ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
DEC 11 2013
SC Court of Appeals

Appeal from Richland County

L. Casey Manning, Circuit Court Judge

EX PARTE: TARA DAWN SHURLING,

APPELLANT,

IN RE: STATE OF SOUTH CAROLINA,

RESPONDENT

V.

BEJAY HARLEY, DEFENDANT

Appellate Case No. 2013-001298

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

As noted in the Motion to Dismiss itself, the Brief of Appellant violates the Appellate Court Rules in numerous and significant ways as outlined herein.

I. Rule 208 (b)(4) SCACR requires references to the record

A review of the Appellant's brief demonstrates scant compliance occurred throughout the brief. Specifically the argument contains numerous assertions which neither the Court or even Respondent should have to plow through the Record to find support for the factual assertions made.

Rule 208 (b)(4), SCACR: References to Record states:

> *The brief shall contain references to the transcript,* pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript. In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced.

Throughout Appellant's brief there are no references to page and line number of any transcript thus making it extremely difficult, if not impossible, for the Respondent and Court to verify assertions made by the Appellant. Appellant in lieu of making the page and line number cites merely "ROA ___". (E.g. Appendix pp. 6-7) Obviously at this stage of the appeal process no record has been prepared and thus the use of such citation is practically useless in Respondent's attempt to verify the facts as stated and prepare a proper response.

In addition to improper references, materials and conversations not included in the court record are referenced throughout Appellant's brief. These items include but are not limited to: various letters written to judges, emails to judges and opposing counsel, conversations between Appellant and Judge Newman's law clerk and alleged conversations Appellant had with Judge Newman. Appellant has also included those items in the Designation of Matter. (Appendix pp. 16-17) In accordance with Rule 210(c) the "record shall not, however, include matter which was not presented to the lower court or tribunal". Specifically items, 4-13 and 20 in Appellant's Designation of Matter are items that do not appear to be part of the court record.

Appellant's brief further attempts by reference to include arguments and authority not included in the record. Appellant wrote:

> Counsel has no desire to impose on this Honorable Court with lengthy arguments restating the positions she has taken in the lower court for the last nearly three years. Counsel therefore *incorporates*, and relies upon by reference, *all* the arguments and authorities presented by her in the *numerous documents referenced herein* all of which will be included in the Record on Appeal.

(Appendix p. 12) (emphasis added)

There is no way Respondent can check such "citations" and the references are improper.

II. Rule 208(b)(1)(c) SCACR establishes the statement of case shall not contain contested matters

Rule 208 (b)(1)(c), SCACR, establishes that the statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. *The statement shall not contain contested matters...*

Appellant has included contested matters in the statement of the case. Examples include language from Appellant's brief that state as follows:

> "In so doing, Counsel drafted proposed orders *which not only reflected the rulings of Judge Newman from the bench but*, also reflected the language found in S. C. Code Ann. § 17-3-50, (C) and previous rulings of the Supreme Court of South Carolina on the subject of attorney fee rates and caps".

(Appendix p. 6) (emphasis added).

Respondent unequivocally asserts this statement is a contested matter. Judge Newman actually states in the record of the December 28, 2011 hearing that the orders as drafted did not reflect the ruling of the Court.

Judge Newman specifically found:

> [L]eaving the hearing, I issued an oral order placing a $10,000 cap on the payment of fees without further approval of the Court. Now, fast forward to December when an order was submitted to me, I did not review notes from the May hearing. I looked at the order and assumed that the order was consistent with what was stated by the Court, but I see now upon it *being pointed out by SCCID and the order itself that paragraphs three and four are inconsistent and inconsistent with what the Court ordered*, and it's also inconsistent with any other order that I've signed the entire year because if an order is made by the Court without further approval, then that's the end of the order without any language allowing for a separate request to be made in excess of the order with the presiding judge as is reflected in paragraph four of this order. So I did not catch that language, and that was brought to my – timely brought to my attention by the department. So I am going to amend the order and delete paragraph four from this order. That would cause this order to be consistent with the proposed order that was submitted to me by Ms. Shurling as far as the amount being up to $10,000 without further approval of the Court, provided the presiding judge finds the time records to be adequate to support the time and expenditures claimed. Then whatever disarray that may cause as to Judge Manning's order, then let that be. It will be addressed by Judge Manning. Mr. Shurling indicates that she would have appealed the order. I invite an appeal of this.

(Appendix p. 51, l. 20 – p. 52, l. 23) (emphasis added).

Judge Newman later continued:

> And I appreciate the compliment about me being very careful in reviewing matters but I don't think I was careful enough in reviewing this, perhaps because it was submitted so much later, and I assumed that everything was consistent with specifically what was ordered. And I certainly understand Ms. Shurling was seeking to add the clarifications in order to pave the way for Judge Manning to sign the one that he did days later or -- *but it's inconsistent with what I ordered from the bench.* So, therefore, I'm going to modify the order deleting paragraph four, and we'll see where it goes from there.

(Appendix p. 53, l. 24 – p. 54, l. 7) (emphasis added).

Appellant continues to assert contested matter in the brief by stating that "Throughout this proceeding he [Judge Newman] also expressed concern that he really didn't know enough about the case to making the decisions he was being called about to ask". (Appendix pp. 6-7)

Respondent is not exactly sure what specific language counsel is referring to as there is no specific page and line number referenced. Although Judge Newman discussed the role of the courts in reviewing vouchers in general, nowhere has Respondent found that Judge Newman stated he did not know enough about this specific case.

Appellant makes a lengthy argument in the Statement of the Case about Judge Newman orally advising her that he had decided not to issue an amended order in the case. As stated in Appellant's brief:

> During a break in those proceedings, Counsel approached Judge Newman, in the presence of his law clerk, and inquired about the status of his amended order in this billing matter. Counsel simply asked the status of the order and expressed her concern that the Court might have executed an order that she had not received for some reason. Judge Newman responded that *he wasn't going to issue an amended order.* He said he had decided that since his term as Chief Administrative Judge was over, he did not have the authority to rule on the issues any longer, and stated that he really didn't feel like he knew enough about the case anyway.

(Appendix pp. 7-8)

Again this is a contested issue because it appears to be an allegation by appellant that Judge Newman essentially reversed his ruling from the December 28, 2011 hearing and orally advised counsel of this. Appellant continued to contact SCCID arguing this

position. However SCCID asserted that the ruling of the Court as found in the transcript of the December 28, 2011 hearing was the law of case.

After a series of letters and emails with appellant continuing to argue this point Judge Newman's office through his law clerk sent a letter to appellant advising that:

> "You will note that the law of this state is that the court speaks only through its records. *State v. Gaskins*, 263 S.C. 343, 346, 210 S.E.2d 590, 591 (1974). "Judicial records are not only necessary but indispensable, to the vitality of a court." *See Long v. McMillan*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (1955) (citation omitted).
>
> The parties, therefore, will have to consult the transcript regarding any concerns involving his ruling."

(Appendix p. 71).

This statement of the trial court affirms the argument of the Respondent that the court record is the sole record required and authorized in arguing this appeal.

III. Rule 208(b)(1)(D) requires the brief be divided into as many parts as that are issues to be argued

Rules 208 (b)(1)(d) requires the brief be divided into as many parts as issues argued and that each one have at its beginning the particular issue to be addressed in distinctive type. The Brief here simply puts all seven Questions into one argument, and there are no distinctive type headings. A similar error resulted in dismissal of the appeal in Lawson v. Arkwright Mills, 259 S.C. 308, 191 S.E.2d 637 (1972).

IV. Rule 208(b)(1)(D) requires discussion of the issues

The rules require "discussion of the issues." Appellant's brief states:

> Counsel has no desire to impose on this Honorable Court with lengthy arguments restating the positions she has taken in the lower court for the last nearly three years. Counsel incorporates, and relies upon by reference, all the arguments and authorities presented by her in the numerous documents referenced herein all of which will be included in the record on appeal.

(Appendix p. 12)

This further violation of Court Rules makes preparing Respondent's Brief an impossibility. There is not any way respondent can know what specifically Appellant is referring to in order to make a proper response. This further necessitates the appeal being dismissed. This also violates the same rule in that the Argument is not divided into as many parts as issues to be argued.

Appellate Courts do not 'grope in the dark' to understand the points they are asked to adjudicate. Winter vs. U. S. Fidelity & Guaranty Co., 240 SC 561, 126 5. E. 2d 724, 727 (1962). The error here would appear to violate the spirit and letter of this basic principle of appellate jurisprudence.

V. Rule 208(b)(1)(E) requires a short conclusion stating the precise relief requested

The Rules require a short conclusion stating the precise relief requested. The conclusion of Appellant is long and contains what appears to be further argument. (Appendix pp. 14-15) More importantly, the Conclusion should state the precise relief requested. The conclusion here again incorporates all arguments made in the lower court. Respondent nor the Court should have to scour the record to ascertain what relief might

be requested lurking somewhere in the entire proceedings purportedly incorporated by Appellant into the Conclusion.

VI. Conclusion

The Respondent has not raised these issues as mere technicalities. The violation of these rules makes in practically impossible to verify some of the facts as stated and prepare a proper response. If the respondent were required to respond to the brief, as is, numerous asserted facts would have to be addressed that are not part of the court record.

As the Supreme Court observed in dismissing the appeal in Lawson, supra, "Appellant's exceptions and brief were obviously prepared with virtually no regard for the rules of this Court." 191 S.E. 2d 637. It is the unfortunate case that this language applies here, also.

J. Hugh Ryan, III
General Counsel, SCCID
P.O. Box 11433
Columbia, SC 29211
(803)734-1338

Attorney for Respondent

December 11, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 11 2013
SC Court of Appeals

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

EX PARTE: TARA DAWN SHURLING, APPELLANT,

IN RE: STATE OF SOUTH CAROLINA, RESPONDENT

V.

BEJAY HARLEY, DEFENDANT

Appellate Case No. 2013-001298

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Memorandum in support of Motion to Dismiss Appeal in the above referenced case has been served upon Tara Dawn Shurling, Esquire, at 3614 Landmark Drive, Suite D, Columbia, SC 29204, this 11th day of December, 2013.

J. Hugh Ryan, III
General Counsel, SCCID

SUBSCRIBED AND SWORN TO before me
this 11th day of December, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: August 21, 2023.