

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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

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

..... Appellants

v.

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

..... Respondents

SUPPLEMENTAL RECORD ON APPEAL

RECEIVED
SEP 24 2014
SC Court of Appeals

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

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

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

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

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

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

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

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

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

INDEX

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

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2009-CP-22-1045

John Steven Goodwin, et al.,)

Plaintiffs,)

vs.)

Landquest Development LLC,)
et al.,)

Defendants.)

Transcript of Record

June 6, 2013

B E F O R E :

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

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

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

Elise F. Crosby, Esquire
Attorney for City of Georgetown

Lawrence M. Hershon, Esquire
Attorney for the Hartford Defendants

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

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

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

1 (There were no exhibits marked during the hearing.)
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

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

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

10 THE COURT: All right.

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

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

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

17 THE COURT: All right, thank you.

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

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

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

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

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

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

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

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

10 MR. LEITER: Correct, Your Honor.

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

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

15 THE COURT: All right.

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

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

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

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

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

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

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

1 set out in the contract.

2 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 THE COURT: It was struck because of bankruptcy?

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

8 THE COURT: Okay.

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

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

20 MR. LEITER: Right.

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

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

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

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

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

1 scenario that we are now facing.

2 THE COURT: All right.

3 MR. LEITER: Thank you.

4 THE COURT: Anything further?

5 MR. LEITER: Thank you, Your Honor.

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

7 MR. SMITH: May it please the Court?

8 THE COURT: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: All right.

22 MS. CROSBY: Thank you, Your Honor.

23 THE COURT: Thank you.

24 Anything in reply?

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

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

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

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

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

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

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

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

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

22 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

24 THE COURT: Okay, all right.

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

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

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

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

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

19 MR. LEITER: Thank you, Your Honor.

20 MR. HERSHON: Thank you, Your Honor.

21 THE COURT: Thank you very much.

22 (Adjourned.)

23

24

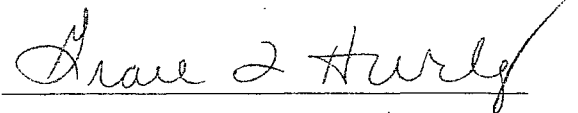
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

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

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



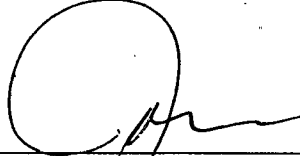
Grace L. Hurley, CVR-CM-M

Official Reporter

December 18, 2013.

Certificate of Counsel

The undersigned hereby certifies that the Supplemental Record on Appeal contains only material authorized by the Order of The South Carolina Court of Appeals dated September 10, 2014, and not any other material.



John M. Leiter, Esquire
Law Offices of John M. Leiter, PA
1203 48th Ave., North, Suite 109
Myrtle Beach, SC 29577
(843) 449-1451; (843) 449-4884 fax
Attorney for Appellants

September 23, 2014

RECEIVED
SEP 24 2014
SC Court of Appeals