THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

RECEIVED
May 21 2020
S.C. SUPREME COURT

Appellate Case No.: 2020-000650

Taliah Shabazz,……..……..…Petitioner,

v.

Bertha Rodriguez,……..Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242(f), SCACR, the Respondent Bertha Rodriguez respectfully submits this Return in opposition to the Petition for Writ of Certiorari.

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 Petitioner Taliah Shabazz. However, that issue was in dispute, as Rodriguez challenged some of the damages being claimed by Shabazz.

The case first came to trial before the Honorable Jocelyn Newman on June 13, 2016. When the jury could not reach a unanimous verdict, Judge Newman 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 any 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.] When he gave them the opportunity to do so, neither attorney objected to the trial judge's answer and instructions to the jury.

The jury resumed 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 an appeal *pro se*.[1]

After notifying the parties that the case would be decided without oral arguments, the Court of Appeals filed an unpublished decision affirming the trial judge's rulings on December 31, 2019. [Opinion No. 2019-UP-416.] Shabazz filed and served a timely Petition for Rehearing, which Rodriguez opposed. The Court of Appeals unanimously denied that petition in an order filed on March 27, 2020. Shabazz then filed the current petition in this Court.

ARGUMENT

I. The Court of Appeals' decision does not warrant review by this Court under the standards set forth in Rule 242, SCACR.

According to the South Carolina Appellate Court Rules, "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted **only** where there are special and important reasons." Rule 242(b), SCACR (emphasis added). The rule goes on to list five situations in which the granting of a writ of certiorari usually occurs. Those situations include cases where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) substantial constitutional issues are directly involved; and (5) a federal question is included, and the Court of Appeals' decision conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. *See also* Toal, Vafai & Muckenfuss, *Appellate Practice in South Carolina* (2nd Ed.) at 276. Rodriguez submits that the present case does not fall into any of those categories, and no "special and important" reason exists for this Court to review the Court of Appeals' decision. Therefore, the Court should deny the petition.

[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 the appeal.

Three of the factors listed in Rule 242(b) are facially inapplicable and do not require extensive discussion. There was no dissent in the Court of Appeals, and the case does not involve any constitutional issues or federal questions that conflict with any decision by the United States Supreme Court. Shabazz has not even argued otherwise. Thus, subsections (2), (4), and (5) of Rule 242(b) are plainly not at issue here.

The remaining two factors are similarly lacking. First, this case does not contain any novel legal issues. The arguments raised by Shabazz, which are not even properly preserved for review, all involve the application of settled law, not novel theories or issues. This appeal simply does not raise or address anything new in the law, which makes item (1) of Rule 242(b) inapplicable. Second, the result in the Court of Appeals does not conflict with any prior decision by this Court.[2]

Granted, the elements listed in Rule 242(b) are not the exclusive bases for granting a writ of certiorari, but no other reasons exist for this Court to review the Court of Appeals' decision. The Court of Appeals largely – and properly – decided this appeal based on principles of issue preservation. Those principles are well-established, and this case does not present any compelling reasons to revisit or change them. Therefore, no further appellate review is warranted, and the Court should deny the petition.

[2] Although Shabazz makes a cursory argument to the contrary, the Court of Appeals' decision does not contradict the case she cites in her petition. This issue is discussed in more detail below in Section II.

II. The issue relating to purported "inflammatory arguments" by defense trial counsel is not preserved for review.[3]

In the Court of Appeals, Shabazz argued that Rodriguez's trial counsel made incorrect or misleading statements to the jury during her closing arguments. Specifically, Shabazz argued that defense trial counsel's statements about an impairment rating given by one of Shabazz's doctors were inaccurate. That alleged inaccuracy formed the sole basis for Shabazz's appellate arguments on this issue.

Although Rodriguez strongly disputes the merits of Shabazz's position, her primary argument on appeal has 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 or 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 of Appeals acknowledged this well-established law in its opinion. Indeed, the Court based its decision primarily on the absence of the required issue preservation. Faced with

[3] The arguments asserted in this section address and apply to the issues contained in sections I, II and III of Shabazz's certiorari petition.

that decision, it is incumbent upon Shabazz in her Petition for Writ of Certiorari to demonstrate how and when her attorney preserved the alleged errors for appellate review. Just as she failed to do so in the Court of Appeals, 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 the closing arguments by defense counsel. Nor is it even possible for her to do so. The trial transcript (contained in the Appendix) conclusively demonstrates that Shabazz's attorney did not raise any objection to defense counsel's closing argument. Under these circumstances, there is no way for Shabazz to show that her challenges to defense trial counsel's closing arguments were preserved for review. Clearly they were not.[4]

In her current petition, Shabazz argues (for the first time) that the Court should overlook the absence of a contemporaneous objection based on its previous decision in *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994). It is true that in *Toyota* the Court stated that in very rare and limited situations, an appellate court can consider issues arising from arguments by trial counsel despite the lack of a timely objection. Nevertheless, there are several reasons why *Toyota* does not entitle Shabazz to the relief she seeks.

First, and most significantly, the current petition is the first time in the history of this case that Shabazz has raised the "*Toyota* exception" as an issue. Shabazz did not cite or rely upon that case in her briefs to the Court of Appeals. More importantly for present purposes, she also did not cite *Toyota* or raise this issue in her petition for rehearing. As this Court has held, an

[4] In fact, Shabazz has essentially conceded that her attorney did not make timely objections to the closing argument or to the judge's answer. In the Court of Appeals, Shabazz argued that her former attorney's failure to make those objections constituted ineffective assistance of counsel. By doing so, Shabazz necessarily acknowledged that no timely objections were made in the trial court.

issue is not preserved for review by the Supreme Court unless it was raised in a rehearing petition in the Court of Appeals. *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 235, 797 S.E.2d 387, 393 (2016) (citing *Sloan v DOT*, 365 S.C. 299, 307-08, 618 S.E.2d 876, 880 (2005)). Shabazz has not met that threshold requirement, and, therefore, the Court should not consider this issue.

Second, even if Shabazz had discussed this issue in her rehearing petition, it still would not be preserved for review. Four years after the *Toyota* decision, this Court clarified the limitations and requirements of the exception to the contemporaneous objection rule in *Dial v. Niggel Assocs.*, 333 S.C. 253, 509 S.E.2d 269 (1998). In that case, the Court explained that "[u]nder *Toyota*, the issue of inflammatory argument **must be raised to the trial judge by way of post-trial motion to preserve the issue for appeal**." *Id.* at 257, 509 S.E.2d at 271 (emphasis added). Although Shabazz filed a post-trial motion, it did not include any citation to, or discussion of, the *Toyota* exception. In fact, the post-trial motion did not even raise the issue of improper arguments by defense trial counsel. The post-trial motion asserted only two grounds: (1) that the evidence supported a larger verdict, and (2) that the jury considered facts not in evidence during deliberations.[5] There is no way for the post-trial motion, which was drafted by an attorney, to be construed as having raised the issue of inflammatory arguments or the *Toyota* exception. Shabazz did not raise that issue until her appellate briefs in the Court of Appeals. Therefore, under the clarifying language in *Dial*, this issue is not preserved for review.

Finally, the *Toyota* exception would not apply to this case even if that issue were properly preserved for review. The exception was never intended to be broad in scope, or to excuse failures to make timely objections in normal cases. Nor was it designed to cover every instance

[5] The second ground was based on the jury's question regarding health insurance during its deliberations.

in which trial counsel makes a questionable or improper argument. As this Court explained in *Dial*, "*Toyota* and the line of cases preceding it concern abuse of a witness or litigant. **Accordingly, we now clarify that our holding in *Toyota* excuses the failure to make a contemporaneous objection only where the challenged argument constitutes abuse of a party or witness**." 333 S.C. at 259, 509 S.E.2d at 272 (emphasis added). *See also In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238-39 (2001) ("The failure to make a contemporaneous objection can be excused only when the challenged argument constitutes abuse of a party or witness."), *overruled in part on other grounds by In re Chapman*, 419 S.C. 172, 796 S.E.2d 843 (2017).

Shabazz has never asserted that defense trial counsel's closing argument amounted to "abuse of a party or witness." Shabazz has alleged only that the argument was inaccurate and misleading. Furthermore, a reading of the closing argument does not reveal any abusive comments directed to any party or witness. Defense trial counsel merely argued that the jury should disregard some of Shabazz's medical bills because they were not causally related to the accident, and that they should not give full credence to the impairment rating. Those arguments were not abusive in the slightest. Indeed, they were not even improper or objectionable. Those arguments were the standard kinds of assertions that defense attorneys tend to make in automobile accident cases such as this one. Therefore, even if the issue could be considered on the merits, the *Toyota* exception – as explained and limited in *Dial* – does not apply to this case.

III. The issue relating to the jury's question about health insurance is not preserved for review.

Based solely on the arguments section of Shabazz's certiorari petition,[6] it appears that Shabazz has abandoned the appellate issue relating to the jury's question about health insurance and the trial judge's response to it. Nevertheless, in an abundance of caution arising from the liberal reading usually given to submissions by *pro se* litigants, Rodriguez will respond to that issue.

During the jury's deliberations, as now often happens in personal injury trials, the jury sent the judge a question as to whether or not any health insurance had paid some of Shabazz's medical bills. The judge conferred with the attorneys for both parties and then brought the jurors back to the courtroom, where he told them the following:

> Now, the last thing I said to you was your decision cannot be based on passion, prejudice, emotion or something not found in the evidence. Not found in the evidence. Nothing outside of this courtroom you can consider. If it's not in the evidence, you can't consider it. This question you can't consider. You need to wipe it out of your mind and begin over as if you never asked me this question because it's not in the evidence.
>
> I'm not upset, but this is the rules that we all have to play by. And in order to be fair to both sides, you have to dissuade yourself of this question, start as if you never asked me the question, blank sheet of paper, began [sic] again with that in mind. Only what's from this witness stand, the exhibits, the arguments of the lawyers and the charge I gave you on the law. You can't consider anything else at all. It will be unfair to the Plaintiff, unfair to Ms. Rodriguez and everybody else involved. Those are the rules and I don't make them up. And I'm not yelling at you, but it's important enough to explain. Wipe that out and out of your mind and begin over.
>
> If you can't wipe it out of your mind and begin over, Mr. Foreman, it's your duty to let me know, okay?

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[6] The section containing Shabazz's arguments is captioned "REASON CERTIORARI SHOULD BE GRANTED."

[Supp. R. p. 119, line 5 – p. 120, line 1.]

After giving that answer, the judge gave the attorneys for both sides an opportunity to put any challenges to the answer on the record. The judge specifically asked the attorneys if they had any "exceptions or additions" to the answer he gave the jurors, and both attorneys replied that they did not. [Supp. R. p. 120, lines 8-11.] Thus, the jury was allowed to continue its deliberations, which resulted in a verdict a short time later.

In order to preserve an issue for appellate review during a trial, a party must make a contemporaneous objection to the challenged testimony, arguments or instructions. *See, e.g.*, *Moore v. Florence Sch. Dist. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994) (absence of a contemporaneous objection to an argument by opposing counsel meant the issue was not preserved for appellate review). Here, Shabazz's attorney did not object to the judge's answer to the jury. In fact, when asked if he had any issues with that answer, the attorney responded, "No, Your Honor." [Supp. R. p. 120, line 10.] As a result, this issue is not preserved for review, and the Court should not consider it.

Furthermore, the *pro se* Petitioner presented this issue in the Court of Appeals as an error by the **jury**, rather than by the judge. Shabazz's briefs did not contain any argument that the judge's answer was inappropriate or amounted to an error of law. Nor did Shabazz cite any authority to support such a proposition. Thus, to any extent the issue of the judge's answer might otherwise be preserved for review, it has been waived. *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.") (quoting *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993)).

Even if Shabazz could permissibly argue that the jury made some sort of mistake in asking its question, an alleged error of this sort on the part of a jury is not an appropriate ground for appellate review. *See generally Vinson v. Hartley*, 324 S.C. 389, 410, 477 S.E.2d 715, 726 (Ct. App. 1996) (neither a trial court nor an appellate court can "second guess" a jury's factual findings). Judges and attorneys almost never know the bases for a jury's decision. Indeed, our system allows jurors to refuse to answer questions about their deliberations so that the jurors can conduct those deliberations with full candor, unafraid of any reprisals or reprimands. The necessary result of this right to juror privacy is a level of uncertainty about the deliberations for everyone else. This is a price our system has chosen to pay.

There is no way for anyone other than the actual jurors to know how much or how little the subject of the jury's question factored into the deliberations. Again, this is how our legal system is designed. As a result, all anyone can evaluate is how the judge responded to what the jury asked. Here, that answer was accurate, fair and non-prejudicial to either party. The judge told the jury it was only to consider the evidence in reaching a decision and that it was to disregard the subject matter raised in the question. The judge even went beyond that and gave the jurors the opportunity to let him know if they could not follow that instruction. This was all the judge was required to do and essentially all he **could** do.[7] Therefore, even if this issue were preserved and properly part of the current petition, it would not provide any basis for relief.

IV. The issue relating to the 14th Amendment is without merit.

Shabazz suggests that her 14th Amendment due process rights were violated because the jury was somehow biased against her. Yet, she has never cited to any evidence or indication of bias by the jurors other than the amount of the verdict itself. Rodriguez respectfully asserts that

[7] If questions of this nature, in and of themselves, were grounds for mistrials or reversals, it would become very difficult to try personal injury cases with any sense of finality.

Shabazz has mistaken persuasion for bias. Defense trial counsel made arguments designed to convince the jury that the accident did not proximately cause all of Shabazz's claimed damages. Shabazz's attorney argued that the opposite was true. Both attorneys crafted their arguments to sway the jury to accept their respective clients' position. That was the job and function of the attorneys at that stage of the trial.

The jury ultimately returned a verdict that was lower than what Shabazz wanted. But that fact alone does not provide any evidence of bias. It merely suggests that the jurors were persuaded more by the defense arguments than by those of Shabazz's attorney. Just as the attorneys did their jobs in making the closing arguments, the jury served its function in considering those arguments, along with the evidence, and reaching a decision as to the case's value. It is well settled in South Carolina that "the jury's determination of damages is entitled to substantial deference." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). Both the trial court and the Court of Appeals adhered to that principle by allowing the verdict to stand. Shabazz has not presented any legal authority that would warrant or justify further review of that issue by this Court.

Although it is not entirely clear, Shabazz also appears to argue that defense counsel's closing arguments violated her 14th Amendment rights to due process. It might be that Shabazz is merely claiming that those closing arguments created the purported jury bias. If that is Shabazz's assertion, it has no merit for the same reasons discussed in the preceding paragraphs (i.e. there is no record evidence of any jury bias).

However, Shabazz might also be arguing that the closing arguments in and of themselves violated her 14th Amendment rights. If so, the issue would not be preserved for appeal because Shabazz's attorney did not object to any portion of defense counsel's closing argument. In

addition, Shabazz has not cited any legal authority for the proposition that an attorney's arguments, without any demonstrable resulting jury bias, can violate an opposing party's constitutional rights. Therefore, any such argument by Shabazz must fail.

The United States Constitution guarantees a **fair** trial, not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 106, S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Shabazz received a full and fair opportunity to present her claim to the jury. Likewise, Rodriguez had a full and fair opportunity to present her defenses as to the damages being sought. There is no indication, let alone any evidence, that the jury was biased for or against either party. The jury simply returned a verdict that was lower than Shabazz had hoped. That is not a constitutional issue; it is just a known risk of litigation. Thus, there is absolutely no basis for any argument or conclusion that Shabazz's constitutional rights were violated.

CONCLUSION

As the Court of Appeals correctly ruled, the issues asserted in Shabazz's petition are not preserved for appellate review. Even if they were, however, Shabazz has not provided any basis for the relief she seeks. Shabazz remains disappointed with the amount of the jury's verdict, and she has attempted to manufacture reasons why that verdict should be disturbed. Her arguments to that effect did not warrant any relief in the Court of Appeals, and they are certainly insufficient to justify further review by this Court. Therefore, the Court should deny the petition and allow the Court of Appeals' decision to stand.

(Signature on next page)

Respectfully submitted,

s/ R. Hawthorne Barrett

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