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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

RECEIVED

APR 30 2013

SC Court of Appeals

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.*

**RESPONDENT'S MOTION TO DISMISS, OR
IN THE ALTERNATIVE, TO STRIKE MATTER
FROM APPELLANTS' INITIAL BRIEF
AND DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Respondent Windjammer Village of Little River, South Carolina, Property Owners' Association, pursuant to Rule 260, SCACR, hereby moves for an Order dismissing the appeal filed by the Appellants, or in the alternative, to strike improper material from Appellants' Initial Brief and Designation of Matter to be Included in

the Record on Appeal. The Respondent will show that, specifically, Appellants' Initial Brief fails to comply with the requirements of Rules 208(b)(1)(A)–(E), 268(d)(2), and Rule 269, SCACR; and Appellants' Designation of Matter to be Included in the Record on Appeal fails to comply with the requirements of Rule 209(b)–(c), SCACR. Furthermore, the Appellants' appeal is fundamentally misguided from Appellant's mistaken belief that the Respondent's counsel somehow re-opened the underlying case on the merits by filing a motion seeking an Order and Rule to Show Cause why the Appellants should not be held in contempt of the trial court for non-compliance with a prior Order of the Court wherein certain costs were awarded to the Respondent. (Initial Brief of Appellant, p. 12.)

The Appellants' Initial Brief resembles more of an argumentative, rambling discourse than a proper discussion of undisputed facts and legal authority, making it virtually impossible for the Respondent to prepare a proper brief in response. The Appellants have elected to represent themselves *pro se* in this matter. While the Respondent acknowledges the courts may give some deference to *pro se* litigants, they nonetheless must have a basic knowledge of procedural requirements and rules, and be held to those standards. In the present matter, the Appellants are misusing their asserted right to an appeal as an opportunity to raise issues for re-determination as if through a new trial had been granted on the merits of the Final Order, dated August 3, 2011, attached hereto as "Exhibit A". However, Appellants' Notice of Appeal is limited and restricted to the Rule 60(b) Order, dated September 14, 2012

and filed September 18, 2012, attached hereto as “Exhibit E.” Therefore and accordingly, the Appellants’ brief must be stricken and the appeal dismissed.

The Appellants’ Initial Brief, as provided to the Respondent, violates the Appellate Court Rules, as discussed in more detail below.

A. Appellants’ Initial Brief Violates Appellate Court Rules.

The Appellants’ Initial Brief violates Rule 208(b), SCACR, in the following particulars:

1. **Rule 208(b)(1)(A). Table of Contents and Cases.** The Appellants have failed to include a Table of Authorities (although one is referenced on the Table of Contents page) and the *sole reference* in Appellants’ Initial Brief to a decided case is to an alleged published South Carolina Supreme Court case styled as “Dedmon v. Horry County Board of Adjustments” – without citation. (Initial Brief of Appellant, p. 16.) Dedmon is an Unpublished Opinion of the Court of Appeals (99-UP-163) and is not directly related to any issues in the present case. Therefore and accordingly, reference to it by the Appellants is in violation of Rule 268(d)(2), SCACR.

2. **Rule 208(b)(1)(B). Statement of Issues on Appeal.** The Appellate Court Rules define the content of the Statement of Issues on Appeal as follows:

A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.

The Appellants have failed to state, precisely, exactly what issues they are appealing. Moreover, on page 3 of Appellant's Initial Brief the Appellants state: "Now it is in the hands of the South Carolina Court of Appeals to sort out the central issues in this case, not resolved at the Trial or in subsequent hearings, . . ." (emphasis added). Pages 1 through 3 of Appellants' Initial Brief, heading (B) entitled "Statement of Issues on Appeal," improperly contains disputed facts, matter irrelevant to this appeal, and fails to state what the Appellants are in fact appealing. The Appellants failure to adhere to the *South Carolina Appellate Court Rules* makes it virtually impossible for the Respondent to prepare a proper brief in response. The Appellants are attempting to use their appeal as an opportunity to raise issues for re-determination as if through a new trial had been granted on the merits of the Final Order ("Exhibit A"), notwithstanding that Appellants' Notice of Appeal is limited and restricted to the Rule 60(b) Order ("Exhibit E").

For the reasons set forth above, pages 1 through 3 of Appellants' Initial Brief should be stricken in its entirety for failure to comply with Rule 208(b)(1)(B), SCACR, and the appeal should be dismissed.

3. **Rule 208(b)(1)(C). Statement of the Case.** Rule 208(b)(1)(C) instructs Appellants that "[T]he statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters," In pages 4 through 14 of Appellants' Initial Brief, the Appellants have improperly narrated a highly contested account of

events leading up to the trial of the underlying action on June 22–23, 2011, also which is interspersed with contested matter irrelevant to the appeal of the Rule 60(b) Order (“Exhibit E”). The Appellants are attempting to re-try matters before this Honorable Court that were considered and ruled on by the lower court after a two (2) day bench trial. The lower court’s Final Order (“Exhibit A”) is not the subject of this Appeal. It is well settled law in South Carolina that an unappealed Order *is the law of the case*. See Toler’s Cove Homeowners Ass’n v. Trident Const. Co., Inc., 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003); Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 174–75, 525 S.E.2d 869, 871 (2000); Priester v. Brabham, 230 S.C. 201, 203, 95 S.E.2d 167, 168 (1956); Wooten v. Wooten, 354 S.C. 242, 250, 580 S.E.2d 765, 769 (Ct. App. 2003); Larimore v. Carolina Power & Light, 340 S.C. 438, 445, 531 S.E.2d 535, 538–39 (Ct. App. 2000). “A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.” Austin v. Specialty Transp. Servs., 358 S.C. 298, 302, 594 S.E.2d 867, 878 (Ct. App. 2004).

For the reasons set forth above, pages 4 through 14 of Appellants’ Initial Brief should be stricken in the entirety for failure to comply with Rule 208(b)(1)(C), SCACR, and the appeal should be dismissed.

4. Rule 208(b)(1)(D). Argument. Rule 208(b)(1)(D) instructs Appellants that:

The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority. A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions.

(a) **Appellants' Initial Brief, heading (D1) entitled "Facts."**

Pages 15 through 24 of Appellants' Initial Brief improperly includes matters irrelevant to the appeal of the Rule 60(b) Order ("Exhibit E"), and contains disputed facts and contested matters that are the subject of a separate, currently pending civil lawsuit. (Horry County Court of Common Pleas Civil Action No. 2010-CP-26-5929.) Moreover, the Appellants have failed to present any matters relevant to the appeal of the lower court's Rule 60(b) Order at all. Therefore and accordingly, for the foregoing reasons, pages 15 through 24 of Appellants' Initial Brief should be stricken in its entirety for failure to comply with Rule 208(b)(1)(D), and the appeal should be dismissed.

(b) **Appellants' Initial Brief, "Arguments Proposition #1."**

Pages 25 through 28 of Appellants' Initial Brief are interspersed with disputed facts and matters irrelevant to the appeal of the Rule 60(b) Order ("Exhibit E"), attempts to argue matters the Appellants' had the full and fair opportunity to present through their counsel and through their own testimony at the bench trial of the underlying action on June 22–23, 2011, and is completely devoid of any discussion or citation

of legal authority. Appellants' argument that the lower court improperly interpreted the English language is not legally founded, and no relief can be granted upon that assertion under Rule 60(b). Moreover, the Appellants, on page 28 of their Initial Brief, seek for this Honorable Court to "overturn the lower Court's Rule 60(b) decision, and by inference its **FINAL ORDER in this case, . . .**" (emphasis added). As set forth in Section A(3) of this Motion, the lower court's Final Order dated ("Exhibit A") is not the subject of this Appeal, and the Appellants are using their asserted right to appeal as an opportunity to raise issues for re-determination as if through a new trial had been granted on the merits of the Final Order ("Exhibit A"). Therefore and accordingly, for the foregoing reasons, pages 25 through 28 of Appellants' Initial Brief should be stricken in its entirety for failure to comply with Rule 208(b)(1)(D), and the appeal should be dismissed.

(c) **Appellants' Initial Brief, "Arguments Proposition #2."**

Pages 29 through 33 of Appellants' Initial Brief improperly includes disputed facts and matters irrelevant to the appeal of the Rule 60(b) Order ("Exhibit E"), and is completely devoid of any discussion or citation of legal authority. In Appellants' Memorandum dated August 23, 2012, 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 "Appellants' 8/23/12 Memo"), which the lower court addressed as a Rule 60(b) Motion at the August 30, 2012 hearing on Defendant/Respondent's Order and Rule to Show Cause, Appellants

raised for the first time what they characterized as “newly discovered evidence.” Appellants referenced a 1998 Memo that had been entered into evidence as Defendant/Respondent’s Exhibit No. 12 at the trial of the underlying action. At the August 30, 2012 hearing, the Honorable Steven H. John patiently outlined and explained the grounds that must be met regarding “new evidence,” and that what the Appellants had characterized as “newly discovered evidence” could have been discovered by due diligence prior to the trial of the underlying action. Regarding the Appellants’ 8/23/12 Memo, Judge John stated that “certainly the Court could not have received it, and did not receive it before August 23rd, 2012, which is more than one year after the signing and filing of the [Final] Order, therefore, the Motion under Newly Discovered Evidence is not proper, and cannot be heard by the Court.” In light of the foregoing, Appellants now assert in the last sentence of paragraph 1 at page 31 of their Initial Brief, that “Even if that Memo does not qualify as *new* evidence, it can still be considered in this Appeal, because it was presented to the lower Court by the Defendant’s attorney Moss at the Trial as evidence.” (emphasis in original). Moreover, the Appellants, in the last paragraph on page 33 of their Initial Brief, state: “**Now in the name of JUSTICE, we pray that the South Carolina Court of Appeals will strike down the FINAL ORDER,**” (emphasis added). As discussed in section A(3) of this Motion, the lower court’s Final (“Exhibit A”) is not the subject of this Appeal, and the Appellants are using their asserted right to appeal as an opportunity to raise issues for re-determination

as if through a new trial had been granted on the merits of the Final Order. Therefore and accordingly, for the foregoing reasons, pages 29 through 33 of Appellants' Initial Brief should be stricken in its entirety for failure to comply with Rule 208(b)(1)(D), and the appeal should be dismissed.

(d) Appellants' Initial Brief, "Arguments Proposition #3."

Pages 34 through 37 of Appellants' Initial Brief improperly includes matters irrelevant to the appeal of the Rule 60(b) Order ("Exhibit E"), and is completely devoid of any discussion or citation of legal authority. The last sentence on page 37 of Appellants' Initial Brief seeks for this Honorable Court to make a determination of whether they were adequately represented at the June 22–23, 2011 trial. Appellants are requesting this Honorable Court to render a decision regarding what they characterize as "ineffective representation," and to grant them a new trial. Respondent respectfully suggests that this issue was not properly before the Trial Court and is not now properly before the Court of Appeals for determination, and therefore no relief can be granted under Rule 60(b). Therefore and accordingly, for the foregoing reasons, pages 34 through 37 of Appellants' Initial Brief should be stricken in its entirety for failure to comply with Rule 208(b)(1)(D), and the appeal should be dismissed.

(e) Appellants' Initial Brief, "Arguments Proposition #4."

Pages 38 through 43 of Appellants' Initial Brief improperly includes matters irrelevant to the appeal of the Rule 60(b) Order ("Exhibit E"), and is completely

devoid of any discussion or citation of legal authority. Therefore and accordingly, for the foregoing reasons, pages 38 through 43 of Appellants' Initial Brief should be stricken in its entirety for failure to comply with Rule 208(b)(1)(D), and the appeal should be dismissed.

4. **Rule 208(b)(1)(E). Conclusion.** Rule 208(b)(1)(E) instructs Appellants to state “[a] short conclusion stating the precise relief requested. Pages 44 through 46 of Appellants' Initial Brief contains no mention of the Rule 60(b) Order (“Exhibit E”) that is the subject of the appeal in this matter. The only relief requested in Appellants' Initial Brief is for this Honorable Court to overturn the lower court's Final Order (“Exhibit A”). As stated herein and above, the Appellants are time barred from seeking to appeal against the Final Order, as they failed to timely file a Notice of Appeal as required. The only issue before this Honorable Court is whether the lower court abused its discretion in its Rule 60(b) Order:

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). The Appellants in their Initial Brief have failed to establish that the lower court abused its discretion in issuing its Rule 60(b) Order, and have failed to state any ground

upon which relief may be granted in this appeal. Therefore and accordingly, pages 44 through 46 of Appellants' Initial Brief should be stricken in its entirety, and the appeal should be dismissed.

B. Appellants' Designation of Matter to be Included in the Record on Appeal Violates Appellate Court Rules.

Rule 209(b), SCACR, entitled "Content" instructs Appellants that:

The Designation must clearly identify what the party desires to have included in the Record on Appeal, and the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. A party shall not include any matter in his Designation which is not relevant to the appeal.

The only matters that can properly be designated pursuant to Rule 209(b), SCACR, for the present matter before this Honorable Court are:

(a) Final Order (Ending Action) dated August 3, 2011 and filed August 5, 2011, attached hereto and incorporated herein as "Exhibit A";

(b) Order Upon Plaintiffs' Motion for Reconsideration Pursuant to Rule 59(e), SCRCR dated February 22, 2012 and filed February 27, 2012, attached hereto and incorporated herein as "Exhibit B";

(c) Order Denying Defendants' Request for Attorney's Fees But Allowing Defendants to Recover Its Costs (without exhibits) dated February 22, 2012 and filed February 27, 2012, attached hereto and incorporated herein as "Exhibit C";

(d) Order Upon Defendant's Motion for an Order and Rule to Show Cause (including Defendant/Respondent's Exhibits 1-4, and Plaintiffs/Appellants' document entitled "Re: August 30th Hearing Plaintiffs' Memorandum in Opposition to Defendant's Proposed

Order Awarding Even More Taxable Costs Pursuant to Rule 54(e) SCRCF”) dated September 14, 2012 and filed September 18, 2012, attached hereto and incorporated herein as “Exhibit D”;

(e) 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), SCRCF”) dated September 14, 2012 and filed September 18, 2012, attached hereto and incorporated herein as “Exhibit E”; and

(f) Transcript of Record dated August 30, 2013, attached hereto and incorporated herein as “Exhibit F.”

No other material should have been designated by the Appellants. They are barred from seeking to appeal against the Final Order (“Exhibit A”) as they failed to timely file a Notice of Appeal as required. Exhibits and material (the Respondent does not concede the propriety or relevance for inclusion of any such material) that might have been submitted to the lower court when that court heard and determined the core property issues arising between the parties, are not allowable in the present appeal.

In seeking to include irrelevant and improper materials in their Designation of Matter, the Appellants have failed to comply with Rule 209(b), SCACR, in that they are attempting to place before the Court of Appeals formerly contested matters that were fully litigated in the lower court and addressed in the Final Order (“Exhibit A”), but not made subject to a timely appeal. Appellants’ attempt is frivolous and not in compliance with Rule 269, SCACR in that it addresses and seeks to raise issues for re-determination as if through a new trial on the merits of the Final

Order. However, Appellants' Notice of Appeal is limited and restricted to the lower court's Rule 60(b) Order ("Exhibit E").

In addition, the Designation of Matter by the Appellants fails to comply with Rules 209(b) and 210(c), SCACR, in that it refers to matters that were not raised properly before the lower court when the Rule 60(b) Order ("Exhibit E") was heard and issued, and thus may not be properly raised before the Court of Appeals.

Further, Appellants' have misrepresented to this Honorable Court that they have complied with the requirement of Rule 209(c) that their Designation contains no matter which is irrelevant to the appeal.

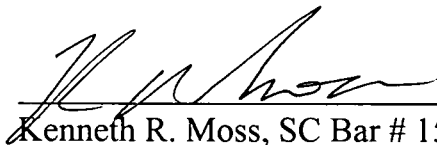
C. Conclusion.

For the foregoing reasons, Respondent hereby moves this Honorable Court for an Order dismissing Appellants' appeal or in the alternative striking the content of Appellants' Initial Brief as outlined above, and striking Appellants' Designation of Matter on the following grounds: (1) the Initial Brief fails to conform to Appellate Court Rules 208(b)(1)(A)–(E), and Rule 269, SCACR; (2) the Initial Brief fails to state any legal rationale why the appeal is not time-barred; (3) the Initial Brief fails to show any abuse of discretion by the lower court, and is frivolous; and, (4) the Designation of Matter filed with the Appellants' Initial Brief fails to conform to Rules 209(b)–(c), SCACR, and is improper.

Respondent respectfully requests this Honorable Court to strike all improper matter, dismiss the appeal and impose sanctions to discourage like conduct in the future.

Respectfully submitted,

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



Kenneth R. Moss, SC Bar # 15520

1180 Highway 17 North, Suite 2

P.O. Box 250

Little River, SC 29566

Tel: (843) 281-9901

Email: kennethmoss@wwpemplaw.com

Little River, South Carolina
April 29, 2013

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

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SC Court of Appeals

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.*

PROOF OF SERVICE

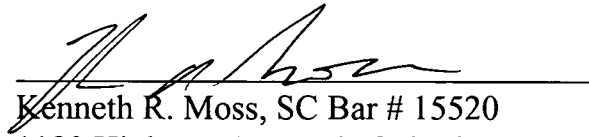
I certify that I have served a copy of the Respondent's Motion to Dismiss, or in the Alternative, to Strike Matter from Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal, with Exhibits A through F attached; the Affidavit of Kenneth R. Moss; and Proof of Service of same in the above-captioned appeal on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Elizabeth A. Crotty
2121 Brunswick Circle
Little River, SC 29566
Pro se Appellant

James K. Orzech
2148 Gamecock Circle
Little River, SC 29566
Pro se Appellant

Respectfully submitted,

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

A handwritten signature in black ink, appearing to read "K. Moss", is written over a horizontal line.

Kenneth R. Moss, SC Bar # 15520

1180 Highway 17 North, Suite 2

P.O. Box 250

Little River, SC 29566

Tel: (843) 281-9901

Fax: (843) 281-9903

Little River, South Carolina

April 29, 2013

WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC

ATTORNEYS AT LAW

1180 HIGHWAY 17 NORTH, SUITE 2 - POST OFFICE BOX 250
LITTLE RIVER, SOUTH CAROLINA 29566
Telephone (843) 281-9901 - Fax (843) 281-9903

O. RICHARD WRIGHT, JR.*
DENNIS T. WORLEY*
HAROLD G. "Butch" POPE*
PAUL J. EKSTER**
KENNETH R. MOSS
MICHAEL T. SMITH++
RICK W. SCOTT*
MARTHA HENLEY SLEDGE*
MELANIE C. NICHOLSON ***
D.F. McGOUGAN, JR.
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**DRC-Certified Family Financial Mediator

**licensed in SC & DC and Admitted to the U.S. Supreme Court

***licensed only in SC, Certified Family Court Mediator, Guardian *ad Litem*

April 29, 2013

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APR 30 2013

SC Court of Appeals

VIA U.S. PRIORITY MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: Elizabeth A. Crotty and James K. Orzech vs. Windjammer Village of Little River, South Carolina, Property Owners' Association
C/A No. 2009-CP-26-10523
Appellate Case No. 2012-213287
Our file no. SC-2156.009A

Dear Ms. Kitchings:

Please find enclosed for filing one (1) unbound original and six (6) copies of Respondent's Motion to Dismiss, or in the Alternative, to Strike Matter From Appellants' Initial Brief and Designation of Matter to Be Included in the Record on Appeal, with Exhibits E through F attached; the Affidavit of Kenneth R. Moss; Proof of Service; and the filing fee in the amount of \$25.00.

The Honorable Jenny Abbott Kitchings
April 29, 2013
Page 2

I have also enclosed an additional copy of the Proof of Service and would appreciate you returning a clocked copy to me in the enclosed self-addressed, stamped envelope I have provided for your convenience.

Yours very truly,

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



Kenneth R. Moss, SC Bar # 15520

KRM:rb
Enclosures as stated
cc: Elizabeth A. Crotty (via U.S. Mail)
James K. Orzech (via U.S. Mail)
Client (via email only)