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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable William A. McKinnon, Circuit Court Judge

Civil Action No. 2022CP4600161

MorningStar Fellowship Church,		Appellant
	V.	
York County, South Carolina,		Respondent

MEMORANDUM IN SUPPORT OF IMMEDIATE APPEALABILITY OF THE CIRCUIT'S ORDER ANNOUNCED ON MAY 20, 2022, AND ENTERED ON MAY 31, 2022

June 24, 2022

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MEMORANDUM IN SUPPORT OF IMMEDIATE APPEALABILITY OF THE CIRCUIT'S ORDER ANNOUNCED ON MAY 20, 2022, AND ENTERED ON MAY 31, 2022

INTRODUCTION

This memorandum is being submitted in direct response to the Clerk's letter of June 14, 2022, requesting a legal memorandum on the issue of immediate availability, due within 10 days of the date of the letter.

As will be shown below, this case is immediately appealable by the Circuit Court's denial of multiple hearings to the appellant, MorningStar Fellowship Church, namely by (1) denying MorningStar the right to a hearing in opposition to York County's Motion to Restore, and then (2) denying MorningStar a hearing on its Motion for Sanctions based upon inaccurate representations made by the York County Attorney, Mr. Kendree, in the County's initial Motion to Restore, filed August 30, 2021.

By denying even the right to have those hearings on contested matters, the Circuit Court's Order violated the appellants' constitutional rights to procedural due process, as guaranteed in both the United States Constitution and the South Carolina Constitution. These are "substantial rights," having been denied, as that is referred to in Section 14-3-330 of the South Carolina Code, Annotated, which statutorily controls the right of immediate appeal.

Thus the Circuit Court's Order of May 31, 2022, violated MorningStar's substantial rights by refusing to grant hearings on such motions, effectively depriving MorningStar of a substantial opportunity to raise defenses to end the litigation, and depriving it of an opportunity to place evidence on the record for subsequent appellate review.

More specifically, the Honorable Circuit Court, in its Order of May 31, 2022, by denying even a basic right to a hearing on the Motion to Restore, and by denying even the basic right to hearing on its Motion for Sanctions, has violated MorningStar's substantive, constitutional, and legal rights on multiple fronts, including (1) the due process right to a hearing under the Fourteenth Amendment to the United States Constitution, (2) the due process right to a hearing under Article I Section 3 of the South Carolina Constitution, (3) the right to due process for purposes of judicial review under Article I Section 22 of the South Carolina Constitution, (4) the right to a *remedy* therein for wrongs sustained under Article I Section 9 of the South Carolina Constitution, (5) the right to a hearing as set forth in Rule 7(b) of the South Carolina Rules of Civil Procedure, which requires hearings on all motions filed generally, (6) the right to a hearing as set forth in Rule 40(j) of the South Carolina Rules of Civil Procedure, which requires hearings, specifically, on motions filed under that rule.

Moreover, Article I Section 23 of the South Carolina Constitution, makes compliance with South Carolina's Constitution mandatory.

That section of the Constitution of South Carolina is set forth as follows:

> The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms.

Due Process under the South Carolina Constitution is mandatory. There are no exceptions.

Thus, by denying MorningStar a hearing on the matters as raised herein, the Circuit Court's order has violated not only Article 1, Section 3 of the South Carolina Constitution but also Article 1, Section 23 of the Constitution, which mandates that due process be given to all citizens of this state.

FACTS

The relevant case history, for purposes of this appeal, is as follows:

1. Litigation initially began between the parties on January 24, 2013, when MorningStar (appellant) filed an action for declaratory judgment and breach of contract against York County over a Development Agreement that had been entered into between MorningStar and York County on January 13, 2008, and which expired by operation of law and under its own terms on January 12, 2013. That action was assigned case number 2013 CP 4600 246.
2. York County counterclaimed on March 25, 2013, also seeking action for Declaratory Judgment, Breach-Of-Contract, Nuisance, and Equitable Accounting.
3. After seven long years of litigation in multiple venues, counsel for MorningStar, alongside former York County litigation counsel, Mr. Keith Martens, with the apparent approval of the Honorable York County Attorney, negotiated a dismissal of the underlying action. From those negotiations, on August 31, 2020, the parties filed a joint stipulation striking the case from the docket, essentially dismissing it, under Rule 40 (j) of the South Carolina Rules of Civil Procedure. (hereinafter “SCRCP.” All Rules referenced hereinafter are applicable rules under the SCRCP, primarily referring to Rules 7, 11, 40(j), and 60 of the SCRCP.) MorningStar also dismissed two other state FOIA actions that were pending in

State Court at the time, and one action pending in the United States District Court for the District of South Carolina, all of which had been brought against either York County or its former County Chair, the Hon. Michael Johnson.

4. Soon after the dismissal of the action on August 31, 2020, MorningStar set out to begin work to complete the Heritage Tower project, which had been at the heart of the initial litigation. MorningStar engaged a primary architect to compile architectural studies, drawings, and submittable plans. MorningStar re-engaged its structural engineering company to assess updates and produce necessary architectural drawings for submittable plans. MorningStar appointed lead accountants in its feasibility study to address business plans and market acceptance. MorningStar retained an internal construction consultant to develop bid packages, manage communication, and consult concerning the selection and deployment of construction.

5. MorningStar arranged site visits, contract development, and bid-processing documents with 60 sub-contractors and four general contractors. MorningStar reviewed background information, feasibility, and bid packages, resulting in the selection of a general contractor, resulting in further expenses.

6. Among other things, MorningStar sought and received approval from the South Carolina Joint Economic Development Authority (JEDA) to begin a 75 million dollar bond project, to complete the interior of the Tower project, and to ensure that it may comply with any updated interior code changes, as may be necessary.[1]

[1] As a point of clarification, the exterior of the Heritage Tower was completed years ago and remains standing. The interior is partially complete, but is largely incomplete. The bonding project was set for an amount to complete the entire project, which once completed, will be used for lower-cost elderly housing.

7. Also, as a follow-up to the joint stipulation, MorningStar incurred other significant expenses, including, but not limited to, engagement of bond counsel to oversee and manage legal matters concerning the bond project, engagement of a major underwriting firm to oversee the bond campaign, and incurred other considerable expenses during the one year between August 31, 2020, and August 30, 2021, including but not limited to architectural fees, engineering fees, project management fees, attorneys fees, accounting charges, and significant administrative and clerical charges

8. MorningStar was able to take these restorative actions for the first time in over seven years because there was no longer any litigation pending regarding the Heritage Tower, because of the Joint stipulation essentially dismissing the action filed on August 31, 2020. Unfortunately, on August 30, 2021, without contacting, without reaching out to, or attempting to work out any disagreements with MorningStar, and without consulting with MorningStar as required by SCRCP Rule 11, the York County Attorney, the Hon. Michael Kendree, filed an unexpected, and previously unannounced Motion to Restore the litigation to the docket, under Rule 40, (j) of the South Carolina Rules of Civil Procedure.

9. The restoration of the matter to the docket, as would have been shown had a hearing been allowed, materially damaged MorningStar, because the very presence of the resurrected litigation effectively stopped dead in its tracks the 75 million dollar bond project that was about to commence to complete the restoration of the tower.

10. Then, without any type of prior consultation or without making any attempt to alert MorningStar or its counsel, the County Attorney, on August 30, 2021, the 365th day after the filing of the joint stipulation under Rule 40 (j), filed a Motion to Restore the matter to the docket, inviting further litigation.

11. In the Motion, unfortunately, the County Attorney attested to a materially inaccurate statement in justifying his reason for having failed to consult with MorningStar's attorney before filing, as acquired by Rule 11 of the South Carolina Rules of Civil Procedure, by claiming that "the Stipulation Pursuant to Rule 40(j) filed herein *permits claims or counterclaims to be restored* upon motion made within one year of the filing of th[e] stipulation." (Emphasis added).

12. It remains unclear and puzzling as to why the County Attorney would make such an inaccurate statement as the basis for his Motion because the Rule 40(j) stipulation, filed a year earlier in no way, shape, or form, contains any language permitting either the claims or the counter claims to be restored, as the County Attorney inaccurately represented.[2]

13. Rather, the initial stipulation filed under Rule 40(j) tracks the language of Rule 40(j) itself, in that "the statute of limitations shall be tolled as to any stricken claim or counterclaim, *provided such claim or counterclaim is restored* upon Motion made within one year of the filing of this stipulation."

14. The stipulation filed on August 31, 2021, does not state or concede that a claim or counterclaim may be restored, as the County Attorney inaccurately stated or

[2] To this point, Rule 11 provides in relevant part that, "The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; *that to the best of his knowledge, information and belief there is good ground to support it*; and that it is not interposed for delay." With respect, it is impossible for The Honorable County attorney to have complied with this portion of the rule, when the representation made in the initial Motion To Restore, insinuating that the parties agreed that claims and counterclaims could be restored, is flat-out inaccurate.

represented in his Motion to Restore, but only that the statute of limitations shall be tolled *provided that* the action is restored.

15. The phrase used in the stipulation, "*provided that* the action is restored," is a contingency, subject to the court's approval, which speaks only to the issue of tolling the statute of limitations for the one-year period between August 31, 2020, and August 31, 2021.

16. A quick review of the Cambridge English dictionary reveals that the phrase "provided that" means "if" or "only if." [3]

17. In other words, "if" or "only if" the matter is restored to the docket, the 1-year interval, under the stipulation, cannot be used against the movant for calculating any potential statute of limitations defense.

18. That plain language within the stipulation, however, tracking the plain language of Rule 40(j), is a far cry from the inaccurate representation placed upon the Motion to Restore by the County Attorney, which was cited as his reasoning for failing to consult with opposing counsel before filing the Motion.

19. To the County Attorney's credit, however, at least he realized there was a Rule 11 consultation requirement before filing, and was attempting to address that requirement, albeit by sharing a wholly inaccurate representation as his reasoning for having failed to consult with opposing counsel, before filing the Motion, as Rule 11 requires.

20. Initially relying upon the County Attorney's wholly inaccurate representation at the heart of his Motion to Restore, and without giving MorningStar an opportunity for

[3] See Cambridge English Dictionary online, for the definition of "provided that." **https://dictionary.cambridge.org/dictionary/english/provided-that**

hearing, and without even reaching out to determine MorningStar's position on the matter (to determine whether MorningStar agreed with or opposed the Motion), the Circuit Court signed an Order, drafted by the County Attorney, at the Circuit Court's request, restoring the matter of the docket.

21. The Order initially restoring the matter to the docket, filed on January 19, 2022, *also contained material inaccuracies in its finding*, which, upon information and belief, was drafted by the County Attorney at the Circuit Court's request. (Emphasis added).

22. Specifically, the Court's Order to Restore found that "the parties agreed that any claim or counterclaim could be restored upon Motion if made within one year," which is a materially inaccurate finding.

23. As the record incontrovertibly shows, there was no such agreement, as referenced in the Court's Order, and there never has been such an agreement between MorningStar and York County that the claim could be "restored upon motion if made within one year."

24. The Circuit Court, thus, constructed this inaccurate finding as justification for its improperly-granted Order to Restore, with the finding being based upon the inaccurate representation in the Motion to Restore, and the inaccurate Order being drafted by the County Attorney, at the Court's request.[4]

25. MorningStar then responded, by filing Motions, under Rules 11 and 60 (b) of the South Carolina Rules of Civil Procedure, "for an Order Granting Sanctions, for an

[4] To the best of our recollection, during the hearing of May 20th, 2022, litigation counsel for York County, indicated to the court that the court had requested the County Attorney draft the language on the order which was signed restoring the matter to the docket. This is corroborated at page two, Paragraph 2, of the Court's order denying MorningStar's Motion to Strike and Motion for Sanctions.

Order to Strike the County's Pleadings in this case, for an Order Dismissing the Underlying Lawsuit with Prejudice (as a result of the Rule 11 violation[5]), and for an Order Setting Aside the previously filed Order Restoring this matter to his docket.

26. The Circuit Court set a video/telephonic hearing for May 20, 2022. The scope of the video/telephonic hearing was primarily to argue that the initial Order restoring this matter to the docket should be stricken because no hearing was initially allowed, as required by Rule 40(j), and whether the matter should have been restored, to begin with. That hearing of May 20, 2022, was not a hearing on the merits under Rule 40(j), nor was it a hearing on the merits of the Appellant's Rule 11 Motion -- as the Circuit Court erroneously concluded in its Order, and as a transcript will also show, that the Appellant, MorningStar, was not even entitled to a hearing on either the Rule 40(j) or the Rule 11 Motion.

27. But as the transcript will fully show, and, as indeed, the Circuit's Court's Order on the Motion to Set Aside under Rule 60 (b) will partially show, the majority of that hearing of May 20, 2022, and indeed the centrality of the Court's findings, centered around the Court's belief that MorningStar was never entitled to a hearing to begin with, under Rule 40 (j), because the Motion to Restore was filed within 365 days (in this case on day 365).

[5] To be clear, the principal remedy sought for the Rule 11 violation calls for the Court to strike a strike the pleading with prejudice, with striking the pleading being mandatory under Rule, which provides in relevant part, "If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. To be equally clear, no rule 11 violations are being alleged whatsoever concerning any of the actions taken by York County's current litigation counsel of record, Mr. Autry, or against York County's former litigation counsel of record, Mr. Martens. The Rule 11 violation is alleged solely about the pleading filed by the York County Attorney, the Honorable Michael Kendree.

28. Of course, Rule 40(j) in no way states that a hearing is only allowable if the Motion to Restore is filed outside of the 365-day after the dismissal, or that no hearing is allowable if the Motion to Restore is filed inside that time frame.

29. The Circuit Court, in its findings denying MorningStar's Rule 60 Motion, inserted additional Provisions to Rule 40 (j) that simply are not present in the Rule, and they have not been set forth under South Carolina case law, in coming to its conclusion that MorningStar was not even entitled to an initial hearing on the matter.

30. This legally-erroneous conclusion by the Circuit Court is found in Finding Number 1 (Circuit Court Order filed May 31, 2022), which provides, in relevant part, that: "MorningStar has no grounds for contesting the restoration of this matter to the active docket because York County's Motion to Restore was timely filed within one year of the date the Stipulation was filed. Therefore, the restoration of the case to the active docket is automatic pursuant to the Stipulation and Rule 40(j) SCRCP, and *no hearing was required prior to restoration*." Thus, the Circuit Court invented something which we refer to herein as the "automatic restoration rule," which simply is in no way, shape, or form, articulated in Rule 40(j).

31. As will be shown, however, a hearing on the Motion to Restore was required, despite the Circuit Court's legally erroneous interpretation of Rule 40(j), Rule 40(j) *does not provide for automatic restoration if a motion is filed within 365 days*,[6] thus depriving the appellant of its constitutionally-guaranteed right to a

[6] SCRCP 40(j) stands in stark contrast to certain procedural rules in other states, *which do provide for automatic restoration to the docket for notices to restore if filed within one year*. Take, for example, Rule 41 (a)(1) of the North Carolina Rules of Civil Procedure, which provides, in relevant part, that "If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

hearing, and the Circuit /Court has denied MorningStar of its due process rights to raise substantial defenses which may have prevented the restoration of this litigation altogether. Based on the Circuit Court's Order as it stands, because no evidence can be proffered on any of the issues raised under Rule 40(j) and Rule 11, the issues cannot now be raised and be subject to appellate review, unless the Circuit Court is ordered to provide MorningStar a hearing on the matter, to lay out its case on crucial matters concerning its defense.

32. The Circuit Court then piggybacked upon this erroneous "automatic restoration" ruling concerning Rule 40(j), to conclude that there was no consultation requirement under Rule 11,[7] and thus, substantially deprived MorningStar of an opportunity for a hearing on that matter as well, once again depriving MorningStar of its constitutionally protected right to due process, that is the right to a hearing.

ARGUMENT

REFUSAL TO ALLOW EVEN A BASIC SUBSTANTIVE HEARING ON MATTERS WHERE HEARINGS ARE REQUIRED UNDER THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE, CONSTITUTES A VIOLATION OF THE CONSTITUTIONAL RIGHT TO DUE PROCESS AND CONSTITUTES A VIOLATION OF A SUBSTANTIAL RIGHT AS SET FORTH IN SECTION 14-3-330 OF THE SOUTH CAROLINA CODE, ANNOTATED

However, no such automatic restoration language is found under Rule 40(j). That's because there is no automatic right to restore, as the Circuit Court believes to be the case.

[7] Even the County Attorney recognized the need for consultation under Rule 11, but put forth an inaccurate factual allegation to his claim that there would be " no useful purpose."

The United States Constitution provides, in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.” S.C. Const. art. I, § 22. *Caldwell v. Wiquist,* 402 S.C. 565, 741 S.E.2d 583 (S.C. App. 2013).

The *Caldwell* case, which is referred to immediately above, cites Article 1, Section 22 of South Carolina's Constitution, which provides for the right of due process, specifically, in cases before administrative agencies in South Carolina, and also sets forth the right to due process for purposes of judicial review.

But even before that, Article I, Section 3 of the South Carolina Constitution, guarantees due process in each case. Moreover, Article I, Section 9 of the South Carolina Constitution, states that “All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.”

In this case, by denying even the basic opportunity for hearings to which it is entitled, the Circuit Court has denied the Appellant, MorningStar, not only its right to due process but also has denied it the opportunity for a speedy remedy, as guaranteed by the South Carolina Constitution.

And beyond even that, that is, beyond even the constitutionally-protected right to a *speedy* remedy, the Circuit Court has denied MorningStar the opportunity to seek *any remedy at all* for the wrongs it sustained, as alleged under the Motions filed, namely, the harm caused by the County’s improperly filed Motion to Restore under Rule 40(j), and the harm caused by the County Attorney's improper violation of Rule 11.

THE BEDROCK PRINCIPLE OF DUE PROCESS:

THE OPPORTUNITY TO BE HEARD

It is a bedrock principle of American constitutional law that the two cornerstones of procedural due process are (1) notice, and (2) the opportunity to be heard.

"'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.' *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995)..." *South Carolina Department of Social Services v. Bertaud-Cabrera* (S.C. App. 2014)

The United States Supreme Court has said that in fulfilling the second cornerstone of procedural due process, which is the opportunity to be heard, a party should at least be given the opportunity to at least try and present evidence, and have a judicial authority to consider that evidence is paramount.

Consider the Supreme Court's direction in the landmark case of *Morgan, et al., v. United States*, 304 U.S. 1 (1938).

> We held its ruling[8] to be erroneous and that the question whether the plaintiffs had a proper hearing should be determined, saying:
>
> > 'But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.'
>
> *Morgan,* 304 U.S. 1, 29.

As our South Carolina Supreme Court has held, '[t]he fundamental requirements of due process include notice, *an opportunity to be heard* in a meaningful way, and

[8] Referring to the United States District Court opinion in the case of bar then before The Supreme Court.

judicial review.' Kurschner v. City of Camden Planning Comm'n , 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)." McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 823 S.E.2d 193 (S.C. App. 2018)

In this case, no such hearing was ever granted to MorningStar in any substantial sense, either before the Court ordered the matter restored to the docket, under Rule 40(j), or on its subsequent Motions to Set Aside the Order, or for Sanctions, under Rule 11, which, if granted as it should have been, would have mandated striking the Motion to Restore. There was no opportunity to be heard in a meaningful way. Beyond that, the Court's Order of May 31, 2021, denying a hearing, if it stands, would cut off any opportunity for judicial review, because no evidence could be put on the record for any subsequent judicial review by this court, or by the South Carolina Supreme Court.

Instead, the Circuit Court summarily granted York County's Motion to Restore, first, without setting a hearing, based upon factually inaccurate representations by the County Attorney in the Motion to Restore, filed August 30, 2021.

When MorningStar made a Motion to Strike the Order to Restore and/or set it aside because no hearing had been granted, the Circuit Court could have and should have stricken the Order to Restore, and then set the matter on, afresh for a hearing, to allow MorningStar to prevent whatever evidence it had, and make whatever arguments of thought appropriate, to oppose the Motion. Yet, the court did not do so.

THE COURT ORDER DENYING A HEARING VIOLATES MORNINGSTAR'S "SUBSTANTIAL RIGHTS."

While we are sensitive to the general rule of prohibiting piecemeal appeals from discretionary rulings by trial judges, and fully understand that most orders may not be

immediately appealable, at the same time, orders and rulings that violate an appellant's substantial rights, in other words, that violate a right under the United States Constitution or of Constitution of the State of South Carolina, and which stifle a party's opportunity to preserve an evidentiary record for subsequent appellate review, are immediately appealable. As will be seen, that is the case in this instance, and this court should allow an immediate review of this matter.

The immediate appeal is appropriate here both statutorily and constitutionally.

We begin by examining the statutory basis under South Carolina law for the immediacy of the appeal.

We first respectfully invite the Honorable Court's consideration of Section 14-3-330 (2) of the South Carolina Code, Annotated, which provides, in relevant part, as follows:

> (2) An Order *affecting a substantial righ*t made in action when such Order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

Our appellate courts have generally interpreted the definition of a "substantial right " under that provision of the statute, and even before the passage of the statute, as meaning fundamental and unalienable rights under the United States Constitution.

As the South Carolina Supreme Court said in *Southern Cotton Oil Co v. Schafer Co*, 138 S.E. 882 (S.C. 1927), “When a constitutional or some substantial right of a party is directly affected, rules of evidence, made to safeguard that right, should be followed strictly." *Southern Cotton Oil Co v. Schafer Co*, 138 S.E. 882 (S.C. 1927).

More recently, in *Hagood v Sommerville* 362 SC 191 607 SE2d 707 SC 2005, the South Carolina Supreme Court held that an Order disqualifying a party's counsel of choice, in a civil case, affected a substantial right of the party is immediately appealable.

In *Green v. City of Columbia,* 311 S.C. 78, 427 S.E.2d 685 (S.C. App. 1993), a case arising out of the South Carolina Workers Compensation Commission, this Court suggested that a Circuit Court Order denying a party's constitutional right to due process is immediately appealable. As this court stated in that case, which held that the underlying matter was immediately appealable, “Due process requires that litigants receive notice of the issues to be met on trial, hearing or appeal.” In *Green*, citing *Henderson v. Wyat*t, this court also stated, "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case. *Henderson v. Wyatt*, 8 S.C. 112 (1877).

BY DENYING EVEN A RIGHT TO A HEARING TO MORNINGSTAR, THE CIRCUIT COURT DENIED MORNINGSTAR THE RIGHT TO RAISE DEFENSES AGAINST THE MOTION TO RESTORE.

Likewise, by denying even a right to a hearing to MorningStar, the Circuit Court denied MorningStar the right to raise defenses against the Motion to Restore.

Estoppel, Statute of Limitations, and Failure to Consult before filing as required by Rule 11 are among the potential substantive defenses that would have been raised at a hearing in opposition to the Motion to Restore.

The defense of estoppel, especially as a potential defense against restoring the lawsuit, is arguably lost forever as a result of the Circuit Court’s failure to Grant

MorningStar a substantive hearing. And, as we have previously argued, the Circuit Court's declining to hear the matter prevents MorningStar from being able to place any evidence on the record for potential appeal in the future, evidence which should prevent York County from resurrecting its lawsuit under Rule 40(j). This, in and of itself is a due process violation and deprivation of a substantial right to MorningStar.

And likewise, because of the Circuit Court's Order of summarily denying any hearing, there was no opportunity to present evidence, at all, or to make any substantial argument, on whether the County Attorney violated Rule 11 in his last-second filing on the Motion to Restore, which, if violated, would have mandated the Motion be stricken under the plain language of Rule 11. [9]

The Circuit Court's interpretation of Rule 40 (j) inserts criteria and conditions (an "automatic 365-day restoration rule") that simply are not spelled out at all in the Rule, namely, the trial Court's belief that there is some sort of automatic reinstatement provision if the Motion to Restore is filed within in 365 days of Rule 40(j) dismissal.

But there is no "automatic 365-day restoration rule" under Rule 40 (j).

The Rule simply does not state that. The General Assembly had every opportunity, in drafting Rule 40(j), to make that reinstatement automatic if the motion were filed within 365 days, but it did not.

CASES ADDRESSING RULE 40 (j)

South Carolina appellate courts have considered several cases on the merits under Rule 40(j). See, e.g. *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (S.C. 2003)(where the SC Supreme Court, at fn 2, calls a 40(j) action it a "dismissal"),

[9] Rule 11(a) provides, in relevant part, that "If a pleading, motion or other paper is not signed or *does not comply with this Rule*, *it shall be stricken* unless it is signed promptly after the omission is called to the attention of the pleader or movant."

Goodwin v Landquest Dev LLC, 414 SC 623 779 SE2d 826 (SC App 2015) (concluding, in part, that a Rule 40(j) filing as the "equivalent" of a "dismissal"), and *Pers. Care, Inc. v. Theos,* 825 S.E.2d 281 (S.C. App. 2019) (showing that a court may consider the statute of limitations issues before considering a Motion to Restore).

Three points should be made about these cases.

1. <u>The cases show the hearings are mandated under Rule 40, (j)</u>. One, each case shows that a hearing is mandated under a Rule 40(j) Motion if the Motion to Restore is contested. All three arose to the appellate courts from Circuit Court hearings that were appealed, for one reason or another, stemming from hearings on contested motions to reinstate under Rule 40 (j).

2. <u>There is no automatic 365-day reinstatement rule</u>. Two, none of the three cases set forth articulated any sort of "automatic 365-day reinstatement rule" that the Honorable Circuit Court seeks to add to the language of Rule 40 (j) by the Order now under appeal. This, of course, would solely be the function of the legislature -- to add such a provision to the rule.

3. <u>The statute of limitations is an appropriate defense against a 40(j) reinstatement</u>. Above and beyond those two points, in the third case cited, *Pers. Care, Inc. v. Theos*, this court indicated that the statute of limitations can be raised as a defense opposing a Motion to Restore under Rule 40 (j).

Likewise, in this case, as in *Pers. Care, Inc. v. Theos,* the statute of limitations would be one of several defenses that MorningStar would raise against reinstatement had it been allowed to contest the Motion to Restore on the merits. But because of the Circuit Court's erroneous "automatic 365-day reinstatement rule," MorningStar could not

meaningfully reach the statute of limitations argument or any other argument In opposition to the Motion to Restore.

Rule 40(j) is a Statute of Limitations Tolling Rule.

It is not an "Automatic Restoration Rule"

With the greatest respect to the Honorable Circuit Court, the Circuit Court has by this Order missed the thrust of Rule 40 (j). In fact, and by its plain language, Rule 40(j) is a Statute of Limitations Tolling Rule. It is not an "Automatic Restoration Rule" which would automatically deprive parties opposing reinstatement even a hearing on the matter.

THE RULE 40 (j) STIPULATION WAS A DISMISSAL OF THE ACTION

We argued, and continue to argue, that the only effect of Rule 40(j) is to toll the statute of limitations if the Motion is filed within 365 days, only *if the motion is granted*. But the language in the Rule does not in any way, shape, or form, make reinstatement "automatic."

Tracking the language of *Maxwell v. Gentez* (cited above) and *Goodwin v Landquest Dev LLC* (also cited above), a stipulation striking the matter from a trial docket is the functional equivalent of a "dismissal" in South Carolina.

A case that has been dismissed, is a case that has ended.

York County attempts to now resurrect the case, by first filing a factually inaccurate Motion to Restore (in violation of Rule 11 -- for which no hearing has been allowed because of the Circuit Court's "automatic restoration rule"), and then by submitting a factually inaccurate proposed order for the Circuit Court to sign, which the Circuit Court, unfortunately, did in fact sign. These actions mark the beginning of a

renewed attempt by York County to deprive MorningStar of its property rights and even its religious rights, seeking the unlawful demolition of the Heritage Tower.

RULE 40(j) STANDS IN STARK CONTRAST AGAINST OTHER STATE RULES WHICH DO ALLOW AUTOMATIC RESTORATION.

As we have pointed out below, SCRCP 40(j) stands in stark contrast to certain procedural rules in other states, which do, in fact, provide for automatic restoration to the docket for notices to restore if filed within one year.

Take, for example, Rule 41 (a)(1) of the North Carolina Rules of Civil Procedure, which provides, in relevant part, that “If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, *a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under* (ii) of this subsection shall specify a shorter time.

However, in stark contrast, no such automatic restoration language is found under Rule 40(j) of the South Carolina Rules of Civil Procedure. That’s because there is no automatic right to restore, as the Circuit Court believes to be the case.

THE COURT IMPROPERLY USED ITS ERRONEOUS “AUTOMATIC REINSTATEMENT RULE” AS AN EXCUSE TO DENY A HEARING ON THE HONORABLE COUNTY ATTORNEY'S VIOLATION OF RULE 11.

But the court not only denied MorningStar;s right to a hearing under Rule 40 (j), but it also denied MorningStar’s right to a hearing under Rule 11 seeing sanctions.

In denying MorningStar’s right to a hearing under Rule 11, The Circuit Court essentially piggybacked upon its erroneous “automatic reinstatement rule.” This is

apparent at Paragraph 2 of the Court's Order of May 31st, which provides, “Since the restoration of this matter to the active docket is automatic, counsel for York County, *Mr. Kendree, had no duty under Rule 11 SCRCP to consult* with counsel for Morningstar before filing the Motion to Restore, because consultation would have served no useful purpose. [10]

So there was no opportunity to place any subjective evidence into the record, or to argue, substantially, that the County Attorney had violated Rule 11 in his last-minute Motion to Restore, when a Rule 11 violation would mandate that any pleading filed in violation of it must be stricken, without discretion. The County Attorney is exonerated on the Motion for his Rule 11 violations, under the reasoning of the Circuit Court’s “automatic restoration rule,” with the court concluding, without any legal basis, that there was no requirement to consult under Rule 11, because restoration was automatic anyway.

Even if there were no duty to consult before filing - and there was such a duty - there remains a duty under Rule 11 to file a factually accurate pleading, and not to file a pleading that inaccurately suggests, in a material manner, that MorningStar had somehow agreed to automatic restoration of the matter to the docket. Thus, Rule 11 was violated on at least two levels by the Honorable County Attorney, we should have mandated the Motion to Restore be immediately stricken under the non-discretionary language of the rule. But by denying even a hearing, the Circuit Court did not give MorningStar its right to even pursue dismissal on that theory.

As cited by this court, and quoting the South Carolina Supreme Court in

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[10] ELECTRONICALLY FILED - 2022 May 31 2:06 PM - YORK - COMMON PLEAS - CASE#2022CP4600161 Page 3 of 3

State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003), "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."...

State v. West, Opinion No. 2010-UP-283 (S.C. App. 5/20/2010) (S.C. App. 2010).

That simply cannot happen, that is, there can be no preservation for appellate review, when the Circuit Court, as in the case at bar, simply denies MorningStar the right to multiple hearings (on Rule 40(j) and Rule 11).

Moreover, the South Carolina Supreme Court has stated that a hearing must be sufficient to satisfy due process requirements. "The review undertaken by the Board of Appellant's non-renewal hearing was insufficient to satisfy the due process requirements of our constitution … ..." *Young v. Charleston Cnty. Sch. Dist.,* 397 S.C. 303, 725 S.E.2d 107, 279 Ed. Law Rep. 477 (S.C. 2012).

It is impossible to have a hearing sufficient to satisfy due process requirements when there is no hearing allowed at all, as is the case here. It is impossible to preserve a matter for appellate review, when the trial judge will not have a hearing on the matter, or not rule upon the matter. That is exactly what has happened in this case when the Circuit Court denied MorningStar its right to a hearing.

By its incorrect interpretation of the law, namely by incorrectly interpreting both Rules for 40(j) and Rule 11 to conclude that no hearings were required under either rule, the Circuit Court deprived MorningStar of an opportunity to raise matters that affect, potentially, the merits of the entire litigation. This in some ways resembles the errors committed by the trial court in *Green v. City of Columbia,* 311 S.C. 78, 427 S.E.2d 685

(S.C. App. 1993), where this court stated, “An Order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case.” 427 S.E.2d at 687.

In this case, evidence on whether litigation should have been restored, to begin with, is a substantial matter in the defense of MorningStar’s case, and by refusing to even hold a hearing, thus depriving MorningStar's right to due process, the Circuit Court banished MorningStar from being able to present evidence at a hearing on the matter, or to make the argument altogether.

Moreover, the Circuit Court refused, despite MorningStar’s arguments, to hear or consider evidence on MorningStar’s statute of limitations defense, which would have been raised in a hearing on MorningStar’s opposition to reinstate the matter to the docket. Even if the County were able buy itself an extra year, for defending against a statute of limitations claim,, which is the sole purpose of filing within 365 days under Rule 40(j) -- MorningStar was nonetheless entitled to argue the statute of limitations as one of his reasons for not restoring the lawsuit.

SC RULES OF CIVIL PROCEDURE REPEATEDLY SHOW THAT A HEARING SHOULD HAVE BEEN ALLOWED.

Several provisions of the South Carolina Rules of Civil Procedure make it clear that a hearing should have been allowed both on the Motion to Restore and in the Motion for Sanctions. The relevant sections of the rules which underscore the right to a hearing are Rules 7 (b), Rule 40 (J), and Rule 11.

SCRCP RULE 7(b), REQUIRES A WRITTEN NOTICE OF *HEARING* FOR EACH AND EVERY WRITTEN MOTION NOT RAISED IN OPEN COURT.

The basic rule outlined in SCRCP Rule 7(b), which requires a written notice of *hearing* for every written motion not raised in open court. Relevant language underscoring this point is found below:

> (b) Motions and Other Papers. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a *written notice of the hearing* of the motion.

Thus, not only is there a requirement of a hearing, when a motion is filed, but there is a requirement for a *written notice of hearing* upon the motion itself. Neither Rule 7 (b), nor any other rule under the South Carolina Rules of Civil Procedure provides for an exception to this. When written motions are filed, there is no exception exempting this requirement on a Motion to Restore, as is the case in this instance. This notice of a *hearing* must be given for every motion filed, which includes a Motion to Restore under Rule 40(j).

Logic dictates that if a notice a hearing must be filed, then a hearing must follow. Hearings are required under Rule 7(b) because hearings are a basic cornerstone of our constitutional right to due process. The right to a hearing is axiomatic, and courts cannot, without running afoul of the Due Process Clause, simply declare that hearings are not allowed, as the Circuit Court did in this case, and under its Order.

The County's Motion to Restore, filed August 30, 2021, acknowledges this plain requirement, acknowledging the hearing requirement under Rule 40 (j), by stating that. “YOU WILL PLEASE TAKE NOTICE that the Defendant York County, South Carolina, at a date and time to be set by the Court, will move pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure for an Order restoring the above-captioned case to the active roster.”

The County's initial Motion to Restore, while not complying with Rule 11 on other grounds, technically complies with Rule 7’s requirement of providing a notice of hearing. Thus, even the County understood the basic requirements of Rule 7, that MorningStar was at least entitled to a hearing on the matter. So the County’s own Motion to Restore in effect acknowledges the requirement for a hearing on a Motion to Restore under Rule 40 (j).

THE PLAIN LANGUAGE OF SCRCP RULE 40 (j) ITSELF MAKES IT CLEAR THAT A HEARING IS REQUIRED, AND THE RIGHT TO SUCH A HEARING IS UNQUALIFIED UNDER THE RULE.

Moreover, the plain language of Rule 40 (j) itself makes it clear that a hearing is required, and the right to such a hearing is unqualified under the rule.

Let's consider Rule 40 (j) in its totality, to show that restoration is not automatic, and to show that the rules require a hearing prior to restoration to the docket:

> (j) Case Stricken From Docket by Agreement. A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be

stricken, and all further agree that *if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken*, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide *all parties notice of the Motion to Restore at least 10 days before it is heard*. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

From the body of this rule, two points should be taken. First, is the clear conditional language showing that Restorations are not automatic, under any circumstances. The second is the clear language showing that a hearing is to be allowed before restoration to the docket.

(1) The conditional language -- *if* the claim is restored upon motion.

Conditional language is provided in the body of the rule, which states, in relevant part, *if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken.*

Notice the word "if."

"If," is a word of condition.

According to the online version of the internationally-acclaimed dictionary Merriam-Webster,[11] "if" as a conjunction means the following:

[11] https://www.merriam-webster.com/dictionary/if

Definition of *if* (Entry 1 of 2)

a: in the event that

b: allowing that

c: on the assumption that

d: on condition that

All these definitions are conditional.

Moreover, the definition of "if" as a noun is equally convincing that the word means "conditional."

1: CONDITION, STIPULATION

the question … depends on too many ifs to allow an answer

— Encounter

2 : SUPPOSITION

Thus, the language contained within the rule that " *if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken."* means "on the condition that" the claim is restored, or "on the supposition" that the claim is restored.

These are not the words of automatic restoration, as envisioned by the Circuit Court. These words envision a meaningful hearing, and a meaningful decision, by a Circuit Court Judge, after the Motion to Restore has been filed, but before an Order is entered either granting or denying the motion.

The rest of the language in that phrase indicates that the only benefit of having the case restored within one year, is that the statute of limitations for that period is not counted against the party seeking to restore the matter to the docket.

Therefore, the only stated benefit of having the matter restored if the motion is made within one year, is for limited statute of limitations protection. No automatic right to restore is presented in the rule, under any circumstances, under the Rule.

MorningStar concedes that *if,* after a pre-hearing under Rule 40(j), the matter were restored to the docket for a good cause, after a meaningful hearing on the matter, then the one-year period between August 31, 2020 (the date the matter was stricken from the docket) and August 30, 2021 (the date the County Attorney filed his Motion to Restore) could not be counted against York County for statute of limitations purposes. That does not mean that other periods could not be counted against York County for statute of limitations purposes, but only that one year could not be counted in the statute of limitations equation.

But given the clear language of the rule, that is the only benefit accrued to York County for having filed on day 365 after the original Rule 40 (j) dismissal - a statute of limitations tolling for one year, provided that the matter is eventually restored.

Although appellate case law is somewhat limited in South Carolina concerning Rule 40(j), perhaps because of language itself is so clear, case law shows not only that a hearing is appropriate, but also, that the sole benefit of Rule 40(j) to the party seeking to reinstate is a statute to limitations tolling should the matter be restored.

In *Maxwell v Genez*, 356 SC 617 (SC 2003), [12] where the South Carolina Supreme Court not only makes it clear that a Rule 40,(j) action is the equivalent of a dismissal of the case, the Court also makes it clear that the principal and sole thrust of

[12] Online Link to *Maxwell v. Genez*.
https://law.justia.com/cases/south-carolina/supreme-court/2003/25761.html

the rule is to provide statute of limitations protection for one year, if the matter is reinstated within one year, for the party seeking reinstatement.

> Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. *Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period. [1]* This conclusion is supported by the Notes to Rule 40 ("Rule 40(j) now requires all adverse parties to consent to the dismissal in writing**,** but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party." (Emphasis added).

Note the Supreme Court's correct interpretation of the "one-year" rule of Rule 40(j), showing that a Motion to Restore filed inside a year goes only to tolling the Statute of limitations for that one year. But more significantly, this is another case where a hearing was held under Rule 40 (j), undercutting the Circuit Court's conclusion that the constitutionally-guaranteed right to a hearing is somehow qualified, based upon the filing date on the Motion to Restore.

(2) Clear Language Showing that an Unqualified Right to a Hearing is to be Allowed Before Restoration to the Docket.

Moreover, the plain language of Rule 40 (j) also shows that the right to a hearing is unqualified.

Again, please allow us to revisit the relevant language of the rule to underscore_this point.

A party moving to restore a case stricken from the docket shall provide *all parties notice of the Motion to Restore at least 10 days before it is heard*.

Note what the language says, versus what it does not say.

The language does not say this: A party moving to restore a case stricken from the docket shall provide all parties notice of the Motion to Restore at least 10 days before it is heard, *provided that a hearing is necessary because the motion is filed beyond the 365-day mark after the matter is stricken.*

The General Assembly could have placed such a 365-day timeline within the language of the Rule. It chose not to do so.

Thus, there are no timeline qualifications within the rule qualifying the right to a hearing as a circuit court believes. There is no arbitrary 365-day line of demarcation under which a hearing can be had if filed on one side of the 365-day line, but with the hearing is not be granted a file on the other side of the 365-day line.

No, a hearing is required, if the opposing party desires it, in every instance where there is an attempt to restore a previously-dismissed case to the docket under Rule 40 (j). The Legislature did not set forth any such timeline,and MorningStar is entitled to a hearing, which the Circuit Court disallowed based upon its misinterpretation of the rule. THE PLAIN LANGUAGE OF SCRCP RULE 11, SHOWS THAT CONSULTATION IS MANDATED BEFORE FILING ANY RULE 40(J) MOTION, AND UNDERSCORES THAT OUR RIGHT TO A HEARING SHOULD HAVE BEEN GRANTED AND STILL SHOULD BE GRANTED.

As we have also filed a Motion for Sanctions because the Honorable County Attorney's violated Rule 11. Let us consider Rule 11's language showing that

consultation was required for all motions filed under Rule 40(j), which further underscores MorningStar’s right to a hearing on the matter.

Let us first examine Rule 11 (a), in the second paragraph, which contains language corroborating our argument that hearing is required, not only under Rule 40(j) but also under Rule 11 itself:

> All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held. There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants.

This paragraph contains two sentences relevant to MorningStar’s right to hearings that have been denied.

Let's begin our analysis with the second sentence first.

> There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants.

This is significant because of the exceptions for which no duty of consultation is required. Since this case does not originate in Family Court, the only emotions for which

no duty of consultation is required are (1) motions to dismiss, (2) for summary judgment, (3) for new trial, or (3) judgment NOV.

Thus, other than these four categories of motions specifically delineated in Rule 11(s), there is a duty of consultation for every other motion to be filed, which includes a Motion to Restore under Rule 40 (j).

We note that this sentence within the rule, in and of itself, cuts against the second finding in the Court's order denying our Motion to Strike, and/or Set Aside the original Order Restoring the matter to the docket, wherein the Court states.

> "Since the restoration of this matter to the active docket is automatic, counsel for York County, Mr. Kendree, *had no duty under Rule 11 SCRCP to consult with counsel* for MorningStar prior to filing the Motion to Restore, because consultation would have served no useful purpose. [13]

First, the Circuit Court believes that because restoration is "automatic," which of course we contest, the Circuit Court goes on to conclude that there is "no duty under Rule 11 SCRCP to consult." This, however, contradicts the plain language of Rule 11 (a), which mandates consultation for every motion, as set forth therein, except for the four motions specifically spelled out in the rule. Note again the very first sentence of Rule 11 (a), which required consultation on *all* motions, except the four already discussed:

> *All motions* filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion…

There is no exception from consultation under Rule 11, despite the Court's erroneous finding, which alleviates the County Attorney from the clear responsibility to

[13]

consult on a motion under Rule 40(j), regardless of when that motion was filed, either before or after the 365-day mark. That exception simply is not present, and with respect, the Circuit Court is incorrect in its analysis and its finding on this point.

We also note that the court concluded that consultation was not necessary because there was “no useful purpose.”

To this, there are three responses.

First, it appears the court believes that there was “no useful purpose,” because the Motion to Restore was filed on day 365, thus, making restoration to the docket “automatic.” So, the " no useful purpose” finding appears to be based upon the Circuit Court’s misinterpretation of Rule 40 (j), and its belief in the “automatic restoration” rule, although Rule 40 (j) makes no distinction for cases filed before or after the 365 mark, except for in calculating statute of limitations issues.

Secondly, MorningStar is entitled to a hearing on whether or not there would have been a “useful purpose” for the consultation, as required under Rule 11. But the Circuit Court summarily concluded that MorningStar is entitled to no hearing, thus depriving MorningStar of his due process rights on a crucial matter that could have, and should have ended the litigation, or at least led to the Motion to Restore having been stricken.

Thirdly, and unfortunately, we note that the Circuit Court in its order does not lay out the complete reason that the County Attorney claimed that consultation would serve “no useful purpose,” which was and is at the heart of MorningStar’s Rule 11 Motion -- namely, the inaccurate claim written by the County Attorney on the face of the Motion to Restore.

Let us again revisit that inaccurate claim.

The Honorable County Attorney, in signing the Motion to Restore, claimed that "Counsel for the Defendant has not consulted with counsel for Plaintiff as it would serve no useful purpose *since the Stipulation Pursuant to Rule 40(j) filed herein permits claims or counterclaims to be "restored upon motion made within one year of the filing of th[e] stipulation."*

The inaccuracy of that claim, based upon a plain reading of the record, is clear. The initial stipulation under Rule 40,(j), does not, in any way, shape, or form, state anywhere that the parties will permit "*claims or counterclaims to be "restored upon motion made within one year of the filing of th[e] stipulation."*

The stipulation filed on August 31, 2022, rather, basically tracks the language of Rule 40(j) and stated, specifically, "The parties further stipulate that the *statute of limitations shall be tolled as to any stricken claim or counterclaim, provided such claim or counterclaim is restored* upon motion made within one year of the filing of this stipulation.

The language of the stipulation only recognizes what the rule allows, that the statute of limitations shall be tolled, *provided that* the claim or Counterclaim is restored. There is nothing that *permits* a claim or counterclaim to be restored, which is a stated reason cited by the County Attorney, in the Motion to Restore, in justifying his failure to consult, as required by Rule 11.

This inaccuracy in the Motion violates Rule 11's requirement that the County Attorney "has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it."

There is simply no good ground to support that type of inaccuracy, period.

Now let's examine the first sentence at paragraph 2, in Rule 11 (a):

All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held.

Note to the language here, “and has attempted in good faith to resolve the matter contained in the motion.”

The Rule requires that for all motions, except for the four exceptions specifically stated, the attorneys get together and try to resolve the issues, for an obvious purpose, to avoid having to bring motions, if possible, and to serve judicial economy by cutting down on unnecessary litigation.

The rule also implicitly recognizes that there may be disputes which the court might have to resolve, through a hearing, which is why the consultation rule and admonishment to try and resolve matters are included in Rule 11 (a).

As it is not listed as one of the exceptions in which no consultation is required, a matter under Rule 40(j), where one party is essentially attempting to resurrect a lawsuit against another, is one of those many situations under which the Rule contemplates that conflict might arise, which might come ultimately, have to be resolved by a court. There is an instruction under the rule to try and work things out.

The legislative comments to the 1989 Amendment to the rule underscore that a good-faith effort must be made to resolve any disputes, which would include the matter at hand, before filing a motion.

> *Note to 1989 Amendment:*
>
> *The amendment to Rule 11(a) requires that a movant make a "good faith" effort to resolve any dispute before filing a motion and to so certify in the motion unless the consultation would serve no useful purpose or could not be timely held.* [14]

MorningStar is entitled to a hearing to show that there was no good-faith effort, by the County Attorney, to resolve anything here, and that what we appear to have here, unfortunately, is a motion filed at the last second, based upon faulty underlying grounds, with no attempt by the County Attorney the even reach out to MorningStar at all, during the one-year interval, to communicate with or make any effort at all to try and resolve anything.

This failure to make a good faith effort to resolve the matter, in and of itself, is enough to justify denial of the Motion to Restore.

But without a hearing, either on the Rule 40(j) Motion, or on the Rule 11 Motion, MorningStar is deprived of a substantial right, namely the right to due process, and is materially damaged because it is impossible to preserve even the record on appeal for review before appellate courts.

THE HEARING HELD BEFORE THE CIRCUIT COURT ON MAY 20, 2022, WHICH WAS HELD REMOTELY, WAS NOT A SUBSTANTIVE HEARING ON THE ISSUE OF

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14 https://casetext.com/rule/south-carolina-court-rules/south-carolina-rules-of-civil-procedure/pleadings-and-motions/rule-11-signing-of-pleadings-attorneys

WHETHER THE CASE SHOULD HAVE BEEN RESTORED TO THE DOCKET, AS REQUIRED BY Rule 40 (J) NOR WAS IT A SUBSTANTIVE HEARING ON THE ISSUE OF THE RULE 11 VIOLATIONS, WHICH IF PROVEN WOULD HAVE REQUIRED THE THE MOTION TO RESTORE TO HAVE BEEN STRICKEN.

To be clear, and as a transcript of that hearing will show,[15] the hearing before the Honorable circuit court on ON MAY 20, 2022, AND ENTERED ON MAY 31, 2022, was not a substantive hearing on the issue of whether the County's Motion to Restore (filed August 30, 2021, which had been improperly summarily granted without a hearing), Nor was a substantive of hearing on whether the County Attorney had violated Rule 11 of the South Carolina Rules of Civil Procedures by filing a materially inaccurate Motion to Restore this matter to the docket.

Rather, the May 20 hearing was treated by the Circuit Court as essentially a hearing almost solely on whether a Rule 40(j) hearing was allowable, to begin with.

We would welcome the Court's examination of a transcript, when it becomes available, as we are convinced that the transcript contents will underscore our contention that the May 20, 2020 hearing was essentially a "hearing on whether MorningStar was entitled to a hearing."

But if even the transcript is not yet complete when this Honorable Court reviews the matter of the issue of immediate appealability, the Circuit Court's Order makes this obvious anyway, that there was a flat-out denial of any substantive hearing based upon the Circuit Court's belief that there is an "automatic restoration rule" under Rule 40 (j) even though not such "Automatic restoration rule" exists under South Carolina law.

[15] A transcript of the hearing of May 20, 2022, has been ordered, but because of the reporter's workload may not be available by the time this Memorandum has been ordered due by the Clerk..

CONCLUSION

The Due Process Clause of the 14th Amendment of the United States Constitution, and Article I, § 3 of the South Carolina's Constitution, together set forth MorningStar's constitutional right to due process, that is the right to appear and to make an argument against the restoration of this lawsuit, before it is restored to the docket. This right to due process is embodied in the clear, unqualified right to a hearing as set forth in Rule 40(j) itself.

The Honorable Circuit Court, in its Order of May 31, 2022, by denying even a basic right to a hearing on the Motion to Restore, and by denying even the basic right to hearing on its Motion for Sanctions, has violated MorningStar's substantive, constitutional, and legal rights on multiple fronts, including (1) the due process right to a hearing under the Fourteenth Amendment to the United States Constitution, (2) the due process right to a hearing under Article I Section 3 of the South Carolina Constitution, (3) The right to due process for purposes of judicial review under Article I Section 22 of the South Carolina Constitution, (4) the right to a *remedy* therein for wrongs sustained under Article I Section 9 of the South Carolina Constitution , (5) the right to a hearing as set forth in Rule 7(b) of the South Carolina Rules of Civil Procedure, which requires hearings on all motions filed generally, (6) the right to a hearing as set forth in Rule 40(j) of the South Carolina Rules of Civil Procedure, which requires hearings, specifically, on motions filed under that rule.

Moreover, Article I Section 23 of the South Carolina Constitution makes compliance with the South Carolina's Constitution mandatory. That section of the Constitution of South Carolina is set forth as follows:

> The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms.

Due Process under the South Carolina Constitution is mandatory. There are no exceptions.

By denying MorningStar a hearing on the matters as raised herein, the Circuit Court's order has violated not only Article 1 Section 3 of the South Carolina Constitution, but also Article 1, Section 23 of the Constitution, which mandates that due process be given by the Circuit Court.

For these reasons, and because of multiple violations of MorningStar's substantial rights of due process under the law and under the Constitution of the State of South Carolina and the United States of America, this matter should be immediately appealable to The Honorable Court of Appeals.

June 22, 2022

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SC Court of Appeals

PROOF OF SERVICE

I certify that on this date, I served a copy of the foregoing document via electronic filing via the E-Flex court system and via pre-paid USPS First Class Mail as follows:

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