THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2016-0002379

Bonnie N. Charlton, Ronald L. Charlton and
Bayside Property,.....Respondents,

v.

South Bay Properties, LLC, Stantec Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewskiu, 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, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission,

Of Whom

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

APPELLANTS' MEMORANDUM IN SUPPORT OF SURREPLY TO RESPONDENTS' MOTION TO DISMISS APPEAL

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ATTORNEYS FOR APPELLANTS

In their Reply, Respondents contend that the facts in the present appeal are "remarkably similar" to the facts in Baldwin Const. Co., Inc. vs. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004). Appellants take special exception to the Respondents' disingenuous argument that: *"In both cases the Appellants obstructed and delayed the actions by failing to cooperate in discovery."* By footnote, Respondents attached copies of an Order dated April 26, 2016 compelling discovery, and an Order dated August 31, 2016 compelling discovery.

Respondents failed, however, to attach Appellants' Motion for Protective Order, filed on January 25, 2016; Appellants' Amended Notice of Motion and Motion to Alter or Amend, filed on May 13, 2016; and, Appellants' Notice of Motion and Motion To Stay Trial; Or, In The Alternative To Identify Issues For Trial, filed on September 13, 2016, copies of which are attached hereto and incorporated herein by reference as Exhibits A, B and C, respectively.

Appellants believe that the attached motions clearly indicate their reasonable and diligent efforts to limit the scope of discovery in the Respondents' mortgage foreclosure action, to those issues actually raised in the Respondents' foreclosure complaint. By judicial fiat, Appellants contend, the Respondents have been allowed to incorporate the Appellants' causes of action in their separate case, bearing case number 2009-CP-22-1045 ("the 2009 action"), asserting an equitable lien with superior priority to the Respondents' mortgage. During the time these motions were being heard and decided in the trial court, the 2009 action was pending before the South Carolina Court of Appeals (Appellate Case No. 2013-001644), , and then the South Carolina Supreme Court (Appellate Court Case No. 2016-000058). The Court of Appeals reversed and

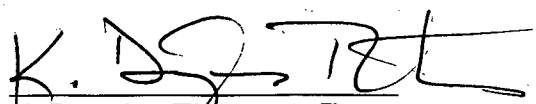
remanded the trial court's denial of Appellants' motion to reinstate that action. The Supreme Court denied the Respondents' Petition for a *Writ of Certiorari*, and remanded this case to the trial court on October 24, 2016.

Appellants believed, and vehemently argued, that it was patently unfair and oppressive to require them to participate in the scope of discovery that would be necessary to establish their entitlement to an equitable lien, superior in priority to the Respondents' mortgage, while at the same time denying Appellants the right to fully litigate their affirmative claims for damages in the 2009 action, and/or by amendment to add such claims and causes of action to the Respondents' mortgage foreclosure action. Thus, Appellants did not "obstruct and delay" the Respondents' mortgage foreclosure action by "failing to cooperate in discovery." Rather, Appellants filed appropriate motions and made appropriate arguments before the trial court, requesting that the issues to be tried in Respondents' mortgage foreclosure action be limited to the issues actually raised in their complaint[1], and that the scope of discovery be similarly limited.

Appellants respectfully submit that Respondents' motion to dismiss the appeal should be denied.

[1] The Respondents' complaint failed to allege, or make any reference to, the Appellants' claim of an equitable lien in the 2009 action. Similarly, the Respondents failed to seek to join the two actions, which Appellants contend was necessary in order to provide the Court with jurisdiction to affect Plaintiffs' claims and causes of action in the 2009 case. The establishment of Appellants' equitable lien will require the proof of a plethora of factual matters, supporting the 11 other causes of action set forth in their 51 page 2009 complaint.

Respectfully submitted:



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ATTORNEYS FOR APPELLANTS

Conway, South Carolina
February 8, 2017

Exhibit A

COPY

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Bonnie N. Charlton, Ronald L. Charlton and Bayside Property, Inc., Plaintiff, vs. South Bay Properties, LLC, et al. Defendant.	)	IN THE COURT OF COMMON PLEAS 15th JUDICIAL CIRCUIT CASE NO.: 2012-CP-22-00934 **MOTION AND ORDER INFORMATION** **FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
_____, Bar No. _____ Address: _____ Phone: _____Fax _____ E-mail: _____Other: _____	K. Douglas Thornton, Bar No. 5565 Address: 1025 Third Avenue, Conway, SC 29526 Phone: 843-488-5858 Fax843-488-5859 E-mail: kdouglasthornton@gmail.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Protective Order
Estimated Time Needed: 15 Min. Court Reporter Needed: ☒YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☒ Defendant — Date submitted: 1/19/16

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

FILED
GEORGETOWN COUNTY, S.C.
2016 JAN 25 AM 9:21
ALMA Y. WHITE
CLERK OF COURT

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: CL Date Filed: ~~25.00~~ CL
☑ MOTION FEE COLLECTED: $ 25.00
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)	COURT OF COMMON PLEAS
)	15TH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN)	CASE NO.: 2012-CP-22-00934

Bonnie N. Charlton, Ronald L. Charlton, and Bayside Property, Inc.,

Plaintiffs,

vs.

South Bay Properties, LLC, Santee Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewskiu, Richard N. Taylor, Robert I. Spillers (a/k/a) Robert Spiller), Deborah T. Spillers (a/k/a Deborah A. Spillers), Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, Joyce M. Owens, Fount L. Shults, Linda M. Shults, Dennis Ridgeway, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission,

Defendants.

NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER
(Rule 26(c) SCRCP)

TO: BONNIE N. CHARLTON, RONALD R. CHARLTON, BAYSIDE PROPERTY, INC. AND THEIR ATTORNEY, CHARLES T. SMITH, ESQUIRE:

YOU WILL PLEASE TAKE NOTICE THAT the Defendants John Steven Goodwin, Louise C. Goodwin, Gary E. Owens, and Joyce M. Owens, by and through their undersigned counsel, will move before this Honorable Court on the tenth (10^{th}) day following service of this Motion, or as soon hereafter as counsel may be heard, for an Order of this Court staying the above named Defendants' Depositions, which are currently scheduled for January 21 – 22, 2015; or, in the alternative, limiting the scope of such discovery depositions to matters which are relevant to Plaintiffs' pending foreclosure action, not to those matters raised in the Defendants' proposed Amended Answers, Counterclaims and Third Party Complaint, nor in their separate Complaint filed with this Court as Case Number 2009-CP-22-1045. In support of this Motion, Defendants would respectfully show the Court as follows:

1. Based upon Subpoenas Duces Tecum issued by Plaintiffs to these Defendants, requiring said Defendants to bring certain documents with them to their Depositions, it appears that Plaintiffs desire and intend to question these Defendants as to matters raised in their 2009 Complaint, and in their proposed Amended Answer, Counterclaim and Third Party Complaint in this action. However:

A. These Defendants, and their co-Plaintiffs in the 2009 action, filed a Motion to Reinstate that action which was denied by this Court. Defendants appealed that Order, and on December 16, 2015, the S.C. Court of Appeals reversed such Order, and directed that the case be remanded, and that Defendants' 2009 action be reinstated. A copy of such order is attached hereto and incorporated herein by reference as Exhibit A. Plaintiffs filed a Petition for Writ of Certiorari with the Supreme Court on or about January 12, 2016. A copy of Plaintiffs' Petition is attached hereto and incorporated herein by reference as Exhibit B; and

B. Defendants' Amended Motion to Amend their Answers, in order to assert counterclaims and a third party complaint setting forth virtually the identical claims and causes of action alleged in their 2009 action, was heard by this Court on October 29, 2015. An Order denying Defendants' Amended Motion to Amend was issued and filed herein on November 16, 2015. Defendants filed and served a Motion to Alter or Amend this Order (Rule 59(e)), on December 1, 2015. Defendants' Rule 59(e) Motion has yet to be scheduled or heard by this Court.

In its present procedural posture, therefore, Plaintiffs' action is limited by the parties' pleadings, which is simply a mortgage foreclosure action against South Bay Properties, LLC, in which the Defendants have been named parties-Defendants "**because they may have or claim an interest in the premises because of the Lis Pendens and Complaint filed in Case Number 2009-CP-22-1045.**" (Plaintiffs' Complaint para. 14.)

2. Plaintiffs have requested no other "relief" as against these Defendants; and have requested only that their potential interests in the premises due to the separate filing of their Lis Pendens and Complaint, be recognized by the Court. The Answers filed by Defendants Goodwins and Owenses, are mere general denials, which admit the allegations regarding the filing and pendency of their 2009 action, but deny the other material allegations of Plaintiffs' Complaint, thereby requiring Plaintiffs to comply with their burden of proof.

3. Until such time as the South Carolina Supreme Court rules upon the Plaintiffs' Petition for Writ of Certiorari, the Defendants' 2009 action is not "pending" before this Court. Similarly, unless and until these Defendants' Rule 59(e) Motion to Alter or Amend the Order denying their motion to amend their answers is finally decided, either by Order of this Court, or by Appellate Decision thereafter, those issues

raised by Defendants' proposed amended pleadings are not before this court, and are not proper subjects of discovery by Plaintiffs.

4. In the event the Defendants' Rule 59 (e) Motion is granted, and not appealed by Plaintiffs, or Defendants' Appeal of the denial of their Rule 59(e) Motion succeeds, Defendants are informed and believe that Plaintiffs will desire and attempt to re-depose them as to the issues then raised before this Court by their amended pleadings, and Plaintiffs' pleadings in response thereto. As provided by Rule 30, SCRCP, a party's deposition "*may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown.*" Unless and until Defendants' Motion to Amend is ultimately granted; or, until these Defendants' Motion to Reinstate their 2009 action, and consolidate it with Plaintiffs' foreclosure action is ultimately granted, the numerous other issues raised in the 2009 action and by Defendants' proposed amended pleadings in the present action, will not be before this Court, and will not be proper subjects for discovery.

To require otherwise would be unduly burdensome, expensive and time consuming. In accordance with Rule 26(c), SCRCP, Defendants' therefore seek an appropriate Protective Order, limiting the scope of discovery to only those issues raised by the pleadings currently before this Court.

5. In their separate action, and in their proposed amended pleadings in the present action, Defendants have generally alleged that Plaintiffs acted as co-developers, and conspired with, or aided and abetted, the other developer-defendants, in such manner as to proximately and foreseeably cause Plaintiffs' substantial damage and losses. Defendants, therefore, have alleged that they are entitled to an equitable

lien on the subject property, with such lien to be given priority above that of the Plaintiffs' mortgage; these allegations, generally, support the filing of the Lis Pendens by Defendants in their separate action.

In the present action, Plaintiffs' Complaint does not ask the Court to establish the lien priority of Plaintiffs' mortgage in relation to any of the Defendants' judgments or liens, including the Defendants' Lis Pendens and equitable lien filed in their separate action. These issues, therefore, are not before the Court, and are not proper subjects of discovery by deposition in the present action. Having failed to request such relief, Plaintiffs cannot avoid, vacate, or otherwise take title to the property without it being subject to the lien of these Defendants' Lis Pendens, and equitable lien asserted by them in their 2009 action.

In the absence of such issues under the current pleadings, Defendants are informed and believe it would be improper to allow Plaintiffs to conduct discovery as to any such issues. In the interest of Judicial economy, Defendants believe their depositions should be stayed pending a final resolution of their Rule 59(e) Motion, and the appeal of their Motion to reinstate the 2009 action.

This Motion will be supported by such other and further fact and law as may appear necessary and appropriate at hearing hereof.

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Attorneys for John Steven Goodwin, Louise C. Goodwin, Gary M. Owens and Joyce M. Owens

Conway, South Carolina

January 19, 2016

2018-CP-32-00934

Exhibit A

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 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. 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]

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[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

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[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

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[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), SCRCP

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

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[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, 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), SCRCP ("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), SCRCP, 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), SCRCP (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

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[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.

C. Petition for Rehearing

Several respondents[9] 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.

2012-CP-22-00934

Exhibit B

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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 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,..... Defendants,

Of whom Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. are Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 16, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in stating as facts matters that are disputed allegations not supported by the record on appeal?

2. Did the Court of Appeals err in overlooking or failing to appreciate the important dates that were the basis for the circuit court's decision?

3. Did the Court of Appeals err in holding - in conflict with *Maxwell v. Genez*, 356 S.C.. 617, 591 S.E. 2d 26 (2003) - that it is not necessary to comply with the statute of limitations when restoring a case that has been stricken?

4. Did the Court of Appeals err in creating multiple conflicting rules regarding the time limit for restoring cases that have been stricken?

STATEMENT OF THE CASE

This case was commenced July 9, 2009. The case was struck because of South Bay Properties, LLC's bankruptcy by Judge Hyman's order dated July 22, 2011. South Bay Properties, LLC's bankruptcy was dismissed August 12, 2011. Four of the Plaintiffs moved to restore this case and to consolidate this case with a separate case pending in circuit court by a motion filed January 22, 2013.

Judge Culbertson found and concluded that the motion to restore this case was not timely because the statute of limitations had expired. The claims alleged in the complaint arose more than three years before the motion to restore was filed and the running of the statute of limitations had not been stayed. Judge Culbertson denied the motion to restore.

The Court of Appeals reversed the denial of the motion to restore and remanded for further proceedings. *John Steven Goodwin, et al. v. Landquest Development, LLC et al.*, Opinion No 5342 (S.C. Ct. App. filed August 12, 2015; withdrawn, substituted and refiled December 16, 2015). Petitioners seek a writ of certiorari to review the Court of Appeals decision.

ARGUMENTS

1. THE COURT OF APPEALS ERRED IN STATING AS FACTS MATTERS THAT ARE DISPUTED ALLEGATIONS NOT SUPPORTED BY THE RECORD ON APPEAL.

The Court of Appeals 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 is apparently based on allegations in paragraph 33 of Plaintiffs' complaint. The allegations in paragraph 33 of the complaint are alleged upon information and belief. (Complaint p. 12, R. p. 028) These Defendants' answer denies the allegations. (Answer p. 2, R. p. 069) "A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose. *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939)" *Peoples Federal Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 425 S.E.2d 764, 310 S.C. 132 (S.C. App. 1992). The record on appeal does not support the existence of the alleged joint venture. As stated in the complaint, South Bay Properties, LLC is a North Carolina limited liability company authorized to do business in South Carolina. (Complaint p.9, R. p. 25)

The Court of Appeals Opinion states that prior to construction, South Bay sold fifty-four lots generating $14,737,600 in proceeds. The statement is apparently based on allegations in paragraph 41 of the complaint. (Complaint p. 14, R. p. 030) These Defendants' answer states 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 record on appeal does not support the validity of the alleged dates, number and amounts of lot sales.

The Court of Appeals Opinion states that South Bay failed to build the basic infrastructure of the subdivision in a timely manner. The statement is apparently based on the allegation in Appellants' Brief that no infrastructure or amenities have been built or installed. (Appellants' Amended Brief p.1) The City of Georgetown's Memorandum in Support of Motion to Dismiss Appeal informed the Court of Appeals 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 Court of Appeals Opinion states that the Goodwins and Owenses - without an attorney - filed answers in a related mortgage foreclosure action. (The Goodwins and Owenses were named as defendants in the mortgage foreclosure action because of the lis pendens filed in this action.) The statement is 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 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, 263, 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 case did not obtain a court order pursuant to Rule 11(b), SCRCP.

2. THE COURT OF APPEALS ERRED IN OVERLOOKING OR FAILING TO APPRECIATE THE IMPORTANT DATES THAT WERE THE BASIS FOR THE CIRCUIT COURT'S DECISION.

The critical dates in this action are:

September 17, 2007	The Goodwins purchased Lot 160 from South Bay Properties, LLC. (Motion to Reinstate/Restore p. 1, R. p. 101)
December 21, 2007	The Owenses purchased Lot 94 from South Bay Properties, LLC. (Motion to Reinstate/Restore p. 1, R. p. 101)
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 and copies of the order were 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 reinstate/restore this action. (Motion to Reinstate/Restore p. 1, R. p. 101)

Judge Hyman's order does not include leave to restore this action at a latter date. Judge Hyman's order does not provide for tolling the statute of limitations. 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), SCRCP. The Goodwins and Owenses did not move to alter or amend Judge Hyman's order pursuant to Rule 59(e), SCRCP. The Goodwins and Owenses did not appeal Judge Hyman's order.

Because the Goodwins and Owenses failed to act, Judge Hyman's order became the law of the case. "An unappealed ruling is the law of the case and requires affirmance."

Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); *Buckner v. Preferred Mutual Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.")

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

If the Goodwins and the Owenses did not intend to abandon their claims they should have acted when Judge Hyman struck their case or, at the latest, within three years after their alleged claims arose. The claims necessarily arose prior to July 9, 2009, the date Plaintiffs' complaint was filed. The Goodwins and the Owenses failed to object to Judge Hyman's order striking this case or to otherwise seek to reinstate this case until January 22, 2013, more than three years after the alleged claims arose and more than seventeen months after Judge Hyman dismissed the case. By then the time for asserting these claims and the time for challenging Judge Hyman's order had long expired.

3. THE COURT OF APPEALS ERRED IN HOLDING - IN CONFLICT WITH *MAXWELL V. GENEZ*, 356 S.C. 617, 591 S.E. 2D 26 (2003) - THAT IT IS NOT NECESSARY TO COMPLY WITH THE STATUTE OF LIMITATIONS WHEN RESTORING A CASE THAT HAS BEEN STRICKEN.

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. On May 1, 2000, the Maxwells moved to restore the case.

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 was not tolled and the statute of limitations barred the Maxwells' claims.

In *Graham v. Dorchester County School District*, 339 S.C. 121, 528 S.E. 2d 80 (Ct. App. 2000) the Court of Appeals correctly applied the statute of limitations to bar restoring the case. That case had been struck with leave to restore pursuant to former Rule 40(c)(3), SCRCP. Because the statute of limitations clearly expired prior to Graham moving to restore, the decision of the trial court dismissing Graham's action with prejudice for failure to timely move to restore her case was affirmed. *Graham v. Dorchester County School District*, 339 S.C. at 125, 528 S.E.2d at 83.

Instead of following the holdings in *Maxwell, supra*, and *Graham, supra*, the Court of Appeals created a new rule 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 substance of the Court of Appeals' new rule is that if a case is timely commenced, there is no time limit on reinstating the case and cases can be reinstated or restored many years or even decades after being ended. This new rule conflicts with the hold in *Maxwell v. Genez, supra.*

4. THE COURT OF APPEALS ERRED IN CREATING MULTIPLE CONFLICTING RULES REGARDING THE TIME LIMIT FOR RESTORING CASES THAT HAVE BEEN STRICKEN.

The Court of Appeals Opinion acknowledges that claims cannot be restored after the statute of limitations has expired where,

> ... 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 Court of Appeals Opinion creates a new rule that claims struck due to bankruptcy can be restored without regard to the statute of limitations. The Court of Appeals Opinion creates an open issue as to whether claims struck for reasons other than bankruptcy or consent of all parties can be restored without regard to the statute of limitations.

Furthermore, the Court of Appeals Opinion specifically reserves for future determination, ". . . 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."

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

The Notes to the 1994 amendments to Rule 40 include the statements:

> Former Rule 40(c)(3) often was used to dismiss and refile many of these cases causing confusion in the docket and the status of those cases.
>
> Rule 40(j) is the final section of the rule and substantially revises the procedure for dismissing a case previously found in Rule 40(c)(3). Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party. 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 to the General Docket.

The Court of Appeals Opinion will again cause confusion in the docket and confusion regarding the status of cases. Cases dismissed without the written consent of all parties will be beyond the reach of statutes of limitations and will form a shadow docket, invisible to court administration.

CONCLUSION

For the reasons stated herein, Petitioners ask the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Charles T. Smith
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Attorney for Petitioners Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc.

January 12, 2016

Exhibit B

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Bonnie N. Charlton, et al., Plaintiff, vs. South BayProperties, LLC, et al. Defendant.	)	IN THE COURT OF COMMON PLEAS 15th JUDICIAL CIRCUIT CASE NO.: 2012-CP-22-00934 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
_____, Bar No. _____ Address: _____ Phone: _____Fax _____ E-mail: _____Other: _____	K. Douglas Thornton, Bar No. 5565 Address: 1025 Third Avenue, Conway, SC 29526 Phone: 843-488-5858 Fax843-488-5859 E-mail: kdouglasthornton@gmail.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Amended Motion to Alter or Amend (%ule 59(e)
Estimated Time Needed: 15 min. Court Reporter Needed: ☒YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

K. D. Thornton
Signature of Attorney for ☐ Plaintiff /☒ Defendant

5/10/16
Date submitted

FILED
GEORGETOWN COUNTY, S.C.
2016 MAY 13 PM 2:54
ALMA Y. WHITE
CLERK OF COURT

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: JB Date Filed: 5/13/16
☒ MOTION FEE COLLECTED: $ 25
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)) COUNTY OF GEORGETOWN)	COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-22-00934
Bonnie N. Charlton, Ronald L. Charlton and Bayside Property, Inc., vs. South Bay Properties, LLC, Santee Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewskiu, Richard N. Taylor, Robert I. Spillers (a/k/a) Robert Spiller), Deborah T. Spillers (a/k/a Deborah A. Spillers), Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, Joyce M. Owens, Fount L. Shults, Linda M. Shults, Dennis Ridgeway, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission, Defendants.	AMENDED NOTICE OF MOTION AND MOTION TO ALTER OR AMEND (Rule 59(e)

FILED
GEORGETOWN COUNTY, S.C.
2016 MAY 13 PM 2:54
ALMA Y. WHITE
CLERK OF COURT

TO: PLAINTIFFS, AND THEIR ATTORNEY CHARLES T. SMITH; AND DEFENDANT SOUTH BAY PROPERTIES, LLC, AND ITS ATTORNEY KRISTIN G. ATKINS:

YOU WILL PLEASE TAKE NOTICE THAT the Defendants John Steven Goodwin, Louise C. Goodwin, Gary E. Owens, and Joyce M. Owens, hereby move

before this Honorable Court for an Order Altering or Amending its Order field herein on April 27, 2016, and served upon these Defendants by first class mail on that date, vacating such Order, and granting these Defendants' Motion for Protective Order by staying the prosecution of this action pending first resolution of Appeal Case No. 2016-000058, or by limiting the scope of discovery to those issues actually raised in Plaintiffs' Complaint for mortgage foreclosure.

In support of this Motion, Defendants would respectfully show the Court as follows:

1. This Court's Order is based upon its finding that these Defendants *"...claim a first priority equitable lien on the subject property superior to Plaintiffs' mortgage."* This finding is made five (5) separate times in the Order. Defendants respectfully submit that this constitutes an error of law, which controlled the Order as it is the sole basis for the Order, on the following grounds:

A. The allegation that Defendants *"claim a first priority equitable lien on the subject property superior to Plaintiffs' mortgage,"* is nowhere to be found in the allegations of Plaintiffs' complaint, nor in the Defendants' Answers. It is inappropriate for the Court to imply this allegation, as a matter of law, as more fully addressed below;

B. Plaintiffs have not requested leave to amend their pleadings to include this issue, knowing that to do so would constitute a waiver of the statute of limitations issue which they have raised in the separate action filed by the Defendants in 2009. This issue was rejected by the Court of Appeals, and as previously brought to this Court's attention, Plaintiffs have petitioned the S.C. Supreme Court for a Writ of Certiorari;

C. Defendants attempted to bring these issues before the Court, by way of a Motion to amend their pleadings. This Motion was denied by The Circuit Court, and a Rule 59(e) Motion is currently pending before Judge Seals regarding this issue. This Court's Order is completely silent as to this Rule 59(e) Motion;

D. If this Court does, in fact, "deem" the equitable subordination of Plaintiffs' mortgage to be included in Plaintiffs' Complaint, and therefore subject to discovery, Defendants' Motion to Amend should be granted, and Defendants should be allowed to proceed upon all causes of action which they sought to assert therein. The equitable subordination allegation depends upon facts pleaded throughout the various causes of action alleged in their proposed amended pleadings, which are virtually identical to the Defendants' Complaint in Case Number 2009-CP-22-1045. In such event, Defendants would be entitled to proceed with the litigation of their legal claims and causes of action first, before Plaintiffs would be allowed to proceed with their foreclosure action; and,

E. Inasmuch as Plaintiffs' Petition for Writ of Certiorari in Case Number: 2009-CP-22-1045, was filed on February 19, 2016, it is not only reasonable, it is necessary and appropriate to further the ends of justice that Plaintiffs' foreclosure action be stayed pending the final resolution of this appeal. Inasmuch as the South Carolina Court of Appeals ruled in these Defendants' favor, Defendants are not interposing this request for stay for purposes of delay. In the event the Supreme Court should reverse the Court of Appeals, and uphold the Trial Court's denial of the Defendants' Motion to Reinstate the 2009 action, the discovery issues currently before this Court would be completely moot.

DISCUSSION OF RELEVANT LAW

Rule 8(a)(2) requires *"that pleadings contain a short and plain statement of the facts showing that the pleader is entitled to relief;"* and 8(a)(3), requires *"a prayer or demand for judgment for the relief to which he deems himself entitled."* Rule 8(f) finds that: *"All pleadings shall be so construed as to do substantial justice to **all** parties."* (Emphasis added.) In the present case, Plaintiffs have failed to state any facts alleging that they are entitled to relief upon Plaintiff's claim of equitable subordination in their separate action. The construction of Plaintiffs' complaint by this Court, to include this allegation, denies substantial justice to the Defendants. This is true also with the finding that: *"The five interrogatories submitted by Plaintiffs are specifically authorized by Rule 33, SCRCP."* This completely disregards the scope of discovery required by the

inclusion of the implied issue of equitable lien subordination. Similarly, the Court's finding that: *"The three requests for production submitted by Plaintiffs requests the documents the Defendants contend support their claim to an equitable lien on the subject property, the documents referenced in the Defendants' answers to interrogatories and the documents the Defendants intend to offer as evidence at trial,"* fails to recognize the breadth and scope of the burden imposed upon the Defendants to adequately and fully respond to these Requests for Production. This identical defect, Defendants respectfully submit, affects this Court's finding that: *"The questions asked at the deposition of John Steven Goodwin are relevant to this foreclosure action and a proper subject for discovery. Plaintiffs' discovery requests do not exceed the scope of reasonable discovery and do not appear to be unduly burdensome, expensive or time consuming."*

As the Supreme Court noted in *Oncology and Hematology Associates of S.C., LLC v. S.C. Dept. of Health and Environmental Control,* 387 S.C. 380, 692 S.E.2d 920, 924-25 (2010):

> *We are keenly aware that the scope of discovery is broad (Citing Rule 26(b)(1))...*
>
> *Yet, there are limits, which we see trial courts generally unwilling to recognize and enforce...*
>
> *Our willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial "hen's tooth." We have no desire to micro-manage discovery orders. It is our hope that in resolving this matter, we will speak to trial courts generally. While discovery serves as an important tool in the truth-seeking function of our legal system, we are concerned that "discovery practice" has become a cottage industry and the merits of a claim are being relegated to secondary status.*

We find persuasive a decision of the Texas Supreme Court in a similar situation. See In Re CSX Corp, 124 S.W.3rd 149 (2003). The Texas Supreme Court granted a party mandamus relief from discovery requests the Court determined were overly broad and irrelevant to resolution of the dispute at hand:

> *Generally, the scope of discovery is within the trial court's discretion. However, the trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure.*
>
> *Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is "reasonably calculated to lead to the discovery of admissible evidence."...Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be "reasonably tailored" to include only relevant matters.*

In the present case, the issue of equitable lien subordination has not been pleaded by any party. Plaintiffs' complaint fails to even specifically request its mortgage be given priority over any of the other judgment creditors or liens identified. To imply the presence of this issue requires an excessively liberal construction of the Plaintiffs' complaint, and fails to "*do substantial justice to **all** parties." (Rule 8(f), SCRCP)*

In *Murdock v. Murdock,* 338 S.C. 322, 333-34, 526 S.E.2d 241 (Ct. Ap. 1999), the Court of Appeals held:

> *"Procedural due process requires that a litigant be placed on notice of the issues which the Court is to consider. Cameron & Barkley Co. vs. S.C. Procurement Review Panel,* 317 S.C. 437, 454 S.E.2d 892 (1995); *Abbott v. Gore,* 304 S.C. 116, 403 S.E.2d 154 (Ct. Ap. 1991). *The Family Court is limited by the scope of due process and the rule that Family Court pleadings are to be liberally construed may not be stretched so as to permit the judge to award relief not contemplated by the pleadings. Id. Henry v. Henry,* 296 S.C. 285, 372 S.E.2d 104 (Ct. App. 1988)...

> *Here, the husband received no notice he would be required to address the issue of debt allocation at the hearing on the rule to show cause. As noted above, neither the notice of hearing, the petition for the rule to show cause, nor the supporting affidavit made any mention of debt allocation as an issue to be addressed. Failing any mention of the issue of debt allocation in relevant pleadings, the Family court acted outside the scope of due process in ostensibly adjudicating the issue at the June 8, 1998 hearing.*

In the present case, Plaintiffs intentionally failed to plead the Defendants' claims of equitable lien subordination in their separate action, knowing that this would both waive their statute of limitations defense, and open the door for Defendants to assert all of the causes of action raised in their 2009 case, as they attempted to do by amending their pleadings in the present action. If reinstatement of Plaintiffs' 2009 action had been granted by Judge Culbertson, as the Court of Appeals indicated it should have been, Plaintiffs would not be allowed to proceed with their mortgage foreclosure action independently. Defendants have filed and asserted a motion for consolidation of their 2009 action with the Plaintiffs' mortgage foreclosure action, for these obvious reasons. In *Pittman Mortgage Co., Inc. v. Edwards*, 27 S.C. 72, 77, 488 S.E.2d 335 (1997) the Supreme Court reversed an arbitration award, finding that the arbitration panel had exceeded its powers by awarding relief not requested in the Plaintiff's pleadings:

> [Respondent's pleadings] *did not request either her shareholders' equity or rescission of the contract for issuance of stock and the return of her contribution to the corporation. Instead, she only sought the issuance of stock and her share of the income owed to her from the business. Further, Respondent did not attempt to amend her pleading to request the value of the stock instead of the issuance of the stock, and there is no evidence to support a finding that Appellants impliedly consented at the hearing to allow the panel to consider this type of relief. Therefore, the panel was limited to deciding to whether she was entitled to stock in the corporation and to order issuance of this stock. By awarding Respondent the value of her stock, the panel exceeded its authority.*

CONCLUSION

For the foregoing reasons, Defendants are informed and believe they are entitled to an Order of this Court vacating its previous Order, staying prosecution of this action pending resolution of Plaintiffs' petition for writ of certiorari, or limiting the scope of discovery by excluding these issues not raised in the parties' pleadings.

This Motion will be supported by such other and further fact and law as may appear necessary and appropriate at the hearing hereof.

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Conway, South Carolina

May 10, 2016

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-22-00934
Bonnie N. Charlton, Ronald L. Charlton, and Bayside Property, Inc., Plaintiffs, vs. South Bay Properties, LLC, Santee Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewskiu, Richard N. Taylor, Robert I. Spillers (a/k/a) Robert Spiller), Deborah T. Spillers (a/k/a Deborah A. Spillers), Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, Joyce M. Owens, Fount L. Shults, Linda M. Shults, Dennis Ridgeway, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission, Defendants.	)	CERTIFICATE OF SERVICE

I, Regina R. Cagle, an employee of Thornton Law, LLC, certify that a copy of Defendants' John Steven Goodwin, Louise C. Goodwin, Gary E. Owens, and Joyce M. Owens' Motion and Order Coversheet and Notice of Motion and Motion to Alter or Amend (Rule 59(e)), in the above captioned matter, were served upon the following

attorneys and/or litigants, this 9th day of May, 2016, by depositing said documents in the U.S. Mail, with proper postage affixed thereto, and addressed as follows:

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Attorney for South Bay Properties, LLC

Regina R. Cagle

May 9, 2016

Exhibit C

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Bonnie N. Charlton, et al, Plaintiff, vs. South Bay Properties, LLC, et al. Defendant.	IN THE COURT OF COMMON PLEAS 15TH JUDICIAL CIRCUIT CASE NO.: 2012-CP-22-00934 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: K. Douglas Thornton, Bar No. 5565 Address: 1025 Third Ave., Conway, SC 29526 Phone: 843-488-5858 Fax843-488-5859 E-mail: kdouglasthornton@gmail.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Stay Trial, etc.
Estimated Time Needed: 45 min. Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

K. D. Thornton
Signature of Attorney for ☐ Plaintiff /☒ Defendant

9-7-16
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ _____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

FILED
GEORGETOWN
2016 SEP 13 AM 9:55
CLERK OF COURT

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: JB Date Filed: 9/13/16
☒ MOTION FEE COLLECTED: $ 25
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

Bonnie N. Charlton, Ronald L. Charlton, and Bayside Properties, Inc.,

Plaintiffs,

vs.

South Bay Properties, LLC, Santee Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewskiu, Richard N. Taylor, Robert K. Spillers (s/k/a Robert Spillers), Deborah T. Spillers (a/k/a Deborah Spillers, Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, and Joyce M. Owens, Fount L. Shults, Lynda M. Shultz, Dennis Ridgeway, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission,

Defendants.

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-22-00934

NOTICE OF MOTION AND MOTION TO STAY TRIAL; OR, IN THE ALTERNATIVE. TO IDENTIFY ISSUES FOR TRIAL

TO: PLAINTIFFS, BONNIE N. CHARLTON, RONALD L. CHARLTON AND BAYSIDE PROPERTIES, INC., and their attorney CHARLES T. SMITH, ESQ.:

YOU WILL PLEASE TAKE NOTICE THAT the Defendants John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens ("hereinafter moving Defendants") will move before this Honorable Court on the tenth (10th) day following service hereof, or as soon hereafter as counsel may be heard, for an Order of this Court:

A. Staying the trial of Plaintiffs' foreclosure action, pending a determination of these moving Defendants' Rule 59(e) Motion in the present case, concerning the Court's denial of these Defendants' Motion to amend their Answers to assert appropriate counterclaims, cross-claims and third party complaints;

B. Staying the trial of Plaintiffs' foreclosure action until the Plaintiffs' Petition for a Writ of Certiorari in Case Number 2009-CP-22-1045, Appellate Case Number 5342 is decided by the South Carolina Supreme Court. Plaintiffs' Petition for a Writ of Certiorari is currently number nine (9) on the Supreme Court's docket; or

C. In the alternative, limiting the issues to be tried in the Plaintiffs' foreclosure action to those issues which are specifically raised in the parties' pleadings, thereby excluding a determination of the plethora of factual and legal issues underlying these moving Defendants' claims of entitlement to an equitable lien, with superiority to Plaintiffs' Mortgage. These issues are to be found only in these moving Defendants' Complaint, in Case Number 2009-CP-22-1045, and in their proposed Amended Answer in the present action, which Motion to Amend has yet to finally be decided by this Court.

In support of this Motion, the moving Defendants would respectfully show unto this Honorable Court as follows:

1. These Defendants' Rule 59(e) Motion for Reconsideration of this Court's Order denying these Defendants' Motion to Amend their Answers **in the present action**, was timely filed and served upon all parties, and upon the Honorable William H. Seals, Jr., on December 10, 2015. The Defendants have attempted to have this Motion scheduled for hearing before Judge Seals, to no avail. In the event this Motion is granted, the

scope and manner of the trial of this action would be substantially affected. These Defendants would be entitled to have their legal claims and causes of action tried by a jury, prior to or concurrent with the trial of equitable issues, including Plaintiffs' mortgage foreclosure cause of action.

Further, as a practical matter, the granting of these Defendants' Motion to Amend their Answers would entitle these Defendants to affirmative relief. This would, in turn, justify the substantial expense and effort to be expended by these Defendants in pursuing discovery against both Plaintiffs, and numerous persons and entities who will only be parties to this action if the Motion to Amend is granted. The current unavailability of affirmative relief for these moving Defendants renders the pursuit of such discovery futile and wasteful.

2. As previously argued, the Plaintiffs' Complaint merely alleges that the moving Defendants filed a Lis Pendens in their prior, separate action (2009-CP-22-1045). The Complaint does not allege that the moving Defendants asserted an equitable lien in that prior action, and does not allege that these Defendants' lien is either superior or inferior to Plaintiff's Mortgage lien. Further, the Plaintiffs have not attempted to interplead or join the Defendants' prior action in order to obtain a final adjudication of the issues raised therein. (See: Rules 14, 20, and 22, SCRCP.) In fact, Plaintiffs have argued extensively on Appeal that the moving Defendants' action is null and void, because the statute of limitations had allegedly expired as to all causes of action asserted by them therein, prior to the date they filed their Motion to reinstate that action. If that were the case, it was not necessary for Plaintiffs to name these Defendants as parties to their foreclosure action.

3. If this Court proceeds with the trial of Plaintiffs' foreclosure action, without the moving Defendants' Motion to Amend their Answers being finally determined, and prior to the final determination of the Plaintiffs' Petition for Writ of Certiorari Appeal of the South Carolina Court of Appeals decision, this Court will be inviting a foreseeably unjust, inequitable and inconsistent result. In this regard, Plaintiffs should be judicially estopped from asserting the validity of the moving Defendants' Lis Pendens in the present action, which is dependent upon the validity of their equitable lien, while simultaneously arguing in the South Carolina Court of Appeals and Supreme Court, that these Defendants' Lis Pendens is a nullity. See: Cothran v. Brown, 350 S.C. 352, 357-58 (Ct. App. 2002):

> *The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing those who seek to misrepresent facts to gain advantage.* Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). See also: John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3rd 26, 29 (4th Cir. 1995) *(Stating goal of judicial estoppel "is to prevent a party from playing 'fast and loose' with the courts, and to protect the essential integrity of the process." As explicitly embraced by our Supreme Court, "[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."* Hayne, 327 S.C. 251, 489 S.E.2d 477. *"When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him."* Id.
>
> *"The application of judicial estoppel "is an equitable concept," depending on the facts and circumstances of each individual case, [and] application of the doctrine is discretionary."* Carrigg v. Cannon, 347 S.C. 75, 83-84, 552 S.E.2d 767, 772 (Ct. App. 2001) (Additional citations omitted.) *Generally for the doctrine to apply, courts look to the following factors:*
>
> > *First, a party's later position must be clearly inconsistent with its earlier position. Second, ...whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception*

> *that either the first or the second court was misled..." a third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if estopped.*
>
> *The above outlined approach emphasizes the potential for harm to the judicial process.*

Under this analysis, judicial estoppel should clearly apply in the present case, and preclude the Plaintiffs from proceeding on their foreclosure action, until both their Petition for Writ of Certiorari, and the moving Defendants' Rule 59(e) Motion regarding their Motion to Amend, are finally heard and decided. Permitting Plaintiffs to assert different facts, and take an entirely different legal position in this action, *could result in the appearance that one Court or the other was misled.* (Cothran, 350 S.C. 359.)

4. The moving Defendants' Motion to Reinstate Case Number 2009-CP-22-1045, which is currently on Appeal before the South Carolina Supreme Court, includes a motion to consolidate that action with the foreclosure action *sub judice*. In the event the Supreme Court affirms the Court of Appeals' decision, granting these Defendants' Motion to Reinstate, these actions would therefore be consolidated for trial, and these Defendants' Motion to Amend their Answers would be moot. Case Number 2009-CP-22-1045 is not a *"different case,"* as this Court has indicated.[1] The prior action forms the basis of the Plaintiffs' allegation in their complaint, that these Defendants have filed a Lis Pendens on the subject property.

As previously noted hereinabove, the Plaintiffs have taken inconsistent positions in these two (2) actions; arguing in Case Number 2009-CP-22-1045 that the

[1] E-mail correspondence from the Honorable Joe M. Crosby, dated August 29, 2016 at 12:13 p.m. A copy of this e-mail is attached hereto and incorporated herein by reference as Exhibit A.

Defendants' claims and causes of action are barred by the statute of limitations, and their Lis Pendens is therefore null and void; while arguing in the present action that these Defendants' Lis Pendens is still a valid lien on the property which must be addressed by this Court in the foreclosure trial. In order to successfully defeat these Defendants' Lis Pendens, and the equitable lien underlying it, Plaintiffs should have joined, or interpleaded, their foreclosure complaint with Case Number 2009-CP-22-1045. (See: Rules 14, 20, and 22 SCRCP.) In the alternative, Plaintiffs could have simply pursued this foreclosure action without naming these Defendants as parties/Defendants, in reliance on their belief that these Defendants' Lis Pendens and equitable lien were null and void. The Plaintiffs have done neither.

5. Despite the Plaintiffs' failure to join or interplead their foreclosure with Case Number 2009-CP-22-1045, this Court has exhibited a willingness to assist the Plaintiffs in curing these procedural defects, by requiring these Defendants to participate in discovery regarding the particulars of their equitable lien which has not been pled by any party in this instant action, and by demonstrating its willingness to proceed with the foreclosure trial notwithstanding the pendency of Defendants' Rule 59(e) Motion before Judge Seals, and these Defendants' (as Plaintiffs) pending Petition for a Writ of Certiorari before the South Carolina Supreme Court. As argued above, this Court is thereby inviting a foreseeably inconsistent, unjust and inequitable result. This would be extremely prejudicial to the Defendants' rights to pursue their civil remedies, for which these Defendants have expended substantial time, money and effort in the pursuit of two (2) separate Appeals.

In State v. Greene, 255 S.C. 548, 567, 180 S.E.2d 179, 189 (1971), the Court reviewed the trial court's overruling numerous motions for new trial, without conducting a hearing on them. Justice Bussey, dissenting, pointed out that:

> *An appeal to a judge's discretion is an appeal to his judicial conscience, and his valid exercise connotes direction by the reason and conscience of the judge to a just result, taking account of the law and the particular circumstances of the case, and precludes capricious or arbitrary action. 48 C.J.S. Judges, Section 44, p. 1008.*

Similarly, in Nienow v. Nienow, 268 S.C. 161, 167, 232 S.E.2d 504, 507 (1977), the Supreme Court, addressing the doctrine of *forum non conveniens*, noted:

> *Intertwined with the doctrine are the traditional notions of fair play and substantial justice. The exercise of discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result.* State v. Hill, 266 S.C. 49, 51, 221 S.E.2d 398, 399 (1976)

In the present case, the appropriate exercise of this Court's discretion, taking account of the law and particular circumstances of this case, requires that Plaintiffs' foreclosure action be stayed pending a resolution of the Appeal and/or these Defendants' Rule 59(e) Motion for amendment of their pleadings. In the alternative, such discretion requires the limitation of issues to be determined in this foreclosure action as requested hereinbelow.

6. Plaintiffs' complaint alleges only that these moving Defendants "*...are made parties to this action because they may have or claim an interest in the premises because of the Lis Pendens and Complaint filed in Case Number 2009-CP-22-1045.*" These Defendants' Answers, filed *pro se*, admit this allegation. Having failed to interplead or join these two (2) actions, the Plaintiffs have also successfully resisted

these Defendants' Motion to reinstate Case Number 2009-CP-22-1045, and to amend their Answers to assert these identical claims and causes of action in the present case, by arguing that the statute of limitations on the Defendants' affirmative causes of action had expired prior to the filing and service of their motion to reinstate their prior action. Thus, the facts and issues which support Plaintiffs' causes of action against the Plaintiffs, and other non-parties to this this action, and which in turn support their equitable lien are not before this Court.

The Complaint in Case Number 2009-CP-22-1045 alleges that the Defendants (the Plaintiffs in this instant action), as co-developers and joint venturers with other non-parties herein, are liable to these moving Defendants for: breach of contract/rescission, breach of contract/declaratory relief/specific performance and damages, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act, negligent misrepresentation, actual/constructive fraud, enforcement of a performance bond, violation of the Interstate Land Sales Full Disclosure Act – seeking damages and/or rescission, violation of the South Carolina Uniform Land Sales Full Disclosure Act – seeking actual, compensatory, consequential and punitive damages, entitlement to an equitable lien, and civil conspiracy. These issues can not be adjudicated within Plaintiffs' foreclosure action. The moving Defendants, therefore, are informed and believe that they are entitled to an Order of this Court limiting the issues to be decided in the present action, in and only in the event the Court shall deny these Defendants' Motion to Stay, as follows:

A. Deciding only whether Plaintiffs' promissory note and mortgage are valid and enforceable as against the Defendants South Bay Properties, LLC, Santee Consulting Services, Inc., f/k/a Trico Engineering

Consultants, Inc., Milone and McBroon, Inc., and Georgetown County Forfeited Land Commission; and

B. In the event the Court shall conclude that Plaintiffs' promissory note and mortgage are a valid and enforceable debt, secured by a lien upon the subject property, awarding Plaintiffs a judgment of foreclosure and sale, subject to a determination of the validity and enforceability of these Defendants' Lis Pendens and equitable lien; either by adjudication of Case Number 2009-CP-22-1045, or its dismissal with finality by the South Carolina Supreme Court.

It would be inequitable and unjust, if not beyond the authority of this Court on the pleadings of record, to find or conclude that these moving Defendants have failed to establish their entitlement to such equitable lien, by having failed to conduct complete discovery and present their entire case on the other enumerated claims and causes of action, within the limited context of Plaintiffs' foreclosure action as pleaded. Such limited adjudication would be equitable and just, due to the Plaintiffs' failure to join or interplead their foreclosure with these Defendants' previous action.

Furthermore, the Plaintiffs are not entitled to relief which they did not request in their Complaint. As advised in *South Carolina Foreclosure Law Manuel, Susan B. Berkowitz, Esquire, et al., Chapter 3, S.C. Bar, a foreclosure complaint should include:*

A description of the note and mortgage with copies attached as exhibits to the Complaint provides the basis for the cause of action.

Paragraphs describing the remaining defendants and the reason they may claim an interest in the property should clearly show that they are subordinate to the lien of the plaintiff, or if they are superior liens that the property is to be sold subject to their liens.

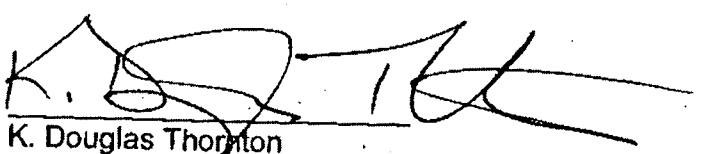
If you have discovered problems with the documentation or the title work, and you assert the necessary allegations in the pleadings to reform the mortgage or quiet the title, the problems will be resolved, if they can be, at the hearing and your judgment should then proceed smoothly.

The prayer of the complaint should request that the court determine the amount of the judgment and extinguish the liens of subordinate lien holders.

In the present case, Plaintiffs attached only a copy of their Promissory Note as an exhibit to their complaint. There is a serious defect in the promissory note and mortgage, inasmuch as the promissory note, as alleged by Plaintiffs in their complaint, is dated September 12, 2007, while the mortgage is dated September 11, 2007. The mortgage is a security instrument, serving the purpose of securing the debt created by the promissory note. Here, because the promissory note did not exist as of the date the mortgage was executed, there was no debt to be secured, and the mortgage itself is therefore voidable. In order to cure this clear defect in their documents, Plaintiffs were required to seek reformation of the promissory note and mortgage in their foreclosure complaint. Plaintiffs have failed to do so. And, as previously argued before this Court, Plaintiffs' complaint fails to allege the superiority or inferiority of their mortgage lien, with regards to any of the Defendants, including these moving Defendants', liens. See also Chief Justice Lewis' dissenting opinion in Perpetual Building and Loan Assn. of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978) (*It is elementary that the right to a judgment must be determined with reference to the relief sought in the pleadings. A deficiency judgment is a personal judgment and a Defendant is entitled to notice in the pleadings that it is sought. No personal judgment was sought or granted and there was, therefore, no basis upon which to grant a deficiency judgment.*

This Motion will be supported by such other and further fact and law as may appear necessary and appropriate at the hearing hereof.

Respectfully submitted:



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September 7, 2016

2012-CP-22-00934

EXHIBIT "A"

Gmail

Douglas Thornton <kdouglasthornton@gmail.com>

Re: Charlton, et al. vs. South Bay Properties, LLC, et al. (2012-CP-22-00934)

1 message

Charles T. Smith <charles.smith@scbar.us> Mon, Aug 29, 2016 at 12:13 PM
To: Douglas Thornton <kdouglasthornton@gmail.com>, John Leiter <jleiter@48th.com>

Attached is a copy of the letter and enclosures I will be delivering to the Master in Equity's office latter today.

Charles

On 8/26/2016 3:04 PM, Joe Crosby wrote:

> Thank you for both parties presenting concerns regarding Mr. Smith's proposed order. Mr Smith should add the 30 day notice provision regarding the expert. Additionally, add the Court denied Mr. Thorton's request that this case be stayed pending the result of a different case.
>
> As this is a discovery /sanctions motion the Court cannot make findings of fact regarding the timing etc. of liens. To the extent needed, the Court is not persuaded the Plaintiffs waived their right to question a witness because they failed to another witness about what the first witness might say.

Joe M. Crosby

CROSBY LAW FIRM, LLC

405 Dozier Street

Georgetown, SC 29440

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jcrosby@crosbyfirm.com

From: Douglas Thornton [mailto:kdouglasthornton@gmail.com]
Sent: Friday, August 19, 2016 3:18 PM
To: Joe Crosby

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2016-00002379

Bonnie N. Charlton, Ronald L. Charlton and Bayside Property,.....Respondents,

v.

South Bay Properties, LLC, Stantec Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewskiu, 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, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission,

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

AFFIDAVIT OF SERVICE

I, K. Douglas Thornton, as co-counsel for John Steven Goodwin, Louise C. Goodwin, Gary M. Owens and Joyce M. Owens, certify that on February 9, 2017, a copy of Appellants' Memorandum in Support of Surreply to Respondents' Motion to

Dismiss was served upon all parties of interest in the within matter, by mailing a copy to their attorneys of record, with proper postage affixed thereto, and addressed as follows:

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

Donald G. Hunt, Jr., Esquire
Kristin Atkins Lee, Esquire
P. O. Box 266
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Eric S. Bland, Esquire
18 Broad Street, Suite Mezz
Charleston, SC 29401

K. Douglas Thornton, Esq.
1025 Third Avenue
Conway, S.C. 29528

SWORN to before me this
9 day of February, 2017

Regina R. Cagle
Notary Public for South Carolina
My Commission Expires: 5/31/26

Thornton Law, LLC

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Conway, SC 29526

PHONE: 843-488-5858

FAX: 843-488-5859

February 9, 2017

Hon. Jenny Abbott Kitchings, Clerk
The S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Bonnie N. Charlton v. South Bay Properties, LLC (2)
Appellate Case No.: 2016-00002379

Dear Ms. Kitchings:

As co-counsel for the Appellants, John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens, I am enclosing the original and six (6) copies each of the Appellants' Memorandum in Support of Surreply to Respondents' Motion to Dismiss Appeal and a Certificate of Service

Thanking you for your attention to this matter, I remain

Yours very truly,

THORNTON LAW, LLC

K. Douglas Thornton

KDT/rrc
cc: Clients
John M. Leiter, Esquire
Charles T. Smith, Esquire
Donald G. Hunt, Esquire
Kristin Atkins Lee, Esquire
John W. Davidson, Esquire
Byron L. Saintsing, Esquire
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