THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-10-3651

Hoang Berry ..... Petitioner,

v.

Stokes Import Collision ..... Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Statutes:

Rules

Other:

COUNTER STATEMENT OF ISSUES ON APPEAL

I. HAS PETITIONER PROPERLY PRESERVED AND PRESENTED HER ARGUMENTS RELATED TO AN INTERPRETER?

II. WOULD RESPONDANT PREVAIL ON THE MERITS?

III. ASSUMING ERROR, WHICH RESPONDENT DENIES, SHOULD THE PETITIONER BE LIMITED TO A NEW APPEAL RATHER THAN A NEW TRIAL?

COUNTER STATEMENT OF THE CASE

Petitioner filed a Complaint against Respondent in the Small Claims Court of Charleston County on November 9, 2010, alleging Respondent failed to properly complete repairs to Petitioner's vehicle. A bench trial was held before Magistrate Judge James Turner on May 2, 2011, with an interpreter present. On May 3, 2011, Judge Turner issued a written order finding for the Respondent.

Petitioner filed an appeal on May 23, 2011, in the Court of Common Pleas and the Magistrate's Return was filed with the Charleston County Circuit Court on June 7, 2011. Petitioner then appeared before the Honorable Kristi L. Harrington on November 21, 2011. Judge Harrington's order affirming the decision of the Magistrate and dismissing the appeal was filed December 15, 2011.

Petitioner then filed a Notice of Appeal to the Court of Appeals on February 1, 2012. On January 9, 2013, the Court of Appeals filed an order affirming the lower court on the basis of issue preservation. Petitioner filed a petition for rehearing, which was denied by the Court of Appeals on February 21, 2013.

Petitioner filed a petition for a writ of certiorari which was granted by the Supreme Court on December 5, 2013.

FACTS

Petitioner was a customer of the Respondent who brought her vehicle to Respondent for repairs following an accident. (R. p. 8). Petitioner subsequently sued the Respondent in Small Claims Court for allegedly defective repairs. (R. pp. 6-9). Respondent prevailed at Small Claims Court (R. p. 2, Order of Disposition filed May 3, 2011), on appeal to the Circuit Court (R. p. 5), and on appeal to the Court of Appeals (Appendix p. 2).

Petitioner argues her limited English proficiency deprived her of equal access to justice and due process. (Initial Br. of Petitioner p. 4). Petitioner concedes that an interpreter was present at the Small Claims Court bench trial on May 2, 2011. (*Id.*).

As indicated by the transcript, no interpreter was present at the appellate hearing in Circuit Court on November 21, 2011. (R. pp. 42-47). Importantly, the transcript also shows Petitioner never requested an interpreter to be present at the Circuit Court hearing and indicates the Petitioner was nevertheless able to communicate effectively with the Circuit Court Judge. (*Id.*) The transcript demonstrates that the Circuit Court told the Petitioner that the court would hear from her (R. pp. 43-44) and then listened to the Petitioner's arguments and concerns regarding the air bag, battery, air conditioning, cruise control, and how much she was charged for painting the hood. (R., pp. 44-45). The Circuit Court also questioned Petitioner if she had told the trial court judge of these

concerns and showed the pictures to the trial court judge. (R. pp. 44). Petitioner responded, "Yes, ma'am." (R. pp. 45). Next, Petitioner asked the Circuit Court if she could appeal again and the Circuit Court instructed her that she may and that she will have 10 days to appeal. (R. pp. 46). Finally, Petitioner also asked the Circuit Court if she should leave the materials she had regarding her claim. (R. pp. 46).

STANDARD OF REVIEW

On appeal, a judge's decision whether to require an interpreter to be present at a hearing is analyzed under the abuse of discretion standard. *Melton v. Olenik*, 379 S.C. 45, 53, 664 S.E.2d 487, 492 (Ct. App. 2008). An abuse of discretion occurs when "a ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of the Petitioner, and therefore, in the circumstances, amounted to error of law." *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961).

ARGUMENT

I. PETITIONER DID NOT PRESERVE AN ARGUMENT AS TO NECESSITY OF A CIRCUIT COURT INTERPRETER BECAUSE THE ISSUE WAS NEVER RAISED TO OR RULED UPON BY THE CIRCUIT COURT AND PETITIONER HAS ABANDONED ANY SUCH ARGUMENT BY FAILING TO RAISE IT IN HER BRIEF.

a. Petitioner Abandoned Any Argument She May Have Had Regarding Issue Preservation

The Court should dismiss the writ of certiorari as improvidently granted because the Court of Appeals' decision was based on Petitioner's failure to preserve the issues for appellate review, and Petitioner has not raised a single issue preservation argument in her Brief.

Rule 242, SCACR, governs the grant of a writ of certiorari. The rule states a writ is granted only where there are special and important reasons, and in particular where:

(a) there are novel questions of law;

(b) there is a dissent in the decision of the Court of Appeals;

(c) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;

(d) substantial constitutional issues are directly involved; and

(e) a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Id.

This appeal involves none of these issues. Instead, the case was decided in the Court of Appeals on issue preservation grounds. Meanwhile, Petitioner's Brief simply ignores and does not address in any fashion the Court of Appeals' finding that the issues have not been preserved.

Rule 208(b)(1)(B), SCACR, addresses a party's failure to argue an issue. It states, "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."

In *Collins Entertainment, Inc. v. White*, 611 S.E.2d 262, 363 S.C. 546 (Ct. App. 2005), the Court of Appeals noted "Petitioners only address the breach of contract claim in their discussion of evidence of damages. Accordingly, we find they have abandoned their other counterclaims against Collins." Similarly, in *Bell v. Bennett*, 414 S.E.2d 786,

307 S.C. 286 (Ct. App. 1992), the Petitioner excepted to the master's ruling on the admissibility of evidence, but failed to argue the issue in his brief and therefore was deemed to abandon it. The Court of Appeals found the unappealed ruling was the law of the case.

Likewise, the Petitioner here does not address the question of issue preservation. Therefore, any arguments on issue preservation should be deemed abandoned on appeal. *See generally Arnal v. Arnal*, 609 S.E.2d 821, 363 S.C. 268 (Ct. App. 2005) (the Petitioner "makes no argument regarding this issue and cites no authority. Therefore, we find the issue is abandoned on appeal."); *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 358 S.C. 78 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); *Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Because the appeal was decided by the Court of Appeals on issue preservation grounds and Petitioner has not raised a single argument related to issue preservation in her Brief, the Court should dismiss the writ of certiorari as improvidently granted.

b. The Issue Is Not Preserved for Appellate Review

This Court should affirm the Circuit Court's order dismissing Petitioner's appeal because Petitioner's ground for reversal, that an interpreter should have been present at the Circuit Court hearing, was never raised to or ruled upon by the Circuit Court. "It is axiomatic that an issue cannot be raised for the first time on appeal." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (internal citations omitted).

The Court of Appeal opinion in *Melton v. Olenik*, 279 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008), relied upon by the Petitioner, provides no indication that parties with limited English proficiency are exempted from this Court's issue preservation requirements or that the statute applies to appellate proceedings.

In *Melton*, the Court of Appeals reversed an entry of default judgment and remanded for new proceedings because the trial court conducted a hearing without an interpreter and never made the factual findings required by S.C. Code Ann. § 15-27-155. *Id.* at 51, 664 S.E.2d at 490. However, in that case, both parties expressed concern with a language barrier before the trial court proceeding, one party brought an interpreter with them to the hearing, and the other party objected to the use of that interpreter and requested an alternate qualified court interpreter. *Id.* at 50, 664 S.E.2d at 490. Furthermore, the petitioner in *Melton* filed a Rule 59(e), SCRCP, motion after the hearing requesting the court address its lack of findings under S.C. Code Ann. § 15-27-155. *Id.* at 49, 664 S.E.2d at 480.

In the present case, Petitioner actually had an interpreter during the trial court proceeding, never requested an interpreter before or during the Circuit Court hearing, and

did not file a Rule 59(e) motion regarding the factual findings under the interpreter statute. For this Court to rule on an issue, it must first be raised and ruled upon by the court below. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733. Thus, this issue is not preserved for review and *Melton* provides no support for Petitioner's argument.

Petitioner did not preserve her right by raising the issue of an interpreter to the trial court or Circuit Court. And now, when represented by counsel,[1] she still has not presented any issue preservation argument to the Court of Appeals or this Court. This Court should therefore dismiss the writ of certiorari as improvidently granted or, in the alternative, find any argument as to issue preservation has been abandoned and that the issue is not preserved for appellate review.

II. STOKES WOULD PREVAIL ON THE MERITS.

a. An Interpreter Is Not Required At The Appellate Level

Petitioner admits an interpreter was present at the small claims trial but argues the transcript does not show the quality of communication between the Petitioner and the Court. (Brief of Petitioner p. 4). Petitioner then states that she is "*concerned that there may have been* a language barrier at both the bench trial in the Small Claims Court and at the appeal in Circuit Court." (*Id.*) (emphasis added). Thus, by the terms of Petitioner's own argument, she only raises the *possibility* of a language barrier.

[1] In the event Appellant argues she should not be impacted by issue preservation requirements because she is a *pro se* litigant, Respondent would refer the Court to *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001). There, the Court of Appeals found it would not hold a layman to an lesser standard than that which is applied to an attorney. *Id.* at 310, 547 S.E.2d at 897. *See also McCall v. A-T-O, Inc.*, 276 S.E.2d 529, 276 S.C. 143 (1981) ("This Court has never held a layman to a lesser standard than attorneys.").

Petitioner appears to argue that S.C. Code Ann § 15-27-155(A) applies to appeals to the Circuit Court. (Brief of Petitioner pp. 5-6). However, this statute provides in pertinent part that:

> whenever a party or witness to a civil legal proceeding does not sufficiently speak the English language to testify, the court may appoint a qualified interpreter to interpret the proceedings and the testimony of the party or witness.

S.C. Code Ann. § 15-27-155(A).

An interpreter was appointed for and available to Berry in her Magistrate Court trial. However, the statute does not state an interpreter is necessary, or authorized, in Berry's appeal to the Court of Common Pleas. The statue is directed solely to trial proceedings as evident in its use of the word "testify." To "testify" means "to give evidence as a witness." Black's Law Dictionary (9th ed. 2009). Parties do not give evidence on appeal, but instead are allowed to argue based on the existing record. Importantly, the statute is also located in Chapter 27 of Title 15, which is entitled "Trial and Certain Incidents Thereof." The statute by its own terms and where it is located within the code does not apply to appellate proceedings. As it is clear based on the record that Petitioner had an interpreter at the trial court level, any reliance on S.C. Code Ann. § 15-27-155(A) by Petitioner is misplaced.

Finally, there is no indication in the record that the Circuit Court felt it could not understand the Petitioner. Instead, the transcript demonstrates that the Circuit Court listened to the Petitioner's arguments and concerns regarding the air bag, battery, air conditioning, cruise control, and how much she was charged for painting the hood. (R.,

pp. 44-45). The Circuit Court also questioned Petitioner if she had told the trial court judge of these concerns and showed the lower court pictures of the alleged damage. (R. pp. 44-45). Petitioner responded, "Yes, ma'am." (R. pp. 45). Finally, Petitioner asked the Circuit Court if she could appeal again and the Circuit Court instructed her that she may and that she will have 10 days to appeal. (R. pp. 46).

b. Petitioner's Rights to Equal Access And Due Process Were Not Denied

Petitioner also makes a cursory equal access and due process argument. (Brief of Petitioner pp. 6-7). In a two paragraph argument, Petitioner cites the South Carolina Constitution (but no case law) and offers no analysis. She raises the issue of, due process and equal access to justice, without sufficiently arguing them or even treating them as separate issues.

First, as discussed above, this argument should be deemed not preserved for appellate review because it was never raised to or ruled upon by the trial court or on appeal to the Circuit Court.

Second, the arguments should be deemed abandoned as the issue is only raised in a short conclusory statement and is not supported by authority. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 358 S.C. 78 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); *Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)

("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

In the event the Court finds these arguments are preserved and have not been abandoned, the evidence is that S.C. Code Ann. § 15-27-155(A) was fully satisfied. An interpreter was appointed for and available to Berry at the trial court. Furthermore, the Record does not reflect Petitioner suffered any prejudice as a result of the concerns she has raised. It is undisputed an interpreter was present at the trial court level and she was able to present evidence and argue her case. While the transcript quoted by Berry in her brief does show some initial confusion between her and the Circuit Court, as discussed above, other portions of the transcript indicate the confusion was cured and Petitioner was able to present her arguments to the Circuit Court.

Furthermore, "[t]o establish an equal protection violation, plaintiffs must demonstrate they were intentionally and purposely subjected to treatment different from others similarly situated." *Seabrook v. Knox*, 369 S.C. 191, 200, 631 S.E.2d 907, 912 (2006). There is simply no indication Petitioner was intentionally or purposefully treated different from other similarly situated persons.

c. *The Record Does Permit Meaningful Appellate Review*

Finally, Petitioner argues that in "almost every instance that a female voice is mentioned in the Small Claims Court transcript it is considered inaudible" and, therefore, the "transcript does not provide any evidence that the Petitioner received equal access to justice at her bench trial." (Brief of Petitioner p. 7).

Petitioner relies exclusively on *State v. Ladson*, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). However, *Ladson* is inapplicable. The case involved a criminal conviction and lengthy prison sentence. There, the Court of Appeals was told the entire transcript was unavailable because the court reporter's equipment failed. The court determined the majority of jurisdictions hold "the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." *Id.* at 324, 644 S.E.2d at 273. But, it then concluded the Petitioner could show prejudice from the incomplete or reconstructed record and that the reconstructed record was inadequate for meaningful appellate review.

Here, Petitioner's contention on appeal is that "there *may* have been a language barrier at both the bench trial ... and at the appeal". (Brief of Petitioner p. 4) (emphasis added). However, she admits an interpreter was present at the bench trial (Brief of Petitioner p. 4). Therefore, the state of the transcript at the bench trial is of limited importance and does not prevent meaningful appellate review because the sole uncontroverted evidence is that an interpreter was present at the bench trial.

III. PETITIONER IS NOT ENTITLED TO A NEW TRIAL BECAUSE AN INTERPRETER WAS PRESENT AT TRIAL.

Even if the Court determines that the Circuit Court's Order dismissing the appeal should be reversed and that S.C. Code § 15-27-155(A) applies to appeals to the Circuit Court, Petitioner is at most entitled to a remand to the Circuit Court so it can make the factual findings under the statute regarding whether an interpreter should be waived.

Petitioner concedes that an interpreter was present at the trial in Small Claims Court and therefore has no grounds to request a new trial. (Brief of Petitioner p. 8).

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted because the claims are not preserved for appellate review and have been abandoned by Petitioner. Additionally, the decision of the Court of Appeals should be affirmed because Petitioner's arguments must fail on the merits—no law requires an interpreter at the appellate level and Petitioner concedes an interpreter was present at the bench trial.

Respectfully submitted,

January 29, 2014

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CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I certify that Respondent's Final Brief complies with SC Rule of Appellate Procedure, Rule 211(b).

January 29, 2014

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