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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

Daniel D. Hall, Circuit Court Judge

Case No. 2017-CP-46-01964
Appellant Case No. 2020-000027

Winston Shell.....Respondent,

vs.

Nathaniel Shell.....Appellant.

APPELLANT'S PETITION FOR REHEARING

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Attorney for Appellants/Petitioners

Pursuant to Rule 221 and 240, SCACR, the Appellants respectfully move the Court for rehearing with respect to this Court's decision in Winston Shell, Respondent, v. Nathaniel Shell, Appellant, Unpublished Opinion No. 2021-UP-436 filed December 8, 2021, which affirmed in Circuit Court's ruling in this case. Appellants suggest the Court overlooked or misapprehended the following points in affirming the probate court's, as affirmed by the circuit court's decision.

- I. **The Court of Appeals misapprehended the law by finding that the lower court did not abuse its discretion in hearing this trial the Tuesday of the trial week with Appellant not having a single witness available to present its case when the court was aware that Appellant was present and ready the Monday of the trial term, was told the judge assigned to the case was not available Tuesday because of a jury trial and a personal conflict, and when Appellant's attorney did not receive notice the trial was beginning on Tuesday until that same morning.**

The trial judge abused his discretion in deciding to move forward with the trial without the presence of a key witness and a party in the case leaving Appellant without any witnesses to present its side of the case. SCRCR Rule 40(i)(2), states in relevant part, "No motion for continuance shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is in not intended for delay."

"But we have often said that, in exercising discretion, courts must be guided by law, and that discretion may not be exercised so as to deprive a litigant of a substantial right, except for good and sufficient reasons." *Ilderton v. Charleston C. R. & L. Co.*, 113 S.C. 91, 101 S.E. 282 at 283 (S.C. 1919). "*A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense*, unless it appears that he has

been guilty of negligence in procuring the attendance of such witness, or in obtaining his testimony.” Id. at 283 (emphasis added).

The trial judge, Judge Hall, was also the judge that was present for the roster meeting the day before the trial began and was well aware of what the parties had been told regarding the scheduling of the case. Specifically, the parties had been told that the case was assigned to Judge McKinnon in the December 4, 2019 email from the clerk of court and that this bench trial would be subject to being called in front of Judge McKinnon. (12/4/19 email, R. p. 184; Trial Tr. p. 5, ll. 17-20; R. 82). The parties were also told that Judge Hall was beginning a trial that would last until at least Tuesday and that Judge McKinnon had a personal conflict that would make him unavailable after 2:00 on Tuesday. (email dated December 4, 2019; R. 184).

When Appellant’s counsel appeared Tuesday morning for the trial, he told the judge that his client was not present and that he had not been able to get in touch with him that morning to let him that the case had been called. (Trial Tr. p. 6, ll. 16-21; R. p. 83). Judge Hall did inquire of Appellant’s counsel as to what he told his client about when the trial would begin. Mr. Phillips told the court that Appellant and his out of state witness were at his office Monday morning ready for trial and after the roster meeting, he told them that he conveyed the information he received from the court and “that we’re gonna have to see when this case can actually be heard; there are a lot of moving pieces.” (Trial Tr. p. 6, ll. 16-21; R. p. 83). Mr. Phillips also informed the court that he did not receive the notice that the case was being called for Tuesday until Tuesday morning. (Trial Tr. p. 6, ll. 4-6; R. p. 83). Mr. Phillips also indicated that while he was unable to reach Appellant that morning, he had not had any difficulty getting in touch with his client throughout the attorney-client relationship. (Trial Tr. p. 7, ll. 10-12; R. p. 84).

When asked by the court if he was ready to proceed with the trial, Mr. Phillips indicated that he didn't have his client present with the obvious implication that he would not be able to present his defenses in the case without him. (Trial Tr. p. 6, ll. 10-12; R. p. 83). Mr. Phillips also represented to the court that he needed Appellant present to introduce testimony and evidence in the case and could not do so without him present. (Trial Tr. p. 9, ll. 15-18; R. p. 86). Mr. Phillips also showed the court that Appellant was present and ready Monday morning for trial and that he had diligently tried to contact Appellant that morning to no avail. (Trial Tr. p. 6, ll. 10-12; R. p. 83). Appellant's attorney also demonstrated that needing additional time was not meant for the purpose of delay by showing that Appellant and his out of state witness were present and ready for trial the day before. It cannot credibly be argued that Appellant had purposefully failed to appear on Tuesday in an effort to delay the trial when he was present and ready Monday morning for the trial.

With Appellant's counsel having substantially complied with SCRCR Rule 40(i), the trial judge was in a position where he had to decide whether or not to move forward with the trial without Appellant or his out of state witness present. At this point, the trial judge knew Appellant's attorney was told that the assigned judge was unavailable Tuesday for multiple reasons, that Appellant's attorney told Appellant and his out of state witness that the case would not be tried that week, that Appellant was present with his witness ready for trial Monday morning, that Appellant's attorney found out the case was being called on Tuesday only that same morning, that Appellant had been responsive to his attorney's attempts to contact him in the past, and that moving forward would leave Appellant with no witnesses to present evidence and testimony relating to his side of a contested debt collections action between brothers. Also, there was no indication that Appellant was guilty of being negligent in failing to be present or have his witness present. In

fact, the court told Appellant's attorney it was very unlikely the case would be called that week due to multiple conflicts with the assigned judge. The court actually told the parties that the case was assigned to Judge McKinnon and never indicated that the case would be called to be heard by Judge Hall.

While Appellant doesn't accuse the court of being intentionally deceptive, the way the court presented the scheduling situation telling the parties that the assigned judge could not hear the case on Tuesday, then calling the case on Tuesday, would make any reasonable attorney feel he had been misled by the court, even if unwittingly so. In addition, any reasonable attorney hearing what the court told the parties about scheduling would have felt safe in telling his client the case would not be tried that Tuesday and likely for the rest of the week.

Given the fact that Appellant was present Monday morning ready to try the case and the fact that Appellant's attorney didn't find out about being called for trial until what appears to be a matter of minutes before the start of the trial, the fair and prudent thing to have done would have been to give Appellant's counsel at least the day Tuesday to track Appellant down before forcing the trial to begin. If Appellant's attorney could not reach Appellant within enough time to fit the trial in Tuesday, continuing the trial until the next term would have only been fair and prudent since moving forward with the trial would deprive Appellant of a substantial right – the right to be able to present testimony to defend against allegations made against you. As the court in *Ilderton* held, "A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense." *Id.* This is exactly what the trial judge in this case did. While being present and ready the Monday of the trial week with his out of state witness, due to information received from the court and his attorney that the assigned judge was not available Tuesday, Appellant ended up being deprived of his right to present testimony in the case

since he only had his attorney present for the trial to try to present his side of this contested debt dispute.

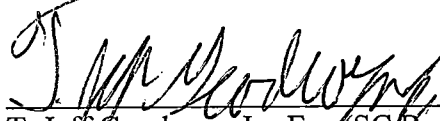
For the above reasons and in light of all of the above-described circumstances, this court has misapprehended the law on this issue and should amend its ruling to find that the trial judge abused his discretion in moving forward with the case without the presence of Appellant and subsequent denial of Appellant's Motion for New Trial, and this court should reverse the trial judge on this issue and remand the case for a new trial.

CONCLUSION

Appellant was present and ready for trial with his out of state witness the Monday of the trial week when the court told the parties that the assigned judge had a conflicting jury trial and a personal conflict on Tuesday. The other sitting judge that term, Judge Hall, also had a jury trial scheduled. No indication was given that the case would be called by Judge Hall. As a result, Appellant's attorney told Appellant the case would not be heard Tuesday and he made other plans and could not receive his attorney's emails and calls to inform him the case was called on Tuesday morning. Judge Hall called the case anyway after his jury trial settled late Monday. Not receiving the email from the clerk that the case would be called Tuesday until Tuesday morning, Appellant's attorney was not able to get in touch with Appellant on such short notice and after telling him the case would not be called Tuesday. As held by the Supreme Court in *Ilderton*, "A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense." *Id.* Knowing all of this and that Appellant would be severely prejudiced by having no witnesses to present his side of the case, the trial judge abused his discretion in deciding to move forward with the trial without Appellant present. As a result, this court should

amend its prior holding and reverse the trial judge's decision to move forward with the case and subsequent denial of Appellant's Motion for New Trial and remand the case for a new trial.

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Dated: December 20, 2021

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Daniel D. Hall, Circuit Court Judge

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Appellant Case No.: 2020-000027

Winston Shell.....Appellant,

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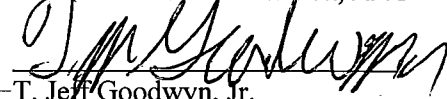
Nathaniel Shell.....Respondent.

PROOF OF SERVICE

I certify that I have served the **Respondent's Petition for Rehearing** on the following parties' counsel, at the addresses listed below by depositing a copy of same in the United States Mail, postage prepaid, on December 20, 2021.

Beverly A. Carroll, Esquire
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December 20, 2021

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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: ***Winston Shell v. Nathaniel Shell***
Civil Action No.: 2017-CP-46-01964
Appellate Case No.: 2020-000027
Our File No.: 3000-0555

Dear Sir or Madame:

Enclosed for filing, please find the Respondent's Petition for Rehearing and Proof of Service in regards to the above referenced matter. Please file the originals and return the filed stamped copies in the self-addressed stamped envelope provided.

As evidenced in the Proof of Service, I have served all interested parties, with a copy of same.

Thank you for your attention to this matter and should you have any questions, please do not hesitate to contact me.

Sincerely,



T. Jeff Goodwyn, Jr.

TJG/msb
Enclosures

cc: Beverly A. Carroll, Esquire
Nathaniel Shell