

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr.,

Trial Court Case No. 2009-CP-26-5782

City of North Myrtle Beach,

Respondent

vs.

East Cherry Grove Realty Co., LLC,

The State of South Carolina and John Doe,

Defendants.

Of whom East Cherry Grove Realty Co., LLC is the Appellant

and the State of South Carolina is a Respondent.

**RESPONDENT CITY OF NORTH MYRTLE BEACH'S
RESPONSE TO APPELLANT'S PETITION FOR REHEARING**

Respondent City of North Myrtle Beach opposes Appellant East Cherry Grove Realty Co., LLC's Petition for Rehearing pursuant to Rule 221 SCACR because of newly discovered evidence. The relief requested by Appellant's counsel is for the Court to stay its opinion until the Appellant's counsel has an opportunity to examine the evidence.

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S.C. SUPREME COURT

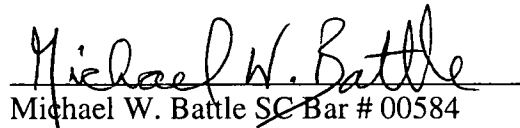
Appellant's Petition should be dismissed because its petition does not have the effect of dismissing or finally deciding a party's appeal. Rule 221(c) SCACR (**Rehearing of Motions**). The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal).

Respondent City of North Myrtle Beach respectfully submits that the appeal and the Court's Opinion should be remitted to the Clerk of Court for Horry County as a final judgment. After the case has been remitted and final judgment has been entered, Appellant's counsel can file a Motion for Relief from a Final Judgment in Circuit Court pursuant to Rule 60 (b), SCRPC.

Circuit Court is the appropriate forum for determination of a Rule 60(b) SCRPC motion because to obtain relief based upon newly discovered evidence, Appellant has the burden of presenting evidence proving the facts essential to entitle Appellant to relief from the final judgment. Rule 60(b)(2), SCRPC. Appellant must prove in an evidentiary hearing that the newly discovered evidence: (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (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 v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2004).

CONCLUSION

For the forgoing reasons, Respondent City of North Myrtle Beach respectfully requests that the Appellant's petition for Rehearing be denied.



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April 26, 2012

Attorney for the City of North Myrtle Beach
Respondent