

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

TANYA GEE, CIRCUIT COURT JUDGE

Case No. 2014-CP-40-6228

JOSEPH C. RIVETT.,

Respondent,

v.

CELADON TRUCKING  
SERVICES, INC. AND BRUCE  
LUDLUM,

Appellants.

**RECEIVED**

JAN 27 2017

SC Court of Appeals

**RETURN TO MOTION**

Respondent submits this return to Appellants' Motion for Leave to File a Rule 60 Motion with Trial Court.

Appellant seeks to have this matter sent back to the trial court based on an allegation that counsel for Respondent committed fraud in telling the lower court that a witness indicated he would appear in court. The motion is devoid of merit and should be denied.

**NO FRAUD, MISREPRESENTATION OR MISCONDUCT OCCURRED**

Respondent submits the Affidavit of Tucker S. Player as Exhibit A. The Affidavit establishes that there was no intention of misleading the lower court and that counsel accurately presented what he believed was communicated by Trooper Trotter on February 3, 2017. If Trooper Trotter never intended to appear in court on February 3, 2016, he should have conveyed

that information to someone. Counsel for Respondent made 9 phone calls to Trotter on February 3, 2016, left several phone messages on Trotter's phone, asked Trotter's supervisor to contact him about the subpoena and the change in time to 2:30pm, and had his process server call him as well to convey the change in time. The Affidavit of Brian Trotter does not state that he ever told anyone that he would **not** appear in court on February 3, 2017. Counsel for Respondent was told by Steve Smith that Trotter said "message received." It was reasonable to interpret this statement as an affirmation that Trotter would appear in court, especially since the only "message" transmitted was that he need not appear in court until 2:30pm as opposed to the designated time of 2:00pm on the face of the subpoena. In the initial dialogue with the lower court, which Appellants failed to cite in their motion, Counsel for Respondent stated that Trooper Trotter was not pleased, but did not indicate that he would not appear. *Transcript*, P. 120. There is nothing false or inaccurate in this statement to the court. In order to establish a prima facie case to shift the burden to Respondent, Appellants are required to demonstrate fraud, misrepresentation or misconduct by clear and convincing evidence. *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792, (Ct. App. 2009). The Affidavit of Brian Trotter does not establish any fraud, misrepresentation, or misconduct on behalf of Appellant or his counsel, much less constitute clear and convincing evidence of such malfeasance. Therefore, the motion should be denied.

#### **EXTRINSIC FRAUD VS. INTRINSIC FRAUD**

In South Carolina, a party can obtain equitable relief from a judgment based on fraud only upon a showing that the fraud is extrinsic. See *Bryan v. Bryan*, 220 S.C. 164, 66 S.E.2d 609 (1951). In *Bryan*, our Supreme Court explained as follows:

There is no doubt that a court of equity has inherent power to grant relief from a judgment on the ground of fraud. However, not every fraud is sufficient to move a

court of equity to grant relief from a judgment. Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in which the judgment was rendered; intrinsic fraud is not sufficient for equitable relief.

Id. at 167-68, 66 S.E.2d at 610.

Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004).

Intrinsic fraud, on the other hand, is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. *Id.*

Appellants' claim of misconduct is based on counsel's statement that Trooper Trotter said he would appear in court at 2:30pm on February 3, 2016. First and foremost, this was proven to be inaccurate when Trooper Trotter did not actually appear in court at 2:30pm on February 3, 2016. More importantly, Appellants cannot demonstrate how this inaccurate statement induced Appellants not to present their case or deprived them of the opportunity to be heard. The sole reason Trooper Trotter was not in court at 9:30am on February 3, 2016 was because Appellants released him from their subpoena. Counsel for Appellants stated to the court below that they decided they didn't need the trooper's testimony and that was the only reason they released him from the subpoena. Mr. Barrow's exact words were "I only told him he was released from my subpoena because I had gotten everything out of the Plaintiff that I was going to get from the trooper." *Transcript* 138, line 23 through p. 139, line 1. Finally, despite the claim in Appellants' motion that Trooper Trotter's testimony was "highly prejudicial" and they were deprived of their ability to cross-examine Trooper Trotter as to causation, the deposition testimony read to the jury did not include a single word or question from any attorney representing Respondent. The portions of the deposition transcript read to the jury contained questions from attorney Chris Daniels, who represented Defendant William Jackson, and Eric Cavanaugh, the attorney for

Appellants. For Appellants to claim that they were prejudiced by the inability to cross-examine Trooper Trotter is ridiculous. This is especially true considering that Appellant Bruce Ledlum testified that (1) he did, in fact, collide with the vehicle of William Jackson (*Transcript* pp. 164-166) and (2) he was travelling "about 25/30 miles an hour." *Transcript* p. 164, lines 2-3. Both of these statements are the only two issues of fact concerning causation that Trotter's deposition testimony touched upon, and Appellant Ledlum's testimony matches that of Trooper Trotter. Appellants suffered not prejudice, were not denied access to any witness or argument at trial, and were certainly not prevented from presenting any evidence that contradicted or mitigated the testimony of Trooper Trotter. Therefore, the motion should be denied.

#### **THE ALLEGED FRAUD WAS IMMATERIAL**

Even if the nonexistent fraud alleged by Appellants actually occurred, which it didn't, and was intrinsic as opposed to extrinsic, which it isn't, it was not material to Judge Gee's ruling on the motion for directed verdict. Judge Gee made it clear that her primary concern was the representation of Trooper Trotter made during the telephone conversation on February 2, 2016. As both counsel agreed at trial, Trooper Trotter stated during his conversation with Counsel for Respondent on February 2, 2016 that he would be in court to testify at 9:30am on February 3, 2016. Counsel for Respondent stated this at trial (*Transcript* p. 110, lines 4-7) and in his Affidavit (*Affidavit of Tucker S. Player*, Paragraph 6) and it was confirmed by Mark Barrow at trial (*Transcript* p. 137, lines 4-7). It was this representation by Trooper Trotter that concerned Judge Gee as she stated on more than one occasion:

25 THE COURT: That's what's frustrating is that you

1 talked to him and he didn't let you know.

2 MR. PLAYER: No, he did not. If there was an issue, I

3 would have gotten a subpoena yesterday.

4 THE COURT: Sure.

5 MR. PLAYER: He said he would be here at Courtroom  
6 3-B, at 9:30. Now, I can do my best to contact him and get  
7 him a new subpoena and get him here this afternoon.  
8 THE COURT: Uh-huh.

*Transcript* page 114, line 25 through page 115, line 8;

25 THE COURT: Well, here's where I'm sympathetic to Mr.  
1 Player. Yesterday when we talked about this trooper coming  
2 in to testify and the convenience of allowing him to just  
3 testify one day because you both were going to call him, at  
4 that point, y'all weren't sure whether you would or would  
5 not call him. But that -- and that was probably yesterday  
6 afternoon.

7 And then at some point thereafter, say six o'clock at  
8 night, y'all decided that you weren't going to need him ---  
9 MR. BARROW: Right.

10 THE COURT: --- and you told him he was relieved of  
11 your subpoena.

12 MR. BARROW: Right.

13 THE COURT: Which is a confusing situation for someone  
14 who's a witness. Maybe less so confusing for someone who's  
15 a trooper who gets subpoenaed a fair amount.

16 And what I'm concerned about is that it seems as  
17 though there was some discussion with the trooper about  
18 whether or not he needed to be here. And I don't know what  
19 was said after that point, but it should have been clear  
20 that he was expected here tomorrow at 9:30.

21 And so I'm a little concerned about that aspect of his  
22 being relieved from the subpoena and perhaps being told  
23 that he did not need to be here by 9:30.

*Transcript* page 136, line 25 through page 137, line 23;

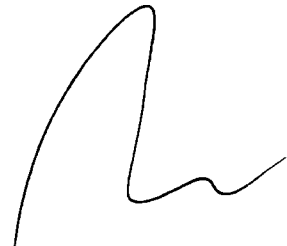
It was the representation of Trooper Trotter on February 2, 2016 that counsel argued to the court, not any representation made on February 3, 2016. *Transcript* page 133, lines 17-21; *Transcript* 142, lines 6-12. Ultimately, Judge Gee found that Appellants suffered no prejudice by allowing the deposition transcript to be read to the jury. *Transcript* page 140, line 16. There is no evidence that the representation Trooper Trotter indicated he would appear in court at 2:30pm played any role in Judge Gee's decision to allow the deposition transcript to be read, much less

clear and convincing evidence required by the rule. Therefore, the motion must be denied.

**REMANDING THE CASE TO THE CIRCUIT COURT WILL DO NOTHING BUT  
WASTE TIME AND RESOURCES**

As we all know, Judge Gee passed away in 2016 after a long fight with cancer. Her passing affects any true reconsideration of her order under Rule 60(b)(3), SCRCF. Only Judge Gee knew the inner workings of her mind when she exercised her discretion pursuant to Rule 32, SCRCF to allow the deposition transcript to be read to the jury. Her decision is to be reviewed under an abuse of discretion standard of review by this Court and the only evidence that exists to demonstrate her decision process and application of the law is already before this Court by virtue of the trial transcript. No other judge has the insight or clairvoyance to extract information that is not in the transcript of the proceedings below. Appellants are essentially asking for this Court to remand this case to the circuit court to compel one of Judge Gee's colleagues on the circuit court bench to do what this Court is going to do on this appeal, i.e. review the transcript and determine if she abused her discretion in allowing the transcript to be read to the jury. In essence, Appellants are attempting to use a Rule 60 motion in place of any appeal, which is not allowed under South Carolina law. *Tench v. South Carolina Dept. of Educ.*, 347 S.C. 117, 553 S.E.2d 451 (2001). This is a needless waste of time and judicial resources. Therefore, the motion should be denied.

January 26, 2017



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Tucker S. Player  
Player Law Firm, LLC  
P.O. Box 21005  
Columbia, SC 29221  
803-772-8008  
Attorney for Respondent



Judge Gee indicated that it would be better to call Trooper Trotter the following morning as opposed to that afternoon.

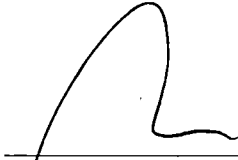
5. At the end of the day on February 2, 2016, Judge Gee asked, and I confirmed, that the Trooper would testify at 9:30am the following morning. This conversation is on the record and can be found on page 100 of the Trial Transcript.
6. I called Trooper Trotter at approximately 5:00pm on February 2, 2016 and told him to be in court at 9:30am the following morning. I told him I had subpoenaed him in January and he specifically stated that he would be in Courtroom 3-B at 9:30am on the morning of February 3, 2016 to testify.
7. After learning that the Trooper would not be appearing at trial on the morning of February 3, 2016, I immediately began calling both dispatch and his cell phone number provided by Defense counsel. Trooper Trotter did not answer his phone or respond to me in any way.
8. I contacted Steve Smith of SWS Process Servers to deliver a subpoena to Trooper Trotter at his home in Gilbert, South Carolina.
9. SWS dispatched a process server to Trooper Trotter's home in Gilbert, South Carolina to serve a subpoena.
10. I contacted Trooper Levine, the immediate supervisor of Trooper Trotter, and spoke with him about my need for Trooper Trotter to appear in court to testify that day. At that point, I had secured an alternate witness, William Joe Jackson, to testify at 2:00pm. I told Trooper Levine to tell Trooper Trotter that he was not needed until 2:30pm as Mr. Jackson would be testifying at 2:00pm.

11. I also left a voicemail message on Trooper Trotter's cell phone that he was not needed in court until 2:30pm that day.
12. I also called Steve Smith and provided him with Trooper Trotter's cell phone number. I believed Trooper Trotter was intentionally avoiding my phone calls and I asked Mr. Smith to tell Trooper Trotter he was not needed until 2:30pm that day.
13. Steve Smith called me to confirm that his process server served the subpoena on Trooper Trotter at 12:48pm.
14. I specifically remember that Steve Smith told me that Trooper Trotter said "message received" after he was served with the subpoena and was told he did not need to be in court until 2:30pm. Steve Smith did indicate that Trooper Trotter was not happy, but he never indicated he would not appear in court.
15. I believed that Trooper Trotter's statement of "message received" indicated he would be in court at 2:30pm as opposed to the 2:00pm time stated on the subpoena.
16. Shortly after 2:00pm, I indicated that I had served Trooper Trotter and stated: "And he did not indicate any – I don't think he was terribly pleased, but didn't indicate he was not going to appear." This conversation is on the record and can be found on page 120 of the Trial Transcript.
17. After Mr. Jackson testified, I did state that Trooper Trotter said he would be in court by 2:30pm. I made this statement in good faith believing that his comment of "message received" meant he would be in court by 2:30pm.
18. I also believed that if Trooper Trotter did not intend to appear in court after being served with a subpoena, he would have had the decency to tell either the process server or Steve

Smith when called Trooper Trotter to convey the message about appearing in court at 2:30pm.

19. I called Trooper Trotter's cell phone 8 times between 12:18pm and 3:33pm. He never answered and never called me back.

FURTHER AFFIANT SAYETH NOT

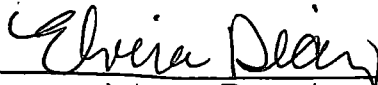


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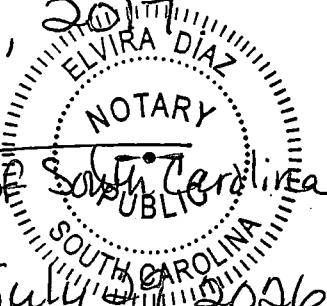
Tucker S. Player  
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State of South Carolina  
County of Richland

Sworn to before me this 26<sup>th</sup>  
day of January, 2017



Notary Public - State of South Carolina



My commission expires: July 27, 2016



**PLAYER**  
PLAYER LAW FIRM, LLC

January 26, 2017

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SC Court of Appeals

South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

**RE: Joseph C. Rivett v. Celadon Trucking Services, Inc. and Bruce Ludlum  
Case No.: 2014-CP-40-6228**

To whom it may concern:

Please find enclosed an original and eight copies of the Respondent's Return to Motion to be filed in regards to the above referenced matter. Please return a clocked copy to me in the envelope I have enclosed. If you need anything else, please let me know. Thank you for your assistance with this matter.

By copy of this letter, I am serving opposing counsel with a copy of the same.

Kind regards,

  
Elvy Diaz  
Legal Secretary

Enclosure(s) as stated

Cc: Mark Barrow, Esq. (w/enclosure)

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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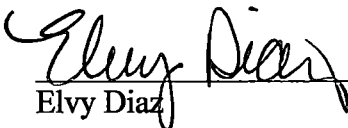
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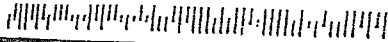
PROOF OF SERVICE

I, Elvy Diaz, Legal Secretary, hereby certify that I have served a copy of Respondent's Return to Motion on the Appellants via U.S. Mail, with sufficient postage attached, addressed to their attorney of record at the following address:

Mark Barrow  
Sweeny, Wingate & Barrow  
P.O. Box 12129  
Columbia, SC 29221

  
Elvy Diaz

January 26, 2017  
Columbia, South Carolina



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