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,

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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

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

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On October 18, 2012, Appellants' 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. Respondent Windjammer Village of Little River, South Carolina, Property Owners'

Association (hereinafter "Defendant" or "Respondent") hereby moves to dismiss this appeal on the grounds that Appellants' August 23, 2012 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 not timely filed, and the arguments asserted by the Appellants at the August 30, 2012 hearing were not legally founded.

II. STATEMENT OF FACTS

The above case came before the Honorable Steven H. John for hearing on August 30, 2012, at which time a hearing upon the Defendant's Motion seeking an Order and Rule to Show Cause was scheduled (hereinafter "Defendant's Motion"). The Plaintiffs, Elizabeth A. Crotty and James K. Orzech were present, representing themselves *pro se*; counsel for the Defendant, Kenneth R. Moss, Esquire was present, along with the Defendant's representative, Cindy Dassoulas.

In response to the Defendant's Motion, the Plaintiffs' prepared and caused to be forwarded to the presiding Judge a document 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" (hereinafter "Plaintiffs' Memorandum"). The Plaintiffs' Memorandum was not styled as a motion, was never filed with the Clerk of Court, nor accompanied by a Motion Cover Sheet or the requisite motion filing fee.

After reviewing the Plaintiffs' Memorandum, the Trial Court was persuaded that the Plaintiffs' Memorandum essentially set forth a Rule 60(b), *SCRCP* motion that the Trial Court should reconsider its Final Order in the above-captioned case, although no motion had actually been filed. Judge John permitted the Plaintiffs to present arguments in support of Plaintiffs' Memorandum, which the Court accepted as a Rule 60(b), *SCRCP* motion.

In their Memorandum, the Appellants asserted three (3) grounds upon which they felt the Trial Court should reconsider its August 3, 2011 Final Order, as amended on February 22, 2012. First, the Appellants asserted there was newly discovered evidence of which they were not aware until after the trial of the underlying action, which evidence would dramatically clarify the issues that were before the Trial Court. Second, Appellants asserted that the Trial Court's improper interpretation of the words "access from" and "entrance" are proper grounds for relief from the Trial Court's August 3, 2011 Final Order, as amended on February 22, 2012. Third, Appellants asserted ineffective representation of them by their former attorney as grounds for which they should granted be relief from the Trial Court's August 3, 2011 Final Order, as amended on February 22, 2012. After listening for the better part of one hour to Appellants' arguments in support of their Memorandum, Judge John made his oral ruling from the bench, which was thereafter reduced to writing and signed by Judge John on September 14, 2012 in an Order entitled "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*)" (hereinafter the "September 14, 2012 Order"). The procedural history of this case is recited in the Trial Court's September 14, 2012 Order, a copy of which is attached hereto as Exhibit A to Respondent's Motion to Dismiss. Therefore, the procedural history is not restated herein.

III. STATEMENT OF LAW

In their August 23, 2012 Memorandum, the Appellants sought relief from the Trial Court's August 3, 2011 Final Order, as amended on February 22, 2012. The Trial Court denied the Plaintiffs' motion, which was not actually a motion but the *pro se* Plaintiffs' Memorandum which the Court construed as a Rule 60(b), *SCRCP* motion.

> Whether to grant or deny a motion under Rule 60(b), lies within the sound discretion of the judge. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Our [The appellate Court's] standard of review, therefore, is limited to determining whether there was an abuse of discretion.

Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). Rule 60(b) of the *South Carolina Rules of Civil Procedure* concerns relief from a judgment for some reason other than the merits of the case, and in relevant part provides expressly that:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** 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:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (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;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. ...

IV. ARGUMENT

It is undisputed that more than one (1) year had elapsed prior to the Plaintiffs' Memorandum. 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. The Plaintiffs' Memorandum was dated August 23, 2012. Therefore and accordingly, the Trial Court did not abuse its discretion to grant relief pursuant to Rule 60(b), *SCRCP*, in properly finding in its September 14, 2012 Order 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' motion, even if it were in fact a motion.

The one year limit for motions pursuant to Rule 60(b)(1)–(3), *SCRCP*, is an absolute time limit. Coleman v. Dunlap, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992). The decision to deny a motion under Rule 60(b) is within the trial court's sound discretion. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004).

The Appellants have not properly raised any of the reasons listed in Rule 60(b), *SCRCP*, for setting aside the Trial Court's August 3, 2011 Final Order, as amended on February 22, 2012. ***They simply disagree with the Trial Court's decision.*** Therefore and accordingly, the Trial Court did not abuse its discretion to grant relief pursuant to Rule 60(b), *SCRCP*, in properly finding in its September 14, 2012 Order that:

> [T]he Court issued its Final Order on August 3, 2011, and Plaintiffs have not filed any appeal of that Order. The Plaintiffs, by and through their former attorney, did file a Motion seeking to alter or amend this Court's previous Order, and the Court did partially amend its prior Order pursuant to the Plaintiffs' Motion. However, ***the grounds asserted in the Plaintiffs' present Memorandum were not asserted in the Plaintiffs prior Rule 59(e) Motion.*** Inasmuch as more than one (1) year has elapsed since this Court's prior Order, and the Plaintiffs never appealed any provision of the Court's prior Order, the law of this case is now set

forth in this Court's prior Order dated August 3, 2011, as amended on February 22, 2012. (Emphasis added.)

A. Appellants' Grounds for Relief Pursuant to Rule 60(b), *SCRCP.*

(1) Ground One: Appellants' assertion of newly discovered evidence.

"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." Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504. (Ct. App. 2003). In the present matter, Appellants failed to appeal the Trial Court's August 3, 2011 Final Order, as amended on February 22, 2012, and have, instead, raised for the first time an assertion of "newly discovered evidence." Appellants failed to file any written discovery requests before the June 22 and 23, 2011 trial of the underlying action. What Appellants have characterized as "newly discovered evidence" could have been discovered by due diligence prior to trial. 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.

Id. 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, supra, 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.

> 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, supra, at 220, 612 S.E. at 461 (Ct. App. 2005). Accordingly, the Appellants are not entitled to any relief under Rule 60(b)(2), *SCRCP*. The Court in Lanier went on to further state:

> 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. Therefore and accordingly, the Trial Court did not abuse its discretion to grant relief pursuant to Rule 60(b), *SCRCP*, in properly finding in its September 14, 2012 Order:

> [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.

(2) **Ground Two: Appellants' assertion that the Trial Court's improper interpretation of the words "access from" and "entrance" are proper grounds for relief.**

There is no basis in law or in fact to grant relief under Rule 60(b), *SCRCP*, on the second of Appellants' asserted grounds that the Trial Court improperly interpreted the English language usage of the words "access from" and "entrance." Therefore and accordingly, the Trial Court did not abuse its discretion to grant relief pursuant to Rule 60(b), *SCRCP*, in properly finding in its September 14, 2012 Order:

> 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.

(3) **Ground Three: Appellants assertion of ineffective representation of them by their former attorney as grounds for which they should granted relief.**

In Greenville Income Partners v. Holman, 308 S.C. 105, 417 S.E.2d 107 (Ct. App. 1992), the Court stated that:

> 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, supra at 107–108, 417 S.E.2d at 108.

To permit the Appellants to set aside the judgment after their attorney filed a *Verified* Complaint based upon the assertion their attorney mistakenly or inadvertently failed to assert all of the Appellants' defenses in the Verified Complaint would unnecessarily make the validity of many judgments rather fragile. As in Greenville, experience reflects that frequently defenses are overlooked or discovered too late. Moreover, we cannot be convinced that under the circumstances of the underlying action, it was not sound trial strategy for Appellants' attorney to have handled their case in the manner he did. See Greenville, supra at 108, 417 S.E.2d at 109. Therefore and accordingly, the Trial Court did not abuse its discretion to grant

relief pursuant to Rule 60(b), *SCRCP*, in properly finding in its September 14, 2012 Order:

> 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.

V. CONCLUSION

For the foregoing reasons as stated herein, Respondent respectfully requests this Honorable Court dismiss the appeal of the *Pro se* Appellants on the grounds that Plaintiffs' Memorandum was not filed within the one year non-discretionary time limit imposed by Rule 60(b)(1)–(3), *SCRCP*, and that the arguments asserted by the Appellants at the August 30, 2012 hearing were not legally founded.

Respectfully submitted,

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Little River, South Carolina
November 18, 2012