STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5342 (S.C. Ct. App. refiled December 16, 2015)

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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, . . . . . Plaintiffs,

Of whom John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens are . . . . . Respondents,

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 . . . . . Defendants,

Of whom Landquest Development, LLC, Kyle V. Corkum, South Bay Properties, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. are . . . . . Petitioners.

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RETURN TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. With the exception of the Court of Appeals' finding of fact that Respondents had complied with the only applicable statute of limitations when their complaint was filed, and that it was not necessary for the statute of limitations to be tolled while the case was stricken, no other matters stated as "fact" in the Court of Appeals' Opinion were prejudicial to Respondents.

2. The Court of Appeals neither overlooked or failed to appreciate any dates or events relevant to the circuit court's decision.

3. The Court of Appeals properly applied the law of *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), and other relevant law, in reaching its conclusion that Respondents had complied with the statute of limitations, and that there was no need for the statute of limitations to be tolled while their action was "Stricken Due To Bankruptcy."

4. The Court of Appeals correctly recognized and applied South Carolina law regarding the status of actions stricken due to bankruptcy, and did not create any new rules, conflicting of otherwise, regarding the time limit for restoring such cases.

## STATEMENT OF CASE

Respondents accept Petitioners' abbreviated Statement of the Case for purposes of this Petition.

## ARGUMENTS

1. With the exception of the Court of Appeals' finding of fact that Respondents had complied with the only applicable statute of limitations when their complaint was filed, and that it was not necessary for the statute of limitations to be tolled while the case was stricken, no other matters stated as "fact" in the Court of Appeals' Opinion were prejudicial to Respondents.

As recognized by the Court of Appeals:

> *Because this is an interlocutory appeal, there are no factual findings below, and our description of the facts is based on the parties' allegations-primarily those of the Goodwins and Owenes. Nevertheless, we have carefully reviewed the record, and we believe our opinion provides an accurate* ***factual context*** *in which to address the legal issue that resolves this appeal. The key fact is that the Goodwins and Owenses commenced this law suit within three (3) years of the date their causes of action accrued...We specifically do not address whether the delay in restoring the case provides the circuit court some other basis on which to dismiss the case, such as failure to prosecute or an equitable theory such as laches. We hold simply that the striking of a case from the docket due to bankruptcy does not require the plaintiff to comply with the statute of limitations again upon making a motion to restore. (Emphasis added.)* (Opinion, pp. 10-11; pages not numbered.)

With the exception of the Court of Appeals' finding that Appellants had complied with the applicable statute of limitations when their action was filed, and that it was not necessary for the statute of limitations to be tolled while the case was stricken, no other matters stated as "fact" in the Court of Appeals' opinion were prejudicial to Respondents.

Within this same argument, Petitioners contend that the Goodwins and Owenses were, in fact, represented by counsel of record when they filed and served their pro se answers to the Petitioners' separate foreclosure action. This is not accurate. Respondents' counsel did not appear of record in the Petitioners' mortgage foreclosure action until the motion for leave to amend the Goodwins' and Owenses' answers was filed on January 22, 2013. The fact that these Respondents' counsel were their attorneys of record in Case Number 2009-CP-22-1045, which forms the subject matter of this appeal, did not result in them becoming these

Respondents' attorneys of record in the Petitioners' separate foreclosure action, Docket Number 2012-CP-22-934. Thus, Rule 11(b), SCRCP, and *ex parte Strom,* 343 S.C. 2 57, 539 S.E.2d 699 (2000), are irrelevant to the facts of this case on Appeal.

2. The Court of Appeals neither overlooked nor failed to appreciate any dates or events relevant to the circuit court's decision.

The alleged "important dates" recited in the Petitioners' petition were recognized and given due consideration by the Court of Appeals in reaching its conclusions. The dates when the Goodwins and Owenses purchased their lots, September 17 and December 21, 2007, are not significant for purposes of this Appeal. The remaining four (4) dates, and the events occurring on those dates, were specifically mentioned and addressed in the Court of Appeals' Opinion. These dates are also irrelevant to the Petitioners' arguments, except for their continued assertion that the Respondents' statute of limitations expired while their case was "Stricken Due To Bankruptcy." The Court of Appeals correctly considered all relevant facts, and applied controlling law, in reaching its decision that the statute of limitations did not expire while Respondents' case was so stricken.

It should be noted that Petitioners have maintained, from their mortgage foreclosure complaint through their petition before this Honorable Court, that: *"The Goodwins and Owenses were named as Defendants in the mortgage foreclosure action because of the lis pendens filed in this action."* (Petition, p. 4.) It is a mutually inconsistent argument to claim, on the one hand, that Respondents' statute of limitations had run, while on the other hand, alleging and arguing that their lis pendens is still in force.

Petitioners also contend, for the first time in their Petition for Rehearing, and now again in their Petition for a Writ of Certiorari, that Judge Hyman's Order striking Respondents' case due to bankruptcy, which did not specifically provide leave to restore the action at a later date,

nor make any specific provision for tolling the statute of limitations, is the law of the case on this issue because Respondents did not move to reconsider or appeal this order.

Petitioners did not raise this issue in their arguments before the circuit court, nor in their brief to the Court of Appeals. Petitioners have provided no reference to the Record on Appeal indicating that this issue was raised to or decided by the trial court, as required by Rule 242(d)(4). The issue was raised by Petitioners for the first time in their Petition for Rehearing by the Court of Appeals, and was, accordingly, not considered or addressed in the Court of Appeals' Opinion. This issue, therefore, cannot be raised and considered by this Court on Petitioners' Petition for Writ of Certiorari. Rule 242(d)(2).

Further, the only relevant issue concerning Judge Hyman's Form-4 Order striking, not dismissing, Appellants' action "Due To Bankruptcy," was whether it constituted a dismissal of Appellants' action, thus requiring that the action be restored by refiling and service, within the remaining statute of limitations. This issue was fully briefed and correctly decided by the Court of Appeals. As the Court of Appeals elucidated, such a finding would, among other relevant law, have been contrary to former Chief Justice Gregory's Administrative Order, issued on May 4, 1988, 1988 -05-04-01, which held, in its entirety, that:

> *I find that common pleas cases filed in circuit court but subsequently stayed as a result of bankruptcy proceedings should be handled consistently and uniformly in all circuits.*
>
> *I further find that if a common pleas case is struck from the calendar (file book) due to bankruptcy and later restored, it should be restored at its original place on the calendar (file book), without the payment of an additional filing fee.*
>
> *Therefore, pursuant to the provisions of Section 4, Article V, South Carolina Constitution,*
>
> *IT IS ORDERED that when a pending case is stayed as a result of a bankruptcy proceeding, the court may strike the case from the calendar (file book) with leave to restore. If the case is restored, it will be returned to the calendar (file book) using its original filing date and its original case number with a "B" designation in the case number suffix block. A new filing fee is not required.*

It would thus appear that the Form-4 Order striking Respondents' case due to bankruptcy, was imbued with Chief Justice Gregory's right to restore. Further, by restoring the case to its original status on the court's calendar, without the necessity of a filing fee, it is necessarily inferred that the statute of limitations would not be at issue in the restoration process.

With respect to the Petitioners' remaining arguments under issue 2, Respondents respectfully refer this court to their final appeal and reply briefs, and the decision of the Court of Appeals, regarding the irrelevance and inapplicability of 11 U.S.C. Section 108(c), to the facts of this case.

3. The Court of Appeals properly applied the law of *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), and other relevant law, in reaching its conclusion that Respondents had complied with the statute of limitations, and that there was no need for the statute of limitations to be tolled while their action was "Stricken Due To Bankruptcy."

Respondents respectfully refer this Court to their final appeal and reply briefs, and the Court of Appeals' Opinion, in full response and rebuttal of Petitioners' arguments under this issue. Respondents would further show as follows:

Petitioners incorrectly argue that the Court of Appeals disregarded the holdings in *Maxwell v. Genez,* 356 S.C. 617, 591 S.E.2d 26 (2003), and *Graham v. Dorchester County School Dist.,* 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000), and created a "new rule" in holding:

> *We hold that because the Goodwins and Owenses complied with the statute of limitations when they initially filed and served the summons and complaint, it was not necessary for them to comply with the statute again when they attempted to restore the case to the docket.*

First, this is consistent with Chief Justice Gregory's Administrative Order, cited above. Second, it is consistent with the ruling of the Supreme Court and Court of Appeals in *Maxwell, supra,* and in *Graham, supra.* The *Maxwell* complaint was specifically stricken under Rule 40(j).

This required the consent of all parties, and placed Maxwell on notice that he was required to move to restore his complaint within one (1) year from the date of removal, or the statute of limitations would no longer be tolled. There was no consent by the parties, and no such notice was given to Respondents in the present case, by Judge Hyman's Form-4 Order striking Plaintiffs' case due to bankruptcy.

In *Graham*, the complaint was struck with leave to restore, pursuant to former Rule 40(c)(3), SCRCP. Rule 40(c)(3) was amended by Rule 40(j), SCRCP, which became effective January 1, 1995. Graham's complaint was filed in 1991, and was stricken with leave to restore pursuant to Rule 40(c)(3), in 1993. Graham moved to restore the case in 1998. Rule 40(c)(3) placed no time limit on a party moving to restore their case, whereas 40(j) imposes a one (1) year time limit from the date the case was stricken, in order for the statute of limitations to be tolled under the Rule. The Court of Appeals affirmed the trial court's finding that the restrictions of 40(j) should be applied retroactively to Graham's case, specifically finding that: *"Retroactive application of Rule 40(j) is 'feasible' and 'will not work injustice' given the circumstances of this case." (Id.*, 339 S.C. at 125.) Graham had waited five (5) years from the date her case was stricken, before moving to have the case restored. Since the case had been stricken under Rule 40(c)(3), it was reasonable to impute knowledge of the new time-limit created by the amendment of the Rule 40(c)(3) by Rule, 40(j), to Graham and her counsel. In the present case, however, there was no citation of Rule 40(j), nor Rules 41 or 79, SCRCP, in the order striking Respondents' case. To find that Respondents' statute of limitations had expired while their case was stricken, under these circumstances, is not "feasible," and would result in an inequitable "hardship" under the circumstances of this case. See also: *Robinson v. Cleckley and Co., Inc.*, 751 F. Supp. 100, 105 (D.S.C. 1990) (*An action which has been removed from the docket pursuant to S.C.R.Civ.P. 40(c)(3) is [still] pending while it is off the docket.)*

Respondents respectfully submit that, as argued extensively in their reply brief, the doctrine of laches governs the "reasonableness" issue when a party moves to restore a case that has been stricken due to bankruptcy, or for other causes. This is not a new rule, having been relied upon in numerous cases cited in *Stribling v. Fretwell,* 157 S.C. 297, 154 S.E.2d 415 (1930); and as recently as the unpublished opinion in *Byrd v. Byrd*, 2005-UP-141 (filed March 1, 2005).

4. The court of Appeals correctly recognized and applied South Carolina law regarding the status of actions stricken due to bankruptcy, and did not create any new rules, conflicting or otherwise, regarding the time limit for restoring such cases.

Petitioners argue that the Court of Appeals' decision:

> *"...creates a new Rule that claims struck due to bankruptcy can be restored without regard to the statute of limitations...*and*...creates an open issue as to whether claims struck for reasons other than bankruptcy or consent of all parties can be restored without regard to the statute of limitations."* (Petition, p. 8)

This argument is disingenuous. If the Respondents' case had been stricken under Rule 40(j), the one (1) year tolling provision of Rule 40(j) would have applied. However, the case was not stricken pursuant to Rule 40(j). If the bankruptcy stay had occurred before Respondents filed their action, the thirty (30) day window provided by 11 U.S.C. Section 108(c) would have applied. This, also, was not the case, as recognized by the Court of Appeals.

Petitioners further argue that:

> *The result of the Court of Appeals' Opinion is that parties will not know whether a case that has been stricken is really ended until someone tries to reinstate the case and receives a final judicial determination. Parties may discover many years after a case has been struck that a court, based upon equitable theories, is willing to reinstate the litigation.*

There is no basis to believe that a case that has been "Stricken Due To Bankruptcy," has been "really ended." (See: Chief Justice Gregory's Opinion, 1988-05-004-01; and *Robinson v. Cleckley and Co., Inc., supra.*)

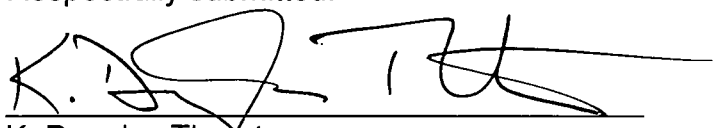
Petitioners, in conclusory and cynical fashion, claim that the Court of Appeals' Opinion will create cases that "*...will be beyond the reach of statutes of limitations, and will form a shadow docket, invisible to Court Administration.*" (Petition, p. 9.) This is totally unsupported. The Court of Appeals' Opinion has in no way affected the operation of statutes of limitation. The reinstatement of such cases will continue to be governed by the doctrine of laches, if they are not governed by the more clearly defined time limits established by Rule 40(j), or court orders which provide specific deadlines for reinstatement. Due process requires that any parties whose cases have been stricken, be provided with reasonable notice of any such relevant deadlines. If none exist, as in the present case, the doctrine of laches will, on a case by case basis, be applied, if appropriate, to determine whether the parties have been dilatory or unreasonable in their efforts to prosecute their cases.

It is understandable that Petitioners failed to raise or argue the doctrine of laches, in either the circuit court or court of appeals. To have done so would have constituted an act of "unclean hands," where fourteen (14) other similarly situated cases, which had all been stricken due to South Bay Properties, LLC's bankruptcy, with identical Form-4 Orders, were restored by the circuit court. Each of these fourteen (14) orders were titled: "Order to Restore Case to Active Status." (Appellants' Brief, pp. 6-7.) One of these fourteen (14) restored cases was that of Petitioners, setting forth claims similar to some of the Respondents' causes of action, in Case No. 2008-CP-22-1490. That case was restored to the active docket on November 2, 2012, just two (2) months prior to the date Respondents filed their motion to reinstate/restore. (Appellants' Brief, pp. 14-15.) The fourteen (14) other orders are found in the Record at pages 121-152.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied, the Court of Appeals' Opinion be affirmed, and this case be remanded for further proceedings.

Respectfully submitted:



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February 11, 2016

Conway, SC

STATE OF SOUTH CAROLINA
In the Supreme Court

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

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Of whom John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens are . . . . . Respondents,

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 . . . . . Defendants,

Of whom Landquest Development, LLC, Kyle V. Corkum, South Bay Properties, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. are . . . . . Petitioners.

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I, K. Douglas Thornton, the undersigned co-counsel for the Respondents, John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens, do hereby certify that I have served a copy of Respondents' Return to Petition for a Writ of Certiorari of Petitioners, upon the Petitioners, Landquest Development, LLC, Kyle V. Corkum, South Bay Properties, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc.; together with service upon The City of Georgetown, Hartford Casualty Insurance Company and Hartford Fire Insurance Company, in the above referenced matter, by forwarding a copy of said Return, to the counsel listed below:

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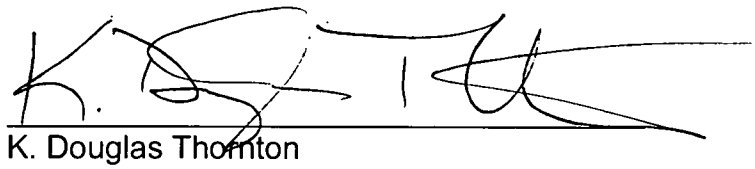

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