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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Following a three-car accident on September 8, 2012, Joseph C. Rivett brought this action on October 10, 2014, alleging negligence against William Joseph Jackson, Bruce Ludlum, and Celadon Trucking Services, Inc. Jackson answered the complaint but settled prior to trial. Ludlum and Celadon answered that, among other things, Rivett's injuries were caused by the intervening and superseding negligence of another.

The case was tried by a jury over the course of three days on February 2-4, 2016. At 9:30 a.m. on the second day, February 3, Rivett intended to call South Carolina State Trooper Brian Trotter, an eyewitness, to the stand. When Trooper Trotter did not appear, the Trial Court determined that Rivett's subpoena to Trooper Trotter was invalid. Nonetheless, the Trial Court gave Rivett until 2:30 p.m. that day to have Trooper Trotter in court. When the trial reconvened, Rivett's counsel represented to the Trial Court that he had sent a new subpoena to Trooper Trotter that day. He further represented that Trooper Trotter told him he would be in court by 2:30. However, when Trooper Trotter still did not appear, Rivett moved to introduce Trooper Trotter's deposition testimony pursuant to Rule 32(a)(3) of the South Carolina Rules of Civil Procedure.

Counsel for Ludlum and Celadon objected to admission of the testimony. See, e.g., Trial Transcript of Record 112:20; 143:12-14; R. p. 194, line 20; R. p. 225, lines 12-14. Having heard testimony from Rivett's counsel that Trooper Trotter told counsel he would appear by 2:30, the trial court found exceptional circumstances existed under 23(a)(3)(E) to admit the deposition testimony. Trooper Trotter's testimony was read to the jury and admitted into evidence, and Respondent also relied on the deposition testimony as evidence to survive Appellants' motion for judgment as a matter of law.

The jury found for Rivett and awarded him $300,000 on February 5, 2016. See Jury Verdict Judgment and Verdict Form, Filed February 5, 2016; R. pp. 11-13. On March 3, 2016, Appellants filed a first notice of appeal.

After the appeal was filed, counsel for Appellants obtained an affidavit from Trooper Trotter dated December 21, 2016 and indicating that Respondent's counsel falsely represented that he had spoken with Trooper Trotter on February 3, 2016. Trooper Trotter also indicated that at no point did he represent to Respondent's counsel or anyone else that he would appear in court on February 3, 2016. As a result, it became apparent that Trooper Trotter's deposition testimony was admitted after false statements were made to the Trial Court.

Based on this new information, Ludlum and Celadon's counsel filed a motion with the court of appeals on January 3, 2017, for leave to file a Rule 60 motion with the trial court. The court of appeals granted the motion on March 24, 2017 and remanded the case for a hearing.

Judge Gee, who presided over the trial, tragically passed away in September, 2016, following a long battle with cancer. As a result, on remand, the Honorable Casey L. Manning heard arguments on the Rule 60 motion on July 21, 2017. On October 4, 2017, the Court entered an order denying Appellants' Rule 60 motion. On October 25, 2017, Appellants filed a second notice of appeal.

ARGUMENTS

I. BECAUSE NO EXCEPTIONAL CIRCUMSTANCES EXISTED TO ADMIT TROOPER TROTTER'S DEPOSITION TESTIMONY AT TRIAL, ADMISSION OF HIS DEPOSITION TESTIMONY WAS IN ERROR, PREJUDICING APPELLANTS AND DEPRIVING THEM OF DUE PROCESS; AS A RESULT, THE COURT SHOULD GRANT APPELLANTS A NEW TRIAL.

a. Standard of Review

Generally, the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). However, as has been noted by many federal courts, when a party's misrepresentations deprive the court of the opportunity to exercise its discretion in an informed manner, there is no longer justification for deference to the court's decision, and the standard for review is de novo. See, e.g., Bresler v. Wilmington Tr. Co., 855 F.3d 178, 208 (4th Cir. 2017), cert. denied, No. 17-248, 2017 WL 3536481 (U.S. Nov. 27, 2017); Mangini v. United States, 314 F.3d 1158, 1161 (9th Cir.), opinion amended on denial of reh'g, 319 F.3d 1079 (9th Cir. 2003); Dakota Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993). The rationale for de novo review stated in these federal cases would likewise apply in state court, where a judge would also be deprived of the opportunity to exercise discretion in the face of misrepresentations by a party. Furthermore, de novo review also applies to "[t]he issue of interpretation of a statute," which "is a question of law for the court." Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Finally, even where the abuse of discretion standard applies, an abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Thus, even under the abuse of discretion standard, an appellant is entitled to a reversal if

the appellant shows "both error and resulting prejudice." Gibson v. Wright, 403 S.C. 32, 38, 742 S.E.2d 49, 52 (Ct. App. 2013).

b. No Basis Existed for Admitting Trooper Trotter's Deposition Testimony.

The general rule in South Carolina is that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules." Rule 43, SCRCP. Rule 32(a)(3)(E) provides a limited exception, permitting the court to admit deposition testimony if the court finds, "upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

South Carolina's Rule 32(a)(3)(E) is essentially the same as the federal version of the rule. Federal Rule of Civil Procedure 32(a)(4)(E) permits use of deposition testimony if the court finds "on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used." Fed. R. Civ. P. 32(a)(4)(E). This Rule reflects the "strong preference for live testimony in open court." United States ex rel. Lutz v. Berkeley Heartlab, Inc., No. CV 9:14-230-RMG, 2017 WL 6015157, at *1 (D.S.C. Dec. 1, 2017). In addition, the rule "imposes a stringent standard," and that it permits use of deposition testimony "when 'exceptional circumstances' outweigh the importance of live testimony in open court." Id. at *2 Furthermore,

> [h]ow exceptional the circumstances must be under Rule 32(a)(3)(E) [now Rule 32(a)(4)(E)] is indicated by its companion provisions. These authorize use of a deposition in lieu of live testimony only when the witness is shown to be unavailable or unable to testify because he is dead; at a great distance; aged, ill, infirm, or imprisoned; or unprocurable through a subpoena.

Id. (citing Allgeier v. United States, 909 F.2d 869, 876 (6th Cir. 1990)). As a result, the rule imposes "a high hurdle because trial testimony normally must be given orally in open court[.]" Id.

In the present case, deposition of Trooper Brian Trotter was erroneously admitted based on a material misrepresentation by Respondent's Counsel, resulting in prejudice to Defendants. Respondent's Counsel sought to admit Trooper Brian Trotter's deposition testimony pursuant to Rule 32(a)(3)(E)[1] of the South Carolina Rules of Civil Procedure. Initially, on the morning of February 3, 2016, the Trial Court ruled that Trooper Trotter's deposition testimony could not be used under the rule. Trial Transcript of Record 112:22-23, R. p. 194, lines 22-23. As a result, the Trial Court permitted Respondent until 2 p.m. to have Trooper Trotter present and indicated that otherwise, Respondent's case would have to close. Id. at 117:6-24, R. p. 199, lines 6-24. At the time the Trial Court issued this decision, it was aware that Appellants had released Trooper Trotter from their subpoena and that Respondent's prior subpoena to Trooper Trotter was invalid. See id. at 110:24-111:3, R. p. 192, line 24-p. 193, line 3; 114:8-15, R. p. 196, lines 8-15; 117:8-9, R. p. 199, lines 8-9. Thus, with this information before it, the Trial Court did not permit admission of the deposition testimony under Rule 32(a)(3)(E).

When Trooper Trotter still did not appear later that afternoon, Respondent again argued for admission of Trooper Trotter's deposition testimony based on exceptional circumstances. The considerations raised to the Trial Court were, essentially: (1) that Trooper Trotter did not appear on the afternoon of February 3, 2016, despite having been served with a subpoena earlier that same day; (2) that introduction of Trooper Trotter's testimony was in the interests of justice because, among other things, the failure to appear was somehow related to the Appellants' decision to release the Trooper from their subpoena; and (3) that Trooper Trotter represented to Respondent's counsel earlier on February 3, 2016, that he would be at trial by 2:30 p.m. that

[1] Respondent also argued that the deposition testimony should be admitted pursuant to Rule 32(a)(3)(D) because Trooper Trotter was served with a trial subpoena earlier that same day. Trial Transcript of Record at 134:1-21, R. p. 216, lines 1-21. However, the Trial Court did not find that a subpoena provided the day of trial was timely, and ultimately did not admit the testimony under Rule 32(a)(3)(D). See id. at 140:4-7, R. p. 222, lines 4-7; 142:13-15, R. p. 335, lines 13-15.

same day. See, e.g., Trial Transcript of Record 132:17-21, R. p. 214, lines 17-21; 134:13-21, R. p. 216, lines 13-21.

The first two considerations were not sufficient to admit the deposition testimony. Regarding the subpoena to Trooper Trotter, the Trial Court found that the Respondent's subpoena was not timely. Id. at 140:3-8, R. p. 222, lines 3-8 (stating that a subpoena served at 12:45 p.m. on January 3, 2016, and requiring an appearance at 2 p.m. the same day is not the type of subpoena that someone can normally answer). Respondent's counsel himself noted that the subpoena was late. Id. at 134:14, R. p. 216, line 14. Failure to timely subpoena a witness, as the Trial Court recognized, is not an "exceptional circumstance" as required under Rule 32(a)(3)(E).

Next, the Trial Court discussed the general "interests of justice" considerations, including the circumstances underlying Appellants' release of Trooper Trotter from their subpoena. See id. at 135:7-142:5, R. p. 217, line 7-p. 218, line 5. As noted above, this information was before the Trial Court the morning of February 3, 2016, when the Trial Court found that Respondent could not use the deposition testimony under the rule. See discussion supra p. 5. When the information was discussed again, Appellants' Counsel confirmed that while they had decided the night before to release Trooper Trotter from their subpoena, in no way did they indicate to Trooper Trotter that he should not appear in Court. Id. at 136:21-137:17, R. p. 218, line 21-p. 219, line 17; 138:19-139:4, R. p. 220, line 19-p. 221, line 4. Furthermore, Appellants put Respondent on notice the day before that they might not call Trooper Trotter, and the Trial Court acknowledged that any plans to call Trooper Trotter were, of course, subject to change. Id. at 96:24-97:1, R. p. 178, line 24-p. 179, line 1; see also 140:19-141:10, R. p. 222, line 19-p. 223, line 10. Appellants confirmed that they released Trooper Trotter from their subpoena so that if Respondent also released him, Trooper Trotter would not still show up to the courthouse when he was not needed.

Id. at 141:18-25, R. p. 223, lines 18-25. The Trial Court stated twice that that this issue had been "cleared up". Id. at 141:13-16, R. p. 223, lines 13-16 (stating "it's good that we got it cleared up on the record" and that any confusion over what happened "has been cleared up"). The Trial Court also stated that Respondent's "good intentions" in stating he intended to call a witness, and that the other side was thus aware of his intentions, were not enough. Id. at 139:8-13, R. p. 221, lines 8-13. Thus, the record establishes that the Trial Court rejected these considerations twice: once on the morning of February 3, 2016, and again that afternoon.

Because the Trial Court had considered and rejected the other proposed "exceptional circumstances," the only remaining consideration before the Trial Court were Respondent's Counsel's representations that Trooper Trotter said he would be in court by 2:30 p.m. on February 3, 2016. See id. at 132:15-16, R. p. 214, lines 15-16; 134:18-20, R. p. 216, lines 18-20. Respondent's Counsel also later allowed this understanding to go uncorrected when it was repeated by the Trial Court. See id. at 139:13-14, R. p. 221, lines 13-14. With this information as the only remaining argument under its consideration, the Trial Court granted Respondent's request and admitted testimony from Trooper Trotter's deposition under Rule 32(a)(3)(E). See id. at 142:13-15, R. p. 224, lines 13-15.

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.

As set forth above, Respondent's Counsel told the Trial Court that Trooper Trotter said he would appear in court by 2:30 p.m. Trooper Trotter did not appear at 2:30 p.m. This was the only consideration still before the Trial Court when it admitted Trooper Trotter's deposition testimony. However, because Trooper Trotter never indicated he would be in court at 2:30 p.m.,

and because he did not speak to Respondent's counsel on February 3, 2016, the admission of Trooper Trotter's deposition testimony on this ground was in error.

It is undisputed that Respondent falsely stated to the Trial Court that "he [Trooper Trotter] told me he would be here at 2:30." Trial Transcript of Record at 132:15-16, R. p. 214, lines 15-16; see also October 4, 2017 Order Denying Defendants' Rule 60 Motion at p. 4, R. p. 5 (noting that the statement is false and that "[b]oth affidavits submitted to this Court concede that Trooper Trotter did not actually speak to Mr. Player on February 3, 2016"). This statement is significant for two reasons: first, because it represents that Respondent's Counsel personally spoke to Trooper Trotter; and second, because it represents that Trooper Trotter said he would appear in Court by 2:30 p.m. Both aspects of this statement are false. Furthermore, this statement was not merely a one-time slip. Respondent later repeated that Trooper Trotter "indicated he would be here by 2:30[.]" Trial Transcript of Record at 134:18-20, R. p. 216, lines 18-20. See also Affidavit of Brian Trotter, R. p. 395; Affidavit of Tucker S. Player, R. pp. 396-399. Respondent's Counsel also allowed this understanding to go uncorrected when it was repeated by the Trial Court. See Trial Transcript of Record at 139:13-14, R. p. 221, lines 13-14.

When the Trial Court then admitted Trooper Trotter's deposition testimony following Respondent's Counsel's misrepresentations, the Trial Court was deprived of the opportunity to exercise its informed discretion. Furthermore, because the Trial Court had already rejected Respondent's other arguments for admission of the deposition testimony, the misrepresentations were the influencing factor before the Trial Court. Because there were no other allegedly exceptional circumstances before the Trial Court, absent these misrepresentations the Trial Court would not and should not have admitted Trooper Trotter's deposition testimony. As a result, admission of the deposition testimony was error.

ii. The Trial Court's admission of the Deposition Testimony was in error even absent the misrepresentations before the Court.

Even if the Trial Court admitted the deposition testimony based on factors besides Respondent's Counsel's misrepresentations, such admission would still have been in error. First, no other circumstances before the Trial Court constituted exceptional circumstances for admission of deposition testimony under Rule 32(a)(3)(E). Second, the Trial Court failed to state the factors required by Rule 32(a)(3)(E) or to consider the Rule's preference for oral testimony. As a result, admission of the testimony was in error.

1. No exceptional circumstances existed for admission of the testimony.

Aside from the misrepresentations regarding Trooper Trotter's statement that he would appear in Court, Respondent's Counsel provided two other arguments for admission of the deposition testimony. While the Trial Court rejected those arguments, as discussed supra pp. 6-7, they are addressed on their merits below out of an abundance of caution.

First, Respondent's argument that Trooper Trotter was under subpoena to appear at between 2 and 2:30 p.m. on February 3, 2016, does not present an exceptional circumstance because the subpoena was untimely. Specifically, the subpoena was served earlier that same day between 10:12 a.m. and 2:05 p.m. See Trial Transcript of Record at 118:10-11, R. p. 200, lines 10-11. The subpoena may have been served as late as 12:45 p.m., less than an hour and a half before the subpoena required an appearance. See id. at 140:3-8, R. p. 222, lines 3-8. This does not constitute a "reasonable time for compliance" as required under Rule 45, SCRCP, and the Trial Court found that such a subpoena was not the type that can normally be answered. Trial Transcript of Record at 140:3-8, R. p. 222, lines 3-8. Respondent's counsel himself noted that the subpoena was late. Id. at 134:14, R. p. 216, line 14. Failure to timely and properly subpoena a

witness, as the Trial Court recognized, is not an "exceptional circumstance" as required under Rule 32(a)(3)(E).

Second, Respondent's counsel listed a variety of circumstances for the Trial Court's consideration which, for purposes of this brief, are referred to generally as Respondent's "interests of justice" arguments. These encompass the remaining arguments Respondent listed to the Trial Court and include: that Appellants' counsel released Trooper Trotter from their own subpoena to cause confusion, id. at 140:14-18, R. p. 222, lines 14-18; that Trooper Trotter had been deposed, id. at 142:7, R. p. 224, line 7; that everyone knew Respondent intended to call Trooper Trotter as a witness, id. at 139:6-7, R. p. 221, lines 6-7; 142:7-8, R. p. 224, lines 7-8; that Respondent's counsel did all he could do to have Trooper Trotter present, id. at 142:9-10, R. p. 224, lines 9-10; and broadly, that admission of the deposition testimony is in the interests of justice, id. at 142:6-7, R. p. 224, lines 6-7. These considerations were rejected by the Trial Court, and even had they not been, they are not "exceptional circumstances" for admission of deposition testimony.

Regarding Respondent's argument that the Appellants released Trooper Trotter from their subpoena to cause confusion, this matter was explicitly addressed and resolved by the Trial Court. As both the Trial Court and Appellants' counsel noted on the first day of trial, Appellants' plans to call Trooper Trotter were subject to change. Id. at 96:24-97:1, R. p. 178, line 24-p. 179, line 1; see also 140:19-141:10, R. p. 222, line 19-p. 223, line 10. Following further discussion on the second day of trial, the Trial Court noted for the record that Appellants' released Trooper Trotter from their subpoena so that if Respondent also released him, Trooper Trotter would not still show up to the courthouse when he was not needed. Id. 141:18-25, R. p. 223, lines 18-25. However, in no way did Appellants indicate to Trooper Trotter that he should not appear in Court. Id. at 136:21-137:17, R. p. 218, line 221-p. 219, line 17; 138:19-139:4, R. p. 220, line 19-

p. 221, line 4. Thus, as the Trial Court noted, this matter was cleared up on the record. Id. at 141:13-16, R. p. 223, lines 13-16.

Respondent's argument that admission of the deposition testimony was appropriate because Trooper Trotter had already "been deposed" is circular and is no basis for admission of testimony under Rule 32. If being deposed was all that was required to admit deposition testimony, Rule 32 would not require exceptional circumstances and due regard for oral testimony in open court. See Rule 32(a)(3)(E).

Respondent's argument that the deposition testimony should be admitted because the parties expected him to be present likewise fails. If simply announcing that a party intended to call a witness was sufficient to later admit deposition testimony, Rule 32(a)(3)(E) would not require exceptional circumstances. As the Trial Court found when Respondent's Counsel raised this argument at trial, "[h]aving good intentions isn't enough. You do have to subpoena him[.]" Trial Transcript of Record, 139:6-11; R. p. 221, lines 6-11.

Respondent's argument that he did all he could to have Trooper Trotter present also fails. Respondent failed to issue a valid subpoena to Trooper Trotter. Id. at 117:8, R. p. 199, line 8; 139:11-12, R. p. 221, lines 11-12. The record does not contain any allegation that Respondent was somehow prevented from issuing a valid subpoena; rather, Respondent simply wanted to save on costs. Id. at 114:16, R. p. 196, line 16. Furthermore, the record indicates that if Trooper Trotter had been subject to a valid subpoena, he would have appeared. See id. at 137:11-12, R. p. 219, lines 11-12. Respondent's failure to issue a valid subpoena does not meet the stringent standard of an exceptional circumstance as set forth in Rule 32(a)(3)(E). If failure to subpoena a party for trial constituted "exceptional circumstances," parties could avoid the law's strong preference for live, oral testimony simply by failing to issue subpoenas. As the Trial Court noted, Respondent's good intentions are insufficient; Respondent was required to subpoena the witness,

which he failed to do simply to avoid the minor cost of reissuing a subpoena. Id. at 139:6-11, R. p. 221, lines 6-11; see also Kita v. City of Seattle, No. C10-0160-JCC, 2011 WL 13156934, at *4 (W.D. Wash. Apr. 18, 2011) (refusing, under the federal version of Rule 32, to "allow Plaintiff to use the Rule as a cost-saving device"); Whyte v. U.S. Postal Serv., 280 F.R.D. 700, 701 (S.D. Fla. 2012) (holding that increased cost to Plaintiff of procuring live testimony is not an exceptional circumstance under federal Rule 32).

Finally, Respondent's general argument that admission of the deposition was in the "interest of justice" also fails. As an initial matter, the statement on its own is not specific enough to provide any useful information for consideration to the Trial Court explaining why admission is in the interests of justice. Furthermore, in this case, the interests of justice weighed against the admission of the testimony. The United States Constitution's due process guarantee protects a party's right to cross examination. See Goolsby v. Goolsby, 229 S.C. 101, 112, 92 S.E.2d 57, 62 (1956) (stating that the right to cross-examination "is a most valuable right" and that "[t]he power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth."); In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) (noting that right to cross-examination is an element of constitutional due process). Furthermore, Rule 32 requires courts to give due regard to the importance of presenting oral testimony in open court. The interests of justice in this case weigh against admission of the testimony. As a result, this general statement by Respondent that admission of the testimony was in the "interest of justice" does not establish grounds for admission of the deposition testimony.

In summary, no exceptional circumstances existed for admission of the deposition testimony under Rule 32(a)(3)(E). As a result, admission of the deposition testimony was error.

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.

Rule 32(a)(3)(E) provides that:

> (3) The deposition of a witness, whether or not a party, may be used by any part for any purpose *if the court finds*:
>
> (E) upon application and notice, that such *exceptional circumstances* exist as to make it desirable, *in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court*, to allow the deposition to be used.

SCRCP 32 (emphasis added). To admit deposition testimony in place of a witness, therefore, Rule 32 thus requires a court to (1) find exceptional circumstances; (2) find that admission of deposition testimony is in the interests of justice; and (3) give due regard to the importance of oral testimony in open court.

As discussed above, the record shows that the Trial Court rejected Respondent's arguments for admission of the deposition testimony with the exception of the misrepresentation as to Trooper Trotter's statements. See discussion supra pp. 6-7. However, in opposing Appellants' Rule 60 motion below, Respondent argued that the Trial Court's admission of the testimony was not based on Respondent's Counsel's misrepresentation. To the extent the Trial Court considered factors aside from the misrepresentation, the Trial Court failed to specifically state on the record what constituted those exceptional circumstances. Such a failure was error. Likewise, the Trial Court failed to specifically state its findings as to why admission of the deposition testimony was in the interests of justice. This failure is also error.

Finally, the Trial Court erred by failing to give due regard to the importance of oral testimony in open court. As cited above, Rule 32(a)(3)(E) requires that prior to admitting deposition testimony, the Trial Court must give "due regard to the importance of presenting the testimony of witnesses orally in open court...." Federal courts have consistently noted that under

federal Rule 32, there is a "strong preference for live testimony in open court." See, e.g., United States ex rel. Lutz v. Berkeley Heartlab, Inc., No. CV 9:14-230-RMG, 2017 WL 6015157, at *1 (D.S.C. Dec. 1, 2017). Here, the Trial Court erred in failing to state, on the record, that it had considered this factor, and moreover, in failing to specifically state the basis for finding that admission of the deposition testimony overcame the importance of oral testimony in open court. As a result, admission of the deposition testimony was in error.

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.

Rule 32(a)(3)(E) requires application and notice before deposition testimony may be admitted. See also Roberts v. Roberts, No. 2009-UP-190, 2009 WL 9528806, at *5 (S.C. Ct. App. May 5, 2009) (stating that "a plain requirement for application of [section 32(a)(3)(E)] is *prior notice*") (emphasis added). Respondent provided no prior notice that he intended to use Trooper Trotter's deposition testimony and first raised the issue on February 3, 2016, the same day the testimony was read into the record. Because Appellants lacked prior notice, the plain requirements of Rule 32(a)(3)(E) were not met and admission of the deposition testimony was in error. See Rule 32(a)(3)(E); see also Roberts, No. 2009-UP-190, 2009 WL 9528806, at *5; Forbes v. Villa, No. SACV111330JGBANX, 2013 WL 12164779, at *5 (C.D. Cal. Dec. 3, 2013), aff'd sub nom. Forbes v. Cty. of Orange, 633 F. App'x 417 (9th Cir. 2016) (finding lack of motion and notice where "counsel only asserted this ground for admissibility a few hours before he intended to introduce the deposition").

c. Respondent's Counsel's Misrepresentations were Material

Respondent's misrepresentations to the Trial Court were material. As an initial matter, the misrepresentation allowed Respondent's Counsel to attempt to shift the responsibility for Trooper Trotter's failure to appear from Respondent to Trooper Trotter. Specifically,

Respondent's Counsel represented to the Trial Court that Trooper Trotter agreed to be in court by 2:30 p.m. Thus, when Trooper Trotter later failed to appear, the implication was that Trooper Trotter misled Respondent's Counsel, shifting the fault for the non-appearance to Trooper Trotter and away from Respondent's failure to issue a timely and valid subpoena.

Furthermore, the record reflects that this misrepresentation was the factor which induced the Trial Court to admit the deposition testimony. As discussed extensively above, see discussion supra pp. 6-7, 9-12, the Trial Court rejected Respondent's remaining arguments for admitting the deposition testimony. As a result, the only remaining consideration was Respondent's Counsel's misrepresentation that Trooper Trotter agreed to appear by 2:30 p.m. Because the Trial Court then admitted the deposition testimony with this misrepresentation before it, the misrepresentation was material.

d. Admission of the Deposition Testimony Prejudiced Respondents

As set forth below, Appellants were prejudiced by Trooper Trotter's testimony. First, based on Respondent's conduct, prejudice should be presumed. Second, the record demonstrates that the lack of Trooper Trotter's live testimony, and the Appellants' inability to cross examine the Trooper at trial, prejudiced Appellants. Third, based on Respondent's arguments to the Trial Court that exceptional circumstances existed for use of the testimony, and based on Respondent's misrepresentations to the Trial Court, Respondent should be estopped from arguing that there was no prejudice.

i. Prejudice Should be Presumed

Respondent made false statements to the Trial Court in moving the court to admit Trooper Trotter's deposition. Those statements were material and through those statements, Respondent obtained the admission of deposition testimony, depriving Appellants' counsel of their right to cross examine Trooper Trotter before a jury and of their right to have the court and

jury judge Trooper Trotter's credibility based on his oral testimony in open court. In the face of such conduct, a reviewing court should not have to look into a crystal ball in an effort to determine the impact to the Appellants, who were deprived of due process and procedural rights. As a result, Appellants are entitled to a presumption that the testimony was prejudicial.

ii. Prejudice is Demonstrated by the Record Below

Furthermore, the record below demonstrates that the admission of Trooper Trotter's deposition testimony was highly prejudicial to Respondents. First, it deprived Appellants of the opportunity to cross-examine Trooper Trotter before the jury and it deprived the Trial Court and the jury of a crucial means to evaluating the witness's credibility. Second, it deprived Appellants' counsel of the opportunity to shape their trial questioning of Trooper Trotter based on trial developments. See, e.g., Goldenson v. Steffens, No. 2:10-CV-00440-JAW, 2014 WL 3105367, at *4 (D. Me. July 7, 2014) (noting that "[t]rial lawyers generally tack to the prevailing wind and change questioning based on trial developments"). Third, despite finding harmless error in admission of the testimony on Appellants' Rule 60 motion below, the Trial Court found that "Trooper Trotter's deposition testimony refuted Plaintiff's claim that there was [sic] two separate collisions," a key issue to the causation element of the case. See October 3, 2017 Order Denying Defendants' Rule 60 Motion at 9; R. p. 10. These arguments are set forth in detail below.

First, Appellants were prejudiced because they were deprived of their right to cross examine Trooper Trotter at trial and of their right to have the jury evaluate the witness's credibility on the stand. See SCRCP Rule 43; SCRCP Rule 32; Goolsby v. Goolsby, 229 S.C. 101, 112, 92 S.E.2d 57, 62 (1956) (stating that the right to cross-examination "is a most valuable right" and that "[t]he power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of

truth."); In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) (noting that right to cross-examination is an element of constitutional due process); O'Bryant v. Gray Ins. Co., No. CV 16-13203, 2017 WL 4785793, at *2 (E.D. La. Oct. 19, 2017) (noting, in the context of federal Rules 32 and 43, that live testimony allows the jury to "view the witness in his/her entirety, including body language, and how the witness conducts himself/herself on the witness stand, which is particularly important in evaluating credibility"). Trooper Trotter's deposition testimony introduced at trial related to causation and damages, both disputed elements of Respondent's claim. See, e.g. Respondents' Answer at ¶¶ 9-10, R. p. 25 (pleading Intervening and Superseding Negligence as a defense); Trial Transcript of Record at 36:24-37:2, R. p. 118, line 24-p.119, line 2 (Appellants' Counsel noting, in opening statements, that Respondent would testify that he was struck twice, once by another vehicle); Trial Transcript of Record at 156:3-17, R. p. 238, lines 3-17 (Appellants' Motion for Directed Verdict based on lack of causation evidence). Among other things, testimony was read to the jury that the Trooper witnessed the accident and that he saw Appellant Celadon's truck push the middle vehicle into the rear of Respondent's car. See, e.g. October 4, 2017 Order Denying Defendants' Rule 60 Motion at p. 8, R. p. 9; Trial Transcript of Record at 149:11-150:1, R. p. 231, line 11-p. 232, line 1. Respondent read into the record Trooper Trotter's testimony that he saw only one accident and that he did not recall being told there were two impacts. Id. at 149:20-24, R. p. 231, lines 20-24; 150:9-18, R. p. 232, lines 9-18; 151:8-12, R. p. 233, lines 8-12. Respondent also read into evidence Trooper Trotter's statement that Respondents' tractor-trailer was travelling 30 miles per hour. Id. at 150:4-8, R. p. 232, lines 4-8.

This testimony prejudiced Respondents' defense of this case. Specifically, if the Respondent was struck twice in the accident—once by Mr. Jackson alone and a second time after Mr. Jackson was pushed into Respondent's car—a jury may have found that Respondent's

injuries were caused, in whole or in part, by Mr. Jackson rather than by Appellants. The testimony as to the number of accidents came from three sources: Respondent, Mr. Jackson, and Trooper Trotter. Respondent testified that he felt two impacts and that he felt no difference between those impacts. Id. at 46:24-25, R. p. 128, lines 24-25; 47:1-2, R. p. 129, lines 1-2. Mr. Jackson testified only as to one collision. Id. at 123:12-18, R. p. 205, lines 12-18. Trooper Trotter's testimony played the critical role of tie breaker, and his testimony came in the form of disinterested eyewitness testimony from a police officer with the authority of his badge. Thus, the weight of credibility his testimony added to Mr. Jackson's testimony was substantial and prejudicial.

Respondents were further prejudiced by their inability to question Trooper Trotter in relation to his testimony's impact on damages. This includes Trooper Trotter's testimony regarding the speed of the vehicle in the context of other testimony presented at trial. See id. at 164:2-19, R. p. 246, lines 2-19. In addition, Respondents were prevented from questioning Trooper Trotter regarding how much Mr. Ludlum's truck slowed down after he hit the brakes, how fast the middle vehicle was going at the time it struck the Respondent's vehicle, and how he was able to estimate speed from his observations. This and other testimony were not available through the deposition, particularly in light of developments at trial. See Deposition Transcript for Trooper Brian N. Trotter, R. pp. 370-394.

Second, admission of Trooper Trotter's deposition testimony deprived Appellants' counsel of the opportunity to shape their trial questioning of Trooper Trotter based on trial developments. See, e.g., Goldenson v. Steffens, No. 2:10-CV-00440-JAW, 2014 WL 3105367, at *4 (D. Me. July 7, 2014) (noting that "[t]rial lawyers generally tack to the prevailing wind and change questioning based on trial developments"). As noted above, testimony of several witnesses was presented at trial. Furthermore, at the time the parties took Trooper Trotter's

deposition on May 15, 2015, the Respondents' questioning was completed without the benefit of the discovery and trial preparation that took place over the next eight months leading up to the first day of trial on February 2, 2016. See Deposition of Trooper Trotter, May 15, 2015, R. pp. 370-394. As a result, Appellants were prejudiced by the admission of Trooper Trotter's deposition testimony in lieu of his live testimony.

Third, that Trooper Trotter's testimony was prejudicial is apparent from the Trial Court's Order on Appellants' Rule 60 motion. Despite denying Appellants' Rule 60 motion, Trial Court's Order found that "Trooper Trotter's deposition testimony refuted Plaintiff's claim that there was [sic] two separate collisions...." October 3, 2017 Order Denying Defendants' Rule 60 Motion at 9, R. p. 10. Again, the question of causation, and thus the question of the number of accidents, was a critical issue at trial. Thus, the testimony was prejudicial.

iii. Respondent is estopped from denying prejudice.

In addition, Respondent should be estopped from arguing that Appellants were not prejudiced by the admission of Trooper Trotter's testimony. Respondent fervently sought the admission of Trooper Trotter's testimony over many pages of the trial transcript. Respondent twice obtained additional time from the trial court so that Trooper Trotter could testify. See, e.g. Trial Transcript of Record at 139:1-14, R. p. 221, lines 1-14. Respondent further asserted that exceptional circumstances existed for admission of the trooper's deposition testimony and twice misrepresented to the Trial Court statements by Trooper Trotter. See, e.g., id. at 132:15-16, R. p. 214, lines 15-16; 134:1-135:4, R. p. 216, line 1-p. 217, line 4. Respondent read testimony from Trooper Trotter's deposition at trial and cited it in his opposition to Appellants' motion for directed verdict. Id. at 147:17-153:17, R. p. 229, line 17-p. 235, line 17; 155:14-15, R. p. 237, lines 14-15; 155:20-22, R. p. 237, lines 20-22. Yet Appellants were deprived of Trooper Trotter's live testimony and of the ability to cross examine him before the jury. Thus,

Respondent's own actions and statement below demonstrate the prejudice of the testimony, and in light of these actions and Respondent's Counsel's misrepresentations, Respondent should be estopped from asserting that the testimony was not prejudicial.

iv. Appellants did not waive the right to argue prejudice.

To the extent Respondent has argued below that Appellants waived any prejudice by releasing Trooper Trotter, this argument without merit. Appellants released Trooper Trotter from their subpoena upon realizing, after the first day of trial, that they did not need to introduce additional information from Trooper Trotter in their own case. However, by no means did Appellants thus waive their right to cross examine Trooper Trotter before the jury and their right to live testimony. It is, in fact, specifically because the Respondent introduced Trooper Trotter's testimony that Appellants had a need to cross examine Trooper Trotter on the stand and to have the jury evaluate Trooper Trotter's credibility. A party does not waive the right to live testimony and to cross examination at trial merely because the party does not have that witness under subpoena themselves.

v. Conclusion

For these reasons, admission of Trooper Trotter's deposition testimony was prejudicial. Furthermore, in light of Respondent's misrepresentations to the Trial Court and arguments to the Trial Court that exceptional circumstances existed for admission of the testimony, Respondent should be estopped from arguing that the testimony was not prejudicial. For the same reasons, Appellants are entitled to a presumption that the testimony was prejudicial.

II. BECAUSE THE TRIAL COURT ADMITTED TROOPER TROTTER'S DEPOSITION TESTIMONY IN ERROR, PREJUDICING APPELLANTS, THE TRIAL COURT ERRED IN DENYING APPELLANTS' RULE 60 MOTION.

a. Standard of Review

Generally, "[w]hether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." Raby Const., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Thus, even under the abuse of discretion standard, an appellant is entitled to a reversal if the appellant shows "both error and resulting prejudice." Gibson v. Wright, 403 S.C. 32, 38, 742 S.E.2d 49, 52 (Ct. App. 2013).

In the present matter, however, the judge who ruled on the Rule 60 motion was not the same judge who presided over the trial and ordered that the deposition testimony be admitted. As a result, at the Rule 60 stage, the Trial Court was interpreting the judgment of a previous judge who admitted the deposition testimony. The Trial Court reviewed the judgment of the prior trial judge through the written transcript of the trial record. "As a general rule, judgments are to be construed like other written instruments." Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013). "The interpretation of the terms of a clear and unambiguous written instrument is a question of law." Id. at 109. "Questions of law are reviewed de novo." Id. De novo review is further justified in this matter because the Court of Appeals is equally situated to the Trial Court judge who reviewed the Rule 60 motion, in that at the Rule 60 stage, the reviewing judge was not the same as the Trial Judge who admitted the deposition testimony.

b. The Trial Court Erred in Denying Appellants' Rule 60 Motion Seeking Relief Based on Respondent's Fraud.

Rule 60 of the South Carolina Rules of Civil Procedure provides that

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> ...
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party[.]

Rule 60, SCRCP. Appellants sought relief from the Trial Court pursuant to Rule 60 on the basis that Respondent's Counsel had made false representations to the Trial Court to secure the admission of deposition testimony from Trooper Brian Trotter. See, e.g., Defendants Bruce Ludlum and Celadon Trucking Services, Inc.'s Rule 60(b) Motion, R. pp. 30-32. See also Defendants' Memorandum in Support of Bruce Ludlum and Celadon Trucking Services, Inc.'s Rule 60(b) Motion, R. pp. 33-57; Transcript of Record of Hearing on Rule 60 Motion, R. pp. 338-368. Appellants' cited an affidavit of Trooper Brian Trotter, dated December 21, 2016, in support. See, e.g., Defendants' Memorandum in Support of Bruce Ludlum and Celadon Trucking Services, Inc.'s Rule 60(b) Motion, R. pp. 33-57.

The Trial Court's Order denying Respondent's Rule 60 motion found that Respondent's counsel made a false statement to the court during Trial. See Order denying Defendants' Rule 60 Motion at 4, R. p. 5 ("When Counsel stated 'he told me he would be here at 2:30" in referring to Trooper Trotter, this statement was false."). Nonetheless, the Trial Court denied Appellants' motion for Rule 60 relief, finding that Respondent's statements did not constitute fraud and further that they did not constitute extrinsic fraud.

i. Respondent's Statements were Fraudulent.

As discussed above in Section I, Respondent twice misrepresented Trooper Trotter's statements to the Trial Court, and further failed to correct the Trial Court when it repeated Respondent's representation. See discussion supra p. 8. Respondent's statements were made after the Trial Court had first denied Respondent's request to admit Trooper Trotter's deposition statements, and the record reflects that those statements were the only remaining grounds for the Trial Court's admission of the deposition testimony. See discussion supra p. 6-7, 9-12. Furthermore, these statements allowed Respondent to shift the blame for Trooper Trotter's failure to appear from Respondent's invalid subpoena to an alleged false statement by Trooper Trotter, i.e. that he would appear by 2:30 p.m. See discussion supra 14-15. Finally, the statement that Trooper Trotter said he would appear at 2:30 p.m., a half-hour later than the time permitted by the Trial Court, obtained Respondent's counsel the opportunity to present the testimony of Mr. Jackson, when the Respondent would otherwise have been forced to close his case. See Trial Transcript of Record at 117:22-24, R. p. 199, lines 22-24. As a result, the record reflects ample motivation for the false statements.

In finding that there was no intent to mislead the court, the Trial Court's reliance on the Affidavit of Tucker S. Player is misplaced. See October 4, 2017 Order denying Defendants' Rule 60 motion at p. 4, R. p. 5. The Order states that "counsel accurately presented what he believed was communicated by Trooper Trotter to a third-party on February 3, 2016." Id. However, this is not the case. Respondent's Counsel represented to the Trial Court that "he [Trooper Trotter] told me that he would be here by 2:30." Trial Transcript of Record at 132:15-16, R. p. 214, lines 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. The Affidavit does not explain any basis for this false representation to the Trial Court. 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, R. p. 216, lines 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, R. p. 395; see also Affidavit of Tucker S. Player, R. p. 396-399. The misrepresentations were calculated to achieve admission of the deposition testimony, as they were made after the Trial Court initially denied the request to admit the deposition testimony, and as they were the only new grounds before the Trial Court at the time it admitted the testimony.

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 at 2:30 p.m.. See Affidavit of Tucker S. Player, R. p. 396-399. Rather, the reasonable interpretation is simply what the words convey: that the Trooper had received the subpoena. Thus, the record reflects that a misrepresentation was intentionally made to the court.

Furthermore, the false representations amounted to a "corruption of the judicial process" that deprived Appellants of their Constitutional and procedural rights to cross examine Trooper Trotter before a jury and to have a jury and the court determine Trooper Trotter's credibility based on his oral testimony in live court. See Chewning v. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003). See also discussion supra pp. 14-20. As set forth above, Appellants were substantially prejudiced by this conduct. See discussion supra pp. 15-20.

In denying Rule 60 relief, the Trial Court's Order also states that "Judge Gee knew Trooper Trotter was not in the courtroom at 2:30pm when she agreed to allow his 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." October 4, 2017 Order denying Defendants' Rule 60 Motion at 4, R. p. 5. This statement appears to conflate Respondent's Counsel's fraud

and what would have appeared to the Trial Court to be fraud by Trooper Trotter. Certainly the Trial Court knew there was a falsity before it when it allowed Respondent to read the deposition testimony. However, the Trial Court's information, provided by Respondent's Counsel, was that the Trooper had made the false statement by stating he would appear by 2:30 p.m. However, pursuant to the December 21, 2016 Affidavit by Trooper Brian N. Trotter, it was actually Respondent's Counsel who made the false statement to the Trial Court, and this is information the Trial Court did not have. R. p. 395. To the extent the Trial Court conflates these two issues, the Trial Court's conclusion that Judge Gee "knew" of the fraud when she admitted Trooper Trotter's deposition is in error.

In summary, the Trial Court erred in finding that Respondent did not engage in fraud before the Trial Court.

ii. Respondent's Statements were Extrinsic.

The Trial Court also erred in finding, at the Rule 60 stage, that Respondent's Counsel did not engage in extrinsic fraud. Pursuant to Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003), "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...." Fraud by an attorney is precisely the type of fraud that constitutes extrinsic fraud. See Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003) (finding extrinsic fraud where the fraudulent conduct was conducted by the attorney, as an "officer of the court"). Furthermore, "[e]xtrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Raby Const., L.L.P. v. Orr, 358 S.C. 10, 19, 594 S.E.2d 478, 483 (2004). This is precisely the type of fraud that occurred in the present case, as Respondent's conduct deprived Appellants of their right to cross examine

Trooper Trotter and of their right for the jury and court to determine Trooper Trotter's credibility based on his oral testimony in live court.

The Trial Court, in its Rule 60 Order, erred in finding that it was the Appellants themselves, rather than Respondent, who deprived appellants of the opportunity to cross examine Trooper Trotter in live court. Specifically, the Order denying Rule 60 relief states that "Defendants cannot demonstrate how [Respondent's] 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." Order denying Defendants' Rule 60 Motion at 7, R. p. 8. The Order later states, "[e]ven discounting the fact that Trooper Trotter's appearance was procured through the actions of Defendants by releasing him from a subpoena, there is no merit to this argument [that Defendants were deprived of the ability to cross-examine Trooper Trotter]." R. p. 9.

As discussed extensively above, at trial Judge Gee specifically rejected Respondent's argument that Trooper Trotter's failure to appear was caused by Appellants. See discussion supra pp. 6-7. See also Trial Transcript of Record at 141:13-16, R. p. 223, lines 13-16 (stating, after discussing this issue with counsel for both parties, that "it's good that we got it cleared up on the record" and that any confusion over what happened "has been cleared up"). Rather, the Trial Court found, multiple times, that it was Respondent's Counsel's actions that resulted in the Trooper's failure to appear. See, e.g., id. at 115:19-21, R. p. 197, lines 19-21 ("You did not re-subpoena him, that would have been the appropriate thing to do."), 139:10-14, R. p. 221, lines 10-14 ("Wait, wait, wait. Having good intentions isn't enough. You do have to subpoena him, and there was an issue with your subpoena..."). As a result, the Order denying Rule 60 relief is in error. Further, because the Trial Court was interpreting the judgment of an earlier judge in

arriving at this conclusion, the Trial Court's conclusions in the Rule 60 Order are subject to de novo review. See Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC, 404 S.C. at 392.

Because the Trial Court erred in its Rule 60 Order in finding that Respondent's statements were not intrinsic, and further in finding that Judge Gee admitted Trooper Trotter's deposition testimony due to Appellants' conduct, rather than Respondent's failure to issue a valid subpoena, the Trial Court's Order denying Defendant's Rule 60 Motion should be reversed and the Defendants are entitled to a new trial.

iii. Respondent's Statements were Material.

As set forth above, supra Section I(c), Respondent's statements were material. Furthermore, as set forth directly above, supra Section II(b)(ii), the Trial Court erred in its Rule 60 Order in finding that Appellants' conduct, rather than Respondent's conduct, procured Trooper Trotter's failure to appear. As a result, the Trial Court's Order denying Defendant's Rule 60 Motion should be reversed and the Defendants are entitled to a new trial.

iv. Respondent's Statements were Prejudicial.

As set forth above, supra Section I(d)(i)-(v), Respondent's statements were prejudicial, and Appellants in no way waived their right to cross examine Trooper Trotter or to have the court and jury evaluate his oral testimony in open court. Furthermore, as set forth above, supra Section II(b)(ii), the Trial Court erred in its Rule 60 Order in finding that Appellants' conduct, rather than Respondent's conduct, procured Trooper Trotter's failure to appear. As a result, the Trial Court's Order denying Defendant's Rule 60 Motion should be reversed and the Defendants are entitled to a new trial.

c. The Trial Court Erred in Denying Appellants' Rule 60 Motion Seeking Relief Based on Respondent's Misrepresentation and further, in Failing to Properly Consider Whether Rule 60 Relief was Appropriate Based on Respondent's Misrepresentation.

The Trial Court's Order Denying Rule 60 relief indicates that the Trial Court intended to address both (1) whether Rule 60 relief was merited based on fraud and (2) whether Rule 60 relief was merited based on misrepresentation. See October 4, 2017 Order denying Defendant's Rule 60 Motion at 4, R. p. 5 (noting that counsel for Appellants raised both misrepresentation and fraud as grounds for relief and stating that "both standards will be addressed"). However, the Trial Court erred by denying relief pursuant to Appellants' motion and in failing to address the misrepresentation component of Rule 60.

Rule 60 permits relief from a final judgment for "(3) fraud, misrepresentation, or other misconduct of an adverse party," on such terms as are just. SCRCP Rule 60. The Trial Court's Order, however, addressed only "the Issue of Fraud" (see October 4, 2017 Order at pp. 3-6, R. pp. 4-7), "Extrinsic Fraud vs. Intrinsic Fraud" (see id. at 6-7, R. pp. 7-8), and "Rule 61, SCRCP" (see id. at 7-9, R. pp. 8-10). At no point does the Order address the standard for relief under Rule 60 based on a misrepresentation, despite the Order's initial finding that a misrepresentation was made. See id. at 4, R. p. 5. This constitutes an error of law and as a result, Respondents are entitled to review of this issue de novo. See Lambries v. Saluda Cty. Council, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

As has been fully set forth herein, Respondent's Counsel falsely represented to the Trial Court that Trooper Trotter told Respondent's Counsel that he would appear in court. This material misrepresentation induced the Trial Court to admit deposition testimony of Trooper Trotter, which testimony related to causation and damages, two primary elements of Appellants'

defense. Appellants were thus prevented from cross examining Trooper Trotter before the jury. Furthermore, Appellants were deprived of their right to have the jury and court evaluate Trooper Trotter's live testimony in open court. Thereafter, the Trial Court denied Appellants' motion for directed verdict after Respondent cited Trooper Trotter's deposition testimony in opposition to the motion. Furthermore, the jury entered an award of $300,000 in their verdict against the Appellants. Jury Verdict Judgment and Verdict Form, Filed February 5, 2016, R. pp. 11-13. As a result, just terms required relief pursuant to Rule 60 based on Respondent's misrepresentations. The Trial Court erred in denying relief pursuant to Rule 60 based on Respondent's misrepresentations and further, in failing to address this element of Appellants' Rule 60 motion.

d. The Trial Court Erred in Finding that the Admission of Deposition Testimony was Not Inconsistent with Substantial Justice Pursuant to Rule 61, SCRCP.

The Trial Court also erred in denying Appellants Rule 60 Order based on its review of Rule 61, SCRCP. Rule 61, which has the heading "Harmless Error," 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. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.
>
> Rule 61, SCRCP.

As has been fully set forth herein, Respondent's Counsel's material misrepresentation induced the Trial Court to admit deposition testimony of Trooper Trotter. Appellants were prevented from cross examining Trooper Trotter before the jury and were deprived of their right to have the jury and court evaluate Trooper Trotter's live testimony in open court. Thereafter, the Trial Court denied Appellants' motion for directed verdict after Respondent cited Trooper Trotter's deposition testimony in opposition to the motion. Furthermore, the jury entered an

award of $300,000 in their verdict against the Appellants. Jury Verdict Judgment and Verdict Form, Filed February 5, 2016, R. pp. 11-13. As a result, the admission of deposition testimony was not harmless error, and refusal to take action based on the admission is inconsistent with substantial justice. As a result, the Trial Court erred in finding harmless error.

Furthermore, Appellants request for relief in this matter is based not merely on the admission of Trooper Trotter's deposition, but moreover on Respondent's material and prejudicial misrepresentation to the Trial Court, depriving Appellants of Due Process. As a result, to the extent Rule 61 imposes a higher bar where reversal is sought based solely on the admission of evidence, any such bar is not applicable in this matter, where the reversal is also sought on misrepresentations of Respondent's Counsel to the Trial Court.

CONCLUSION

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

Respectfully submitted,

May 3, 2018

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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.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCAR.

May 3, 2018

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