

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable Joseph M. Strickland, Master-in-Equity

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SEP 06 2017

SC Court of Appeals

Appellate Case No.: 2017-001795

Country Properties, LLC.....Respondent,

vs.

Nancy Dunn Martin.....Appellant.

RESPONDENT'S RETURN TO APPELLANT'S REQUEST FOR LEAVE TO
MAKE MOTION FOR RELIEF PURSUANT TO RULE 60(b), SCRPC

Respondent Country Properties, LLC (hereinafter "Respondent") respectfully submits this Return to Appellant's motion for leave to make a Rule 60(b)(2)-(3), SCRPC before the trial court. For the reasons stated herein, leave to file the Rule 60 motion should be denied.

Procedural Background

The Trial Court entered its final order in this case on September 27, 2016. The final order found that the Respondent had a prescriptive easement over the property of the Appellant, and easement by grant over the property of the Appellant and that the road in question was dedicated to the public. See September 27, 2016 Order. Appellant filed a

Rule 59(e) and Rule 52(b), SCRPC; motion in November 9, 2016. That motion was denied on July 21, 2017. The Appellant served the Notice of Appeal on August 22, 2017. Appellant now moves for leave to file a Rule 60(b)(2)-(3), SCRPC motion.

Argument

The motion for leave to file the Rule 60(b)(2)-(3), SCRPC, motion should be denied because the motion fails to provide the requisite grounds for a Rule 60(b)(2)-(3) motion. The motion for leave fails to state the requisite grounds for a Rule 60(b)(2) motion as outlined in Lanier v. Lanier, 612 S.E.2d 456, 459, 364 S.C. 211 (2005) (“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.”). Likewise, the motion fails to state the requisite grounds for a Rule 60(b)(3) motion as outlined in Chewning v. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605 (2003) (“fraud upon the court as that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.”) *see also* Chewning, 354 S.C. at 86 (“Again, any claim of fraud upon the court must be accompanied by particularized allegations.”). As such, granting leave to file the motion in the absence of grounds presented for such a motion will only work to delay this case.

I. **The allegation of repairing a dam is insufficient to support a Rule 60(b)(2), SCRCP, Motion.**

Rule 60(b), SCRCP, reads: "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: (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)...."

"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."

Lanier, 612 S.E.2d at 459.

In the present case, Appellant has not provided any evidence or argument to this Court that any of the five elements could be met. With regard to the first and fourth elements, even assuming there was a repair of the dam, the outcome of the present case will not change. Indeed, the existence/nonexistence of additional means of access is not an element of a prescriptive easement, an easement by grant or a public dedication of a road. This is not an easement by necessity case. An easement by necessity was not pled and the Trial Court did not find an easement by necessity. In fact, the Trial Court specifically inquired into this issue.

"THE COURT: Now does the -- does the fact that the dam was washed away, and I think Mr. Floyd said a road as well, does that change anything as far as your theory, Mr. Wells?"

MR. WELLS [Respondent Attorney]: Judge, we never claimed -- we did not claim a case by necessity, which is an easement because he has no other access. So I don't think that changes the law in the case."

Trial Transcript, p. 18, line 15-22 (attached hereto as Exhibit A).

With regard to the second, third and fifth element, the record in this case is replete with the evidence that the dam over the years has washed out and been rebuilt. *See* Trial Transcript, p. 357, line 22-p. 359, line 12 (attached as Exhibit B); *see also* Trial Transcript, p. 94, line 10-p. 95, line 18 (attached as Exhibit C). In fact, the Trial Court noted this in the factual findings in its Order. *See* Final Order, Paragraph 7. The fact that a dam was rebuilt once again as has been attempted throughout this properties history is not new evidence. Rule 60(b)(2), SCRCF, does not apply to this Final Order and leave to file such a motion should not be granted by this Court.

II. The allegation of repairing a dam is insufficient to support a Rule 60(b)(3), SCRCF, Motion.

Rule 60(b), SCRCF, provides, in part: "(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: (3) fraud, misrepresentation, or other misconduct of an adverse party;...."

"When a party asserts grounds for relief because of fraud, misrepresentation, or other misconduct of an adverse party under Rule 60(b)(3), SCRCF, the movant must prove her entitlement by clear and convincing evidence." *Gainey v. Gainey*, 382 S.C. 414, 427, 675 S.E.2d 792, 799 (Ct.App. 2009).

In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic. *Bryan v. Bryan*, 220 S.C. 164, 66 S.E.2d 609 (1951). (extrinsic fraud is necessary in order to secure equitable relief vacating a prior judgment). Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud

prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). “Again, any claim of fraud upon the court must be accompanied by particularized allegations.” Chewning, 354 S.C. at 86.

There is no evidence, much less clear and convincing evidence, to support the serious allegation of extrinsic fraud on the Trial Court. The repair of a dam does not amount in any conceivable way to an extrinsic fraud. There is no evidence or argument that the Appellant was not given an opportunity to fully exhibit or try her case. In fact, much of the Appellant’s case, as shown in the trial transcript excerpts attached hereto, was about the repair and damage to the dam. However, just as it was during the trial and as it is on appeal, the ruling of the Court finding a prescriptive easement, and easement by grant and public dedication does not depend on alternate means of access.

Rule 60(b)(3) does not apply to the Final Order and leave to file such a motion should not be granted by this Court.


Conclusion

For the reasons stated herein, the motion for leave to file the Rule 60 Motions with the Trial Court should be denied.

[signature page follows]

Respectfully Submitted,

BUNDY MCDONALD, LLC



M. Brent McDonald, SC Bar # 78057
1516 Old Trolley Road, 2nd Floor
Summerville, SC 29485
Telephone: 888-552-1559
brent@bundymcdonald.com

BAXLEY PRATT & WELLS, P.A.

John Wells, Esq.
3 The Commons
Lugoff, SC 29078
Telephone: (803)438-4200
JWells@baxleywell.com

**Attorneys for Respondent Country
Properties, LLC.**

September 6, 2017

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1 maintenance on it. The hunt club did all the
2 maintenance on these roads. We've got a number
3 of defenses. We've got -- if you happen to
4 find that there is in some way an easement,
5 there's an abandonment, there's adverse
6 possession, and a number of other statute of
7 limitations, a number of other defenses that we
8 believe will cause the Defendant to prevail in
9 this case. And we'll certainly be as speedy as
10 we can in this trial, Judge. Thank you.

11 THE COURT: Let me have a call here with the lawyers
12 right here on the record. This lawsuit was
13 filed back in 2014?

14 MR. FLOYD: That's correct.

15 THE COURT: Now does the -- does the fact that the
16 dam was washed away, and I think Mr. Floyd said
17 a road as well, does that change anything as
18 far as your theory, Mr. Wells?

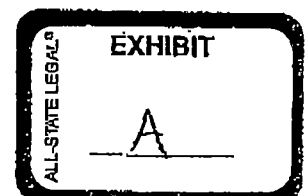
19 MR. WELLS: Judge, we never claimed -- we did not
20 claim a easement by necessity, which is an
21 easement because he has no other access. So I
22 don't think that changes the law in the case.

23 THE COURT: All right. Mr. Floyd, Mr. Peel?

24 MR. FLOYD: I don't -- I don't think it changes,
25 it's all on his property, he's rebuilt it. He



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1 built it, he modified it, and all that sort of
2 stuff so he's got access.

3 THE COURT: All right. Mr. Wells, call your first
4 witness please.

5 MR. WELLS: I call Anna Williams.

6 ANNA C. WILLIAMS, having been duly sworn, testifies
7 as follows:

8 MS. WILLIAMS - DIRECT EXAMINATION BY MR. WELLS:

9 Q: Ms. Williams, where do you live?

10 A: Ridgeway, South Carolina.

11 Q: And how long have you been a title searcher?

12 A: 30 years.

13 Q: Okay. And what companies and individuals have
14 you worked for in that time?

15 A: Some of the clients I've worked for, this is
16 not a full list, would be Absolute Title of
17 Columbia, South Carolina; Poinsettia Title in
18 Lexington, South Carolina; The Law Offices of
19 Roddy Jordan; Law offices of Bart Bartlett; Law
20 Office of George Lafaye; Law Office of Tally
21 Lattimore; Hawkins, Richardson and Associates
22 out of Greer, South Carolina; Russell
23 Templeton, Columbia, South Carolina; Baxley,
24 Pratt and Wells, Lugoff; Connel and Simmons in
25 Lugoff; Patrick Partin Camden, South Carolina;



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1 say?

2 A: (No audible response.)

3 Q: What do you say?

4 A: What's your definition of public and private?

5 Q: I heard you say that you believe this road was
6 public up to your property line. That's what
7 you said, right?

8 A: That's correct.

9 Q: Okay. Despite that fact, you've taken a street
10 sign and you've installed it here on your
11 property, haven't you.

12 A: That's correct. Yes, sir.

13 Q: And you still maintain that that's a public road
14 from 601 all the way to your property line but
15 no further?

16 A: Didn't say that. You said that.

17 Q: Okay.

18 MR. FLOYD: No further questions.

19 THE COURT: Any re-direct?

20 MR. WELLS: Yes, Your Honor.

21 MR. PODELL - RE-DIRECT EXAMINATION BY MR. WELLS:

22 Q: Mr. Floyd asked you about the width of the dam?

23 A: Yes, sir.

24 Q: Across Raglin Creek?

25 A: Yes, sir.



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1 Q: Would you look at Plaintiff's Exhibit 37?

2 A: Yes, sir.

3 Q: Do you recognize that picture?

4 A: Yes, sir.

5 Q: Did you take the picture?

6 A: Yes, sir.

7 Q: And what does that show on the picture?

8 A: Portion of the dam that has been washed out.

9 Q: Okay. When was the picture-taken?

10 A: Wasn't the last flood, it was two years ago.

11 Q: Okay. Was that the 2015 flood or a rainstorm
12 previously?

13 A: A rainstorm previous to that.

14 Q: Does it normally look like that or was that
15 damage from a storm?

16 A: That was damage from a rainstorm.

17 Q: Okay. Hold that up so the court can see it and
18 show which side the -- I think you can tell
19 which side the pond is on.

20 THE COURT: This is Plaintiff's Exhibit Number 37,
21 correct?

22 MR. WELLS: Yes, Your Honor.

23 THE COURT: Thank you.

24 MR. WELLS: We move to introduce Plaintiff's Exhibit
25 37.



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- 1 MR. PEEL: No objection, Your Honor.
- 2 THE COURT: All right. Your motion is granted.
- 3 (Plaintiff's Exhibit Number 37 was admitted into
4 evidence at this time.)
- 5 Q: Was that -- did you repair the dam after that
6 picture was taken?
- 7 A: Yes, sir.
- 8 Q: And is the dam in good repair today?
- 9 A: No, sir.
- 10 Q: And when did it fall into disrepair?
- 11 A: When we had the twenty inch rain in '15,
12 October.
- 13 Q: Now, Mr. Floyd asked you about a conversation
14 with Gary Wessinger ---
- 15 A: Yes, sir.
- 16 Q: --- about the access through the gate?
- 17 A: Yes, sir.
- 18 Q: Tell me about that incident.
- 19 A: I was using the road, as I recall the gate was
20 open.
- 21 Q: The gate on Ms. Martin's property?
- 22 A: Yes. And I went through the other gate and I
23 believe if I'm correct here when I came back the
24 gate was locked so I had to go back through
25 again. If I remember correctly I think I called



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1 we had to enter into the property and that was
2 the access that he had been given for it.
3 Q: So you were given a key?
4 A: Uh-huh.
5 Q: And you just used it?
6 A: That's correct.
7 Q: All right. Nobody ever confronted you about
8 it, nobody ever said anything to you about it?
9 A: No one ever said anything.
10 Q: All right. Wasn't there a dam across this
11 Raglins Creek right here or a road?
12 A: No, there was no dam across it. My brother and
13 I put a dam across it. We rebuilt the old dam
14 that was there.
15 Q: So there was a dam there?
16 A: We rebuilt that dam.
17 Q: So you could drive across it, right?
18 A: No, you couldn't use that.
19 Q: You never drove across that?
20 A: No ---
21 THE COURT: I'm sorry. Mr. Floyd?
22 MR. FLOYD: Yes, sir.
23 THE COURT: You had asked him about the dam and his
24 testimony was that they rebuilt it. Is he
25 talking about rebuilding after what happened in



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- 1 October or was it ---
- 2 MR. BRAZELL: Oh, no. It was -- my understanding,
- 3 it was used back in timber days an it had burst
- 4 at some point and it never was built back. And
- 5 my brother and I took it upon ourselves to
- 6 build it back.
- 7 THE COURT: And what year was that, sir?
- 8 MR. BRAZELL: What year?
- 9 THE COURT: Yes, sir.
- 10 MR. BRAZELL: In '09.
- 11 THE COURT: '09, okay. Thank you very much. I'm
- 12 sorry to interrupt you.
- 13 MR. FLOYD: No, no.
- 14 Q: So y'all built the dam?
- 15 A: Uh-huh.
- 16 Q: But it was one there before, you just improved
- 17 what was there?
- 18 A: (Nods head.)
- 19 Q: Did you hunt on Saturdays?
- 20 A: Yes, sir.
- 21 Q: And do you know Dunn's Mountain Hunting Club?
- 22 A: Uh-huh.
- 23 Q: And did they come Saturdays as well?
- 24 A: I wouldn't have any idea.
- 25 Q: But you know who Dunn's Mountain Hunting Club



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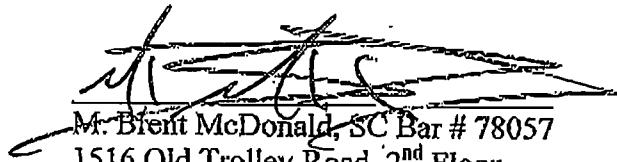
Country Properties, LLC.....Respondent,

vs.

Nancy Dunn Martin.....Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellant's Request for Leave to Make a Motion for Relief Pursuant to Rule 60(b), SCRPC on Appellant Nancy Dunn Martin by depositing a copy of the Return in the United States mail, postage prepaid, on September 6, 2017, addressed to Appellant's counsel of Record, Joey Floyd, Esq., Wesley D. Peel, Esq., and Robert C. Osborne, III, Esq. at the addresses shown below.



Mr. Brent McDonald, SC Bar # 78057
1516 Old Trolley Road, 2nd Floor
Summerville, SC 29485
Telephone: 888-552-1559
brent@bundymcdonald.com

Attorney for Respondent Country Properties, LLC

September 6, 2017

Other Counsel of Record:

Joey D. Floyd
Wesley D. Peel
Robert C. Osborne, III
Bruner Powell Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260

W.H. BUNDY, JR.
M. BRENT MCDONALD

BUNDYMCDONALD, LLC
ATTORNEYS AT LAW
1516 OLD TROLLEY ROAD, 2ND FLOOR
SUMMERVILLE, SC 29485
TELEPHONE: 888-552-1559

M. BRENT MCDONALD
Direct: 843-492-0221
brent@bundymcdonald.com

September 6, 2017

Via FED-EX (Overnight Delivery) & Fax

The Honorable Jenny Abbott Kitchings
Clerk of Court – The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

RE: Country Properties, LLC. v. Nancy Dunn Martin
Appellate Case No.: 2017-001795

Dear Ms. Kitchings,

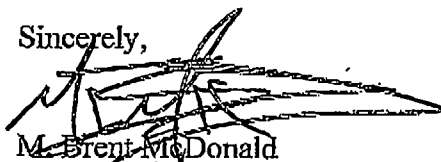
Enclosed for filing please find the original and six (6) copies of Country Properties, LLC's response to Appellant's Request for Leave to Make Motion for Relief Pursuant to Rule 60(b) of the SCRCF. Also enclosed is Proof of Service of the same upon Appellant's counsel.

Please file the original and return a file stamped copy to us in the envelope enclosed for your convenience.

I have sent our response on September 6, 2017 via FED-EX Priority Overnight Delivery. Due to the current weather conditions, they are unable to guarantee an exact delivery date. Therefore, pursuant to Rule 262 (a)(2), I have also faxed a copy of our response to your attention at 803-734-1839. I have faxed a copy to counsel as well.

I thank you for your attention to this matter, and as always, please do not hesitate to call me should you require anything further.

Sincerely,



M. Brent McDonald
1516 Old Trolley Rd, 2nd Floor
Summerville, SC 29485
(843) 492-0221
Attorney for Respondent

MBM/kjw
Enclosure

cc: John Wells, Esquire
Joey R. Floyd, Esquire
Wesley D. Peel, Esquire
Robert C. Osborne, III, Esquire

W.H. BUNDY, JR.
M. BRENT MCDONALD

BUNDYMCDONALD, LLC
ATTORNEYS AT LAW
1516 OLD TROLLEY ROAD, 2ND FLOOR
SUMMERVILLE, SC 29485
TELEPHONE: 888-552-1559

M. BRENT MCDONALD
Direct: 843-492-0221
brent@bundymcdonald.com

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