

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.*

AFFIDAVIT OF KENNETH R. MOSS

PERSONALLY APPEARED BEFORE ME, Kenneth R. Moss, Esquire, who being duly sworn, does hereby state and affirm as follows, having actual knowledge of all matters set forth herein:

1. I am the attorney of record for the Respondent, Windjammer Village of Little River, South Carolina, Property Owners' Association (hereinafter "Defendant or "Respondent"), and I am familiar with all matters surrounding this action. I have provided the within affidavit in support of the Respondent's Motion to Strike False,

Misleading, Improper, and Inaccurate Matter From the Record on Appeal; To Compel The Appellant's 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.

2. The trial of the underlying action was held on June 22–23, 2011 before the Honorable Steven H. John in Horry County, South Carolina. The Court's Final Order was signed on August 3, 2011, filed with the Clerk of Court on August 5, 2011 and served upon Appellant's counsel on August 5, 2011.

3. Thereafter, post-trial motions were timely filed and a hearing was held on February 13, 2012 on Plaintiffs' Motion for Reconsideration Pursuant to Rule 59(e), and Defendant's Post-Trial Motion for Attorney's Fees and Costs. On February 22, 2012, the Court signed its "Order Upon Plaintiffs' Motion for Reconsideration," and its "Order Denying Defendants' Request for Attorney's Fees But Allowing Defendant's to Recover Its Costs." Both Orders were filed with the Clerk of Court on February 27, 2012. The Court's February 22, 2012 "Order Denying Defendants' Request for Attorney's Fees But Allowing Defendant's to Recover Its Costs" instructed the Plaintiffs to tender payment to the Defendant in the amount of \$1,933.24.

4. On April 30, 2012, on behalf of the Defendants, I filed a request for hearing on a Motion for an Order and Rule to Show Cause for Plaintiffs' failure and refusal to comply with the Court's "Order Denying Defendants' Request But Allowing Defendant's to Recover Its Costs" dated February 22, 2012 and filed February 27, 2012. I did not

then, nor have I ever, filed any motion or requested in any way that the trial court reopen the merits of the underlying case.

5. On or about August 6, 2012, Plaintiffs' served upon me a copy of their document entitled "Re: August 30, 2012 Hearing Plaintiffs' Memorandum in Opposition to Defendant's Proposed Order Awarding Even More Taxable Costs Pursuant to Rule 54(e) SCRCP."

6. On or about August 24, 2012, Plaintiffs' served upon me a copy of their document 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."

7. Plaintiffs' Memoranda, as served upon me, did not include any evidence that they had been filed with the Clerk of Court. Subsequently I learned and confirmed that the Plaintiffs' Memoranda had not been filed with the Clerk of Court and were not accompanied by the requisite Motion Cover Sheet and filing fee.

8. On August 30, 2012, a hearing was held before the Honorable Steven H. John upon Defendant's Motion for an Order and Rule to Show Cause for Plaintiffs' failure and refusal to comply with the Court's February 22, 2012 "Order Denying Defendants' Request But Allowing Defendant's to Recover Its Costs." In that hearing Plaintiffs / Appellants confirmed they had received copies of the Court's Orders dated February 22, 2012, but had not complied with the Court's Order because they had not been provided a full accounting and/or the underlying receipts supporting the \$1,933.24 they had been ordered to pay by the Court.

9. At the August 30, 2012 hearing, the Honorable Steven H. John noted that he had received and reviewed 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," dated August 23, 2012 (hereinafter "Plaintiffs' Memorandum"). After confirming that I had received a copy of the Plaintiffs' Memorandum, Judge John accepted Plaintiffs' Memorandum and thereafter elected to treat the Memorandum as a motion pursuant to Rule 60(b), *SCRCP*, even though the Memorandum was never filed with the clerk of court, no motion coversheet was affixed, and no motion fee had been was paid.

10. After confirming the Plaintiffs had not filed the aforementioned Memorandum with the Clerk of Court, Judge John requested the Clerk of Court staff member present do so at the conclusion of the hearing. I have since learned that the Clerk of Court's staff member did not file the Plaintiffs' Memorandum as directed by Judge John.

11. For the better part of an hour, the Plaintiffs/Appellants presented arguments to Judge John in support of their Memorandum. Judge John explained to the Plaintiffs/Appellants in great detail why Plaintiffs' Memorandum could not be considered by the Court.

12. The Court's "Order Upon Defendant's Motion for an Order and Rule to Show Cause" and "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*

Rule 60(b), SCRCP Motion)” were signed by Judge John on September 14, 2012 and filed with the Clerk of Court on September 18, 2012.

13. The Court’s “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 Rule 60(b), SCRCP Motion*)” is the subject matter of this appeal, as the Appellants never appealed the Court’s Final Order that was signed on August 3, 2011, filed with the Clerk of Court on August 5, 2011, and served upon Appellant’s counsel on August 5, 2011.

14. On October 18, 2012, Appellants served their Notice of Intent to Appeal the Trial Court’s “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 Rule 60(b), SCRCP Motion*)” dated September 14, 2012.

15. At the time Plaintiffs filed their Notice of Appeal, Plaintiffs were fully informed that Plaintiffs’ Memorandum, considered by the Trial Court as a Rule 60(b) motion, had been denied because it was filed more than one year after the non-discretionary time limit pursuant to Rules 60(b)(1)–(3), *SCRCP*, and that even if the Trial Court could accept as true all of the arguments asserted in Plaintiffs’ Memorandum, their arguments were not legally founded.

16. Appellants filed their Initial Brief and Designation of Matter on Appeal on March 13, 2013.

17. As is more fully set forth in Respondent’s written motion, Appellants Amended Designation of Matter filed with the Court on May 24, 2013 designates

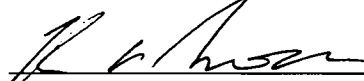
erroneous, false, and misleading documentation for inclusion in the Record on Appeal. The Respondent respectfully requests that the following matters in the Record on Appeal be stricken or corrected as appropriate, and the filing of Respondent's Final Brief stayed until the Corrected Record on Appeal is filed and served.

FURTHER AFFIANT SAYETH NOT!

Respectfully submitted,

**WRIGHT, WORLEY, POPE, EKSTER
& MOSS, PLLC**

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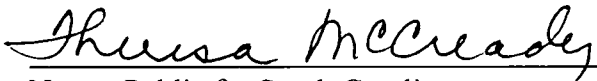
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North Myrtle Beach, South Carolina

January 06, 2014

SWORN TO AND SUBSCRIBED

Before me this 6th day of Jan, 2014.



Notary Public for South Carolina

My Commission Expires: 6-14-2015