

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Elizabeth A. Crotty and James K. Orzech,)

Plaintiffs,)

vs.)

Windjammer Village of Little River, South Carolina, Property Owners' Association, a South Carolina Eleemosynary Corporation,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-10523

FILED
HORRY COUNTY
2012 SEP 18 AM 10:55
MELANIE HUGGESS
CLERK OF COURT

**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), SCRPC)*

The above case came before me for hearing at 9:00 a.m. on August 30, 2012, at which time a hearing upon the Defendant's Motion seeking an Order and Rule to Show Cause was scheduled. 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 undersigned 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." The Plaintiffs' Memorandum was never filed with the Clerk of Court nor accompanied by a Motion Cover Sheet or the requisite motion filing fee.

10/7
A.H.J.

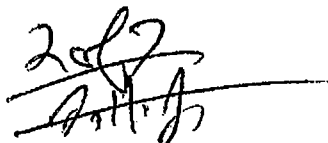
Blumberg No. 5208
EXHIBIT
A

After reviewing the Plaintiffs' Memorandum, the Court finds that the Memorandum essentially sets forth a motion that the Court should reconsider its Final Order in the above-captioned case; however, no motion has actually been filed. The procedural history of this case is as follows.

PROCEDURAL HISTORY

The above-captioned matter was tried before me in a bench trial on June 22 and 23, 2011. On June 23, 2011 the Court made its ruling in this matter. The Court signed and issued its Final Order on August 3, 2011; the Defendant filed the Order with the Clerk of Court for Horry County and served a copy upon Plaintiffs' counsel on August 5, 2011.

On August 12, 2011, Plaintiffs filed a Notice of Motion and Motion for Reconsideration Pursuant to Rule 59(e), *SCRPC* (hereinafter "Plaintiffs' Motion for Reconsideration"). On August 15, 2011, the Defendant filed a Post-Trial Motion for Attorney's Fees and Costs Pursuant to Rule 54, *SCRPC* (hereinafter "Defendant's Post-Trial Motion"). 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. A copy of the Defendant's Post-Trial Motion, with attachments, was served on Plaintiffs' counsel on August 15, 2011. On August 29, 2011, the Defendant filed a Return to Plaintiffs' Motion for Reconsideration. On October 7, 2011, the Plaintiffs filed with the Clerk of Court for Horry County a Memorandum in Opposition to Defendant's Post-Trial Motion and Memorandum in



Support of Plaintiffs' Motion for Reconsideration, both bearing the date of October 6, 2011. A hearing on the Plaintiffs' Motion for Reconsideration and the Defendant's Post-Trial Motion was scheduled for November 1, 2011; however, Plaintiffs' counsel had received a 90-day suspension from the practice of law and was unable to appear. The hearing was continued until such time as Plaintiffs' counsel would be able to attend. On February 2, 2012, the Defendant filed a Memorandum in Opposition to Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Reconsideration.

A hearing on the parties' Motions was held before the undersigned at 2:00p.m. on February 13, 2012. The Court heard oral argument from the parties on Plaintiffs' Motion for Reconsideration, whereby the Plaintiffs' requested the Court reconsider portions of its Final Order dated August 3, 2011 and filed August 5, 2011. Thereafter, the Court heard oral argument on Defendant's Post-Trial Motion. Defendant's counsel handed up to the Court a Supplemental Affidavit of Attorney's Fees and Costs dated January 23, 2012, and signed by Kenneth R. Moss, Esquire. The Supplemental Affidavit itemized attorney's fees and costs the Defendant had incurred with Mr. Moss' law firm as of January 23, 2012.

After reviewing the Memoranda submitted and hearing argument from both parties on the Motions before the Court, the Court issued its written Orders on the Plaintiffs' Motion for Reconsideration and the Defendant's Post-Trial Motion for Attorney's Fees and Costs, dated February 22, 2012 and filed February 27, 2012. On March 7, 2012, the Defendant served Plaintiffs' counsel with a copy of the Court's Order Denying Defendant's Request for Attorney's Fees but Allowing Defendant to Recover Its Costs.

3/8/12
[Signature]

On April 30, 2012, counsel for the Defendant filed a Motion seeking an Order and Rule to Show Cause. In response to the Defendant's Motion, Plaintiffs forwarded a Memorandum to the undersigned 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."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no question that more than one (1) year has elapsed since August 3, 2011, the date on which this Court issued its Final Order [Ending Action], which Order was filed and timely served upon the Plaintiffs' counsel on August 5, 2011. Even though the Plaintiffs' Memorandum dated August 23, 2012 is not styled or titled a motion, nor was it filed as a motion, the Court is persuaded that the Plaintiffs intended the document as a motion for relief from a judgment or order under Rule 60(b), *SCRCP*. Upon inquiry by the Court, counsel for the Defendant confirmed he had received a copy of Plaintiffs' Memorandum. Even though Plaintiffs' Memorandum was not filed as a motion, the Court directed that the Plaintiffs' Memorandum be filed with the Clerk of Court. In support of their position, the Plaintiffs assert three (3) grounds. First, the Plaintiffs have asserted that there is newly discovered evidence of which they were not aware until after the trial of this action that would dramatically clarify the issues that were before the Court during the trial. Second, Plaintiffs have asserted that the improper interpretation of the words "access from" and "entrance" by the Court is proper grounds for relief from this Court's previous Order. Third, Plaintiffs have asserted the ineffective representation

40/2
10/11/12

of them by their former attorney is a grounds or basis for which the Court should grant them relief from this Court's previous Order.

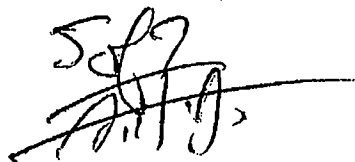
In relevant part, Rule 60(b) of the *South Carolina Rules of Civil Procedure* provides expressly that

(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. ...

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

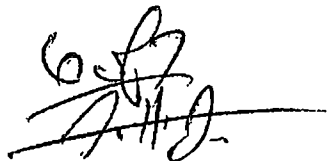
A handwritten signature in black ink, appearing to be "J. P. ...", with a long horizontal line extending to the right.

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.

Even if the Court could consider Plaintiffs' Memorandum to be a motion under Rule 60(b), *SCRCP*, the Court is not persuaded that the Plaintiffs would be entitled to the relief requested in their Memorandum. As to the first of Plaintiffs' asserted grounds, the Court is not persuaded that the facts 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 in the oral arguments made to the Court, 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, even if the Court were to consider the Plaintiffs' Memorandum as a timely Rule 60(b) motion, the Plaintiffs would not be entitled to the relief they are requesting based on newly discovered evidence.

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," those matters were fully litigated at the prior trial, 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. Thus, even if the Court were to consider the Plaintiffs' Memorandum a timely motion, the Plaintiffs are not entitled to any relief based upon the second of their asserted grounds.

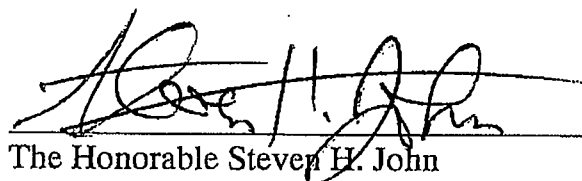
With respect to the last of Plaintiffs' asserted grounds, namely that they were ineffectively represented by their former attorney at trial, the Court finds that Plaintiffs'

A handwritten signature in black ink, appearing to be "D.H.D.", is written over a horizontal line.

Memorandum and arguments concerning ineffective assistance of their counsel are not proper before this Court, and this is not the forum for the Plaintiffs to voice those concerns. The Plaintiffs have simply not brought those claims forward in the proper procedural posture and this Court cannot entertain the Plaintiffs' assertions.

The Court issued its Final Order on August 3, 2011, and Plaintiffs never filed an 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 clarify its prior Order. Inasmuch as more than one (1) year has elapsed since this Court's prior Order, and because the Plaintiffs never appealed any provision of the Court's prior Order, the law of this case is set forth in this Court's prior Order dated August 3, 2011, as clarified on February 22, 2012. The Plaintiffs' arguments currently before the Court are not legally founded, even assuming that the Court would accept as true all of the arguments made by the Plaintiffs. Therefore the relief requested in Plaintiffs' Memorandum dated August 23, 2012 is hereby denied.

IT IS SO ORDERED!



The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

September 14, 2012
Conway, South Carolina

