

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 JOSEPH C. RIVETT,)
)
 PLAINTIFF,)
)
 VS.)
)
 WILLIAM JOE JACKSON, BRUCE)
 LUDLUM and CELADON)
 TRUCKING SERVICES, INC.,)
)
 DEFENDANTS.)

IN THE COURTS OF SOUTH CAROLINA
 FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-40-6228

ORDER

2017 OCT -4 AM 9:20
 RICHLAND COUNTY
 CLERK OF COURT
 JENNIFER L. GIBSON

The matter comes to this Court via an Order from the South Carolina Court of Appeals granting leave to Defendants to file a motion pursuant to Rule 60(b), SCRCP with this Court. The presiding judge who issued the Order being challenged passed away during the pendency of the appeal. I took this matter under advisement as the Chief Administrative Judge and heard arguments from Counsel on July 21, 2017. I ordered counsel to submit proposed orders within five days. Plaintiff submitted his order on July 25, 2017. Defendants did not submit a proposed order until August 1, 2017. After consideration of the applicable law and arguments of counsel, I deny Defendants' motion.

FACTUAL BACKGROUND

This matter was heard by a Richland County Jury on February 2, February 3, and February 4, 2016, resulting in a judgment for Plaintiff in the amount of \$300,000.00. The Honorable Tanya Gee presided over the trial. Judge Gee passed away in 2016 after a long battle with cancer.

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 SC Court of Appeals

During the first day of trial, an issue arose with regard to the scheduling of witnesses to testify. Plaintiff testified as the first witness. Thereafter, Plaintiff played the video depositions of the treating physicians. Plaintiff intended to call the South Carolina State Trooper who witnessed the accident to testify at trial as well. A discussion took place on the record which established three things: (1) Plaintiff conditioned his willingness to delay calling Trooper Trotter until February 3, 2016 because Defendants intended to call him as a witness; (2) Counsel for Defendant represented to the Court that he intended to call Trooper Trotter to the stand after he had heard all of Plaintiff's testimony; and (3) everyone understood that Trooper Trotter was supposed to testify at 9:30am on the morning of February 3, 2016. *Trial Transcript, February 2, 2016, Pages 96-98.*

After Court on February 2, 2016, Counsel for Plaintiff spoke with Trooper Trotter telephonically and confirmed that he would be in the courtroom ready to testify at 9:30am on the morning of February 3, 2016. *See Affidavit of Tucker Player, ¶¶ 5 and 6; Trial Transcript, February 2, 2016, Page 137, lines 4-7.*

The following morning, Trooper Trotter did not appear to testify. A discussion took place on the record in which Counsel for Defendants indicated that he released Trooper Trotter from his subpoena the night before. After an examination of the subpoena Plaintiff served on the trooper, Judge Gee determined that the subpoena was defective as it only compelled Trooper Trotter to testify during the week of January 19, 2016. Judge Gee allowed Plaintiff until 2:00pm to produce the trooper to testify. *Trial Transcript, February 3, 2016, Pages 110-118.*

Once court reconvened at 2:00pm, counsel for Plaintiff informed Judge Gee that he had served Trooper Trotter with a subpoena at his home in Gilbert, South Carolina and the Trooper did not "indicate" he would not appear to testify. *Trial Transcript, February 3, 2016, page 120.*

Plaintiff then called William Jackson to the stand. After Mr. Jackson testified, Trooper Trotter had yet to appear. Judge Gee allowed counsel to walk outside to see if the trooper was in the courthouse. When counsel returned, he said the trooper was not there but “he told me he would be here at 2:30.” *Trial Transcript, February 3, 2016*, Page 132, lines 15-16. Shortly thereafter, Plaintiff made a motion to read the deposition transcript into the record pursuant to Rule 32(a)(3)(E), SCRPC arguing that exceptional circumstances made it desirable and in the interests of justice to allow such reading. Judge Gee allowed the transcript to be read to the jury pursuant to this Rule. At no point did she mention any concern or consideration over counsel’s representation that Trotter told him he would appear at 2:30pm on February 3, 2016.

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). The standard of review, therefore, is limited to determining whether there was an abuse of discretion. A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). In order to establish a prima facie case to shift the burden to Plaintiff, Defendants 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).

RULING OF THE COURT

On the Issue of Fraud

At the hearing, counsel for Defendants claimed that the basis of this motion was on a “misrepresentation” made by counsel. Yet, after the hearing, counsel submitted the case of *Chewning v. Ford Motor Company, Inc.* 354 S.C. 72, 579 S.E.2d 605 (2003), which deals exclusively with fraud upon the court, in support of its motion. This Court is uncertain exactly what Defendants are claiming in pursuit of this motion, so both standards will be addressed.

There were three assertions by Mr. Player concerning what Trooper Trotter communicated on February 3, 2016. In two of those assertions, counsel said that Trooper “indicated” that he would attend. Only a single sentence is referenced by Defendants in which counsel specifically asserted that he spoke with Trooper Trotter on February 3, 2016. To the extent that the language used by counsel in that single sentence was inaccurate, all parties agree. When counsel stated “he told me he would be here at 2:30” in referring to Trooper Trotter, this statement was false. Both affidavits submitted to this Court concede that Trooper Trotter did not actually speak to Mr. Player on February 3, 2016. However, I find that this does not constitute fraud.

Plaintiff submitted the Affidavit of Tucker S. Player as **Exhibit A**. The Affidavit establishes that there was no intention of misleading Judge Gee and that counsel accurately presented what he believed was communicated by Trooper Trotter to a third-party on February 3, 2016. Moreover, Judge Gee knew Trooper Trotter was not in the courtroom at 2:30pm when she agreed to allow his deposition testimony to be read some time after 2:37pm that day. Judge Gee knew it was not true when it was made and allowed the reading of the deposition to the jury. If Defendants are alleging that somehow the issue of counsel actually speaking to Trooper Trotter was the “fraud”, they have failed to provide any evidence that this particular issue played a role in Judge Gee’s decision to allow the deposition into the record. The transcript is clear that when

counsel argued about representations of the Trooper, he was referring to the February 2, 2016 conversation during which all parties agree the trooper told counsel he would be present to testify at 9:30am on February 3, 2016. *See Transcript of February 3, 2016, page 133, lines 17-21; See Transcript of February 3, 2016, page 142, lines 6-12.* More importantly, it is clear that Judge Gee was referring to the conversation during the evening of February 2, 2016 when she made her decision concerning the deposition. *See Transcript of February 3, 2016, page 135, lines 25 – Page 136, line 8; See Transcript of February 3, 2016, page 136, lines 16-23; See Transcript of February 3, 2016, page 139, lines 15-16.* The transcript indicates that Judge Gee ultimately based her decision to allow the deposition to be read because she found Defendants would suffer no prejudice as a result. *Transcript of February 3, 2016, page 140, lines 16.* As discussed below, I agree with Judge Gee's ruling.

With regard to fraud on the court, such an assertion is without merit. The very case cited and produced by Defendants discusses fraud of the court at length:

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) *citing United States v. Int'l Telephone & Telegraph Corp.*, 349 F. Supp. 22, 29 (D. Conn. 1972) (internal citations omitted):

Fraud upon the court is a "serious allegation . . . involving 'corruption of the judicial process itself.'" *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 *quoting In re Whitney-Forbes*, 770 F.2d 692, 698 (7th Cir. 1985).

. . . 'Fraud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing - - what can properly be characterized as a deliberate scheme to defraud - - before relief from a final judgment is appropriate. . . . Thus, when there is no

intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for 'fraud on the court.'

Chewning v. Ford Motor Company, Inc. 354 S.C. 72, 579 S.E.2d 605 (2003).

To allege that the representation of Mr. Player amounts to a "corruption of the judicial process" or "most egregious conduct" is unsupported by the evidence in the record.

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.*

Defendants cannot demonstrate how this inaccurate statement induced Defendants 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 Defendants released him from their subpoena. The only way Defendants could be prejudiced by the non-appearance of Trooper Trotter was if they knew he would not appear to testify after they released him from their subpoena, which was vehemently denied by counsel at trial. See *Trial Transcript of*

February 3, 2016, page 138-139, and 142. Counsel for Defendants stated to the Court 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 of February 3, 2016*, page 138, line 23 through p. 139, line 1. What is important about this representation by Mr. Barrow is that he had "gotten everything out of the Plaintiff" when he represented to Judge Gee that he still intended to call Trooper Trotter on February 2, 2016. See *Transcript of February 2, 2016*, page 97. Finally, despite the claim in Defendants' 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 question from any attorney representing Plaintiff. 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 Defendants. For Defendants to claim that they were prejudiced by the inability to cross-examine Trooper Trotter is unsupported by the record.

Defendants look to the *Chewning* case as support that the fraud they allege was extrinsic fraud. In *Chewning*, the offending lawyers suborned perjured testimony and intentionally concealed documents. Nothing remotely akin to these egregious acts took place here. More importantly, extrinsic fraud "requires a showing that one has acted with an intent to deceive or defraud the court" *Id.* Defendants have not and cannot offer any proof of any fraudulent or improper intent on behalf of counsel. Therefore, they cannot establish the requisite proof of extrinsic fraud to entitle them to relief under Rule 60(b)(3), SCRCF.

Rule 61, SCRCF

Rule 61, SCRCP states :

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.

Defendants claim that they were deprived of the ability to cross-examine Trooper Trotter. Even discounting the fact that Trooper Trotter's appearance was procured through the actions of Defendants in releasing him from a subpoena, there is no merit to this argument. First and foremost, Defendants cannot point to a single issue or line of testimony upon which they would need to "cross examine" Trooper Trotter. Trooper Trotter only testified to four issues that were arguably positive towards Plaintiff's case:

1. It was raining at the time of the accident;
2. Traffic was heavy at the time of the accident;
3. He witnessed the accident, and he saw Defendant Celadon's truck strike William Jackson's vehicle and "push" it into the rear of Plaintiff's vehicle; and
4. The Celadon truck was traveling approximately 30 miles per hour immediately prior to the accident.

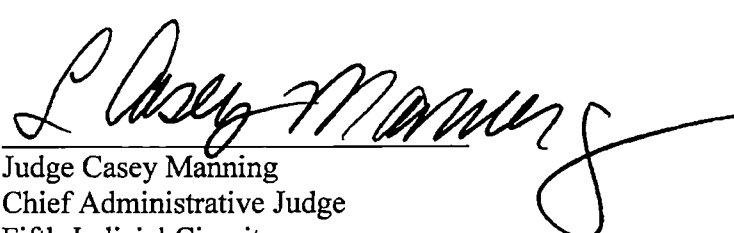
This Court reviewed the trial transcript and it is clear that all of these assertions by Trooper Trotter were introduced into evidence through other witnesses. Mssrs. Jackson and Ledlum testified that it was raining and traffic was heavy at the time of the accident. *Trial Transcript*, pages 122 and 162. Mr. Jackson testified that he was struck in the rear of his vehicle by the Celadon truck and pushed into Plaintiff. *Trial Transcript*, page 123 and 127. Defendant Ledlum admitted that he was travelling between 25 and 30 miles per hour immediately prior to the incident. *Trial Transcript*, page 164. Finally, Mr. Ledlum testified that he struck Mr. Jackson in

the rear. *Trial Transcript*, page 164. It is difficult, if not impossible, to conceive of a line of cross examination questions that Defendants were deprived of using because of Trooper Trotter's absence at trial. Moreover, Trooper Trotter's deposition testimony refuted Plaintiff's claim that there was two separate collisions and affirmed that Plaintiff did not seek medical assistance at the scene of the accident. This latter issue, it appears, was the only reason Defendants intended to call the trooper according to counsel. Defendants have not, and cannot, provide any specific argument of how the deposition testimony of the trooper caused them any harm. Therefore, it is clear that even if Judge Gee made an error in allowing Trooper Trotter's deposition transcript, which she did not, it was harmless error and does not entitle Defendants to a new trial.

For the foregoing reasons, the motion is DENIED.

IT IS SO ORDERED.

This 3 day of July, 2017,


Judge Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2014CP4006228**

Joseph C Rivett

William Joe Jackson

PLAINTIFF(S)

Bruce Ludlum

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Oct, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Michael R. Jeffcoat	Tucker S. Player	Christopher J. Daniels	Phillip Jason Reynolds
		James Eric Cavanaugh	Mark Steven Barrow
		Brandon Robert Gottschall	

ATTORNEY(S) FOR THE PLAINTIFF(S) _____ ATTORNEY(S) FOR THE DEFENDANT(S) _____

Court Reporter _____

Clerk of Court _____

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OCT 27 2017

Jeanette W. McBride