THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Presiding Judge

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SC Court of Appeals

Case No. 2009-CP-26-10523

Appellate Case No. 2012-213287

Elizabeth A. Crotty and James K. Orzech .... *Appellants,*

v.

Windjammer Village of Little River, South Carolina,
Property Owners' Association, a South Carolina
Eleemosynary Corporation .... *Respondent.*

[INITIAL] BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES ON APPEAL

A. Have the Appellants failed to comply with the South Carolina Appellate Court Rules by including redundant, immaterial, impertinent, irrelevant, inadmissible, and scandalous material in their *Amended* Initial Brief and *Amended* Designation of Matter to be Included in the Record on Appeal, and raising matters not argued to the trial court?

B. Are the Appellants time-barred from an appeal against the merits of the trial court's "Final Order" dated August 3, 2011?

C. Did the trial court err or abuse its discretion in denying relief to the Appellants pursuant to the grounds for relief asserted in the Appellant's August 23, 2012 Memorandum, which the trial court treated as a Rule 60(b) Motion?

D. Did the Respondent's request for an Order and Rule to Show Cause re-open the underlying action to further review?

II. STATEMENT OF THE CASE

The Plaintiffs/Appellants' appeal is from an Order of the trial court styled as "Order Upon Plaintiffs' August 23, 2012 Memorandum Requesting that the Court Re-Visit the Final Order in the Name of Justice (*Court accepted as a Motion Pursuant to Rule 60(b), SCRCP*)" (hereinafter referred to as the "Rule 60(b) Order").

On October 28, 2009, the Plaintiffs/Appellants filed the underlying action, bearing Civil Action Number 2009-CP-26-10523, in the Horry County Court of Common Pleas regarding the disputed contractual obligations of the Plaintiffs/ Appellants as members of the Defendant/Respondent Windjammer Village Property Owners' Association. A bench trial on the merits of the case was held before the

Honorable Steven H. John on June 22–23, 2011. (Rule 60(b) Order, p. 2; Final Order, p. 1.) On June 23, 2011 the trial court made its oral ruling, which was thereafter reduced to writing and signed and issued by the trial court on August 3, 2011 (hereinafter referred to as the "Final Order"). Counsel for the Defendant filed the court's Final Order with the clerk of court and hand-delivered a copy to Plaintiffs' counsel on August 5, 2011. (Rule 60(b) Order, p. 2; Final Order; Aff. of Service; Tr. p. 3, lines 7–10.)

On August 12, 2011 the Plaintiffs filed a Notice of Motion and Motion for Reconsideration Pursuant to Rule 59(e), SCRCP (hereinafter referred to as the "Rule 59(e) Motion"). (Rule 60(b) Order, p. 2.) On August 15, 2011 the Defendant filed a Post-Trial Motion for Attorney's Fees and Costs Pursuant to Rule 54, SCRCP. The costs incurred were supported by receipts and the Affidavit of Defendant's counsel, and receipts and the Affidavit of Angela Marcotte, which were attached to the Defendant's Post-Trial Motion. (Rule 60(b) Order, p. 2.) On August 15, 2011 a copy of the Defendant's Post-Trial Motion, with the aforementioned attachments, was served on Plaintiffs' counsel. (Rule 60(b) Order, p. 2.) On August 29, 2011 the Defendant filed a Return to the Plaintiffs' Rule 59(e) Motion. (Rule 60(b) Order, p. 2.) On October 7, 2011 the Plaintiffs filed a Memorandum in Opposition to Defendant's Post-Trial Motion for Attorney's Fees and Costs, and a Memorandum in Support of Plaintiffs' Rule 59(e) Motion, both bearing the date of October 6, 2011. (Rule 60(b) Order, pp. 2–3.) After some delay in the trial court being notified of the motions, the trial court scheduled a hearing for November 1, 2011 on the Plaintiffs'

Rule 59(e) Motion, and the Defendant's Post-Trial Motion for Attorney's Fees and Costs. (Rule 60(b) Order, p. 3; Tr. p. 3, lines 14–15.) However, prior to the November 1, 2011 hearing date Plaintiffs' counsel received a temporary suspension from the practice of law, which required the trial court to delay the hearing on the parties' motions. (Rule 60(b) Order, p. 3; Tr. p. 3, lines 16–19.) After the Supreme Court lifted the temporary suspension of Plaintiffs' counsel, the trial court scheduled February 13, 2012 as the hearing date for the parties' motions. (Rule 60(b) Order, p. 3; Tr. p. 3, lines 19–22.) The Defendant filed its Memorandum in Opposition to Plaintiffs' Memorandum in Support of Plaintiffs' Rule 59(e) Motion on February 2, 2012.

On February 13, 2012 the parties appeared before the Honorable Steven H. John for the hearing on their motions. (Rule 60(b) Order, p. 3; Tr. p. 3, lines 19–22.) The trial court heard oral argument on the Plaintiffs' Rule 59(e) Motion regarding the Plaintiffs' request for the trial court to reconsider and modify portions of its Final Order signed and issued August 3, 2011, and filed and served on Plaintiffs'/Appellants' counsel on August 5, 2011. (Rule 60(b) Order, p. 3; Tr. p. 3, lines 22–23.) Thereafter, the court heard oral argument on the Defendant's Post-Trial Motion for Attorney's Fees and Costs. (Rule 60(b) Order, p. 3.) Counsel for the Defendant handed up to Judge John a Supplemental Affidavit of Attorney's Fees and Costs dated January 23, 2012 and signed by Attorney Kenneth R. Moss. The Supplemental Affidavit itemized the total amount of attorney's fees and costs the Defendant had incurred with Attorney Moss' law firm as of January 23, 2012. (Rule 60(b) Order, p. 3.)

After reviewing the memoranda and attachments thereto, and hearing oral argument from the parties on both Motions, the trial court signed and issued its written "Order Upon Plaintiffs' Motion for Reconsideration Pursuant to Rule 59(e), SCRCP" (the "Rule 59(e) Order"), and its "Order Denying Defendant's Request for Attorney's Fees But Allowing Defendant to Recover Its Costs" (hereinafter referred to as the "Order Allowing Defendant to Recover its Costs"). (Rule 60(b) Order, p. 3; Tr. p. 3, line 25 – p. 4, line 5.) Both Orders were signed and issued on February 22, 2012, and filed with the clerk of court on February 27, 2012. (Rule 60(b) Order, p. 3; Tr. p. 3, line 22 – p. 4, line 5.) On March 7, 2012, the Defendant served a copy of the trial court's "Order Allowing Defendant to Recover its Costs" on Plaintiffs' counsel. (Rule 60(b) Order, p. 3.)

In April 2012, counsel for the Defendant sought an Order and Rule to Show Cause against the Plaintiffs for their failure to pay costs to the Defendant pursuant to the trial court's February 22, 2012 Order Allowing Defendant to Recover its Costs (Rule 60(b) Order, pp. 3–4; Tr. p. 4, lines 1–5), and requested the trial court convene a hearing on the matter. (Tr. p. 4, lines 6–11.) Again, after some delay a hearing was scheduled for August 30, 2012. (Tr. p. 4, lines 13–15.) Counsel for the Defendant notified the Plaintiffs, now appearing *pro se*, of the August 30, 2012 hearing.

In anticipation of the August 30, 2012 hearing, the Plaintiffs prepared two memoranda. The Plaintiffs' first memorandum, dated August 6, 2012 and entitled "RE: AUGUST 30TH HEARING: Plaintiffs' Memorandum in Opposition to Defendant's Proposed Order Awarding Defendant Even More Taxable Costs Pursuant to

Rule 54(e) SCRCP" (hereinafter referred to as the "August 6, 2012 Memorandum"), was forwarded to Defendant's counsel prior to the August 30, 2012 hearing, but was not forwarded to the trial court or the clerk of court. (Tr. p. 5, lines 2–3; Tr. p. 5, lines 6–7; Tr. p. 23, line 23 – p. 24, line 13; Tr. p. 25, lines 5–6.) The Plaintiffs' second memorandum, dated August 23, 2012 and entitled "RE: AUGUST 30TH RULE TO SHOW CAUSE HEARING: Plaintiffs' Memorandum Requesting That the Court Re-visit the Final Order in the Name of Justice," was forwarded to the trial court and Defendant's counsel before the August 30, 2012 hearing, but was not filed with the clerk of court. (Rule 60(b) Order, pp. 1, 4, and 5–6; Tr. p. 4, lines 16–23; Tr. p. 5, lines 7–8.)

On August 30, 2012 the parties appeared before the Honorable Steven H. John for a hearing on the Defendant's request for an Order and Rule to Show Cause. (Rule 60(b) Order, p. 1; Tr. p. 4, lines 13–15.) The trial court inquired of Attorney Moss if he had received a copy of the Plaintiffs' August 23, 2012 Memorandum. Attorney Moss confirmed he had received a copy, as well as a copy of the Plaintiffs' August 6, 2012 Memorandum. (Rule 60(b) Order, p. 4; Tr. p. 4, line 24 – p. 5, line 5; p. 23, line 23 – p. 24, line 13.) Even though the Plaintiffs disregarded the requirements to properly file and bring a motion before the court (Rule 60(b) Order, pp. 1, 4, and 5; Tr. p. 4, lines 20–23; Tr. p. 5, lines 9–11; Tr. p. 8, lines 11–13; Tr. p. 21, lines 19–20), the trial court nonetheless accepted the Plaintiff's August 23, 2012 Memorandum as if it were a Rule 60(b) Motion, and undertook to address the issues contained therein. (Rule 60(b) Order, pp. 2, 4, and 6; Tr. p. 5, line 25 – p. 6,

line 2; Tr. p. 6, lines 23–24; Tr. p. 21, lines 15–17.) The Plaintiffs' August 23, 2012 Memorandum is hereinafter referred to as the "Rule 60(b) Motion."

The trial court began by addressing the Plaintiffs' three asserted grounds for relief contained in their Rule 60(b) Motion: (1) Newly Discovered Evidence of which they were not aware until after the trial of the underlying action that would dramatically clarify the issues that were before the court; (2) Confusion at Trial brought about by the improper interpretation of the words "access from" and "entrance"; and (3) Ineffective Representation of them by their former attorney. (Rule 60(b) Order, pp. 4–5; Tr. p. 5, line 11 – p. 8, line 10.) The trial court also noted that inasmuch as the Plaintiffs' Rule 60(b) Motion was dated August 23, 2012, it was impossible for the court to have received it until more than one year after the signing and filing of the Final Order. (Rule 60(b) Order, pp. 4, 5–6, and 7; Tr. p. 7, lines 5–10.)

As to the first asserted ground for relief raised by the Plaintiffs, the trial court found the alleged "Newly Discovered Evidence" consisted of matters that could have been discovered by due diligence prior to the June 2011 trial, and were therefore not proper grounds for a Rule 60(b) Motion. (Rule 60(b) Order, pp. 5–6; Tr. p. 5, lines 14–19; Tr. p. 7, lines 14–18; Tr. p. 17, lines 2–6.) The second asserted ground alleged by the Plaintiffs, styled as "Confusion," pertained to matters that could have been raised at the Rule 59(e) hearing in February 2012, or appealed from the Order arising from that hearing to the appellate courts; however, neither of those two courses of action had occurred. (Rule 60(b) Order, pp. 4, and 6; Tr. p. 7, line 19 – p. 8, line 1.) As to the Plaintiffs' third asserted ground for relief, the trial court declined to address

allegations of Ineffective Representation of counsel as a ground upon which the Final Order might be modified. (Rule 60(b) Order, pp. 6–7; Tr. p. 8, lines 2–6.)

The trial court made its oral ruling denying the Plaintiffs' Rule 60(b) Motion (Rule 60(b) Order, p. 7; Tr. p. 5, line 7 – p. 8, line 10; Tr. 16, line 5 – p. 17, line 22; Tr. p. 22, lines 6–11); directed the clerk of court to file the Plaintiffs' Rule 60(b) Motion (Rule 60(b) Order, p. 4; Tr. p. 8, lines 11–13; Tr. p. 16, line 24 – p. 17, line 2); and directed Attorney Moss to prepare an Order regarding the Plaintiffs' Rule 60(b) Motion and the trial court's ruling on the issues raised therein. (Tr. p. 8, lines 14–15; Tr. p. 22, lines 13–17.) The Plaintiffs requested and received permission to address the court, and in support of their Rule 60(b) Motion, presented argument on their three asserted grounds for relief, as well as other matters. The trial judge explained further why the court respectfully declined to grant relief to the Plaintiffs. (Rule 60(b) Order; pp. 4–7; Tr. p. 5, line 7 – p. 8, line 10; Tr. 16, line 5 – Tr. p. 17, line 19; Tr. p. 22, lines 6–11.) Thereafter, the court's oral ruling on the Plaintiffs' Rule 60(b) Motion was reduced to writing, and on September 14, 2012 the trial court signed and issued its "Order Upon Plaintiffs' August 23, 2012 Memorandum Requesting that the Court Re-Visit the Final Order in the Name of Justice (*Court accepted as a Motion Pursuant to Rule 60(b), SCRCP*)" (the "Rule 60(b) Order"), which was filed with the clerk of court on September 18, 2012, and is the subject of this Appeal.

The trial court agreed to receive a copy of the Plaintiffs' August 6, 2012 Memorandum to see if it could be considered by the court. (Tr. p. 23, line 23 – p. 24, line 2.) A copy was handed up for the trial court's review, and upon inquiry from the

court Defendant's counsel confirmed he had received and reviewed a copy of the Plaintiffs' August 6, 2012 Memorandum (Tr. p. 23, line 23 – p. 24, line 16) and would be able to address whatever points the Plaintiffs had made. (Tr. p. 24, line 23 – p. 25, line 1.) Although the trial court had never received a copy of the Plaintiffs' August 6, 2012 Memorandum (Tr. p. 23, line 23 – p. 24, line 2; Tr. p. 24, lines 12–13), nor had a copy been filed with the clerk of court (Tr. p. 25, lines 5–6), the trial court decided to allow it (Tr. p. 25, lines 5–6) and proceed with arguments on the Defendant's request that the court issue a Rule to Show Cause for the Plaintiffs failure to abide by the terms of the court's prior Order Allowing Defendant to Recover its Costs. (Tr. p. 24, lines 17–22.) After hearing arguments from the parties, the trial court delivered its oral ruling from the bench. Addressing the Plaintiffs, the trial judge stated the court would not tolerate non-compliance with its Order; directed the Plaintiffs to comply with the court's prior Order (Tr. p. 46, line 24 – p. 48, line 5); and reserved, but declined, to hold the Plaintiffs' in contempt of court at that time, instead giving the Plaintiffs ninety (90) days to pay the costs awarded to the Defendant/Respondent in the court's prior Order. (Tr. p. 48, lines 5–8.) Further, the trial court succinctly set forth the contempt powers vested in the court, and so there would be no misunderstanding, the court made it clear to the Plaintiffs that this was a direct Order of the court – not something that had been cooked up by the Defendants – and the Plaintiffs would comply with that Order or be subject to the contempt powers of the court. (Tr. p. 48, line 14 – p. 49, line 12.) Attorney Moss was directed to prepare an order that reflected the court's ruling. (Tr. p. 48, line 12–13.) Thereafter, the trial court's oral ruling was

reduced to writing, and the "Order Upon Defendant's Motion for an Order and Rule to Show Cause" was signed and issued by the trial court on September 14, 2012 and filed with the clerk of court on September 18, 2012.

On October 18, 2012, the Plaintiffs' filed a Notice of Intent to Appeal the trial court's Rule 60(b) Order dated September 14, 2012 and filed on September 18, 2012. This appeal followed. The other orders of the trial court affecting the parties to this case were not made subject to a Notice of Appeal. The Appellants have stated it is only the Rule 60(b) Order against which they are appealing. (Appellants' *Amended* Initial Brief, p. 31, ¶ 2.) The Appellants have, therefore, abandoned any appeal against other orders of the trial court.

III. ARGUMENT

A. The Appellants have failed to comply with the South Carolina Appellate Court Rules by including redundant, immaterial, impertinent, irrelevant, inadmissible, and scandalous material in their *Amended* Initial Brief and *Amended* Designation of Matter to be Included in the Record on Appeal, and raising matters not argued to the trial court.

The Appellants filed a Notice of Appeal on October 18, 2012 against the trial court's Rule 60(b) Order, and filed their Initial Brief and Designation of Matter on March 13, 2013. The Respondent filed a Motion on April 29, 2013 to Dismiss and/or Strike inappropriate content from the Appellants' Initial Brief and Designation of Matter, to which the Appellants filed a Return on May 9, 2013.

In their May 9, 2013 Return, the Appellants argued that there were four (4) "Propositions" relevant to their Appeal:

1. That the trial court erred in June 2011 when interpreting a contract between the parties;

2. That the trial court erred in August 2012 by rejecting "new evidence" sought to be introduced by the Plaintiffs/Appellants;

3. That the Court of Appeals should grant a new trial because of ineffective representation of counsel for the Plaintiffs/Appellants; and

4. That the Order signed by the trial court judge did not accurately reflect oral statements made by the judge in open court.

The recitations of "Facts" set forth by the Appellants in their *Amended* Initial Brief at pages 17 through 27, to the extent that each one of those "Facts" has not been proven by evidence admitted at the trial below between the parties, constitute matters that are improperly included, to which the Respondent maintains objection before this Court.

While the Respondent's April 29, 2013 Motion to Dismiss and/or Strike was pending determination before this Court, the Appellants filed a Motion to Amend and Replace Appellants' Designation of Matter to be Included in the Record on Appeal. On July 2, 2013 this Court in part granted Respondent's Motion by striking pages 1, 2, and part of page 3 of the Appellants' Initial Brief, and ordered the Appellants to file an *Amended* Initial Brief with ten days with a more concise STATEMENT OF THE ISSUES ON APPEAL. However, this Court also by the same Order granted the Appellant's Motion to Amend their Designation of Matter. The Respondent filed and served a Motion to Strike Matters included in the Appellants' *Amended* Designation of Matter on July 8, 2013.

On July 12, 2013, the Appellants filed their *Amended* Designation of Matter and *Amended* Initial Brief. The *Amended* Initial Brief revised the pages stricken by the Court; however, the Appellants also took the liberty of making significant revisions to the remainder of their Brief that were not specified in or authorized by the Court's Order of July 2, 2013. Matters not previously asserted in Appellant's Initial Brief of March 13, 2013 were included in their *Amended* Initial Brief.

The *Amended* Initial Brief states as Appellants' Issues on Appeal the four "Propositions" set forth in their Return of May 9, 2013 as paraphrased above. Those stated Issues are not proper in any appeal against the trial court's Rule 60(b) Order. Material claimed by the Appellants to relate to those Issues is redundant, immaterial, impertinent, inadmissible, and scandalous in this Appeal, and the Respondent re-asserts that the Appellants have therefore violated Rule 208(b)–(c), Rules 208(b)(1)(A) and 208(b)(1)(C)–(E), Rule 209(b)(6), Rule 210(c), Rule 268(d)(2), and Rule 269, SCACR.

1. The Appellants' first Issue on Appeal relates to the interpretation of a contract that was the subject of a two-day bench trial in the Court of Common Pleas on June 22–23, 2011. The trial court signed and issued its written Final Order (Ending Action) on August 3, 2011; the Defendant/Respondent filed the Order with the clerk of court and served a copy upon counsel for the Plaintiffs/Appellants on August 5, 2011. (Final Order; Aff. of Service.) Thereafter, the Appellants timely filed a motion for reconsideration pursuant to Rule 59(e), SCRCP; after some delay the trial court heard oral argument on that motion on February 13, 2012. In its written Order Upon

Plaintiffs' Motion for Reconsideration Pursuant to Rule 59(e), SCRCP (hereinafter referred to as the "Rule 59(e) Order"), the trial court partially clarified its Final Order dated August 3, 2011. The Rule 59(e) Order was signed and issued by the trial court on February 22, 2012, and filed with the clerk of court and served upon counsel for the Plaintiffs/Appellants on February 27, 2012.

However, the Appellants did not timely appeal against the Final Order signed and issued on August 3, 2011, and filed with the clerk of court and served on Plaintiffs' counsel on August 5, 2011. The Appellants did not file a Motion or Appeal within the one-year time limit set forth pursuant to Rule 60(b), SCRCP. At the August 30, 2012 hearing, in addressing the Plaintiffs' Rule 60(b) Motion dated August 23, 2012, the trial court noted:

> [I]t is dated – and certainly the Court could not have received it, and did not receive it before August 23rd, 2012. That is more than one year after the signing and filing of the Order, therefore, the Motion under Newly Discovered Evidence is not proper, and cannot be heard by the Court.

(Tr. p. 7, lines 7–10; Rule 60(b) Order, pp. 5–6.)

Therefore, the Final Order signed and issued August 3, 2011, and filed with the clerk of court and served upon Plaintiffs counsel on August 5, 2011 (Final Order; Aff. of Service), as clarified on February 22, 2012, became the law of the case since there was no appeal, as the trial court ruled on August 30, 2012. (Rule 60(b) Order, p. 7, ¶ 2; Tr. p. 17, lines 9–14.) The trial court's oral ruling was reduced to writing and signed and issued by the trial court on September 14, 2012, and filed with

the clerk of court on September 18, 2012. Any argument regarding the interpretation of a contract litigated on June 22–23, 2011 is improper in this Appeal.

2. The Appellants next allege error in the trial court's rejection of their "new evidence" argued to the trial court on August 30, 2012. The trial court reviewed all the material submitted, and found as fact that the matters alleged as "new evidence" existed and could have been discovered by due diligence prior to the trial of the underlying action in June 2011. (Tr. p. 7, lines 11–18; Tr. p. 10, line 9 – p. 11, line 1.) The trial court also found as fact that the material was known to exist by the Plaintiffs/Appellants prior to February 2012 when their Rule 59(e) motion was argued. (Tr. p. 16, lines 13–24.) Therefore, the trial court correctly found that the material did not fall within the definition of "newly discovered evidence" as set forth in Rule 60(b)(2), SCRCP. (Rule 60(b) Order, p. 6, ¶ 2; Tr. p. 6, lines 14–21; Tr. p. 7, lines 5–18.) The attempted inclusion of material rejected by the trial court in the Appellants' *Amended* Designation of Matter on Appeal and *Amended* Initial Brief is improper and represents irrelevant material.

Narruhn v. Alea London Ltd., 404 S.C. 337, 340, 745 S.E.2d 90, 91 (2013) ("Motions under Rule 60(b)(1), (2), or (3) must be made within a reasonable time, but not later than one year of the order taken."), *reh'g denied* (July 25, 2013); ***Perry v. Heirs at Law of Gadsden***, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003) ("A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief.").

The trial court in the present case found that the Appellants had filed what could be construed as a motion on August 23, 2012 seeking reversal of the Final Order dated August 3, 2011, and filed and served on August 5, 2011, and, therefore, were out of time. As stated above, the trial court also found that the Appellants knew of the grounds on which they sought to overturn the Final Order within the one year time limit set forth by Rule 60(b).

However, the present appeal is not against the underlying decision contained in the Final Order; it is an appeal against the denial of the Rule 60(b)(2) Motion considered by the trial court on August 30, 2012. As such, the Appellants' *Amended* Initial Brief and *Amended* Designation of Matter contain irrelevant and inadmissible material. The Appellants' *Amended* Initial Brief also contains unproven allegations and assertions from a separate pending civil action (Civil Action No. 2010-CP-26-05929), as well as a separate pending civil action (Civil Action No. 2013-CP-26--05908) containing unproven allegations of complaints made by Appellant Crotty to State and Federal agencies. Neither of these civil actions are a part of the record in the present case, and were not presented to the trial court through admissible evidence at any hearing in the underlying matter. These pending actions are also irrelevant and inadmissible in the Record on Appeal in this case.

The trial court ruled that:

> In this action, the Court issued its Final Order on August 3, 2011. Inasmuch as the Plaintiffs' Memorandum requesting the Court Re-Visit the Final Order in the Name of Justice was dated August 23, 2012, and not actually filed with the Clerk of Court,

> the Plaintiffs' Memorandum was not and could not have been received by the Court until after one (1) year had elapsed. Accordingly, under Rule 60(b), *SCRCP*, it would not be proper for the Court to entertain the Plaintiffs' request, even if it were in fact a motion.

(Rule 60(b) Order, p. 5–6.)

In ***Ballard v. Carlson***, 882 F.2d 93, 96 (4th Cir. 1989), the court noted:

> Pro se litigants are entitled to some deference from courts. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972). But they as well as other litigants are subject to the time requirements and respect for court orders without which effective judicial administration would be impossible.

In the present matter, the trial court showed extreme deference to the Plaintiffs/Appellants. There are no procedural grounds on which the Court of Appeals may overturn the trial court's ruling on this issue.

3. Ineffective representation of counsel is not a ground for appeal in a civil case. The Sixth Amendment right to counsel applies only in criminal cases. *E.g.*, ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Any reference to allegedly ineffective representation at the trial level by Appellants' counsel (in which allegation the Respondent does not join) is irrelevant and immaterial to the issues in this case.

4. While the Respondent does not concede that the oral ruling by the trial court was not expressed in the Final Order or the Rule 60(b) Order, a trial court has discretion to change its mind and amend its oral ruling. ***Ford v. State Ethics Comm'n***, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial

judge retains discretion to change his mind and amend his oral ruling accordingly."); ***Case v. Case***, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) ("The [Order] must be in writing and until such time the Judge may modify, amend or rescind such an oral Order."); ***First Union Nat'l Bank v. Hitman, Inc.***, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly."), *aff'd*, 308 S.C. 421, 418 S.E.2d 545 (1992).

The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties. *See* Rule 58, SCRCP.

The allegations contained in the Appellants' *Amended* Initial Brief (*e.g.*, pp. 8 and 44) that Respondent's counsel and Judge John committed ethical breaches in their conduct of the case represents impertinent and scandalous material that is inappropriate in this Appeal.

B. The Appellants are time-barred from appealing against the merits of the trial court's Final Order dated August 3, 2011.

The Appellants are attempting in this Appeal to have the Court of Appeals retry the underlying merits of the case litigated on June 22–23, 2011 that resulted in a written Final Order dated August 3, 2011, and filed and served on the Appellants on August 5, 2011. (Final Order; Aff. of Service.)

The Appellants' *Amended* Initial Brief and *Amended* Designation of Matter is crafted and intended to be an appeal on the ***merits*** of the trial court's 2011 Final Order,

not the trial court's Rule 60(b) Order. By Appellants' own pleading, their intentions behind filing this appeal are:

- "On October 18, 2012, we, now as *Pro Se* Appellants, served a NOTICE OF INTENT TO APPEAL the Trial Court's ORDER UPON PLAINTIFFS' MEMORANDUM REQUESTING THAT THE COURT RE-VISIT THE FINAL ORDER IN THE NAME OF JUSTICE (*Court accepted as a Rule 60(b), SCRCP Motion*), stamped September 18, 2012, ***and by direct inference, the Final Order, itself.***" (Emphasis added; citations omitted.) (Appellants' *Amended* Initial Brief, p. 13, ¶ 1.);

- "That choice of words ["enter" and "access"] results in vastly different interpretations of where we can and cannot *park* – ***the central issue for making this appeal.***" (Emphasis added.) (Appellants' *Amended* Initial Brief, p. 22, ¶ 2.);

- "Are there any minimum standards to be met in South Carolina before the Trial process fails before the Law, because of ineffective representation? Does it even matter? ***That is what we are asking the Appeals Court to decide, and if those standards have not been met, to strike down the Trial Judge's FINAL ORDER, while at the same time making Judge Hyman's TEMPORARY INJUNCTION – in its entirety – permanent.*** . . . (Emphasis added; citations omitted.) (Appellants' *Amended* Initial Brief, p. 41, ¶ 3.);

- "We submit that The Honorable Larry B. Hyman, Jr., . . . got it exactly right when he granted us an ORDER FOR TEMPORARY INJUNCTION on October 28, 2009. . . ." (Citations omitted.) (Appellants' *Amended* Initial Brief, p. 49, ¶ 2.);

- "We therefore request that the South Carolina Court of Appeals:

  (1) ***Strike down the FINAL ORDER***[1] (Ending Action) by the Honorable Steven John, except for the PERMANENT INJUNCTION against the removal of the 'Paved Driveway,' . . . ***and instead,***

  (2) ***Grant PERMANENT STATUS to the ORDER FOR TEMPORARY INJUNCTION***, dated October 28, 2009; ***and***,

  (3) ***Cause the RECORDING MEMORANDUM***, dated May 15, 2012 and filed with the Office of the Registrar of Deeds for Horry County, ***to be removed; and***

  (4) ***Order that the COSTS, amounting to $1,933.24*** that we paid to Respondent's attorney in November 2012, ***be returned to us***." (Emphasis added; citation omitted.) (Appellants' *Amended* Initial Brief, p. 50.)

As ruled by this Court in ***McCall v. State Farm Mut. Auto. Ins. Co.***, 359 S.C. 372, 377–78, 597 S.E.2d 181, 184 (Ct. App. 2004):

> An unappealed order becomes the law of the case. *Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003); *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 174–75, 525 S.E.2d 869, 871 (2000); *Priester v. Brabham*, 230 S.C. 201, 203, 95 S.E.2d 167, 168 (1956); *Wooten v. Wooten*, 354 S.C. 242, 250, 580 S.E.2d 765, 769 (Ct. App. 2003); *Larimore v. Carolina Power & Light*, 340 S.C. 438, 445, 531 S.E.2d 535, 538–39 (Ct. App. 2000). "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the

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[1] This is not the Order against which the Appeal has been made.

> law of the case." *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004).

In ***Lindsay v. Lindsay***, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997), this Court relied upon two South Carolina Supreme Court cases, which are applicable to the present Appeal:

> ***It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.*** *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993). Failure to challenge the ruling "is an abandonment of the issue and precludes consideration on appeal." *Id.* at 168, 432 S.E.2d at 484. ***The unchallenged ruling, "right or wrong, is the law of the case and requires affirmance."*** *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

(Emphasis added.)

C. The trial court did not err or abuse its discretion in denying relief to the Appellants pursuant to the grounds for relief asserted in the Appellants' August 23, 2012 Memorandum, which the trial court treated as a Rule 60(b) Motion.

"A motion for new trial on after-discovered evidence is addressed to the sound discretion of the trial court." ***State v. Clamp***, 225 S.C. 89, 80 S.E.2d 918 (1954).

> [T]he the movant must show that the evidence upon which it is based: (1) is such as would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

State v. Strickland, 201 S.C. 170, 22 S.E.2d 417 (1942); ***State v. Clamp***, *supra*; ***State v. Wright***, 228 S.C. 432, 90 S.E.2d 492 (1955).

In ***State v. Corm***, 224 S.C. 74, 77 S.E.2d 354 (1953), the South Carolina Supreme Court ruled that:

> In an appeal from an order denying a motion for a new trial, it is settled by numerous cases that this Court may not nicely weigh the testimony upon which such a motion is based; that power rests in the Circuit Court, for it has at hand the instrumentalities with which to exercise the power, and that Court's settled judgment ought not to be impeached except for errors of law, or for an abuse of its discretion. *State v. Griffin*, 100 S.C. 331, 84 S.E. 876. The hearing Judge, being bound by the foregoing principle of law, was required to look into the nature of the motion and the character of the evidence to support it.

1. **"Newly discovered evidence"**

When considering the Plaintiffs' August 23, 2012 Memorandum as if a Rule 60(b) Motion, the Appellants asserted there was "newly discovered evidence" within the meaning of Rule 60(b)(2), SCRCP. The trial court determined that, even if the Memorandum was to be considered as a Motion that had been timely filed, the matters the Appellants sought to bring before the court were in existence and fully discoverable before the trial that had taken place in June 2011. (Tr. p. 7, lines 11–18; Tr. p. 10, lines 9–25). The trial court's ruling is consistent with the standard set forth in ***State v. Clamp***, *supra*, and was not an abuse of discretion.

The trial court correctly defined for the Appellants what constitutes "newly discovered evidence." (Tr. p. 6, lines 14–21). In ***Lanier v. Lanier***, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005), this Court held that:

> To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result

> if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

Lanier at 217, 612 S.E.2d at 459 (Ct. App. 2005). Further, the Court defined "newly discovered evidence," as follows:

> Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence ***could not have been discovered by due diligence prior to trial.*** *Black's Law Dictionary* defines "due diligence" as [t]he "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Id.* at 468 (7th ed. 1999). "Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." 12 *Moore's Federal Practice* § 60.42[5] (Matthew Bender 3rd ed.).

(Emphasis added.) ***Lanier*** at 220, 612 S.E.2d at 460 (Ct. App. 2005). If the Appellants had exercised due diligence, they could have discovered their asserted "new evidence" prior to trial, as the trial court rightly determined. (Tr. p. 7, lines 11–18).

> Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2). *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004) (citing *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004)).

Lanier at 220, 612 S.E. at 461 (Ct. App. 2005).

The Court in ***Lanier*** also stated:

> In *Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654, (Ct. App. 2004), this Court held that "South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial." *Id.* at 152, 591 S.E.2d at 657.

Lanier at 220, 612 S.E.2d at 461 (Ct. App. 2005).

The trial court held in its Rule 60(b) Order, which is the sole Order against which this Appeal has been taken, that:

> [T]he Court is not persuaded that which the Plaintiffs have characterized in their Memorandum as newly discovered evidence is in fact newly discovered evidence within the meaning of Rule 60(b), SCRCP. The documents referred to by the Plaintiffs in their Memorandum, and indeed in the oral arguments made to the Court, evidence that the documents relied upon by the Plaintiffs do not fall within the meaning of newly discovered evidence. The documents referred to by Plaintiffs in fact did exist prior to the trial of this action and could have been discovered by the Plaintiffs or their counsel in response to proper discovery requests. Therefore and accordingly, even if the Court were to consider the Plaintiffs' Memorandum as a Rule 60(b) motion, and that it were a timely Rule 60(b) motion, the Plaintiffs would not be entitled to the relief they are requesting based on the assertion that there has been newly discovered evidence.

(Rule 60(b) Order, p. 6, ¶ 2; Tr. p. 10, lines 8–25.)

2. "The English Language"

In the Rule 60(b) Order, the trial court found that:

> As to the second of Plaintiffs' asserted grounds, mainly that there was confusion at the trial brought about by the interpretation of the words "access from" and "entrance," the Court is persuaded that those matters were fully litigated before the Court, and the Plaintiffs had the full and fair opportunity through their counsel and through their own testimony to present their arguments concerning the interpretation of those words.

(Rule 60(b) Order, p. 6, ¶ 3; Tr. p. 7, lines 19–25.)

The dissatisfaction of the Appellants with the Final Order dated August 3, 2011, that was not timely appealed, is an insufficient basis to challenge the trial court's Rule 60(b) Order. Contrary to the statements of the Appellants in their "Proposition" #1 as set forth in their Statements of Issues on Appeal, the Board of the Respondent Property Owners' Association did not "decree" the meaning of certain words. The trial court determined their meaning at the end of a two-day trial in June 2011. The law of the case cannot now be overturned.

3. "Ineffective Assistance"

As argued above, ineffective representation by counsel, even if such occurred in the present case, is not a ground for an appeal in a civil case: "The acts of an attorney are directly attributable to and binding on his client. ***Mitchell Supply Co. Inc. v. Gaffney***, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988); ***Arnold v. Yarborough***, 281 S.C. 570, 316 S.E.2d 416 (Ct. App.1984)." ***Greenville Income Partners v. Holman***, 308 S.C. 105, 107–108, 417 S.E.2d 107, 108 (Ct. App. 1992).

In the present case under Appeal, the trial court held:

> With respect to the last of Plaintiffs' asserted grounds, namely that they were ineffectively represented by their former attorney at trial, the Court finds that Plaintiffs' Memorandum and arguments concerning ineffective assistance of their counsel are not procedurally before this Court, and therefore this is not a proper forum for the Plaintiffs to voice those concerns. The Plaintiffs have simply not brought those claims forward in the proper procedural posture and the Court cannot entertain the Plaintiffs' assertions.

(Rule 60(b) Order, pp. 6–7.)

The asserted failure of an attorney to interpose available defenses does not amount to the kind of mistake, surprise, inadvertence, and excusable neglect contemplated by Rule 60(b). ***Greenville Income Partners*** at 108, 417 S.E.2d at 109. The trial court in the present case did not abuse its discretion in declining to grant relief to the Appellants on the grounds of ineffective assistance of counsel.

D. The Respondent's request for an Order and Rule to Show Cause did not re-open the underlying action to further review.

The trial court held that the Respondent's filing of a request for an Order and Rule to Show Cause concerning the non-payment of an award of costs to the Respondent at trial did not "re-open" the entire case for re-litigation by the Appellants. (Tr. p. 18, lines 12–17.) A Rule to Show Cause deals with conduct that may be actual or constructive contempt of a court order, occurring outside the presence of the court. ***Toyota of Florence v. Lynch***, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994); ***Curlee v. Howle***, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982). It is not a re-litigation of the issues that predated the court order, and does not commence new proceedings: an Order of the court is required before a Rule to Show Cause may issue. *E.g.*, ***Midlands Util., Inc. v. South Carolina Dep't of Health and Envtl. Control***, 298 S.C. 66, 378 S.E.2d 256 (1989) (Rule to show cause issued to seek compliance with consent orders).

IV. CONCLUSION

The Appellants failed to timely appeal the Final Order signed and issued by the trial court on August 3, 2011, as partially clarified on February 22, 2012. The

Appellants' Appeal is simply an attempt to circumvent the Rules of Appellate Procedure. The sole basis on which their Appeal might be found to have merit is if the trial court committed an error of law or abused its discretion in issuing its Rule 60(b) Order. The Appellants have not shown a scintilla of evidence of error or abuse of discretion by the trial court.

Therefore and accordingly, for the reasons stated hereinabove, the Respondent respectfully requests this Honorable Court reject the Appeal of the Appellants, and tax the costs of this proceeding against the Appellants pursuant to Rule 222, SCACR.

Respondent respectfully requests oral argument before this Honorable Court.

Respectfully submitted.

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