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
The Honorable L. Casey Manning, Circuit Court Judge on Remand

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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.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities iii

Arguments

I. EACH ISSUE PRESENTED IN THE APPELLANTS' INITIAL BRIEF IS PRESERVED FOR APPEAL 1

II. APPELLANT DID NOT ABANDON ITS ARGUMENTS AS TO ABUSE OF DISCRETION 5

Conclusion 5

TABLE OF AUTHORITIES

CASES

South Carolina Dep't of Transp. v. First Carolina Corp. of South Carolina, 372 S.C. 295, 641 S.E.2d 903 (2007) 2

State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) 2, 3

Chewning v. Ford Motor Company, Inc., 354 S.C. 72, 579 S.E.2d. 605 (2003) 4

OTHER AUTHORITIES

South Carolina Rules of Civil Procedure, Rule 32 3-4

South Carolina Rules of Civil Procedure, Rule 60 4-5

ARGUMENT

I. EACH ISSUE PRESENTED IN THE APPELLANTS' INITIAL BRIEF IS PRESERVED FOR APPEAL.

Respondent's brief argues that Appellants failed to preserve certain issues. In so doing, Respondent's brief lists six specific sub-section headings from Appellants' initial brief, arguing "[n]one of these statements were raised by counsel below...." Respondent's Initial Brief at 4. However, Respondent's arguments fail for two reasons.

a. Respondent's preservation of issues argument fails to address the actual issues on appeal.

As an initial matter, Appellants' Initial Brief identified two issues for appeal: (1) whether the Trial Court erred in admitting Trooper Trotter's deposition testimony at trial; and (2) whether the Trial Court erred in denying Appellants' motion for relief pursuant to Rule 60. See Appellants' Initial Brief at 1. These are the issues on appeal, and Respondent has not challenged whether these were preserved.

Rather, Respondent challenges a few subsections (technically, subsections of subsections) setting forth brief explanations of the elements supporting the larger issues on appeal. See, e.g., id. The propositions broken out into these subsections are not separate issues on appeal; rather, they are simply pieces to the larger arguments supporting Appellants' positions on the issues on appeal.

To the extent that Respondent argues that each and every piece of an appellate issue must be raised below, Respondent is mistaken. It goes without saying that a putative appellant need not have all nuances and refinements to the appellate argument set forth in the trial record. It is enough that the issue is sufficiently clear to the trial court that the trial court may rule on the

issue. See, e.g., South Carolina Dep't of Transp. v. First Carolina Corp. of South Carolina, 372 S.C. 295, 641 S.E.2d 903 (2007).

b. Appellant sufficiently raised to the trial court the items challenged by Respondent on the basis of issue preservation.

Furthermore, even if each individual segment of Appellants' arguments had to be raised below, Appellants sufficiently raised the items challenged in Respondent's brief to the trial court. As a result, they are preserved for appeal. 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). Nor must the appellant phrase its arguments in the exact terms used in its objection below. See S.C. Dep't of Transp, 372 S.C. at 302, 641 S.E.2d at 907 (holding that issue was preserved "[a]lthough [appellant] did not phrase its objection in the exact terms used in the issues on appeal").

i. Appellants' arguments in sections I.b.i., I.b.ii.2, and I.b.ii.3 of the initial brief are preserved for appeal.

The first three items Respondent objects to on failure to preserve grounds are those propositions contained in the headings at subsections I.b.i, I.b.ii.2, and I.b.ii.3 of Appellants brief. Respondent argues that "[n]one of these statements were raised by counsel below...." Each of these subsections set forth propositions in support of Appellants' contention that there was no basis for the trial court to admit the deposition of Trooper Trotter, which in turn supports Appellants' position that the trial court erred in admitting the deposition testimony.

Subsection I.b.i. addressed Appellants' position that by making misrepresentations to the trial court, Respondent deprived the trial court of its discretion. This argument was raised to the Trial Court below. For example, at the Rule 60 hearing, Appellants' counsel asserted:

> We are saying the evidence was not in front of Judge Gee. There was a misrepresentation to Judge Gee. She made a ruling based on the evidence that she

> had in front of her at that time. She didn't know that the trooper had never talked to the Plaintiff's counsel, had never indicated to anybody that he would be in court at 2:30 that day, and she made a ruling based on exceptional circumstances. It had been represented that the trooper said he would be there and he wasn't there. It looks like the trooper is making a representation that is false to an officer of the court, the attorney. ... and based on that, the Defendant's counsel was deprived of their right to cross.

Transcript of Record of Hearing on Rule 60 Motion 15:4-18. Appellants counsel did not use the words "deprived of discretion," and they did not have to. See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (noting that exact words of the legal doctrine are not necessary to preserve issue for appeal). Appellants plainly argued that the trial court made a ruling based on a misrepresentation from Respondent's counsel with the understanding that she had the necessary facts in front of her, when in fact she did not. As a result, this matter was preserved for appeal.

Likewise, Appellants' arguments in subsection I.b.ii.2. and I.b.ii.3. were raised below and preserved for appeal. Both subsections expounded on Appellants' position that, even absent the misrepresentation to the trial court, admission of the deposition testimony was error. In subsection I.b.ii.2., Appellants urged that 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. In subsection I.b.ii.3., Appellants asserted that Respondent failed to provide application and notice as required by Rule 32(a)(3)(E) and that admission of the deposition testimony was thus in error.

This argument was before the trial court below, and Appellants timely objected to the admission of the deposition testimony. See, e.g., Trial Transcript of Record at 133:22-143:14 (containing discussion regarding admission of deposition testimony under Rule 32). Rule 32 was specifically before the Trial Court, and much of it was explicitly read into the record. Id. at 133:22-134:12. Appellants objected to the Trial Court's admission of the trial testimony based on

the discussion in the record. Id. at 143:12-18. Appellants counsel also noted that they weren't prepared for admission of the deposition testimony under rule 32 (see id. at 143:24-25), which goes to application and notice as required by the rule. As a result, these matters were preserved.

Moreover, at the time Appellants' counsel objected to admission of the deposition testimony to the trial court, Appellants were not yet aware of the Respondent's misrepresentation, as Respondent's misrepresentation was not made known until after trial. As a result, Appellants' arguments that admission of the deposition testimony was error—even had the misrepresentation never been made—were preserved, including those pieces of the argument set forth in sections I.b.ii.2. and I.b.ii.3.

c. Appellants' argument in subsections I.d.i. and I.d.iii. of the initial brief is preserved for appeal.

Appellants' propositions that prejudice should be presumed (subsection I.d.i. of Appellants' initial brief; mislabeled as subsection I.c.i. in Respondent's initial brief) and that Respondent should be estopped from denying prejudice (subsection I.d.iii. of Appellants' initial brief, mislabeled as section I.c.iii. in Respondent's initial brief) were also raised below and preserved for appeal. Appellants' counsel raised prejudice at trial (see, e.g. Transcript of trial record at 135:7-24) and at the Rule 60(b) hearing (see, e.g. Transcript of Rule 60(b) Hearing at 15:4-18; Motion and Memorandum in Support of Rule 60(b) Motion at 4). As a result, the issue of prejudice was preserved for appeal.

d. Appellants' argument in subsection II.b.i.—that Respondent's statements were fraudulent—is preserved for appeal.

Finally, Respondent incorrectly argues that Appellants failed to raise Respondent's fraudulent statements to the trial court. Appellants consistently cited Rule 60(b)'s fraud and misrepresentation standard below, beginning with their Motion and Memorandum in Support of

their Rule 60(b) motion. See Motion and Memorandum in Support of Rule 60(b) motion at 2. Throughout arguments at the Rule 60(b) hearing, Appellants' counsel's presentation focused on Respondent's false statement to the court. See, e.g. Transcript of Record for Rule 60(b) Hearing at 5:12-8:14. Furthermore, the trial court recognized that the issue of fraud was before it and ruled specifically on this issue, even noting Appellants submitted the case of Chewning v. Ford Motor Company, Inc., 354 S.C. 72, 579 S.E.2d. 605 (2003), which deals with fraud. Order Denying Rule 60(b) Motion at 4-7. As a result, fraud was also raised to the trial court and was preserved for appeal.

II. APPELLANT DID NOT ABANDON ITS ARGUMENTS AS TO ABUSE OF DISCRETION

To the extent Respondent has argued that Appellants abandoned any arguments as to the trial court's abuse of discretion at the Rule 60(b) hearing, see Respondent's Initial Brief at 3, this is incorrect. At the Rule 60(b) hearing, Appellants' arguments below were based on the misrepresentation by Respondent's counsel. As a result, the abuse of discretion argument was not before the court below at the Rule 60(b) hearing; it had already been preserved by objections at the trial. Appellants counsel did not abandon its argument as to abuse of discretion, but was simply not able to pursue it at the Rule 60(b) stage, as it was not relevant to the misrepresentation and fraud standard of Rule 60(b).

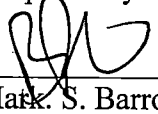
CONCLUSION

For the reasons stated herein and in Appellants initial brief, this Court should reverse the judgments of the circuit court and grant Appellants a new trial.

Signature Page to Follow

March 27, 2018

Respectfully submitted,



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