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Feb 08 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2021-001137

Jennings-Dill, Inc.,

Respondent,

v.

Eric Israel,

Appellant.

**PETITION FOR REHEARING
BY APPELLANT ERIC ISRAEL**

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TABLE OF AUTHORITIES

Cases

G. G. v. Gloucester Cty. Sch. Bd.,
822 F.3d 709, 725 (4th Cir. 2016),2

Hampton v. Haley,
403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013)3

Mailsource v. M. A. Bailey & Assocs.,
356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003).....1

Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.,
387 S.C. 583, 694 S.E.2d 15 (2010)3

Rules

Rule 221(a), SCACR1

Comes now Appellant, above named, by and through the undersigned counsel and pursuant to Rule 221(a), SCACR, and hereby respectfully petitions this Court to rehear this matter for the reasons stated herein.

- I. The Court of Appeals misapprehended Israel's argument as to likelihood of success on the merits by not fully addressing and misapprehending Israel's argument that no evidence was presented that Israel ever possessed or misappropriated any trade secret or confidential information.

The Court of Appeals misapprehended Israel's argument that no evidence exists to support that Israel used or misappropriated any trade secret. While the court correctly recognized that all of the claims relied on by Jennings-Dill, Inc.'s ("JDI") to seek a preliminary injunction relied on the allegations that "that Israel possessed or misappropriated a trade secret or other confidential information that belonged to JDI and subsequently used that information to solicit JDI employees to work for PSI," the Court of Appeals misapprehended Israel's argument that no evidence existed to support this critical nexus of JDI's claims. This misapprehension is compounded by the Court of Appeals not finding error in the circuit court's reliance on speculative and hearsay in affidavits over competent direct evidence.

When deciding whether to issue a preliminary injunction, "the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a *prima facie* showing has been made." *Mailsource v. M. A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003). Here, a *prima facie* case cannot be made and there is no evidence that (1) Israel possessed or misappropriated a trade secret or other confidential information that belonged to JDI or (2) Israel used the same to solicit any employee. No evidence exists in the records to support either of these necessary findings. While the Court of Appeals points to evidence that Israel "accessed" JDI's confidential information on June 24, 2021, the Court of Appeals never

addressed that this access was on JDI's company iPad, and no evidence exists that the information was ever used by Israel or left the iPad, which was returned to JDI the following day.

- II. The Court of Appeals did not address and misapprehended Israel's argument that the circuit court erred by relying solely on hearsay and speculative evidence and did not address that the circuit court accepted speculative and hearsay evidence over competent direct evidence.

The Court of Appeals failed to address Israel's argument that the circuit court relied *exclusively* on hearsay and speculative evidence. While the Court of Appeals properly recognized that South Carolina courts have not specifically addressed the reliance on hearsay when considering a preliminary injunction, the Court of Appeals failed to address that the circuit court in this case relied exclusively on hearsay and speculation that Israel (1) possessed or misappropriated a trade secret or other confidential information that belonged to JDI or (2) Israel used the same to solicit any employee.

Furthermore, the Court of Appeals failed to address Israel's argument that the circuit court erred relying on hearsay and speculative evidence over competent direct evidence. Israel argued that Jennings-Dill did not submit *any* direct evidence of solicitation or misappropriation by Mr. Israel. Israel further argued that the circuit court improperly weighed and accepted the hearsay and speculative evidence over the direct evidence he submitted in the form of two affidavits. Indeed, the case cited by the Court of Appeals, *G. G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016) for the proposition that hearsay is admissible to support a preliminary injunction, also held that "the nature of evidence as hearsay goes to 'weight, not preclusion.'" Yet, the Court of Appeals did not address Israel's argument that the Circuit Court improperly weighed hearsay and speculative statements over direct evidence. Furthermore, the Court of Appeals did not address JDI's extensive use of hearsay within hearsay or the cumulative effect of its exclusive reliance on hearsay and speculation.

The Court of Appeals misapprehended Israel’s argument that the circuit court erred by relying on pure speculation to issue a preliminary injunction. Such a standard is in direct opposition to South Carolina’s well-established standard that an injunction is an extraordinary and drastic remedy. *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). Allowing such a remedy to be granted based on purely speculative statements in the face of direct evidence is contrary to the law and creates dangerous precedent.

III. The Court of Appeals misapprehended Israel’s argument that the circuit court improperly balanced the equities as the Court of Appeals failed to address that consideration of the test was inappropriate by the circuit court.

The Court of Appeals did not address Israel’s argument *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010) held that balancing the equities was not “appropriate” when considering whether to grant a preliminary injunction. The Court of Appeals only found that the test was “not necessary.” The Court of Appeals failed to address Israel’s argument the test was not appropriate, as held by the Supreme Court in *Poynter*. The Court of Appeals further misapprehended Israel’s argument that consideration of this test by the Circuit Court was reversible error because it was not merely unnecessary but also inappropriate.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by Appellant Eric Israel on Jennings-Dill, Inc. by sending its attorneys of record a copy of the same via electronic mail on February 8, 2024 and by depositing a copy of it in the United States Mail, postage prepaid, on February 8, 2024, addressed to its attorneys of record, Phillip Kilgore, Christopher Thomas, and Sara Olschewske, at OGLETREE DEAKINS NASH SMOAK, 300 N Main St #500. Greenville, SC 29601.

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