case the trial court gave Instruction S, which stated that the plaintiffs had to prove they were fired "just because" they reported their supervisor's actions. In addition, Instruction S instructed the jury that they must find for Triple Canopy if Triple Canopy "had any reason to fire Plaintiffs -- other than for reporting [their supervisor's] alleged misconduct." These two provisions in Instruction S misstated the law to the jury.

While Instruction S misstated the law, Instruction 9 correctly stated the law. Instruction 9 stated that if Triple Canopy fired Schmidt and Sheppard for failing to engage in criminal conduct then the jury should find for the plaintiffs, but if Triple Canopy fired the plaintiffs for reasons other than failing to engage in criminal

conduct, then the jury should find for Triple Canopy. The language in Instruction 9, like that of the instruction given in Shaw, "fully and fairly stated the common law of Virginia." Shaw, 255 Va. at 542, 498 S.E.2d at 699.

We have held that a "positive wrong in one instruction is not cured by a correct statement of law in another." Gary v. Artist, 186 Va. 616, 625, 43 S.E.2d 833, 837 (1947). Instruction S misstates the law; however, Instruction 9 cannot cure the error in Instruction S.

When there are two conflicting instructions, "the jury will be as likely to follow the bad as the good, and it cannot be known which they have followed." Heinz Company v. Shafer, Inc., 188 Va. 320, 334, 49 S.E.2d 298, 304 (1948); see also Tolston, 200 Va. at 183, 104 S.E.2d at 757; Redd v. Ingram, 207 Va. 939, 942, 154 S.E.2d 149, 152 (1967). For this reason, "the giving of such conflicting and inconsistent instructions is error, unless it plainly appears from the record that the jury could not have been misled by them." Gabbard v. Knight, 202 Va. 40, 47, 116 S.E.2d 73, 78 (1960). We find nothing in the record that plainly indicates the jury could not have been misled by the instructions.

The judgment of the Circuit Court of Fairfax County is therefore reversed and this matter is remanded for a new trial.

This order shall be certified to the said circuit court.

A Copy,

Teste:

*original order signed by the  
Clerk of the Supreme Court of  
Virginia at the direction of the  
Court*