

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JAN 24 2020

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable L. Casey Manning, Fifth Judicial Circuit Court Judge
Richland County

Appellate Case No.: 2016-002268

Taliah Shabazz,.....Appellant,

v.

Bertha Rodriguez,.....Respondent.

RETURN TO PETITION FOR REHEARING

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Attorneys for the Respondent

The Respondent respectfully submits this Return in opposition to the Appellant's Petition for Rehearing.

STATEMENT OF THE CASE

This appeal stems from an automobile accident case, which was tried to a jury verdict in August of 2016. The Respondent Bertha Rodriguez admitted fault for the accident prior to trial, and the only remaining issue was the amount of damages sustained by the Appellant Taliah Shabazz.

The case first came to trial before the Honorable Jocelyn Newman on June 13, 2016, but when the jury could not reach a unanimous verdict, the judge declared a mistrial on June 14, 2016. The case was again called to trial on August 29, 2016, this time before the Honorable Casey Manning.

At both trials, Rodriguez admitted fault for the accident, but defended on the issue of Shabazz's claimed damages. Although Rodriguez's attorney did not dispute some of Shabazz's initial medical treatments, she argued that treatments a year later, as well as complaints of continuing headaches long after the accident, were not causally related and should not be awarded. Defense counsel also elicited testimony from Shabazz's pain management physician that called into doubt any causal link to the accident. Specifically, the physician testified that he believed it was unlikely a person suffering from migraines as severe as those Shabazz claimed would wait a full year before reporting them or seeking treatment for them. Other evidence showed that Shabazz did not receive any treatments for severe headaches until nearly a year after the accident.

After closing arguments to which neither side made any objections, the trial judge submitted the case to the jury. During the deliberations, the jury sent a question to the trial judge

asking whether health insurance had paid for some of Shabazz's bills. The trial judge consulted with the attorneys for both sides and then brought the jury back to the courtroom. He told the jurors they could not consider anything other than the evidence presented during the trial and that they should disregard the question they raised and return to deliberations as if the question had never been asked. [R. p. 79.] Neither party objected to the trial judge's answer and instructions to the jury.

The jury returned to its deliberations and eventually returned a verdict for Shabazz in the amount of \$12,500. Counsel for Shabazz requested and received ten days to file post-trial motions. Within that timeframe, Shabazz filed a motion seeking a new trial absolute or a new trial *nisi additur*. [R. pp. 1-6.] The trial judge denied that motion in an Order filed on October 10, 2016. [R. pp. 7-9.] Shabazz then commenced this *pro se* appeal.¹

After notifying the parties that the case would be decided without oral arguments, the Court filed an unpublished decision affirming the trial judge's rulings on December 31, 2019. [Opinion No. 2019-UP-416.] Shabazz filed and served a Petition for Rehearing, to which the Court requested a response in a letter dated January 17, 2020.

ARGUMENT

Shabazz petitions for rehearing on the following grounds: (1) that the trial court erred by allowing Rodriguez's counsel to incorrectly state how the impairment scales were calculated during closing arguments; and (2) that the jury erred by considering the issue of insurance during its deliberations. In her previous briefs, Shabazz also argued that her attorney provided ineffective assistance of counsel by failing to object to the allegedly improper closing arguments or to the judge's answer to the jury's question about medical insurance.

¹ It appears that Shabazz's former attorney ceased representing her at some point after the filing of the post-trial motions, but before the start of this appeal.

According to Rule 221(a), SCACR, a rehearing petition “shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” Shabazz has failed to do that in her petition. Rather than arguing, let alone demonstrating, that the Court overlooked or misapprehended anything on the relevant issues, Shabazz merely sets forth a more concise version of the arguments asserted in her previous appellate briefs. Therefore, Shabazz has not established any basis for a rehearing, and the petition should be denied.

I. THE ISSUES RAISED BY SHABAZZ WERE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

Rodriguez’s primary argument on appeal is, and always has been, that Shabazz failed to preserve her issues for review during the trial. “It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.” *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). “Failure to make a contemporaneous objection makes this issue unavailable on appeal.” *White v. Wilbanks*, 298 S.C. 225, 229, 379 S.E.2d 298, 300 (Ct. App. 1989), *rev’d on other grounds*, 301 S.C. 560, 393 S.E.2d 182 (1990). “The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements of language complained of and to ask the court for a distinct ruling thereon.” *State v. Black*, 319 S.C. 515, 521, 426 S.E.2d 311, 315 (Ct. App. 1995). *See also Small v. Springs Indus., Inc.*, 300 S.C. 481, 488, 388 S.E.2d 808, 812-13 (1990) (the appellant failed to preserve the issue of whether the trial court's instruction to the jury was erroneous because the appellant did not object to the instruction).

The Court acknowledged this well-established law in its opinion. Indeed, it appears the Court based its decision in large part on the absence of the required issue preservation. Faced with that decision, it was incumbent upon Shabazz in a rehearing petition to demonstrate how

and when her attorney preserved the alleged errors for appellate review (*i.e.* something this Court “overlooked or misapprehended”). Just as she failed to do in her appellate briefs, Shabazz has not made any such demonstration in the current petition.

Shabazz has not pointed to anything in the Record on Appeal showing that her attorney objected to either the closing arguments by defense counsel or to the trial judge’s answer to the jury’s question about medical insurance. Nor is it even possible for her to do so. The trial transcript (contained in the Record) shows that Shabazz’s attorney did not raise any objection to defense counsel’s closing argument. Furthermore, Shabazz’s attorney expressly indicated that he had no objections to, or problems with, the trial judge’s answer to the jury’s question about medical insurance. [Supp. R. p. 120, lines 8-11.] Under these circumstances, there is no way for Shabazz to show that the issues were preserved for review because they plainly were not.²

In her petition, Shabazz does not substantively address the Court’s conclusion that her merits issues were not preserved for review. She does not set forth or discuss any case law to counter the cases cited and relied upon by the Court. She also does not identify any legal authorities for the proposition that the errors she claims the trial court made were not subject to the traditional rules of issue preservation. In short, Shabazz has not satisfied her burden of demonstrating that the Court overlooked or misapprehended any law or record evidence in deciding that her issues were not preserved. For that reason, the Court should deny her petition and leave its original decision intact.

² In fact, Shabazz has essentially conceded that her attorney did not make timely objections to the closing argument or to the judge’s answer. By claiming that the attorney’s failure to make those objections constituted ineffective assistance of counsel, Shabazz necessarily acknowledges that no timely objections were made in the trial court.

II. THIS APPEAL IS NOT THE PROPER FORUM FOR SHABAZZ'S COMPLAINTS ABOUT HER ATTORNEY.

Even giving the rehearing petition a liberal reading in light of Shabazz's *pro se* status, it does not appear that she raises any arguments about ineffective assistance of counsel. Therefore, Rodriguez respectfully asserts that Shabazz has waived that issue for any further review and that the Court's ruling on that issue has become the law of the case. Nevertheless, in an abundance of caution, Rodriguez will briefly address this issue.

Shabazz believes her attorney gave her ineffective assistance of counsel by not making the objections as discussed in the preceding section. Rodriguez does not believe or concede that the attorney acted improperly by not making those objections, or that the absence of such objections affected the trial result at all. Yet, even if the attorney provided ineffective assistance of counsel, that would not constitute grounds for reversal. As the Court noted, arguments about ineffective assistance of counsel cannot serve as the basis for reversing the result of a civil trial. 2019-UP-416 at 3 (citing *Nelson v. Boeing Co.*, 446 F.3d 1118, 1119 (10th Cir. 2006)). The rehearing petition does not set forth any arguments or authorities to challenge that principle. As noted above, the petition appears not to address this issue at all. Therefore, Shabazz cannot possibly have demonstrated anything on this issue that the Court overlooked or misapprehended.

Whether or not Shabazz has legitimate complaints about her attorney is not something for this Court to consider. To the extent any such valid complaints exist (and, again, Rodriguez argues they do not), other forums would exist to address them. Accordingly, the Court's decision on this issue is correct and should stand.

III. EVEN IF THE COURT WERE TO ADDRESS THE MERITS OF SHABAZZ'S ARGUMENTS, THE END RESULT WOULD BE THE SAME.

It appears that through her petition, Shabazz is asking the Court to ignore principles of issue preservation and rule on the merits of her unpreserved arguments. The Court did not reach the merits in its original decision, and there is no reason or basis for the Court to do so now. Two of the issues are patently unpreserved and the third is not a proper issue for a civil appeal. Therefore, for purposes of the current petition, there is no need for the Court to consider the merits of Shabazz's appeal.

Yet, were the Court to address those issues, the end result of the appeal would not change. The trial judge did not commit any reversible error, regardless of whether or not they were preserved for review. The closing arguments by defense counsel were proper, the judge's answer to the jury's question was accurate and reasonable, and Shabazz's attorney did not fail to represent her interests. In short, Shabazz received the full and fair opportunity to present her case to which she was entitled. Although she did not receive the result she wanted, that is an entirely different question that is not this Court's to answer.

The Respondent's Brief presented full arguments on the merits of Shabazz's appellate issues, simply out of an abundance of caution. For the sake of space (and because they are unnecessary in light of the Court's decision), Rodriguez will not repeat those arguments here. Instead, Rodriguez incorporates those arguments by this reference and relies upon them to the full extent that would be necessary or appropriate at this stage of the appeal.

CONCLUSION

As discussed above, the issues raised by Shabazz are not properly before this Court, and even if they were, they do not provide any basis for reversal. For these reasons, the Court should deny the Petition for Rehearing and allow its decision to stand.

Respectfully submitted,

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January 24, 2020

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent, certifies that I have this 24th day of January, 2020, served a copy of the **Return to Petition for Rehearing** upon the *pro se* Appellant by causing it to be deposited in the United States mail with sufficient postage, addressed to: Taliah Shabazz; 6289 U.S. Highway 321 S; Winnsboro, SC 29180.

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January 24, 2020

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January 24, 2020

Via Hand Delivery

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

Re: Taliah Shabazz v. Bertha Rodriguez
Appellate Case No. 2016-002268
Our File No. 1464.7551

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the original and seven copies of the Respondent's Return to Petition for Rehearing, and (2) the original and one copy of the Proof of Service. Please file the originals and necessary copies and return the extra stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

R. Hawthorne Barrett

R. Hawthorne Barrett

RHB
Enclosures

cc: Taliah Shabazz, Pro Se