

No. 35646-5-II  
COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS

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STATE OF WASHINGTON

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John Harper, et al., Appellants

v.

Coldwell Banker, et ux., Respondents

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MOTION FOR DISCRETIONARY REVIEW

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**A. Identification of Petitioners**

Petitioners, John Harper and Svetlana Kudina, by and through their attorney of record, Boris Petrenko, present this motion to the Washington Court of Appeals, Division Two.

**B. The Trial Court Decision for Review**

**Assignment of Error**

The trial court erred in denying Petitioners' Motion to continue in order to secure assistance of a Russian speaking interpreter at Summary Judgment hearing.

**Issue Presented for Review**

Did the trial court err when it denied Petitioners' request for a Russian interpreter to assist Petitioners at Summary Judgment hearing due to Petitioners' insufficient skills, knowledge and training to speak and comprehend in the English language?

**C. Statement of the Case**

**Procedural History**

In May 2006, Plaintiffs-Petitioners herein, John Harper and Svetlana Kudina, commenced pro-se civil action in Clark County Superior Court (the trial court), under cause No. 06-2-02392-1, against Defendants-

Respondents herein, Coldwell Banker Barbara Sue Seal Properties and Pyramid Homes Incorporated.<sup>1</sup>

In October 2006, on the motion of the Respondents, Coldwell Banker Barbara Sue Seal Properties and Pyramid Homes Incorporated, the trial court set November 3, 2006, as a date of the hearing for Respondents' Summary Judgment.<sup>2</sup>

Petitioners are the non-English speakers who speak Russian as their primary language. On October 31, 2006, realizing the complexity of the legal proceedings and Petitioners' limited ability to communicate in the English language, Petitioners filed Notice of Hearing Strike, noticing to the trial court their lack of sufficient English skills and notifying the trial court that Petitioners needed assistance of a Russian interpreter to fully comprehend and participate in Summary Judgment hearing.<sup>3</sup> On November 3, 2006, Petitioners appeared in court before Honorable Judge Robert L. Harris and timely renewed their motion to continue noticing to the trial judge Petitioners' need for assistance by a Russian speaking interpreter.<sup>4</sup> Petitioners, Lana Kudina and John Harper, notified the court of their inability to secure a Russian interpreter due to interpreter's

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<sup>1</sup> CP Summons and Complaint, Docket Date 05-08-2006.

<sup>2</sup> CP Motion for Summary Judgment, Docket Date 09-29-2006.

<sup>3</sup> CP Notice of Hearing Strike-P, Docket Date 10-31-2006.

<sup>4</sup> RP at 1.

unavailability on that date.<sup>5</sup> The trial judge denied Petitioners' request for continuance and proceeded with Summary Judgment hearing.<sup>6</sup> At the time of the Summary Judgment hearing, Petitioners repeatedly made objections to the trial court conducting Summary Judgment hearing until assistance of a Russian speaking interpreter could be secured by the Petitioners.<sup>7</sup> The trial judge indicated that the court had two or three interpreters readily available on a daily basis to the trial court.<sup>8</sup> Nevertheless, the trial court conducted Summary Judgment proceedings against the Petitioners in English language.<sup>9</sup> The trial court concluded Summary Judgment hearing in favor of the Respondents Coldwell Banker Barbara Sue Seal Properties and Pyramid Homes Incorporated granting Respondents' motion for Summary Judgment and dismissing Petitioners' claims.<sup>10</sup>

#### **D. Standard of Review**

The appointment of an interpreter is within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse.<sup>11</sup>

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<sup>5</sup> RP at 3.

<sup>6</sup> RP at 6.

<sup>7</sup> RP at 12-14.

<sup>8</sup> RP at 6.

<sup>9</sup> RP 1-17

<sup>10</sup> RP at 14 and 17.

<sup>11</sup> *State v. Mendez*, 56 Wash.App. 458, at 463, 784 P.2d 168 (1990) (citing *State v. Trevino*, 10 Wash.App. 89, at 94-95, 516 P.2d 779 (1974));

**E. Argument**

UNDER REVISED CODE OF WASHINGTON, TO SECURE CONSTITUTIONAL RIGHTS OR OTHERWISE OF A NON-ENGLISH-SPEAKING LITIGANT, LITIGANT HAS A RIGHT FOR THE APPOINTMENT OF AN INTERPRETER BY THE COURT IN ANY LEGAL PROCEEDINGS.

- A. Petitioners were deprived of their constitutional right to a due process of law because the trial court failed to provide a Russian interpreter to assist Petitioners who were unable to readily understand or communicate in the English language.

Text of the Revised Code of Washington **2.43.010. Legislative Intent** provides:

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons, who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

It is the intent of the legislature in the passage of this chapter to provide for the use and procedure for the appointment of such interpreters. Nothing in chapter 358, Laws of 1989 abridges the parties' right or obligations under other statutes or court rules or other law.<sup>12</sup>

Washington court said that in this State, the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and “the right inherent in a fair trial to be present at one’s own trial.”<sup>13</sup> It is also the declared policy of this

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<sup>12</sup> See *RCW 2.43.010 Legislative Intent*.

<sup>13</sup> *State v. Gonzales-Morales*, 138 Wash.2d 374, at 379, 979 P.2d 826 (1999).

state under RCW 2.43.010.<sup>14</sup> *The purpose of RCW 2.43 is to uphold the constitutional right of non-English-speaking persons.*<sup>15</sup> (Emphasis added)

It is well-settled that the use of an interpreter is discretionary with the trial court.<sup>16</sup> The federal courts have held that whenever put on notice that there may be some significant language difficulty, the trial court should exercise its discretion to determine whether an interpreter is needed.<sup>17</sup> When a non-English-speaking person is a party to a legal proceeding, a “certified” interpreter must be appointed unless good cause is shown.<sup>18</sup>

In the case before the court, prior to November 3, 2006 Summary Judgment hearing and at the very beginning of the proceedings, Petitioners repeatedly notified the trial court of their inability to fully understand and communicate in the English language and asked for assistance of a Russian interpreter.<sup>19</sup> It is also apparent from the record that Petitioners colloquies with the trial judge were unclear and often irresponsive due to

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<sup>14</sup> *Id.*, at 379.

<sup>15</sup> *Id.*, at 381. Also see *State v. Aquino-Cervantes*, 88 Wash.App. 699, at 706, 945 P.2d 767 (1997).

<sup>16</sup> *Kropiwka v. Department of Industry, Labor & Human Relations*, 87 Wis. 2d 709, at 715, 275 N.W.2d 881 (1979) (citing *Petrovich v. U.S.*, 205 U.S. 86, 91, 27 S.Ct. 456, 51 L.Ed. 722 (1907); *U.S. v. Barrios*, 457 F.2d 680 (9<sup>th</sup> Cir. 1972); *U.S. v. Sosa*, 379 F.2d 525, 527 (7<sup>th</sup> Cir. 1967), cert. denied, 389 U.S. 485, 88 S. Ct. 94, 19 L. Ed. 2d 111 (1967); *People v. Atsilis*, 60 Mich. App. 738, 231 N.W.2d 534 (1975); *People v. Soldat*, 32 Ill.2d 478, 207 N.E.2d 449 (1965).

<sup>17</sup> *State v. Woo Won Choi*, 55 Wash.App. 895, at 901-902, 781 P.2d 505 (1989)

<sup>18</sup> *State v. Serrano*, 95 Wash.App. 700, at 704 977 P.2d 47 (1999) (citing *RCW 2.43.030 (1)(b)*, *State v. Pham*, 75 Wash.App. 626, 633, 879 P.2d 321 (1994), review denied, (126 Wash.2d 1002, 891 P.2d 37 (1995).

<sup>19</sup> RP at 12-14.

Petitioners' lack of understanding and inability to readily communicate in English language.

The trial court proceeded on the record denying assistance of a Russian interpreter to the Petitioners Lana Kudina and John Harper. As a result, as indicated on the record, Respondents were merely present at the hearing, but not able to participate in Summary Judgment proceedings.<sup>20</sup> By denying Petitioners' request for continuance in order to secure assistance of a Russian speaking interpreter, the trial court infringed on the Petitioners' constitutional right to a due process of law in violation of the declared policy by the Washington State Legislature. [See *RCW 2.43.010 Legislative Intent* and *State v. Gonzales-Morales* supra].

B. The Washington State Legislature did not empower the trial judge to waive a non-English litigants' right to interpreter.

Revised Code of Washington **2.43.060. Waiver of right to interpreter** provides:

The right to a qualified interpreter may *not* be waived except when:

- (a) A non-English-speaking person requests a waiver; and
- (b) The appointing authority determines on the record that the waiver has been made *knowingly, voluntarily, and intelligently*.<sup>21</sup> (Emphasis added)

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<sup>20</sup> RP 17.

<sup>21</sup> See *RCW 2.43.060 Waiver of right to Interpreter*.

Where there is uncontradicted evidence that the witness does not speak or understand English, it would be an abuse of discretion to fail to appoint an interpreter.<sup>22</sup> The state courts have also recognized that interpreters are necessary to ensure meaningful participation in the context of civil cases.<sup>23</sup> As language is the principal basis of communication in a trial or hearing, a litigant's ability to understand and communicate the language is critical to the proceeding's fairness.<sup>24</sup> The due process requirement of an "opportunity to be heard" which must be "tailored to the capacities and circumstances of those who are to be heard" demands no less.<sup>25</sup> It is a fundamental axiom of our system of jurisprudence that due process of law includes the right to have an adequate interpretation of the proceedings.<sup>26</sup> This would apply to a litigant who does not speak sufficient English to understand the proceedings...<sup>27</sup>

It is clear from the record, that the trial court abused its discretion when the trial judge disregarded Respondents' repeated requests for a

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<sup>22</sup> *Gardiana, v. The Small Claims Court for the San Leandro-Hayward Judicial District of Alameda County*, 59 Cal.App.3d 412, at 418; 130 Cal. Rptr. 675, 1976 Cal.App. LEXIS 1655 (1976).

<sup>23</sup> *In the Matter of Irma Lizotte v. John A. Johson, as Commissioner of the New York State Office of Children and Family Services, et al.*, 4 Misc. 3d 334, at 342; 777 N.Y.S.2d 580; 2004 N.Y. Misc. LEXIS 602 (2004) (citing *Yellen v. Baez*, 177 Misc. 2d 332, 336, 676 N.Y.S.2d 724 (1997)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, citing *Goldberg v. Kelly*, 397 U.S. 254, 268-269, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)).

<sup>26</sup> *Yellen v. Baez*, 177 Misc. 2d 332, at 335; 676 N.Y.S.2d 724; 1997 N.Y. Misc. LEXIS 715 (1997).

<sup>27</sup> *Id.*

Russian speaking interpreter and proceeded with Summary Judgment hearing because, first, as indicated on the record, the trial court had two or three interpreters readily available on a daily basis, and there is no plausible explanations as to why one of the interpreters was not appointed by the trial court to assist the Petitioners.<sup>28</sup> The trial judge could easily appoint a Russian speaking interpreter with the costs imposed on the Petitioners.

Second, Petitioners made timely notice to the court of their inability to fully understand and communicate in the English language. Petitioners realized the complexity of the legal process and their need for assistance of a Russian interpreter, because Petitioners knew that they would not be able to fully understand and participate in the Summary Judgment hearing due to their limited abilities to understand and communicate in the English language. The trial judge never doubted Petitioners' claim of inadequate English skills and their need for a Russian interpreter assistance. Consequently, the trial judge's disregard of the Petitioners' requests constitutes error in derogation of Revised Code of Washington 2.43.060 and Legislative Intent.

Finally, Petitioners did not waive their right to an interpreter as the statute requires. [See *RCW 2.43.060. Waiver of right to interpreter*, supra].

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<sup>28</sup> RP at 6.

There is nothing on the record, which would indicate that Petitioners knowingly, voluntarily and intelligently waived their right to an interpreter. On the contrary, as evident from the record, Petitioners repeatedly notified the trial court of their need and requested assistance of a Russian interpreter. Petitioners' mere presence during the Summary Judgment hearing and numerous requests for a Russian speaking interpreter can not be considered as a waiver of a right to an interpreter. Hence, the trial court's denial of the Petitioners' request for a Russian interpreter constitutes error.

**F. Conclusion**

For the reasons set out above, Appellants, John Harper and Svetlana Kudina, respectfully request that the Court of Appeals find that the trial court erred in denying their motion to continue Summary Judgment hearing in order to secure assistance of a Russian interpreter at the hearing, reverse the trial court's Summary Judgment decision and remand the case to the trial court for further proceedings with assistance of the Petitioners by a Russian speaking interpreter.

Respectfully submitted this 29th day of December, 2006.



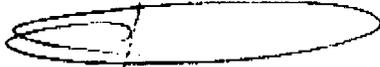
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5 Dated, December 29, 2006

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