

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE ROBERT E. HOOD
CIRCUIT COURT JUDGE

CASE NO. 2019-001508

RECEIVED
OCT 15 2019
SC Court of Appeals

Jimmy Boykin,

Respondent,

V.

Zady Burton, individually and as Personal Representative of the Estate of Helen Burton
and Sandy Boykin a/k/a Sandy Boykin, Jr.,

Defendants

of whom

Zady Burton is the Appellant,

Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The Trial Court erred in finding the Appellant in contempt in the absence of the admission of any clear and convincing evidence that the Appellant violated the Order and that such violation was wilful.
2. The Trial Court erred in making its ruling based solely on the allegations in the unverified Complaint, the Respondent's affidavit, arguments of counsel and the post-hearing affidavit of Respondent's attorney.
3. The Trial Court erred in making its ruling without admitting any evidence.
4. The Trial Court erred by not permitting the Appellant to present evidence on his behalf.
5. The Trial Court erred in issuing an Order which makes no findings of fact nor any conclusions of law.
6. The Trial Court erred in awarding attorney fees to the Respondent.
7. The Trial Court erred in awarding interest to the Respondent.
8. The Trial Court erred in making any finding concerning Mr. Jellenik's letter of May 14, 2018.

STATEMENT OF THE CASE

Helen Burton died testate on October 24, 2006. Her estate was filed in the Kershaw County Probate Court as 2006-ES-28-0391.

This action was originally filed by the Respondent in 2013. The action specifically addressed matters concerning the real estate and was not a general removal of the probate estate to the Circuit Court. The parties mediated the Circuit Court case and the mediator created a settlement document which was neither executed by the parties nor by their attorneys. Nevertheless, Judge Lee approved the settlement and issued an order attempting to put it into effect.

Judge Lee's Order was affirmed by this Court in an unpublished opinion Rec. p. _____. The South Carolina Supreme Court denied the petition for a writ of certiorari.

Appellant initiated a contempt action in June 18, 2018, which resulted in the issuance of Judge Newman's Order.

Respondent initiated a contempt action which after a hearing resulted in the Order which is the subject of this appeal.

ARGUMENT

Civil contempt must be proved by clear and convincing evidence.

An appellate court should reverse a decision regarding contempt only if it is without evidentiary support or the trial judge abused his discretion. An abuse of discretion occurs .. where the order, based upon findings of fact, lacks evidentiary support. Miller v. Miller, 375 S.C. 443, 463, 652 S.E.2d 754, 759, 760, 761 (Ct. App. 2007)

Charges of constructive contempt are brought by a rule to show cause which must be based upon an affidavit or verified petition. Id. The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect. Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994)

In this case, the only material presented to the Court was the pleadings, two affidavits and the arguments of counsel.

ISSUE ONE:

1. The Trial Court erred in finding the Appellant in contempt in the absence of the admission of any clear and convincing evidence that the Appellant violated the Order and that such violation was wilful.
2. The Trial Court erred in making its ruling based solely on the allegations in the unverified Complaint, the Respondent's affidavit, arguments of counsel and the post-hearing affidavit of Respondent's attorney.
3. The Trial Court erred in making its ruling without admitting any evidence.

In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order. Hawkins v. Mullins, 359 S.C. 497, 597 S.E.2d 897 (S.C. App., 2004)

It is well settled that pleadings are not evidence. It is also well settled that arguments of counsel are not evidence. Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127

(Ct. App. 1991).

The Respondent was clearly available to testify but did not. The Court declined to allow Ms. Burton to speak to the Court. Tr. p. 19.

There was, therefore, no evidence admitted which was establish any facts in the case.

ISSUE TWO

4. The Trial Court erred by not permitting the Appellant to present evidence on his behalf.

As stated above, Ms. Burton, the Appellants's wife, was present and attempted to address the Court. The Court declined to allow her to do so. Tr. p.19.

It is elemental that a Defendant should be entitled to present evidence that would show that any failure to comply with a prior order was either not wilful or that performance was impossible.

The Court's refusal was an abuse of discretion.

ISSUE THREE

5. The Trial Court erred in issuing an Order which makes no findings of fact nor any conclusions of law.

In all actions tried upon the facts without a jury, the Court shall find facts specially and state separately its conclusions of law thereon. Rule 52, SCRPC.

Although this is directory, the order in this action is singularly devoid of any findings. The response to the Motion to reconsider was similarly terse.

ISSUE FOUR

6. The Trial Court erred in awarding attorney fees to the Respondent.

Because the Respondent should not have been successful in seeking a finding of contempt, the portion of the Order granting attorney fees should also be vacated in its entirety. Success on the merits is a basic requirement for the award of attorney fees.

The materials submitted in support of the award do not meet the requirements for the award of fees. Baron Data Systems v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)

Even if the Respondent could be entitled to an award of some attorney fees, the Court erred in awarding any fees for matters in the Probate Court. The attorney for the Respondent included 3.75 hours (\$937.50) of time for Probate Court matters.

In addition, the attorney charged time for preparing the Respondent's affidavit. This affidavit was prepared only after the issuance of the Rule to Show Cause and therefore could not have been the basis for the issuance of the Rule. The affidavit was not offered as evidence at the hearing and would not have been admitted into evidence if it had been offered.

There is simply no evidentiary support for the award of fees.

ISSUE FIVE

7. The Trial Court erred in awarding interest to the Respondent.

The only basis for the award of interest is the affidavit filed by the Respondent. This affidavit was prepared only after the issuance of the Rule to Show Cause and therefore could not have been the basis for the issuance of the Rule. The affidavit was not offered as evidence at the hearing and would not have been admitted into evidence if it had been offered. Such an affidavit is not evidence.

The Respondent was available to testify but did not.

There is no evidentiary support for the award of interest.

ISSUE SIX

8. The Trial Court erred in making any finding concerning Mr. Jellenik's letter of May 14, 2018.


Mr. Jellenik's letter was not submitted into evidence. Although there was argument concerning the content of the letter, There is no evidentiary support for the Court's order.

CONCLUSION

The Court should reverse the Order finding the Appellant in contempt.

The Court should also vacate the provisions in the Court's Order which granted the following:

1. Direct the Appellant to take acts to close the estate.
2. Makes any findings concerning Mr. Jellenik's letter of May 14, 2018.
3. Awards attorney fees to Respondent.
4. Awards interest to the Respondent
5. Deducts the awards for the alleged contempt from the \$12,000.00 originally due.



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October 15, 2019

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Zady Burton is the Appellant.

PROOF OF SERVICE

I certify that I have served one copy of the Appellant's Initial Brief and Designation of Matter on the Respondent by depositing them in the United States Mail, postage prepaid, on October 15, 2019, addressed to his attorney of record, Moultrie B. Burns, Jr., Savage Royall & Sheheen, P.O. Drawer 10, Camden, SC 29021.



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