THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 96-CP-40-1230

Thomas J. and Carolyn Silvester, ... Appellants,

v.

Spring Valley Country Club . . . . . Respondent.

INITIAL BRIEF OF RESPONDENT SPRING VALLEY COUNTRY CLUB

John E. Cuttino (S.C. Bar No. 1519)
Jessica A. Waller (S.C. Bar No. 100256)
GALLIVAN, WHITE & BOYD, P.A
1201 Main Street, Suite 1200
Post Office Box 7368 (29202)
Columbia, SC 29201
Telephone: (803) 779-1833
Facsimile: (803) 779-1767

ATTORNEYS FOR RESPONDENT
SPRING VALLEY COUNTRY CLUB

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

I. **Did The Trial Court Abuse Its Discretion In Dismissing This Action Pursuant To Rule 41(b) Of The South Carolina Rules Of Civil Procedure For Failure To Prosecute, Where Appellants Failed To Take Any action Regarding This Matter For More Than Twelve Years?**

INTRODUCTION

In 1992, the Spring Valley Country Club ("Spring Valley" or "Respondent") performed work on a draining system on its property. Thomas and Carolyn Silvester ("Appellants"), who are adjacent landowners, filed a Complaint in 1996 in the Richland Court of Common Pleas, alleging that water draining from Respondent's property damaged their land. Respondent's motion for summary judgment was granted in 1998. The Court of Appeals in February of 2001 affirmed in part and reversed in part the grant of summary judgment, and remanded the case back to circuit court. Appellants took no further action regarding this matter until March 2013, at the earliest, when they contacted the Circuit Court to inquire about the status of their case.

The trial court properly granted Respondent's motion to dismiss pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure, because Appellants' complete failure to prosecute was wholly unreasonable and lacking justification. South Carolina jurisprudence permits dismissal of an action when a party fails to prosecute his or her case. The trial court properly dismissed the action where more than twelve years of inactivity existed and more than seventeen years had passed since Appellants filed their original Complaint. This Court should affirm.

STATEMENT OF THE CASE

Appellants filed this action on April 11, 1996, alleging that water draining from Respondent's property damaged their property. Appellants alleged trespass and nuisance causes of action. On June 17, 1998, the trial court granted Respondent's motion for summary judgment. Pursuant to Appellants' first appeal, this Court issued a 2001 opinion affirming in part and reversing in part the trial court's decision. The Court remanded the action back to Richland County Court of Common Pleas. *See Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001).

Following the February 12, 2001 remand, Appellants did not pursue the case for twelve years and there was no activity in the case. Appellants then contacted the Richland County Court of Common Pleas in March of 2013. A Status Conference was held with Chief Administrative Judge L. Casey Manning on April 17, 2013. Thereafter, Respondent filed a Rule 41(b), SCRCP, motion to dismiss for failure to prosecute. The motion was heard on August 5, 2013. The trial court granted Respondent's motion and dismissed the action on August 6, 2013. Appellants filed their Notice of Appeal with this Court on September 3, 2013.

STATEMENT OF FACTS

Appellants filed the Complaint nearly eighteen (18) years ago, on April 11, 1996, alleging the construction of a draining system in 1992 damaged their property. (*See* Complaint generally). Following Appellants' first appeal, the case was remanded to the circuit court on February 12, 2001. Thereafter, no action was taken by the Appellants for more than twelve years. (Motion to Dismiss Hearing Transcript, p. 5). In April of 2013, Respondent's attorney John E. Cuttino received a phone call from Judge Manning's law clerk, indicating that Appellants had called the court inquiring into the status of their case. (Motion to Dismiss Hearing Transcript, p. 6). Thereafter, the parties met with Judge Manning, who in view of the unusual circumstances of the case and the advanced age of the matter, gave the parties four months to attempt to reach a resolution. (Motion to Dismiss Hearing Transcript, p. 6).

Unable to reach a resolution, Respondent either filed a motion to dismiss pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure. (Motion to Dismiss, pp.1-2). The hearing was held on August 5, 2013. Appellants attempted to argue the merits of the underlying case, as opposed to the narrow issue before the court concerning their over twelve year delay in prosecuting the case. (*See* Hearing Transcript, pp. 11-19). After hearing the parties' arguments, the trial court ruled:

> [T]he fact that no action has been taken on this case in the last ten or 12 years, I think that's why the rule – Rule 41(b) is in place to allow the courts to operate in a – in a consistent and orderly fashion.
>
> You know, the problem that pro se litigants have – and that's not just you. We have many pro se litigants, but the rules are the same for both, pro se and represented litigants.

> If you choose to operate pro se, you have got to follow the same rules as anybody else, as Mr. Cuttino does or any other litigant in this court. That's the only way the courts can operate in a – as I say, in a consistent and orderly fashion.
>
> So I'm going to ask Mr. Cuttino to prepare me an order to dismiss this case.

(Motion to Dismiss Hearing Transcript, p. 22). The written order dismissing the case was filed on August 6, 2013.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion In Dismissing This Action Pursuant To Rule 41(b) Of The South Carolina Rules Of Civil Procedure For Failure To Prosecute Because Appellants Took No Action Towards Prosecution Of This Case For More Than Twelve Years.

A. Standard of Review

"When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCP, an appellate court may reverse the trial court's decision upon an abuse of discretion." *In re Miller*, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011) (citing *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006)). "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 Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). A trial court's decision regarding a motion to dismiss for failure to prosecute will not be disturbed, except upon a clear showing of an abuse of discretion. *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006).

B. The Trial Court did not Err in Dismissing Appellants' Action for Failure to Prosecute.

Rule 41 of the South Carolina Rules of Civil Procedure provides that a defendant may move for dismissal of an action against him for failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure or any order of the court. Rule 41(b), SCRCP. 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*, 368 S.C. at 62, 626 S.E.2d at 904 (citing *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983)). Dismissal with prejudice is warranted where the plaintiff has been given an "abundant opportunity" to litigate and has exceeded the "limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties." *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990); *see also Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997) (although Rule 41 allows a trial judge to dismiss an action upon a motion for the other party's failure to prosecute, the judge has the inherent power to, *sua sponte*, dismiss actions for a party's failure to prosecute the relevant claims). The United States Fourth Circuit Court of Appeals has indicated the trial court should consider the following 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. *Hillig v. Comm'r of Internal Revenue,* 916 F.2d 171, 174 (4th Cir.1990).

In *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983), the South Carolina Supreme Court reviewed dismissal of the appellant's case for failure to prosecute. There, the appellant served a summons but did not serve a complaint until twenty months after service of the summons. *Id.* at 60, 301 S.E.2d at 758. The Court held that the plaintiff "failed to . . . timely prosecute the case" by taking no action between the service of the summons and the service of the complaint some twenty months later. *Id.* The *Shevey* Court also rejected the notion that the respondent-defendant was required to proactively demand a complaint from the appellant.

> "The defendants, no less than the plaintiff, had the *right* . . . to press for trial; but the *duty* to do so was the plaintiff's, not theirs. While a defendant *may* bring about an expeditious trial of a case, he has no legal obligation to do so; *except to meet such actions as are taken by the plaintiff, he may remain passive.*" (Emphasis added).

Id. at 60, 301 S.E.2d at 759 (quoting *Thomas & Howard Company v. Fowler*, 238 S.C. 46, 52, 119 S.E.2d 97, 100 (1961)).

Appellants' status as *pro se* litigants does not absolve them of the requirement to monitor and prosecute their case and to adhere to the Rules of Civil Procedure. *See State v. Burton*, 356 S.C. 259, 266, 589 S.E.2d 6, 9, n.5 (2003) ("A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law."); *see also Pack v. S. C. Wildlife & Marine Res. Dep't*, 92 F.R.D. 22, 25 (D.S.C. 1981) (citing *Cruz v. Beto*, 405 U.S. 319 (1972)) (noting that although a *pro se* litigant is not held to same high standards as members of the Bar, it must meet certain standards, including a good faith attempt to comply with the rules of discovery). Rather, "a party has a duty to monitor the progress

of his case." *Goodson v. Am. Bankers Ins. Co. of Florida*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). "Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Id.*

Appellants' reliance on *McComas* as analogous to the present situation is misplaced. In *McComas*, the plaintiff's case was dismissed after she failed to appear when her case was called on the trial roster. 368 S.C. at 61, 626 S.E.2d at 904. This Court reversed the dismissal, finding there was no indication the plaintiff failed to prosecute her case. The Court noted that she contacted her attorney every morning and afternoon of that court week, she arranged transportation and left for the courthouse once she learned her case was called, and she spent months engaging in discovery in preparation for her trial. *Id.* at 63, 626 S.E.2d at 905. This Court held that "[u]nlike other cases when the trial court has found unreasonable neglect by the plaintiff, [this plaintiff] simply arrived late on the day of trial" and "[t]here was no indication [the plaintiff] did not prosecute her case." *Id.*

Here, unlike the plaintiff in *McComas*, Appellants failed to take any actions with respect to their case for over twelve years. The *Shevey* court found untimely failure to prosecute a case after twenty *months* of inaction, which is a small amount of time compared to Appellants' inexcusable delay of over a decade.

Considering the *Hillig* factors, *supra*, it is clear that dismissal was warranted in this matter. It was Appellants' responsibility and duty to move this action forward and to inquire about the status of the case at some point prior to 2013. Instead, the case was completely dormant and the Appellants took no action to resolve this matter or prosecute

the case—they did not communicate with the clerk or court, they did not communicate with opposing counsel, and they did not submit any correspondence or discovery that would indicate an intent to pursue this matter. Appellants cannot relieve themselves of any responsibility with respect to monitoring their own case by simply shifting this responsibility to the circuit court and Respondent. Their status as *pro se* litigants does not relieve the Appellants of their duty to inquire about their case, which at times includes requesting a hearing before the court. Nor does their *pro se* status place a duty upon Respondent to affirmatively prosecute their case for them.

Furthermore, Appellants' unjustified and unreasonable failure to do so has caused prejudice to Respondent. The allegations set forth in the Complaint of 1996 concern events that occurred in 1992. Thus, Appellants' failure to prosecute has resulted in prejudice to Respondent, who, if reversed, would be required to defend allegations concerning events that occurred over twenty (20) years ago. Addressing the third *Hillig* factor, the only way to describe an unreasonable delay and complete inaction of twelve years is "dilatory." Finally, in light of the staleness of this case and Appellants' lack of justification, dismissal is the only effective sanction.[1]

Quite simply, Appellants have consciously refused to take the initiative in this litigation. This is a situation which Rule 41(b) of the South Carolina Rules of Civil Procedure addresses. The trial court did not abuse its discretion and the order dismissing the case should be affirmed.

[1] Although dismissal of the action is a "harsh" result, it is warranted in this case. The allegations contained in Appellants' Complaint are more than twenty years old, well-outside the applicable statute of limitations, and should be dismissed for an utter failure to prosecute.

CONCLUSION

Based on the foregoing arguments, Respondent respectfully requests this Court affirm the trial court's order dismissing this action for failure to prosecute pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure.

Respectfully submitted,

John E. Cuttino (S.C. Bar No. 1519)
Jessica A. Waller (S.C. Bar No. 100256)
GALLIVAN, WHITE & BOYD, P.A
1201 Main Street, Suite 1200
Post Office Box 7368 (29202)
Columbia, SC 29201
Telephone: (803) 779-1833
Facsimile: (803) 779-1767

ATTORNEYS FOR RESPONDENT
SPRING VALLEY COUNTRY CLUB

March 26, 2014

Gallivan, White & Boyd, P.A.
ATTORNEYS AT LAW

1201 Main Street, Suite 1200
Post Office Box 7368 (29202)
Columbia, South Carolina 29201
Telephone 803.779.1833
Facsimile 803.779.1767
www.GWBlawfirm.com

March 26, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Thomas J. and Carolyn Silvester v. Spring Valley Country Club*
Court of Appeals Case No.:
Case No.: 1996-CP-40-1230

Dear Ms. Kitchings:

Please find enclosed the original and two copies of Respondent Spring Valley Country Club's Initial Brief, Designation of Matter and Certificate of Compliance. Please file these documents and return clocked copies to this office via our courier.

Also, please note that I have recently joined the Law Firm of Gallivan, White & Boyd. This information is represented in the aforementioned documents.

By copy of this letter, and as evidenced on the attached Proof of Service, I am serving Pro Se Appellants with the same.

With kind regards, I remain

Very truly yours,

John E. Cuttino
Direct Dial: 803-724-1714
EMail: jcuttino@gwblawfirm.com

JEC/sm
cc: Thomas J. and Carolyn Silvester