THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Presiding Judge

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.*

RESPONDENT'S MOTION TO STRIKE FALSE, MISLEADING, IMPROPER, AND INACCURATE MATTER FROM THE RECORD ON APPEAL; TO COMPEL THE APPELLANTS' TO SUBMIT A CORRECTED RECORD ON APPEAL; TO STAY THE TIME FOR SUBMISSION OF RESPONDENT'S FINAL BRIEF PENDING THE COURT'S DISPOSITION OF RESPONDENT'S MOTION TO STRIKE MATTER INCLUDED IN THE RECORD ON APPEAL AND/OR UNTIL A CORRECTED RECORD ON APPEAL IS FILED AND SERVED

MOTION

Respondent Windjammer Village of Little River, South Carolina, Property Owners' Association, by and through its counsel, hereby moves this Honorable Court for an Order (1) striking false, misleading, improper, and inaccurate matter from the Record on Appeal filed by the Appellants on December 23, 2013, and (2) requiring accurate copies of the designated documents to be inserted into a Corrected Record on Appeal. The Respondent is aware that a Motion to Strike does not stay the time limits imposed by the Appellate Court Rules; however, the Respondent is unable to prepare its Final Brief until the Record on Appeal is corrected inasmuch as the page numbers in the Record may change. Therefore, the Respondent respectfully moves this Honorable Court for an Order to stay the deadline for submission of the Respondent's Final Brief until a Corrected Record on Appeal has been filed and served. The parties to this Appeal will not be prejudiced by an extension to file Final Briefs insofar as the Initial Briefs have already been filed. The Respondent will, however, be prejudiced if the Record on Appeal is not corrected, as set forth below.

PROCEDURAL HISTORY

A trial on the merits of the underlying action was held on June 22–23, 2011 in the Court of Common Pleas for Horry County before the Honorable Steven H. John. After a two day trial, the trial judge issued his oral ruling from the bench and gave instructions to both counsel regarding the preparation and due date of a proposed

order. On August 3, 2011, the trial court signed the Final Order, which was filed with the clerk of court on August 5, 2011. A clocked copy was hand-delivered to counsel for the Plaintiffs (Appellants), and the Affidavit of Service was filed with the clerk of court on August 8, 2011. On August 12, 2011, the Plaintiffs filed a Motion for Reconsideration Pursuant to Rule 59(e), SCRCP. The Plaintiffs' motion was heard by the trial court on February 13, 2011. On February 22, 2012, the trial court signed its "Order Upon Plaintiffs' Motion for Reconsideration Pursuant to Rule 59(e), SCRCP," which partially clarified its August 3, 2011 Final Order. The trial court's Order Upon Plaintiffs' Motion for Reconsideration was filed with the clerk of court on February 27, 2012, and the clerk mailed clocked copies of the Order to the counsel of record that same date. Upon receipt of the Order, the Plaintiffs' terminated the services of their counsel and elected to represent themselves "*pro se*."

The Defendant's (Respondent) filed a motion seeking an Order and Rule to Show Cause as to why the Plaintiffs should not be held in contempt of court for non-compliance with a prior Order of the trial court awarding certain costs awarded to the Defendant. The filing of the motion and subsequent hearing on the Order and Rule to Show Cause did not reopen the underlying case on the merits.

In anticipation of the August 30, 2012 Rule to Show Cause hearing, the Plaintiffs prepared two memoranda and mailed them to Defendant's counsel. The Plaintiffs' memorandum 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 mailed directly to the trial judge, and is the only memorandum relevant to this appeal. The Plaintiffs' memorandum was not styled or titled as a motion, had not been filed with the clerk of court, nor was it accompanied by the requisite motion cover sheet or motion filing fee.

More than one year had elapsed since the trial court issued its Final Order on August 3, 2011, which Order was filed and timely served upon the Plaintiffs counsel on August 5, 2011. Although the Plaintiffs' August 23, 2012 memorandum was dated more than one year after the entry of the court's Final Order, after reviewing the Plaintiffs' memorandum the trial court determined that the memorandum essentially set forth a motion that the court should reconsider its Final Order; however, no motion had actually been filed. Notwithstanding the above, the trial court was persuaded that the Plaintiffs had intended the document to be a motion for relief from a judgment or order pursuant to Rule 60(b), SCRCP, and directed that the Plaintiffs' memorandum be filed with the clerk of court.

The Plaintiffs' memorandum asserted three grounds for which the court should grant them relief from the trial court's Final Order: (1) newly discovered evidence; (2) the English language; and (3) ineffective assistance of counsel. The trial court addressed the Plaintiffs' three asserted grounds and found that had Plaintiffs' exercised due diligence, they would have discovered the asserted "newly discovered

evidence," and that the remaining grounds asserted for relief were not proper for a Rule 60(b) motion. Thereafter, the court's oral ruling 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*)" (hereinafter referred to as the "Rule 60(b) Order"), which was filed with the clerk of court on September 18, 2012, and is the subject of this appeal.

On October 18, 2012, Appellants' filed and served a copy of their Notice of Intent to Appeal the Order of the Honorable Steven H. John entitled "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*)," signed September 14, 2012 and filed with the Clerk of Court in and for Horry County on September 18, 2012. The other orders of the trial court affecting the parties to this case were not made subject to a Notice of Appeal. Therefore, the Appellants' Notice of Appeal is limited and restricted to the Rule 60(b) Order.

MEMORANDUM IN SUPPORT OF MOTION

The Appellants *Amended* Designation of Matter filed with the Court on May 24, 2013 designates erroneous, false, and misleading documentation for inclusion in the Record on Appeal. The Respondent respectfully requests that the following matters in the Record on Appeal be stricken or corrected as appropriate,

and the filing of Respondent's Final Brief stayed until the Corrected Record on Appeal is filed and served. In support of its motion, the Respondent would show and allege that:

1. Page 20 of the Record is a Certificate of Mailing, not the "Affidavit of Service [of Final Order] dated August 5, 2011 and filed August 8, 2011" clearly identified and designated for inclusion in the Record by the Respondent. Therefore and accordingly, page 20 of the Record on Appeal should be stricken and replaced with the Affidavit of Service as designated by the Respondent.

2. Pages 21 and 22 of the Record are the Appellants' Notes regarding the trial judge's oral order. The notes may be a transcription taken from the trial judge's oral instructions, however, were expressly not considered by the trial judge as they were not transcribed by a court reporter. As noted by the trial judge, the recording and transcription contained on pages 21 and 22 are in violation of Rule 605(b), SCACR, which prohibits recording in the courtroom during sessions of court. Therefore and accordingly, pages 21 and 22 should be stricken from the Record on Appeal.

3. The Appellants' have included at pages 39–59 of the Record an unclocked copy of the Verified Complaint, with Exhibits A1–A3, Exhibits B1–B2, and Exhibit C. With the Verified Complaint and Exhibits, the Appellants have attempted to introduce material that was not a part of the Verified Complaint as filed with the clerk of court. The Appellants' have deliberately and intentionally attempted to mislead this Court by inserting material as "Exhibit B2," knowing that

it was not a part of the Verified Complaint that was filed with the clerk of court. Attached hereto as **Exhibit A** is a clocked, certified copy of the Verified Complaint that was filed with the clerk of court on October 28, 2009. Therefore and accordingly, pages 39–59 of the Record on Appeal should be stricken and replaced with a certified copy of Appellants' Verified Complaint obtained from the clerk of court.

4. Exhibit C to the Petition for Order and Rule to Show Cause dated March 24, 2010, pages 76–77 of the Record on Appeal, should be stricken from the Record in that the document was tape recorded and transcribed by the Appellants, and does not contain any certification that it is a true and accurate transcription based upon a verbatim recording. In paragraph 5 on page 65 of the Record, it is expressly noted by Appellants' former counsel that the transcription was an unofficial transcript. Also, and as noted herein, the Appellants' have deliberately and intentionally inserted false and misleading information into the Record. Therefore and accordingly, pages 76–77 should be stricken from the Record on Appeal.

5. Pages 83–108 of the Record is a copy of the Appellants' memorandum 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," with Exhibits A–F attached. This memorandum is marked as an Exhibit, and contains language on page 94 not contained in the copy of the memorandum the Respondent received from the Appellants on August 24, 2012. One would assume the Judge received the same copy the Respondent did, and that it is the one the Judge

reviewed prior to the hearing for an Order and Rule to Show Cause. A copy of the memorandum, as received by the Respondent, is attached hereto as **Exhibit B**. Therefore and accordingly, pages 83–108 of the Record on Appeal should be stricken and replaced with the version received by the Respondent on August 24, 2012.

6. Pages 102–104 of the Record is an incomplete version of Defendant's Trial Exhibit 12. Therefore and accordingly, pages 102–104 of the Record on Appeal should be stricken and replaced with a complete copy of Defendant's Trial Exhibit 12, consisting of 4 pages.

7. Pages 172-193 of the Record are an incorrect July 2009 version of the "Restrictions/Rules/Regulations of Windjammer Village of Little River, South Carolina, Property Owners' Association." (R. pp. 172–193). The correct version to be included in the Record on Appeal has a revision date of August 17, 2010, and was introduced and admitted into evidence at trial of the underlying action as Respondent's Trial Exhibit 61. A copy of the cover page of Respondent's Trial Exhibit 61 is attached hereto as **Exhibit C**. Therefore and accordingly, pages 172-193 of the Record on Appeal should be stricken and replaced with a copy of the version of the Restrictions that were before the trial court.

8. Appellants included in the Record at pages 205–220 an "Exhibit F – Photo Album," listed in their Designation of Matter as a "2008-2012 **Photo Album** of Windjammer Village **Parking** Patterns" consisting of 15 pages. The trial judge did not review and there was never admitted into evidence a "photo album," either at trial or at any motion hearing. Most of the photographs in the Record on Appeal (R. p. 205;

R. pp. 207–220) were not introduced or admitted into evidence at the trial of the underlying action, or any motion hearing. While there were individual and unannotated photographs introduced and admitted into evidence at the trial of the underlying action as Plaintiffs' Trial Exhibits 5–11, and 14–15. Those photographs were mounted on large poster type board, without narrative beneath the photos. A copy of the clerk of court's "Receipt for Exhibits" is attached hereto as **Exhibit D**. Plaintiffs' Trial Exhibits 16–20 were introduced and admitted at the underlying trial. These Trial Exhibits were standard, individual 8"x10" photos taken by a resident, Bennie Dowty, showing the distance between the paved mailbox driveway and the Appellants' property, as well as between the roadway and various residents' property. It should be noted that Mr. Dowty is not, and never has been, a surveyor. While it is possible that a few of the photographs included in the Record on Appeal, ***without the narrative***, may have been admitted into evidence at the underlying trial, the Respondent is unable to verify which photographs were used. Plaintiffs' Trial Exhibits 5–11, and 14–15 were removed from the clerk of court's evidence room by the Appellants on May 29, 2012. (**Exhibit E**.)

a. Pages 207–214, and 218–219 of the Record are photos of the Appellants' house and surrounding area, and not photos of "Windjammer Parking Patterns" as specified in the Appellants' *Amended* Designation of Matter. Further, these photos were not produced to the Respondent as discovery prior to trial, were not introduced and admitted as evidence at the trial of the

underlying action, nor at any motion hearing. Therefore and accordingly, pages 207–214 and 218–220 should be stricken from the Record on Appeal.

b. Page 205 of the Record was certainly never produced through discovery, was never introduced or admitted as evidence at the trial of the underlying action, nor any motion hearing, Further, this page was not designated by the Appellants for inclusion in the Record – it is something they have written to bolster their assertions – just as they have altered photographs by adding narrative and alleging their "photo album" was given to the trial court for review. This allegation is a complete fabrication. Therefore and accordingly, page 205 should be stricken from the Record on Appeal.

c. Page 206 of the Record is falsely presented as the "plat that accompanied the Contract of Sale." Page 206 appears to be an alteration of the plat that was introduced into evidence. The plat that accompanied the Contract of Sale was a copy of the plat recorded in Plat Book 159 at Page 70 with the Register of Deeds for Horry County. A copy of the plat is attached as Exhibit A3 to the Plaintiffs' Verified Complaint (**Exhibit A**). Moreover, Plaintiffs' Trial Exhibit 3 is a copy of the Contract of Sale with a copy the plat attached, a copy of which is attached hereto as **Exhibit F**. Therefore and accordingly, page 206 should be stricken from the Record on Appeal.

d. Photo #8 (R. p. 213) – Kevin Hughes' house. This photograph does not match any of the descriptions of photographs introduced and admitted into evidence through either Plaintiff at the trial of the underlying action. The [partial] trial transcript of Ms. Crotty's testimony (Tr. p. 16, line 25 – p. 17, line 5) identifies Plaintiffs' Trial Exhibit 8 as Kevin Hughes' house. Photo #8 at page 213 of the Record is the property owned by the Plaintiffs, and it was not used as an exhibit at the underlying trial or any motion hearing. Therefore and accordingly, page 213 should be stricken from the Record on Appeal.

e. Photo #9 (R. p. 214) – propane truck parked on the paved mailbox driveway. A photograph of a propane truck making a delivery to the Plaintiff's residence was introduced and admitted into evidence as Plaintiffs Trial Exhibit 5. (Tr. p. 15, lines 9–12.) Without the narrative beneath it, this photograph may have been admitted as an Exhibit at trial. However, without having access to the original for verification, and due to the fact that this photo has been annotated, page 214 should be stricken from the Record on Appeal.

f. Photo #10 (R. p. 215) – white truck parked on gravel parking pad. This photograph does not match any of the descriptions of photographs introduced and admitted into evidence through either Plaintiff at the trial of the

underlying action. The [partial] trial transcript of Ms. Crotty's testimony (Tr. p. 17, lines 10–17) identifies the location of this property as 2120 Lafayette Circle, owned by Fred and Mona Stampler. Pursuant to supplemental discovery responses filed by Plaintiffs' counsel, this property is located at 2105 Adams Circle, owned by Mr. Richard Gherri. Therefore and accordingly, page 215 should be stricken from the Record on Appeal.

g. Photo #11 (R. p. 216) – excavation for a parking pad. This photograph does not match any of the descriptions of photographs introduced and admitted into evidence through either Plaintiff at the trial of the underlying action. In fact, the [partial] trial transcript of the Plaintiffs' testimony does not identify Plaintiffs' Trial Exhibit 11 at all, nor does this photo exist in any of the Plaintiffs' discovery responses, and it was not used at any motion hearing. Therefore and accordingly, page 216 should be stricken from the Record on Appeal.

h. Photo #12 (R. p. 217) – photographs of vehicles parked at the home of POA member Charlie Nill. There were ***two (2)*** large photos of Mr. Nill's SUV parked at his residence introduced and admitted into evidence as Plaintiffs' Trial Exhibits 6 and 7. It is not clear from the [partial] trial transcript of Ms. Crotty's testimony regarding Plaintiffs' Trial Exhibit 6 (Tr. p. 16, lines 11–21), as to if Photo #12 was Plaintiffs' Trial

Exhibit 6 or 7. Nor is it clear from the [partial] trial transcript of Ms. Crotty's testimony regarding Plaintiffs' Trial Exhibit 7 (Tr. p. 15, line 35 – p. 16, line10), as to if Photo #12 was Plaintiffs' Trial Exhibit 6 or 7. It is clear, however, from the photograph on page 217 of the Record on Appeal, that Mr. Nill's red SUV is not parked on common property. Due to the fact that this photograph has been annotated, page 217 should be stricken from the Record on Appeal.

i. Photo #15 (R. p. 220) – Appellants' admit in the annotation below this photograph that it was never presented to the court. Therefore and accordingly, page 220 should be stricken from the Record on Appeal.

A copy of page 13, line 25 – page 17, line 22 of the [partial] trial transcript containing Plaintiff Crotty's description of Plaintiffs' Trial Exhibits 5–11 is attached hereto for identification purposes as **Exhibit G**. Insofar as pages 205–220 have been annotated, and the few that may have been entered as trial exhibits have been altered, pages 205–220 of the Record on Appeal should be stricken in its entirety.

The Appellants' have again misrepresented to this Honorable Court that they have complied with the Appellate Court Rules. During the course of this appeal the Appellants have violated Appellate Court Rules 203(b)(1), 208(b), 208(b)(1)(A),

208(b)(1)(B), 208(b)(1)(C), 208(b)(1)(D), 208(b)(1)(E), 209(b), 209(c), 210, 210(c), 240(c)(2), 240(e), 260, 267, 268(d)(2), 269, and 605(b). For the reasons set forth above, Respondent hereby moves this Honorable Court for an Order striking all improper matter from the Record on Appeal. Respondent further moves this Honorable Court for an Order to Stay the Time Limit for filing Respondent's Final Brief until such time as Appellants have corrected the Record on Appeal. Due to the repetitive, frivolous, and abusive nature of Appellants' filings in the courts of this State, Respondent respectfully requests this Honorable Court impose sanctions against the Appellants to discourage like conduct in the future.

Respectfully submitted,

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