THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge
App. Case No. 2014-000632

THE STATE

Respondent,

v.

KYLIE NILSON

Appellant.

APPELLANT'S REPLY TO RESPONDENT'S MOTION TO STRIKE

Appellant hereby responds to Respondent's Motion to Strike with the following.

I. References to Record in Appellant's Initial Brief.

In its Motion to Strike, Respondent contends that Appellant, in her Initial Brief, failed to adequately reference the record in accordance with Rule 208(b)(4) of the South Carolina Appellate Court Rules ("SCACR"). While all references to the Record on Appeal will be provided to this Court in Appellant's Final Brief, if this Court so requests, Appellant will resubmit her Initial Brief with all correct references to the record. In any event, a lack of references to the record in Appellant's Initial Brief, as well as a resubmission of this brief with the appropriate references made, causes no prejudice to Respondent.

II. Clarity of Appellant's Designation of Matter.

Appellant's Designation of Matter clearly indicates that the "Transcript of Proceedings" will be included in the Record on Appeal. As a result, it is Appellant's intention to include transcripts of both the October 8, 2013 Magistrate's court trial in front of Judge Livingston *and* the March 12, 2014 Circuit Court motion hearing in front of Judge Culbertson. Additionally, Appellant's Designation of Matter was filed with this Court on July 14, 2014. Respondent's Initial Brief was not filed until December 31, 2014. Consequently, Respondent had ample opportunity to raise its objection to the language of Appellant's Designation of Matter being unspecific, but simply failed to do so. Therefore, Respondent's argument regarding this matter is waived.

However, if this Court agrees with Respondent that "Transcript of Proceedings" is overly broad, Appellant will resubmit a new, more specific Designation of Matter that defines exactly which portions of the proceedings are to be included should this Court so require.

III. Respondent has misinterpreted the language of Rule 210(c) and the Court's ruling in I'On v. Town of Mount Pleasant.

According to Rule 210(c) of the SCACR, "[t]he Record shall not . . . include *matter which was not presented to* the lower court or tribunal." (emphasis added). Respondent contends that, per Rule 210, a lower court ruling is not preserved for appeal unless there is written documentation of such ruling for the higher court to consider. This contention is incorrect. The Supreme Court of South Carolina has interpreted Rule 210 to mean that "issues and arguments are [properly] preserved for appellate review . . . when they are *raised to and ruled on* by the lower court." Elam v. S.C. Dep't of Transportation, 361 S.C. 9, 23 (2004) (emphasis added) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have

been *raised to and ruled upon* by the trial judge to be preserved for appellate review." (emphasis added)); Gaffney v. Peeler, 21 S.C. 55 (1884) (finding that a question of law which was *not presented to or passed upon by the trial court* cannot be raised on appeal)).

Respondent cites I'On v. Town of Mount Pleasant in support of its contention that an issue has not been preserved for appeal unless written documentation of that issue has been presented to every preceding court. Specifically from I'On, Respondent asserts that "[i]mposing . . . preservation requirement[s] on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On v. Town of Mount Pleasant, 338 S.C. 406, 422 (2000).

Respondent has taken the I'On holding out of context. The Court in I'On simply addresses the burden on parties to preserve issues for appeal and only mentions those rules relative to appellants in passing. *Id.* at 421-22. In fact, the I'On Court, much like the Court in Elam, Wilder, and Gaffney, as well as this Court in the South Carolina Rules of Appellate Practice, makes *no mention whatsoever* of actual, written documentation being a *requirement* for issue preservation. Instead, Appellant submits to this Court that, while written record is imperative in courts where counsels' arguments are not commonly heard, such as this, the only true requirement is that the *issue or matter be presented* to the lower court or tribunal. See Rule 210(c), SCACR.

Based on the foregoing case law and the language of Rule 210(c), it is clear that the preservation of issues for appeal is not whether the reviewing court has a written record of the rulings. Instead, it is whether the issue was properly *presented to, and ruled upon by*, the lower court. In the present case, all of the issues discussed in both Appellant's Initial and Reply Briefs were properly presented to both lower courts. Specifically, all issues were initially presented to

and ruled on by Judge Livingston at the magistrate's court level. Then, the exact same issues were again presented to and ruled on by Judge Culbertson at the circuit court level. More importantly, had Judge Culbertson felt that the record was insufficient to make a ruling; Appellant would have supplied a record of the trial at that time. However, neither Judge Culbertson *nor Assistant Solicitor Thomas* expressed such concerns. For this reason, Respondent has effectively *waived any objection* which it might have had to the consideration of Appellant's trial transcript on appeal. City of Greenville v. Bryant, 257 S.C. 448, 454 (1972) (finding that appellant's failure to object to specific, obscene publications at an initial Greenville City Council hearing constituted failure to preserve the issue for later objection).

Since Appellant believes that these issues were incorrectly ruled on by both lower courts, Appellant seeks to present these issues on appeal to this Court. Therefore, Appellant should be permitted to include the transcript of her Magistrate's court trial in the Record on Appeal.

IV. CONCLUSION

For the foregoing reasons, Appellant should be permitted to present a *complete* Record on Appeal, including a transcript of her Magistrate's court trial. Additionally, Appellant requests that all timelines be held in abeyance until this Court has ruled on this motion.

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Respectfully submitted,

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February 6, 2015
Myrtle Beach, South Carolina

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V.

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PROOF OF SERVICE

The undersigned attorney hereby certifies that on February 6, 2015, a true copy of Appellant's Reply to Respondent's Motion to Strike in the above referenced case has been served upon:

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FAX: (803) 734-1839

FROM: Jeffrey T. Lucas II

DATE: February 6, 2015

RE: Kylie Lauren Nilson, Appellate No.: 2014-000632

Number of Pages (including this sheet): 7

Comments: The original of this document has been mailed to the SC Court of Appeals and Opposing Counsel has been served via U.S. Mail with a copy of the same.

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