THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-0368

CHANG HUA ZENG . . . . . Appellant

v.

COOSAW PARTNERS, LLC and TERRY KINDER . . . . . Respondents

FINAL BRIEF OF RESPONDENTS

SMITH | CLOSSER, P.A.

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I. FACTS

Respondent Coosaw Creek Partners, LLC is the owner of a shopping center located on Dorchester Road, North Charleston; Respondent Terry Kinder is one of the partners in Coosaw Creek and acts as the property manager. Appellant Chang Hua Zeng is the proprietor and owner of an oriental restaurant, known as Bamboo House. On September 10, 2009, Appellant and Respondent entered into a commercial lease, pursuant to which Appellant was to occupy a space located at one end of the center. Appellant was responsible for any and all alterations to the "white box" unit he rented that he deemed necessary for the operation of his business.

In 2011, the parties were advised by the City of North Charleston that the business would require a specialized grease fan on top of the building. The roof structure was insufficient to support the new unit; after significant difficulty attempting to coordinate with Appellant, Respondents undertook the work themselves through the services of a design engineer and the appropriate contractors. At the same time as the new unit was ready to be installed as a fixture addition to the roof, Respondents – who had been dealing with thefts of air conditioning units from the center – put two new units, including the one servicing Appellant's business, on top of the roof. Appellant, through counsel, negotiated an addendum to his lease allowing him to pay an increase of $200 per month to his rent in order to repay a portion of the cost of the new installation.

Appellant subsequently filed a complaint seeking One Million Dollars in damages. A careful reading of the complaint, combined with Appellant's statements during the course of the hearing, reveals that he raised three causes of action: breach of contract, fraud, and discrimination. The breach of contract is apparently predicated upon Respondents' refusal to permit Appellant to block off a portion of the communal parking lot for the sole use of his

customers. The fraud arises from Appellant's belief that 1) no work was actually necessary on the roof; and 2) that Respondents are forcing him to pay for a new support system that Respondents at all times intended to be used by their other tenants. It is impossible to determine the factual basis for the claim of discrimination. Respondents denied all allegations and sought attorney's fees pursuant to the Lease Agreement.

II. PROCEDURAL POSTURE

The matter was originally scheduled for a bench trial to commence on October 2, 2013. At that time, Appellant informed the Honorable Diane Goodstein that he believed his command of the English language to be insufficient to permit him to testify or understand the proceedings. Judge Goodstein prepared a detailed Order continuing the matter until January 6, 2014, and setting out the procedure by which Appellant, with the assistance of counsel for Respondents and the Court itself, was to locate a qualified interpreter of Mandarin Chinese.

It appears that no formally qualified interpreter could be found within any reasonable distance from the State of South Carolina. On April 8, 2014, Appellant appeared for the trial accompanied by an interpreter he had selected. He presented his own testimony, both through the interpreter and by himself. Respondents called no witnesses, and on June 14, 2014, the Court entered an Order dismissing all of Appellant's claims and awarding Respondents their fees incurred. It is from that Order that Appellant now appeals. The sole issue raised in the appeal is the adequacy of the interpreter.

ARGUMENT

I. No Finding of Waiver Was Necessary as the Interpreter Was Selected by Appellant.

Although Appellant phrases his argument as having two separate issues, there is actually only one raised in his Initial Brief. This argument is predicated entirely on Section 15-27-155(A) of the South Carolina Code of Laws, which he asserts requires the Trial Court to make factual findings regarding the competence of the interpreter, and to determine whether or not waiver of a court-appointed, qualified, interpreter is necessary before allowing the trial to go forward. Appellant also claims that the statute mandates a finding that testifying without an interpreter is in his best interest, and the Trial Court should not have permitted him to speak. Under the facts of this case, this is incorrect.

Section 15-27-155(A) of the South Carolina Code of Laws reads as follows:

> Notwithstanding any other provision of law, 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. However, the court may waive the use of a qualified interpreter if the court finds that it is not necessary for the fulfillment of justice. The court must first make a finding on the record that the waiver of a qualified interpreter is in the best interest of the party or witness and that this action is in the best interest of justice.

Appellant cites to *Melton v. Olenik*, 664 S.E.2d 487, 379 S.C. 45 (Ct. App. 2008) as support for his contention that the Trial Judge was required to ensure that he had a qualified interpreter, or, in the alternative, expressly find that waiver of court-certified assistance was in Appellant's interest.

The *Melton* Court did, in fact, hold that the trial court was required to create a factual record in cases where it concluded that no qualified interpreter would be necessary. *Melton* is sufficiently factually distinguishable as to have no relevance to the instant situation. In *Melton*, both the plaintiff and the defendant were Korean, and neither was fluent or even comfortable in

the English language. Both parties expressed their concern regarding the language barrier prior to the hearing. The plaintiff arrived at the hearing with an interpreter, to whom the defendant objected. After the trial judge conducted a voir dire of the interpreter, the defendant renewed her objection. The hearing proceeded without any interpreter whatever. The Court of Appeals, which quoted extensively from the transcript, found that it was impossible to decipher the testimony, finding that it was "confusing and at times incoherent." *Id.* at 51, 664 S.E.2d at 490. The Court concluded that the trial court was required to make factual findings, in accordance with the statute, before it could decide that no interpreter would be required.

Although Appellant in the instant action objected to proceeding without an interpreter – the first time the case was called for trial it was continued for the express purpose of allowing him, with the assistance of both opposing counsel and the trial court, to locate one – there was no question of proceeding without Appellant having assistance with his language difficulties. Although it appears from the transcript that the interpreter herself might not have been totally comfortable in her role[1], she was selected and brought to the courthouse by Appellant himself. Far from objecting to the use of the services of this individual, and regardless of whether she was or was not "qualified" within the meaning of S.C. Code § 15-27-155, this was an interpreter selected, hired, and brought to the trial by the person who wanted her services.

Although Appellant now complains that his own hand-selected interpreter was not properly qualified by the Court prior to entering upon her services, this is simply not a case in which the Court was required to independently verify the qualifications of the interpreter, or make any determination as to whether or not the use of this individual was in Appellant's best interest. This was Appellant's interpreter. Furthermore, despite Appellant's current

[1] Although it does not appear in the record, it seems that the closest court-qualified interpreter in Mandarin Chinese was located in California. Bringing this individual to South Carolina imposed a financial burden the Court was not willing to bear.

protestations that the Trial Court was required to ask Appellant separately whether he waived the use of an interpreter, the transcript of the hearing clearly demonstrates that Appellant did so.

Appellant testified regarding his complaint, through the interpreter he had chosen and brought with him to the hearing. Following his own direct testimony, he was cross-examined, again through the interpreter, by counsel for Respondent. At the conclusion of his own testimony, he returned to his seat, whereupon the Court asked if he had any additional witnesses. Appellant, still speaking through his hand-selected interpreter, made a couple of statements from counsel table, after which the following exchange occurred:

PLAINTIFF (by his interpreter):	If it's okay, I want to try my English to repeat my purpose. I…
THE COURT:	He's finished testifying. Did --- did you want to testify some more? Did --- would he like to testify additionally? Because if you wish, you may.
PLAINTIFF:	Okay.
THE COURT:	Yes?
THE INTERPRETER:	Yes.
THE PLAINTIFF:	Yeah.
THE COURT:	Okay. Well, come on back up.

(Plaintiff resumes his seat on the witness stand)

THE PLAINTIFF:	Okay. I try my English; see it's enough; make you understand what's I mean and why I am kind of here….

Transcript, pp. 14 – 15, R. pp. 48 – 49.

Following the resumption of his testimony, Appellant testified at length, testimony that comprises a full three-and-a-half pages of the transcript, without interruption. Although it is clear that English is not his native language, and some of his language structure is awkward, he

appears to have gotten his points across. He appeared to be satisfied with his testimony, and resumed his seat at counsel table without indicating any confusion or desire to continue to speak.

A waiver is an intentional relinquishment of a known right. *Bonnette v. State*, 277 S.C. 17, 282 S.E.2d 597 (1981). It may be either express or implied. *Lawrimore v. American Health & Life Ins. Co.*, 276 S.C. 112, 276 S.E.2d 296 (1981). An implied waiver results from acts and conduct of the party against whom the doctrine is invoked, from which an intentional relinquishment of a right is reasonably inferable. *Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 148 S.E.2d 369 (1966).

It is difficult to conceive of a situation in which an implied waiver of a known right is more clear. Appellant knew that he had the right to an interpreter; he himself had requested a continuance of the original trial date in order to locate one, and had selected an individual he believed to be competent to accompany him to trial. He used the services of the interpreter during his initial testimony and cross-examination. After discussing the matter with the Trial Judge, he elected to add to his testimony, and specifically stated, on the record, that he wished to try his English. Once he had brought an interpreter to help him with his testimony, and then specifically stated that he wished to add to that testimony in his own words, there is no need for the Court to additionally ask him, specifically, whether he waives his right to the continued use of an interpreter. He has already said so, and his resumption of the stand and additional testimony makes his waiver of any right or examination apparent.

Because of the actual process in this particular instance, neither the statute nor the single case cited by Appellant are relevant or apposite. Appellant entered this trial fully cognizant of his right to have an interpreter, selected one himself and brought that individual to the trial, and, following his interpreted testimony, affirmatively indicated to the Trial Court his desire to waive

any right to on-going translation and testify in English himself. Appellant cannot now complain of the procedure, or the interpreter, he selected.

II. Appellant Has Failed to Preserve Any Issues for Appeal.

In addition to the general waiver of the use of a qualified interpreter, Appellant has equally clearly failed to preserve the issues he now raises.

When the case was first called for trial, Appellant specifically requested a continuance in order to obtain assistance in presenting his facts and argument. As noted *supra*, the Trial Court not only granted the continuance, and ordered that opposing counsel help Appellant, but itself took on some of the burden of attempting to locate an interpreter qualified in Mandarin. Despite the best efforts of all concerned, no such interpreter was located within any reasonable distance of the Trial Court.

The significance of Appellant's request is to show that, had Appellant truly been dissatisfied with the quality of the assistance he was receiving during the actual hearing, he certainly knew enough at that time to ask that the Court permit him to continue to case yet again. He had done so once. He knew he could request a continuance. He did not do so, nor did he raised any objections to the Trial Court regarding proceeding at the time the case was called.

An issue waived below cannot be brought forward for the first time on appeal. *Doe v. Roe*, 379 S.C. 291, 297, 665 S.E.2d 182, 185 (Ct. App. 2008); *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct. App. 2001). The issue must have been raised to and ruled upon by the trial judge in order to be preserved for review. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (Ct. App. 2008); *see also Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006)("An appellate court will not consider issues on appeal which have not been preserved for appellate review.").

To preserve an issue for appeal, it must be: 1) raised to and ruled upon by the trial court; 2) raised by the appellant; 3) raised in a timely manner; and 4) raised with sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301 – 02, 641 S.E.2d 903, 907 (2007). It is, of course, clear from the transcript that Appellant never raised the qualifications of his interpreter to the Trial Court, nor did he at any time request that the Trial Court conduct a voir dire of the interpreter in order to determine her qualifications. It is also clear that Appellant at no time requested that the Trial Court make a finding as to whether it was or was not in his best interest to use the interpreter he had provided, or to testify without the assistance of his interpreter. In fact, despite the existence of this appeal, Appellant never objected to a single event or occurrence at the trial. He did not object to his testimony being translated by the interpreter he had chosen. He did not object to the Trial Court's omission of any qualification of his interpreter. Not only did he not object to the Trial Court's decision to have him testify without any interpreter at all, he affirmatively indicated that it was his decision to do so. Only after the conclusion of the hearing, and only after the Trial Court's Final Order ruling in favor of Respondents, did Appellant raise any issues. The issues Appellant now raises to this Court were never addressed below, and have not been preserved for appellate review.

III. Either Appellant Has Violated the Rules of Appellate Procedure Or His Knowledge Of English Is Far Greater Than He Has Represented.

Rule 267(b) of the South Carolina Rules of Appellate Procedure reads:

> [t]he original of a document or paper filed by a party or his attorney shall be signed by the party or the attorney. The signature of a party or attorney constitutes a certificate by him that he has read the document or paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

Appellant herein simultaneously argues that he is unable to testify on his own behalf without the services of a court-qualified interpreter, and, at least by implication, that he is qualified to write and understand the Initial Brief he has filed with this Court.

Respondent cannot know whether the Initial Brief was written by Appellant or not. If it was, his command of the English language is clearly far beyond that necessary to be able to testify on his own behalf, without an interpreter. The Initial Brief is clearly and succinctly written. Not only the English but the citation form is proper; the former appears to comply with the standard rules of grammar, spelling, and composition, and the latter basically complies with the rules set out by the *Harvard Bluebook*. In the alternative, if the Initial Brief was drafted on Appellant's behalf by a third party, Appellant's signature on the document is certification that he has not only read but understood it.

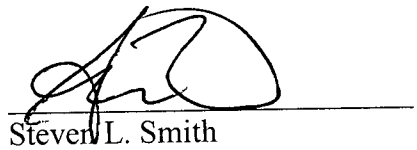
Appellant cannot simultaneously argue that he was unable to properly present his case at trial due to his inability to speak English and that he understands the complex Initial Brief he has submitted. It is routinely accepted that counsel will argue theories of recovery in the alternative. What is not accepted is that a party will make a single argument predicated upon facially contradictory facts. Appellant is contending, in a well-written and coherent brief drafted in totally comprehensible English, that he does not speak English. Either his command of the language is excellent, or he has signed and filed a document he does not understand. To put it simply, either the entire basis for this appeal is spurious, or the Initial Brief, and the appeal, should be dismissed for failure to comply with the fundamental Rules of this Court.

CONCLUSION

For the reasons set forth above, Respondent would respectfully request that the Appeal be dismissed and the decision of the Trial Court affirmed in its entirety.

Respectfully submitted,

SMITH | CLOSSER, P.A.



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RESPONDENTS' INITIAL BRIEF AND DESIGNATION OF MATTER FOR RECORD ON APPEAL

PROOF OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Appellants' Final Brief, to the following:

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2-20, 2015
Charleston, South Carolina
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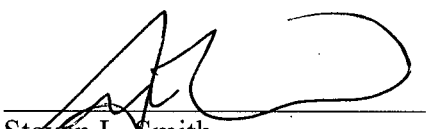
CERTIFICATE OF RESPONDENTS

The undersigned hereby certifies that the Final Brief of Respondents complies with Rule 211(b) of the South Carolina Rules of Appellate Procedure.

SMITH | CLOSSER, P.A.



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