STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Trial Court Case No. 2009-CP-22-1045

APPELLATE CASE NO. 2013-001644

John Steven Goodwin, Louise C. Goodwin, Thomas L. Puckett and Brenda C. Puckett, Robert Nahama and Jeanne E. Nahama, Thomas Holland and Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers), and Deborah T. Spillers (a/k/a Deborah Spillers, Patrick A. DiAngelo and Deborah A. DiAngelo, Gary E. Owens and Joyce M. Owens, Fount L. Shults and Lynda M. Shults, and Dennis Ridgeway and Teresa Lynn Ridgeway, ...Appellants

v.

Landquest Development, LLC, Kyle V. Corkum, South Bay Properties, LLC, C. R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton and Bayside Property, Inc., the City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and National Land Sales, Inc., f/k/a Source One Communities, LLC, a/k/a Source One Signature Communities.....Respondents

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APPELLANTS' RETURN TO RESPONDENT CITY OF GEORGETOWN'S MOTION TO STRIKE A PORTION OF REPLY BRIEF, AND MEMORANDUM IN SUPPORT THEREOF

Respondent City of Georgetown ("City") has moved to strike that portion of Appellants' Reply Brief that addresses the doctrine of laches. The City also contends that Appellants improperly cited and relied upon an unpublished opinion of this Court. Appellants submit the following Return to the City's Motion, and respectfully request that it be denied.

A. "NEW ISSUE" RAISED IN REPLY BRIEF.

In its Initial Brief, City argued that:

> *"First and foremost, South Carolina law provides that a case when stricken is required to be restored within a particular time frame which is established by the applicable statute of limitations. The Appellants appear to dispute that. The Appellants seem to claim that there is no time frame or deadline that is established for a 'stricken' case to be restored. According to the Appellants, a Motion to Restore can be filed at any time- without any consideration given to or the application of the statute of limitations. That is contrary to South Carolina law."* (Respondent City's Initial Brief, p. 4.)

Notably, City failed to cite any law or precedent for its argument that the applicable statute of limitations determines the deadline for filing a motion to restore a case. This position could not be reasonably contested, if the statute of limitations were an issue. As Appellants argued in their Initial Brief, the statute of limitations in their case could not have expired while the case remained on the court's inactive docket, the case having been commenced well in advance of the expiration of the three (3) year statute of limitations.

Respondent City "argued" at length that Appellants were required to file a motion to restore their action, after it was stricken due to South Bay's Bankruptcy. The City submitted numerous cases in support of this position – but this was not a contested

issue between the parties. This argument, and the law cited in support thereof, were therefore irrelevant.

Moreover, this law does not support the City's contention that a specific time frame exists, based on the statute of limitations or otherwise, within which a party must move to have its case restored. Acknowledging that Rule 40(j) did not apply to Appellants' Motion to Restore, City offered the following unsupported argument and opinion.

> *"...As discussed above, any case that is "stricken" must be restored. Moreover, there is a time limitation on a Motion to Restore regardless of whether the case is stricken under Rule 40(j) or due to bankruptcy. Otherwise, a party could attempt to restore a case whenever he wants—five years, ten years, or even fifty years later. Clearly, that is not the law...."*

In making this argument, the City again failed to identify or cite any relevant precedent establishing the law on this subject. In response to this argument, therefore, Appellants sought, found, and offered to this Court the applicable and controlling law of Stribling v. Fretwell, 157 S.C. 297, 154 S.E.2d 415 (1930), and its progeny, which do in fact dismantle the City's argument that there was a specific time limitation for Appellants to file their Motion to Restore. In other words, Respondent City asserted an argument which was contrary to the prevailing and controlling law, failed to support their argument with relevant law or precedent, and made it incumbent upon Appellants to find and offer this Court the correct law concerning this issue in rebuttal.

Appellants recognize and agree that "[a]n Appellant may not use the Reply Brief to argue issues not argued in the Initial Brief." Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261, 267 (Ct. App. 1999) (and other cases cited by Respondent City.,

Respondent City's Memorandum in Support of Motion to Strike Portion of Reply, p. 2.) Appellants have been unable to find other relevant precedent regarding the appropriate response, when an opposing party presents an unsupported and erroneous argument of law in its initial brief.

This "issue" has been present, however, since Appellants' Motion to Restore was argued before the trial court on March 7, 2013, and again at Appellants' Motion to Reconsider hearing on June 6, 2013. See: March 7, 2013 Transcript (R. ____), p. 16, l. 5 – p. 17, l. 25; p. 22, l. 12 – p. 24, l. 10; June 6, 2013 Transcript (R. _____), p. 11, ll. 5-8; p. 13, l. 4 – p. 16, l. 1; p. 25, l. 3 – p. 26, l. 10. Although the doctrine of laches was not mentioned in these cited arguments with the Court, the principles of this doctrine were clearly being discussed and argued. None of the Respondents, including the City, ever raised or argued the doctrine of laches as grounds for denial of Appellants' motion to restore their action. This was, and is, their argument to make, not Appellants'. Arguably, Respondents failed to assert laches, in recognition of the fact that Appellants were not guilty of laches. Instead, the Respondents, including Respondent City, raised the statute of limitations, through an argument by analogy with Rule 40(j).

In response to Appellants' initial Motion, and their motion for reconsideration of the Order denying their motion to restore, Judge Culbertson interposed Bankruptcy Rule 11 U.S.C.(A), §108(C). Judge Culbertson found that Appellants' statute of limitations had expired during the Bankruptcy Stay, that Appellants had failed to take advantage of the thirty (30) day window to restore provided by §108(C), and were therefore barred from pursuing restoration of their case. In focusing upon the issues thus raised by the Respondents and the trial court, Appellants did not argue the relevant and controlling

law found in Stribling, supra because the application of a statute of limitations analysis was in error.

Appellants assert the analysis that the trial court should have undertaken would have been whether the doctrine of laches, as applied in Stribling, and similar cases cited in their Reply Brief, would have been the appropriate standard to apply as additional grounds for reversal of the trial court's orders denying their motion to restore and motion to reconsider the Order denying their motion to restore.

For purposes of judicial economy, Appellants respectfully request that this Court consider this argument as being timely made, and dispositive of this issue. It is clear in Stribling, and the related cases cited in Appellants' Reply Brief, that cases stricken for reasons other than Rule 40(j), remain on the trial court's docket, and the statute of limitations does not expire while they "slumber" in this status. A similar result was reached in Thomas & Howard Co. v. Fowler, 238 S.C. 46, 119 S.E.2d 97 (1961), a case cited by Appellants in their oral argument before Judge Culbertson on June 6, 2013 (Tr., p. 13, ll. 24 – 25).

In the alternative, Appellants request that this case be remanded to the trial court for adjudication of these issues. Such adjudication may be dispositive of this appeal.

B. APPELLANTS' RECITAL OF UNPUBLISHED DECISION BYRD V. BYRD OP. NO. 2005-UP-141 (2005).

City contends that "*...Appellants have cited to and rely substantially on the unpublished decision of* Byrd v. Byrd, Op. No. 2005-UP-141 (2005.) *Because* Byrd *has no precedential value, City requests that the discussion of the* Byrd *case be stricken.* Rule 268(d)(2), SCACR, is correctly cited by City. While this Rule notes that such

decisions **should** not be cited, there is no prohibition against such citation. Similarly, Respondent City has correctly cited Lanham v. Blue Cross and Blue Shield of S.C., Inc., 338 S.C. 343, 349, 526 S.E.2d 253 Ct. Ap. 2000) which noted that the lower court and Blue Cross had relied upon an unpublished opinion, and that such opinions have no precedential value.

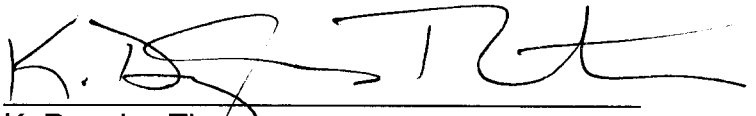
Appellants offered the Byrd case, as potentially persuasive authority, being a much more recent case than Stribling, and decided on the same principle. Byrd also cited Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003), which was cited in both Appellants' and Respondent's Initial Briefs, in support of its finding that there was no time limitation for restoration of cases stricken under the Supreme Court's Administrative 270 Day Order, which merely required a showing of "good cause." Appellants also referred to, and therefore incorporated, all legal precedent recited on this issue in their Initial Brief, not relying solely on Byrd to support this argument. (Appellants' Reply Brief, p. 1.)

CONCLUSION

For the reasons set forth herein, Appellants respectfully request that Respondent City's motion to strike that portion of Appellants' Reply Brief arguing the doctrine of Laches, and Appellants' discussion and citation of the case of Byrd v. Byrd, Op. No. 2005-UP-141 (2005), be denied. In the alternative, Appellants request that this case be remanded to the trial court for determination of the issue of laches.

Respectfully submitted:

THORNTON LAW FIRM, LLC



K. Douglas Thornton
1025 Third Avenue
Conway, South Carolina 29526
Telephone: (843) 488-5858
Facsimile: (843) 488-5859
kdouglasthornton@gmail.com

LAW OFFICES OF JOHN M. LEITER, PA
John M. Leiter
1203 48th Avenue, North, Suite 109
Myrtle Beach, South Carolina 29577
Telephone: (843) 449-1451
Facsimile: (843) 449-4884
jleiter@48th.com

ATTORNEYS FOR APPELLANTS

July 31, 2014
Conway, South Carolina

STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

I, Regina R. Cagle, as an employee of the Thornton Law Firm, LLC, certify that a copy of Appellants' Return to Respondent City of Georgetown's Motion to Strike a Portion of Reply Brief and Memorandum in Support Thereof, in the above captioned action was served upon the following counsel of record on the 31st day of July, 2014, by mailing same to the following addresses:

Charles T. Smith, Esq.
608 Cypress Street
Georgetown, SC 29440

Andrew F. Lindemann, Esq.
Davidson & Lindemann, PA
PO Box 8568
Columbia, SC 29202

Elise Freeman Crosby, Esq.
405 Dozier Street
Georgetown, SC 29440

Lawrence Michael Hershon, Esq.
Post Office Box 1509
Columbia, SC 29202

John M. Leiter, Esq.
1203 48th Ave., North, Suite 109
Myrtle Beach, SC 29577

Regina R. Cagle

Regina R. Cagle

July 31, 2014

Conway, SC

Thornton Law Firm, LLC

K. Douglas Thornton

KDOUGLASTHORNTON@GMAIL.COM

1025 THIRD AVENUE
CONWAY, SC 29526

PHONE: 843-488-5858

FAX: 843-488-5859

July 31, 2014

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 116929
Columbia, South Carolina 29211

Re: John Steven Goodwin, et al. vs. Landquest Development, LLC, et al.
Appellate case No.: 2013-001644

Dear Ms. Kitchings:

Enclosed herewith please find an original and one (1) copy of the Appellants' Return to Respondent City of Georgetown's Motion to Strike a Portion of Reply Brief, and Memorandum in Support Thereof, together with a Certificate of Service of this document upon counsel. When filing has been completed, please forward a clocked copy of these documents to our office in the self-addressed, stamped envelope provided for your convenience.

With kind regards, I am

Yours very truly,

THORNTON LAW FIRM, LLC

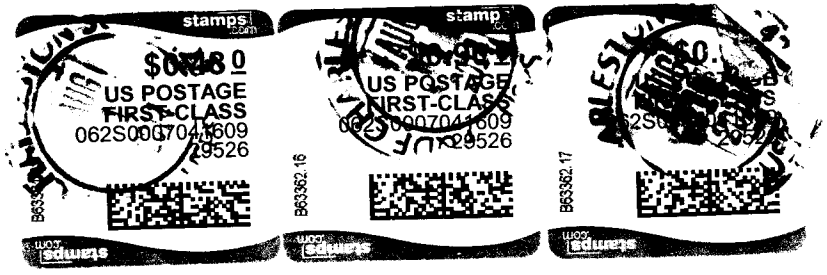
Regina

Regina R. Cagle
Paralegal to K. Douglas Thornton

Enclosures as stated

cc: John M. Leiter, Esq.
Charles T. Smith, Esq.
Andrew F. Lindemann, Esq.
James Lynn Werner, Esq.
Lawrence Michael Hershon, Esq.

THORNTON LAW, LLC
1925 THIRD AVENUE
CONWAY, SC 29526



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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 116929
Columbia, South Carolina 29211