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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

RECEIVED

MAR 29 2019

SC Court of Appeals

Appellate Case No.: 2017-001795
Civil Case No.: 2014-CP-40-01805

Country Properties, LLC, Respondent,

v.

Nancy Dunn Martin, Appellant.

**MOTION TO STAY APPEAL OR, IN THE ALTERNATIVE,
FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF**

Joey R. Floyd, Bar No. 68491
Wesley D. Peel, Bar No. 9283
Chelsea J. Clark, Bar No. 102211
Bruner, Powell, Wall & Mullins, LLC
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(803) 252-7693
Attorneys for Appellant

STATEMENT OF THE CASE

This matter is presently before the Court on appeal by Nancy Dunn Martin (“Appellant”). Appellant filed an appeal of the order of the Honorable Joseph M. Strickland granting an easement through Appellant’s property to Country Properties, LLC (“Respondent”), among other things. Shortly after filing of the instant appeal, Appellant sought leave of the Court to file a Rule 60(b) motion with the trial Court. The Court entered an order granting leave on October 5, 2017. The same order held this appeal in abeyance “pending the trial court’s ruling on the motion.” Appellant subsequently filed its Rule 60(b) motion with the trial court. Following briefing and arguments, Judge Strickland granted Appellant’s motion and ordered a new trial on January 28, 2019. On February 6, 2019, Respondent filed a motion to alter or amend Judge Strickland’s order, pursuant to Rule 59(e), SCRCF. Judge Strickland denied Respondent’s motion on March 20, 2019. Respondent appealed Judge Strickland’s grant of a new trial by notice to this Court on March 26, 2019. See **Exhibit A**. Because the outcome of this second appeal will affect the outcome of the instant appeal, Appellant files this motion to stay.

MOTION

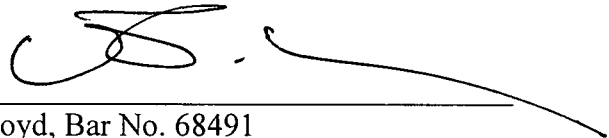
Appellant requests that the Court enter an Order holding this matter in continued abeyance, pending the outcome of the second appeal, filed on or about March 26, 2019, pursuant to Rule 240, SCACR. The instant appeal concerns the merits of the final order of the trial court following the original trial of this matter. Judge Strickland has granted Appellant a new trial, based upon new evidence, which may ultimately render this appeal moot if upheld. However, if Judge Strickland’s order for a new trial is reversed or otherwise altered on appeal, the continuance of this appeal will be necessary for the protection of Appellant’s right to review on appeal of the trial court’s original final order. See Rule 201, SCACR.

The briefing, argument, and consideration of this appeal, prior to resolution of the second appeal, would go against the interests of judicial economy and impose additional and potentially unnecessary costs upon the parties.¹ Thus, Appellant requests that the Court enter an order holding this matter in abeyance until such time as a remittitur or final appellate order is entered in the second appeal, filed by Respondent.

In the alternative, Appellant requests a thirty-day extension from the date of the Court's Order resolving the above motion to prepare her initial brief in this matter, given the intervening events in lower court and the need to address the procedural posture of this appeal and the newly filed appeal by Respondent. Counsel for Appellant has consulted with counsel for Respondent and Counsel for Respondent consents to this extension of time for Appellant's brief.

Respectfully submitted,

BRUNER POWELL WALL & MULLINS, LLC



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Attorneys for Appellant

March 29, 2019
Columbia, South Carolina

¹ Counsel for Appellant has consulted counsel for Respondent regarding this motion and has been informed that Respondent desires a consolidation of the two appeals. Appellant believes that consolidation does not best serve the interests of the parties and does not present the most logical approach for briefing and arguing the issues of the two cases—given that the trial court's most recent order may negate the need to address this appeal entirely. Appellant should not be required to expend the resources necessary to address the full merits of this appeal prior to a determination of whether or not a new trial will go forward.

EXHIBIT A

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.

Civil Action No.: 2014-CP-40-01805

Country Properties, LLC.....Appellant,


vs.

Nancy Dunn Martin.....Respondent.

NOTICE OF APPEAL

Plaintiff Country Properties, LLC (“Appellant”) appeals the order of the Honorable Joseph M. Strickland, Master-in-Equity Order Granting Defendant’s Rule 60(b) Motion filed on January 28, 2019. (attached hereto as Exhibit A). Appellant also appeals the Order Denying Plaintiff’s Rule 59(e), SCRCF Motion To Alter Or Amend Order Granting Defendant’s Rule 60(b) Motion filed on March 20, 2019. (attached hereto as Exhibit B). Appellant received written notice of entry of the Order Denying Plaintiff’s Rule 59(e), SCRCF Motion To Alter Or Amend Order Granting Defendant’s Rule 60(b) Motion on March 20, 2019.

[Signature Page Follows]



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March 26, 2019

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Telephone No.: 803-252-7693
Attorneys for Respondent

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	Civil Action No.: 2014-CP-40-01805
)	
Country Properties, LLC)	
)	
)	
)	ORDER GRANTING DEFENDANT'S
Plaintiff,)	RULE 60(b) MOTION
)	
v.)	
)	
Nancy Dunn Martin,)	
)	
)	
)	
Defendant.)	

STATEMENT OF THE CASE

This matter is before this Court, pursuant to the Rule 60(b) motion of Defendant Nancy Dunn Martin ("Defendant" or "Martin"). This matter initially came before the Court upon the complaint of Plaintiff Country Properties, LLC ("Plaintiff" or "Country Properties"). The subject of the underlying case relates to an easement for the use of a dirt road on Martin's property. Following a trial held March 21-24, 2016, this court issued an order finding, among other things, that the Plaintiff had an easement across Martin's property and that the road across Martin's property was also a public road.

Following the issuance of this Court's order, Defendant appealed to the Court of Appeals on August 22, 2017. On August 27, 2017, Defendant discovered new evidence related to the proceedings. On August 30, 2017, Defendant petitioned the appellate court for leave to file a Rule 60(b) Motion to seek Relief from Judgment or Order before this court. The Court of Appeals granted Defendant's motion on October 5, 2017.¹ On October 24, 2017, Defendant filed a Rule 60(b) motion with this Court. The parties appeared and argued the Motion on July 18, 2018 and

¹ Pursuant to the Court of Appeal's order, the appeal is held in abeyance so that the trial court can entertain the Rule 60(b) motion.

this order follows. After review of the motion and arguments of the parties, I find that Defendant's motion should be granted and that a new trial should be ordered.

BACKGROUND

Country Properties filed suit on March 18, 2014 in Richland County, South Carolina listing five causes of action against Martin. Plaintiff sought access to Defendant's property under three theories of declaratory judgment: that it was deeded a right of access, that it held a prescriptive easement, and that the road through Defendant's property is public. Based on the first two theories, Plaintiff also sought a permanent injunction to prevent obstruction of its use of the road through Defendant's property. Defendant answered the complaint, opposing all causes of action asserted by Plaintiff, and counterclaimed under a theory of adverse possession or prescription by servient tenement.

The case was referred by consent to the Master-in-Equity by The Honorable Casey Manning in July 2014. The matter was tried before this court on March 21–24, 2016. Following the presentation of numerous exhibits and witness testimony, this court issued an Order in favor of the Plaintiff. The final order, filed on September 27, 2018, found that Plaintiff has an easement through Defendant's property, that Defendant should be enjoined from obstructing Plaintiff's access to the easement road, and that the road through Defendant's property is an unmaintained public road of Richland County. The order relied in part on evidence from the Plaintiff that Raglin Creek formed a natural barrier impeding Plaintiff's access to its property—thus necessitating the need for access via Defendant's property. Plaintiff avowed that a dam that had previously created passage across the creek was washed out completely and unusable. Following the order finding for the Plaintiff, Defendant filed a motion to alter or amend that was subsequently denied. Defendant appealed the case to the Court of Appeals, but shortly thereafter discovered new

evidence regarding the dam. Aerial photos of the dam showed that it had in fact been recently repaired. The photos imply that vehicular traffic may now traverse the dam. This development suggests that the Plaintiff's need for the use of Defendant's property may be significantly less than indicated at trial. Based on this information, Defendant sought and received leave from the Court of Appeals to file a Rule 60(b) motion for relief from judgment. Following a hearing on this matter, I conclude that Defendant's motion should be granted and a new trial ordered.

DISCUSSION

Defendant moves for relief from judgment on the basis of Rule 60(b)(2), SCRCP. Rule 60(b) provides, in relevant part, as follows:

(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:

(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);

Rule 60(b), SCRCP. In order to prevail on a Rule 60(b)(2) a moving party must show that the new 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 v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (quoting James F. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE 484 (2d ed. 1996)). The decision to grant a motion under Rule 60(b), SCRCP, is within the sound discretion of the trial judgment and will be reversed only under an abuse of discretion standard. *See Se. Hous. Found. v. Smith*, 380 S.C. 621, 636, 670 S.E.2d 680, 688 (Ct. App. 2008) (citations omitted); *see also Lanier*, 364 S.C. at 215-16, 612 S.E.2d at 458 (citations omitted).

The new evidence presented by Defendant is aerial photographs taken by a drone of a dam on Plaintiff's property. These photos depict a full functional dam with no damage apparent in the photos. At trial, Plaintiff presented witness testimony by one of its two members about the dam. The testimony indicated that the dam had previously been dangerous or unstable, preventing usage by larger vehicles. Testimony indicated that \$70,000 in repairs had previously been made to the dam; but that the October 2015 flood that gravely affected South Carolina caused significant damage to the dam, causing it to again be impassible. Notably the trial in this matter was held only a few short months after the historic October 2015 floods giving little intervening time for repairs or improvements to the deluged dam.

The new evidence presented however suggests that Plaintiff has now had the opportunity to repair the dam, making it passable, and therefore eliminating any need for Plaintiff to traverse Martin's property. The evidence at trial suggested that a large portion of Plaintiff's property could not be reached by Plaintiff's other existing methods of egress because of the impeding creek and damaged dam. The evidence now suggests the Plaintiff can access all of its property via routes that do not transect Martin's property, which changes the court's analysis. Therefore, I find that the new evidence supports the conclusion that the outcome of a new trial would likely be different than the outcomes previously reached. Because the likely result of the trial would be changed, I find that this new evidence is material to the issues to be determined and that it is appropriate to order a new trial.

The timing of events in this case indicate that Defendant could not have obtained this new evidence in time to present it at the original trial. The dam is located near the center of Plaintiff's property (a little over 1000 acres) and is not visible from Defendant's property. The new evidence was gathered using an aerial drone — not a technology one typically employees. Prior to the

original trial, Defendant did not have an opportunity to view the dam or to ascertain its importance to the accessibility of Plaintiff's property. Further, the dam had recently been damaged by the flood and there is no evidence in the record to suggest it had been repaired at the time of the original trial. The record completely lacks any similar evidence to that now presented by the Defendant. Additionally, this new evidence does not conflict with prior evidence or testimony about the dam, but rather presents new information about the state of the dam and its role in this case. Thus, this new evidence is not cumulative or impeaching, nor was it obtainable by Defendant prior to the original trial. Therefore, it is appropriate to consider this new evidence now.

Given that Defendant has presented new evidence it could not have previously discovered, that this evidence materially affects the prior determinations of the court and likely changes the outcome of the case, and that this evidence is neither cumulative nor impeaching, I conclude that Defendant's Rule 60(b) motion should be granted and a new trial ordered.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is **GRANTED**.

IT IS FURTHER ORDERED that a new trial shall be held in this matter.

IT IS SO ORDERED.

-electronic signature page to follow-

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-40-01805

Country Properties, LLC,

Nancy Martin,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: s/Joey R. Floyd P.O. Box 61110, Columbia, South Carolina 29260	Attorney for : <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

John W. Wells

P.O. Box 10

Lugoff, SC 29078

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joey R. Floyd

P.O. Box 61110

Columbia, SC 29260

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2019 Mar 26 1:38 PM - RICHLAND - COMMON PLEAS - CASE#2014CP4001805
FILED - 2019 Jan 28 8:51 AM - RICHLAND - COMMON PLEAS - CASE#2014CP4001805



Richland Common Pleas

Case Caption: Country Properties LLC vs Nancy Dunn Martin
Case Number: 2014CP4001805
Type: Master/Order/Form 4

It is so Ordered

s/Joseph M. Strickland, 3055

EXHIBIT B

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CASE NO.: 2014-CP-40-01805

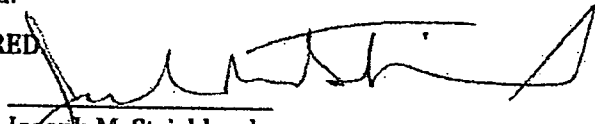
Country Properties, LLC.,)
)
)
)
 Plaintiff)
 vs.)
)
 Nancy Dunn Martin,)
)
)
 Defendant(s))

ORDER DENYING PLAINTIFF'S RULE 59(e), SCRPC MOTION TO ALTER OR AMEND ORDER GRANTING DEFENDANT'S RULE 60(b) MOTION

The matter before the court is a motion by the Plaintiff, M. Brent McDonald, Rule 59(e) SCRPC Motion to Alter or Amend Order Granting Defendant's Rule 60(b) Motion, in the above captioned case.

The motion is denied.

AND IT IS SO ORDERED



 Joseph M. Strickland, as
 Master in Equity for Richland County

Columbia, South Carolina
 March 19, 2019

ELECTRONICALLY FILED - 2019 Mar 26 1:38 PM - RICHLAND - COMMON PLEAS - CASE#2014CP4001805
 FILED - 2019 Mar 20 9:22 AM - RICHLAND - COMMON PLEAS - CASE#2014CP4001805

BRUNER, POWELL, WALL & MULLINS, LLC

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JOEY R. FLOYD, P.A.

BENJAMIN C. BRUNER, P.A.

JAMES L. BRUNER (RETIRED)
BRIAN P. ROBINSON, P.A.**

CHELSEA J. CLARK

STEVEN R. SPREEUWERS

ABIGAIL A. CARSON

* ALSO ADMITTED IN DISTRICT OF COLUMBIA

**OF COUNSEL

AUTHOR'S EMAIL: CCLARK@BRUNERPOWELL.COM

March 29, 2019

RECEIVED

MAR 29 2019

SC Court of Appeals

VIA HAND DELIVERY

Jenny Abbott Kitchings

Clerk of Court

S.C. Court of Appeals

1220 Senate Street

Columbia, SC 29201

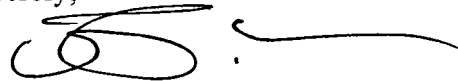
**Re: Country Properties, LLC, Respondent, v. Nancy Dunn Martin, Appellant
Appellate Case No.: 2017-001795, Our File No. 8-2376.102**

Dear Ms. Kitchings:

Please find attached three items, to be filed on behalf of the Appellant in the above-captioned matter, as well as two filing fees in the amount of \$50.00 each. Included are a Motion to Stay Appeal or, in the Alternative, for Extension of Time to File Appellant's Brief and Motion to Substitute Counsel. Additionally, please find included an invoice from Creel Court Reporting evidencing receipt by Appellant of the trial transcript in this matter prior to the filing of this appeal, as well as a proof of service for all items. I have included the required copies, as well as a copy for return by our runner after it is stamped at your convenience. Please let me know if you have any questions or concerns.

With my kindest regards, I am,

Sincerely,



Chelsea J. Clark, Esq.

CJC/hos

Enclosures

cc: John W. Wells, Esq. (by US Mail and email)
Michael Brent McDonald, Esq. (by US Mail and email)