THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case Number 2013-001644
Trial Court Case Number 2009-CP-22-01045

John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett and Brenda C. Puckett, Robert Nahama and Jeanne E. Nahama, Thomas Holland and Sharon Louise Holland, Joyce C. 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 C. Corkum, South Bay Properties, LLC, C. R. Thomspon 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.

BRIEF OF RESPONDENTS RONALD L. CHARLTON, BONNIE N. CHARLTON, JAMES R. CHARLTON, AND BAYSIDE PROPERTY, INC.

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STATEMENT OF THE CASE

This case was commenced on July 9, 2009. Twenty-one plaintiffs asserted twelve causes of action against twelve defendants. The defendants asserted numerous defenses, counterclaims and cross-claims.

On July 22, 2011, this case was stricken from the docket due to the bankruptcy of South Bay Properties, LLC. Less than a month later, on August 12, 2011, South Bay Properties, LLC's bankruptcy was dismissed.

On January 22, 2013, four of the plaintiffs filed a motion to restore this case to the docket and to consolidate this case with a separate case. The Trial Judge found and concluded that the motion to restore this case to the docket was not timely because the statute of limitations had expired. The Trial Judge denied the motion to restore and to consolidate. The plaintiffs' motion to alter or amend the judgment was denied.

ARGUMENTS

1 THERE IS A TIME LIMIT FOR RESTORING CASES STRICKEN FROM THE DOCKET.

The essence of this appeal is Appellants' contention that there is no time limit for restoring cases that have been stricken from the docket. As stated on page 5 of Appellants' Brief:

> Appellants' action was filed long before the expiration of the applicable three (3) year statute of limitations. Therefore, there was no "period of time" to be "tolled" by Rule 40(j), or to be extended by 11 U.S.C.A. §108(c).

Appellants contend that plaintiffs have the right to restore cases that were stricken from the docket many years or decades earlier. Appellants' contention is wrong for the following reasons.

A. Appellants' contention is contrary to the South Carolina Rules of Civil Procedure.

Rule 40(j), SCRCP, provides in part:

> 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.

The words in the South Carolina Rules of Civil Procedure were included for a reason. If statutes of limitations do not run while a case is stricken from the docket, the discussion of statutes of limitations in Rule 40(j) is meaningless surplusage. Court rules,

like statutes, "should be so constructed that no word, clause, sentence, provision or point shall be rendered surplusage or superfluous." See: *Pike v. South Carolina Department of Transportation*, 332 S.C. 605, 618, 506 S.E.2d 516, 523 (Ct. App. 1998) (quoting *Matter of Decker*, 327 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)).

For this Court to accept Appellants' contention, that there is no time limit on restoring cases that have been stricken from the docket, part of Rule 40(j) must be discarded as meaningless surplusage.

B. Appellants' contention is contrary to the holdings in *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003) and *Graham v. Dorchester County School District*, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000).

On March 17, 1995, Maxwell was involved in an automobile accident. She and her husband filed suit. On April 13, 1999, a circuit court judge struck the Maxwells' case from the docket. On May 1, 2000, the Maxwells moved to restore the case to the docket.

The Supreme Court observed: "A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j), the party simply cannot take advantage of the one year tolling period provided by the rule." *Maxwell v. Genez*, 356 S.C. at 619, 591 S.E.2d at 28. Since the Maxwells' motion to restore was filed more than one year after their case was stricken, the statute of limitations had expired and the Maxwells' claims were barred.

In October of 1991, Graham filed suit for injuries she received in a bus accident. On April 30, 1993, a circuit court judge struck the case pursuant to former Rule 40(c)(3), SCRCP. Effective January 1, 1995, Rule 40(c)(3) was amended and replaced by Rule 40(j).

The trial court dismissed Graham's action with prejudice for failure to timely move to restore her case and the Court of Appeals affirmed noting:

> Rule 40(j) required motions to restore be made within one year of the case being stricken to take advantage of the tolling of the statute of limitations. In Graham's case, the one year period should have begun to run upon the adoption of Rule 40(j). Therefore, the motion to restore should have been filed at least 10 days prior to January 1, 1996. *Graham v. Dorchester County School District*, 339 S.C. at 123, 528 S.E.2d at 82

For this Court to accept Appellants' contention, that there is no time limit on restoring cases that have been stricken from the docket, the holdings in *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003) and *Graham v. Dorchester County School District*, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000) must be overturned.

C. Appellants' contention is contrary to the judicial principles underlying statutes of limitations.

This Court explained the importance of statutes of limitations in *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008) :

> The purpose of statutes of limitation is to ensure litigation is "brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004) (quoting *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956)). "[S]tatutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs." *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000) .
>
> Statutes of limitation ... protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less

reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.
Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000) .

Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation. *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (internal citations and quotations omitted).

The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, [s]tatutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims. Moreover, limitations periods discourage plaintiffs from sitting on their rights. Statutes of limitations are, indeed, fundamental to our judicial system. *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005) (alterations in original) (internal citations and quotations omitted).

At the motion hearing the Trial Judge was mindful of the important policy considerations raised by Appellants' extreme position and expressed his concern to Appellants' attorney.

THE COURT: You know, and I - that's my question. I think everybody agrees that had you filed this motion [to restore] the day after bankruptcy was discharged you'd be okay. I think everybody equally agrees that if you hadn't filed this motion yet and you don't file it for another 15 or 20 years that you're certainly outside the timeframe. What

I'm trying to figure out is what is that timeline between the day after bankruptcy and 15 years down the road - - -

MR. LEITER: Understood.

THE COURT: - - - where it becomes too late to move to restore it.
(Transcript of hearing held March 7, 2013, p 22, R. p. 337)

For this Court to accept Appellants' contention, that there is no time limit on restoring cases that have been stricken from the docket, the principles underlying statutes of limitations must be ignored and plaintiffs allowed to sleep on their rights until evidence is lost or destroyed, witnesses have become impossible to locate, and memories have faded.

2 THE TRIAL JUDGE CORRECTLY APPLIED RULE 40(J), SCRCP, TO THE FACTS OF THIS CASE.

By a motion dated July 12, 2011, South Bay Properties, LLC, with the consent of all parties, moved for a continuance in the jury roster scheduled for the week of July 25, 2011. The motion stated that South Bay Properties, LLC had filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of North Carolina and, as a result of the bankruptcy, South Bay Properties, LLC was subject to the protection of the automatic stay provisions of the United States Bankruptcy Code. The motion requested that the matter be continued and that South Bay Properties, LLC be protected against any future calls for trial during the pendency of the bankruptcy. (Motion for Continuance, R. pp. 98-99)

In response to South Bay Properties, LLC's motion, a circuit court judge issued an order granting a continuance for the week of July 25, 2011, and issued an order striking the case due to the bankruptcy. (Order Granting Motion for Continuance, R. pp. 2-3; Order Striking Action, R. p. 1) Less than a month later, on August 12, 2011, South Bay Properties, LLC's bankruptcy was dismissed. (Order Dismissing Bankruptcy, R. pp. 109-112)

On January 22, 2013, four of the twenty-one plaintiffs filed a motion to restore this case to the docket and to consolidate this case with a mortgage foreclosure action. (Motion, R. pp. 101-104) The Trial Judge correctly concluded that the statutes of limitations on the Appellants' claims were not tolled by Rule 40(j), SCRCP, because the

motion to restore the case was filed more than one year after the action was stricken from the docket. Appellants do not argue that Rule 40(j) tolled the statutes of limitations.

Appellants' Brief does argue that the order striking this case from the docket "... was issued and filed by the court *sua sponte*, not upon motion of any party." Appellants' Brief p. 6 In fact, the order striking the case was issued by a circuit court judge in response to South Bay Properties, LLC's motion which requested that it be "...protected against any future calls for trial during the pendency of the South Bay bankruptcy." (Motion for Continuance p. 2, R. p. 99)

Appellants' Brief also argues that Appellants' case should have been restored to the docket because fourteen similar cases were restored. Appellants' Brief p. 7 In fact, the fourteen cases were very different from Appellants' case. Thirteen of the other cases involved Wells Fargo Bank, N.A.'s mortgages on real property so the applicable statute of limitations was twenty years. S. C. Code §15-3-520(a) (1976) The fourteenth case was brought by Bonnie N. Charlton and Ronald L. Charlton to enforce a surety bond, a sealed instrument, so the applicable statute of limitations was also twenty years. S. C. Code §15-3-520(b) (1976) The statutes of limitations had not expired in the fourteen other cases and no party objected to restoring those cases to the docket. The statutes of limitations on Appellants' claims were three years. Since the statutes of limitations had expired on Appellants' claims, these Respondents objected to restoring Appellants' case to the docket.

Appellants' Brief also argues that the United States District Court's opinion in *Robinson v. Cleckley and Co., Inc.*, 751 F. Supp. 100 (D.S.C. 1990), requires that

Appellants' case be restored to the docket. Appellants' Brief p. 8 In fact, the United States District Court opinion does not address restoring cases to the docket. The United States District Court's opinion discusses the procedure for removal of civil actions from state court and the interpretation of 28 U.S.C. §1446(b) and Rule 40(c)(3), SCRCP. Neither 28 U.S.C. §1446(b) nor Rule 40(c)(3), SCRCP, are applicable to the present appeal.

3 THE TRIAL JUDGE CORRECTLY APPLIED 11 U.S.C § 108(c) TO THE FACTS OF THIS CASE.

The Trial Judge observed that a bankruptcy may last three or four or five years and expressed concern that the statute of limitations could expire while a case is stayed by bankruptcy. (Transcript of hearing held March 7, 2013, p 14, R. p. 329) The Trial Judge's concern was satisfied by 11 U.S.C. § 108(c). That section of the Bankruptcy Code provides that if a nonbankruptcy law or rule fixes a period for commencing or continuing a civil action against the debtor and such period did not expire before the start of the bankruptcy, then such period does not expire until at least thirty days after notice of the termination or expiration of the bankruptcy stay.

The Trial Court Judge correctly concluded that 11 U.S.C. § 108(c) insured Appellants had at least thirty days after notice of the termination of South Bay Properties, LLC's bankruptcy to commence or continue any claims against South Bay Properties, LLC. Appellants do not argue that 11 U.S.C. § 108(c) prevented the statute of limitation from expiring when Appellants failed to move to restore this case to the docket until sixteen months after South Bay Properties, LLC's bankruptcy was dismissed.

4 THE TRIAL JUDGE DID NOT VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS.

Appellants' Brief argues that Appellants' procedural due process rights were violated when Appellants were not allowed to restore this case to the docket while fourteen similarly situated cases were restored to the docket. Appellants' Brief p. 14 "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Moore v. Moore*, 657 S.E.2d 743, 746, 376 S.C. 467, 472 (2008) (quoting *Sloan v. S.C. Bd. of Physical Therapy Examr's*, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006)) Appellants were not arbitrarily and capriciously deprived of a cognizable property interest. Appellants overlook or misapprehend two important distinctions between their case and the fourteen cases that were restored to the docket. First, no party objected to restoring the other cases to the docket. Second, the statutes of limitations in the other cases had not expired when those cases were restored to the docket.

Appellants' Brief also argues that Appellants' rights to equal protection under the Fourteenth Amendment were violated because the case entitled *Bonnie N. Charlton and Ronald L. Charlton v. The City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and South Bay Properties, LLC*, (Civil Action No. 2008-CP-22-1490) was restored to the docket two months prior to the date Appellants filed their motion to restore. Appellants' Brief p. 15 The action was brought by Bonnie N. Charlton and Ronald L. Charlton was to enforce the Subdivision Performance Bond given by South Bay Properties, LLC, as principal, and Hartford Casualty Insurance Company, as

surety, to The City of Georgetown, as obligee, for the construction of site infrastructure in the subdivision.

Equal protection requires "all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *GTE Sprint Communications Corp. v. Public Service Commission of South Carolina*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) The Charltons' case and Appellants' case did not present like circumstances and conditions. *Bonnie N. Charlton and Ronald L. Charlton v. The City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and South Bay Properties, LLC* was an action on a sealed instrument so the applicable statute of limitations was twenty years and the statute of limitation had not expired when the case was restored to the docket. All the parties in the Charlton case agreed to restore the case to the docket.

5 RESPONDENTS DID NOT WAIVE THE RIGHT TO ASSERT THE STATUTE OF LIMITATIONS IN OPPOSITION TO APPELLANTS' MOTION TO RESTORE THIS CASE TO THE DOCKET.

Appellants' Brief argues that Respondents waived the right to assert the statutes of limitations as a bar to restoring this case to the docket citing *Mende v. Conway Hospital, Inc.*, 404 S.E.2d 33, 304 S.C. 313 (S.C. 1991). Appellants' Brief p. 16 In that case one of Mende's expert witnesses was hospitalized and a continuance was not available. Conway Hospital's counsel agreed with Mende that a voluntary nonsuit without prejudice would make a suitable substitute for delaying the trial. The parties demonstrated by their actions that the case was only to be temporarily delayed and would be resumed at a later date when all important witnesses became available. When Mende refiled her action a few days later, Conway Hospital answered raising the defense of the statute of limitations. The Supreme Court held that the circumstances involved and Conway Hospital's conduct indicated that Conway Hospital had waived the defense of the statute of limitations. There has been no similar conduct in the present case.

Appellants argue that either allowing or participating in the restoring of other cases to the docket constituted waiver of the statutes of limitations on Appellants' claims. "Waiver is the voluntary and intentional relinquishment of a known right." *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 375, 588 S.E.2d 639, 641 (Ct. App. 2003) Allowing or participating in restoring one case to the docket is not a voluntary and intentional relinquishment of the right to object to restoring a different case involving different parties, different claims and different issues.

CONCLUSION

For the reasons stated herein, the Order Denying Motions to Restore and to Consolidate and the Order Denying Motion to Alter or Amend Judgment should be affirmed.

Respectfully submitted,

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