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May 17 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PICKENS COUNTY
Court of Commons Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2017-CP-39-0428

Appellate Case No. 2018-001423

John M. Burgess Appellant,

v.

Katherine Hunter Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case centered on an automobile collision occurring on or about December 10, 2013 in which the Appellant alleged Respondent was liable for the injuries and ensuing damages sustained by the Appellant. This case was called before the Court on June 25, 2018 for a Jury Trial. On June 29, 2018, the Jury rendered its verdict, finding that both the Appellant and Respondent were negligent, but assigning 51% liability to the Appellant.

At the close of the first day of Trial and upon adjournment—and confirming Appellant's own observations—Appellant was alerted that throughout the entire line of questioning of Respondent and Appellant, the Presiding Judge made numerous and continuous, overt facial expressions and gestures; upon learning of same, Appellant had immediate cause for concern. Arriving in the courtroom on Day 2 of trial, Appellant's counsel immediately requested a meeting with the Presiding Judge and Respondent's counsel in the Judge's chambers to discuss the matter. At this meeting, it was the Appellant's counsel's intention to attempt to cure any actions that may have biased or unduly influenced the jury while at the same time doing so in the least confrontational and in the most deferential manner possible. The meeting was contentious at best.

Upon return to the courtroom, the Presiding Judge stated that Appellant had something to put on the record. Appellant stated his objection to the facial expressions and other actions emanating from the bench; Appellant specifically cited Canon 3 of Rule 501, SCACR.[1] Appellant was promptly cutoff during his noting of objection on the record and accused of threatening the Presiding Judge; Appellant was not afforded an opportunity to state his motion for mistrial, motion for recusal, or further develop his objection on the record.[2] No curative measures were taken by

[1] R. p. 200, line 2 through p. 170, line 17.

[2] *Id.*

the Presiding Judge upon the Jury returning to the courtroom. Appellant believed any further attempts to object on the various issues would have been futile considering the manner in which his prior objection was received by the Presiding Judge.

Trial proceeded, and the facial expressions and gestures continued throughout trial, however, without any further objection or statements from Appellant. Other instances of note throughout trial included terse comments and ruling on objections against Appellant where the Presiding judge admitted to having not heard the question(s) prompting the objection, to be developed more fully in Appellant's foregoing arguments. Following the Jury verdict, Appellant made a post-trial Motion for New Trial "based on the impropriety that was alleged or, essentially, put on the record early Tuesday morning and the same grounds—the same ground for that motion," a reference to the previously stated objection regarding facial expressions and gestures during Appellant counsel's direct examination of the Appellant and Respondent on day one of trial.[3] Again, Appellant was cutoff by the Presiding Judge, who ultimately denied the Motion for New Trial.[4]

Within two hours of the verdict being rendered, Appellant's counsel received an unsolicited email from a Juror. Two days removed from trial and after several conversations between the Juror and Appellant's counsel, the Juror sent an email to Appellant's counsel that included an attached Letter which depicted in detail (1) the Presiding Judge's actions and (2) their effect on the Jury.[5] Upon receipt of the Letter from the Juror, Appellant's counsel prepared an affidavit

[3] R. p. 612, line 5 through line 9.

[4] *Id*.

[5] R. p. 15.

which, if signed by the Juror, would adopt the Letter as his sworn statement; the Affidavit was signed on July 3, 2018. On July 10, 2018, only seven (7) days removed from receiving the signed Affidavit of the Juror, Appellant filed his Amended Motion for New Trial.[6]

On July 12, 2018, Respondent filed her Brief in Opposition to Plaintiff's Amended Motion for New Trial.[7] On July 17, 2018, Appellant filed his Response to Defendant's Brief in Opposition to Plaintiff's Amended Motion for New Trial.[8] Finally, on July 19, 2018, the Court issued an Order denying Plaintiff's Amended Motion for New Trial on the ground that the filing was untimely, and therefore, the Court did not have jurisdiction to grant a new trial. The Court also filed a memorandum opinion with its Order dated July 19, 2018.[9]

[6] R. p. 6.

[7] R. p. 18.

[8] R. p. 22.

[9] R. p. 28.

ARGUMENT

I. FACIAL EXPRESSIONS, GESTURES, AND LACK OF ATTENTION DIRECTED TOWARDS PLAINTIFF'S/APPELLANT'S COUNSEL WHILE COUNSEL PRESENTED CASE TO JURY WAS REVERSIBLE ERROR.

II. TRIAL JUDGE ERRED IN DISMISSING PLAINTIFF'S MOTION FOR NEW TRIAL AT THE CONCLUSION OF CASE BASED ON PREVIOUSLY COMPLAINED OF FACIAL EXPRESSIONS, GESTURES, AND LACK OF ATTENTION DIRECTED TOWARDS PLAINTIFF'S/APPELLANT'S COUNSEL.

Whether Facial Expressions and Gestures Amount to Influence or Tend to Bias Jury

Whether overt facial expressions and gestures have the potential to create bias or unduly influence a jury cannot be denied. Canon 3 of Rule 501, SCACR reads in pertinent part (emphasis added):

> **B. Adjudicative Responsibilities.**
>
> **(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.**
>
> Commentary:
>
> The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.
>
> **(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.**
>
> Commentary:
>
> A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

> A judge must perform judicial duties impartially and fairly. **A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.**

Canon 3 of Rule 501, SCACR specifically warns that a judge who manifest bias on any basis in a proceeding impairs the fairness therewith, and further, that facial expressions and body language, in addition to oral communications, can give jurors an appearance of judicial bias. It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties.[10] Motions for a new trial have been granted where the remarks of a trial judge tended to impugn the credibility of counsel and to diminish her in the eyes of the jury.[11] It is respectfully submitted that a judge *must* be alert to avoid behavior that may be perceived as prejudicial. The oral communications, facial expressions and gestures, and body language in the instant matter were all of a nature that had the potential to give an appearance of judicial bias.

Appellant recognizes that it has long been held that by failing to move for mistrial or recusal or requesting a curative instruction, Plaintiff may waive any error, failing to give the court the opportunity to cure or correct any perceived error.[12] Appellant further recognizes that it has long been held that even attempting to make a motion for new trial after the verdict is rendered comes too late to avoid a waiver of the alleged error.[13] However, Appellant points to *State v. Pace* as

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[10] *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994).

[11] *Id.*

[12] *Adams v. Orr*, 260 SC 90, 194 SE2d 232 (1973).

[13] *State v. Penland*, 275 SC 537, 278 SE2d 765 (1981).

controlling on the instant matter.[14]

In *State v. Pace*, the trial judge's comments to the jury regarding a lady defense counsel's age and gender were deemed to have deprived the defendant of a fair trial, where the remarks of the court tended to impugn the credibility of counsel and diminish her in the eyes of the jury. In camera, the judge "chastised" defense counsel that a broad question she asked amounted to a fishing expedition. The defense counsel in *State v. Pace* did *not* state a *single* objection on the record and did not make a motion for new trial *at any point*. In addressing the defense counsel's failure to state an objection or to make a motion for a new trial, the Supreme Court of South Carolina stated, "As to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile. Accordingly, we find no waiver of this issue."[15]

The facts in *State v. Pace* bear stark resemblance to the instant matter. The Presiding Judge's overt facial expressions, gestures, and other actions diminished Plaintiff's counsel in the eyes of the jury and deprived the Plaintiff of a fair trial. The Affidavit of Chris Lee highlights the effect the alleged actions had on the jury. In chambers, Plaintiff's counsel attempted to discuss his concerns regarding the facial expressions, gestures, and other actions brought to his attention during adjournment and the undersigned's effort was met with great hostility and accusations of threatening the Court.[16] Unlike the defense counsel in *State v. Pace*, the Appellant's counsel,

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[14] *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994).

[15] *State v. Pace*, 316 S.C. 71 at 74, 447 S.E.2d 186 at 187 (1994)(citing *Dunn v. Charleston Coca-Cola Bottling*, 426 S.E.2d 756 (1993).

[16] In chambers, the Presiding Judge, within fifteen seconds and before the undersigned could complete his thought, began shouting at the undersigned, accused the undersigned of threatening him, and shouted at him to get out of chambers—even after the undersigned pleaded with him to allow him to explain his position.

immediately upon returning to the courtroom, stated his objection and concerns on the record in a tone that could only be characterized as a demonstration of deference and discomfort with his position.[17] Before the Appellant's counsel could finish his statement, he was interrupted by the Court. As the Appellant's attempted to step from behind his desk to address the Court, he was instructed to get back behind his desk with a shout.[18] Appellant's counsel was accused of threatening the Presiding Judge in making his objection and cautioned to be careful of what he might accuse the Court moving forward.[19] After being accused a second time of threatening the Presiding Judge, Appellant's counsel, noticing that a motion for new trial and/or recusal was appropriate, stated, "May I respond?" The Presiding Judge responded with an emphatic, "No!"[20] Appellant was not permitted to state any further objection or motion at that time. The Appellant, being keenly aware of *State v. Pace*, believed any further discussion of the matter *or any discussion of any further alleged impropriety on the part of the Presiding Judge* would have been futile, and that the issues would not be waived in a subsequent motion for new trial or on appeal. Regardless, at the close of trial, the undersigned renewed his motion for a new trial citing the same grounds as his prior objection.[21]

The strained discourse between Appellant's counsel and the Presiding Judge continued throughout Day 2 of trial *in the presence of the Jury*. Shortly after stating his objection regarding facial expressions and gestures, Appellant's counsel attempted to object to a line of questioning

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[17] R. p. 200, line 2 through p. 201, line 17.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] R. p. 612, line 5 through line 9.

regarding the citation of a statute; Appellant's counsel was chastised regarding the use of speaking objections.[22] However, a pattern of allowing speaking objections had already been established by Respondent's counsel on Day 1 of trial.[23] The speaking objections by Respondent's counsel continued *afterward* as well without admonition from the Court.[24] This discrepancy in the way the attorneys were treated *indeed* occurred in the presence of the Jury.

Whether the Actions Complained of Indeed Influenced or Biased Jury

Canon 3 of Rule 501, SCACR and *State v. Pace* clearly highlight the potential prejudice that may inure from the use of facial expressions and gestures emanating from the bench. If taken as true, the Affidavit of the Juror depicts undue influence exerted upon the Jury and the bias that ultimately ensued to the extent that Appellant was not afforded a fair and impartial trial. The Affidavit highlights undue influence and bias that permeated throughout the Jury from Day One of trial and continuing throughout. The Affidavit also lends credibility to Appellant's concerns as stated on the record on Day Two of trial. The actions complained of and objected to at the start of Day Two indeed influenced and biased the jury.

Even in the absence of the Affidavit, there is evidence of facial expressions and gestures emanating from the Court by the Court's own admission. It is worth noting that rather than denying or downplaying the use of facial expressions and gestures, the Presiding Judge instead chastised the Appellant's counsel stating, "You have no idea what my facial expressions are… You have no

[22] R. p. 206, line 9 through line 21.

[23] R. p. 97, line 18 through 21; *see also* R. p. 102, line 8 and 9; *see also* R. p. 103, line 19 through 21; *see also* R. p. 106, line 15 and 16; *see also* R p. 119, line 21 and 22; *see also* R. p. 120, line 24; *see also* R. p. 122, line 11and 12; *see also* R, p. 124, line 13 and 14; *see also* R. p. 136, line 19 and 20; *see also* R p. 168, line 19 through 21; *see also* R p. 185, line 4 and 5; *see also* R. p. 187, line 19 and 20.

[24] R. p. 266, line 4 through 6.

idea what is going through my mind."[25] While the Appellant concedes that very point, the Appellant also argues that if Appellant did not know what the Presiding Judge's facial expressions and gestures meant, then certainly the same can be said for the jury. It is highly unlikely that the Jury perceived the facial expressions and gestures as anything other than detrimental or prejudicial to the Appellant and his counsel.

Whether the Actions Complained of Were Prejudicial In Nature

The case was decided narrowly—51% liability to the Plaintiff and 49% to the Defendant. A 1% difference drastically changes the outcome of this case.[26] If the margins were not so narrow, the argument might stand that even though the Presiding Judge's actions unduly influenced the jury and created bias within the jury, the actions were ultimately not prejudicial and had no bearing on the outcome. Plaintiff rejects even that argument. However, that argument is not available in the instant action. Even the slightest undue influence or biasing of the Jury by the Presiding Judge had the potential to have a drastic effect on the outcome of this case. The actions complained of were prejudicial in nature.

[25] R p. 200, line 2 through p. 201, line 17.

[26] R. p. 2.

III. TRIAL JUDGE ERRED IN DISMISSING PLAINTIFF'S AMENDED MOTION FOR NEW TRIAL AS UNTIMELY WHERE THE AMENDED MOTION FOR NEW TRIAL WAS FILED EIGHT (7) DAYS AFTER PALINTIFF'S/APPELLANT'S COUNSEL RECEIVED A SIGNED AFFIDAVIT FROM A JUROR.

Timeliness of Amended Motion for New Trial and Timeliness of Subsequent Notice of Appeal of the Order Dated July 19, 2018

On or about July 3, 2018, Appellant received notice of an Affidavit signed by a juror that, upon information and belief, related directly to the grounds stated for the prior oral motion for new trial made on June 29, 2018 following dismissal of the jury.[27] In an abundance of caution, both in preserving the right to submit upon appeal as well as to allow the Court an opportunity to question the Jurors, Appellant filed his Amended Motion for New Trial based on Newly Discovered Evidence. The Amended Motion for New Trial was filed on July 10, 2018, which was 11 days after the jury was dismissed, but only 7 days following notice of the existence of an Affidavit signed by a Juror. Appellant's position is that the Amended Motion for New Trial was timely pursuant to *Gray v. Bryant*.[28]

In *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), the Supreme Court held that amendment of a motion for new trial based upon newly discovered evidence is permissible if made within a reasonable time following discovery of new evidence even if made *after* the 10-day period allowed in S.C. Rules of Civil Procedure, Rule 59.[29] The *Gray* Court held that "Rule 59 and 60(b) must be read together."[30] The *Gray* Court went on to cite *Smith v. Quattlebaum*, 223 S.C. 384, 76

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[27] R. p. 15.

[28] *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989).

[29] *Id*.

[30] *Id* at 287, 896.

S.E.2d 154 (1953):

> "In Smith, defendant moved for a new trial because of an after-discovered relationship of juror to plaintiff. The court ruled that the trial court had jurisdiction to hear a motion for a new trial because of the after or newly-discovered evidence exception. The Court stated further:
>
> 'It is the duty of the trial judge to ascertain the qualifications of the jurors, and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court's inherent power to remedy the situation when brought to his attention, even after sine die adjournment of court, by the granting of a new trial, if in its discretion, necessary. *Smith*, 76 S.E. (2d) at 157.'"[31]

In the instant matter, Plaintiff's Amended Motion for New Trial filed on July 10, 2018 was made within a reasonable time following notice of the newly discovered evidence. The newly discovered evidence does not disclose discussions during deliberations, and instead, highlight both the potential bias of the jury as well as improper communications between jurors prior to deliberations. Because it is the duty of the trial judge to ascertain the qualification of jurors, and further, when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court's inherent power to remedy the situation when brought to his attention. Irrespective of same, the trial judge dismissed the Amended Motion for New Trial by Order dated July 19, 2018 as untimely. It is respectfully submitted that dismissal of Appellant's Amended Motion for New Trial was error.

[31] *Id.*

IV. COURT OF APPEALS ERRED IN FINDING THAT APPELLANT FAILED TO PRESERVE THE ISSUE REGARDING FACIAL EXPRESSIONS AND GESTURES FOR APPELLATE REVIEW.

The Court of Appeals has opined, in support of its Affirmation of the Trial Court's Final Judgment, that the contentious exchange between Appellant's counsel and the Presiding Judge did not occur in the presence of the Jury, and further, that Appellant'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, the Court of Appeals has opined 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 further, that Appellant failed to seek objections or remedy the rest of trial. Respectfully, the Appellant offers that the Court of Appeals 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. Appellant was denied the opportunity to state specific objections on the record by the Presiding Judge at the Trial.[32] 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.[33]

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)

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

[33] R. p. 16-17.

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 is now argued prejudiced the Jury 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. 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 the Court of Appeals did not need to 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 Appellant was not afforded an opportunity to state his objections on the record.[34] The Appellant argues that there was a sufficient record established by the Appellant's counsel at the beginning of Day 2 of trial to support reversal. Appellant further offers 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

[34] R. p. 200-201 and p. 612

Affidavit of a Juror[35] that alleges not only facial expressions and gestures emanating from the Presiding Judge but also how those expressions and gestures were allegedly perceived by the Jurors prior to deliberations.[36] 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 become aware later because a Juror contacted the Appellant's counsel after the trial had concluded. Appellant 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.[37] 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.[38] 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*.[39]

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[35] R. p. 16-17.

36 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.

[37] R. p. 6-31.

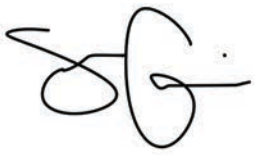
[38] *Gray v. Bryant*, 298 S.C. 286, 379 S.E.2d 894 (1989).

[39] *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)."

CONCLUSION

The facial expressions and gestures from the Trial Court giving rise to this Appeal were prejudicial in nature and constitute reversible error. Further, dismissal of the Appellant's Amended Motion for New Trial as untimely was also error. It is respectfully submitted that a new trial should be granted in favor of the Appellant and/or for any further relief the Court deems just and proper.

Respectfully submitted,



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CERTIFICATION OF COUNSEL

I certify that a petition for rehearing was made and finally ruled on by the Court of Appeals.

Stephen N. Garcia, SC Bar No. 76191