

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ROBERT A. FORTUNATI, ADMINISTRATOR :
OF THE ESTATE OF JOSEPH FORTUNATI; :
ROBERT A. FORTUNATI, SUSAN :
FORTUNATI; AND MARK FORTUNATI, :

Plaintiffs, :

v. :

File No. 1:07-cv-143-jgm

ANDREW CAMPAGNE, MARC THOMAS, :
JEREMY HILL, TODD PROTZMAN, :
ROB SNETSINGER, KARL GARDNER, :
HUGH O'DONNELL, MIKE DUDLEY & :
WALTER GOODELL, :

Defendants. :

MEMORANDUM AND ORDER
(Docs. 172 and 175)

Plaintiffs Robert A. Fortunati, as Administrator of the Estate of Joseph Fortunati, Robert A. Fortunati, Susan Fortunati, and Mark Fortunati have filed a Motion requesting the Court revise its December 29, 2009 Summary Judgment Order. (Doc. 172.)

The facts relevant to this Motion have been recounted in detail in the December 29, 2009 Ruling on Defendants' Motion for Summary Judgment (Doc. 101) ("Summary Judgment Order"), familiarity with which is assumed. With their Motion, Plaintiffs have submitted a photograph depicting the scene of Joseph Fortunati's shooting, shown to Defendant Jeremy Hill during his deposition testimony on March 23, 2009, and bearing Hill's marks

indicating where he believed Joseph Fortunati and various troopers were standing at the time of Joseph's death. (Doc. 172-1.) Plaintiffs argue the photograph markings indicate Hill had a clear view of Joseph Fortunati at the time of the shooting. The markings indicate there were four troopers standing between Hill and Joseph Fortunati, and two of them were directly in front of Hill. (Id.) The photograph was not included in the original summary judgment filings.

Plaintiffs argue their Motion is made under Federal Rule of Civil Procedure 54(b), which provides that an order or decision adjudicating fewer than all the claims in an action does not end the action and may be revised at any time before entry of judgment. Fed. R. Civ. P. 54(b). Defendants argue the Motion is untimely. Local Rule 7(c) provides that a motion for reconsideration, other than one made under Rules 59 or 60, must be filed within 14 days of the date of an order. D. Vt. L.R. 7(c). A Rule 59 motion must be filed within 28 days of an order. Fed. R. Civ. P. 59.

Even if Plaintiffs' Motion were made under the authority of Rule 60, which permits relief from a final order when a motion articulates a reason justifying relief, and even if the Motion were deemed filed within a reasonable time after the Summary Judgment Order, the Plaintiffs' arguments fail on the merits.

The Court, having carefully reviewed the entirety of Jeremy Hill's deposition testimony and the photograph submitted by Plaintiffs, finds that the photograph does not create any genuine issue of material fact regarding whether Joseph Fortunati had a gun in his hand at the moment he was killed. The photograph does not contradict, but rather supports, Hill's deposition testimony that he was standing behind several other troopers moments before and immediately before Joseph's death, that he could only see Joseph, who was standing behind trees, "periodically," he "couldn't see his whole body," and he could only see "parts of" Joseph at the moment of his death. (Doc. 172-2, Hill Dep. Test. at 72, 77.) Furthermore, Hill's testimony confirmed that he reported having observed Joseph "reaching for something in his waistband area" after a beanbag round went off, prior to the shooting. (Id. at 76-77.) The photograph does not call any of Hill's testimony into question, and does not contradict that Hill lacked a clear view of what was happening, or that Hill could not recall whether he could see Joseph's hands from where he was located. (Id. at 78.)

Therefore, Plaintiffs' Motion to Revise the Summary Judgment Order (Doc. 172) is DENIED. Plaintiffs' Motion for Ruling on Pending Motions and for Final Judgment (Doc. 175) is DENIED as moot.

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 29th
day of March, 2011.

/s/ J. Garvan Murtha
Honorable J. Garvan Murtha
Senior United States District Judge