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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

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

v.

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

RETURN TO MOTION TO DISMISS

Appellants Elizabeth A. Crotty and James K. Orzech, hereby, submit their RETURN TO MOTION TO DISMISS, asking that RESPONDENT'S MOTION TO DISMISS dated April 29, 2013, be **denied**, in that Respondent's attorney Moss's prior MOTION TO DISMISS, dated November 18, 2012, covered essentially the same objections, which already have been **denied** by the Court of Appeals, so are therefore **moot**. Respondent also proposed an ALTERNATIVE TO STRIKE MATTER FROM APPELLANTS' INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD OF APPEAL, which Appellants will address separately in Part **B** of this RETURN.

In his MOTION, Respondent's attorney goes on for fourteen pages in outline format, mostly covering matters we already had rebutted in our prior RETURNS, while criticizing Appellants' INITIAL BRIEF and DESIGNATION OF MATTER, complete with providing copies of the only six EXHIBITS that he considers proper for inclusion into the RECORD ON APPEAL, all of which he already had attached to prior MOTIONS to the Court of Appeals. Also included is an AFFIDAVIT OF KENNETH R. MOSS that is nearly identical, with only minor updates, to his previous AFFIDAVIT, provided as Exhibit B to Respondent's MOTION TO DISMISS, dated November 18, 2012.

A. Appellants' INITIAL BRIEF Violates Appellate Court Rules.

In the first few pages of Respondent's MOTION TO DISMISS, dated April 29, 2013, attorney Moss stated,

> "... Appellants' appeal is fundamentally misguided from Appellants' 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 ..."

However, in Respondent's previous MOTION TO DISMISS of Nov. 18, 2012, attorney Moss had asked the Court to dismiss our appeal on similar grounds, stating,

> **(1)** Plaintiffs' (now Appellants') MEMORANDUM REQUESTING THAT THE COURT RE-VISIT THE FINAL ORDER IN THE NAME OF JUSTICE, which the Trial Court treated as a Rule 60(b) Motion, was <u>not</u> timely filed, and that
>
> **(2)** The arguments, asserted by the Appellants at the August 30, 2012, Hearing were <u>not</u> legally founded.

On February 11, 2013, the Court of Appeals issued an ORDER, signed by Associate Judge Jasper M. Cureton, which stated, "After careful consideration, Respondent's MOTION TO DISMISS is **denied**..." Additionally, attorney Moss petitioned the Court for a 45-day extension of time to file Respondent's INITIAL BRIEF, but was granted only a 30-day extension, expiring May 13th, by an ORDER dated March 29th signed by Chief Judge John Cannon Few.

Apparently Respondent's attorney is still in **denial** that he inadvertently re-opened this case for appeal and was not satisfied with the Appeals Court's rulings, so rather than applying his energy to producing Respondent's INITIAL BRIEF by the due date, he instead opted to file yet another redundant MOTION TO DISMISS, which, in addition to wasting even more of the Court's time, conveniently stayed his May 13th deadline indefinitely until the Court can decide upon his current MOTION TO DISMISS.

1. Table of Contents and Cases. It is true that we as *Pro Se* Appellants' did not include a 'Table of Authorities' in our INITIAL BRIEF, despite the fact that one appears in the 'Table of Contents.' This was done by design and not as an error of omission. Since we are not attorneys and have not been schooled in South Carolina Law, we felt that any resort to Case Law in our INITIAL BRIEF would only look amateurish and might detract from the logical arguments we were making. However, there is a mechanism in Rule 208(b)(7) called 'Supplemental Citations' that permits us to advise the Clerk of the Appellate Court, by letter, with copy to Respondent's attorney, when pertinent and significant authorities come to our attention after the INITIAL BRIEF. Appellants have, indeed, been searching through Case Law on the South Carolina Court's website for such applicable authorities, which when found will be forwarded to the Clerk by letter per rule

and then included in the 'Table of Authorities' in our FINAL BRIEF. Further, we expect that Respondent's attorney will cite authorities in his INITIAL BRIEF that we can comment on in our INITIAL REPLY BRIEF per Rule 208(a)(3). Our mention of "Dedmon v. Horry County Board of Adjustments" on page 16 of our INITIAL BRIEF clearly was intended only as an historical marker that helped explain the four-year gap from 1998 to 2002 between Windjammer Village's attempts to sell off the old Bathhouse property, and not as a citation of Case Law relevant to this Appeal.

2. Statement of Issues on Appeal. We disagree with Respondent's attorney on his assessment of our 'Statements of Issues.' Rule 208(b)(1)(B) specifies, "A statement of each issue shall be concise and direct to each issue." Our four 'propositions' clearly meet that standard. Remember that we are appealing an ORDER based on our MOTION that the lower Court accepted as "Pursuant to Rule 60(b), SCRCP," allowing for appeal based on "mistake, inadvertence, surprise, or excusable neglect," as well as on "newly discovered evidence" and "fraud, misrepresentation, or other misconduct of an adverse party." Each of our four 'propositions' fits well into one or more of these categories. Further, our 'Statement of Issues on Appeal' was derived verbatim from pages 2 through 4 of Appellant Orzech's RETURN TO MOTION TO DISMISS dated November 29, 2012, and then edited for inclusion into our INITIAL BRIEF. Respondent's attorney filed a REPLY TO APPELLANT ORZECH'S RETURN AND MOTION TO STRIKE on December 2, 2012, which was **denied** by ORDER of the South Carolina Court of Appeals, dated February 11, 2013, and signed by Jasper M. Cureton, A.J. In other words, this material was already accepted into the appeals process by the Court, so attorney Moss' objections are **moot**.

3. Statement of the Case. As attorney Moss noted, Rule 208(b)(1)(C) instructs Appellants that the 'Statement of the Case' "shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters, ..." Any fair reading of Appellants' 'Statement' must conclude that it met this standard. Every point in the 'Statement' was derived directly from documents under consideration at the Circuit Court's Hearing on August 30, 2012, including Plaintiffs' (1) MEMORANDUM REQUESTING THAT THE COURT RE-VISIT THE FINAL ORDER IN THE NAME OF JUSTICE, dated August 23, 2012, which the Court accepted as a MOTION pursuant to Rule 60(b), and (2) Plaintiffs' MEMORANDUM IN OPPOSITION TO DEFENDANT'S PROPOSED ORDER AWARDING DEFENDANT EVEN MORE TAXABLE COSTS PURSUANT TO RULE 54(e) SCRCP, dated August 6, 2012. These MEMOS, along with their attachments, are provided as Appellants' **Exhibits #1 and #2** to this RETURN, and are further discussed in **Part B.**

4 (a) Facts: Our Section (D1) was derived verbatim from Appellant Crotty's RETURN TO MOTION TO DISMISS dated December 4, 2012, and then edited and enlarged upon for inclusion into our INITIAL BRIEF. Respondent's attorney filed a REPLY TO APPELLANT CROTTY'S RETURN AND MOTION TO STRIKE on December 10, 2012, which was **denied** by ORDER of the South Carolina Court of Appeals, dated February 11, 2013, and signed by Jasper M. Cureton, A.J. In other words, this material was already accepted into the appeals process, so attorney Moss' objections are **moot**. Further, Rule 208(b)(1)(D) 'Argument' states in part, "... 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." [Emphasis added.]

Propositions

It is standard practice in debate to argue for or against a 'proposition.' Respondent's attorney must attack Appellants' propositions with his own compelling arguments to the contrary. Mr. Moss enjoys the significant advantage of having studied law in South Carolina, so the burden is now upon him to provide the legal rationale, with applicable citations, in opposition to our logical propositions. We as Appellants then can counter in our RETURN BRIEF. The Judges of the Court of Appeals ultimately will decide which side prevailed on each debating point and then on who wins in this case overall, prescribing remedies, as necessary. To our understanding that is how the system should work, whether or not we are seasoned trial attorneys, employing one citation after another or *Pro Se* Appellants, depending almost entirely on logic.

Appellants' first three 'propositions' initially appeared in that format in Appellant Orzech's RETURN TO MOTION TO DISMISS (pages 4-10) dated November 29, 2012. They, along with material that became 'Proposition #4,' were derived directly from Plaintiffs' MEMORANDUM REQUESTING THAT THE COURT RE-VISIT THE FINAL ORDER IN THE NAME OF JUSTICE, with attachments, dated August 23, 2012, which the Court accepted as a MOTION pursuant to Rule 60(b). Attorney Moss filed RESPONDENT'S REPLY TO APPELLANT ORZECH'S RETURN, AND RESPONDENT'S MOTION TO STRIKE on December 2, 2012. The Honorable Court denied Respondent's MOTIONS TO STRIKE on February 11, 2013. In other words, this subject matter in the

'proposition' format had been accepted into the appeals process, prior to March 13, 2013, so attorney Moss' objections to its inclusion in Appellants' INITIAL BRIEF are **moot**.

4. (b) Arguments: Proposition #1 states, "Contracts made in South Carolina must be interpreted and enforced according to the true meanings of the words actually in the Contract in the English language, and **not** by the decrees of Board Members in some Property Owners' Association." Appellants contend that at the June 2011 Trial the Judge erred in formulating his interpretation of the contract, because he wrongfully substituted the meaning of the word 'entrance' (not in the contract) for that of 'access' (actually in the contract), leading to a diametrically opposite conclusion, strongly contrary to our property rights. He erred yet again by failing to correct himself when this point was brought to his attention at the August 2012 Hearing, which lead to his flawed Rule 60(b) ORDER now on appeal.

We have determined in our study of case law to date that the concept that we referred to as "the true meanings of the words actually in the Contract in the English language" can be found in electronic searches as "plain language." It seems that there is a different standard in contracts for wording that is deemed "unambiguous" versus that which is "ambiguous." However, in this case, there is a **paradox**. Specifically, both sides in this dispute agree that the wording in the 2002 Sales Contract is "unambiguous." However, each side interprets those words in ways that are polar opposites. So, does this then mean that the wording in the contract actually ***is*** "ambiguous" with an entirely different set of rules? Attorney Moss would do well to sort out this **paradox** in his INITIAL BRIEF, applying case law for just such a contingency that argues in his favor,

rather than insisting that there is no legal basis for the "plain language" interpretation of words in contract law in South Carolina, or continuing to worry over procedure and style.

4. (b) Arguments: Proposition #2 states, "To be enforceable in South Carolina, the terms of a Sales Contract must actually appear in that Contract signed by the buyer, and **not** just be someone else's belatedly faint recollection of some informal understanding made with another party four years prior, unbeknownst to the current buyer." The underlying argument for this proposition were addressed orally before Judge Steven H. John at the August 2012 Hearing (see Transcript), having appeared in Plaintiffs' MEMORANDUM REQUESTING THAT THE COURT RE-VISIT THE FINAL ORDER IN THE NAME OF JUSTICE, which the Court accepted as a MOTION pursuant to Rule 60(b) **(Appellants' Exhibit #1).** The "new evidence" in question was an internal Memo from 1998, signed by the Treasurer of the Windjammer Village POA, which is attachment **D** in Plaintiffs' MEMORANDUM and appeared as Defendant's Exhibit 12 at the June 2011 Trial. Appellants' argument for Proposition #2 does not rely solely on that piece of evidence as being "new." Rather, read in its entirety on pages 29 through 33 in Appellants' INITIAL BRIEF, Proposition #2 petitions the Honorable Court for redress from the lower Court's "mistake and inadvertence," and especially from Respondent's "fraud, misrepresentation, or other misconduct ..." per Rule 60(b).

4 (b) Arguments: Proposition #3 states, "To be adequately represented in South Carolina by Counsel, the attorney must at least inform his or her clients that they were walking into a Trial, at which their property rights would be at risk in perpetuity, and not just another routine 'Merits Hearing' to make a 'Temporary Injunction' permanent." In

Proposition #3, Appellants primarily are petitioning the Honorable Court to address a rather basic question, involving our Fourteenth Amendment right to the 'due process of law' before being deprived of property. At the conclusion of our argument for Proposition #3 on page 37 of Appellants' INITIAL BRIEF, we ask, "So were we fairly and fully represented at a Trial in which we lost considerable property rights, likely lowering our home's value and our ability ever to sell it, while making our ability to live there much more stressful? Are there any minimum standards to be met in South Carolina before the Trial process fails before the Law, because of ineffective representation?" We then petitioned the Appeals Court to grant us a new Trial, to which attorney Moss duly objected. Perhaps we instead should have asked that the FINAL ORDER from the June 2011 Trial be overturned, with the ORDER FOR TEMPORARY INJUNCTION, dated October 28, 2009, be made permanent, which is more in line with what we suggested as remedies in the 'Conclusions' to our INITIAL BRIEF. This matter will be so amended for the sake of consistency in Appellants' FINAL BRIEF.

4. (b) Arguments: Proposition #4 states, "A Court's FINAL ORDER that: **(a)** Did not accurately reflect what the Presiding Judge actually said in the Courtroom during the Trial; **(b)** Failed suddenly and spectacularly just twenty-four days after signing; **(c)** Required that several of its tenets be clarified and/or modified at a Motions-for-Reconsideration Hearing; and **(d)** Poses questions and unintended consequences that cannot be addressed without the prospect of continuing litigation, should be overturned." This proposition was added to the other three at the time of writing Appellants' INITIAL BRIEF (pages 38-43), being derived from Appellants' Exhibits #1 and #2, plus from Appellants' RETRUNS to Respondent's MOTIONS already before the Honorable Court.

Proposition #4 exposes and documents the already proven folly of the FINAL ORDER, which draft attorney Moss, himself, authored for the Court. Respondent's attorney failed to make any specific case against the inclusion of this proposition in the INITIAL BRIEF.

4. (f) Conclusion: Respondent's attorney objected to the 'Conclusions' section in Appellant's INITIAL BRIEF, primarily because, as a remedy, we asked the Honorable Court to overturn the FINAL ORDER from the June 2011 Trial, and that in its place the ORDER OF TEMPORARY INJUNCTION dated October 28, 2009 be made permanent. *Somehow*, attorney Moss contends that our Appeal only applies to the lower Court's Rule 60(b) ORDER, and not to the underlying FINAL ORDER.

However, for us, this seems to defy logic, since our MEMORANDUM dated August 23, 2012 (Appellants' Exhibit #1), which the Court accepted as a MOTION pursuant to Rule 60(b), asked the lower Court to re-visit the FINAL ORDER in the name of Justice. Indeed, the title of Rule 60 is "Relief from Judgment or Order." Rule 60(b) states, "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; ..." We submit that Respondent's objections to Appellants' Conclusions are not valid.

B. Appellant's DESIGNATION OF MATTER to be included in the RECORD ON APPEAL Violates Appellate Court Rules.

Attorney Moss erroneously claims in his current MOTION that each Section of Appellants' INITIAL BRIEF includes matter irrelevant to our appeal of the Rule 60(b) ORDER (Respondent's **Exhibit E**), and/or contains disputed facts and contested matter. However, Mr. Moss neglected to cite the core document that lead to the lower Court's Rule 60(b) ORDER in the first place – PLAINTIFFS' MEMORANDUM REQUESTING THAT THE COURT RE-VISIT THE FINAL ORDER IN THE NAME OF JUSTICE, dated August 23, 2012, **(Appellants' Exhibit 1 complete with its Attachments A-F),** which the Court accepted as a MOTION pursuant to Rule 60(b). By definition, this MOTION and all of the material cited or contained in it or attached to it are central, not irrelevant, to this appeal, being the basic document from which Appellants' INITIAL BRIEF, as well as all other RETURNS and MOTIONS, were derived. The issues brought out in this fundamental reference were argued thoroughly and vigorously at the Rule 60(b) HEARING of August 30, 2012, which dialog is contained verbatim in the Court Transcript (Respondent's Exhibit **F**).

At the August 30th Hearing, Judge John heard two MOTIONS, one regarding Costs from the June 2011 Trial and one that became our Rule 60(b) MOTION. We chose to Appeal only the latter and chose not to Appeal the former, but rather we paid the Costs specified ($1933.24), despite never actually seeing the underlying invoices, *if* they exist.

In his current MOTION TO DISMISS, attorney Moss elected to include the Court's ORDER UPON DEFENDANT'S MOTION FOR AN ORDER AND RULE TO SHOW CAUSE (Respondent's Exhibit **D**), despite the fact that it is not the ORDER that is on appeal.

Notably, Judge John did not grant the Defendant even one more penny, beyond what was specified in the original ORDER, thanks in large part to our written and our oral arguments to the Court on August 30th, which Exhibit **D** and the TRANSCRIPT (Respondent's Exhibit **F**) clearly reveals.

However, Respondent's attorney untruthfully included in his Exhibit **D** package a bogus 3-page ORDER AWARDING TAXABLE COSTS PURSUANT TO RULE 54(e), SCRCP, with total Costs of $3,168.24, which Judge John never awarded and never signed, falsely trying to make it appear to the Appeals Court that Defendants (now Respondents) had been awarded even more Costs at the August 30th Hearing, when in fact they did not.

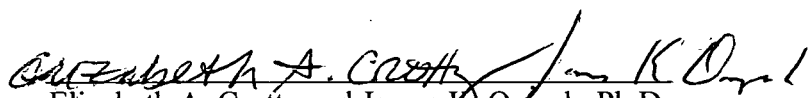
Respondent's attorney also neglected to include Plaintiffs' (now Appellants') MEMORANDUM IN OPPOSITION TO DEFENDANT'S PROPOSED ORDER AWARDING DEFENDANT EVEN MORE TAXABLE COSTS PURSUANT TO RULE 54(e) SCRCP **(Appellants' Exhibit 2 complete with Attachment #1),** which clearly exposed attorney Moss' awkward attempt to sway Judge John into awarding his clients even more questionable, discrepancy-ridden Costs.

C. Conclusion

Appellants disagree with Respondent's Conclusions, in that the Honorable Court already has ruled upon each of the points that were addressed in Appellants' favor. Nonetheless, Appellants do agree that our DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD OF APPEAL could be shortened for the sake of simplicity. We intend to thoroughly review the DESIGNATION OF MATTER that we sent to the

Court of Appeals along with the INITIAL BRIEF, and likely we will file a MOTION to amend it within the next week.

Respectfully submitted,



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