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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT, CHESTER COUNTY

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2025-001021

Jai Anne Bullin as Guardian and Conservator for Lillian Anne Brown Rayfield (as incapacitated person) …….Appellant,

v.

Merri Rowe Thomas, ……..…Respondent,

AND

Merri Rowe Thomas …….Respondent,

v.

Jai Anne Bullin, ……..…Appellant.

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

This appeal arises from the unwarranted dismissal of a years-long case for alleged failure to prosecute. The undisputed record shows the matter was ready for trial long before the court, acting *sua sponte* and without warning, imposed the harsh sanction of dismissal. Dismissal for failure to prosecute is a last resort, reserved for extreme cases where a plaintiff has demonstrated a clear and persistent pattern of unreasonable delay despite repeated warnings and opportunities to act. That was not the case here. The lower court entered a three-word Form 4 Order reading "Failure to prosecute" without explanation or factual basis. Nothing in the record supports such a sanction. The Plaintiff had diligently prosecuted the matter, secured multiple trial rosters, and was simply awaiting a trial date when the court dismissed the case. The dismissal was arbitrary, capricious, unsupported by law, and fundamentally unjust. It must be reversed to restore Plaintiff's right to a trial on the merits.

II. STATEMENT OF THE ISSUES ON APPEAL

1. Did the lower court abuse its discretion by dismissing the case *sua sponte* for failure to prosecute when the parties had long been prepared for trial and were awaiting a trial date?
2. Did the lower court apply the wrong legal standard by evaluating and denying Plaintiff's Rule 59(e) Motion to Alter or Amend under the appellate "clear abuse of discretion" standard rather than the proper Rule 59(e) standard?
3. Did the lower court err in finding Plaintiff's Rule 59(e) Motion was defective under Rule 59(g), and by denying it on that procedural ground?

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III. STATEMENT OF THE CASE

A. Original Case Filed in 2017

The underlying action was originally filed in Chester County Court of Common Pleas on September 17, 2017, by the Appellant/Plaintiff Jai Anne Bullin and Robert Rayfield as Guardians and Conservators for their mother Lillian A. Brown, against their sister, the Respondent/Defendant Merri Rowe Thomas alleging that she engaged in various misconduct such as exertion of undue influence over their mother to procure a quitclaim deed for land in Chester County, South Carolina. (**R. pp. 0028-0036**).

The case was set for several trial rosters starting in mid-2019. Each time the matter was put on the trial roster over the next couple of years, the Parties submitted consent motions for continuance for a variety of reasons, such as the need to take additional depositions or due to Plaintiff counsel's emergency medical leave in fall 2020. (**R. pp. 0127-0147**). The court granted each consent motion without condition or comment on case progress.

B. Trial on February 14, 2022

On February 14, 2022, the case was called for trial after being on the roster for approximately eleven months beforehand. In the weeks leading up to trial, the parties submitted various pre-trial filings and undertook other typical trial preparation actions to prepare their cases.

On the first day of trial, counsel for both parties appeared along with the Defendant, however the Plaintiffs did not show. Counsel explained that Plaintiffs were not present because their mother had been injured from a sudden fall and neither of the two caregivers were available due to their own illnesses, compelling Mrs. Bullin as a guardian and caregiver for her mother to care for her that day and moved for a continuance on that basis. (**R. pp. 0104-0105**). Plaintiff counsel explained Mrs. Bullin was the primary witness in this case, and the other named Plaintiff,

Robert Rayfield, had no involvement in or useful knowledge concerning the matter that he could testify about. (**R. p. 0107, line 21 - p. 0108, line 9**). Defense counsel objected and informed the Court he intended to pursue an involuntary dismissal/non-suit pursuit to Rule 41(b) for failure to prosecute. (**R. pp. 0106-0107**). The court denied both Parties' respective motions. (**R. pp. 0110-0111**).

In camera discussions ensued, during which the Parties discussed the possibility of striking the case from the docket pursuant to Rule 40(j), under certain conditions acceptable to the Defendant. Back in open court, Defendant agreed to striking the case from the docket under Rule 40(j) upon four specific conditions that were placed on the record by defense counsel. (**R. p. 0111, line 6 – p. 0112**). The court granted the Rule 40(j) motion under those conditions. (**R. p. 0113**).

Defense counsel prepared a proposed Rule 40(j) Order that day and circulated it to Plaintiff counsel for consent late that afternoon. (**R. pp. 0157-0160**). About an hour later, Defense counsel sent a follow up email threatening to submit the proposed order without Plaintiff counsel's consent should he not respond that day. (**R. p. 0161**). At approximately 8 am the next day, Defense counsel submitted the proposed order containing additional conditions not discussed at the February 14th hearing without Plaintiff counsel's consent. (**R. pp. 0162-0166**).

The court entered the "Order Striking the Case from Any Docket Pursuant to Rule 40(j)" the next day without removing the additional conditions inserted by the Defendant. (**R. pp. 0001-0005**). That order was later amended when Plaintiff challenged the inclusion of the extra conditions. (**R. pp. 0006-0011**).

C. Case Reinstated to the Docket February 13, 2023

Plaintiff filed a timely motion to restore the case to the docket on February 13, 2023 (**R.**

p. 0167) and a motion to amend the complaint to remove Mr. Rayfield as a Plaintiff shortly thereafter. Both motions were granted and the case restored to the active docket on March 31, 2023. (**R. pp. 0012-0014**).

Plaintiff filed the 2nd Amended Complaint on April 11, 2023. For some reason, thereafter the case proceeded under a new 2023 case number (CA No. 2023-CP-12-00170) and a new docket in the court's system. Defendants filed an Answer to the 2nd Amended Complaint, Counterclaims and a Third-Party Complaint a few weeks later to which Plaintiff filed responsive pleadings on June 26, 2023. At that point, the Parties had nothing left to do to prepare their cases for trial and needed only for the court to place it on a trial roster.

D. Court Dismisses the Case in Form 4 Order for "Failure to Prosecute" Without Any Motion, Hearing, or Warning

On February 21, 2025, without notice or warning, the court entered a Form 4 Order dismissing the case for "failure to prosecute" (the "Dismissal Order"). (**R. pp. 0015-0017**). The Dismissal Order did not explain the factual or legal basis for its holding. It just checked the "Decision by the Court" box option under "Disposition Type" which says "[t]his action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered." And entered its three word decision in the statement of judgment box – "Failure to prosecute."

No motion to dismiss for failure to prosecute was pending before the court nor hearing on the issue noticed or held. No status conference had been noticed or held since restoration of the case nearly two years prior. Entry of the Dismissal Order came as a shock and its sparse contents further befuddled litigants who had been waiting for their case to be set for trial since mid-2023. The only thing Plaintiff could identify as the potential basis for the dismissal was the fact the parties had not undergone ADR.

E. The ADR Notice

No ADR Notice was filed in the original 2017 case (CA No. 2017-CP-12-00445), with court records showing the single ADR docket entry as "ADR/Alternative Dispute Resolution (Workflow)" dated April 5, 2018, even though the parties never mediated in the five years between filing and trial. An ADR Notice was filed in the 2023 case (CA No. 2023-CP-12-00170) on November 29, 2023. (**R. p. 0189**). There were several strange things about that notice and its filing. The ADR Notice in the 2023 case is docketed as a "Letter" and while court records indicate a filing date of November 29, 2023, the document itself has the filing date listed as September 17, 2017. Also, the ADR Notice lacks the electronic filing stamp on the right-hand side affixed to all e-filed documents. Regardless of those oddities, the potential consequences of noncompliance are spelled out in the ADR Notice. It specified what "may" happen should the parties fail to mediate by the ADR deadline saying that:

> A Rule to Show Cause why sanctions should not be imposed may be issued in all cases that fail to file a Proof of ADR or Exemption form indicting evidence of participation in or exemption from an ADR process within 300 days from the date of filing of the action or 90 days from the date of this notice February 29th 2024.

(**R. p. 0189**). The ADR Notice is clear that noncompliance "*may*" result in a Rule to Show Cause hearing where the parties would have the opportunity to explain why sanctions should not be imposed (assuming they do not mediate between receiving the Rule to Show Cause order and the hearing date).

F. Plaintiff's Rule 59 Motion Seeks Amendment of Dismissal Order

Plaintiff filed a Motion to Alter or Amend the Dismissal Order seeking to have the case restored to the docket ("Plaintiff's Rule 59 Motion"). (**R. pp. 0168-0181**). In support of that filing, Plaintiff attached the Affidavits of Plaintiff counsel Thomas Roper and his paralegal Esther Beckley each addressing the only possible scenario they could think of which might have led to

the court's Dismissal Order—the parties had received an ADR notice warning that failure to complete mediation could lead to dismissal. Both affidavits swore that they searched their emails and records and found no ADR Notices. (*See* **R. pp. 0169-0181**).

Defendant opposed Plaintiff's Rule 59 Motion arguing that the Dismissal Order should stand because (1) Plaintiff failed to present "clear evidence" showing that the court abused its discretion; and (2) Plaintiff's Rule 59 Motion was "inherently defective in that the Movant failed to comply with Rule 59(g), SCRCP, or the rule against improper *ex parte* communications." (**R. p. 0185**).

On March 19, 2025, The Honorable Paul Burch who had entered the Dismissal Order heard oral arguments on the Plaintiff's Rule 59 Motion. During the hearing the Court Administrator claimed that Plaintiff counsel had ignored "numerous" requests for an update on the status of the case representing to the court that "I numerously [*sic*] text [*sic*] him asking for some status on this case (inaudible). For over a year I would send – I would leave him messages on his phone. I would do everything I could do, never heard one word from him. And I can pull it up on my computer." (**R. p. 0122, lines 19-23**). This was news to Plaintiff counsel, and he informed the court that he had no record of these communications. (**R. p. 0122, line 24**). Defendant maintained the Dismissal Order should stand. (**R. p. 0123, lines 11-20**). Judge Burch said he would need to review the record to decide Plaintiff's Rule 59 Motion and took it under advisement. (**R. p. 0123, lines 2-3; R. p. 0125, lines 6-8**).

G. Post-Hearing Search Reveals Two Informal Status Inquiries from the Same Day

After the hearing, Plaintiff counsel searched his emails and voicemails to see if he had missed "numerous" messages from the Court Administrator as she had represented. He detailed his findings in a supplemental affidavit attaching the single email and one voicemail from the

Court Administrator both dated January 28, 2025, that he found. (*See* **R. pp. 0194-0197**). Both messages simply requested a case status update without any indication failure to respond could risk dismissal for lack of prosecution. No status conference was ever noticed or held after the case got restored to the docket in 2023, and the only record of requests for case status updates were these two informal inquiries made the same day in late January 2025. By then the parties had been ready for trial for nearly three years.

H. Court Refuses to Amend Dismissal Order and Plaintiff Appeals

On May 15, 2025, the court entered an Order Denying Plaintiff's Rule 59 Motion copying the Defendant's opposition memorandum verbatim, only adding a few introductory paragraphs (the "Rule 59 Order"). (**R. pp. 0018-0027**). Accordingly, it held that the Dismissal Order must remain undisturbed because the (1) Plaintiff failed to present "clear evidence" showing that the court abused its discretion in dismissing the case for failure to prosecute; and (2) Plaintiff's Rule 59 Motion was "technically defective" failing to comply with Rule 59(g). (**R. pp. 0020-0022**).

Plaintiff timely filed the Notice of Appeal of both the Dismissal Order and Rule 59 Order on May 23, 2025.

IV. STANDARD OF REVIEW

Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed on appeal, except upon a clear showing of an abuse of discretion. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). Appellate courts review discretionary decisions for abuse of discretion, focusing on whether the trial court's ruling was arbitrary, irrational, or unsupported by evidence. In *Bridges v. Wyandotte Worsted Co.*, the South Carolina Supreme Court clarified that abuse of discretion means the trial court's ruling lacked reasonable factual support, resulted in prejudice to the appellant's rights, and

amounted to an error of law. 239 S.C. 37, 121 S.E.2d 300 (1961).

However, the appellate court gives no deference to discretionary decisions when the lower court fails to exercise its discretion. *Morris v. BB&T*, 438 S.C. 582, 586-87, 885 S.E.2d 394, 396-97 (2023)("We disagree that the commission is entitled to any deference in this case, however, because there is no indication the commission actually exercised its discretion."). When that happens, the lower court has abused its discretion, and its decision is considered an error of law. *Id*. *citing Fontaine v. Peit*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015)("A failure to exercise discretion amounts to an abuse of that discretion.").

V. LEGAL ARGUMENTS AND ANALYSIS

A. The Court Abused its Discretion in Dismissing the Case for Failure to Prosecute

1. The court failed to exercise discretion when it dismissed the case

The court's three-word Form 4 dismissal—"Failure to prosecute"—reflects no legal reasoning, factual basis, or exercise of discretion. The absence of analysis itself demonstrates abuse of discretion and legal error. "The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances." *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023). The record must indicate that the trial court followed this process for its decision to be upheld. *Id.*; *see also State v. Miller*, 404 S.C. 29, 744 S.E.2d 532 (2013)(held abuse of discretion occurs when a court is vested with discretion fails to exercise it or acts arbitrarily and capriciously.)

The lower court failed to exercise its discretion in any manner. The Dismissal Order contains nothing reflecting a deliberate legal thought process being undertaken to reach a ruling supported by the facts and circumstances of the case. On the contrary, a Form 4 was entered with a three word ruling. This definitively establishes that the lower court abused its discretion and warrants reversal of the Dismissal Order.

2. The Dismissal Order is not supported by applicable law or the evidence

"The plaintiff has the burden of prosecuting her action, and the trial court may properly dismiss an action for plaintiff's *unreasonable* neglect in proceeding with her cause." *McComas v. Ross*, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904 (Ct. App. 2006)(*emphasis added*). Our Supreme Court has affirmed dismissal of actions for failure to prosecute when "the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect." *Id*. at 62; *see Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); *Bond v. Corbin*, 68 S.C. 294, 294–95, 47 S.E. 374, 374 (1904)(case dismissed after repeated failures to appear when called for trial.) "In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant." *McComas*, 368 S.C. at 62-63.

The Fourth Circuit has addressed this issue, holding that dismissal for failure to prosecute is a harsh sanction, which "should be resorted to only in extreme cases." *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976). Dismissal on this ground is "generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Id*. The court's discretion should

be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. *Id*.; *Bush v. U.S. Postal Serv.*, 496 F.2d 42, 44 (4th Cir. 1974)(reversed district court's dismissal for failure to prosecute where it did not appear that there was deliberate delay or prejudice to the opposing party.)

The South Carolina Supreme Court has utilized the Fourth Circuit's test for determining whether to dismiss a case for failure to prosecute saying that "the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *McComas*, 368 S.C. at 63 *citing Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990).

The record demonstrates steady prosecution of the case and readiness for trial since 2022. No pattern of delay, no warnings, and no prejudice existed. The lower court's failure to evaluate the *McComas* factors or cite facts supporting its decision shows a total absence of discretionary analysis establishing an abuse of discretion and constituting an error of law requiring reversal of the Dismissal Order.

3. The affidavits further confirmed the evidence already before the court

The Rule 59 Order claims that the only evidence presented in support of Plaintiff's Rule 59 Motion were the two affidavits of Plaintiff counsel and his paralegal, which it says failed to establish that the court abused its discretion in dismissing the case for failure to prosecute. (**R. pp. 0021-0022**).

First, the assertion that Plaintiff's Rule 59 Motion relied solely on two affidavits is incorrect. The court's own records provided the clearest and most conclusive evidence that

dismissing the case for failure to prosecute was an abuse of discretion. "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011). The docket in the original 2017 case reflects extensive litigation and, most importantly, that the case was ready for trial on February 14, 2022. The only reason it did not proceed was Plaintiff's unforeseen absence. The parties agreed to strike the case under Rule 40(j). It was later restored in June 2023 and required no further preparation for trial.

Both the Dismissal Order and Rule 59 Order ignore these undisputed facts. The Rule 59 Order goes further by mischaracterizing the parties' post-restoration inactivity as "undue delay" to justify dismissal. (**R. p. 0020 n.3**) (noting no activity "for nearly twenty (20) months," including no discovery or settlement discussions.) That is true but irrelevant. Those steps had already been completed by early 2022. When restored, the case was ready for trial; all that remained was for the court to set a date. Instead, twenty months later, the court summarily dismissed the action. A case ready for trial when removed from the docket remains ready when restored. The court's disregard of its own record establishing that readiness constitutes an abuse of discretion warranting reversal.

The affidavits just provide another piece of evidence reflecting the court's abuse of discretion by showing the parties had only failed to do one thing—undergo mediation. Participating in mediation is an obligation shared equally by the parties, and more importantly, a task having nothing to do with preparing a case for trial. As noted above, the ADR Notice specified the potential consequence for failing to mediate—possible issuance of a Rule to Show Cause Order requiring the parties to justify their failure to mediate. Thus, the affidavits were additional evidence that the parties had done everything to prosecute the case when it was dismissed.

The record contains no evidence that Plaintiff unreasonably delayed the proceedings in any respect. Dismissal for failure to prosecute is reserved for the most extreme cases of persistent, prejudicial delay that cannot be remedied by lesser sanctions. Nothing before the court suggested any such conduct here. The continuances in the original proceedings were all by consent, and the parties were ready for trial on February 14, 2022, when a family emergency prevented Ms. Bullin's attendance. After the case was reinstated in June 2023, no continuances were sought, no status conferences held, and only two informal status inquiries were made on a single day with no warning that dismissal was even contemplated. The parties were simply waiting for the court to set a trial date.

None of the circumstances our courts have deemed sufficient to justify dismissal for failure to prosecute exist in this record. A case ready for trial for years cannot lawfully be dismissed for failure to prosecute, especially without notice. The lower court's decision bears no resemblance to the extreme situations warranting this sanction and constitutes an abuse of discretion.

B. The Court Applied the Wrong Standard in Deciding Plaintiff's Rule 59 Motion

Rule 59(e) allows amendment of a judgment to correct a clear error of law or prevent manifest injustice. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992); *Elam v. SCDOT*, 361 S.C. 9, 602 S.E.2d 772 (2004). The court below, however, erroneously required Plaintiff to show a "clear abuse of discretion" which is the appellate standard, not the trial-level Rule 59(e) standard. (**R. pp. 0021-0022**). This misapplication of law effectively insulated its prior ruling from correction and itself constitutes an abuse of discretion.

By ignoring the Rule 59(e) grounds for amendment—manifest injustice and clear error—the court refused to correct an obvious procedural wrong. The Dismissal Order lacked evidentiary or legal support and denying reconsideration of it under an incorrect standard compounded that

error.[1]

C. The Court Erred in Finding Plaintiff's Rule 59 Motion Technically Defective

The court further denied relief by deeming Plaintiff's Rule 59 Motion "technically deficient" for purportedly failing to provide the judge a copy of the motion per Rule 59(g). (**R. p. 0022**). Yet Plaintiff filed the Rule 59 Motion via the court's e-filing system, and a motions roster was promptly generated the next day setting the hearing before Judge Burch. This satisfied Rule 59(g)'s purpose: to ensure the presiding judge is notified of the motion because that judge must decide it under Rule 59. *See Gallagher v. Evert*, 353 S.C. 59, 63 (Ct. App. 2002). No authority supports denying a Rule 59(e) motion for such a trivial administrative point. Accordingly, the lower court's reliance on this technicality to deny substantive relief was arbitrary and improper.

VI. CONCLUSION

The lower court stripped Ms. Bullin of her right to a trial with three words: "Failure to prosecute" and nothing more. No facts supported the ruling, and no law justified it. The undisputed record shows the parties were ready for trial in February 2022, making any finding of failure to prosecute impossible. Nothing in the proceedings below warranted such a harsh sanction. After the case was restored to the docket in 2023, no status conferences were held, no warnings issued, and the only communication from the court was a single call and one email from the Court Administrator in January 2025, that were both inadvertently overlooked. That is a far cry from what South Carolina law requires to justify dismissal for failure to prosecute.

This is not a close call. Dismissing this case under these circumstances was an egregious

[1] Furthermore, applying the clear abuse of discretion standard of review at the trial level thwarts the purpose of Rule 59, including providing the trial judge a chance to amend their rulings when it is shown they are effected by significant legal, evidentiary, or other maladies. It would also require trial judges give their own prior rulings deference in evaluating whether they require amendment—a nonsensical and ineffective approach to deciding Rule 59 motions to say the least.

error that cannot stand. Reversal is necessary to restore Ms. Bullin's right to have her claims decided on the merits at trial. Accordingly, the Dismissal Order entered March 3, 2025, and the Order Denying Plaintiff's Motion to Alter or Amend entered May 15, 2025, should be reversed and the case remanded for trial.

Respectfully Submitted,

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