IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Richard Stogsdill, Nancy Stogsdill, Mother of Richard Stogsdill, Robert Levin, and Mary Self, Mother of Robert Levin, Plaintiffs, vs. The South Carolina Department of Health and Human Services, Defendant.	C/A No. 3:12-cv-0007-JFA **ORDER**

This matter is currently before the Court on Plaintiffs Richard Stogsdill and Nancy Stogsdill's (collectively "Plaintiffs") motion to alter or amend this Court's previous Findings of Facts and Conclusions of Law (ECF No. 474) and subsequent judgment (ECF No. 475) issued after the most recent bench trial in this action. (ECF No. 477). Having been fully briefed, this matter is now ripe for consideration.

I. FACTUAL AND PROCEDURAL HISTORY

The relevant factual and procedural history is outlined in the Court's previous order at issue (the "Order") and is incorporated herein by reference. (ECF No. 474). By way of brief recitation, the Court recently concluded the fourth bench trial in this decade old matter wherein all of Plaintiffs' remaining claims were presented. Through a series of prior orders, several of Plaintiffs' claims were adjudicated or otherwise dismissed well before the instant trial. However, a portion of Plaintiffs' claims, predominantly Plaintiffs' claims centered on

the provision of medical equipment with "reasonable promptness," remained as a justiciable controversy.

These claims proceeded to a bench trial before the undersigned in which the parties presented evidence on July 8, 9, 12 and 19, 2021, and the Court heard additional arguments on August 16, 2021. The Court issued an order on October 5, 2021 including the findings of fact and conclusions of law relevant to these claims as required by Rule 52 of the Federal Rules of Civil Procedure. (ECF No. 474). Plaintiffs apparently take issue with several of these findings of facts and conclusions of law and have asserted the instant motion in an effort to amend the Order and consequently alter the resulting judgment. Having been fully briefed, this matter is now ripe for review.

II. LEGAL STANDARD

Motions under Rule 59 are not to be made lightly: "[R]econsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." 12 James Wm. Moore et al., Moore's Federal Practice ¶ 59.30[4] (3d ed.); *Doe v. Spartanburg Cty. Sch. Dist. Three*, 314 F.R.D. 174, 176 (D.S.C. 2016) (quoting *Pac. Ins. Co. v. Am. Nat. Fire Ins*. Co., 148 F.3d 396, 403 (4th Cir. 1998)). Courts "have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). To be clearly erroneous, the earlier decision cannot be "just maybe or probably wrong; it must ... strike [the Court] as wrong with the force of a five-week old, unrefrigerated dead fish." *TFWS, Inc. v. Franchot*,

572 F.3d 186, 194 (4th Cir. 2009) (quoting *Bellsouth Telesensor v. Info. Sys. & Networks Corp.*, Nos. 92-2355, 92-2437, 1995 WL 520978 at *5 n.6 (4th Cir. Sept. 5, 1995))

Rule 59(e) motions "may not be used to make arguments that could have been made before the judgment was entered." *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002). Nor are they opportunities to relitigate issues already ruled upon. *Pac. Ins. Co.*, at 403 (4th Cir. 1998) (quoting Wright et al., *supra*, § 2810.1, at 127–28). Motions to reconsider are not "opportunities to rehash issues already ruled upon because a litigant is displeased with the result." *R.E. Goodson Constr. Co., Inc. v. Int'l Paper Co.*, No. 4:02-4184-RBH, 2006 WL 1677136, at *1 (D.S.C. June 14, 2006) (citing *Tran v. Tran*, 166 F. Supp. 2d 793, 798 (S.D.N.Y. 2001)).

"A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

Plaintiff also seeks relief from the judgment pursuant to Rule 60 "on the grounds of mistake, newly discovered evidence and fraud, and such other grounds that may justify relief." (ECF No. 477, p. 1). Relevant here, motions based on fraud, mistake, or newly discovered evidence must made no more than a year after the entry of the relevant judgment or order. Fed. R. Civ. P. 60(c).

III. DISCUSSION

Initially, the Court would note that Plaintiffs' attempts to "incorporate by reference all objections previously made at trial and in hearings, motions, responses, replies and other filings, including, but not limited to ECF numbers 103, 110, 134, 136, 138, 187, 192, 214, 221, 240, 296, 313, 321, 322, 324, 366, 385, 387, 390, 401, 403, 409, 412, 417, 435, 440,

444, 451, 457, 466, 468 and 473, together with all with attachments" for "purposes of issue preservation" is improper as motions to alter or amend are not opportunities to rehash issues already ruled upon because a litigant is displeased with the result. Moreover, motions to reconsider are unnecessary for issue preservation. *Henry A. Knott Co., Div. of Knott Indus. v. Chesapeake & Potomac Tel. Co. of W. Virginia*, 772 F.2d 78, 81 n.3 (4th Cir. 1985).

Additionally, several of Plaintiffs' arguments are subject to summary dismissal as they attempt to relitigate decisions made over a year ago which have themselves been reaffirmed in prior orders adjudicating Plaintiffs' previous motions to alter or amend. (ECF Nos. 381 & 394, 395)[1]. Specifically, Plaintiffs attempt to again challenge this Court's orders (1) dismissing the director of DHHS[2] (ECF Nos. 131 & 381); (2) dismissing all claims other than those related to equipment, supplies, and assistive technology (ECF No. 395); (3) dismissing claims of violation of Plaintiffs' due process rights (ECF No. 381); (4) dismissing claims of violation of the South Carolina Administrative Procedures Act (ECF Nos. 131 & 381); and (5) dismissing claims of violation of the Americans with Disabilities Act (ECF No. 381).

[1] ECF No. 381 was filed on March 23, 2020; ECF No. 394 was filed on July 6, 2020; and ECF No. 395 was filed on July 6, 2020.

[2] Anthony Keck previously served as Director of DHHS and has since been succeeded by Robert Kerr. Plaintiffs therefore request Kerr be substituted for Keck in his official capacity. This request is moot given the Court's denial of the motion to reconsider the director's previous dismissal from the action.

In addition to constituting an attempted third bite at the apple, Plaintiffs' motion on these issues comes more than twenty-eight days after the various orders adjudicating them were filed and, therefore, the motion is untimely as to these arguments. Fed. R. Civ. P. 59(b). To the extent Plaintiffs are seeking relief under Fed. R. Civ. P. 60(b), Plaintiffs' motion was filed more than one (1) year after the various orders were entered and, therefore, is untimely. Fed. R. Civ. P. 60(c)(1). Thus, Plaintiffs' motion is denied as to these arguments.

In an apparent attempt to avoid the untimely nature of their arguments, Plaintiffs cite to Rule 54 within their Reply brief which allows the Court to revise a previous ruling "any time before the entry of a judgment adjudicating all the claims." Fed. R. Civ. P. 54(b). However, Plaintiffs' attempt to utilize Rule 54 is inapplicable here given that a final judgment has been entered in this action. (ECF No. 475).

However, Plaintiffs' motion is timely to the extent it seeks to alter or amend determinations made in Order after the most recent bench trial in this action.

Initially, Plaintiffs seek to have this Court amend its determinations that Defendant acted with reasonable promptness when supplying Richard with a water walker[3], a stander, a ceiling lift, a gait trainer, ankle-foot orthosis ("AFOs"), door opener, and a wheelchair.

Plaintiffs' arguments regarding the Court's determinations on reasonable promptness each appear to be nothing more than a mere rehashing of those positions

[3] Although the Court agreed with Plaintiffs that the water walker was not provided with reasonable promptness, Plaintiffs disagree with the methodology and reasoning used to reach this determination.

previously advanced at trial and within Plaintiffs' proposed findings of facts (ECF No. 466). As noted by Defendant, Plaintiffs have failed to show a clear error of law, new evidence, or a change in law sufficient to warrant any alteration or amendment in the Order. Although Plaintiffs take issue with the time calculations issued in the Order (i.e., the dates the clock started and stopped when determining reasonable promptness), their arguments amount to mere disagreements with the Court's rationale. As stated above, this is not a proper basis for altering or amending the Court's order.

Plaintiffs also request that the Court "alter or amend is ruling as it relates to 42 U.S.C. 1396a(a)(17)." However, they offer no argument as to why the Court's original ruling was clearly erroneous. Therefore, Plaintiffs' motion is denied on this ground as well.

Plaintiffs also appear to assert arguments not seen before including reference to new regulations and wavier application documents. Specifically, Plaintiffs argue that this Court failed to appropriately apply federal regulations at 42 C.F.R. § 441.301(b)(1)(i) and § 441.303(c). (ECF No. 477, p. 32-33). A review of Plaintiffs' proposed findings of fact and conclusions of law show a total absence of any reference to 42 C.F.R. § 441.303 and a single passing reference to 42 C.F.R. 441.301. (ECF No. 466, p. 32)("In April 2003, DDSN approved Doe's a 'plan of care,' pursuant to 42 C.F.R. § 441.301(b), which included residential habilitation services."). Because motions to alter or amend are not opportunities to advance arguments a party could have, yet failed to make earlier, such reliance on previously unutilized regulations is improper here.

The same is true for Plaintiffs' arguments related to alleged violations of 42 U.S.C. § 1396(n). This statute appears only once within Plaintiffs' proposed findings of fact and

conclusions of law. However, this single reference is contained within a block quote and not included in any substantiative argument put forth by Plaintiffs. (ECF No. 466, p. 33). Accordingly, Plaintiffs' attempts to articulate new legal arguments is improper grounds for altering or amending the Court's prior Order. [4] Plaintiffs were given unfettered opportunity, at their request (ECF No. 456), to submit their position via proposed findings of facts and conclusions of law. The failure to properly advance arguments now elucidated for the first time is not a proper ground for altering or amending a prior order. *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002)("Rule 59(e) motions may not be used to make arguments that could have been made before the judgment was entered.").

Plaintiffs and Defendant also discuss new developments, occurring after the close of the bench trial, related to Richard's continued need for incontinence supplies such as catheters, leg bags, and connective tubing. As discussed in the Order, it appears that Richard has again experienced confusion as to the proper source of funding for his needed incontinence supplies. However, it also appears that any confusion or dispute as to the source of funding for these supplies has been settled by way of consent order dated October 8, 2021 issued as a result of a recent administrative appeal. (ECF No. 476, p. 39-48). Accordingly, no further action is needed on this matter as Plaintiffs have received assurances that "DDSN shall continue to pay for all incontinence supplies as previously provided through the ID/RD wavier by DDSN unless and until DHHS assumes

[4] To clarify, the full text of 42 U.S.C. § 1396(n) and 42 C.F.R. 441.301 were included in Plaintiffs' exhibits attached to their proposed findings of fact and conclusions of law. (ECF No. 466-1). However, Plaintiffs failed to specifically articulate how these provisions applied or how Defendant violated these provisions in regard to Richard.

responsibility for payment of the cost of these supplies, without interruption of these services." (ECF No. 476, p. 43). This consent order "fully resolves [Plaintiffs] appeal of the termination of services." (ECF No. 476, p. 48). Any violations of this consent order should be enforceable via the administrative review process. Thus, any "new evidence"[5] provided by Plaintiffs does not warrant any alteration or amendment to the Court's Order.

Additionally, although Plaintiffs attempt to introduce new evidence in both their initial motion and in the Reply brief, it appears that this evidence only shows ongoing proceedings including another administrative appeal over the continued funding for Richard's incontinence supplies. None of the evidence presented indicates that Richard has gone without his incontinence supplies, only that the source of funding is somehow still in dispute. This new evidence, all apparently formulated after the close of trial in this decade old matter, is not proper grounds for an alteration or amendment of the previous order.

The Court cannot allow this action to linger on in a state of continuous litigation to serve as tertiary source of administrative oversight whenever Plaintiffs face a procedural challenge. [6] This Court understands Plaintiffs' frustrations and has attempted to adjudicate all claims grounded in the burdensome procedure Plaintiffs must endure when requesting equipment. However, the issues in this lawsuit must be adjudicated with some finality.

[5] The Court would note that this evidence is not new evidence heretofore undiscovered, but rather evidence of new conduct.

[6] The Court would note that the issues surrounding Richard's incontinence supplies was raised for the first time in the most recent bench trial in this action. The Court cannot reasonably be expected to reopen the record, expand the scope of Plaintiffs' allegations, and conduct an entirely new trial in response to each conceivable qualm Plaintiffs may experience with this Defendant into perpetuity.

Plaintiffs' claims of "ongoing" violations does not somehow transform this Court into an ever-present avenue of direct relief to be called upon throughout Richard's lifetime. Any new issues arising since the entry of final judgment or in the future may serve as grounds for separate administrative claims or possible lawsuits. However, the issues in this case have been presented and adjudicated. The Court sees no reason to alter or amend the final judgment previously entered.

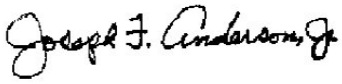
Additionally, to clarify, Plaintiffs' current motion is one to alter or amend a previous final judgment or for relief from that judgment. (ECF No. 477, p. 1)("Pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure Plaintiffs move for an order altering or amending the Court's 'Findings of Fact and Conclusions of Law' and Judgment."). Accordingly, Plaintiffs' later request for relief pursuant to Rule 54; a new trial pursuant to Rule 59(a)(2); or to reopen the judgment pursuant to Rule 59(a)(2) are procedurally improper as these arguments appear for the first time in Plaintiffs' Reply brief[7] and the time to file such motions has expired. Fed. R. Civ. P. 59(b).

[7] "The ordinary rule in federal courts is that an argument raised for the first time in a reply brief or memorandum will not be considered." *Clawson v. FedEx Ground Package Sys., Inc.*, 451 F. Supp. 2d 731, 734 (D. Md. 2006)(citing *United States v. Williams,* 445 F.3d 724, 736 n. 6 (4th Cir.2006)).

IV. CONCLUSION

For all of the reasons stated above, Plaintiffs' motion to alter or amend the Order or for relief from judgment (ECF No. 477) is respectfully denied.

IT IS SO ORDERED.



December 21, 2021
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge