RECEIVED
FEB 06 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Tanya A. Gee, Circuit Court Judge

Appellate No. **2016-000462**
Case No. **2014-CP-40-6228**

Joseph C. Rivett., ...Respondent,

v.

Bruce Ludlum and Celadon Trucking Services, Inc., ...Appellants.

APPELLANTS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE RULE 60(b) MOTION WITH TRIAL COURT

Appellants hereby submit this Reply in support of their January 3, 2017 Motion for leave to file a Rule 60(b) motion with the Trial Court. Respondent filed a Return to the Motion on January 26, 2017. As explained below, Respondent's Return in opposition to Appellant's Motion is without merit.

1. Respondent's Misrepresentations

Respondent first asserts that no fraud, misrepresentation, or misconduct occurred in this case because his statements to the court were based on a misinterpretation of Trooper Trotter's statements. Respondent's contention, however, is without merit. Respondent represented to the trial court that "he [Trooper Trotter] told me that he would be here by 2:30." Transcript of Record at 132:15-16 (emphasis added). This statement communicates to the court that Respondent's counsel was personally told by Trooper Trotter that the Trooper would be in court at a specific time. Nor was this a one-time slip, as counsel later again stated that Trooper Trotter "indicated he would be here by 2:30." *Id.* at 134:18-20. However, Trooper Trotter never told anyone that he would be in court at 2:30 on February 3, 2016, much less Respondent's counsel personally. *See* Affidavit of Trooper Brian Trotter, Exhibit A to Appellant's Motion for Leave; *see also* Affidavit of Tucker S. Player, Exhibit A to Respondent's Return. Moreover, Trooper Trotter's alleged statement "message received," made to the process server and passed second-hand to Respondent's counsel, in no way affirmed that the Trooper would appear in court. *See* Affidavit of Tucker S. Player, Exhibit A to Respondent's Return. Rather, the reasonable

interpretation is simply what the words convey: that the Trooper received the subpoena. Thus, the record reflects that a misrepresentation was made to the court.

2. Respondent's Misrepresentations were Extrinsic

Respondent next asserts that equitable relief from the trial court's judgement is unavailable in this matter because Appellants' motion is based on extrinsic rather than intrinsic fraud. However, this matter involves misrepresentation by "an attorney—an officer of the court," and as such is extrinsic rather than intrinsic. Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003). This misrepresentation deprived the Appellants from the opportunity to cross-examine a witness in court. The importance of this right is demonstrated by the fact that Rule 23(a)(3)(E) permits deposition testimony to be read only in *exceptional* circumstances. Respondent's failure to properly subpoena a witness is not an exceptional circumstance, as the trial court found (*see* Transcript of Record at 140:3-7); rather, the court relied on Respondent's representation that Trooper Trotter "told me that he would be here."

Respondent appears to assert that Appellants' claim of prejudice is "ridiculous." However, the importance of Trooper Trotter's testimony is illustrated by Respondent's own extensive efforts to introduce the testimony. Specifically, Respondent shuffled other witnesses' schedules, sought additional time from the trial court, and asserted that exceptional circumstances existed for admission of the trooper's deposition testimony. Furthermore, Respondent cited the trooper's testimony in his opposition to Appellants' motion for directed verdict. Yet Appellants were deprived of an opportunity to cross-examine this witness based on a misrepresentation by Respondent. As a result, Appellants seek leave from the Court to file a Rule 60 motion with the trial court.

3. Respondent's Misrepresentations were Material

Respondent next asserts that there is no evidence that the trial court relied on Respondent's misrepresentations to admit Trooper Trotter's deposition testimony in the Trooper's absence. However, the only pieces of evidence before the court as to whether exceptional circumstances existed for use of the deposition testimony were Respondent's failure to properly subpoena the trooper to appear at 9:30 a.m., the Respondent's subsequent untimely subpoena for the trooper to appear later the same day at 2 p.m., and Respondent's representation that the trooper told Respondent's counsel that he would be in court at 2:30 p.m.

The trial court found that the first two pieces of evidence were insufficient. Regarding Respondent's belief that the trooper would appear at 9:30, the court stated "[y]ou do have to subpoena him, and there was an issue with your subpoena, which I gave you an opportunity to get the trooper here by two o'clock. When we got here by two o'clock, he said he'll be here by 2:30." Transcript of Record at 139:11-14. Regarding the Respondent's subsequent subpoena for the trooper to appear at 2 p.m. the same day, the court found that such a subpoena did not provide sufficient time. *Id.* at 134:1-21. Thus, Respondent's representation that the trooper told Respondent he would be present was the only material piece of evidence before the court.

To the extent Respondent's Return attempts to blame the trooper's failure to appear on the fact that Appellants released the trooper from their own subpoena, the Respondent's contention was fully addressed by the trial court. *See* Respondent's Return at 4-5. Respondent selectively cites portions of the record, leaving out the court's later statement that "... I think it's good that we got it cleared up on the record because I do think there is some confusion over exactly what happened and that has been cleared up." Transcript of Record at 141:13-16 (emphasis added).

Respondent also asserts that the trial court "found that Appellants suffered no prejudice" from the deposition testimony. Respondent's Return at 4. The "finding" cited by the Respondent is not a finding at all; it appears the trial court was simply attempting to finish Respondent's sentence. *See* Transcript of Record at 140:14-18. The deposition testimony had not even been reviewed at that time.

4. The Rule 60(b) Motion is an Appropriate use of Time and Resources

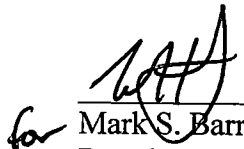
Finally, Respondent argues that Appellant's motion is a waste of time and resources because the presiding trial judge has since passed away. As a result, Respondent asserts that no judge could appropriately rule on the Rule 60 motion. However, motions are frequently heard by trial judges who were not involved in the original proceedings, and the record here provides a roadmap for the trial court judge who would hear the motion.

To the extent Respondent asserts the Rule 60(b) motion would is sought "in place" of an appeal and that such action is not "allowed under South Carolina law," the Respondent's contention is without merit. Rule 60(b) plainly allows a party to seek leave to file a motion for relief from a judgment. Furthermore, the importance of providing this review is made clear by the different standards applied in the trial court as opposed to the Court of Appeals. Specifically, the trial court has within its sound discretion the decision whether to grant a Rule 60(b) motion. The Court of Appeals, in contrast, reviews the trial judge's decision only for an abuse of discretion.

As a result, Appellants Motion for Leave to File a Rule 60(b) Motion should be granted.

February 6, 2017

Respectfully,



for Mark S. Barrow
Brandon R. Gottschall
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233
Attorneys for Appellant

RECEIVED
FEB 06 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Tanya A. Gee, Circuit Court Judge

Case No. **2014-CP-40-6228**

Joseph C. Rivett., ...Respondent,

v.

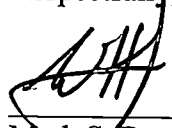
Bruce Ludlum and Celadon Trucking Services, Inc., ...Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Reply in Support of Motion for Leave to File Rule 60 Motion with Trial Court on Joseph C. Rivett by depositing a copy of it in the United States Mail, postage prepaid, on February 6, 2017 addressed to his attorney of record, Tucker S. Player, Esquire, Player Law Firm, LLC, 1415 Broad River Road, Post Office Box 21005, Columbia, SC 29221.

February 6, 2017

Respectfully,



for Mark S. Barrow
Brandon R. Gottschall
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233
Attorneys for Appellant

RECEIVED
FEB 06 2017
SC Court of Appeals

S·W·B

SWEENY WINGATE & BARROW P.A.

February 6, 2017

Reply to: Main Office

Brandon R. Gottschall
(803) 256-2233 x7132
brg@swblaw.com

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Joseph C. Rivett v. Celadon Trucking
Civil Action No.: 2014-CP-40-6228 - Appellate No.:2016-000462
Our File: 2772-9340

Dear Ms. Kitchings:

Enclosed for filing is Appellants' Reply in Support of Motion for Leave to File Rule 60(b) Motion with Trial Court and a Proof of Service in the above case. Please file the originals and return a filed copy to the courier.

Thank you for your assistance and should you have any questions or concerns please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

for Brandon R. Gottschall

BRG/bjp
Enclosures

cc: Tucker S. Player, Esquire, Player Law Firm, LLC