

RECEIVED

Feb 17 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PETITION FOR REHEARING

Stephen N. Garcia
Garcia Law, LLC
604 Pettigru Street
Greenville, SC 29601
(864) 271-7335
Attorney for Appellant

Andrew F. Lindemann
Lindemann, Davis & Hughes, P.A.
P.O. Box 6923
Columbia, SC 29260
Attorney for Respondent

COMES NOW PLAINTIFF, by and through undersigned counsel, and files this, his Petition for Rehearing pursuant to Rule 221(a), SCACR, and in support of his Petition for Rehearing, Plaintiff respectfully submits the following as having been overlooked and/or misapprehended by the Court:

1. Although this Honorable Court states that the contentious exchange between Plaintiff's counsel and the Trial Court Judge did not occur in front of the jury, respectfully, this Honorable Court seemingly overlooks that the facial expressions and gestures occurred in the Jury's presence on Day 1 of trial and continued therewith, however, even if the complained of facial expressions and gestures had *not* continued after Day 1, Plaintiff was irreparably prejudiced by the facial expressions and gestures emanating from the Trial Court on Day 1;
2. Although this Honorable Court states that Plaintiff's counsel has failed to point to any evidence in the record describing the alleged prejudicial facial expressions and gestures or demonstrating actual bias or prejudice from the judge or jury, respectfully, this Honorable Court seemingly overlooks (1) that Plaintiff's counsel *did* place an objection on the record on Day 2 of trial (although Plaintiff's counsel was prevented from expanding on the objection) and (2) that the unsolicited Affidavit of the Juror submitted by Plaintiff at the trial level and at the appellate level recounts the very facial expressions and gestures giving rise to the this Appeal;
3. Although this Honorable Court states that Plaintiff's counsel failed to request a remedy for the prejudicial expressions and gestures, respectfully, this Honorable Court seemingly overlooks that Plaintiff's Counsel attempted to state further objections on the record but was denied the ability to speak by the Presiding Judge and was further

cautioned as to whether any further statements would be threatening to the Presiding Judge;

4. Although this Honorable Court states that Plaintiff's counsel failed to object or seek a remedy for the rest of trial (following Day 1), respectfully, this Honorable Court seemingly overlooks that Plaintiff's counsel attempted to make objections and even seek recusal on the record, but was denied the opportunity and accused (and cautioned) of threatening the Court, and further, that irrespective of whether continued, contemporaneous objections were placed on the record or not, the prejudicial effect of the Presiding Judges facial expressions and gestures on Day 1 of Trial irreparably prejudiced the Plaintiff; and
5. Although this Honorable Court states that the record must contain an inkling of evidence describing the facial expressions and gestures being objected to or showing the expressions or gestures were made, respectfully, this Honorable Court seemingly overlooks that Plaintiff attempted to introduce evidence of facial expressions and gestures from the perspective of a Juror at the trial level but that motion was denied, and further, Plaintiff has also attempted to submit that same evidence from a Juror to this Honorable Court for its review.

WHEREFORE, Plaintiff requests that the Appeal of the Orders originating from the Court of Common Pleas dated July 2, 2018 and July 19, 2018 be reexamined and reheard, and for any further relief the Court deems just and proper.

(SIGNATURE ON FOLLOWING PAGE)

Garcia Law, LLC

By: /s / Stephen N. Garcia
Stephen N. Garcia, SC Bar No. 76191

604 Pettigru Street
Greenville, SC 29601
Dial: (864) 271-7335
For Appellant

February 17, 2022

Greenville, SC

MEMORANDUM OF LAW

In support of his Petition for Rehearing, and pursuant to Rule 221(a), SCACR and Rule 240(c)(2), SCACR, Plaintiff respectfully submits the following as having been overlooked and/or misapprehended by the Court:

1. Although this Honorable Court states that the contentious exchange between Plaintiff's counsel and the Trial Court Judge did not occur in front of the jury, respectfully, this Honorable Court seemingly overlooks that the facial expressions and gestures occurred in the Jury's presence on Day 1 of trial and continued therewith, however, even if the complained of facial expressions and gestures had *not* continued after Day 1, Plaintiff was irreparably prejudiced by the facial expressions and gestures emanating from the Trial Court on Day 1;
2. Although this Honorable Court states that Plaintiff's counsel has failed to point to any evidence in the record describing the alleged prejudicial facial expressions and gestures or demonstrating actual bias or prejudice from the judge or jury, respectfully, this Honorable Court seemingly overlooks (1) that Plaintiff's counsel *did* place an objection on the record on Day 2 of trial (although Plaintiff's counsel was prevented from expanding on the objection) and (2) that the unsolicited Affidavit of the Juror submitted by Plaintiff at the trial level and at the appellate level recounts the very facial expressions and gestures giving rise to the this Appeal;
3. Although this Honorable Court states that Plaintiff's counsel failed to request a remedy for the prejudicial expressions and gestures, respectfully, this Honorable Court seemingly overlooks that Plaintiff's Counsel attempted to state further objections on the record but was denied the ability to speak by the Presiding Judge and was further

cautioned as to whether any further statements would be threatening to the Presiding Judge;

4. Although this Honorable Court states that Plaintiff's counsel failed to object or seek a remedy for the rest of trial (following Day 1), respectfully, this Honorable Court seemingly overlooks that Plaintiff's counsel attempted to make objections and even seek recusal on the record, but was denied the opportunity and accused (and cautioned) of threatening the Court, and further, that irrespective of whether continued, contemporaneous objections were placed on the record or not, the prejudicial effect of the Presiding Judges facial expressions and gestures on Day 1 of Trial irreparably prejudiced the Plaintiff; and
5. Although this Honorable Court states that the record must contain an inkling of evidence describing the facial expressions and gestures being objected to or showing the expressions or gestures were made, respectfully, this Honorable Court seemingly overlooks that Plaintiff attempted to introduce evidence of facial expressions and gestures from the perspective of a Juror at the trial level but that motion was denied, and further, Plaintiff has also attempted to submit that same evidence from a Juror to this Honorable Court for its review.

DISCUSSION

This Honorable Court has opined, in support of its Affirmation of the Trial Court's Final Judgment, that the contentious exchange between Plaintiff's Counsel and the Presiding Judge did not occur in the presence of the Jury, and further, that Plaintiff's Counsel failed to point to any evidence in the Record describing the alleged facial expressions and gestures or demonstrating actual bias or prejudice from the judge or jury. Further, this Honorable Court opines that the record must contain an inkling of evidence describing the facial expressions and gestures being objected to or showing the expressions or gestures were made and that Plaintiff failed to seek objections or remedy the rest of trial. Respectfully, the Appellant offers that this Honorable Court may have overlooked or misapprehended the facts and/or record in reaching its opinion. Specifically, the behavior of the Presiding Judge occurred on Day 1 of trial and continued therewith through the rest of trial. Plaintiff was denied the opportunity to state specific objections on the record by the Presiding Judge at the Trial.¹ Further, the Appellant has offered, as part of the Record on Appeal, an Affidavit that specifically highlights not only the observed facial expressions and gestures, but further, that jurors perceived the facial expressions and gestures and were influenced by them.²

First, Appellant has not argued that the contentious exchange between Plaintiff's counsel and the Presiding Judge are grounds, alone, for reversal of the Judgment appealed. That very contentious exchange only served the purpose of placing on the record the Plaintiff's objection(s) to what had been observed but not fully understood on Day 1 of trial. Appellant further pointed to the contentious exchange occurring at the start of Day 2 of trial to highlight that (1) the Presiding Judge did not deny making facial expressions and gestures that allegedly prejudiced the Jury

¹ R. p. 200-201 and p. 612 (Where Plaintiff's counsel was prevented, at both instances, of stating objections on the record.)

² R. p. 16-17.

during the contentious exchange, and that (2) the contentious exchange included the Presiding Judge's denial of Plaintiff 's counsel's attempt to make a record of the alleged facial expressions and gestures. What I ask this Honorable Court to reconsider is that the facial expressions and gestures occurring on Day 1 alone and cited as grounds for appeal and reversal created an insurmountable and irreparable bias with the Jury that could not be corrected by mere curative statements. Further, whether the facial expressions and gestures cited as grounds for reversal continued after Day 1 or not does not minimize the prejudicial effect of what occurred on Day 1 of trial. In essence, the Appellant argues that the damage had been done on Day 1 of trial and that this Honorable Court need not look any further than Day 1 of trial to determine that the *entire* trial for the Plaintiff had been tarnished by the Presiding Judge and that Plaintiff was prejudiced therewith.

Even if the Appellant conceded that a request for a curative statement and/or further objections may have minimized the prejudicial effect that the facial expressions and gestures had upon the Jury on Day 1 (or at any time thereafter), the Plaintiff was not afforded an opportunity to state his objections on the record.³ The Appellant argues that there was a sufficient record established by the Plaintiff's counsel at the beginning of Day 2 of trial to support reversal. Appellant further offers to this Honorable Court that apart from the objection(s) stated on the record at the beginning of Day 2 of trial, the Appellate Record *also* contains evidence describing the alleged, prejudicial facial expressions and gestures by way of the Juror Affidavit. Appellant submitted the unsolicited Affidavit of a Juror⁴ that alleges not only facial expressions and gestures emanating from the Presiding Judge but also how those expressions and gestures were allegedly

³ R. p. 200-201 and p. 612

⁴ R. p. 16-17.

perceived by the Jurors *prior to deliberations*.⁵ Appellant would also call to the attention of this Honorable Court that the Plaintiff was not fully aware of the breadth of the Jury's perception of the Presiding Judge's alleged facial expressions, gestures, and other behavior nor their effect on the Jury until *after* trial and only did later because a Juror contacted the Plaintiff's counsel immediately after the trial had concluded. Plaintiff attempted to introduce this Affidavit of Juror by motion to develop the record regarding the alleged facial expressions and gestures, but this Motion was dismissed by the Trial Court.⁶ The only method available to Plaintiff to make the Juror's Affidavit a part of the Trial Record is by way of motion. Plaintiff tracked the language of *Gray v. Bryant* and presented this Juror testimony to the Trial Court.⁷ This statement of the Juror was not available to the Plaintiff until after the trial had concluded, and the Plaintiff filed its motion consistent with *Gray v. Bryant*.⁸

CONCLUSION

Plaintiff attempted to place objection(s) on the record but was denied the opportunity to do so. Further, Plaintiff was irreparably harmed by the alleged facial expressions and gestures made by the Presiding Judge on Day 1 of trial. Plaintiff further attempted to develop the record regarding facial expressions and gestures after being alerted by a Juror that the facial expressions and gestures that occurred on Day 1 of trial. Plaintiff requests that the Appeal of the Orders originating

⁵ Appellant recognizes the precedence regarding the inadmissibility of statements made by jurors during deliberations and the potential exceptions therewith, however, Appellant notes that the Affidavit of Juror also includes alleged statements made by jurors prior to deliberations and during the pendency of the trial.

⁶ R. p. 6-31.

⁷ *Gray v. Bryant*, 298 S.C. 286, 379 S.E.2d 894 (1989).

⁸ *Id.* at 287; "It is our view that Rules 59 and 60(b) must be read together. Rule 60(b), S.C.R. Civ. P., reads in pertinent part: On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

from the Court of Common Pleas dated July 2, 2018 and July 19, 2018 be reexamined and reheard,
and for any further relief the Court deems just and proper.

Garcia Law, LLC

By: /s/ Stephen N. Garcia
Stephen N. Garcia, SC Bar No. 76191

604 Pettigru Street
Greenville, SC 29601
Dial: (864) 271-7335
For Appellant

February 17, 2022

Greenville, SC

RECEIVED

Feb 17 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Katherine Hunter by email on February 17, 2022 and addressed to her attorney of record: **Andrew F. Lindemann, Esq., Andrew@LDH-Law.com.**

February 17, 2022

/s/ Stephen N. Garcia

Stephen N. Garcia
Garcia Law, LLC
604 Pettigru Street
Greenville, SC 29601
Dial: (864) 271-7335
Fax: (864) 271-7338
Attorney for Appellant