

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2016-000058
Opinion No. 5342 (S.C. Ct. App. refiled December 16, 2015)

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,. 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.

APPENDIX VOLUME 2

Charles T. Smith (S.C. Bar No. 5070)
608 Cypress Street
Georgetown, South Carolina 29440
(843) 545-6578
Attorney for Petitioners Ronald L. Charlton,
Bonnie N. Charlton, James R. Charlton, and
Bayside Property, Inc.

Other Counsel of Record:

K. Douglas Thornton
Thornton Law Firm, LLC
1025 Third Avenue
Conway, SC 29526
(843) 488-5858
and
John M. Leiter
Law Offices of John M. Leiter, PA
1203 48th Avenue North, Suite 109
Myrtle Beach, SC 29577
(843) 449-1451
Attorneys for Respondents

Donald G Hunt, Jr.
Kristen G. Atkins
Atkins Hunt Atkins, P.C.
Post Office Box 266
Fuquay-Varina, NC 27526
(919) 552-2020
Attorneys for Landquest Development, LLC,
Kyle V. Corkum and South Bay Properties, LLC

Andrew F. Lindemann
Davison, Morrison & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568
(803) 806-8222
and
Elise F. Crosby
Crosby Law Firm, LLC
405 Dozier Street
Georgetown, SC 29440
(843) 54+-3103
Attorneys for The City of Georgetown

James Lynn Werner
Lawrence M. Hershon
Parker, Poe, Adams & Bernstein, LLP
Post Office Box 1509
Columbia, SC 29202
(803) 255-8000
Attorneys for Hartford Casualty Insurance Company
and Hartford Fire Insurance Company

INDEX

VOLUME 1

Record on Appeal.	1
------------------------	---

VOLUME 2

Supplemental Record on Appeal.	353
Amended Final Brief of Appellant.	387
Final Brief of Respondent City of Georgetown.	409
Final Brief of Respondents Hartford Casualty Insurance Company and Hartford Fire Insurance Company.	435
Final Brief of Respondents Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc.	446
Amended Final Reply Brief of Appellant.	465
Decision of Court of Appeals.	482
Petition for Rehearing of Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc.	492
Petition for Rehearing of Landquest Development, LLC, Kyle V. Corkum and South Bay Properties, LLC.	499
Order Granting Rehearing.	501
Substituted Decision of Court of Appeals.	503

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appeal No. 13-001644
Case No. 2009-CP-22-1045

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 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

SUPPLEMENTAL RECORD ON APPEAL

RECEIVED

SEP 24 2014

SC Court of Appeals

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Avenue North, Suite 109
Myrtle Beach, SC 25977
ATTORNEY FOR APPELLANTS

K. Douglas Thornton, Esq.
Thornton Law Firm, LLC
1025 Third Avenue
Conway, SC 29526
ATTORNEY FOR APPELLANTS

Charles T. Smith, Esq.
Grimes & Smith
608 Cypress Street
Georgetown, SC 29440
ATTORNEY FOR RESPONDENTS
RONALD L. CHARLTON, BONNIE N.
CHARLTON, JAMES R. CHARLTON
AND BAYSIDE PROPERTY, INC.

Joseph Kevin Qualey, Esq.
Qualey & Beck
23 Broad Street
Charleston, SC 29401
ATTORNEY FOR C.R. THOMPSON
AND SONS, LLC

Donald G. Hunt, Jr., Esq.
Kristin Atkins, Esq.
Akins Hunt, P.C.
P.O. Box 266
Fuquay-Varina, NC 27526
ATTORNEY FOR LANDQUEST
DEVELOPMENT, LLC, KYLE V.
CORKUM AND SOUTH BAY
PROPERTIES, LLC

Ronnie Richter, Esq.
Bland Richter, LLP
Peoples Building - Mezzanine Level
18 Broad Street
Charleston, SC 29401
ATTORNEY FOR LANDQUEST
DEVELOPMENT LLC, KYLE V.
CORKUM and SOUTH BAY
PROPERTIES, LLC

Elise F. Crosby, Esq.
Crosby & Crosby Law Firm
405 Dozier Street
Georgetown, SC 29440
ATTORNEY FOR THE CITY OF
GEORGETOWN

Andrew Lindemann, Esq.
Davidson & Lindemann, PA
1611 Devonshire Drive
PO Box 8568
Columbia, SC 29202
ATTORNEY FOR THE CITY OF
GEORGETOWN

Lawrence M. Hershon, Esq.
Parker Poe Adams & Bernstein, LLP
P.O. Box 1509
Columbia, SC 29202
ATTORNEY FOR HARTFORD
CASUALTY INSURANCE COMPANY
AND HARTFORD FIRE INSURANCE
COMPANY

INDEX

Transcript of Hearing before Hon. Benjamin H. Culbertson Georgetown County, South Carolina Courthouse June 6, 2013	346
--	-----

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2009-CP-22-1045

John Steven Goodwin, et al.,)

Plaintiffs,)

vs.)

Landquest Development LLC,)
et al.,)

Defendants.)

Transcript of Record

June 6, 2013

B E F O R E :

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

John M. Leiter, Esquire
K. Douglas Thornton, Esquire
Attorneys for Plaintiffs

Elise F. Crosby, Esquire
Attorney for City of Georgetown

Lawrence M. Hershon, Esquire
Attorney for the Hartford Defendants

Charles T. Smith, Esquire
Attorney for the Charltons and
Bayside Property, Inc.

Donald G. Hunt, Jr., Esquire
Attorney for the Landquest Entities

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (On the record, June 6, 2013.)

2 THE COURT: All right, we'll take the first one is
3 2009-CP-22-1045. This is the case of John Steven Goodwin and
4 others versus Landquest Development, LLC, and others.

5 According to my roster the matter is before the Court on a
6 motion to alter or amend judgment. Please give the court
7 reporter your names and who you represent.

8 MR. LEITER: Your Honor, John Leiter, together with
9 Doug Thornton, representing the Plaintiffs.

10 THE COURT: All right.

11 MR. HERSHON: Lawrence Hershon, Your Honor, from Parker
12 Poe on behalf of Hartford.

13 THE COURT: All right, sir, thank you.

14 MR. SMITH: Charles Smith. I represent Ronald L.
15 Charlton, Bonnie N. Charlton, James R. Charlton and Bayside
16 Property, Inc.

17 THE COURT: All right, thank you.

18 MS. CROSBY: Elise Crosby, Your Honor, for the City of
19 Georgetown.

20 MR. HUNT: Good morning, Your Honor, Don Hunt on
21 behalf of the Landquest entities. They've brought each a
22 motion was submitted a few, I guess it was last week and that
23 the order's not ---

24 THE COURT: Yeah, well, it was - I don't know when we
25 got it. The letter was dated Friday. We've been in Horry.

1 I've gone over it and the application, everything looks fine
2 to sign it. I have not signed it yet, but I am going to sign
3 it because it meets everything we did. Okay?

4 MR. HUNT: Very well, then Don Hunt for the Landquest
5 parties, Your Honor.

6 THE COURT: All right, and I'm sorry, your name again?

7 MR. HUNT: Don Hunt, H-U-N-T.

8 THE COURT: All right, Mr. Leiter, Mr. Thornton, this
9 is your motion?

10 MR. LEITER: Correct, Your Honor.

11 THE COURT: All right, let me hear from whoever's
12 going to argue it.

13 MR. LEITER: And we - I'll begin the argument, Your
14 Honor, and ---

15 THE COURT: All right.

16 MR. LEITER: --- we are here today, Your Honor, asking
17 the Court to reconsider its previous order of March 27th, 2013,
18 where the Court denied our request to reinstate or restore the
19 case to the active trial roster.

20 When I argued it the first time or argued the motion to
21 restore, Your Honor, the first time maybe, I thought about it
22 afterwards, maybe I used the wrong analogy. I am a religion
23 major by undergraduate training and maybe a religious overview
24 is the right way to approach it first and that is the - what
25 we're looking at rather than the nature of the soul and the

1 status of the soul at death is what is the status of this case
2 having been stricken. If a case is dismissed it's easy to
3 compare that to the death of the person and that person either
4 goes to heaven or hell depending on which side of the case
5 they may be. When the case is stricken, however, our analogy
6 would be that the case is really in a coma or as one case
7 referred to it that we'll mention it's in a slumbering state,
8 but it's still filed, it is still on the roster, it is still
9 pending. It's just in a different state.

10 We would ask the Court to reconsider its ruling on the
11 following basis that first of all the Court analogized the
12 fact that the Plaintiffs did not move to restore within one
13 year to Rule 40(J). We believe that 40(J), the wording of
14 40(J) and the case law that interprets it is actually
15 supportive of our motion to restore. Secondly, we would argue
16 that under the facts of this case considering the large number
17 of companion cases, meaning cases that were filed against the
18 various Defendants, same Defendants other than the Charlton
19 Defendants, those cases were all restored and including the
20 Charltons' request to have the case, their own case restored
21 were all done well after any one year period that would have
22 otherwise been applicable in a 40(J) scenario, and lastly, we
23 don't believe the bankruptcy court rule that the Court used as
24 supporting law actually supports the ruling that we are not
25 allowed to restore the case at this point.

1 In our motion we do recite some of the core facts which
2 this Court is aware of through other motions and having heard
3 the matter in status conference, but they do give an insight
4 into what has happened and why we are here today. The Court
5 is aware of the factual allegations that give rise to the
6 various causes of action including the Charltons' cause of
7 action and the other matter that they had restored in November
8 of 2012, but I think the important place to begin is what
9 happened in the journey of the soul or the journey of this
10 case as it progressed. There's no question that the Plaintiff
11 filed clearly well within the - any applicable statute of
12 limitation period, no question about it. As we set forth in
13 our motion the, the infrastructure that, that should have been
14 put in place pursuant to the contract and the various filings
15 of the - the Defendants was supposed to have been completed in
16 2008. So there was no cause of action that accrued until it
17 became clear that that infrastructure that was promised to all
18 these Plaintiffs were not going to be built. So the
19 Plaintiffs' complaint was filed within a year of that. It was
20 filed in 2009. The ---

21 THE COURT: All right, so, when, when did the cause of
22 action arise?

23 MR. LEITER: 2000 and - the earliest it could have
24 been, Your Honor, is 2008. The - before that they were still
25 within the purchase period and within the contractual period

1 set out in the contract.

2 THE COURT: All right.

3 MR. LEITER: So the Plaintiffs filed their action in
4 2009 when it became clear that the infrastructure was simply
5 not going to be built, and in fact the Charltons had already
6 filed their lawsuit against the developer for breach as well
7 as the surety company for failing and refusing to fund the
8 surety bond that covered the project that was required to be
9 filed in order to get the appropriate building permits and
10 filing permits.

11 So our complaint as well as the other complaints, the
12 related case complaints were filed in the 2009 time period.
13 The Landquest Defendants or South Bay LLC, in particular,
14 filed for bankruptcy protection in 2010. So I want to bring
15 that out to the Court's attention, and so the case clearly was
16 stayed from that point on. Now, nothing happened on the court
17 roster until Judge Hyman, I believe, dismissed the case or I'm
18 sorry struck the case pursuant to his Rule 4 order sometime in
19 June, I believe, of 2000 - let me get the exact date, in - on
20 July 22nd, 2011, Judge Hyman struck the case from the active
21 roster because it had - because of the bankruptcy filing and
22 that's what the Form 4 order says. So, again, the bankruptcy
23 proceedings started in June of 2010, no action was taken
24 either by the parties to this litigation or the Court itself
25 until I believe it came up on a trial roster and the Court was

1 made aware that the matter was in bankruptcy and that's when
2 Judge Hyman entered his Form 4 order in July of 2011.
3 Thereafter the bankruptcy was dismissed in August of 2011 and
4 that's now what brings us to this Court, when should any
5 motion to restore have been filed based on the facts of this
6 case?

7 In our motion itself we list the various related cases
8 that were pending at the time and that were struck as a result
9 of the bankruptcy proceeding and we list the dates that they
10 were restored and it shows that they all were restored well
11 after any 30-day period.

12 THE COURT: But were any of them challenged? Was the
13 restoration of any of those cases objected to by any of the
14 parties?

15 MR. LEITER: I don't know that either way but for the
16 purposes of my argument I will take the position, you know,
17 least favorable to us, most favorable to the other side, that
18 they were not challenged, but I, I don't know the answer to
19 that particular question, but let's, let's - that actually is
20 part of our argument challenged or not, what kind of notice
21 were the Plaintiffs under in order to know when to file any
22 motion to restore, whether it was as early as May the 2nd,
23 2012, when the first order restoring the case was filed or as
24 late as November 2nd, 2012, when the Charltons actually
25 restored their action that included the bonding company and

1 the Landquest Defendants. So the first point of the Court's
2 order was an analogy to 40(J) that there is some application
3 of 40(J) to the facts of this case and I would like to address
4 that first because I think that actually does go in part to
5 the question the Court is asking about what was challenged,
6 what wasn't challenged and what might be the effect of that.
7 40(J) does strike the case from the docket much like what
8 happened in this case where we were struck from the docket as
9 well. The difference, however, is that 40(J) is a right or
10 privilege that the Plaintiff has to take the case off the
11 active docket and the Court, the rules in essence say if
12 you're going to, you, Plaintiff, if you're going to take
13 advantage of the right or privilege to remove the case from
14 the active docket and we, the Court through our rules are
15 giving you that right, you also have to abide by the rules
16 that we say you have to follow in the event that you actually
17 do take advantage of that right and the Court says that the
18 statute of - the rule says that the statute of limitations
19 will otherwise be tolled if you, Plaintiff, take advantage of
20 40(J) and restore your case within one year. So if you want
21 to take advantage of this privilege and you otherwise have a
22 statute problem and you don't want to worry about the statute
23 problem then we are tolling it if you restore it within that
24 one year. That - obviously the difference between a 40(J)
25 scenario and scenario we're in is that we didn't ask for the

1 continuance or we didn't ask for the case to be struck. That
2 was on the motion of the Court itself and appropriately so
3 because of the bankruptcy. So, there is no clear demarcation
4 or guide or anything that tells the Plaintiffs or anyone else
5 that after bankruptcy you have to file by a certain date. The
6 rules don't say you have to do it within 30 days, you have to
7 do - you don't have to do it within one year. It's just
8 silent to that. There is no notice given to the Plaintiffs
9 and that's because really the case is held in abeyance because
10 of the bankruptcy but it doesn't go away. It's still there.
11 It's still pending. There's not a statute problem. The
12 Plaintiff has not taken advantage or requested a right or a
13 privilege that it wouldn't have otherwise had. We weren't
14 asking for anything. We were just observing the bankruptcy
15 formalities and the case was in abeyance, was in a coma state
16 for the 14 months while it was in bankruptcy. So then it's
17 dismissed. So what happens then? What would have happened
18 had let's say on May the 2nd, 2012, the first time that a party
19 asked that the case be restored? Well, it clearly would have
20 been within one year after the dismissal of the bankruptcy
21 proceeding, but there's no rule that says it has to be brought
22 within that one year and we have capable counsel opposing us
23 in this case if you will, and by and large those are the same
24 counsel that were in the other cases. So had there been a
25 right to oppose the restoration of these cases I believe that

1 the Court would have heard about it and I'm going to argue in
2 part that the reason it wasn't raised is that there wasn't
3 grounds to raise it, quite honestly, and that goes to our
4 second point which is under the facts of these, of, of these
5 cases, of these related cases it's just fundamentally unfair
6 to say, okay, with everyone else we're going to allow you to
7 restore it challenged or not but as to you, Plaintiffs, we're
8 not going to allow you to restore it.

9 One case that His Honor cites in his order denying our
10 motion to restore is the case of Maxwell versus Genez. It's a
11 2004 Supreme Court decision where in that case the lower
12 court, the trial court denied a 40(J) motion to restore
13 because it was not filed within the one year time period that
14 40(J) allows and the trial court said under the circumstances
15 of that case because you didn't file it and have it restored
16 within one year we're not going to let you restore it. Now,
17 under the facts of those cases it's clear that the statute of
18 limitations had run otherwise because the car wreck case that
19 precipitated that lawsuit happened in 1999, some three or
20 four, four or five years before the motion to restore was
21 finally filed.

22 The Court of Appeals reversed the trial court but they
23 said, "Well, we're going to allow you to proceed under Rule
24 6(D) to enlarge the time in which to file your motion to
25 restore." One of the parties took it up on cert. The Supreme

1 Court took it and they said, "No, we're reversing outright.
2 Court of Appeals you're wrong. We're not going to allow you
3 to use Rule 6, the motion to extend the time, but we're going
4 to tell the trial court that they were wrong as well."
5 Nothing in Rule 40(J) says that you can't restore your case
6 after the one-year time period, but if you want to take
7 advantage of the tolling period you might lose out on that.
8 So they reversed the trial court for not allowing the case to
9 be restored, even though it was clearly after the one-year
10 time period to restore, and clearly after the statute of
11 limitations had otherwise run, but they were saying, "We're
12 going to go - let this go back. It's going to be restored and
13 the parties can bring up whatever issues they want to the
14 action once it's put back on the active trial docket."

15 Lastly, the bankruptcy action I believe, Your Honor, the
16 rule that you cited basically says there's going to be a 30-
17 day window where if some other time period had otherwise run
18 in your case at the state court level you have 30 days in
19 which to bring your action. So if you hadn't filed your
20 lawsuit because of the pendency of the bankruptcy and the
21 statute of limitations had otherwise run we're giving you 30
22 days in which to file it after the case comes out of
23 bankruptcy. We are not in that situation, Your Honor, because
24 as I've already said and as the record reflects the case was
25 already pending. It was timely filed. It was pending. It

1 was just simply struck at that point. It was in limbo but it
2 was still an active case. So we believe that the only - the
3 right action is to restore it under the facts of this case and
4 the related cases. So many other cases were allowed to be
5 restored it really doesn't make sense equitably to say no to
6 this case and 40(J) itself would allow the case to be
7 restored. There could be a statute of limitations argument
8 interposed but the case itself would be restored. We believe
9 if the Court were to follow that logic and then a motion on
10 the statute of limitations was filed that the Defendants would
11 lose on that ground for any number of reasons including the
12 fact that when we moved to have the case restored we were
13 still within the applicable statute of limitations. The
14 problem we have with His Honor's order is that it doesn't
15 spell out any of that. It just simply doesn't say when the
16 statute of limitations began, when it ended, what was the
17 effect of the bankruptcy, was that a tolling period, what was
18 the legal effect of the case being struck, you know, is the
19 statute running against that while it's still an active case
20 or at least it's not been dismissed, which is a clear
21 demarcation line, and I believe we have an older case where
22 the Court and this goes back to 1961 where I believe Judge
23 Littlejohn was the trial court and reversed. This is the case
24 of Thomas and Howard Company versus William B. Fowler, and
25 that's found at 119 S.E.2d 97, Your Honor, and in that case

1 the, the South Carolina Supreme Court refers to a California
2 court that says a case that was struck and was - and moved to
3 be restored after four years and ten months was okay, that the
4 case had during that time period was slumbering, but it was
5 still allowed to be restored and in the ---

6 THE COURT: It was struck because of bankruptcy?

7 MR. LEITER: I don't - it doesn't say, Your Honor.

8 THE COURT: Okay.

9 MR. LEITER: The case is cited and I did not go back
10 and look at the underlying California case. I can do that if
11 the Court wishes.

12 THE COURT: I mean, I guess the - you said it was
13 restored four years later, but I mean, had it been pending in
14 bankruptcy for three and a half years or had it been
15 discharged from bankruptcy after a week and it had been just
16 sitting out there slumbering for four years without bankruptcy
17 protection? That's, that's my primary question following your
18 argument is this case was discharged or the parties in this
19 case were discharged from bankruptcy in August of 2011.

20 MR. LEITER: Right.

21 THE COURT: Under your analogy there is no deadline in
22 which to seek restoration of the case to the active docket or
23 if there is then what is that deadline?

24 MR. LEITER: Well, I believe I can answer that, Your
25 Honor. There is no statutorily or case law mandated deadline.

1 If we had that we would have followed it. So clearly there's
2 nothing by way of notice or otherwise that tells us you better
3 do it by X date because if you do it on Y date you've run
4 afoul of that rule by even one day. We just don't know what
5 that is.

6 THE COURT: So 20 years down the road you could seek
7 to restore it?

8 MR. LEITER: It could be, Your Honor. I believe that
9 the greater argument is what are the factors that are
10 compelling that would instruct the Court not to restore it? I
11 think that's the greater argument here. I think at the end of
12 the day there has to be an equitable analysis of the facts of
13 this case to make that very determination. I mean, if it were
14 20 years down the road, parties have passed away, property has
15 been conveyed away, I could see some strong equitable
16 arguments that might make restoring it a more difficult task,
17 but those equitable arguments simply don't exist in this case.
18 I mean, if the, if the Charlton Plaintiffs restore it in
19 November of 2012 and we then move to restore ours in January
20 of 2013, only two months later, where is the inequity in that?
21 It simply just doesn't exist. If, if it were 20 years I think
22 we would be having a different conversation based on two
23 months without any notice of any specific rule, rule of law,
24 rule of the court that says otherwise that two months
25 shouldn't make that, should not make the life or death kind of

1 scenario that we are now facing.

2 THE COURT: All right.

3 MR. LEITER: Thank you.

4 THE COURT: Anything further?

5 MR. LEITER: Thank you, Your Honor.

6 THE COURT: All right, who wants to go first?

7 MR. SMITH: May it please the Court?

8 THE COURT: Yes, sir.

9 MR. SMITH: This matter was fully argued before the
10 Court originally and then carefully considered by the Court
11 after arguments. So I will just be brief in touching upon a
12 couple of the arguments that have been made again today.
13 Three matters specifically I did want to address: one, the
14 argument has been repeatedly made that other cases have been
15 restored, therefore in fairness this case should be restored.
16 As the Court has already noted none of the other cases was
17 there an issue concerning the statute of limitations.
18 Therefore, they have a completely different situation. The
19 second thing is every one of the cases where the order
20 restoring it was attached to the motion the restoration was by
21 Wells Fargo Bank because they were seeking to enforce their
22 mortgage, the statute of limitations on a mortgage being 20
23 years from maturity date of the mortgage. That's why the
24 statute of limitations was not an issue in any of those cases.
25 The case brought by the Charltons involved not the developer

1 as was suggested but only the City of Georgetown and the
2 bonding company. The purpose of that action was to bring a
3 resolution to the outstanding bond. That action has been
4 successful in that the parties are right now nearly at the
5 point of a settlement of that case, restoring that case was by
6 full agreement of all the parties involved. So the other
7 cases really have no influence on the present action. The two
8 arguments concerning the statute of limitations advanced by
9 the Plaintiffs are first that the statute of limitations
10 should not have begun to run when they purchased their lots
11 back in 2007, instead the statute of limitations should be
12 delayed in running until August of 2008, and the argument is
13 made that no cause of action existed until August of 2008. Of
14 course to determine whether there's a -- whether a cause of
15 action did exist we need merely to look at the complaint. The
16 complaint is based strictly upon the actions that occurred
17 prior to the purchase of the lots, primarily the
18 representations that the Plaintiffs' claim were made to them
19 by various Defendants, the compliance by various Defendants
20 with Unfair Trade Practices Act in marketing the lots, the
21 compliance by various Defendants in the disclosure
22 requirements under both federal and state law. The only
23 action, the only thing in the complaint in all of the 12
24 causes of action that points to the date of August of 2008 is
25 paragraph 60, Section E of the complaint in which it's alleged

1 that it was represented to the Plaintiffs that the
2 infrastructure and amenity construction would be commenced in
3 September 2007 and was expected to be completed in
4 approximately August of 2008. Now if the Plaintiffs were
5 complaining that the amenities weren't completed in August of
6 2008, that they were a week, a month, a year late in being
7 completed then the completion date would be important but what
8 the complaint alleges not that the amenities were completed
9 late, the amenities were never started, they have never been
10 built. So based upon even that provision, the fact that the
11 amenities were not commenced in 2007 the cause of action arose
12 back in 2007, almost six years ago. The second key argument
13 that the Plaintiffs make, although not as clearly, is that
14 during the time that their action was actively pending from
15 the time it was filed in July of 2009 until July of 2011 when
16 the action was stricken that the statute of limitations should
17 be tolled for those two years but they point to no statute, no
18 court rule, no opinion tolling the statute of limitations
19 during that time. The two cases, appellate cases we've cited
20 to the Court and that are mentioned in the Court's order there
21 is no suggestion in there that there's a tolling during that
22 period of time. What the Plaintiffs are asking you to do is
23 to create a new, a tolling statute for that period. There are
24 two tolling statutes that may be of assistance or might have
25 been of assistance to the Plaintiffs if they had restored the

1 case within one year of the time that it was stricken then
2 there would have been a tolling, but they did not do that.
3 Secondly, this bankruptcy code provides a tolling during the
4 time that the bankruptcy prevented this case from going
5 forward but that was only 30 days. What happened is they
6 extended 18 months after the bankruptcy was dismissed. So we
7 have a case that's well past the statute of limitations. I
8 think the Court has adequately addressed the case in its prior
9 order and therefore we'd ask that the motion to reconsider be
10 denied.

11 THE COURT: All right, so, so your argument is that
12 and let's just say for the sake of their argument the statute
13 of limitations started to run in August of 2008 and this case
14 they filed bankruptcy in - not when it was stricken but it was
15 ---

16 MR. SMITH: I'm not sure when the bankruptcy was
17 filed, Your Honor. The action was stricken due to the
18 bankruptcy in July of 2011 and then the bankruptcy was
19 dismissed in August of 2011, about 20 days later.

20 THE COURT: Okay, do we have any information as to
21 when they actually filed bankruptcy?

22 MR. HUNT: Your Honor, Don Hunt. I was co-counsel of
23 record in that particular case. It was filed in June 2010.

24 THE COURT: Okay, so even if it had not - let's say
25 for the sake of argument it appeared on a roster in June of

1 2010. It couldn't have gone forward because they were in
2 bankruptcy. So actually the statute - bankruptcy tolled it
3 from June of 2010 until August of 2011; is that correct?
4 Would that be the correct analogy? If it arose in August of
5 2008, nine, so you had not quite two years when they filed
6 bankruptcy, and then the statute of limitations would be
7 tolled by bankruptcy from June of 2010 until August of 2011.
8 Would that ---

9 MR. SMITH: Your Honor, bankruptcy is not my area. I
10 think one of my - the other Defendants' counsels might be
11 better able to address that than I am.

12 MR. HERSHON: Your Honor, I would - Lawrence Hershon for
13 the, for the Hartford Defendants. I would just like to
14 differentiate the Court between the tolling and the stay and
15 really the bankruptcy there's a stay and there's, there's
16 federal case law. There's a case out of the - and this is out
17 of the Eighth Circuit, Hussman v. TWA, 169 F.3d 1151 that says
18 that bankruptcy code does not provide for a tolling of the
19 state statute of limitations during the period of bankruptcy
20 but rather just that the action may be - must be commenced
21 within 30 days after the termination of that stay.

22 THE COURT: Okay, so the fact that they filed
23 bankruptcy does not toll the statute of limitations ---

24 MR. HERSHON: Right, and that's with the ---

25 THE COURT: --- like it would under 40(J).

1 Bankruptcy, it continues to run; is that ---

2 MR. HERSHON: Right, that's correct, that's correct,
3 Your Honor, and that's where I think that, that, that statute
4 11 U.S.C. 108 comes in that gives that 30 days after the
5 termination of a bankruptcy.

6 THE COURT: So in other words if you file bankruptcy
7 the statute of limitations continues to run. If you're
8 discharged from bankruptcy or released from bankruptcy you've
9 got the remainder of what's on the statute of limitations or
10 30 days?

11 MR. HERSHON: That's my understanding, Your Honor.

12 THE COURT: I got you, okay. I'm sorry to cut you
13 off, Mr. Smith. Anything further?

14 MR. SMITH: Oh, no, no, Your Honor. I appreciate
15 having someone more capable of responding to the Court's
16 questions.

17 THE COURT: All right, does anybody else have any
18 arguments?

19 MR. HUNT: Your Honor, just very briefly, Don Hunt,
20 because I've been their counsel in North Carolina, the
21 Landquest Defendants for this, I've been involved directly and
22 indirectly with all the cases that have been here in
23 Georgetown for the last four years, five years, going on five
24 years. They're all about to wind down. This one was
25 dismissed and it's back before you and I want to address just

1 two points that the Plaintiffs made and one the Court
2 addressed, which is they seem to be vague and suggestive as to
3 when their statute of limitations accrued and that at a later
4 date they could make whatever arguments they want to support
5 whatever date they want for accrual. Well, I think that's a
6 bit disingenuous because when did they know it accrued? At
7 the very latest when the Plaintiffs themselves filed the
8 lawsuit, which is 2009. So they had to have known or should
9 have known there was a reason that they were harmed because
10 they themselves acted by 2009. So we know that the statute
11 accrued well before 2009. According to their Rule 59 motion
12 all of their causes of action are subject to a three-year
13 statute of limitations. That statute of limitations would
14 have lapsed sometime in 2012. If they wanted to take
15 advantage of relation back under 40(J), that is, you know,
16 it's as if they met their statute of limitations in 2009, they
17 should have reactivated within 12 months. They did not, and
18 in the other what I call lot owner cases there were two
19 strains of those. The Goodwin strain which I think was more
20 economical in its approach, you join multiple Plaintiffs that
21 sue the Defendants in a single action, we have what my office
22 referred to as the Robert Maring strain, which essentially
23 took about 20 Plaintiffs and filed 20 different lawsuits.
24 Wachovia Bank did move to reactivate those cases and there was
25 absolutely no opposition from any party in those cases, and

1 lastly I would point out kind of what I detected as kind of
2 the philosophical upshot of an otherwise religious argument
3 which is essentially restoration should be allowed even if
4 it's futile. That's essentially what the Plaintiffs are
5 saying, restore us, we'll fight about statute of limitations
6 later when it's obvious to everybody here that the statute of
7 limitations has lapsed. Restore if it's futile. What does
8 that do? It's bad public policy. It rewards the Plaintiffs
9 for slumbering on their rights and not doing anything for 18
10 months and it restores a case and wastes further judicial
11 resources that could be devoted to other cases that don't have
12 timing issues and that the Plaintiffs themselves did not sleep
13 on their rights. So we ask the Court to deny the motion.

14 THE COURT: All right, thank you. Anyone else?

15 MS. CROSBY: No, sir, Your Honor, Elise Crosby for the
16 City of Georgetown, no argument. I just would point out
17 factually that the City is a Defendant not only as a named
18 Defendant but also of a cross-claim of Mr. Smith's clients.
19 We are defending a cross-claim in this action as well as the
20 Goodwins' action.

21 THE COURT: All right.

22 MS. CROSBY: Thank you, Your Honor.

23 THE COURT: Thank you.

24 Anything in reply?

25 MR. LEITER: Your Honor, I know that time is short and

1 I will make it brief, but Mr. Hunt suggested that we are being
2 vague and suggestive about when the statute of limitations
3 ran. I'm trying to do everything but be vague and suggestive.
4 I would argue that we're being put to the burden. They're
5 saying the statute has run. That's all we're going to say
6 about it. Now prove that it hasn't run.

7 THE COURT: Well, what about their argument that
8 bankruptcy does not stay the statute of limitations and that
9 that's what - what is the statute in the order? 11 U.S.C. A
10 108 that that's what that is for, that if you - that the
11 statute of limitations is not tolled by bankruptcy. It
12 continues to run and if it expires during the period of
13 bankruptcy then 11 108 gives you 30 days to reinstitute your
14 action or restore it?

15 MR. LEITER: Well, number one, I disagree with that
16 interpretation, but let me go to a more theological point of
17 view, Your Honor. It's a rhetorical question but a real one,
18 we filed within the statute of limitation period. There -
19 it's absolutely not argued otherwise. There's no question
20 that we did. I mean, I found Mr. Smith's argument interesting
21 that when our Plaintiffs closed on these lots in September of
22 2007 they knew that the infrastructure was not going to be
23 built and that they had been lied to but they had closed on
24 these lots anyway. I mean, I can ---

25 THE COURT: Well, for the sake of this argument I'm

1 giving you August 2008 as the starting of your statute of
2 limitations.

3 MR. LEITER: Okay, so I believe that's the kind of
4 analysis that would otherwise have to be done if the case had
5 been dismissed and we were asking to reinstate a dismissed
6 case. What is the nature of a stricken case that was not
7 struck pursuant to 40(J)? The case was struck not by - at the
8 Plaintiffs' request, not necessarily even by the Defendants'
9 request, by the Court's own motion. We - our position is not
10 equivocal. It's not vague. It's clearly not suggestive. We
11 filed within the statutory time period of under any statute of
12 limitations. We continued the case. We even have motions to
13 compel pending against Landquest that were stayed because of
14 the bankruptcy. We filed - we were stayed. Now, when did the
15 statute of limitations start running again, at what point?
16 When was - when did it ever ---

17 THE COURT: So you're saying that filing bankruptcy
18 tolls the statute of limitations?

19 MR. LEITER: I'm saying we filed our action within the
20 time period. It was - we were never dismissed. It was never
21 taken off. We filed within the appropriate time period.

22 THE COURT: All right.

23 MR. LEITER: It's, it's the Defendants who are saying
24 that the statute of limitations is not tolled by the filing of
25 the bankruptcy. If it's not been tolled we filed within the

1 statute of limitations. When did another statute of
2 limitations start running? That's why this analysis is not
3 based on the statute of limitations. It's based on equitable
4 issues. We had a case pending. We never asked that it be
5 removed. We filed - we were pursuing it in the appropriate
6 way. We were seeking discovery. The bankruptcy was filed.
7 It was taken off the active roster but it was still pending.
8 There's no issue of a statute of limitations - a new statute
9 of limitation time period coming up. That simply is our
10 position. 108(C) clearly deals with if you have not filed
11 your action by the time the bankruptcy is filed. You have a
12 30 day window if your statute is otherwise run. So I don't
13 know what you call it but it sounds like a tolling of the
14 statute of limitations to me if 108(C) has any efficacy, and
15 this is our position why no one else restored the other cases.
16 Mr. Smith said that Wachovia or Wells restored because of
17 their mortgage foreclosures. I don't believe any of those
18 cases are mortgage foreclosure cases. I don't believe a
19 counterclaim was filed in those - I'm being told that they
20 were. If that is, in fact, the case then I stand corrected.

21 THE COURT: So what do you say 11 U.S.C. 108 does, 11
22 U.S.C. (A), 108(C)?

23 MR. LEITER: Our position on that is simple, hopefully
24 clear, not equivocal, but first let me begin by saying I've
25 noticed that the - the other side has not presented any case

1 to the Court or us that says 108(C) stands for the proposition
2 that they claim it stands for. I've been looking for that
3 case. I certainly haven't found it.

4 THE COURT: But I mean the statute says you've got 30
5 days from discharge of bankruptcy to pursue.

6 MR. LEITER: It says that if you - if there is a clear
7 demarcation, let's say that you haven't filed your lawsuit by
8 the time that the bankruptcy is instituted, clearly if someone
9 then while the bankruptcy is pending files a lawsuit they're
10 going to be held in contempt of court of violating the
11 automatic stay provisions of bankruptcy. So they can't file
12 their lawsuit. So if you, if you're stuck in bankruptcy the
13 statute runs, bankruptcy is dismissed. You then have 30 days
14 in which to file your action. If there is another
15 demarcation, a clear demarcation and let's even say that the
16 Court said you have one year in which to move to restore your
17 case, let's say it's out - the case has been struck because of
18 40(J), bankruptcy is filed, your year comes and goes, you
19 can't file your 40(J) motion while the bankruptcy is pending.
20 You have to wait till the bankruptcy is terminated. You then
21 have 30 days in which under that kind of scenario to file your
22 motion to restore, if you want to take advantage of your one-
23 year tolling period. So even if the case, bankruptcy went
24 longer than the one year that would otherwise be under 40(J)
25 you still have that protected window. Here we have - we all

1 agree that there's no rule, there's no court case, there's no
2 nothing that tells us on what date you better file in order,
3 your motion in order to take advantage of 108(C). So it
4 simple doesn't apply to the facts of this case.

5 THE COURT: All right, I understand your argument, you
6 know, and I want to - I'm going to go ahead and put it on the
7 record because, you know, if I'm wrong, I'm wrong, the
8 Appellate Court can deal with it, but I think 11 U.S.C.(A)
9 108(C) stands for the proposition that if this case was struck
10 pursuant to bankruptcy and the statute of limitations ran
11 during that period of bankruptcy, even though you had filed,
12 the action is stricken because of bankruptcy, stayed because
13 of bankruptcy, that the statute of limitations expires while
14 the case is in bankruptcy, then I think 11 U.S.C.(A) 108(C)
15 gives you 30 days to seek restoration after the case is
16 discharged from bankruptcy. So I'm going to deny your motion
17 to alter or amend. It's pretty clear what my ruling is. If
18 I'm wrong, I'm wrong. The Appellate Court will tell me, and
19 they have in the past, but I have - but at least it gives them
20 a definitive line as to why I ruled the way I did. Is there
21 anything else you want me to address because I think that's
22 pretty clear for them to ---

23 MR. LEITER: No, I believe the Court's clear.

24 THE COURT: Okay, all right.

25 MR. LEITER: Being, you're not being equivocal or

1 unclear on that. The only thing we would ask, Your Honor, is
2 that we - that there is a formal order to that effect that one
3 of the other side prepare an order and allow you to ---

4 THE COURT: Who wants to do an order or ---

5 MR. SMITH: I'll be happy to volunteer, Your Honor.

6 THE COURT: Okay, and just - thank you, Mr. Smith, and
7 just make sure it's clear in there that I'm denying their
8 motion to alter or amend because I don't think that this is,
9 even though my other order did address Rule 40(J), I think
10 it's clear, even though I'm not certain, it just makes more
11 sense to me that if you file a case that is stayed because of
12 bankruptcy the statute of limitations expires during that
13 period, even though you filed the action you've got a -
14 there's a time limit on this that 11 U.S.C. (A) 108(C) gives
15 you 30 days after discharge from bankruptcy to seek
16 restoration of the case or if you hadn't filed to file your
17 action or that it basically gives you a 30-day time period
18 there. All right.

19 MR. LEITER: Thank you, Your Honor.

20 MR. HERSHON: Thank you, Your Honor.

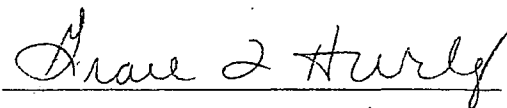
21 THE COURT: Thank you very much.

22 (Adjourned.)
23
24
25

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of John Steven Goodwin, et al. versus Landquest Development, LLC, et al., held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on June 6, 2013.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM-M

Official Reporter

December 18, 2013.

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

APPELLANTS' AMENDED FINAL BRIEF

RECEIVED
OCT 09 2014
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....	ii
Statutes and Rules.....	iii
Statement of Issues on Appeal.....	iv
Statement of Case.....	1
Arguments	
1. The trial court erred in applying Rule 40(j), SCRCP, to the facts and procedures of this case.	4
2. The trial court erred in applying Title 11 U.S.C.A., §108(c) to the facts and procedures of this case.	9
3. The trial court violated Appellants' Constitutional Rights to Due Process in applying the procedural requirements of either Rule 40(j), SCRCP, or of title 11, U.S.C.A., §108(c), or both, without prior notice to Appellants, and thereby imposing a materially different procedural standard for reinstatement of Appellants' action, than that required of fourteen (14) separate but similarly situated cases on the Court's Docket.	13
4. Respondents waived the right to assert a Statute of Limitations Defense.	16
Conclusion.....	17

TABLE OF AUTHORITIES

<u>Clear Channel Outdoor v. City of Myrtle Beach</u> , 372 S.C. 230, 235, 652 S.E.2d 565, 567 (2007)	14
<u>F/S Manufacturing v. Kensmoe</u> , 798 N.W.2d 853 (N.D. 2011)	12
<u>F.S. Royston Guano Co. v. Com. of Virginia</u> , 253 U.S. 412, 415, 40 S. Ct. 560, 64 L.ed. 989, 1920	15
<u>Grotting v. Hudson Shipbuilders, Inc.</u> , 85 B.R. 568 (Wd. Dist. WA, U.S.D.C. 1988)	13
<u>Jones v. Lott</u> , 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)	11
<u>Maxwell v. Genez</u> , 356 S.C. 617, 591 S.E.2d 26	9
<u>Mende v. Conway Hospital</u> , 304 S.C. 313, 404 S.E.2d 33, 314 (Ct. App. 1991)	16
<u>Moore v. Moore</u> , 376 S.C. 467, 473, 657 S.E.2d 743, 747 (2007)	14
<u>Robinson v. Cleckley and Co., Inc.</u> , 751 Fed. Supp. 100, 105, (D.S.C. 1990)	8,9
<u>S.C. Dep't. of Soc. Servs. v. Beeks</u> , 325 S.C. 243, 246, 481 S.E.2d 703, 75 (1997)	14
<u>S.C. Dep't. of Soc. Servs. v. Wilson</u> , 352 S.C. 445, 452, 574 S.E.2d 730, 733 (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.ed.2d 484, 494 (1972)	14
<u>Town of Iva v. Holley</u> , 74 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007)	15
<u>Village of Willowbrook v. Olech</u> , 528 U.S. 562, 120 S. Ct. 1073, 145 L.ed.2d 1060 (2000)	16

STATUTES AND RULES

14 th Amendment, U.S. Constitution	15
Chapter 11 of the U.S. Bankruptcy Code	2
2 Collier on Bankruptcy at 108.04[1] – 108.04 [2] (16 th ed. 2010)	11,12
Rule 40(a), SCRCP	5,7,10
Rule 40(b), SCRCP	7
Rule 40(c)(3)	8
Rule 40(j), SCRCP	4,5,6,7,8,9,13,14,15,17
Rule 59, SCRCP	4
S.C.R.Civ.P(3)(a)	8
S.C.R.Civ.P40(c)(3)	9
Title 11 U.S.C.A., §108(c)	5,9,10,11,12,13,14,15,17
Title 11 U.S.C.A., §108(c)(2)	13
28 U.S.C., §1446(b)	8

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in applying Rule 40(j), SCRCP, to the facts and procedures of this case?
- II. Whether the trial court erred in applying Title 11, U.S.C.A., §108(c) to the facts and procedures of this case?
- III. Whether the trial court violated Appellants' Constitutional Rights to Due Process and Equal Protection in applying the procedural requirements of either Rule 40(j), SCRCP, or of Title 11, U.S.C.A., §108(c), or both, without prior notice to Appellants, thereby imposing materially different procedural standards for reinstatement of Appellants' action than that required of fourteen 14 separate but similarly situated cases on the Court's Docket?
- IV. Whether Respondents' waived or are otherwise barred, from asserting the statute of limitations as a defense to Appellants' motion to reinstate/restore and consolidate?

RECEIVED
OCT 09 2014
SC Court of Appeals

STATEMENT OF CASE

This action arises from a failed real estate subdivision in the City of Georgetown, South Carolina, known as "Harbor Club on Winyah Bay." As more fully alleged in Appellants' Complaint (R., Exh. 8), dubious marketing practices and representations were employed by the developers and their realtor, in soliciting purchase contracts for the subdivision lots. A substantial majority of each lot's appraised value was based upon the projected completion of all infrastructure and amenities in the subdivision. The infrastructure and amenities were to have been completed in approximately August of 2008. Absent the infrastructure, the City of Georgetown allowed closings conditioned upon issuance of a subdivision performance bond, which was issued by Hartford Casualty Insurance Company in the principal penal sum of \$7,882,359.00. To this day, no infrastructure or amenities have been built or installed.

The Respondents, Bonnie N. Charlton, Ronald L. Charlton, Bayside Property, Inc., and Third Party Defendant James R. Charlton (collectively referred to herein as the "Charltons") conveyed the subdivision land to the putative developer, South Bay Properties, LLC, for the sum of \$20,850,000.00. This contract closed on September 17, 2007, the same date South Bay conveyed 29 lots to various purchasers, resulting in total gross lot sale proceeds of \$7,926,550.00. The Charltons took back a promissory note and mortgage in the sum of \$14,580,662.82. It thus appears that the Charltons received approximately 79% of the gross lot closing proceeds, which they presumably used to satisfy personal debt of approximately \$7,000,000.00. This debt had previously been secured by the subdivision tract.

Appellants contend that, prior to this closing date, the Charltons had been notified by South Bay that its development loan had been withdrawn, and that there were therefore no funds available for constructing the infrastructure or amenities. Appellants further contend that, despite this knowledge, the Charltons were allowed to make the decision, and elected to proceed with the closings of the first 29 lots. Between September 29, 2007, and January 4, 2008, South Bay sold 25 more lots in the subdivision to ultimate lot purchasers, generating additional gross lot sales proceeds of \$6,811,050.00. Presumably, the Charltons received approximately 79% of these net closing proceeds, as well. In summary, the Appellants contend and have alleged, that the Charltons and Bayside were joint venturers in the subdivision with the developer(s).

Appellants filed their original complaint on July 9, 2009, in Case No. 2009-CP-22-1045. (R. Exh. 8.) Appellants' efforts to conduct discovery in the case below were stayed when South Bay filed a petition for relief under Chapter 11 of the Bankruptcy Code on June 18, 2010. Thereafter, by form Order dated July 22, 2011, the Circuit Court struck Appellants' action, *sua sponte*, giving the following basis: "Case Stricken Due to Bankruptcy." (R., Exh. 1). A nearly identical form Order was filed in fourteen (14) other similar pending cases, in which South Bay was a party defendant, due to its bankruptcy filing. By Order executed on August 12, 2011, the Honorable Stephani W. Humrickhouse, United States Bankruptcy Judge, dismissed the Bankruptcy Petition of South Bay Properties, LLC.

On August 31, 2012, Respondents Bonnie N. Charlton, Ronald L. Charlton, and Bayside Properties, Inc. filed their Summons and Complaint for Foreclosure of their above referenced Mortgage (the "Charlton/Bayside Foreclosure"); in Case No. 2012-

CP-22-00934. Appellants were named as Parties-Defendant to the foreclosure action, because of their Lis Pendens and Complaint filed on July 9, 2009. Appellants Owens and Goodwins initially filed pro se Answers, in the form of general denials, to the Charlton/Bayside foreclosure action on November 5th and 19th, 2012, respectively. Thereafter, Appellants retained the services of their former trial attorneys, and on January 22, 2013, Appellants' filed a Motion for Leave to Amend their Answers, and a Motion to Reinstate/Restore Complaint and Lis Pendens, and to Consolidate Appellants' original action with the Charlton/Bayside foreclosure action for trial. (R., Exh. 12).

Appellants' Motion for Leave to Amend their Answer was scheduled to be heard by the Master in Equity on February 25, 2013. However, the Master in Equity concluded that a conflict of interest precluded him from hearing the Motion to Amend, and an Order Returning Action to Circuit Court was filed on March 22, 2013. Appellants' Motion to Amend, therefore, has yet to be heard and decided.

Appellants' motion to reinstate/restore their complaint in Case No.: 2009-CP-22-1045, and to consolidate that action with the Charlton Foreclosure, was heard by the court on March 7, 2013. This motion was denied by form order filed on March 11, 2013, and a formal order thereafter filed on March 27, 2013. Appellants served a Rule 59, SCRCP, motion to alter or amend this order on or about April 11, 2013. This motion was heard by the court on June 6, 2013. The court denied this motion by form order filed on June 7, 2013, (R., Exh. 5), and formal order was thereafter filed on June 21, 2013. (R., Exh. 6.)

The orders of March 8, March 27, June 7, and June 21, 2013, are the subjects of the present appeal, notice of which was filed and served by Appellants on July 22, 2013. The causes of action asserted by Appellants in their original complaint (2009-CP-27-1045) are virtually identical to the counterclaims, crossclaims and third party complaint which Appellants seek to add to their proposed amended answers. If Appellants' appeal of the orders denying Appellants' motion to reinstate/restore and consolidate is not successful, Appellants' motion to amend will be moot, as the applicable statute of limitations will bar all such claims.

ARGUMENT

1. The trial court erred in applying Rule 40(j), SCRCP, to the facts and procedures of this case.

The circuit court order striking Appellants' case was issued by the Court, *sua sponte*. The only reason or basis given by the Court for striking this case, was: "Case Stricken Due to Bankruptcy." (R., Exh.1.) Fourteen (14) other cases on the Georgetown common pleas jury trial roster were stricken by the Court because of South bay's Bankruptcy, with identical form orders, for the identical reason.

The Court's March 27, 2013 order denying Appellants' motions to restore and to consolidate, was premised substantially upon Rule 40(j), SCRCP. The Court found that: *...the Plaintiff's claims was [sic] not tolled by Rule 40(j) because the motion to restore the action was filed more than one (1) year after the action was stricken.*" The Court also found that *11 U.S.C.A. §108(c) provided the Plaintiffs an extension of time because of South Bay Property's Bankruptcy. But, the extension of time expired thirty (30) days after notice of the termination or expiration of the Bankruptcy state. The*

Bankruptcy was dismissed on August 12, 2011, seventeen (17) months before the motion to restore was filed."

Apodictally, Appellants' original action was not stricken pursuant to either Rule 40(j), or 11 U.S.C.A. §108(c), and was not "dismissed." The case remained on the circuit court's "General Docket" (Rule 40(a), SCRCP), awaiting restoration to the "Active Roster," as discussed more fully hereinbelow. 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). (Supp. R. p. 369, lines 18-24; p. 370, lines 10-21; p. 371, lines 21- p. 373, line 4.)

The trial court found and concluded that Appellants' claims were "*barred by the statute of limitations and restoration of this case should be denied. Since restoration of this case is denied, consolidation of this case with Bonnie N. Charlton, et al. v. South Bay Properties, LLC, et al. (Case No.: 2012-CP-22-00934) is moot.*" (Exhibit 3.) For the reasons set forth herein, Appellants respectfully submit that the trial court's order is controlled by errors of law, and that consolidation of Appellants' original action (2009-CP-22-1045) with the Charlton foreclosure action (2012-CP-22-00934) is appropriate for the reasons elucidated by Judge Culbertson at this hearing (R., p. 339, line 18 – p. 342, line 1), among others.

Rule 40(j) provides as follows:

*"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 ten (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. (Emphasis added.)

The order striking Appellants' case was issued and filed by the court *sua sponte*, not upon motion of any party. There was no written agreement by all parties to Plaintiff's case that it be stricken, and that the statute of limitations would be tolled if the claim was restored upon motion made within one (1) year of the date stricken. There was also no reference to Rule 40(j), in the order striking Appellants' case, as being the controlling or relevant procedure for restoring the action, following conclusion of South Bay's bankruptcy. It is also revealing that Judge Culbertson, in ruling from the bench at the hearing of Appellants' motion to alter or amend his order denying Plaintiffs' motion to reinstate, announced that his order *was not going to rely on 40(j), SCRCP*. (Supp. R., p. 373, lines 5-20; p. 374, lines 6-18. (Exhibit 6))¹

Rule 40(a) and (b), together with the circuit court's order reinstating the other fourteen (14) similar cases "*to active status*,"² provide a clear indication of the actual effect of the order striking Appellants' case. Rule 40(a), in pertinent part, provides for the maintenance by the clerk of court of a "General Docket" and a "Jury Trial Roster". Rule 40(b) provides for the transfer of cases from the "General Docket" to the "Jury Trial Roster." Each and every one of the orders restoring the other fourteen (14) cases, all of which had been "stricken due to bankruptcy", based on South Bay's Bankruptcy, are

¹ Due to inadvertence and oversight, Appellants failed to request the transcript of the June 6, 2013 hearing of Appellants' motion to alter or amend the order denying Appellants' motion to reinstate. Appellants have now requested this transcript, and will move before this Honorable Court for leave to supplement the Record hereafter by adding this transcript and appropriate references hereafter.

² Exhibit "A" to Appellants' motion to alter or amend judgment, filed April 15, 2013; R., Exhibit 13.

titled "ORDER TO RESTORE CASE TO ACTIVE STATUS," and contain the following ruling: *"For the reasons stated above, it is hereby ordered that the foregoing matter be moved to an active status and placed back on the trial roster."*

It is evident, therefore, that the orders striking Appellants' and the other fourteen (14) cases, resulted in Appellants' case being transferred from the Jury Trial Roster to the General Docket. The orders placing the other similar cases "*back on the trial roster*," had the effect of transferring those cases back to the Jury Trial Roster. But these orders were not issued pursuant to Rule 40(j), and the procedure for restoring these cases to the Jury Trial Roster was not governed by Rule 40(j).

Appellants' action was filed well within the applicable three (3) year statute of limitations. The statute of limitations could not have expired, therefore, while the case remained on the circuit court's General Docket.

In Robinson v. Cleckley and Co., Inc., 751 Fed Supp. 100, 105, (D.S.C 1990), Judge Hawkins addressed a nearly identical issue in reference to former Rule 40(c)(3), the predecessor to Rule 40(j). The issue in Robinson, arose under 28 U.S.C. §1446(b), which addresses removal of a diversity case to Federal Court. Section 1446(b) prohibits removal of a case on the basis of diversity, more than one (1) year after it was commenced (in state court). (Id. at 103.) The action was removed from the active court calendar pursuant to Rule 40(c)(3), on September 30, 1987. It was restored by court order on January 19, 1989. Settlements with the other co-defendants, resulted in creating diversity jurisdiction for the first time on November 9, 1989. The sole remaining Defendant filed a notice of removal on December 6, 1989. Judge Hawkins framed the issued for the court as follows:

The issue raised by the Defendant is essentially whether a case that has been stricken from the calendar pursuant to Rule 40(c)(3) is recommenced, for purposes of 28 U.S.C. §1446(b), when it is restored to the calendar or whether the time bar of §1446 continues to run while the case remains off of the docket. (Id. at 105.)

The court held that, "...the procedure for restoration is not the same as the procedure for commencing a new case. The commencement of a case requires the filing and service of a summons and complaint. S.C.R. Civ.P(3)(a). The restoration of a case under Rule 40(c)(3) does not require service; rather, the case may be restored merely by re-filing the case and paying the new filing fee...Further, for purposes of 28 U.S.C. §1446(b), **an action which has been removed from the docket pursuant to S.C.R.civ.p.40(c)(3) is pending while it is off the docket.**" (Emphasis added.)

In the present case, Appellants were not required to re-file and serve their summons and complaint. Similar to the other fourteen (14) Plaintiffs in the related actions, Plaintiffs were required only to move to have their case restored to the active roster. As with the Robinson action, Appellants' action was still pending, on the General Docket, although it had been removed from the Jury Trial Roster.

Finally, as our Supreme Court ruled in Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26: "...Rule 40(j) does not have a deadline during which a motion to restore must be filed." It only requires that, if the party seeking to restore the case wishes to have the statute of limitations tolled while the case is removed, they must file their motion to restore the case within one (1) year from the date it is stricken. This can only be accomplished, however, by written agreement with all opposing parties. This procedure was not invoked in the present case, because Rule 40(j) was not involved in any way in the order striking Appellants' action. It was not necessary for the statute of

limitations to be tolled in Appellants' action, while it remained active, but dormant, on the court's General Docket.

2. The trial court erred in applying Title 11, U.S.C.A., §108(c) to the facts and procedures of this case.

Title 11 U.S.C.A. §108(c), of the Federal Bankruptcy Code, provides as follows:

§108. Extension of time.

(c) Except as provided in section 524 of this title, if applicable non-bankruptcy law, an order entered in a non-bankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

Appellants' motion to alter or amend the March 27, 2013 order, setting forth the same grounds for reversal of that order as are set forth in this Appeal, was denied by the court as recited hereinabove. The formal order denying Appellants' motion to alter or amend, filed on June 21, 2013, more fully addressed the "...*impact of South Bay Properties, LLC's bankruptcy on the statute of limitations...*" and is also controlled by the same error of law. The Court found that "*South Bay Properties, LLC's bankruptcy did not toll of [sic] the statute of limitations but merely insured the Plaintiffs had at least thirty (30) days after notice of termination of the bankruptcy to commence or continue any claims against South Bay Properties, LLC that had not expired*

before the start of the bankruptcy." (Exhibit 6.) The statute of limitations applicable to Appellants' complaint was "tolled" by the filing of the complaint before the three (3) year statute of limitations expired. It was not necessary that the statute of limitations be "tolled" any further, by either the filing or dismissal of South Bay Properties, LLC's bankruptcy, nor by compliance with 108(c)(2). It was only necessary that Appellants' action be restored to the Jury Trial Docket, (Rule 40(a), SCRPC) once the bankruptcy stay had been lifted or cancelled.

Following the hearing of Appellants' motion to reinstate/restore and consolidate, Judge Culbertson issued instructions to Respondents' attorney for preparation of the formal order, which relied entirely upon 11 U.S.C.A., §108(c) (R., Exhibit 6). Respondents had asserted the applicability of Rule 40(j) at oral argument, and this law was included in the March 27, 2013 formal order nonetheless. At the hearing of Appellants' motion to alter or amend this order, Judge Culbertson ruled from the bench that his ruling did not include Rule 40(j). (Supp. R., p. 373, lines 5-20; p. 374, lines 6 - 18.)³ This issue remains in the court's orders on appeal, therefore, and is addressed in order to avoid application of the two issue rule. See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). (*"Under the two issue rule, where a decision is based on more than one ground, the Appellate Court will affirm unless the Appellant appeals all grounds because the unappealed ground will become the law of the case."*)

In some jurisdictions state law may dictate suspension of a statute of limitations when a bankruptcy or another court proceeding has stayed the initiation of an action. Such suspensions would presumably be included within the terms of §108(c), adding the entire duration of the automatic stay to the applicable time period....However,

³ Motion to Supplement Record pending.

*absent such a provision in applicable non-bankruptcy law, a statute of limitations or other deadline for an action against a debtor **which would have expired while an automatic stay was applicable** is extended by only the second period set forth in §108(c), thirty (30) days after notice of the termination or expiration of the automatic stay barring the action.* 2 Collier on Bankruptcy at 108.04 [1] – 108.04 [2] (16th ed. 2010) (Emphasis added)

In the present case, Appellants' statute of limitations would not have "expired" during South Bay's Bankruptcy because suit had been filed before South Bay filed Bankruptcy. Appellants' action, although stayed by the Bankruptcy, would have continued automatically after the bankruptcy stay was terminated, but for the circuit court orders striking the case from the active (Jury Trial) roster. The order striking the case did not "fix a period for... continuing" Appellants action (108(c)).

In F/S Manufacturing v. Kensmoe, 798 N.W.2d 853 (N.D. 2011), the North Dakota Supreme Court analyzed the effect of 108(c), and the 30 day extension of time it provides when an ongoing case has been stayed by a bankruptcy proceeding.

*However, absent such a provision in applicable non-bankruptcy law, a statute of limitations or other deadline for an action against a debtor **which would have expired while an automatic stay was applicable** is extended by only the second period set forth in §108(c), thirty (30) days after notice of determination or expiration of the automatic stay barring the action.* (citing: 2 Collier on Bankruptcy, Id.) (Emphasis added.)

Technically speaking, the Bankruptcy Code does not provide that a statute of limitations is tolled during the period of bankruptcy. (citations omitted.) Further, §108(c)(1) does not independently toll or suspend statutes of limitations which have not expired as of a Bankruptcy Petition date. (citation omitted.) The reference in 108(c) to "suspension" of time limits, clearly does not operate in itself to stop the running of a statute of limitations; rather, this language merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes. (citations omitted.)

As argued hereinabove, the statute of limitations applicable to Appellants' case was tolled, or effectively complied with, by the filing of Appellants' action within the applicable time period. While the *prosecution of Appellants' action was stayed by the automatic Bankruptcy stay*, Appellants were not in jeopardy of their statute of limitations expiring, because their action was still active, but dormant; on the circuit court's General Docket.

The effect of the circuit court's form order striking Appellants' action due to South Bay's Bankruptcy, was merely to place it on inactive status on the General Docket, to be reinstated or terminated. Appellants, like the other fourteen (14) Plaintiffs in the related cases, were not required to move to restore their case to the Jury Trial Roster within thirty (30) days after receipt of notice of termination of the Bankruptcy stay. The thirty (30) day extension would have only become operative if Appellants had been stayed from *commencing* their action because of South Bay's Bankruptcy, and Appellants' three (3) year statute of limitations had expired while South Bay's Bankruptcy was ongoing. Those are not the facts of this case. Appellants' action was commenced approximately two (2) years before South Bay's Bankruptcy Petition was filed. This was the result in Grotting v. Hudson Shipbuilders, Inc. 85 B.R. 568 (Wd. Dist. WA, U.S.D.C. 1988). In Grotting, the commencement of Plaintiffs' personal injury claim against the Defendant was stayed by Defendant's prior bankruptcy filing. The automatic bankruptcy stay did not toll the applicable three (3) year statute of limitations, and Plaintiff failed to file its action within the thirty (30) day extension provided by 108(c)(2), after receiving notice of the termination of the automatic stay. The Defendant was granted partial summary judgment on this basis.

III. The trial court violated Appellants' Constitutional Rights to Due Process in applying the procedural requirements of either Rule 40(j), SCRCP, or of Title 11, U.S.C.A., §108(c), or both, without prior notice to Appellants, and thereby imposing a materially different procedural standard for reinstatement of Appellants' action, than that required of fourteen (14) separate but similarly situated cases on the Court's Docket.

As previously argued, the trial court reinstated fourteen (14) separate, similarly situated cases, on motions filed, and placed them "...back on the trial roster." (Exhibit 13.) In the present case, in response to Appellants' motion to have their case reinstated/restored, the trial court adopted a completely different standard, and applied the requirements of either Rule 40(j), SCRCP, or Title 11, U.S.C.A. §108(c), or both, and found that Appellants' had failed to timely comply with these requirements, and therefore their applicable statute of limitations had expired.

In Moore v. Moore, 376 S.C. 467, 473, 657 S.E.2d 743, 747 (2007), our Supreme Court reviewed the requirements of procedural due process:

Procedural "[d]ue process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 652 S.E.2d 565, 567 (2007).

...[D]ue process is flexible and calls for such procedural protections as the particular situation demands." S.C. Dep't. of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.ed.2d, 484, 494 (1972)). *The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur.* S.C. Dep't. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

The order striking Appellants' case violated Appellants' procedural due process

rights by failing to provide any notice that the order was or would be subject to the procedural requirements of either Rule 40(j), or §108(c). As a result of this lack of notice, Appellants were also denied an adequate opportunity for a hearing before the court concluded that their applicable statute of limitations had expired, due to their failure to comply with the procedural requirements of these undisclosed standards. Appellants' entitlement to pursue this action constitutes a significant right and interest, for which they are entitled to the protection of procedural due process. (Supp. R. p. 353, line 15 - p. 356, line 8.)

In Town of Iva v. Holley, 74 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007), this court discussed the equal protection requirements of the 14th Amendment, and criteria for qualification as a "class of one" noting that:

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." This clause requires that "the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose." (citation omitted.) It does not dictate that people in different circumstances cannot be treated differently under the law. (citation omitted.) Rather, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royston Guano Co. v. Com. of Virginia, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L.ed. 989, 1920.

In the present case, the Appellants are similarly situated to all fourteen (14) of the other civil actions which were restored to the active roster by the circuit court, without imposing the procedural requirements of either Rule 40(j), SCRCP, of Title 11, U.S.C., §108(c). One of the fourteen (14) cases, in fact, was an action in which the Charlton Defendants in Appellants' action, were the Plaintiffs in a case similar to that alleged by Appellants in their complaint. That case (2008-CP-22-1490) was restored by the court

on November 2, 2012, just two (2) months prior to the date Appellants filed their motion for reinstatement. These other cases are similarly situated to Appellants', in that they were all stricken because of the bankruptcy of South Bay Properties, LLC, with identical or nearly identical form orders indicating simply "*Stricken due to bankruptcy.*"

Appellants qualify as a "class of one" under the criteria elucidated by the United States Supreme Court in Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L.ed.2d 1060 (2000). Appellants are informed and believe the substantially disparate standard applied to their claims, as compared with the other fourteen (14) cases, constitutes evidence that they were intentionally treated differently from the others, with whom they were similarly situated, and that there is no rational basis for the difference in treatment. (Supp. R. p. 356, lines 4 - 8.)

4. Respondents Waived the Right to Assert a Statute of Limitations Defense.

Assuming that the Appellants filed their Motion to Restore after the statute of limitations ran (which is expressly denied), the Respondents waived their right to raise the statute of limitations as a defense. As stated above, the Charltons, The Hartford and South Bay either allowed or participated in the restoring of related cases. In fact, the Charltons, South Bay and The Hartford entered into a consent order restoring the case the Charltons had brought against The Hartford and South Bay. It could have been argued that the statute of limitations had run in most, if not all, of the restored cases.

A party can waive the statute of limitations by words or conduct, including failure to claim the defense, "... or by any action or inaction manifestly inconsistent with an

intention to insist on the statute." (emphasis in original) Mende v Conway Hospital, 304 S.C. 313, 404 S.E.2d 33, 314 (Ct. App. 1991). As shown above, the Respondents failed to assert the statute of limitations when they could have done so in the related actions. The restoration of the related cases after the statute of limitations may have run clearly manifests actions inconsistent with their intention now to insist on the application of the statute of limitations in this matter.

CONCLUSION

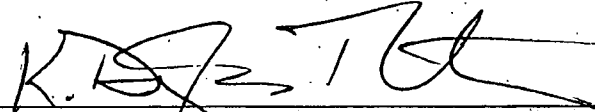
For the foregoing reasons, Appellants respectfully submit that the trial court erred in finding that their statute of limitations had expired, due to their failure to comply with the standards required by either Rule 40(j), SCRCP, or Title 11 U.S.C.A., §108(c). Neither law was referred or alluded to in any way by the order striking Appellants' action due to the bankruptcy of South Bay Properties, LLC. Neither Rule 40(j), nor §108(c) apply to or govern the reinstatement of Plaintiff's action under the facts and circumstances recited herein. Respondents waived the right to raise these procedural requirements in opposition to Appellants' motion to reinstate/restore.

To impose such standards upon Appellants, singularly, while failing to impose such standards upon any of the fourteen (14) other Plaintiffs with similarly situated claims, violates Appellants' constitutional rights to procedural due process and equal protection of the law. Appellants request that the order denying their motion to reinstate/restore and consolidate, and the order denying their motion to alter or amend, be reversed, and that the case be remanded to the circuit court with directions to reinstate Appellants' action (2009-CP-22-1045) to the active jury trial docket, to

consolidate Appellants' action with the Charltons Foreclosure, and to proceed to litigation of all claims on their merits.

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

AND

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

October 7, 2014

Conway, SC

RECEIVED
OCT 09 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-22-1045

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 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, 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.

BRIEF OF RESPONDENT
CITY OF GEORGETOWN

RECEIVED

OCT 08 2014

SC Court of Appeals

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Elise F. Crosby
CROSBY LAW FIRM, LLC
405 Dozier Street
Post Office Box 2424
Georgetown, South Carolina 29440
(843) 546-3103

Counsel for Respondent City of Georgetown

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-22-1045

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 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, 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.

**BRIEF OF RESPONDENT
CITY OF GEORGETOWN**

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Elise F. Crosby
CROSBY LAW FIRM, LLC
405 Dozier Street
Post Office Box 2424
Georgetown, South Carolina 29440
(843) 546-3103

Counsel for Respondent City of Georgetown

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case	1
Arguments	3
I. The Circuit Court correctly ruled that the statute of limitations expired prior to the filing of the Appellants' motion to restore and that the Appellants failed to move to restore the action within a thirty-day window allowed under the United States Bankruptcy Code.	3
II. The Appellants' constitutional arguments are neither preserved for appellate review nor have any merit.	9
III. The Appellants' claims against the City of Georgetown are now moot, and for that reason, this Court lacks appellate jurisdiction.	13
Conclusion	18

TABLE OF AUTHORITIES

Cases

<i>Abraham v. Palmetto Unified School District No. 1</i> , 343 S.C. 36, 538 S.E.2d 656 (Ct. App. 2000).	5
<i>Byrd v. Irmo High School</i> , 321 S.C. 426, 468 S.E.2d 861 (1996).	14
<i>City of North Myrtle Beach v. Lewis-Davis</i> , 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004).	12
<i>Elam v. South Carolina Department of Transportation</i> , 361 S.C. 9, 602 S.E.2d 772 (2004).	10
<i>Ellie, Inc. v. Miccichi</i> , 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).	10
<i>Harbit v. City of Charleston</i> , 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2008).	12
<i>Hickman v. Hickman</i> , 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990).	11
<i>In re Gorski</i> , 370 S.C. 357, 635 S.E.2d 95 (2006).	4
<i>I'On v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000).	10
<i>Jones v. Equicredit Corp. of South Carolina</i> , 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001).	4
<i>Matter of Decker</i> , 322 S.C. 215, 471 S.E.2d 462 (1995).	5
<i>Maxwell v. Genez</i> , 356 S.C. 617, 591 S.E.2d 26 (2003).	5, 6, 7, 9

<i>Maxwell v. Genez</i> , 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002).	6
<i>McNaughton–McKay Electric Co. of North Carolina, Inc.</i> <i>v. Andrich</i> , 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1997).	4
<i>Olson v. South Carolina Department of Health and</i> <i>Environmental Control</i> , 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008).	12
<i>Rainey v. Haley</i> , 404 S.C. 320, 745 S.E.2d 81 (2013).	13
<i>Sloan v. Friends of the Hunley, Inc.</i> , 369 S.C. 20, 630 S.E.2d 474 (2006).	17
<i>Smothers v. U.S. Fidelity and Guaranty Co.</i> , 322 S.C. 207, 470 S.E.2d 858 (Ct. App. 1996).	11
<i>Southeastern Housing Foundation v. Smith</i> , 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008).	17
<i>Stark Truss Co., Inc. v. Superior Construction Corp.</i> , 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004).	5
<i>State v. Austin</i> , 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991).	12
<i>Sunset Cay, LLC v. City of Folly Beach</i> , 357 S.C. 414, 593 S.E.2d 462 (2004).	13
<i>U.S. Bank Trust National Association v. Bell</i> , 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).	4
 <u>Statutes and Rules</u>	
S.C. Code Ann. § 6-29-1180.	15

S.C. Code Ann. § 15-78-110.	8
11 U.S.C. § 108(c).	3, 7, 9, 11
Rule 40(j), SCRCP.	passim
Rule 59(e), SCRCP.	11

STATEMENT OF THE CASE

This action involves a real estate development in the City of Georgetown known as Harbor Club on Winyah Bay. The Appellants are purchasers of lots in the development. The Appellants filed suit on July 9, 2009, after the developers failed to construct various infrastructure and amenities.

Among the numerous Defendants is the Respondent City of Georgetown, which has been sued as the obligee on a Subdivision Performance Bond issued by the Respondent Hartford Fire Insurance Company as the surety for the developer. The Appellants' only cause of action against the City of Georgetown is the seventh cause of action as alleged in the Complaint. (R. 46-56). The Appellants seek only prospective relief against the City. (R. 65-66). Specifically, the Appellants pray for an order directing the City to call the Subdivision Performance Bond issued by the Respondent Hartford Fire Insurance Company as the surety. The Appellants also seek declaratory relief to the same effect.

On July 22, 2011, the Appellants' action was stricken because of the bankruptcy filed by South Bay Properties, LLC. (R. 1). Less than a month later, on August 21, 2011, the bankruptcy was dismissed. (R. 109-112). The Appellants, however, waited until January 22, 2013, to file a motion to restore the action. (R. 101). That motion was heard by Circuit Court Judge Benjamin Culbertson on March 7, 2013. Judge Culbertson ultimately issued an order denying the motion to

restore. He concluded the "the Plaintiffs' claims are barred by the statute of limitations and restoration of this case should be denied." (R. 7).

The Appellants thereupon filed a Rule 59(e) motion to alter or amend judgment, which was heard on June 6, 2013. Judge Culbertson ultimately denied that motion by an Order filed June 21, 2013. (R. 12-14). The Appellants then filed an appeal to this Court.

ARGUMENTS

- I. The Circuit Court correctly ruled that the statute of limitations expired prior to the filing of the Appellants' motion to restore and that the Appellants failed to move to restore the action within a thirty-day window allowed under the United States Bankruptcy Code.**

The Appellants contend that Circuit Court Judge Benjamin Culbertson erred in denying their motion to restore their lawsuit after the suit had been stricken based upon the bankruptcy of the Respondent South Bay Properties, LLC. By Order filed March 27, 2013, Judge Culbertson denied the motion to restore. Judge Culbertson ruled that the Appellants failed to seek to restore the action within the statute of limitations or within an additional thirty-day window allowed under the United States Bankruptcy Code, specifically 11 U.S.C. § 108(c). (R. 7).

The Appellants contend that Judge Culbertson erred in several respects. First, they argue that Judge Culbertson erred in relying on Rule 40(j), SCRCP, because the case was stricken based upon the automatic stay resulting from South Bay's bankruptcy and not by the consent of the parties per Rule 40(j). Second, the Appellants contend that the action was merely stricken and not dismissed, and as a result, the statute of limitations was not implicated. Third, the Appellants maintain that, even if the statute of limitations applied, the resolution of that issue was premature. Instead, as they claim, the action should have been restored, and the statute of limitations could have then been asserted as a defense. Each of these

arguments lack merit.

First and foremost, South Carolina law provides that a case when stricken is required to be restored within a particular timeframe which is established by the applicable statute of limitations. The Appellants appear to dispute that. The Appellants seem to claim that there is no timeframe 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.

Without dispute, a case that is "stricken" under South Carolina procedural law is required to be restored by the filing and adjudication of a motion to restore. Even cases that are stricken because of a pending bankruptcy are not restored without the filing and adjudication of a motion to restore. *See e.g., McNaughton–McKay Electric Co. of North Carolina, Inc. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1997); *Jones v. Equicredit Corp. of South Carolina*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001).¹ The requirement of a motion to restore is not limited to cases stricken under Rule 40(j). The Appellants appear to agree with that precept.

¹ In at least one reported decision, a case stricken due to a bankruptcy was restored under Rule 40(j), SCRCP. *See, U.S. Bank Trust National Association v. Bell*, 385 S.C. 364, 684 S.E.2d 199, 203 (Ct. App. 2009) ("[a]fter Mr. Bell's bankruptcy case was closed, the foreclosure action was restored to the active docket on March 28, 2007, pursuant to Bank's motion under Rule 40(j), SCRCP"). *See also, In re Gorski*, 370 S.C. 357, 635 S.E.2d 95, 96 (2006) (attorney disciplinary case which refers to an action that was to be restored after the defendant's insurance company filed bankruptcy and the case was stricken pursuant to Rule 40(j)).

The Appellants nonetheless contend there is no time limitation for the filing of a motion to restore. Yet, a case stricken under Rule 40(j) clearly has a time limitation. That is obvious because Rule 40(j) expressly provides for a tolling mechanism for a statute of limitations. If the parties consent to striking a case under Rule 40(j), the parties must consent to a tolling of the statute of limitations for a period of one year on the condition the case is restored within one year after it is stricken. Logically speaking, if the statute of limitations provided no time limitation for the restoration of a stricken case, then the tolling provision set forth in Rule 40(j) would be absolutely meaningless. It is well settled that procedural rules, like statutes, "should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Abraham v. Palmetto Unified School District No. 1*, 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), citing *Matter of Decker*, 322 S.C. 215, 471 S.E.2d 462, 463 (1995).² See also, *Stark Truss Co., Inc. v. Superior Construction Corp.*, 360 S.C. 503, 602 S.E.2d 99, 102 (Ct. App. 2004) (rule of civil procedure should not be construed so as to render its requirements meaningless).

Indeed, in *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), the South Carolina Supreme Court recognized that the time for restoration of a stricken case

² See, *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003) ("[i]n interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes").

is limited by the statute of limitations. The Supreme Court explained that "[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." 591 S.E.2d at 28. Therefore, in *Maxwell*, the plaintiff could move to restore more than a year after the case was stricken; however, as the Supreme Court recognized, the defendants were free to exercise "their right to oppose the motion to restore on grounds of the expiration of the statute of limitations" 591 S.E.2d at 28, n.2. In *Maxwell*, the Supreme Court ultimately reinstated the Circuit Court's denial of the motion to restore based upon the expiration of the statute of limitations.³

In the present case, the Appellants insist that their action was not stricken under Rule 40(j). They are correct. By Order filed July 22, 2011, Circuit Court Judge Larry Hyman struck the case "due to bankruptcy." (R. 1). The Form 4 Order shows that the case was not stricken under Rule 40(j).

However, that makes absolutely no difference in the final analysis. 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

³ Additional procedural history of the case is available in the Court of Appeals' decision which was reversed by the Supreme Court. See, *Maxwell v. Genez*, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002).

a case whenever he wants -- five years, ten years or even fifty years later. Clearly, that is not the law. Despite the Appellants' protestations, there *is* a time limitation, and that is established, like in *Maxwell*, by the statute of limitations, subject of course to any applicable tolling provisions.

In the case at bar, the one-year tolling provision of Rule 40(j) is inapplicable for two reasons. First, as the Appellants themselves point out, the case was not stricken under Rule 40(j), and the parties did not consent in writing to any tolling period. Second, even if Rule 40(j) were applicable, the motion to restore was filed more than a year after the case was stricken, and accordingly, the Appellants "simply cannot take advantage of the one year tolling period provided by the rule." *Maxwell*, 591 S.E.2d at 28.

As Judge Culbertson did note, the United States Bankruptcy Code does, however, provide for a "tolling" provision or more aptly a "savings" provision that allows for any case to be commenced or continued (i.e. restored) if such action is taken within thirty days after notice of the termination or expiration of the bankruptcy stay. 11 U.S.C. § 108(c). Yet, the application of this "tolling" or "savings" provision does not save the Appellants' case. Moreover, the Appellants have not asserted any other applicable tolling laws or theories.

During oral argument in the lower court, the Appellants' counsel conceded that the statute of limitations for his clients would have begun to run at the earliest in 2008, when the infrastructure and amenities had not been completed (or for that

matter begun to be built) by the developer. (Supp. R. 351). Judge Culbertson focused on August 2008, and using that date, the three-year statute of limitations would have expired in August 2011.⁴ The South Bay bankruptcy was dismissed on August 12, 2011. Therefore, the Appellants had until September 12, 2011, by which to file their motion to restore. That did not occur. The motion to restore was filed on January 22, 2013, which was more than sixteen months later.⁵

Even if the Appellants take issue with using August 2008 (or any date in 2008) as the date that the statute of limitations began to run, the Appellants cannot dispute using July 9, 2009, which is the filing date of their Complaint. (R. 17). Using that date, the three-year statute of limitations expired on July 9, 2012, which was still more than six months prior to the date that the motion to restore was filed. Under any scenario, it is clear that the three-year statute of limitations expired prior to any attempt by the Appellants to restore this action after it was stricken due to South Bay's bankruptcy.

Finally, the Appellants argue that Judge Culbertson should have restored the case and required the parties to argue a statute of limitations defense later. In other

⁴ The City of Georgetown does not concede that the applicable statute of limitations is three years. To the extent that the Appellants maintain that they have sued the City for monetary relief, which is denied, then the statute of limitations would be governed by the Tort Claims Act and would be two years. *See*, S.C. Code Ann. § 15-78-110.

⁵ Even using the final day of 2008 given the Appellants' concession that the earliest date was in 2008 (Supp. R. 351), then the motion to restore needed to be filed by December 31, 2011, and that did not occur.

words, they claim that the expiration of the statute of limitations is no basis for denying the motion to restore. That position is directly contrary to the Supreme Court's decision in *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), where the Court reinstated the Circuit Court's denial of a motion to restore because the statute of limitations had expired. The Court, in fact, recognized the defendants' "right to oppose the motion to restore on grounds of the expiration of the statute of limitations." 591 S.E.2d at 28, n.2. Consequently, it was absolutely appropriate for Judge Culbertson to have considered the statute of limitations and used its expiration as the basis for denying the motion to restore.

In sum, Judge Culbertson correctly analyzed the issues presented by the Appellants' motion to restore. He recognized that a case that is stricken must be restored and that there is a time limitation for doing so, which is established by the statute of limitations. He further determined that the statute of limitations expired long before the Appellants filed their motion to restore and that there was no "tolling" or "savings" provision under state law (Rule 40(j)) or federal bankruptcy law (11 U.S.C. § 108(c)) that made the Appellants' motion timely.

II. The Appellants' constitutional arguments are neither preserved for appellate review nor have any merit.

The Appellants have also raised a number of other collateral issues that are not properly preserved for appellate review but which nonetheless have no merit.

The Supreme Court and this Court have repeatedly explained that an appellant cannot raise an issue on appeal that was not first raised to *and* decided by the lower court. In *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by*, the trial court." *Id.* (Emphasis in original).

In particular, the Appellants have raised a due process argument for the first time on appeal whereby they claim to have never been placed on "notice" of any requirement to restore their lawsuit within the statute of limitations or within thirty days after the termination of the bankruptcy stay. This issue was not properly raised below, and it is clear that the issue was never addressed by Judge Culbertson in his orders. In fact, the Appellants' counsel never uttered the words "due process" at either hearing. While a cursory reference was made to "due process"

for the first time in the Rule 59(e) motion, that was untimely.⁶

Nonetheless, the Appellants now argue that "[t]he order striking Appellants' case violated Appellants' procedural due process rights by failing to provide any notice that the order was or would be subject to the procedural requirements of either Rule 40(j) or § 108(c)." *See*, Appellants' Brief, p. 14. This argument fails for three primary reasons. First, the Appellants are jurisdictionally precluded from claiming any error as a result of Judge Hyman's order striking the case. The Notice of Appeal reflects that no appeal was filed from that order. (R. 153-154). Second, Judge Culbertson did not hold that Rule 40(j) or 11 U.S.C. § 108(c) created any procedural obligation or deadline to restore the Appellants' case. He simply concluded that those provisions were not applicable to "toll" or "save" the Appellants' case given the untimely motion to restore. And third, it is well settled that "[e]veryone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests." *Smothers v. U.S. Fidelity and Guaranty Co.*, 322 S.C. 207, 470 S.E.2d 858, 860 (Ct. App. 1996).

The Appellants have also asserted an equal protection argument. As this Court has explained, "[t]he *sine qua non* of an equal protection claim is a showing

⁶ It is well settled that a Rule 59(e) motion may not be used to present a new issue or new evidence to the court that could have been presented prior to entry of judgment. In *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990), this Court held: "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." 392 S.E.2d at 482.

that similarly situated persons received disparate treatment." *Olson v. South Carolina Department of Health and Environmental Control*, 379 S.C. 57, 663 S.E.2d 497, 504 (Ct. App. 2008). The Equal Protection Clause "does not prohibit different treatment of people in different circumstances under the law." *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776, 782-83 (Ct. App. 2008). Here, the Appellants argue that other similar lawsuits were restored after the South Bay bankruptcy was terminated. However, those cases were restored with the consent of the parties and involved different statutes of limitations. Nonetheless, as Judge Culbertson pointed out during the motion hearings, the fact that other cases were restored by consent and with no challenge by the parties to the timeliness of the restoration distinguishes the present case.⁷ In short, the Appellants cannot show that the Court ruled inconsistently or otherwise treated similarly situated litigants differently. The Appellants' equal protection arguments clearly lack merit.

⁷ As former Chief Judge Sanders explained, "appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811, 817 (Ct. App. 1991). The same is true with trial courts. The judges can address only the issues raised to them. If the parties consented in other cases to restore the actions and no one raised the timeliness of the motions to restore, it was not the court's duty to raise such an issue *sua sponte*. In fact, as this Court has explained, "[i]t is an error of law for a court to decide a case on a ground not before it." *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462, 464 (Ct. App. 2004).

III. The Appellants' claims against the City of Georgetown are now moot, and for that reason, this Court lacks appellate jurisdiction.

The Respondent City of Georgetown further submits that all claims alleged by the Appellants against the City are moot, and as a result, this Court lacks appellate jurisdiction.⁸

The South Carolina Supreme Court has explained that the Declaratory Judgments Act "has its limits." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462, 466 (2004). "An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act." *Id.* "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Id.* "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81, 87 (2013). Most importantly, "[a] declaratory judgment should not address moot or abstract matters." *Sunset Cay*, 593 S.E.2d at 466.

⁸ The City previously filed a motion to dismiss this appeal on the same basis. That motion was summarily denied by Acting Judge Jasper Cureton by Order filed April 16, 2014. (R. 15). The City is reasserting the grounds for dismissal herein in order to bring the issue before the full panel and because the issue is one of subject matter jurisdiction which may be raised at any stage of the litigation. Furthermore, in the event of an additional appeal, the City wants to ensure that this issue is properly preserved.

It is well settled that an appellate court lacks subject matter jurisdiction when there is no justiciable controversy between the parties. *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996). When events occurring after the filing of an appeal render the appeal moot as to one or more parties, the appellate court lacks subject matter jurisdiction over that aspect of the appeal. *Id.*

In the case at bar, there is no longer any justiciable controversy between the Appellants and the City of Georgetown. The Appellants' only cause of action against the City is the seventh cause of action as alleged in the Complaint. (R. 46-56). The Appellants have only sought prospective relief against the City. (R. 65-66). Through their claim for declaratory relief, the Appellants sought an order directing the City to call the Subdivision Performance Bond issued by the Respondent Hartford Fire Insurance Company as the surety so that the required site improvements may be installed. The record reflects that the City took that action -- the City called the Subdivision Performance Bond with the surety, Hartford Fire Insurance Company. In addition, the City brought suit against Hartford and resolved that action by entering into an Agreement dated August 20, 2013.⁹ That Agreement, a copy of which is an exhibit to the Hershon Affidavit previously filed with this Court (R. 168-179), provides for the installation of and payment for the site improvements as required by the City of Georgetown Land Development

⁹ The Appellants' Notice of Appeal was served July 23, 2013. (R. 153-154).

Regulations and S.C. Code Ann. § 6-29-1180. In accordance with that Agreement, Hartford has engaged a contractor and issued a Notice to Proceed under the Construction Contract. As a result, the Appellants have received the relief sought, and their claim against the City is rendered moot.

In disputing the City's assertion that their claim is now moot, the Appellants previously made two arguments. First, the Appellants claimed that the City's agreement with Hartford does not cover all improvements. Second, they argued that they may amend on remand – if successful on the merits of their appeal – to pursue a money damages claim against the City. Neither argument has merit.

As to the first argument, the Agreement between the City and Hartford does address all site improvements as *required* by the Land Development Regulations and S.C. Code Ann. § 6-29-1180. Section 500.1 of the Land Development Regulations provides that "[t]he Planning Commission shall not give approval of the Final Plat for recording unless the subdivider has installed *the following improvements as herein specified and required*, or has provided a financial guarantee therefore as specified in Section 502." (R. 193). (Emphasis added). Section 502 states that a developer must provide "Financial Guarantees covering *all improvements required by this Ordinance*" – i.e., the "required improvements." (R. 198). (Emphasis added). The financial guarantees may take the form of a subdivision performance bond. Section 502.3 provides that "[p]rior to completion of any or all *required improvements* by the subdivider, the subdivider may post a

performance bond with the governing authority guaranteeing the completion of *said improvements.*" (R. 198). (Emphasis added). Clearly, the financial guarantees in the form of a performance bond may cover only "required improvements." In fact, the funds from the bond may only be used to guarantee and pay for "required improvements." *See*, Section 502.5, City of Georgetown Land Development Regulations ("Any funds received from the financial guarantees required by this Ordinance shall be used only for the purpose of making the improvements for which said guarantees were provided"). (R. 200). Those "required improvements" are set forth in Section 501, which is entitled "Required Improvements," and those required improvements are provided for in the Agreement with Hartford. Hartford, as the surety, has agreed to install and pay for the site infrastructure improvements required under Section 501.

In their second argument, the Appellants claim that they are intended beneficiaries under the Subdivision Performance Bond issued by Hartford. That is not the case. The Subdivision Performance Bond itself clearly and unambiguously provides that "[n]o right of action shall accrue hereunder to or for the use or benefit of anyone other than the obligee." (R. 180).

Moreover, the Appellants have not included a money damages claim in their only cause of action against the City. Paragraph 131 of the Complaint provides that "the declaratory relief sought by Plaintiffs herein will partially mitigate Plaintiffs' damages to which Plaintiffs otherwise claim entitlement." *See*,

Complaint, para. 131. (R. 56). But that language refers to the damages claimed from the other Defendants, most notably the developer. The Appellants have not sought damages against the City as is evident from the assertion that "there is no adequate remedy at law with respect to these issues, except by way of the relief provided by the declaratory judgment statutes aforesaid." *See*, Complaint, para. 132. (R. 56).

Further, the Court is strongly urged to review the prayer at the end of the Complaint. In the prayer as to the Seventh Cause of Action, which is the only count against the City, the Appellants sought "an Order declaring and requiring that the City of Georgetown ... utilizing [sic] the bond to start or complete the required improvements and site infrastructure." *See*, Complaint, p. 49. (R. 65).

Again, the Appellants have received *that very relief*. It is well settled that a party's receipt of the requested relief moots a claim. *See*, *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680, 684, n.2 (Ct. App. 2008); *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006). The Appellants' claims have thus been rendered moot. There is no longer any case or controversy between the City and the Appellants, and for that reason, this Court lacks subject matter jurisdiction over this appeal as it applies to the City. The Appellants' appeal against the City therefore should be dismissed.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent City of Georgetown respectfully requests that this Court affirm the orders of Circuit Court Judge Benjamin H. Culbertson filed March 27, 2013 and June 21, 2013, denying the Appellants' motion to restore and ending this action against all Respondents including the City. In the alternative, the City of Georgetown respectfully requests that this Court dismiss the Appellants' appeal against the City as moot.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

-and-

Elise F. Crosby
CROSBY LAW FIRM, LLC
405 Dozier Street
Georgetown, South Carolina 29440
(843) 546-3103

Counsel for Respondent City of Georgetown

Columbia, South Carolina

October 8, 2014

THE 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 South One Signature Communities Respondents

**RESPONDENTS HARTFORD CASUALTY INSURANCE COMPANY'S AND
HARTFORD FIRE INSURANCE COMPANY'S FINAL BRIEF**

James Lynn Werner
Lawrence M. Hershon
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

Attorneys for Respondents Hartford Casualty
Insurance Company and Hartford Fire Insurance
Company

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
ARGUMENT	1
I. IS THERE A TIME LIMIT FOR RESTORING CASES STRICKEN FROM THE DOCKET?.....	1
II. DID THE TRIAL JUDGE CORRECTLY APPLY RULE 40(J), SCRCP, TO THE FACTS OF THIS CASE?	2
III. DID THE TRIAL JUDGE CORRECTLY APPLY 11 U.S.C. § 108(C) TO THE FACTS OF THIS CASE?	2
IV. DID THE TRIAL JUDGE VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS?	2
V. DID RESPONDENTS WAIVE THE RIGHT TO ASSERT THE STATUTE OF LIMITATIONS IN OPPOSITION TO APPELLANTS' MOTION TO RESTORE THIS CASE TO THE DOCKET?	2
VI. THE APPELLANTS' SOLE CAUSE OF ACTION AGAINST HARTFORD IS NOW MOOT BY VIRTUE OF INTERVENING EVENTS SO THAT NO JUSTICIABLE CONTROVERSY EXISTS.....	3
CONCLUSION.....	7

TABLE OF AUTHORITIES

CASES

<u>Brown v. Wingard,</u> 285 S.C. 478, 330 S.E.2d 301 (1985)	5
<u>Employers Ins. of Wausau v. Construction Management Eng'g.,</u> 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989).....	6
<u>Graham v. State Farm Mut. Auto. Ins. Co.,</u> 319 S.C. 69, 459 S.E.2d 844 (1995)	5
<u>Mathis v. South Carolina State Highway Dep't,</u> 260 S.C. 344, 195 S.E.2d 713 (1973)	4
<u>Novak & Co., Inc. v. Travelers Indemnity Co.,</u> 392 N.Y.S.2d 901 (N.Y. App. Div. 1977)	6
<u>Power v. McNair,</u> 255 S.C. 150, 177 S.E.2d 551 (1970)	5
<u>Richmond Shopping Center v. Wylie N. Jackson Co.,</u> 255 S.E.2d 518 (Va. 1979).....	6
<u>Sloan v. Friends of Hunley, Inc.,</u> 369 S.C. 20, 630 S.E.2d 474 (2006)	4
<u>SOCAR, Inc. v. St. Paul Fire & Marine Ins.,</u> 288 S.C. 287, 341 S.E.2d 822 (Ct. App. 1986).....	6
<u>South Carolina Public Service Comm'n v. Colonial Constr. Co.,</u> 274 S.C. 571, 266 S.E.2d 76 (1980)	6

STATUTES

S.C. CODE ANN. § 6-29-1180.....	5, 6
---------------------------------	------

RULES

Rule 220(c), SCACR	7
--------------------------	---

STATEMENT OF ISSUES ON APPEAL

1. IS THERE A TIME LIMIT FOR RESTORING CASES STRICKEN FROM THE DOCKET?
2. DID THE TRIAL JUDGE CORRECTLY APPLY RULE 40(J), SCRCP, TO THE FACTS OF THIS CASE?
3. DID THE TRIAL JUDGE CORRECTLY APPLY 11 U.S.C. § 108(C) TO THE FACTS OF THIS CASE?
4. DID THE TRIAL JUDGE VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS?
5. DID RESPONDENTS WAIVE THE RIGHT TO ASSERT THE STATUTE OF LIMITATIONS IN OPPOSITION TO APPELLANTS' MOTION TO RESTORE THIS CASE TO THE DOCKET?
6. IS APPELLANTS' SOLE CAUSE OF ACTION AGAINST HARTFORD NOW MOOT BY VIRTUE OF INTERVENING EVENTS SO THAT NO JUSTICIABLE CONTROVERSY EXISTS?

STATEMENT OF THE CASE

The Hartford Respondents adopt and incorporate the Statement of the Case provided in the Initial Brief of Respondents Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. (the "Charlton Respondents").

ARGUMENT

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

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

II. DID THE TRIAL JUDGE CORRECTLY APPLY RULE 40(J), SCRCP, TO THE FACTS OF THIS CASE?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

III. DID THE TRIAL JUDGE CORRECTLY APPLY 11 U.S.C. § 108(C) TO THE FACTS OF THIS CASE?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

IV. DID THE TRIAL JUDGE VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

V. DID RESPONDENTS WAIVE THE RIGHT TO ASSERT THE STATUTE OF LIMITATIONS IN OPPOSITION TO APPELLANTS' MOTION TO RESTORE THIS CASE TO THE DOCKET?

The Hartford Respondents adopt and endorse, without duplicating here, the arguments set forth in the Brief of the Charlton Respondents, and the opinions of the Circuit Court in its Order dismissing the lawsuit and denying the subsequent motion to reconsider. The Court should affirm the Circuit Court's Order based on the arguments set forth therein.

VI. THE APPELLANTS' SOLE CAUSE OF ACTION AGAINST HARTFORD IS NOW MOOT BY VIRTUE OF INTERVENING EVENTS SO THAT NO JUSTICIABLE CONTROVERSY EXISTS.

In the alternative to the arguments set forth by the Charlton Respondents, if the dismissal is not affirmed in full, the Court should dismiss the Hartford Respondents for the reasons set forth below.

Statement of Facts

In this case, Appellants have sued the Hartford Respondents on one claim for declaratory relief. Appellants allege that they are owners of various lots located in a subdivision situated in Georgetown County, South Carolina, known and designated as 'Harbor Club on Winyah Bay.' (R. p. 18, Complaint, ¶1) Hartford Casualty Insurance Company issued a Subdivision Performance Bond, dated July 17, 2007, in the penal sum of \$7,882,359.00, on behalf of South Bay Properties, LLC, as Principal (the developer), in favor of the City of Georgetown, South Carolina, as Obligee. (R. p. 250-51, Subdivision Performance Bond) Plaintiffs admit that the scope of the Performance Bond "was to assure construction of the infrastructure (roads and utilities) in the Subdivision. (R. p. 31, Complaint, ¶48) Appellants' sole claim against Hartford is for a declaratory judgment as to Hartford Respondents' legal duties and obligations for Hartford to pay the Respondent City under the Subdivision Performance Bond for completion of the required improvements and site infrastructure under the City's Land Development Regulations. (R. p. 55, Complaint ¶129) Appellants further admit that such declaratory relief "will terminate the controversies among the parties to this action with respect to the required infrastructure and site improvements in the Subdivision and will remove the uncertainties with respect to these issues." (R. p. 55-56, Complaint ¶131)

Regardless of the lack of legal authority for Appellants to assert or maintain such claim, due to events that have transpired since the dismissal of the underlying lawsuit the claim against the Hartford Respondents is now moot.

On August 20, 2013, the City of Georgetown, as Obligee on the Bond, entered into an Agreement with Hartford Fire Insurance Company (the Surety per Rider to the Bond) whereby those parties to the Bond have agreed to have the improvements covered by the Bond constructed and installed. (R. p. 237-96, Hartford Agreement with City) On December 11, 2013, following completion of a bidding and contractor selection process, Hartford entered into a Construction Contract with R.H. Moore Company, Inc. ("R.H. Moore"), pursuant to the aforementioned Agreement between Hartford and the City, to install the site infrastructure and utilities pursuant to plans and specifications approved by the City of Georgetown. (R. p. 297-314, R.H. Moore Contract) Hartford issued a Notice to Proceed under the Construction Contract with R.H. Moore, effective January 13, 2014, and R.H. Moore has commenced and already performed much of the work on the Project to install the required site infrastructure (roads and utilities). (R. p. 315, Notice to Proceed)

Argument

South Carolina appellate courts may only consider cases presenting a justiciable controversy. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). A case is moot where "a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." Id. at 26, 630 S.E.2d at 477 (citing Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

An appellate court shall not pass judgment on moot and academic questions or make an adjudication where there remains no actual controversy. Id. Moot appeals result when

intervening events render a case non-judicial. Mootness exists “when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” Matthis v. South Carolina State Highway Dep’t, 260 S.C. 344, 346, 195 S.E. 2d 713, 715 (1973).

“To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy.” Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). “A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.” Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)).

Hartford’s Subdivision Performance Bond is a product of the State statutory scheme and a local regulatory scheme. The State Statute (S.C. CODE ANN. § 6-29-1180) provides that where the local land development regulations require the installation of “site improvements,” then the Surety Bond must be in favor of the local government “to ensure that, in the event of default by the developer, funds will be used to install the required improvements at the expense of the developer.” The City of Georgetown’s Land Development Regulations Section 501 requires that “every subdivision developer shall be required to grade and improve streets and alleys, and to install curbs, monuments, sewers, storm water inlets, and water mains in accordance with the specifications established by the City of Georgetown Planning and Zoning Commission. (R. p. 194, Section 501, Land Development Regulations) If the subdivider has not completed all of the required improvements within the time specified in the Bond, “the governing authority may let or re-let the Contract and the subdivider and Performance Bond shall be severally and jointly liable for the cost thereof to the amount specified for such improvements in said Bond.”

After the Developer defaulted on its obligation to install the required site improvements, and after the close of the Developer’s Bankruptcy proceedings which affected any action related

to the property, Hartford and the City entered into an agreement to complete the construction of the site improvements required under the Subdivision Performance Bond. Because the City, as Obligee under the Bond, and Hartford, as Surety under the Bond, have executed an agreement for construction of the improvements covered by Hartford's Subdivision Performance Bond, at Hartford's expense as provided for in The City of Georgetown's Land Regulations, a justiciable controversy no longer exists. Appellants acknowledged in their Complaint that a declaration of Hartford's duties under the Bond to provide funds to the City to install the site infrastructure required by the Land Development Regulations would "terminate the controversies among the parties to this action..." (R. p. 55-56, Complaint, ¶131) Now, by virtue of the intervening agreement between the City and Hartford, no declaration is needed because the required site infrastructure is already being installed. A declaration by the Court would be meaningless. The claim for declaratory relief is moot by Appellants' own pleading.

Any adjudication by this Court on the issues raised on appeal will not settle any rights between Hartford and the Appellants, because the rights and obligations under the Bond run between Hartford and the City.¹ The parties to the Bond have already resolved any dispute.

¹ In South Carolina, it is beyond question that a surety's obligation on a performance bond is contractual, and such obligation cannot be extended beyond the terms of the bond and the intent of the parties expressed therein. South Carolina Public Service Comm'n v. Colonial Constr. Co., 274 S.C. 571, 266 S.E.2d 76 (1980); SOCAR, Inc. v. St. Paul Fire & Marine Ins., 288 S.C. 287, 341 S.E.2d 822 (Ct. App. 1986). When the language in the bond is plain and unambiguous, the bond must be interpreted in accordance with such language and terms. Employers Ins. of Wausau v. Construction Management Eng'g., 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989).

Moreover, for a third party (one not a party to the bond) to enforce the provisions of, or to collect under a performance bond, the bond itself must manifest a clear right granted to such third party. See Richmond Shopping Center v. Wylie N. Jackson Co., 255 S.E.2d 518 (Va. 1979); Novak & Co., Inc. v. Travelers Indemnity Co., 392 N.Y.S.2d 901 (N.Y. App. Div. 1977).

In this case, the Subdivision Performance Bond specifically identified by Appellants in their Complaint as the basis of their claims against Hartford, clearly and unambiguously states:

No right of action shall accrue hereunder to or for the use or benefit of anyone other than the obligee, and the obligee's right hereunder may not be assigned. . . .

(R. p. 250, Subdivision Performance Bond)

The Subdivision Performance Bond in issue, consistent with the underlying statutory authority for such bond in S.C. CODE ANN. §6-29-1180, expressly states that the Surety is bound under said Bond only to the City of Georgetown as the named Obligee.

related to the Bond and have agreed to complete the work covered under the Bond. Furthermore, as a result of the Agreement between the City and Hartford, there is no remaining issue with respect to the legal duties and obligations under the Bond and no remaining claim in the case requiring interpretation by the Court as to the Bond. By their Agreement, the City and Hartford have undertaken to provide and perform the work at issue in the claim for declaratory relief. The claim is now moot.

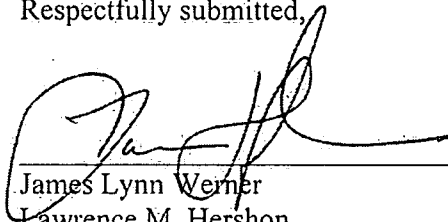
Because no justiciable controversy remains, as the agreement has been entered into for performance on the Bond, the appeal as to the Hartford Respondents should be dismissed.

CONCLUSION

In addition to the arguments stated herein, the Hartford Respondents further request that the Court affirm the judgment entered in this case on any other ground appearing in the record, pursuant to Rule 220(c), SCACR. For the reasons stated above, there is no reversible error by the Circuit Court, and the dismissal below should be affirmed.

It is clear that Appellants are not parties to the Hartford Subdivision Performance Bond, and they were not required, or intended to be, by the underlying statutes and regulations which govern such Bond. Since, for one who is not a party to the performance bond to enforce its provisions as a third-party beneficiary the bond itself must clearly grant such right, see Richmond Shopping Center, 255 S.E.2d 518; Novak & Co., 392 N.Y.S.2d 901, the express provision of the Bond undeniably negates any intended beneficiary assertions. The enforceable, express language of the Bond establishes that Appellants have no rights under the Bond, which is expressly for the use or benefit of only the named Obligees – the City, and no one else.

Respectfully submitted,



James Lynn Werner

Lawrence M. Hershon

Parker Poe Adams & Bernstein LLP

P. O. Box 1509

Columbia, SC 29202

Telephone: 803-255-8000

Facsimile: 803-255-8017

jimwerner@parkerpoe.com

lawrencehershon@parkerpoe.com

ATTORNEYS FOR RESPONDENTS HARTFORD
CASUALTY INSURANCE COMPANY AND
HARTFORD FIRE INSURANCE COMPANY

August 11, 2014
Columbia, South Carolina

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. Thomson 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.

RECEIVED

AUG 11 2014

Charles T. Smith
608 Cypress Street
Georgetown, South Carolina 29440
(843) 545-6578
Attorney for Respondents Ronald L. Charlton,
Bonnie N. Charlton, James R. Charlton, and
Bayside Property, Inc.

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Arguments	
1 There is a Time Limit for Restoring Cases Stricken from the Docket	3
2 The Trial Judge Correctly Applied Rule 40(j), SCRCP, to the Facts of this Case	8
3 The Trial Judge Correctly Applied 11 U.S.C. § 108(c) to the Facts of this Case	11
4 The Trial Judge did not Violate Appellants' Constitutional Rights to Due Process	12
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	14
Conclusion	15

TABLE OF AUTHORITIES

CASES

<i>Carolina Marine Handling, Inc. v. Lasch</i> , 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005)	6
<i>City of North Myrtle Beach v. Lewis-Davis</i> , 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004)	5
<i>Graham v. Dorchester County School District</i> , 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000)	4, 5
<i>GTE Sprint Communications Corp. v. Public Service Commission of South Carolina</i> , 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986)	13
<i>Hooper v. Ebenezer Senior Services and Rehabilitation Center</i> , 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008)	5
<i>MailSource, LLC v. M.A. Bailey & Associates, Inc.</i> , 356 S.C. 370, 375, 588 S.E.2d 639, 641 (Ct. App. 2003)	14
<i>Matter of Decker</i> , 327 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)	4
<i>Maxwell v. Genez</i> , 356 S.C. 617, 591 S.E.2d 26 (2003)	4, 5
<i>Mende v. Conway Hospital, Inc.</i> , 304 S.C. 313, 404 S.E.2d 33(1991)	14
<i>Moates v. Bobb</i> , 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)	6
<i>Moore v. Moore</i> , 657 S.E.2d 743, 746, 376 S.C. 467, 472 (2008)	12
<i>Moriarty v. Garden Sanctuary Church of God</i> , 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999)	6
<i>Pike v. South Carolina Department of Transportation</i> , 332 S.C. 605, 618, 506 S.E.2d 516, 523 (Ct. App. 1998)	4
<i>Robinson v. Cleckley and Co., Inc.</i> , 751 F. Supp. 100 (D.S.C. 1990)	9
<i>Sloan v. S.C. Board of Physical Therapy Examiners</i> , 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006)	12

<i>State ex rel. Condon v. City of Columbia</i> , 339 S.C. 8, 528 S.E.2d 408 (2000)	5
<i>Webb v. Greenwood County</i> , 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956)	5

OTHER AUTHORITIES

11 U.S.C. § 108(c)	3, 11
Rule 40(c)(3), SCRCPP	4
Rule 40(j), SCRCPP	3, 5, 8
S. C. Code § 15-3-520(a) (1976)	9
S. C. Code § 15-3-520(b) (1976)	9

STATEMENT OF ISSUES ON APPEAL

- 1 IS THERE A TIME LIMIT FOR RESTORING CASES STRICKEN FROM THE DOCKET?
- 2 DID THE TRIAL JUDGE CORRECTLY APPLY RULE 40(J), SCRCP, TO THE FACTS OF THIS CASE?
- 3 DID THE TRIAL JUDGE CORRECTLY APPLY 11 U.S.C. § 108(C) TO THE FACTS OF THIS CASE?
- 4 DID THE TRIAL JUDGE VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS?
- 5 DID RESPONDENTS WAIVE THE RIGHT TO ASSERT THE STATUTE OF LIMITATIONS IN OPPOSITION TO APPELLANTS' MOTION TO RESTORE THIS CASE TO THE DOCKET?

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), SCRCF. 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, 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 haled [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), SCRCF. Neither 28 U.S.C. §1446(b) nor Rule 40(c)(3), SCRCF, 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,

Charles T. Smith

Charles T. Smith
608 Cypress Street
Georgetown, South Carolina 29440
(843) 545-6578
Attorney for Respondents Ronald L. Charlton,
Bonnie N. Charlton, James R. Charlton, and
Bayside Property, Inc.

August 7, 2014

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.

APPELLANTS' AMENDED FINAL REPLY BRIEF

RECEIVED

OCT 09 2014

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....	ii
Statutes and Rules.....	iii
Statement of Issues on Appeal.....	iv
Brief Statement in Reply.....	v
Arguments	
I. The applicable statute of limitations had not expired prior to the filing of Appellants' Motion to Restore, and Appellants were not required to file their Motion to Restore within the thirty (30) day window provided by the United States Bankruptcy Code, 11 U.S.C. §108(c).	1
II. Appellants' constitutional arguments were preserved for Appellate review, and do not lack merit.	5
III. Appellants' claims against both the Respondent City and Respondent Hartford are not moot, by virtue of a settlement agreement concluded between these Respondents on August 20, 2013, and this Court is therefore, not deprived of Appellate jurisdiction.	6
III(a). Appellants are not precluded from asserting claims for relief as third party beneficiaries of the subject bond.	7
Conclusion.....	10

TABLE OF AUTHORITIES

	Page
1. <u>A.E.I. Music Network, Inc. v. Business Computers, Inc.</u> , 290 Fed. 3 rd 952, 956 (7 th Cir. 2002)	7
2. <u>Byrd v. Byrd</u> , 2005-UP-141 (filed March 1, 2005)	1
3. <u>Employer's Insurance of Wausau v. Construction Management Engineering</u> , 297 S.C. 354, 377 S.E.2d 199 (Ct. App. 1989)	9
4. <u>In Re Gorski</u> , 370 S.C. 357, 635 S.E.2d 95, 96 (2006)	5
5. <u>Jones v. Equicredit Corp. of S.C.</u> , 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001)	4
6. <u>McNaughton-McKay Electric Co. of N.C., Inc. vs. Andrich</u> , 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1997)	4
7. <u>NoVAK & Company, Inc. v. The Travelers Indemnity Company</u> , 56 A.D.2d 418, 392 N.Y.S.2d 901 (1977)	10
8. <u>Richmond Shopping Center, Inc. v. Wiley N. Jackson, Co.</u> , 220 Va. 135, 255 S.E.2d 518 (Va. 1979)	9
9. <u>Robinson v. Cleckley and Co., Inc.</u> , 751 Fed. Supp. 100, 105 (D.S.C. 1990)	1
10. <u>Sloan Construction Company, Inc. v. Southco Grassing, Inc.</u> , 377 S.C. 108, 659 S.E.2d 158 (2008)	7
11. <u>Smothers v. U.S. Fidelity and Guaranty Co.</u> , 322 S.C. 207, 477 S.E.2d 858, 860 (Ct. App. 1996)	6
12. <u>SOCAR, Inc. v. St. Paul Fire and Marine Ins.</u> , 288 S.C. 287, 341 S.E.2d 822 (Ct. App. 1986)	9
13. <u>South Carolina Public Service Commission v. Colonial Construction Co.</u> , 274 S.C. 581, 266 S.E.2d 76 (1980)	9
14. <u>Stribling v. Fretwell</u> , 157 S.C. 297, 154 S.E.2d 415 (1930)	2
15. United States Bankruptcy Code, 11 U.S.C. §108(c)	1, 6
16. <u>U.S. Bank Trust National Assn. v. Bell</u> , 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009)	4

STATUTES AND RULES

	Page
11 U.S.C. §108(c)	i, iv, 3, 5, 10
S.C.R.Civ.P. 40(c)(3) [the precursor to Rule 40(j)]	1, 3, 4, 5
Rule 40, SCRCP	1, 3, 5

STATEMENT OF ISSUES ON APPEAL

- I. The applicable statute of limitations had not expired prior to the filing of Appellants' Motion to Restore, and Appellants were not required to file their Motion to Restore within the thirty (30) day window provided by the United States Bankruptcy Code, 11 U.S.C. §108(c)
- II. Appellants' constitutional arguments were preserved for Appellate review, and do not lack merit.
- III. Appellants' claims against both the Respondent City and Respondent Hartford are not moot, by virtue of a settlement agreement concluded between these Respondents on August 20, 2013, and this Court is therefore, not deprived of Appellate jurisdiction.
 - (a) The Appellants are not precluded from asserting claims for relief as third party beneficiaries of the subject Bond.

BRIEF STATEMENT IN REPLY

Appellants affirm and reiterate all arguments asserted with regard to these issues in their Initial Brief, in reply and contravention to the Respondents' arguments. Appellants submit the following additional argument in reply.

REPLY ARGUMENTS

I.

The applicable statute of limitations had not expired prior to the filing of Appellants' Motion to Restore, and Appellants were not required to file their Motion to Restore within the thirty (30) day window provided by the United States Bankruptcy Code, 11 U.S.C. §108(c)

As argued in their Initial Brief, Appellants contend that the effect of the Circuit Court Order striking Appellants' case (sua sponte order: "*Case stricken due to Bankruptcy.*") (Appellants' Initial Brief, p. 4), was to leave Appellants' action on the court's docket, but in a dormant status (Appellants' Initial Brief, p. 7.) This is corroborated by the Circuit Court Orders restoring the other fourteen (14) cases which had been "Stricken due to [South Bay's] bankruptcy", all of which were titled "Order to Restore Case to Active Status," and ruled that: "*For the reasons stated above, it is hereby ordered that the foregoing matter be moved to an active status and placed back on the trial roster.*" (Id.) Appellants' position is also supported by the law cited in this section of their Initial Brief. "[A]n action which has been removed from the docket pursuant to S.C.R.Civ.P. 40(c)(3) [the precursor to Rule 40(j)] is pending while it is off the docket." Robinson v. Cleckley and Co., Inc., 751 Fed. Supp. 100, 105 (D.S.C. 1990). See also Rule 40, SCRCP, and other cases cited.

In the unpublished case of Byrd v. Byrd, 2005-UP-141 (filed March 1, 2005), this Court found that a five (5) year delay by both parties in moving to have that case restored to the active docket, was not *per se* unreasonable. Commenting upon the Supreme Court Administrative Order requiring that lawsuits pending in the family court for more than 270 days without a final hearing or other disposition be "struck from the

docket," this Court noted that:

"No mention is made as to how much time a litigant has to request this relief, let alone that an extended lapse of time before moving to restore, without more, is tantamount to lack of good cause. Moreover, the family court made no specific findings as to why it would be 'unjust' to hold a hearing on the merits. We therefore hold the family court's refusal to restore the 1997 case to the docket under these circumstances amounted to an error of law."

As with the Supreme Court's Administrative Order requiring final hearings or dispositions within 270 days for pending family court actions, the Order striking Appellants' action made no mention of any time limits for Appellants to file a motion to restore their action to the active docket.

Similarly, in Stribling v. Fretwell, 157 S.C. 297, 154 S.E.2d 415 (1930), the Supreme Court found that a delay of 23 years from commencement of the action, when the case had been stricken eleven (11) years prior to Plaintiff's moving to "re-docket" the case, was too long. This breach of contract action was commenced by the Plaintiff/Appellant on December 24, 1904. In June of 1916, when the case had still not been tried, the presiding Circuit Judge "struck off" the case from the docket. The Plaintiff did not move to restore the case until 1927. Numerous similar cases were cited by the Stribling Court, all of which affirmed the denial of Motions to restore actions to the active docket, based upon the doctrine of laches. None of the cases cited in Stribling mentioned or referred to the applicable statute of limitations. In the present case, the Respondents have not raised or argued the doctrine of laches, and Appellants submit that it would not bar their motion to restore this action in any event. (Supp. R. p. 358, line 8 – p. 359, line 11; p. 359, line 21 – p. 361, line 1.)

It is not disputed that Appellants commenced their action well before the expiration of the applicable statute of limitations. The Respondents acknowledge that the Appellants' action was not stricken pursuant to Rule 40(j)¹ (City's Initial Brief, p. 6: "...Appellants insist that their action was not stricken under Rule 40(j). They are correct. By Order filed July 22, 2011, Circuit Court Judge Larry Hyman, struck the case 'due to bankruptcy.' (R., Exh. D). The Form 4 Order shows that the case was not stricken under Rule 40(j).") As argued in their Initial Brief, Appellants contend that Rule 40(j) simply has no relevance to this case. Since Appellants' action was "still pending," after being stricken by Judge Hyman, there was no need for the applicable statute of limitations to be tolled by any further action or undertaking by the Appellants. Therefore, as argued in Appellants' Initial Brief, the provisions of 11 U.S.C. §108(c) also have no application to this case.

While contending that "*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*" (City's Initial Brief, p. 4), the Respondents provide no legal citations or support for this argument. Instead, the Respondents rely upon Rule 40(j) and §108(c), by apparent analogy. The cases cited by Respondents are similarly unsupportive. Appellants have not argued that they were not required to file a motion to restore in order to have their action restored to the active docket. Appellants do contend that the only relevant issues at such motion hearing would have been: (1) had

¹ Respondent Hartford adopted and endorsed all arguments of Respondent City's Initial Brief on this and all other issues, with the exception of "mootness."

South Bay's bankruptcy filing been dismissed or otherwise concluded; and (2) would the doctrine of laches serve to bar Appellants' Motion to Restore? As previously noted, the Respondents have not raised or argued the doctrine of laches at any time during these proceedings.

Respondents cite the cases of McNaughton-McKay Electric Co. of N.C., Inc. vs. Andrich, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1997); and Jones v. Equicredit Corp. of S.C., 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001), to support their argument that cases stricken due to a pending bankruptcy are not restored without the filing and adjudication of a motion to restore. In Andrich, this Court merely mentions that McNaughton-McKay's action was stayed due to the filing of Andrich's bankruptcy, and that after the bankruptcy case was dismissed, "McNaughton-McKay *restored this case against Andrich to the Court of Common Pleas docket.*" In Jones, this Court merely noted that the Respondents' foreclosure action was stayed by three (3) different bankruptcy filings, after which the Master in Equity entered successive Orders to Restore and Proceed with Foreclosure. Neither case involved or relied upon Rule 40(j) or §108(c). Neither case discusses the necessity of filing a motion to restore, which is not disputed, in any event.

Respondents cite the case of U.S. Bank Trust National Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009), for the proposition that: "*In at least one reported decision, a case stricken due to bankruptcy was restored under Rule 40(j), SCRPC.*" (Respondents' Brief, p. 4 fn. 1) The Bell decision, however, merely mentions that the

bank filed a Rule 40(j) Motion to Restore its foreclosure action, after the Respondents' Bankruptcy case was closed. This was not an adjudicated issue before the Court, leaving one to assume that this case was initially dismissed pursuant to Rule 40(j), or that the Respondent Bank merely elected to proceed with the filing of a Rule 40(j) Motion – which would have been procedurally incorrect if the case was not dismissed pursuant to Rule 40(j). In an apparent attempt to corroborate the necessity of a Rule 40(j) Motion to restore, following dismissal of an intervening bankruptcy, Respondents cite the case of In Re Gorski, 370 S.C. 357, 635 S.E.2d 95, 96 (2006). In that disciplinary action, the Respondent attorney failed to timely restore his client's medical malpractice claim, which **had been** previously dismissed pursuant to Rule 40(j). There is no question that, if Appellants' action had been dismissed pursuant to Rule 40(j), Appellants would have been required to file a motion to reinstate within one (1) year, in order to preserve the statute of limitations tolling provision of Rule 40(j). And, as argued in the due process segment of their Initial Brief, Appellants would have been on notice of this one (1) year filing requirement. Those are simply not the facts of this case.

II.

Appellants' constitutional arguments were preserved for Appellate review, and do not lack merit.

As discussed hereinabove, Appellants contend that Rule 40(j) and §108(c) have no bearing on the Appellants' Motion to reinstate/restore their original Complaint. These constitutional issues were raised in Appellants' Motion to Alter or Amend the Order

denying their Motion to Restore/Reinstate, in paragraph 5(A)(C), and (D)(3). (R., Ex. 13.) These issues were argued before the Court at the hearing on June 6, 2013, (Supp. R., p. 353, lines 19 - 25; p. 355, lines 3 - 10; p. 356, lines 4 - 8 [added]; and, p. 359, line 25 - p. 360, line 5).²

In denying Appellants' Motion to Alter or Amend, based on the provision of 11 U.S.C. §108(c), the trial court effectively denied the Appellants' due process and equal protection arguments. As Respondents argue, *"Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect its interest."* Smothers v. U.S. Fidelity and Guaranty Co., 322 S.C. 207, 477 S.E.2d 858, 860 (Ct. App. 1996). (City's Initial Brief, p. 11) That assumes, however, that 11 U.S.C. §108(c) is the controlling law, and that the relevant statute of limitations expired while Appellants' Complaint was still pending before the Court. These constitutional issues are properly preserved for review by this Court.

III.

Appellants' claims against both the Respondent City and Respondent Hartford are not moot, by virtue of a settlement agreement concluded between these Respondents on August 20, 2013, and this Court is therefore, not deprived of Appellate jurisdiction.

Appellants would first note that this issue has not been presented to the trial court for review or determination, and there is therefore no record on this issue for the Court to review. This identical issue was raised by both Respondents City of Georgetown and Hartford in Motions to Dismiss this Appeal, previously filed herein. Appellants would respectfully refer this Court to their Return to Motion to Dismiss

² Motion to Supplement record pending.

Appeal of Respondents, City of Georgetown, The Hartford Casualty Insurance Company, and Hartford Fire Insurance Company, filed herein on February 21, 2014, and incorporate such Return argument in its entirety herein, as fully as if repeated verbatim.

III(a).

The Appellants are not precluded from asserting claims for relief as third party beneficiaries of the subject Bond.

Once again, this is an issue which has not been raised or adjudicated by the trial court. Sloan Construction Company, Inc. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008) establishes that, in South Carolina, a statutory bond requirement is "...a contractual term incorporated by the Legislature, and therefore, the 'relevant intentions' in determining whether a third party [can] enforce the contract pursuant to the third party beneficiary doctrine [are] no longer those of the parties but those of the Legislature." Citing: A.E.I. Music Network, Inc. v. Business Computers, Inc., 290 Fed. 3rd 952, 956 (7th Cir. 2002). In Sloan, the Supreme Court found that the Subcontractors and Suppliers Payment Protection Act (SPPA) includes an implied private cause of action for breach of a governmental entity's duty to assure placement of required payment and performance bonds. The Court found that the SPPA was enacted for the special benefit of such subcontractors, and that they are "...the only parties with a financial interest in enforcing the bond requirements of the SPPA." (Id. 377 S.C. 115, 117, 659 S.E.2d 162, 163.) As noted above, the Sloan Court further found that such subcontractors are entitled to pursue actions for breach of the bond contracts as third party beneficiaries, again citing A.E.I.

Appellants contend that the bond requirement in the present case was enacted specifically for their benefit. As more fully recited in Appellants' Initial Brief, a very substantial portion of the appraised value of Appellants' individual lots, was based upon the completion of infrastructure and amenities which were guaranteed by the Hartford Bond. These improvements were to have been completed, by the terms of the purchase agreements and representations made by the developer and joint venture respondents, by August, 2008. The fact that the City and the Hartford have now concluded an agreement to **commence** construction of the infrastructure, six (6) years after it was to have been completed, does not constitute full or timely performance. Moreover, as more fully argued in Appellants' Return to these Respondents' motions to dismiss this appeal, it appears that the City and Hartford have agreed to provide materially less infrastructure and/or amenities than were assured by the Bond. Without the Bond, the developer would not have been allowed to close any of the Appellants' lots. These closings, which occurred between September 17, 2007, and January 4, 2008, produced gross sales revenues of \$14,737,600.00. (Appellants' Complaint, paragraphs 39 and 41, R. Exh. 8.) Appellants respectfully submit that this issue should be remanded to the trial court, along with all other issues, for further evidentiary development and adjudication.

Respondent Hartford argues that: *"In South Carolina, it is beyond question that a surety's obligation on a performance bond is contractual, and such obligation cannot be extended beyond the terms of the Bond and the intent of the parties expressed therein."*

(Hartford's Initial Brief, p. 6, FN 1.) Asserting that this precludes Appellants' third party beneficiary claims, Respondent cites South Carolina Public Service Commission v. Colonial Construction Co., 274 S.C. 581, 266 S.E.2d 76 (1980); and, SOCAR, Inc. v. St. Paul Fire and Marine Ins., 288 S.C. 287, 341 S.E.2d 822 (Ct. App. 1986). In South Carolina Public Service Commission, the Supreme Court merely found that a surety's liability could not be enlarged beyond the express terms of its undertaking in the Bond. There was no issue concerning a third party beneficiary in this case. Similarly, in SOCAR, the sole issue was whether steel suppliers, who had provided material to a construction site, were covered by the provisions of a payment Bond which guaranteed payment for persons who "worked at the site." No third party beneficiary claim was involved. Similarly, Employer's Insurance of Wausau v. Construction Management Engineering, 297 S.C. 354, 377 S.E.2d 199 (Ct. App. 1989), also cited by Respondent Hartford on this point, does not address the issue of a third party beneficiary claim in any way.

The two (2) cases cited by Respondent Hartford which do include discussion and Appellate adjudication of third party beneficiary claims, are from Virginia and New York. Richmond Shopping Center, Inc. v. Wiley N. Jackson, Co., 220 Va. 135, 255 S.E.2d 518 (Va. 1979) involved the construction of a performance bond issued between a general contractor and the Commonwealth of Virginia, for a highway construction project. Although the Court's discussion regarding the law of contract construction appears to closely resemble that of South Carolina, there is no mention of a Subcontractor's Payment Protection Act, or any similar legislation, as discussed in Sloan supra. The

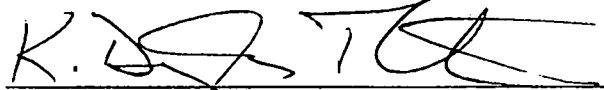
same is true of NoVAK & Company, Inc. v. The Travelers Indemnity Company, 56 A.D.2d 418, 392 N.Y.S.2d 901 (1977).

CONCLUSION

In reliance upon the arguments set forth in their Initial Brief, and herein, Appellants request that this Court reverse the decision of the Circuit Court, denying Appellants' Motion to Restore/Reinstate their Complaint to the active jury trial docket, and remand this case for such purpose, to be consolidated with the foreclosure action filed and currently pending therein by the Charlton Respondents. Appellants respectfully submit that the Circuit Court committed reversible errors of law in finding that the relevant statute of limitations had expired, and that Appellants failed to timely file their Motion to Restore under 11 U.S.C. §108(c). There is no clear rule of law fixing or establishing a time limitation for the filing of such motion to restore, such motions being governed by the equitable doctrine of laches. To hold otherwise would be a denial of Appellants' procedural due process rights, as well as their entitlement to equal protection of the laws. And, as argued more fully above, the record is insufficient for this Court to determine whether the settlement agreement concluded between the Respondents City of Georgetown and Hartford has rendered Appellants' claims against those Respondents moot.

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

AND

JOHN M. LEITER, PA
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

October 7, 2014

Conway, SC

RECEIVED
OCT 09 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

v.

Landquest Development, LLC, Kyle C. Corkum, South Bay Properties, LLC, C.R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, 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 Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, Bayside Property, Inc., The City of Georgetown, Hartford Casualty Insurance Company, and Hartford Fire Insurance Company are the Respondents.

Appellate Case No. 2013-001644

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

REVERSED AND REMANDED

K. Douglas Thornton, of Conway, and John M. Leiter,
Law Offices of John M. Leiter, PA, of Myrtle Beach, for
Appellants.

Charles T. Smith, of Georgetown, for Respondents
Ronald L. Charlton, Bonnie N. Charlton, James R.
Charlton, and Bayside Property, Inc.;

Andrew F. Lindemann, Davidson & Lindemann, PA, of
Columbia, and Elise Freeman Crosby, Crosby Law Firm,
LLC, of Georgetown, for Respondent The City of
Georgetown;

Lawrence Michael Hershon and James Lynn Werner,
Parker Poe Adams & Bernstein, LLP, both of Columbia,
for Respondents Hartford Casualty Insurance Company
and Hartford Fire Insurance Company.

FEW, C.J.: John and Louise Goodwin and Gary and Joyce Owens appeal the circuit court's refusal to restore their case to the docket after it was "stricken" due to one defendant's bankruptcy. The circuit court denied the motion to restore the case on the ground the case was barred by the statute of limitations. We hold that because the Goodwins and Owens 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. We reverse and remand for further proceedings.

I. Facts and Procedural History

In September 2007, Bonnie and Ronald Charlton and Bayside Property, Inc. sold a tract of land on Winyah Bay in the city of Georgetown to South Bay Properties, LLC for \$20.85 million—\$6.27 million in cash and a \$14.58 million note secured

by a mortgage. South Bay—a joint venture of Landquest Development, LLC, C.R. Thompson and Sons, LLC, and Kyle C. Corkum—planned to develop the property into a residential subdivision named the Harbor Club on Winyah Bay. Prior to construction, South Bay sold fifty-four lots—including one each to the Goodwins and Owenses—generating \$14,737,600 in proceeds.

On July 9, 2009, after South Bay failed to build the basic infrastructure of the subdivision in a timely manner, the Goodwins and Owenses, along with other lot owners, filed this lawsuit ("lot owners' action") and recorded a lis pendens on the property still owned by South Bay. The record indicates the lawsuit was promptly served.

In June 2010, South Bay filed a petition for bankruptcy. The record reflects no further activity in the lot owners' action until it appeared on the trial roster for July 25, 2011. South Bay then filed a motion for a "continuance," relying on the "automatic stay" imposed under the federal bankruptcy code. *See* 11 U.S.C. § 362(a)(1) (2012) (discussed in section II. A. of this opinion). The circuit court granted South Bay's motion for a continuance, and in a separate Form 4, it ordered "Case Stricken Due To Bankruptcy." On August 12, 2011, the bankruptcy court dismissed South Bay's bankruptcy case.

In August 2012, the Charltons and Bayside filed an action to foreclose on the mortgage. They named as defendants any party that "may have or claim" an interest in the property, including the Goodwins and Owenses. The Goodwins and Owenses—without an attorney—filed answers that contained only a general denial of the allegations in the complaint. The Charltons and Bayside filed a motion for an order of reference to the master-in-equity.

On January 22, 2013, the Goodwins and Owenses—then represented by an attorney—filed two motions. The first was a motion to "Reinstate/Restore" seeking "an Order . . . reinstating the [lot owners'] action to the active trial docket" and to consolidate the lot owners' action and the foreclosure suit. The second was a motion to amend their answers in the foreclosure suit to assert counterclaims and cross-claims seeking the same relief they sought in the lot owners' action.¹

¹ The cross-claims and counterclaims in the proposed amended answers in the foreclosure suit are nearly identical to the claims in the lot owners' action.

The circuit court denied the motion to restore the lot owners' action, ruling the Goodwins' and Owenses' claims were barred by the statute of limitations. As to consolidation, the circuit court stated, "Since restoration . . . is denied, consolidation of this case . . . is moot." In a separate order in the foreclosure suit, the circuit court referred that case to the master and declined to rule on the motion to amend. The Goodwins and Owenses filed motions to alter or amend both orders pursuant to Rule 59(e), SCRPC. In the foreclosure suit, they asked the circuit court to rescind the order of reference and repeated their request to amend their answers. After the master recused himself for unrelated reasons and returned the foreclosure suit to circuit court, the court entered orders denying the Rule 59(e) motions in both cases.²

II. Motion to Restore

The Goodwins and Owenses argue the circuit court erred in denying their motion to restore on the grounds that their claims were barred by the statute of limitations. We agree.³

The statute of limitations provides, "Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued" S.C. Code Ann. § 15-3-20(A) (2005). Thus, the statute of limitations applies to the date a lawsuit is "commenced." Rule 3(a) of the South Carolina Rules of Civil Procedure provides, "A civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations" Section 15-3-530 of the South Carolina Code (2005) prescribes the limitations period for this case as three years. The Goodwins and Owenses complied with the statute of limitations in 2009 when they filed the summons and complaint and served them on the defendants within

² The Goodwins and Owenses interpreted the order in the foreclosure suit as denying their motion to amend. In a separate appeal in the foreclosure suit, we found the order did not deny the motion to amend and was not an immediately appealable order. We dismissed the other appeal and remanded for further proceedings.

³ Because this is a question of law, we review the circuit court's decision de novo. See *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (stating an appellate court "reviews questions of law de novo" (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008))).

the three-year limitations period. Thus, the circuit court erred by finding the lawsuit barred by the statute of limitations.

The respondents argue, however, the Goodwins and Owenses did not comply with the tolling provisions of 11 U.S.C. § 108(c) (2012) and Rule 40(j) of the South Carolina Rules of Civil Procedure. As we will explain, because the lawsuit had already been commenced, there was nothing to toll. Therefore, the tolling provisions are irrelevant.

A. 11 U.S.C. § 108(c)

The filing of a petition for bankruptcy by a defendant in a state civil proceeding invokes 11 U.S.C. § 362(a)(1). Section 362 is entitled "Automatic stay," and provides the filing of the petition "operates as a stay . . . of . . . the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor." § 362(a)(1). This automatic stay prevents a state court from proceeding with the action while the stay is in effect. Under 11 U.S.C. § 362(c)(2)(B) (2012), "the stay . . . continues until . . . the [bankruptcy] case is dismissed."

Our rules of procedure do not address how a circuit court must deal with the automatic stay. However, neither our rules nor 11 U.S.C. § 362 require the dismissal of the action. Here, the circuit court did not dismiss the action. The circuit court employed a Form 4 order provided by our supreme court that contains various boxes for the court to check to indicate the effect of the order.⁴ The form includes boxes for the dismissal of an action and the reason for the dismissal, but the court did not check the dismissal boxes in this order. Rather, the circuit court checked the box labeled "ACTION STRICKEN," and as a reason for striking, the

⁴ See Rule 84, SCRPC ("The Supreme Court shall prescribe the content and format of forms required by these rules."). By order dated June 24, 2008, the supreme court approved the form used by the circuit court in this case. See Order re: Form 4, Judgment in a Civil Case, No. 2008-06-24-01 (S.C. Sup. Ct. filed June 24, 2008), *available at* <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2008-06-24-01> (last visited August 7, 2015). The Form 4 form has subsequently been revised. See Order re: Judgment in a Civil Case Form (SCRPC Form 4C), No. 2013-03-26-01 (S.C. Sup. Ct. filed Mar. 26, 2013), *available at* <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2013-03-26-01> (last visited August 7, 2015).

box labeled "Bankruptcy." In the portion of the form provided for text, the circuit court wrote, "Case Stricken Due To Bankruptcy."

In deciding not to restore the case to the docket, the circuit court relied on 11 U.S.C. § 108(c), which states,

[I]f applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay.

The circuit court incorrectly concluded section 108(c) has any application to this case. By its terms, the subsection tolls "a [time] period for commencing or continuing a civil action" when the time period is "fixe[d]" by (1) "applicable nonbankruptcy law," (2) "an order," or (3) "an agreement." Here, there is no order or agreement fixing any period of time for restoring the lawsuit, and the only "law" the respondents contend is applicable is the statute of limitations. However, the Goodwins and Owenses commenced the lot owners' action, and thus complied with the statute of limitations, before the automatic stay took effect. Under these circumstances, the statute of limitations was no longer an "applicable nonbankruptcy law" that "fixe[d]" a period for commencing or continuing a civil action."⁵ Therefore, the tolling provision in section 108(c) is irrelevant in this case.

B. Rule 40(j), SCRPC

The circuit court also relied on Rule 40(j) of the South Carolina Rules of Civil Procedure. We find the court erred in relying on this rule for several reasons. First, the lot owners' action was stricken due to bankruptcy, not pursuant to Rule

⁵ 11 U.S.C. § 108(c) is applicable to a situation where the automatic stay has prevented the commencement of a lawsuit before the statute of limitations expires, or where a law, order, or agreement otherwise sets some time limit for "commencing or continuing" a lawsuit.

40(j). Second, even if Rule 40(j) was at issue, the rule does not set a deadline for restoring a case. As our supreme court has explained,

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. . . . 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. 617, 620-21, 591 S.E.2d 26, 28 (2003).

Under Rule 40(j), therefore, the applicable deadline remains the statute of limitations. The effect of the rule is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year. Because the Goodwins and Owenses commenced the lawsuit within the statute of limitations, there was nothing to toll and they did not need the tolling provision in Rule 40(j).

Third, the requirement of complying with the statute of limitations after a case is stricken pursuant to Rule 40(j) depends on the event of "striking" being considered a dismissal. While our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed. In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as "substantially revis[ing] the procedure for *dismissing* a case previously found in Rule 40(c)(3)." Rule 40, SCRPC Notes, Notes to 1994 Amendments (emphasis added). The notes go on to state, "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 Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored" *Id.*; *see also Maxwell*, 356 S.C. at 621, 591 S.E.2d at 28 (relying on the notes in interpreting Rule 40(j)).

Moreover, the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal. See *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27 ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."); *Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992) ("[W]here possible, all provisions of a statute must be given full force and effect.").

There is also an historical basis for considering a case stricken pursuant to Rule 40(j) as the equivalent of dismissed. We adopted our Rules of Civil Procedure in 1985. See Rule 86(a), SCRPC ("These rules shall take effect on July 1, 1985."). Before then, the circuit court had the power to dismiss an action without prejudice if it was called for trial and the parties were not ready to proceed. See *Small v. Mungo*, 254 S.C. 438, 441, 443, 175 S.E.2d 802, 803, 804 (1970) (holding the inability of counsel "to contact plaintiff and his witnesses and be ready for trial" and "the failure of plaintiff and his counsel to appear when the case was called for trial constituted a failure to proceed with the cause . . . and a ground for dismissal of the action"). When the supreme court decided *Small*, former Circuit Court Rule 81 was in effect. The rule provided, "When a case is reached on the Common Pleas trial roster and is called for trial, . . . if counsel are not ready to go forward with the case it shall be placed . . . at the foot of the Calendar." S.C. Code Ann. vol. 22, Circuit Court Rule 81 (Supp. 1984) (repealed 1985). In 1985, former Rule 40(c)(3), SCRPC, took effect. Similar to the procedure described in *Small*, Rule 40(c)(3) applied only if the parties were not prepared to proceed when the case was called for trial. However, the rule allowed the circuit court to "strike" the action. The rule provided:

When an action is reached on the trial roster and is called for trial, it shall not be continued by consent, and if counsel are not ready to go forward the court shall strike the action from the calendar (file book) with leave to restore, unless continuance is granted for good cause shown.

Rule 40(c)(3), SCRPC (West 1994) (repealed 1995).

The rule did not use the word "dismissed," but tracking the language of former Circuit Court Rule 81, it did require a restored case to "be placed at the foot of the

calendar (file book) and a new case number assigned." Rule 40(c)(3); *see* Rule 40(c)(3), Notes ("This Rule 40 is substantially a compendium of present Circuit Court Rules . . ."). Our law treated the striking of a case pursuant to Rule 40(c)(3) as the equivalent of a dismissal,⁶ and our courts required the plaintiff to comply with the statute of limitations upon restoring the case. *See Graham v. Dorchester Cnty. Sch. Dist.*, 339 S.C. 121, 122, 125 n.1, 528 S.E.2d 80, 81, 82 n.1 (Ct. App. 2000) (stating in a case "struck . . . from the trial roster . . . pursuant to former Rule 40(c)(3), SCRCP" that "the statute of limitations clearly expired" before the motion to restore was filed). *But see Robinson v. J.F. Cleckley & Co.*, 751 F. Supp. 100, 105 (D.S.C. 1990) (stating for purposes of calculating timely removal pursuant to 28 U.S.C. § 1446(b) (2012), "an action which has been removed from the docket pursuant to [Rule] 40(c)(3) is pending while it is off of the docket" and is not "commenced when it is restored to the calendar").

There is no such basis in our law, however, for considering the striking of a case due to bankruptcy as a dismissal. In fact, the striking of a case from the docket due to bankruptcy is not mentioned in our rules at all. In practice, our courts have treated the striking of a case due to bankruptcy as not being a dismissal. For example, in an "Administrative Order" dated May 4, 1988, then Chief Justice Gregory provided, "I . . . 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." *See* Administrative Order, No. 1988-05-04-01 (S.C. Sup. Ct. filed May 4, 1988), *available at* <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=1988-05-04-01> (last visited August 7, 2015).

We acknowledge the Form 4 uses the term "stricken"—the same term that equates to "dismissed" under Rule 40(j). However, while the forms are provided for in the Rules, *see* Rule 84, SCRCP, and are designed to assist courts to carry out the Rules, the forms themselves are not the law. *See Robinson*, 751 F. Supp. at 105 (stating "this court would be remiss if we allowed administrative laws . . . to dictate important procedural rights").

It is also important to note that striking a case pursuant to Rule 40(j) may be done only by consent. *See* Rule 40(j), SCRCP (providing the party asserting a claim may strike it only when "all parties adverse to that claim . . . agree in writing that it may be stricken"). To the contrary, many cases are stricken due to bankruptcy

⁶ *See* Rule 40, SCRCP Notes, Notes to 1994 Amendments (referring to "the procedure for dismissing a case previously found in Rule 40(c)(3)").

whether the parties consent or not. In this case, for example, the record contains no indication the case was stricken with the consent of the Goodwins or Owenses. In fact, it appears the circuit court entered the order striking the case on its own initiative, with no prior notice to the parties.⁷ To consider the striking of this case—or any case where the automatic stay applies—as a dismissal without the consent of the party making the claim would conflict with Rule 41(b), SCRCP, which provides limited circumstances in which an action may be dismissed involuntarily.⁸

For these reasons, we find the tolling provision of Rule 40(j) is irrelevant in a case stricken due to bankruptcy.

III. Conclusion

We **REVERSE** the denial of the Goodwins' and Owenses' motion to restore the case and **REMAND** for further proceedings. Because our resolution of the issues discussed above is dispositive of the appeal, we do not address the Goodwins' and Owenses' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (An "appellate court need not address remaining issues when disposition of prior issue is dispositive").

HUFF and WILLIAMS, JJ., concur.

⁷ The only motion in our record that mentions South Bay's bankruptcy is South Bay's motion for a continuance, which recites the "consent of all parties." However, the motion does not request striking the action. In the Goodwins' and Owenses' Rule 59(e) motion, they indicate they did not consent to striking the case, stating, "The case was struck either at the request of South Bay . . . or on the Court's own initiative."

⁸ *See also* Rule 79(f), SCRCP ("No action listed in the file book . . . shall be . . . stricken . . . unless and until: (1) plaintiff shall file and serve a notice . . . or stipulation of dismissal . . . ; or (2) counsel . . . have prepared and filed an order . . . bearing the written consent of all interested parties . . . ; or (3) dismissal is ordered by the court."). None of those events occurred in this case.

77061

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

AUG 27 2015

SC Court of Appeals

Appellate Case Number 2013-001644

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. Thomspson 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.

PETITION FOR REHEARING

Charles T. Smith
608 Cypress Street
Georgetown, South Carolina 29440
(843) 545-6578
Attorney for Respondents Ronald L. Charlton,
Bonnie N. Charlton, James R. Charlton, and
Bayside Property, Inc.

The Respondents Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. petition for rehearing the appeal of John and Louise Goodwin and Gary and Joyce Owens from the circuit court's order denying their motion to restore this case. These Respondents respectfully suggest that the Opinion filed August 12, 2015, overlooked or misapprehended the following matters:

1. *The Opinion states as facts disputed allegations that are not supported by the Record on Appeal.*

The Opinion states that South Bay is a joint venture of Landquest Development, LLC, C.R. Thompson and Sons, LLC and Kyle C. Corkum. The statement was apparently based on allegations in paragraph 33 of the Complaint. The allegations in paragraph 33 of the Complaint were made based upon information and belief. (Complaint p. 12, R. p. 028) These Respondents' Answer denied the allegations. (Answer p. 2, R. p. 069)

The Opinion states that prior to construction, South Bay sold fifty-four lots generating \$14,737,600 in proceeds. The statement was apparently based on allegations in paragraph 41 of the Complaint. (Complaint p. 14, R. p. 030) These Respondents' Answer denied the allegations and stated that the best evidence of the dates, number and amounts of lot sales are the deeds and related documents that speak for themselves. (Answer p. 3-4, R. p. 070-071)

The Opinion states that South Bay failed to build the basic infrastructure of the subdivision in a timely manner. The statement was apparently based on the allegation in Appellants' Brief that no infrastructure or amenities have been built or installed. (Appellants' Amended Final Brief p.1) The City of Georgetown's Memorandum in

Support of Motion to Dismiss informed the Court that the City and Hartford Fire Insurance Company resolved the issue by Hartford Fire Insurance Company engaging a contractor, at its expense, to complete the infrastructure. (Memorandum p. 3-4, R. P. 159-160)

The Opinion states that the Goodwins and Owenses - without an attorney - filed answers in a related mortgage foreclosure action. (The Goodwins and Owenses, along with the other Plaintiffs in this action, were named as defendants in the mortgage foreclosure action because of the lis pendens filed in this action.) The statement was apparently based on allegations in Appellants' Brief that the Goodwins and Owenses filed *pro se* answers in the mortgage foreclosure action and thereafter retained the services of their former attorneys who filed a motion to amend the answers. (Appellants' Amended Final Brief p.3) In order to be removed as counsel of record, an attorney must receive a court order pursuant to Rule 11(b), SCRCP. *Ex parte Strom*, 343 S.C. 257, 539 S.E.2d 699 (2000). The Goodwins and Owenses were not without an attorney because the attorneys that filed the lis pendens, summons and complaint in this action did not receive a court order pursuant to Rule 11(b), SCRCP.

The Opinion states that our rules of procedure do not address how a circuit court must deal with the automatic stay caused by a defendant filing a petition for bankruptcy. But, a later section of the Opinion acknowledges that the Supreme Court's Administrative Order Number 1988-05-04-01 addresses this matter. The order provides that cases stayed as a result of bankruptcy proceeding should be handled consistently and uniformly in all

circuits. "... [W]hen 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."

2. *The Opinion overlooks important dates that were the basis for the Circuit Court's decision.*

The critical dates in this action are:

July 9, 2009	This action was commenced. Motion to Reinstate/Restore p. 2, R. p. 102
July 22, 2011	The Honorable Larry B. Hyman, Jr. struck this action due to the bankruptcy of South Bay Properties, LLC and a copy of the order was mailed to the Plaintiffs' attorneys. Form 4, R. p. 001
August 12, 2011	South Bay Properties, LLC's bankruptcy was dismissed. Motion to Reinstate/Restore p. 3, R. p. 103
January 22, 2013	The Goodwins and Owenses moved to restate/restore this action. Motion to Reinstate/Restore p. 1, R. p. 101

After Judge Hyman struck this action, the Goodwins and Owenses did not move for relief from Judge Hyman's order on the grounds of mistake, inadvertence, surprise, excusable neglect or any of the other grounds listed in Rule 60(b), SCRCF. The Goodwins and Owenses did not object that Judge Hyman's order failed to include leave to restore as suggested in the Supreme Court's Administrative Order Number 1988-05-04-01. The Goodwins and Owenses did not appeal from Judge Hyman's order. Because the Goodwins and Owenses failed to act, Judge Hyman's order became the law of the case.

Judge Hyman's order did not include leave to restore the action at a later date. Judge Hyman's order did not toll the statute of limitations. In contrast, Rule 40(j),

SCRCF, does grant leave for a claim to be restored upon motion made within one year of the date stricken and for the statute of limitations to be tolled.

Twenty-one days after Judge Hyman issued his order, South Bay Properties, LLC's bankruptcy was dismissed. The Goodwins and Owens could have moved to restore this case within a month thereafter relying upon 11 U.S.C.A. § 108(c). Because the Goodwins and Owens failed to timely act, the protection afforded by 11 U.S.C.A. § 108(c) expired.

The Goodwins and Owens claims necessarily arose prior to July 9, 2009, the date this action was commenced. The Goodwins and Owens failed to challenge Judge Hyman's order striking the case or to otherwise seek to restore the case until January 22, 2013, more than three years after the alleged claims arose and more than seventeen months after Judge Hyman issued his order.

3. *The Opinion conflicts with 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).*

There was no indication in *Maxwell v. Genez, 356 S.C. 617, 591 S.E. 2d 26 (2003)* or *Graham v. Dorchester County School District, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000)* that the plaintiff failed to comply with the statute of limitations when the plaintiff initially filed and served the summons and complaint. If the plaintiff had not complied with the statute of limitation when the plaintiff commenced the action, that failure would have ended the action.

The Maxwells' case was struck pursuant to Rule 40(j), SCRCp. The Maxwells' motion to restore was filed more than a year after their case was struck. The Supreme Court held that the statute of limitations had expired when the motion to restore was filed and therefore the Maxwells' claims were barred. The Graham case was struck prior to adoption of current Rule 40(j). Graham's motion to restore was filed ten days past the one year anniversary of the case being stricken. The Court of Appeals affirmed the trial court's dismissal of the action on the basis that the motion to restore was not timely.

The Opinion rejects the *Maxwell* and *Graham* holdings and adopts a new rule by stating: "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." The effect of the Opinion is that there is no longer a time limit on restoring cases that have been stricken. Case can be restored many years or even decades after being stricken.

4. *The Opinion creates multiple conflicting rules regarding the time limit for restoring actions which have been stricken.*

The Opinion appears to acknowledge that actions struck by consent of the parties, in accordance with Rule 40(j), cannot be restored after the statute of limitations, as extended by the rule's tolling provisions, has expired. The Opinion appears to hold that actions struck due to bankruptcy must be restored without regard to the statute of limitations if the summons and complaint were timely filed and served. The Opinion appears to leave open whether there are time limitations on restoring actions struck by

courts for other reasons. The Opinion suggests that an action must be restored, even if the request is not made until decades after the case was stricken, if the filing and service of the initial summons and complaint complied with the statute of limitations.

CONCLUSION

For the reasons stated herein, the Opinion filed August 12, 2015, should be withdrawn and the Order Denying Motions to Restore and to Consolidate and the Order Denying Motion to Alter or Amend Judgment should be affirmed.

Respectfully submitted,

Charles T. Smith

Charles T. Smith
608 Cypress Street
Georgetown, South Carolina 29440
(843) 545-6578
Attorney for Respondents Ronald L. Charlton,
Bonnie N. Charlton, James R. Charlton, and
Bayside Property, Inc.

August 26, 2015

77055

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2013-001644

RECEIVED
AUG 27 2015
SC Court of Appeals

John Steven Goodwin, et. al., ... Appellants,

v.

Landquest Development, LLC, et. al. Respondent.

PETITION FOR REHEARING

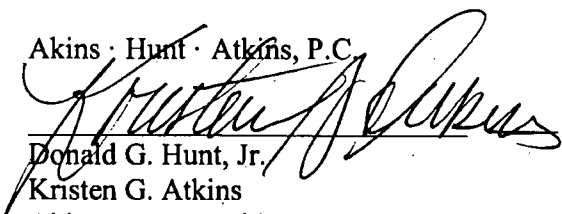
Donald G. Hunt, Jr.
Kristen G. Atkins
Akins · Hunt · Atkins, P.C.
134 N. Main Street, Suite 204
Post Office Box 266
Fuquay-Varina, NC 27526
Telephone: (919) 552-2020
Facsimile: (919) 552-3221

Pro Hac Vice Counsel for Respondents Landquest
Development, LLC, Kyle V. Corkum and South Bay
Properties, LLC

NOW COME Respondents, Landquest Development, LLC, Kyle V. Corkum and South Bay Properties, LLC, and, pursuant to Rule 221 of the South Carolina Appellate Court Rules, respectfully petition for rehearing the appeal in this matter. In support of this petition, respondents, for purposes of judicial economy and to avoid repetition, adopt and incorporate the substance of the petition for rehearing filed by their fellow respondents Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc.

Respectfully submitted,

Akins · Hunt · Atkins, P.C.



Donald G. Hunt, Jr.

Kristen G. Atkins

Akins · Hunt · Atkins, P.C.

134 N. Main Street, Suite 204

Post Office Box 266

Fuquay-Varina, NC 27526

Telephone: (919) 552-2020

Facsimile: (919) 552-3221

Pro Hac Vice Counsel for Respondents Landquest Development, LLC, Kyle V. Corkum and South Bay Properties, LLC

26 August 2015

The South Carolina Court of Appeals

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,

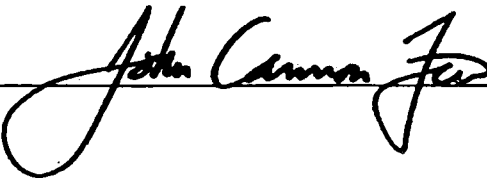
v.

Landquest Development, LLC, Kyle C. Corkum, South Bay Properties, LLC, C. R. 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.

Appellate Case No. 2013-001644

ORDER

The petitions for rehearing are granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

 C.J.

Thomas C. Hoff

J.

H B Ua

J.

Columbia, South Carolina

cc:

John M. Leiter, Esquire
K. Douglas Thornton, Esquire
Charles T. Smith, Esquire
Joseph Kevin Qualey, Esquire
Ronald L. Richter, Jr., Esquire
Elise Freeman Crosby, Esquire
Lawrence Michael Hershon, Esquire
Andrew F. Lindemann, Esquire
Donald G. Hunt, Jr., Esquire
Kristen G. Atkins, Esquire
James Lynn Werner, Esquire
National Land Sales, Inc.
Alma Y. White

FILED

December 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

v.

Landquest Development, LLC, Kyle C. Corkum, South Bay Properties, LLC, C.R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, 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 Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, Bayside Property, Inc., The City of Georgetown, Hartford Casualty Insurance Company, and Hartford Fire Insurance Company are the Respondents.

Appellate Case No. 2013-001644

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5342
Heard June 3, 2015 – Filed August 12, 2015
Withdrawn, Substituted and Refiled December 16, 2015

REVERSED AND REMANDED

K. Douglas Thornton, of Conway, and John M. Leiter,
Law Offices of John M. Leiter, PA, of Myrtle Beach, for
Appellants.

Charles T. Smith, of Georgetown, for Respondents
Ronald L. Charlton, Bonnie N. Charlton, James R.
Charlton, and Bayside Property, Inc.;

Andrew F. Lindemann, Davidson & Lindemann, PA, of
Columbia, and Elise Freeman Crosby, Crosby Law Firm,
LLC, of Georgetown, for Respondent The City of
Georgetown;

Lawrence Michael Hershon and James Lynn Werner,
Parker Poe Adams & Bernstein, LLP, both of Columbia,
for Respondents Hartford Casualty Insurance Company
and Hartford Fire Insurance Company.

FEW, C.J.: John and Louise Goodwin and Gary and Joyce Owens appeal the circuit court's refusal to restore their case to the docket after it was "stricken" due to one defendant's bankruptcy. The circuit court denied the motion to restore the case on the ground the case was barred by the statute of limitations. We hold that because the Goodwins and Owens 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. We reverse and remand for further proceedings.

I. Facts and Procedural History

In September 2007, Bonnie and Ronald Charlton and Bayside Property, Inc. sold a tract of land on Winyah Bay in the city of Georgetown to South Bay Properties,

LLC for \$20.85 million—\$6.27 million in cash and a \$14.58 million note secured by a mortgage. South Bay—a joint venture of Landquest Development, LLC, C.R. Thompson and Sons, LLC, and Kyle C. Corkum—planned to develop the property into a residential subdivision named the Harbor Club on Winyah Bay. Prior to construction, South Bay sold fifty-four lots—including one each to the Goodwins and Owenses—generating \$14,737,600 in proceeds.

On July 9, 2009, after South Bay failed to build the basic infrastructure of the subdivision in a timely manner, the Goodwins and Owenses, along with other lot owners, filed this lawsuit ("lot owners' action") and recorded a lis pendens on the property still owned by South Bay. The record indicates the lawsuit was promptly served.

In June 2010, South Bay filed a petition for bankruptcy. The record reflects no further activity in the lot owners' action until it appeared on the trial roster for July 25, 2011. South Bay then filed a motion for a "continuance," relying on the "automatic stay" imposed under the federal bankruptcy code. *See* 11 U.S.C. § 362(a)(1) (2012) (discussed in section II. A. of this opinion). The circuit court granted South Bay's motion for a continuance, and in a separate Form 4, it ordered "Case Stricken Due To Bankruptcy." On August 12, 2011, the bankruptcy court dismissed South Bay's bankruptcy case.

In August 2012, the Charltons and Bayside filed an action to foreclose on the mortgage. They named as defendants any party that "may have or claim" an interest in the property, including the Goodwins and Owenses. The Goodwins and Owenses—without an attorney—filed answers that contained only a general denial of the allegations in the complaint. The Charltons and Bayside filed a motion for an order of reference to the master-in-equity.

On January 22, 2013, the Goodwins and Owenses—then represented by an attorney—filed two motions. The first was a motion to "Reinstate/Restore" seeking "an Order . . . reinstating the [lot owners'] action to the active trial docket" and to consolidate the lot owners' action and the foreclosure suit. The second was a motion to amend their answers in the foreclosure suit to assert counterclaims and cross-claims seeking the same relief they sought in the lot owners' action.¹

¹ The cross-claims and counterclaims in the proposed amended answers in the foreclosure suit are nearly identical to the claims in the lot owners' action.

The circuit court denied the motion to restore the lot owners' action, ruling the Goodwins' and Owenses' claims were barred by the statute of limitations. As to consolidation, the circuit court stated, "Since restoration . . . is denied, consolidation of this case . . . is moot." In a separate order in the foreclosure suit, the circuit court referred that case to the master and declined to rule on the motion to amend. The Goodwins and Owenses filed motions to alter or amend both orders pursuant to Rule 59(e), SCRCP. In the foreclosure suit, they asked the circuit court to rescind the order of reference and repeated their request to amend their answers. After the master recused himself for unrelated reasons and returned the foreclosure suit to circuit court, the court entered orders denying the Rule 59(e) motions in both cases.²

II. Motion to Restore

The Goodwins and Owenses argue the circuit court erred in denying their motion to restore on the grounds that their claims were barred by the statute of limitations. We agree.³

The statute of limitations provides, "Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued" S.C. Code Ann. § 15-3-20(A) (2005). Thus, the statute of limitations applies to the date a lawsuit is "commenced." Rule 3(a) of the South Carolina Rules of Civil Procedure provides, "A civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations" Section 15-3-530 of the South Carolina Code (2005) prescribes the limitations period for this case as three years. The Goodwins and Owenses complied with the statute of limitations in 2009 when they filed the summons and complaint and served them on the defendants within

² The Goodwins and Owenses interpreted the order in the foreclosure suit as denying their motion to amend. In a separate appeal in the foreclosure suit, we found the order did not deny the motion to amend and was not an immediately appealable order. We dismissed the other appeal and remanded for further proceedings.

³ Because this is a question of law, we review the circuit court's decision de novo. See *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (stating an appellate court "reviews questions of law de novo" (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008))).

the three-year limitations period. Thus, the circuit court erred by finding the lawsuit barred by the statute of limitations.

The respondents argue, however, the Goodwins and Owens did not comply with the tolling provisions of 11 U.S.C. § 108(c) (2012) and Rule 40(j) of the South Carolina Rules of Civil Procedure. As we will explain, because the lawsuit had already been commenced, there was nothing to toll. Therefore, the tolling provisions are irrelevant.

A. 11 U.S.C. § 108(c)

The filing of a petition for bankruptcy by a defendant in a state civil proceeding invokes 11 U.S.C. § 362(a)(1). Section 362 is entitled "Automatic stay," and provides the filing of the petition "operates as a stay . . . of . . . the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor." § 362(a)(1). This automatic stay prevents a state court from proceeding with the action while the stay is in effect. Under 11 U.S.C. § 362(c)(2)(B) (2012), "the stay . . . continues until . . . the [bankruptcy] case is dismissed."

Our rules of procedure do not address how a circuit court must deal with the automatic stay. However, neither our rules nor 11 U.S.C. § 362 require the dismissal of the action. Here, the circuit court did not dismiss the action. The circuit court employed a Form 4 order provided by our supreme court that contains various boxes for the court to check to indicate the effect of the order.⁴ The form includes boxes for the dismissal of an action and the reason for the dismissal, but the court did not check the dismissal boxes in this order. Rather, the circuit court checked the box labeled "ACTION STRICKEN," and as a reason for striking, the

⁴ See Rule 84, SCRCP ("The Supreme Court shall prescribe the content and format of forms required by these rules."). By order dated June 24, 2008, the supreme court approved the form used by the circuit court in this case. See Order re: Form 4, Judgment in a Civil Case, No. 2008-06-24-01 (S.C. Sup. Ct. filed June 24, 2008), *available at* <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2008-06-24-01> (last visited August 7, 2015). The Form 4 form has subsequently been revised. See Order re: Judgment in a Civil Case Form (SCRCP Form 4C), No. 2013-03-26-01 (S.C. Sup. Ct. filed Mar. 26, 2013), *available at* <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2013-03-26-01> (last visited August 7, 2015).

box labeled "Bankruptcy." In the portion of the form provided for text, the circuit court wrote, "Case Stricken Due To Bankruptcy."

In deciding not to restore the case to the docket, the circuit court relied on 11 U.S.C. § 108(c), which states,

[I]f applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay.

The circuit court incorrectly concluded section 108(c) has any application to this case. By its terms, the subsection tolls "a [time] period for commencing or continuing a civil action" when the time period is "fixe[d]" by (1) "applicable nonbankruptcy law," (2) "an order," or (3) "an agreement." Here, there is no order or agreement fixing any period of time for restoring the lawsuit, and the only "law" the respondents contend is applicable is the statute of limitations. However, the Goodwins and Owenses commenced the lot owners' action, and thus complied with the statute of limitations, before the automatic stay took effect. Under these circumstances, the statute of limitations was no longer an "applicable nonbankruptcy law" that "fixe[d] a period for commencing or continuing a civil action."⁵ Therefore, the tolling provision in section 108(c) is irrelevant in this case.

B. Rule 40(j), SCRPC

The circuit court also relied on Rule 40(j) of the South Carolina Rules of Civil Procedure. We find the court erred in relying on this rule for several reasons. First, the lot owners' action was stricken due to bankruptcy, not pursuant to Rule

⁵ 11 U.S.C. § 108(c) is applicable to a situation where the automatic stay has prevented the commencement of a lawsuit before the statute of limitations expires, or where a law, order, or agreement otherwise sets some time limit for "commencing or continuing" a lawsuit.

40(j). Second, even if Rule 40(j) was at issue, the rule does not set a deadline for restoring a case. As our supreme court has explained,

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. . . . 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. 617, 620-21, 591 S.E.2d 26, 28 (2003).

Under Rule 40(j), therefore, the applicable deadline remains the statute of limitations. The effect of the rule is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year. Because the Goodwins and Owens commenced the lawsuit within the statute of limitations, there was nothing to toll and they did not need the tolling provision in Rule 40(j).

Third, the requirement of complying with the statute of limitations after a case is stricken pursuant to Rule 40(j) depends on the event of "striking" being considered a dismissal. While our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed. In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as "substantially revis[ing] the procedure for *dismissing* a case previously found in Rule 40(c)(3)." Rule 40, SCRCP Notes, Notes to 1994 Amendments (emphasis added). The notes go on to state, "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 Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored" *Id.*; see also *Maxwell*, 356 S.C. at 621, 591 S.E.2d at 28 (relying on the notes in interpreting Rule 40(j)).

Moreover, the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal. See *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27 ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."); *Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992) ("[W]here possible, all provisions of a statute must be given full force and effect.").

There is also an historical basis for considering a case stricken pursuant to Rule 40(j) as the equivalent of dismissed. We adopted our Rules of Civil Procedure in 1985. See Rule 86(a), SCRPC ("These rules shall take effect on July 1, 1985."). Before then, the circuit court had the power to dismiss an action without prejudice if it was called for trial and the parties were not ready to proceed. See *Small v. Mungo*, 254 S.C. 438, 441, 443, 175 S.E.2d 802, 803, 804 (1970) (holding the inability of counsel "to contact plaintiff and his witnesses and be ready for trial" and "the failure of plaintiff and his counsel to appear when the case was called for trial constituted a failure to proceed with the cause . . . and a ground for dismissal of the action"). When the supreme court decided *Small*, former Circuit Court Rule 81 was in effect. The rule provided, "When a case is reached on the Common Pleas trial roster and is called for trial, . . . if counsel are not ready to go forward with the case it shall be placed . . . at the foot of the Calendar." S.C. Code Ann. vol. 22, Circuit Court Rule 81 (Supp. 1984) (repealed 1985). In 1985, former Rule 40(c)(3), SCRPC, took effect. Similar to the procedure described in *Small*, Rule 40(c)(3) applied only if the parties were not prepared to proceed when the case was called for trial. However, the rule allowed the circuit court to "strike" the action. The rule provided:

When an action is reached on the trial roster and is called for trial, it shall not be continued by consent, and if counsel are not ready to go forward the court shall strike the action from the calendar (file book) with leave to restore, unless continuance is granted for good cause shown.

Rule 40(c)(3), SCRPC (West 1994) (repealed 1995).

The rule did not use the word "dismissed," but tracking the language of former Circuit Court Rule 81, it did require a restored case to "be placed at the foot of the

calendar (file book) and a new case number assigned." Rule 40(c)(3); *see* Rule 40(c)(3), Notes ("This Rule 40 is substantially a compendium of present Circuit Court Rules . . ."). Our law treated the striking of a case pursuant to Rule 40(c)(3) as the equivalent of a dismissal,⁶ and our courts required the plaintiff to comply with the statute of limitations upon restoring the case. *See Graham v. Dorchester Cnty. Sch. Dist.*, 339 S.C. 121, 122, 125 n.1, 528 S.E.2d 80, 81, 82 n.1 (Ct. App. 2000) (stating in a case "struck . . . from the trial roster . . . pursuant to former Rule 40(c)(3), SCRCPP" that "the statute of limitations clearly expired" before the motion to restore was filed). *But see Robinson v. J.F. Cleckley & Co.*, 751 F. Supp. 100, 105 (D.S.C. 1990) (stating for purposes of calculating timely removal pursuant to 28 U.S.C. § 1446(b) (2012), "an action which has been removed from the docket pursuant to [Rule] 40(c)(3) is pending while it is off of the docket" and is not "commenced when it is restored to the calendar").

There is no such basis in our law, however, for considering the striking of a case due to bankruptcy as a dismissal. In fact, the striking of a case from the docket due to bankruptcy is not mentioned in our rules at all. In practice, our courts have treated the striking of a case due to bankruptcy as not being a dismissal. For example, in an "Administrative Order" dated May 4, 1988, then Chief Justice Gregory provided, "I . . . 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." *See* Administrative Order, No. 1988-05-04-01 (S.C. Sup. Ct. filed May 4, 1988), *available at* <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=1988-05-04-01> (last visited August 7, 2015).

We acknowledge the Form 4 uses the term "stricken"—the same term that equates to "dismissed" under Rule 40(j). However, while the forms are provided for in the Rules, *see* Rule 84, SCRCPP, and are designed to assist courts to carry out the Rules, the forms themselves are not the law. *See Robinson*, 751 F. Supp. at 105 (stating "this court would be remiss if we allowed administrative laws . . . to dictate important procedural rights").

It is also important to note that striking a case pursuant to Rule 40(j) may be done only by consent. *See* Rule 40(j), SCRCPP (providing the party asserting a claim may strike it only when "all parties adverse to that claim . . . agree in writing that it may be stricken"). To the contrary, many cases are stricken due to bankruptcy

⁶ *See* Rule 40, SCRCPP Notes, Notes to 1994 Amendments (referring to "the procedure for dismissing a case previously found in Rule 40(c)(3)").

whether the parties consent or not. In this case, for example, the record contains no indication the case was stricken with the consent of the Goodwins or Owenses. In fact, it appears the circuit court entered the order striking the case on its own initiative, with no prior notice to the parties.⁷ To consider the striking of this case—or any case where the automatic stay applies—as a dismissal without the consent of the party making the claim would conflict with Rule 41(b), SCRCP, which provides limited circumstances in which an action may be dismissed involuntarily.⁸

For these reasons, we find the tolling provision of Rule 40(j) is irrelevant in a case stricken due to bankruptcy.

C. Petition for Rehearing

Several respondents⁹ filed a petition for rehearing in which they contend this court's opinion contains factual inaccuracies. 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 Owenses. 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 lawsuit within three years of the date their causes of action accrued.

⁷ The only motion in our record that mentions South Bay's bankruptcy is South Bay's motion for a continuance, which recites the "consent of all parties." However, the motion does not request striking the action. In the Goodwins' and Owenses' Rule 59(e) motion, they indicate they did not consent to striking the case, stating, "The case was struck either at the request of South Bay . . . or on the Court's own initiative."

⁸ *See also* Rule 79(f), SCRCP ("No action listed in the file book . . . shall be . . . stricken . . . unless and until: (1) plaintiff shall file and serve a notice . . . or stipulation of dismissal . . . ; or (2) counsel . . . have prepared and filed an order . . . bearing the written consent of all interested parties . . . ; or (3) dismissal is ordered by the court."). None of those events occurred in this case.

⁹ Landquest Development, LLC; Kyle C. Corkum; South Bay Properties, LLC; Ronald L. Charlton; Bonnie N. Charlton; James R. Charlton; and Bayside Property, Inc.

These respondents also go to great lengths in their petition for rehearing to demonstrate that the Goodwins and Owenses waited an unreasonable length of time after the bankruptcy case was dismissed before moving to restore this case to the docket. However, our decision does not depend on the reasonableness of the Goodwins' and the Owens's conduct. Our decision rests entirely on the key fact—they commenced their action within the statute of limitations—and the legal principle that after doing so they did not have to comply with the statute of limitations again simply because the case was stricken due to bankruptcy. 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.

III. Conclusion

We **REVERSE** the denial of the Goodwins' and Owenses' motion to restore the case and **REMAND** for further proceedings. Because our resolution of the issues discussed above is dispositive of the appeal, we do not address the Goodwins' and Owenses' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (An "appellate court need not address remaining issues when disposition of prior issue is dispositive").

HUFF and WILLIAMS, JJ., concur.