

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-26-00789

Roger D. Herrington II Respondent,

v.

Roger Dale Herrington and Eunice M. Herrington Petitioners,

RETURN IN OPPOSITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for the Respondent certifies that the Petition for Rehearing was made and then ruled on by the South Carolina Court of Appeals on October 5, 2022.

QUESTIONS PRESENTED

I – WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT LACHES DID NOT BAR RESPONDENT’S CLAIMS?

II – WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT PETITIONERS’ ISSUES REGARDING LAY WITNESS’ TESTIMONY ON VALUE WAS NOT PRESERVED FOR APPELLANT REVIEW?

STATEMENT OF THE CASE

Roger Dale Herrington ("Petitioner Dale") and his wife, Eunice Herrington ("Petitioner Eunice") had a business in 1995 called Dale Herrington Septic Tank and Land Clearing. (T. pp. 57-58; Respondent's Exhibit #1). Their son, Roger Dale Herrington, II ("Respondent") also had a septic tank business called A.A.A. Septic and Land Clearing. (T. p. 59; Respondent's Exhibit #2). The father, mother and son, in late 1995 entered into a verbal agreement to combine their businesses. (T. p. 56, lines 8-12; T. pp. 60-63; Respondent's Exhibit #3).

The new business was called Herrington's Septic Tank and Cleanup ("business"). Respondent was to work side by side with Petitioner Dale in the field and was to be paid five hundred (\$500.00) dollars per week. (T. pp. 59-60). Petitioner Eunice was to run the office for the business. (T. p. 61, lines 2-10). All of the profits from the business made were to go to Petitioners. (T. p. 66, line 4-17). Respondent was to work in the business for ten (10) years and then the ownership of the business was to be turned over to him. (T. p. 61, lines 2-13). He was then supposed to pay Petitioner Dale and Petitioner Eunice five hundred (\$500.00) dollars per week for the rest of their lives. (T. pp. 64-66).

Petitioner Dale became disabled as a result of a car accident in 1999 and Respondent had to do all of the work for the business. (T. pp. 65-69). Petitioner Dale

was paralyzed from the neck down. (T. p. 69, line 14-p. 70, lines 1-19). Respondent's income was increased to eight hundred (\$800.00) dollars per week due to Petitioner Dale's inability to help with the work. (T. p. 69, lines 1-4; T. p. 70). In 2006 the business was not turned over because Petitioner Eunice asked Respondent to wait a few years and leave the business as it was until she could get her Social Security resolved. (T. p. 68, line 21-p. 71). Respondent considered the business to be his then until Petitioner Dale and Petitioner Eunice sold it to another son, John Keith Herrington (T. p. 74, lines 10-24; p. 131, lines 23-24; p. 186, lines 13-14).

Respondent became concerned when Petitioner Dale and Petitioner Eunice started using funds from the business to buy a mobile home and set it up for their pregnant granddaughter. Respondent, at that time was no longer receiving a check from the business. (T. p. 73, line 1-9; p. 73, lines 1-9; p. 127). When Respondent questioned Petitioner Dale about it he claimed Respondent was fired. (T. p. 128). Petitioner Dale and Petitioner Eunice denied that there was an agreement between the parties. (Amended Answer p. 1, ¶4; T. p. 42). They claimed Respondent had emotional and rage issues which resulted in his firing. (T. pp. 120-123). The existence of an agreement between the parties was corroborated by persons who had grave dislikes for the Respondent and nothing to gain from the trial, his ex-wife and ex-girlfriend. (T. pp. 34-39; pp. 42-44; pp. 47-50). Both testified, each at different times that they heard Petitioner Dale, Petitioner Eunice and Respondent discuss the agreement; its terms of

ten (10) years and the business would be turned over to Respondent. (T. p. 36 line 3-p. 39, lines 1-15; T. pp. 49-54).

A jury trial began on November 18, 2019 and the jury returned a verdict for Respondent on November 20, 2019 in the amount of One Hundred Seventy Thousand & Five (170,005.00) Dollars (T. p. 245, lines 3-20).

On appeal the Petitioners submitted the following issues for the Court of Appeals for consideration: (1) the trial court should not have submitted these claims to the jury because they were equitable causes of action; (2) the doctrine of Laches barred the claims; (3) the evidence did not support the jury's findings; and (4) the trial court allowed improper lay witness testimony. The Court of Appeals affirmed the decision of the trial court. The Court of Appeals denied the Plaintiff's Petition for a rehearing filed on July 20, 2022. This writ of certiorari was filed regarding two of the aforesaid issues.

ARGUMENT I – WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT LACHES DID NOT BAR RESPONDENT'S CLAIMS?

The Court of Appeals was correct in holding that Respondent's claims were not barred by Laches. First, the court held "The Appellate Court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by error of law, *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). The court considered the elements of Laches as enumerated in *Hallums v. Hallums*, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988) as

delay, unreasonable delay and prejudice. Petitioners claimed they were prejudiced by the death of a witness, Archie Mack. Mr. Mack's testimony would have been about what Petitioners view as Respondent's rage. Additionally, Keith Herrington and Samuel Scott were present with Mr. Mack and testified at the trial on this same issue. Given the fact that the only facts the decedent, Mr. Mack, was to testify about, came from two other witness' testimony, the Petitioners were not prejudiced by the death of Mr. Mack. (T. p. 189, lines 17-25).

The Court of Appeals considered the reasons for the delay in Respondent's testimony. The Court pointed out, "Respondent testified that although he and the Petitioners agreed the Petitioners would turn the family business over to him after he worked for the business for a ten year period, at the end of this period, he agreed to allow Petitioner Eunice, his mother, to keep the business in her name. Thereafter, he worked for the business for another six years under the assumption he was the owner. Respondent stated Petitioner Dale, Respondent's father, fired him in 2013, and Petitioner Dale sold the business to Respondent's brother in 2015."

ARGUMENT II – WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT PETITIONERS' ISSUES REGARDING LAY WITNESS' TESTIMONY ON VALUE WAS NOT PRESERVED FOR APPELLANT REVIEW?

Respondent submitted a list of equipment acquired by the business during the 15 years he worked for the business. The Respondent was the owner of this equipment as

owner of the business. It should be noted that the equipment was acquired at different times; Respondent worked with it, had repairs done to it and was familiar with their general values, therefore his view of the values were rationally based on his perception. Lay people can give testimony as to the value of property owned by them. SCRCRCP Rule 701. (R. p. 273).

Appellants claim that the list was the measure of damages used by the jury for its damages award. This is pure speculation on Petitioners' part. They miss two things with that assertion. First, the list of equipment's total value was more than Two Hundred Fifty Thousand (\$250,000.00) Dollars and the Petitioners were offered Two Hundred Fifty Thousand (\$250,000.0) Dollars for the business. (R. p. 094, lines 18-24; p. 095, lines 19-21). The Court of Appeals was correct in ruling that the Petitioners' issue regarding improper testimony was not preserved for Appellate review. It reasoned that the Petitioners objected to the testimony on hearsay grounds at trial and on appeal the Appellate issue was improper testimony. On appeal the Petitioners argued that these two issues were the same. However, the court ruled that these were two separate issues. The Court correctly decided that the Petitioners "posited" the issues as the same. The record is clear that the Trial Court never had the issue of improper lay witness testimony before it. The Court of Appeals Ruled based on *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344,479 S.E.2d 67, 75 (Ct. App. 1996) held that "the same ground argued on appeal must have been argued to the Trial Court."

CONCLUSION

The writ of certiorari in this case should be denied and the decisions of The Trial Court and Court of Appeals be allowed to stand. The Court of Appeals correctly decided these two causes based on the applicable law.

In addition, the writ of the Petitioners' addresses not one of the following considerations governing the review, usually used by this court in granting a writ of certiorari:

1. Where there are novel questions of law.
2. Where there is a dissent in the decision of the Court of Appeals.
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. Where substantial constitutional issues are directly involved.
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

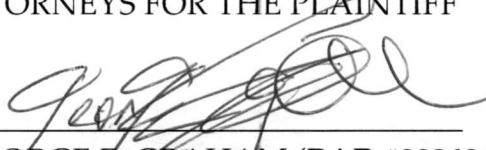
Therefore, the writ should be denied.

Respectfully submitted,

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November 30, 2022

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PROOF OF SERVICE

I certify that on November 30, 2022, I served the Respondent's Motion For Cost on the Appellants, through their attorney of record, by depositing a copy of same in the United States Mail, postage prepaid to:

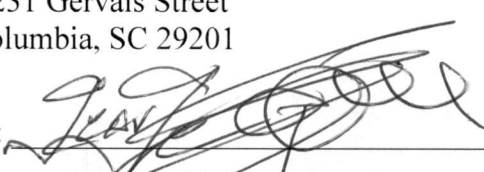
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