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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

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

John M. Burgess,..... Appellant,

v.

Katherine C. Hunter, ... Respondent.

RETURN TO APPELLANT'S PETITION FOR REHEARING

The Appellant John M. Burgess has petitioned this Court for a rehearing of its recent unpublished opinion in *Burgess v. Hunter*, Op. No. 2022-UP-036 (S.C. Ct. App. filed February 2, 2022). In response, the Respondent Katherine C. Hunter submits that this Court properly ruled on the issues challenged by the Appellant in his petition for rehearing.

The Appellant asserts that trial judge denied his counsel the opportunity to place objections on the record. That is not supported by the record. The Appellant made no attempt on day one of the trial to make any objection, let alone a contemporaneous objection. He now claims that the "facial expressions and gestures" by the trial judge on day one of the trial were alone sufficient to deny him a fair trial. Yet, the Appellant cannot point to a single objection asserted on day one.

At the commencement of day two, there was an exchange between Appellant's counsel and the trial judge outside the presence of the jury, where counsel raised the issue of "facial expressions" of the trial judge while he was conducting witness examinations the previous day. Importantly, the Appellant made no motion for recusal nor a motion for mistrial. His counsel, in fact, advised the court that "I'm not necessarily asking for any recusal or anything along those lines." (R. 200). He also did not request any curative instruction. Critically, there was no request for *any action* which would serve as a basis for the new trial that he now seeks.

Thereafter, the Appellant had four additional days of trial; yet, he never again raised any objection, contemporaneous or otherwise, to the judge's alleged conduct. He had four days to seek some corrective action if he believed that the judge's facial expressions or gestures were deriving him of a fair trial. He took no such action. Not a single contemporaneous objection was made throughout five days of trial. Moreover, to the extent he claims that the trial judge would not permit an oral objection to be made, that is not supported by the record. But most importantly, if the Appellant's counsel was not comfortable making an oral objection or an oral motion for recusal or an oral motion for a mistrial or an oral motion for a curative instruction, there was nothing stopping him from filing a written objection or motion. Again, the trial lasted five days. He was given many opportunities – for instance, each evening between the days of trial presented an opportunity to e-file a written objection or motion. Nothing was filed. It was not until the case was over and an adverse verdict returned, that the Appellant filed a written motion seeking relief. That was simply too late. A litigant cannot sit on its rights and then assert them only after he lost.

Next, as previously alluded to, the Appellant claims to have been "irreparably harmed" to a sufficient degree on day one of the trial to warrant a new trial. This is an argument made for

the first time on rehearing, which is not permissible. *See, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review). Nonetheless, the Appellant has not presented evidence of the judge's alleged "facial expressions and gestures" on day one, nor has he demonstrated any prejudice. Finally, as mentioned, there is certainly no contemporaneous objection or request for any relief – be it recusal or a mistrial or even a curative instruction – that was made on day one. This argument, therefore, should be rejected on procedural and substantive bases.

Finally, the Appellant contends that the record contains "evidence describing the alleged prejudicial facial expressions and gestures by way of the Juror Affidavit." This is presumably in response to the Court's ruling that the Appellant "failed to point to any evidence in the record describing the alleged prejudicial facial expression and gestures or demonstrating actual bias or prejudice from the judge or jury." (Slip Op. at 2). However, the Appellant fails to recognize that in his adjudication of the Amended Motion for New Trial, the trial judge ruled the Lee affidavit inadmissible under Rule 606(b) of the South Carolina Rules of Evidence. That ruling *was not appealed*, and thus constitutes the law of the case. *See*, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").

Nonetheless, even if the Appellant had appealed the exclusion of the Lee affidavit, he would not prevail. The affidavit is presented in an attempt to describe the alleged facial expressions, gestures, and "lack of attention" by the trial judge during the trial itself. That is not a proper use of a juror affidavit per Rule 606(b). A juror affidavit cannot be used, in essence, to supplement the trial record after the fact to describe what the juror allegedly saw take place in the courtroom during the trial. Moreover, the Lee affidavit is also used to describe juror

comments allegedly made before and during deliberations in the juror room as well as to give Juror Lee's opinions on the impact of the judge's alleged conduct on other jurors. Rule 606 "draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369, 371 (2008). Likewise, Juror Lee cannot speculate as to the decision-making process for other jurors. *See, Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008). *In fact, Lee never even states that the trial judge's conduct influenced his own decision in the case*. Finally, such commentary alleged made by other jurors is hearsay without an exception, Thus, for these additional reasons, the Lee affidavit was correctly ruled inadmissible in accordance with Rule 606(b).

Finally, the accuracy of the affidavit is highly questionable when compared to what can be gleaned from the official record of the trial.[1] As far as the description of the trial judge's conduct, Juror Lee claims that judge appeared disinterested because he would "glance at the clock" and "was always on his laptop." (R. 16). Of course, that is not abnormal or prejudicial conduct. Judges will look at the clock to determine how long testimony has proceeded and to assess when breaks should be taken. Judges will also use a laptop computer to keep abreast of other legal matters, review applicable rules, case law, or statutes as the case proceeds, prepare or review jury charges, and numerous other absolutely proper behaviors.

Juror Lee suggests that the judge was "distracted" and did not pay attention so that he needed questions repeated to rule on objections. (R. 16). A review of the record shows that

[1] The Court is also reminded that Juror Lee sent his counsel an email within a few hours after the jury was discharged. (R. 8, 15). That email was never produced and is not in the record. Thus, its contents are unknown. The Appellant's counsel had no explanation for why that email was not made a part of the record.

occurred one time during a five-day trial. (R. 187). Juror Lee alleges that the trial judge told the Appellant's counsel to "get to the point" and not to be "talking in circles." (R. 16). There is no such quote in the record. Juror Lee claims that the trial judge told the Appellant's counsel to "make it brief." (R. 16). In actuality, that occurred when the Appellant's counsel rose to make his rebuttal closing argument, and the judge said, "All right, briefly." (R. 579). Of course, the trial judge has a responsibility to manage a trial, including encouraging counsel to be direct and to the point and not to be repetitive or cumulative and to move the trial along so as not waste the court's and jurors' time. That is not inappropriate or prejudicial conduct by a trial judge. Thus, the Court is correct in its ruling that there is no competent evidence of the alleged prejudicial facial expressions and gestures.

In sum, the Court correctly affirmed the judgment entered in the court below. The Appellant is not entitled to a new trial absolute. The Respondent Katherine C. Hunter, therefore, respectfully requests that this Court deny the Appellant's petition for rehearing.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

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March 10, 2022

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John M. Burgess,..... Appellant,

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondent, does hereby certify that service of the **Return to Appellant's Petition for Rehearing** was made upon Appellant's counsel by email only this the 10th day of March 2022 as follows:

Stephen N. Garcia, Esquire
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s/ Andrew F. Lindemann

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**Also Admitted in North Carolina*
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March 10, 2022

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: John M. Burgess v. Katherine Hunter
Appellate Case Number: 2018-001423
Civil Action Number: 2017-CP-39-0428
Claim Number: 21379503
Our File Number: 307.20053

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Amended Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Return to Appellant's Petition for Rehearing** in the above referenced matter. By copy of this letter, I am serving a copy on Appellant's counsel by email only pursuant to Section (d)(1) of the same Order.

Thank you for your assistance in this matter. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Stephen N. Garcia, Esquire *(w/ Enclosure, Via Email Only)*