THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Tonya Gee, Circuit Court Judge
The Honorable Casey Manning, Circuit Court Judge

Court of Appeals Case No.: 2016-000462
Case No. 2014-CP-40-6228

Joseph C. Rivett ..... Respondent

v.

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

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Initial Brief of Respondent

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ISSUE ON APPEAL

I. DID THE LOWER COURT ERR IN ALLOWING THE DEPOSITION TESTIMONY OF TROOPER TROTTER INTO EVIDENCE?

II. DID THE LOWER COURT ERR IN DENYING APPELLANTS' RULE 60, SCRCP MOTION?

STATEMENT OF THE CASE

This matter was heard by a Richland County Jury on February 2, February 3, and February 4, 2016, resulting in a judgment for Respondent in the amount of $300,000.00. The Honorable Tanya Gee presided over the trial.

During the first day of trial, an issue arose with regard to the scheduling of witnesses to testify. Respondent testified as the first witness. Thereafter, Respondent played the video depositions of the treating physicians. Respondent intended to call the South Carolina State Trooper, Brian Trotter, who witnessed the accident, that same day. A discussion took place on the record which established three things: (1) Respondent conditioned his willingness to delay calling Trooper Trotter until February 3, 2016 on the representation of that Appellants intended to call him as a witness on the morning of February 3, 2016 (*Transcript of Trial, February 2*, p.96, lines 9-18); (2) Counsel for Defendant represented to the Court that he intended to call Trooper Trotter to the stand (*Transcript of Trial, February 2*, page 96, line 19 through page 97); 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 Respondent 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 Appellants indicated that he released Trooper Trotter from his subpoena the night before. After an examination of the subpoena Respondent 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 Respondent 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 Respondent 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. Respondent 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, Respondent made a motion to read the deposition transcript into the record pursuant to Rule 32(a)(3)(E), SCRCP 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.

Appellant moved this Court for leave to file a Rule 60, SCRCP Motion with the trial court after obtaining an affidavit from Trooper Trotter which indicated he never spoke with counsel on February 3, 2016 and never told anyone he would be in court by 2:30pm. This court allowed the motion. That motion was heard on July 21, 2017 by Judge Casey Manning. Judge Manning denied the motion.

ARGUMENTS

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 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).

Appellants argue, twice, that this Court should review the matter under a de novo standard. However, these arguments are based on a premise that the lower court operated under a misrepresentation of facts due the actions of counsel. This is not the case. While such an argument may have been viable before the leave to file the Rule 60 motion was granted, there can be no argument that the trial court did not have all of the facts before it in July 2017. Therefore, there was no false representation of facts that prohibited the exercise of discretion, and this Court should review this matter under an abuse of discretion standard with regard to both Judge Gee and Judge Manning. With regard to the argument that Judge Gee abused her discretion, that argument was specifically denied by Appellants in the hearing before Judge Manning. *Transcript of Manning Hearing*, July 27, 2017, p.14, l.24 through p.15, l.2.

ARGUMENTS NOT PRESERVED FOR REVIEW

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct.

App. 2001). An issue that was not preserved for review should not be addressed by the Court of Appeals. *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995).

In Appellant's Initial Brief, Appellant makes numerous arguments that were never made to either Judge Gee at the trial in 2016 or Judge Manning in the Rule 60, SCRCP Motion in 2017. Those arguments are as follows:

> I.b.i. – Because the Trial Court admitted Trooper Trotter's deposition testimony based on a material misrepresentation, the Trial Court was deprived of its discretion and admission of the deposition testimony was in error;
>
> I.b.ii.2 – The Trial Court failed to state the grounds for admission of the deposition testimony under Rule 32(a)(3)(E) and failed to give due regard to the importance of oral testimony in open court.
>
> I.b.ii.3 – Respondent failed to provide application and notice as required by Rule 32(a)(3)(E) and admission of the deposition testimony was thus in error;
>
> I.c.i – Prejudice should be presumed;
>
> I.c.iii – Respondent should be estopped from denying prejudice; and
>
> II.b.i – Respondent's statements were fraudulent.

None of these statements were raised by counsel below, and only one was addressed by either Judge Gee or Judge Manning. Judge Manning, *sua sponte*, addressed the issue of whether the statement of counsel constituted intentional fraud, but none of the arguments made in the three pages devoted to this issue in Appellants' Initial Brief have ever been seen before. Therefore, this Court should not address them as they were not preserved for review.

THE MISREPRESENTATION

The entirety of Appellants' appeal is based on two sentences uttered by counsel during a 3-day trial. In both instances, counsel represented that Trooper Trotter told him that he would

appear in court at 2:30pm on February 3, 2016. I made the statements and they were incorrect. I have admitted it and tried to explain what happened in my affidavit and attached exhibits previously presented to this Court.

I have never and would never intentionally mislead a court for any reason. Such behavior is an anathema to me as a lawyer and as a person. The allegations that I knowingly and intentionally defrauded Judge Gee are simply untrue. I have no precedent on this issue, only my affidavit in evidence, my word as a man, and my oath as an officer of the Court.

THE THREE PREMISES OF APPELLANTS' APPEAL

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). While Respondent openly admits to making an inaccurate statement to Judge Gee, Appellants argue now that the actions of counsel constituted intentional fraud on Judge Gee. There are three premises upon which Appellants' appeal relies as its foundation. If any one of these premises fails, so does the appeal. As demonstrated below, all three premises fail through the application of the law and review of the facts below.

PREMISE #1 – JUDGE GEE RELIED ON THE MISREPRESENTATION IN FINDING EXCEPTIONAL CIRCUMSTANCES

The first, and most important, premise of Appellants is that Judge Gee relied upon the misrepresentation in finding exceptional circumstances necessary to allow the deposition testimony into the record. The record below demonstrates that this is untrue. Judge Gee made it clear that her primary concern was the representation of Trooper Trotter made during the telephone conversation on February 2, 2016 when he indicated that he would be in court at 9:30am on the morning of February 3, 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 (*See Transcript of February 3, 2016, page* 110, lines 4-7) and in his Affidavit (*Affidavit of Tucker S. Player*, Paragraph 6) and it was confirmed by Counsel for Appellant at trial (*See Transcript of February 3, 2016, page* 137, lines 4-7). It was this representation by Trooper Trotter that concerned Judge Gee as she stated on more than one occasion. *Transcript of February 3, 2016, page* 114, line 25 through page 115, line 8; *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. *See Transcript of February 3, 2016, page* 133, lines 17-21; *See Transcript of February 3, 2016, page* 142, lines 6-12. Ultimately, Judge Gee found that Appellants suffered no prejudice by allowing the deposition transcript to be read to the jury. *See Transcript of February 3, 2016, 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.

Appellant now, as this argument was not made to Judge Manning, argues that Judge Gee had already ruled that the deposition could not be used. This is simply untrue. First and foremost, no motion to use the transcript had been made or argued at the time Judge Gee made the remark. It was not a ruling of the court, merely part of the colloquy between the judge and lawyers. Moreover, if Appellants' argument that the only evidence before Judge Gee was the misrepresentation about Trotter appearing at 2:30pm, Judge Gee would have stated that during the actual arguments on the actual motion. This did not happen. The only representation discussed as the one Trotter made on February 2, 2016 that he would be in Courtroom 3B at

9:30am on February 3, 2016. *Trial Transcript, February 3, 2016, page* 136 -137. Therefore, this premise must fail through any reasonable review of the record below.

PREMISE #2 – APPELLANTS WERE PREJUDICED BY BEING NOT BEING ALLOWED TO CROSS-EXAMINE TROOPER TROTTER

This premise argued by Appellants is meritless in many ways. First and foremost, the record is clear that Trooper Trotter would have been called to testify on February 2, 2016 if not for the representation of Appellant's counsel that they intended to call the trooper to testify the next morning. *Trial Transcript, February 2, 2016, pages 96-98.* More importantly, Trooper Trotter would have been in Courtroom 3B at 9:30am on February 3, 2016 to testify but for the actions of counsel for Appellants in releasing Trotter from their subpoena.

And they now declare that Respondent deprived them of the opportunity to cross examine the witness they released from their own subpoena.

As irrational as this argument might seem, it is merely the tip of the iceberg. One need only review the actual transcript of Brian Trotter's deposition to understand how utterly disingenuous this argument is and conclusively determine that the second premise of Appellants' appeal fails.

Throughout their brief, Appellants decry the prejudice they suffered because they were not able to cross-examine Trooper Trotter at trial. It is true that Appellants were limited in what they could present to the jury, but what is not revealed in the brief is the extent to which Appellants willingly chose to forego the cross-examination questions available to them at trial. As pointed out in Judge Manning's Order, Respondent did not ask a single question of Trooper Trotter in his deposition. Trotter was only questioned by counsel for the defendants in the case, including counsel for Appellants at the time. *Judge Manning Order*, p.7. But counsel for Appellants asked several questions to Trotter concerning the very issues they complain about

being denied cross-examination in this appeal. For example, the following questions were asked by Appellants' counsel concerning the speed of the truck prior to the accident:

> *Counsel for Appellants*: The speeds, you said that was an estimate based on what you saw?
>
> *Trotter*: Yes sir.
>
> *Counsel for Appellant*: I know you do have some training in accident reconstruction, but as I understand it, you did not actually reconstruct this accident and calculate these speeds, correct?
>
> *Trotter*: Correct.
>
> *Counsel for Appellant*: So this is just a best guess based on what you witnessed with your own eyes?
>
> *Trotter*: That's correct.
>
> *Deposition of Brian Trotter*, p.15,l.17 through p.16,l.2.

With regard to Trotter's eyewitness account of the accident, counsel made several inquiries into what the Trooper was doing at the time of the accident (*Deposition of Brian Trotter*, p.17,l.22 through p.18l.11), which direction he was facing (*Deposition of Brian Trotter*, p.18,l.12 through l.14), where he was standing in relation to the accident (*Deposition of Brian Trotter*, p.18,l.15 through l.17) potential obstacles in his line of sight (*Deposition of Brian Trotter*, p.18,l.18 through l.25), and the fact that Trotter had to look behind him to see the vehicles in the accident(*Deposition of Brian Trotter*, p.19,l.6 through l.21). All of these questions have two things in common: (1) they challenged the veracity and accuracy of Trooper Trotter's testimony regarding both the speed of Appellants' vehicle and the issue of whether two collisions occurred; and (2) **were intentionally omitted by Appellants at trial when Trooper Trotter's deposition testimony was read to the jury**. The only portion of the deposition transcript read into evidence at trial was that pertaining to Respondent's failure to request medical assistance at the

scene of the accident. *Trial Transcript, February 3, 2016, page 153-154.* It was this particular testimony which counsel represented to the Trial Court was no longer needed and the reason Trotter was released from the subpoena. *Transcript of February 3, 3016,* page 138, line 23 through p. 139, line 1

The intentional acts of Appellants in relieving Trotter of their subpoena, and then purposefully refraining from asking the cross-examination questions and responses available to them at trial, bars Appellants from seeking relief from this Court. As stated by this Court in *King v. Oxford,* 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984):

> It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests. Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. A party must avail himself of the knowledge or means of knowledge open to him. The court will not protect the person who, with full opportunity to do so, will not protect himself.

Therefore, the second premise fails.

PREMISE #3 – THE FRAUD WAS EXTRINSIC

In South Carolina, a party can obtain equitable relief from a judgment based on fraud only upon a showing that the fraud is extrinsic. *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 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. The alleged fraud occurred *after* Appellants made the decision to release the witness from their subpoena. It is actually impossible for the alleged misrepresentation of counsel to have induced Appellants to do *anything*. The heart of Appellants allegation is that the fraud induced the Trial Judge to rule in Respondent's favor, which is typically viewed as intrinsic fraud. The only way Appellants 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, 3016*, page 138-139, and 142.

Appellants look to the case of *Chewning v. Ford Motor Company, Inc. 354 S.C. 72, 579 S.E.2d 605 (2003)* 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.* This did not happen and the third premise fails as well.

ANY ERROR WAS HARMLESS ERROR

The entire basis of Appellants claim of prejudice is centered on an alleged violation of the Confrontation Clause. *Article 6, United States Constitution.* Confrontation Clause violations are subject to a harmless error analysis. *State v. Holder,* 382 S.C. 278, 676 S.E.2d 690, (2009). 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. *Id.*

Appellants claim that they were deprived of the ability to cross-examine Trooper Trotter. As discussed above, the failure to present evidence to challenge the assertions of Trooper Trotter lies solely with counsel for Appellants. Regardless, all of his testimony was duplicative of other witnesses in the case. Trooper Trotter only testified to four issues that were arguably positive towards Respondent'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 Respondent's vehicle; and

4. The Celadon truck was traveling approximately 30 miles per hour immediately prior to the accident.

A review of the trial transcript demonstrates that all of these assertions by Trooper Trotter were introduced into evidence through other witnesses. Defendants Jackson and Ledlum testified that it was raining and traffic was heavy at the time of the accident. *Trial Transcript*, pages 122 and 162. Defendants Jackson testified that he was struck in the rear of his vehicle by the Celadon truck and pushed into Respondent. *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. There was nothing presented in the deposition testimony of Trooper Trotter that was not introduced by either as Appellant or original Defendant. Therefore, even if there was some error, it was merely harmless error as no prejudice was suffered by Appellants. This is exactly what Judge Gee found at trial and the verdict must be affirmed. Trial Transcript p. 140.

CONCLUSION

Appellants seek relief from this Court based on three premises. First, they claim that Judge Gee determined that exceptional circumstances existed under Rule 32, SCRCP because of

counsel's misstatement that the Trooper would appear at 2:30pm. This is directly contradicted by the record below. Second, Appellants claim that they were prejudiced by their inability to cross examine Trooper Trotter at trial. However, the record shows that Trotter's absence from trial was caused by the Appellants releasing him from subpoena, and Appellants intentionally withheld from the jury the cross examination questions that were presented and answered by the Trooper in his deposition. Finally, despite the fact that the misrepresentation was made AFTER Appellants took the prejudicial step of releasing the Trooper from their subpoena, they claim that they suffered extrinsic fraud which deprived them of the ability to fully try their case. All of these premises fail and the judgements below must be affirmed. Even if some error did occur, it was harmless as all of the Trooper's testimony was duplicative of the Appellants themselves on the stand. Therefore, the verdict must be affirmed.

This 12th day of March, 2018,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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TANYA GEE, CIRCUIT COURT JUDGE

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JOSEPH C. RIVETT.,

Respondent,

v.

CELADON TRUCKING SERVICES, INC. AND BRUCE LUDLUM,

Appellants.

PROOF OF SERVICE

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

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Elvy Diaz

March 12, 2018
Columbia, South Carolina

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March 12, 2018

South Carolina Court of Appeals
1015 Sumter Street
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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 one copy of the Respondent's Initial Brief of Respondent and Designation of Matter in 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

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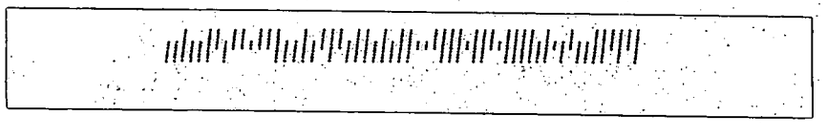

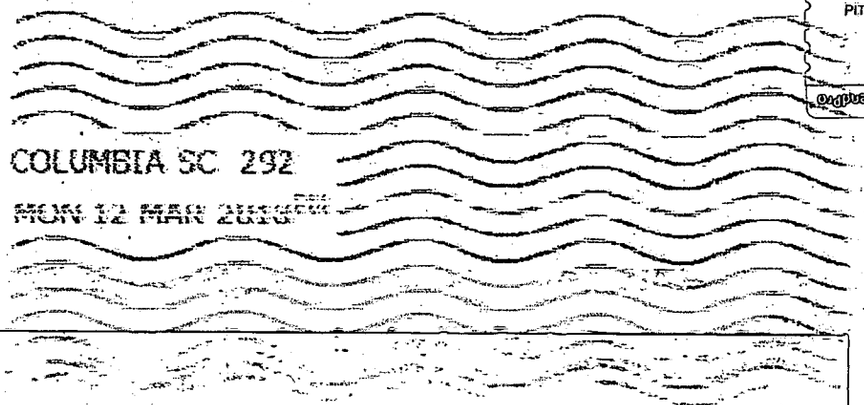

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