

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

Case Number: 02-CP-40-0229

Appellate Case No.: 2012-212341

Karl A. Daskocil and John M. Daskocil, of whom Karl A.
Daskocil.....Appellant,

v.

Patricia Gail D. Culp, Trustee of Karl V. Daskocil Trust U/A/D December 14,
1995.....Respondent.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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RULES

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE COURT PROPERLY DISMISS PLAINTIFFS' ACTION WITHOUT PREJUDICE WHERE PLANITIFF JOHN DOSKOCIL ABANDONED HIS CLAIM AND ASKED THAT THE CASE BE DISMISSED AND WHERE KARL DOSKOCIL FAILED TO COMPLY WITH A COURT ORDER?

- II. DID THE COURT PROPERLY DISMISS PLAINTIFFS' ACTION WITHOUT PREJUDICE WHERE THE ONLY PARTY SEEKING A JURY TRIAL ABANDONED THAT CLAIM VIA NOTICE TO THE COURT?

STATEMENT OF THE CASE

This is a trust case that has a long and tortured history. This lawsuit was originally commenced on December 3, 2001 by John and Karl Duskocil, each of whom are trust beneficiaries, against their sister, Patsy Culp, the trustee of their Father's trust¹. The case was filed in Probate Court and was removed to the Circuit Court by Order dated January 17, 2002. The case was then referred to the Honorable Joseph Strickland, sitting by designation as a special circuit court judge..

During this time there were companion cases proceeding in the Richland County Probate Court. By Order dated December 13, 2002, Judge Strickland incorporated an "Agreement Among Successors" as an Order of the Court and ordered that this case be held in abeyance pursuant to a settlement agreement. See Order 12-13-2002.

All was quiet until October 11, 2005 when Karl and John Duskocil filed a Motion To Restore. See Motion 10-7-2005. Those 3 years of silence and no activity were typical of Appellant in this case throughout its 12 year litigation history. After the Motion to Restore, there was very little activity until Nelson Mullins filed a motion to be relieved as counsel for the Plaintiffs John and Karl Duskocil. See Consent Order Removal Counsel . At some point Tommy Lydon made an appearance for Karl Duskocil; however, he too moved to be relieved

¹ Frank Duskocil is a fourth beneficiary of the trust. He is not a party to the action. Karl, John Patsy and Frank are all beneficiaries of the trust.

and Michael Brackett undertook representation of Karl Duskocil in 2007. John Duskocil proceeded pro se and then secured the Representation of Hank Burris.

The litigation history was made more complicated than it needed to be by these constant machinations of John and Karl Duskocil alternating between being represented by various counsel and proceeding pro se at various stages of the litigation.

Finally, the matter was ready for trial. The parties appeared on October 21, 2008 for a hearing on the merits to be conducted by The Honorable Joseph Strickland. Present at the hearing were Robert G. Rikard, for Patsy Culp, Mike Shavo, Esquire for Frank Duskocil, Michael Brackett, for Karl Duskocil, and Hank Burris, for John Duskocil. In addition, Karl Duskocil, John Duskocil, Patsy Culp and Frank Duskocil were present in the courtroom. George Davis was present in his capacity as special administrator of the estate.

Prior to the trial beginning, the parties began to engage in settlement discussions. Settlement discussions continued in and outside of the Courtroom. Throughout the course of the day, the parties came to a settlement agreement regarding the present case. That agreement was then entered into the record in open court. Further, The Honorable Joseph Strickland polled the parties that were present after the settlement agreement was read into the record to ascertain whether they were in agreement. See Tr. of Hearing 10-21-2008.

However, true to form, there was zero activity after this hearing other than John and Karl's attorneys moving to be relieved as counsel. On January 7, 2009 Michael Brackett moved to be relieved as attorney for Karl and February 5, 2009

Hank Burris moved to be relieved as attorney for John. See Motions to be Relieved.

On February 3, 2010, Respondent moved for the Court to enforce the settlement agreement that was put on the record during the 2008 hearing. A hearing was held on July 7, 2010 and the Court issued an Order compelling the settlement and an Order of dismissal on September 29, 2010. See 7-7-10 Transcript and Order dated 9-29-10.

Karl Dorskocil moved to reconsider that Order on October 12, 2010. A hearing was held on that issue on April 27, 2011. During that hearing, the Court reversed its prior Order, set aside the settlement agreement and ruled that the case should be tried. John Dorskocil asked that the matter be set for a jury trial. Tr. 10-12-2010. Additionally, Mr. Brackett renewed his motion to be relieved as counsel for Karl Dorskocil.

After the hearing, John Dorskocil filed a notice with the Court by letter indicating that he withdrew his request for a jury trial and that he had no plans on ever remanding the case to circuit court. See Ltr of John Dorskocil and court email of 8-15-2011.

A hearing was conducted on October 20, 2011 regarding Michael Brackett's motion to be relieved as counsel for Karl. The Court granted Mr. Brackett's motion to be relieved and Ordered Karl Dorskocil to either secure new counsel by February 1, 2012 or provide a report to the Court regarding his status to move forward.

Karl Duskocil failed to secure new counsel and failed to provide the Court with a status report before the February 1, 2012 deadline. On February 16, 2012, the Court issued an Order granting Mr. Brackett's request to be relieved and dismissed the entire matter without prejudice for failure to prosecute. Karl Duskocil moved to reconsider and another hearing was held on April 13, 2012. At that hearing John Duskocil reaffirmed his position that he did not support the effort to continue this case and asked that it be dismissed with prejudice. Tr. 4-13-12 at p. 8.

The Court denied Karl Duskocil's motion to reconsider. See Order 5-17-12. This appeal followed.

ARGUMENT

I. **The Lower Court Properly Dismissed the Action For Failure to Prosecute**

The lower Court ordered that the instant action must be dismissed pursuant to Rule 41 SCRPC for failure to prosecute. The Court found that there had been ten years of litigation and that Karl Duskocil had failed to comply with an Order of the Court to secure new counsel or provide a report to the Court.

Whether an action should be dismissed for failure to prosecute is a decision within the sound discretion of the court and will not be disturbed on appeal absent a clear showing of abuse of that discretion. Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). Further, the plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. Don Shevey & Spires, Inc. v. Am. Motors Realty Corp., 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983).

An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Kiriakides v. Sch. Dist. of Greenville County, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

Appellant alleges that he was somehow surprised by the Court's Order. However, this ignores multiple warnings that Appellant received at the hearing conducted on October 20, 2011. At that hearing, the Court agreed to relieve yet another attorney for Karl Duskocil. Counsel for the Respondent raised the issue of prejudice to the Respondent and the burden that multiple delays had caused

respondent. Tr. 10-20-2011 hearing at p. 24. Counsel for Respondent asked that there be some consequences or penalty if Appellant continued to delay this case and did not move the case to a conclusion after 10 long years.

The Court initially indicated to Karl Duskocil that he would have until January 9, 2012 to report back to the Court. Tr. p. 25. However, Mr. Duskocil indicated that was not enough time and asked for a date in February. The Court granted that request and Ordered Karl Duskocil to report back to the Court by February 1, 2012. Tr. at p. 28.

Karl Duskocil then ignored the deadline that he requested and failed to report back to the Court within the allotted time period.

Therefore, the Court did not abuse its discretion in dismissing Appellant's action for failure to prosecute because Appellant was on notice of the Court's Order, Appellant chose the deadline date himself and Appellant violated the Court's order.

Appellant had a long history of delay in prosecuting his action. The following timeline is instructive:

12-3-2001	Appellant files action
12-13-02	case settled, Order holding case in abeyance
10-11-05	Motion by Appellant to restore case
10-21-08	Case settled on record, action dismissed

16 months passes with no activity other than Appellant's Counsel moves to be relieved

2-3-10	Respondent moves to enforce settlement agreement
4-27-11	Hearing conducted restoring case to trial docket

6 more months of zero activity from Appellant

10-20-11 Hearing re: Appellant's counsel's motion to be relieved
10-20-11 Court Orders Appellant provide report by 1-1-2012

3 and ½ months of no activity from Appellant
Court dismisses with prejudice

The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with her cause. Don Shevey & Spires, Inc. v. Am. Motors Realty Corp., 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). Here, Appellant engaged in delay after delay and violated the Court's order. The Respondent raised the issue of delay and prejudice at the 10-20-11 hearing and the Court warned Appellant to comply with its deadline. The Court was well within its discretion to dismiss the case for failure to prosecute and for failure to comply with a Court Order. This case suffered needless delays due to the Appellant's conduct over the course of its 11 years of litigation. Cases must have some finality and an end point.

The question of whether an action should be dismissed for failure to prosecute is left to the discretion of the circuit judge and his decision will not be disturbed except upon a clear showing of an abuse of such discretion. See Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970); see also Bond v. Corbin, 68 S.C. 294, 296, 47 S.E. 374, 375 (1904) ("From the earliest adjudications to the present time, this matter is wisely left to the discretion of the circuit judge.").

Here, the lower Court did not abuse its discretion in dismissing the case for failure to prosecute. Judge Strickland managed this litigation for over ten years and was in a unique position in which to make his ruling.

II. The Court Properly Dismissed the Case Where the Only Party that Moved for a Jury Trial Abandoned That Request and Abandoned His Entire Case.

Appellant cites to draft orders and other documents that do not appear in the record. Therefore, those issues are not preserved and have no bearing on this appeal. However, he does argue that somehow he should be forgiven any delay because there was a motion to restore the matter to the jury trial roster. That motion occurred during a hearing that was held on April 27, 2011 to enforce the prior settlement agreement. During that hearing, the Court reversed its prior Order, set aside the settlement agreement and ruled that the case should be tried. John Daskocil, who is not a party to this appeal, asked that the matter be set for a jury trial. Tr. 10-12-2010. Additionally, Mr. Brackett renewed his motion to be relieved as counsel for Karl Daskocil. Appellant never moved that the case be remanded to the jury roster.

After the hearing, John Daskocil filed a letter with the Court indicating that he withdrew his request for a jury trial and that he had no plans on ever remanding the case to circuit court. See Ltr of John Daskocil and court email of 8-15-2011. Additionally, at the hearing on 4-13-2012 John Daskocil reiterated his position:

Yes, sir. John Daskocil. I am a plaintiff in this case. I do not support this motion, and I would like it dismissed with prejudice. We've been in court now for 11 years, and as Karl mentioned, we cannot go to probate and divide the assets of the estate until we have finished this legal proceeding. Karl's going for broke. We've discussed this many times, that if he doesn't win then he's going to continue to file ... He will continue to litigate until there's no money in the estate left. That's how adamant he is. ... He's

the one that had broken down the settlement negotiations, he's the one ... the reason that we're still here and we can't close this matter. ... Your Honor, please dispense this case with prejudice. I have seen the forensic accounting that was provided, and I am entirely satisfied that Patsy's done nothing wrong. Tr. p. 8 – 9, p. 33.

Again, Appellant's argument fails. While John Doskocil did ask for the case to be remanded for a jury trial, he abandoned that claim prior to the Order of Dismissal. Appellant failed to make his own motion to remand for a jury trial and waived that issue. The Court did not abuse its discretion in dismissing this action.

III. The Dismissal Was Not a Product of Ex Parte Communications

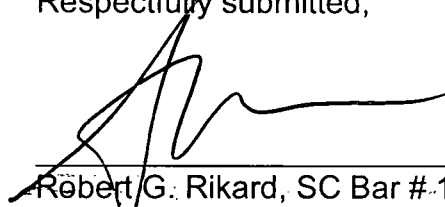
Appellant appears to argue that his prior counsel, Michael Brackett, somehow engaged in nefarious conduct or ex parte communications with the Court that were meant to harm Appellant. This argument is not supported by any interpretation of the record and is preposterous. Appellant was present at a hearing on 10-20-11 regarding Mr. Brackett's motion to be relieved as attorney for Appellant. During that hearing, Mr. Brackett indicated that even if the Court granted his motion, he would be happy to prepare the Order and submit. Appellant agreed to that process. Tr. 10-20-11 hearing at p. 23. It was only after Appellant engaged in further delays and violations of the Court's Order that the Court dismissed the case with prejudice.

Appellant's arguments simply are not supported by any facts in this record that spans 11 years and they should be ignored and stricken.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the lower Court dismissing the instant case without prejudice as well as the subsequent decision denying Appellant's motion for reconsideration.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on Karl A. Daskocil, pro se Appellant, 3009 West San Nicholas, Tampa, Florida 33629 by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2013 and by sending a pdf copy to his last know email address.


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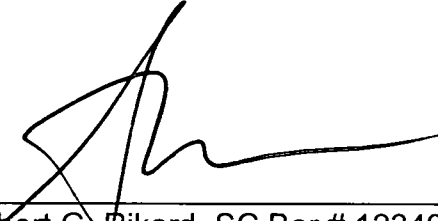
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RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE
RECORD OF APPEAL

1. Order 12-13-2002
2. Motion to Restore 10-7-2002
3. Motion to be Relieved by NMRS
4. Motion to be Relieved Lydon
5. Transcript of Hearing 10-21-2008
6. Motion to be Relieved Brackett
7. Motion to be Relieved Burris
8. Order 9-29-10
9. Transcript 7-7-2010
10. Transcript 10-12-2010
11. Notice and Court email John Doscocil 8-15-2011
12. Transcript 10-20-2011
13. 12. Transcript 4-13-2012
14. Order 2-16-12

15. Order 5-17-12



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CERTIFICATION

I certify that that the Respondent's Designation of Matter to be Included on
Appeal contains no matter which is irrelevant to the appeal.



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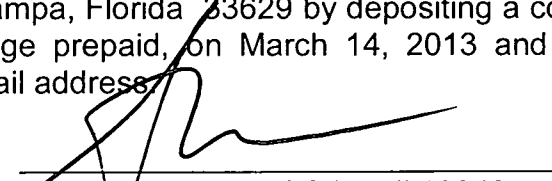
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PROOF OF SERVICE

I certify that I have served the Designation of Matter to be Included on Appeal and the certification of the Designation on Karl A. Dorskocil, pro se Appellant, 3009 West San Nicholas, Tampa, Florida 33629 by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2013 and by sending a pdf copy to his last know email address



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