

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.

RESPONDENT SPRING VALLEY COUNTRY CLUB'S RETURN TO APPELLANTS'
MOTION TO EXCLUDE CERTAIN MATTER FROM THE RECORD ON APPEAL

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

RECEIVED

MAY 15 2014

SC Court of Appeals

Pursuant to Rule 240(e), SCACR, Respondents respectfully submit this Return to Appellants' Motion to Exclude Certain Matter from the Record on Appeal.

Appellants have moved to exclude Respondent's item 2. in its Designation of Matter to be Included in the Record on Appeal, which is the "Complaint of Thomas J. and Carolyn Silvester." (See Complaint of Thomas J. and Carolyn Silvester (hereinafter "the Complaint"), attached as Exhibit A). Appellants contend the Complaint, which was filed on April 11, 1996, has no relevance to this case.¹ Respondents respectfully disagree.

The substance of this appeal before the South Carolina Court of Appeals is to examine the trial court's order granting Respondent's motion to dismiss for failure to prosecute, pursuant to Rule 41 of the South Carolina Rules of Civil Procedure. (See Order Granting Respondent's Motion to Dismiss, Attached as Exhibit B). The trial court's order was based, in part, on the fact that there has been over twelve (12) years of inactivity in this case and nearly seventeen (17) years have passed since the Plaintiffs filed this underlying Complaint.

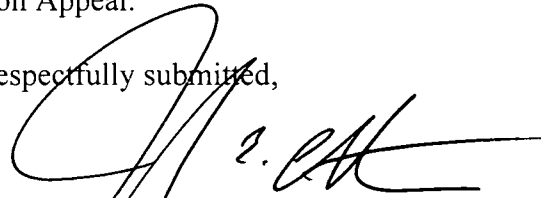
In light of the basis of the trial court order which is now on appeal, Respondent submits that the form and substance of the Complaint is completely relevant to a determination of whether Plaintiffs have failed to prosecute this action and unreasonably neglected their rights thereto. See *McComas vs. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006)(citing *Don Shevey & Spires, Inc. vs. American Motors Realty Corporation*, 279 S.C. 58, 301 S.E.2d 757 (1983)) (noting that a plaintiff has the burden of prosecution his or her action, and a trial court may properly dismiss the action for the Plaintiff's unreasonable neglect in proceeding with the case).

¹ Respondent respectfully submits that Appellants have failed to comply with Rule 240(c), SCACR. Specifically, Appellants have failed to file a memorandum with citation of authorities in support of their Motion. Beyond a blanket assertion that the Complaint is not relevant, Appellants have not submitted any legal authority explaining their reasoning behind this assertion. Therefore, pursuant to Rule 240(g), Respondent respectfully requests Appellants be deemed to have abandoned this argument, and the Complaint appropriately become part of the Record on Appeal.

Indeed, in order for this Court to properly evaluate the parties' arguments, the Court must understand the timeline and evolution of this matter from the beginning. Because a Complaint is the true vehicle which begins a legal action and asserts all claims and relief a party desires, it is inextricably intertwined with motions to dismiss, appeals, and remands. Moreover, Respondent cannot comprehend how the underlying Complaint is irrelevant to Appellants' arguments, which include assertions that the trial court improperly applied the rules of law regarding failure to prosecute and is required to obey its obligation of scheduling a case. *See* Rule 41, SCRPC ("For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.").

For the foregoing reasons, Respondent respectfully requests Appellants' Motion to Exclude Certain Matter from the Record on Appeal be denied and the Complaint be appropriately designated as part of the Record on Appeal.

Respectfully submitted,



John E. Cuttiro (S.C. Bar No. 1519)
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ATTORNEYS FOR RESPONDENT SPRING
VALLEY COUNTRY CLUB

May 15, 2014

Exhibit A

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT FOR THE

Richland COUNTY

Fifth JUDICIAL CIRCUIT

Thomas J. and Carolyn Silvester
Plaintiff

COVER SHEET FOR
CIVIL ACTIONS

vs.

Spring Valley Country Club
Defendant

96CP 401230

Docket No.

The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this Cover Sheet must be served on the defendant(s) along with the Summons and Complaint.

NATURE OF ACTION: (check one category for the main cause of action)

- TORT - Motor Vehicle
- TORT - Professional Malpractice
- TORT - Unfair Trade Practices, and Other Economic or Business-Related Wrongs
- TORT - Products Liability
- TORT - General or Other
- PCR
- GOV/ADM - Workers Comp.
- GOV/ADM - General or Other
- CONTRACT - Debt Collection
- CONTRACT - Employment
- CONTRACT - Construction
- CONTRACT - Wrongful Breach
- CONTRACT - General or Other
- REAL PROPERTY
- MINOR SETTLEMENTS
- DOMESTICATE FOREIGN JUDGMENT
- OTHER (Please Describe)

JURY DEMAND YES NO

Note: Information requested on this form is preliminary in nature, and for administrative purposes only. The response to this request for information on jury demand merely indicates a likelihood that a jury trial will or will not be requested and does NOT constitute a demand for or a waiver of trial by jury pursuant to applicable rules or statutes.

DOCKETING INFORMATION (Check one box.)

- This case is subject to arbitration (all cases with monetary damages less than \$25,000 are subject to arbitration, unless otherwise exempt).
- This case is subject to mediation (all cases not subject to arbitration must be mediated, unless otherwise exempt).
- This case is exempt from ADR, and certificate is attached.

Thomas J. Silvester, Pro Se
Name of Plaintiff/Plaintiff's Attorney (print type or press clearly)

Thomas J. Silvester
Signature of Plaintiff/Plaintiff's Attorney

12 Glenlake Road
Mailing Address
Columbia, South Carolina 29223
City, State, Zip Code

Date: April 10, 1996

(803) 736-0715
Telephone

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THOMAS J. AND CAROLYN)
SILVESTER,)

Plaintiffs.)

vs.)

SPRING VALLEY COUNTRY CLUB,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 96-CP-40

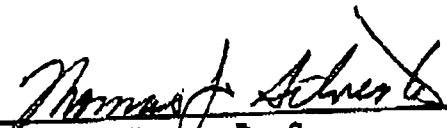
96CP 401230

SUMMONS
(JURY TRIAL DEMANDED)

FILED
96 APR 11 AM 10:41
SARAH A. SCOTT
CLERK & G.S.

TO: THE DEFENDANT, ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said Complaint upon the subscriber, at 12 Glenlake Road, Columbia, South Carolina, 29223 within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.


Thomas J. Silvester, Pro Se
12 Glenlake Road
Columbia, South Carolina 29223
(803) 736-0715

Columbia, South Carolina
4/10 1996.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
THOMAS J. AND CAROLYN)
SILVESTER,)
Plaintiffs,)
vs.)
SPRING VALLEY COUNTRY CLUB,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 96-CP-40-
96CP 401230

COMPLAINT
(Jury Trial Demanded)

FILED
APR 11 AM 10:41
JESSICA A. SCOTT
C.C. & G.S.

TO: THE DEFENDANT, ABOVE-NAMED:

The Plaintiffs, Thomas J. and Carolyn Sylvester, complaining of the Defendant above-named would respectfully show unto this Honorable Court the following:

1. The Plaintiffs are citizens and residents of the County of Richland, State of South Carolina.
2. The Defendant, Spring Valley Country Club (hereinafter "the Country Club"), upon information and belief, is a non-profit corporation organized under the laws of the State of South Carolina with its principal place of business in Richland County, State of South Carolina.
3. The Plaintiffs own Lot 12 Glenlake Road in the Spring Valley Subdivision.
4. The Country Club owns lands located at the rear of the Plaintiffs' lot which drain onto the Plaintiffs' lot causing the erosion of landscaping, the deposit of trash and the creation of potentially hazardous health conditions from standing water.

FOR A FIRST CAUSE OF ACTION
(Trespass)

5. Each and every allegation contained in paragraph one (1) through four (4) is realleged and incorporated herein by express reference as though fully set forth verbatim in this paragraph.

6. The Plaintiffs are legally seized with and in possession of their lot, 12 Glenlake Road in the Spring Valley Subdivision. They are the "true owners" of this property.

7. The Defendant owns property adjacent to and abutting the rear of the Plaintiffs' property.

8. The willful conduct of the Defendant has created an invasion which has interfered with and continues to interfere with the right of exclusive possession of the Plaintiffs' lot in that the Defendant has allowed and continues to allow water to drain from its property onto the property of the Plaintiffs causing portions of the Plaintiffs' lot to become a drainage area "collection pond". Such conduct has deprived and continues to deprive the Plaintiffs from using portions of their property especially after heavy rains.

9. The Defendant has been placed on notice of such trespass and has failed to resolve the drainage problem.

10. The trespass upon the Plaintiffs' property is a direct and proximate result of the actions of the Defendant in:

- (a) constructing a french drainage system in 1992 to collect and concentrate water onto the Plaintiffs' property in a direct and concentrated manner.
- (b) failing to properly implement, operate or maintain a storm drainage system so as to allow it to operate within its lawful confines.

- (c) failing to act, after notice of a defect in the system, which allowed its water to invade upon the property of the Plaintiffs and to interfere with the Plaintiffs' exclusive right of possession of 12 Glenlake Road.
- (d) allowing storm drainage water to leave its property and "take over" portions of the property of the Plaintiffs.
- (e) intentionally failing to make any effort to prevent its storm runoff water from taking over the Plaintiffs' land and interfering with the Plaintiffs' right to possession thereof.
- (f) failing to put into place or construct a sufficient drainage system to prevent foreseeable erosion and the resultant damage therefrom and in causing its water and trash to come onto the lands owned by the Plaintiffs and interfere with the Plaintiffs' exclusive right of possession of their land.
- (g) failing to take reasonable and commercially feasible actions in installing an adequate drainage system as recommended in an engineering study commissioned by the Spring Valley Homeowners Association to prevent the damage and destruction on the Plaintiffs' lot, thereby interfering with the Plaintiffs' exclusive right of possession of 12 Glenlake Road.
- (h) failing to fulfill their legal duties relating to their water.

11. To the extent that the Defendant has a valid easement to discharge storm waters over and across the lands of the Plaintiffs, the Defendant has intentionally and wilfully exceeded any and all rights created or given by said easement.

12. The Plaintiffs have not given the Defendant permission or consent to take their lot for the purposes of a drainage area or holding pond for excess surface storm water. The Plaintiffs have not authorized the Defendant to enter their lot to make use of same for the purposes of storm water holding.

13. In perpetuating and continuing its actions of trespass, the Defendant has acted wantonly, willfully and in reckless disregard of the Plaintiffs' rights. In its repeated trespasses, after notice to cease its entry upon the Plaintiffs' lot, the Defendant has acted willfully, wantonly and intentionally to cause and allow its drainage waters to occupy and damage the Plaintiffs' property.

14. As a direct and proximate result of the repeated, willful acts of trespass of the Defendant, the Plaintiffs have suffered and will continue to suffer damages to their property, emotional distress, and other damages. The Plaintiffs have spent and will be required to continue to spend large sums of money to repair the damage to their property as a direct and proximate result of the trespass of the Defendant, all to the detriment and damage of the Plaintiffs

15. As a result of the trespass of the Defendant, the Plaintiffs are informed and believe that they are entitled to nominal, compensatory, actual and punitive damages as well as a permanent injunction prohibiting the Defendant from continuing its repeated conduct of trespass.

FOR A SECOND CAUSE OF ACTION
(Nuisance)

16. Each and every allegation contained in paragraphs one (1) through fifteen (15) is realleged and incorporated herein by express reference as though fully set forth verbatim in this paragraph.

17. As owner of their lot and home, the Plaintiffs are seized with a right to the use and enjoyment thereof. They have a right to enjoy mental tranquility and a right to an absence from all but reasonable interference from third parties.

18. The conduct of the Defendant, and the manner in which the Defendant has used or allowed its property rights to be used, has caused the Plaintiffs material annoyance, discomfort, hurt and damage to their property.

19. The conduct of the Defendant, which has caused the flooding of the Plaintiffs' premises and the deposit of trash and erosion of landscaping upon the Plaintiffs' land, lawn and garden, is both unreasonable and continuous. This conduct causes and results in continuous and/or recurring unreasonable interference with the Plaintiffs' use and enjoyment of their lot. Due to the conduct of the Defendant, the Plaintiffs are unable to enjoy their yard, are unable to maintain their landscaping and lawns and are forced to endure the continuous and repeated infiltration of water onto their lot which causes and creates potentially hazardous health conditions.

20. The interference caused by the conduct of the Defendant is substantial.

21. The interference caused by the conduct of the Defendant would upset and inflame an ordinary reasonable person.

22. There is no redeeming social value to the conduct of the Defendant.

23. The actions of the Defendant are not appropriate in that it has failed to resolve the drainage problem affecting the Plaintiffs' lot.

24. The intent of the Defendant is such that it is maintaining the nuisance with a conscious disregard for the rights of the Plaintiffs and the Plaintiffs' property and with full knowledge of the nuisance which they have created and continue to maintain.

25. The failure of the Defendant to properly resolve the drainage problem affecting the Plaintiffs' lot has interfered with, and continues to interfere with, the Plaintiffs' right to the quiet use and enjoyment of their property.

26. The nature of the conduct of the Defendant is such that it is allowing water to accumulate on the Plaintiffs' lot, providing a place for mosquitos, snakes and other vermin to breed, depositing trash upon the Plaintiffs' lot and destroying the premises of the Plaintiffs.

27. The nuisance created by the Defendant has resulted in a diminution of the market value of the Plaintiffs' property, has caused the Plaintiffs to expend funds in the past and will cause the Plaintiffs to expend funds in the future to correct problems which are foreseeable consequences of the nuisance and which have caused the Plaintiffs mental anguish as well as irreparable damage to their property.

28. As a result of the creation and maintenance of a nuisance by the Defendant, the Plaintiffs are informed and believe that they are entitled to nominal, compensatory, actual and punitive damages as well as a permanent injunction prohibiting the Defendant from continuing in its failure to resolve the drainage problem affecting the Plaintiffs' lot thereby causing a nuisance on the Plaintiffs' property.

FOR A THIRD CAUSE OF ACTION
(Injunction)

29. Each and every allegation contained in paragraphs one (1) through twenty-eight (28) is realleged and incorporated herein by express reference as though fully set forth verbatim in this paragraph.

30. The Plaintiffs are seized with a right to the use and enjoyment of their property.

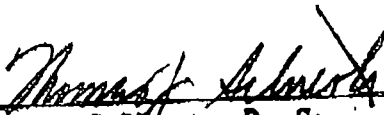
31. The Defendant has trespassed and created a nuisance on the Plaintiffs' property, willfully, wantonly and with a conscious disregard for the Plaintiffs' rights.

32. The Defendant continues to trespass and maintain a nuisance on the Plaintiffs' property which has interfered with, and continues to interfere with, the Plaintiffs' right to the quiet use and enjoyment of their property.

33. Because the Plaintiffs continue to suffer harm with each heavy rain, as a result of the Defendant's trespass and maintenance of a nuisance on the Plaintiffs' property, and because the Plaintiffs cannot be fully compensated by an award of damages alone, the Plaintiffs are

informed and believed that they are entitled to an Order permanently enjoining the Defendant from allowing water to drain from its property onto the property of the Plaintiffs causing portions of the Plaintiffs' lot to become a drainage area "collection pond".

WHEREFORE, the Plaintiffs pray that this Court grant judgment in favor of the Plaintiffs for the relief above requested and for such other and further relief as this Honorable Court deems just, appropriate and proper.



Thomas J. Silvester, Pro Se
12 Glenlake Road
Columbia, South Carolina 29223
(803) 736-0715

Columbia, South Carolina
4/11 1996.

Exhibit B

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 96CP4001230

Thomas J Silvester

Spring Valley Country Club

Nicholas D Kelley

DEFENDANT(S)

PLAINTIFF(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 21st day of Aug., 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas J. Silvester

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Edward Cuttino

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

FILED
2013 AUG 27 PM 1:45
JEANETTE W. MCBRIDE
CLERK OF COURT
RICHLAND COUNTY

thereafter appealed Judge McKellar's Order for Summary Judgment . On February 12, 2001, the South Carolina Court of Appeals issued its Opinion, affirming and reversing in part Judge McKellar's decision, and remanding the action to the Richland County Court of Common Pleas. *Silvester vs. Spring Valley Country Club*, 344 S.C. 280, 542 S.E.2d 563 (Ct. App. 2001). There is no evidence this action appeared on the Richland County trial roster thereafter. There is also no evidence the Plaintiffs made any effort to pursue or advance their case to trial at any time between the issuance of the Court of Appeals opinion on February 12, 2001. Only in late March or early April 2013, did they telephone the Richland County Clerk of Court to inquire about the status of their case. This amounts to a period of over twelve (12) years of inactivity. Further, more than seventeen (17) years have passed since the Plaintiffs filed their original Complaint.


A Plaintiff has the burden of prosecuting his or her action, and a trial court may properly dismiss an action for the Plaintiff's unreasonable neglect in proceeding with the case. *McComas vs. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006)(citing *Don Shevey & Spires, Inc. vs. American Motors Realty Corporation*, 279 S.C. 58, 301 S.E.2d 757 (1983)). In addition, a party has a duty to monitor the progress of his or her case. Lack of familiarity of legal proceedings does not excuse this obligation, and the Court will not hold a layman to any lesser standard than is applied to an attorney. *Goodson vs. American Bankers Insurance Company of Florida*, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988). Rule 41(b) of the South Carolina Rules of Civil Procedure states: "For failure of the Plaintiff to prosecute or to comply with these rules or any



Order of the Court, a defendant may move for dismissal of an action or of any claim against him". The Defendant Spring Valley Country Club has so moved, and the circumstances of this matter warrant a dismissal of the Plaintiff's action. Accordingly,

IT IS HEREBY ORDERED that the Defendant's Motion is granted, and this action is dismissed.

AND IT IS SO ORDERED.



G. Thomas Cooper, Presiding Judge
Court of Common Pleas
Fifth Judicial Circuit

August 6, 2013
Columbia, South Carolina

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

Court of Appeals Case No.: 2013-001869

Thomas J. and Carolyn Silvester, Appellants

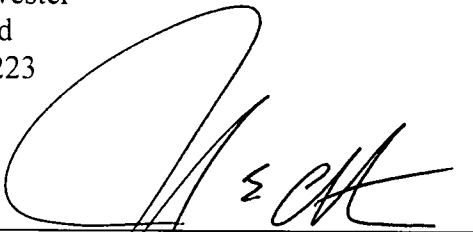
v.

Spring Valley Country Club Respondent,

PROOF OF SERVICE

I certify that on March 26, 2014, I served a copy of Respondent's Return to Appellants' Motion to Exclude Certain Matter from the Record on Appeal by United States mail, postage prepaid to the following:

Tom and Carolyn Silvester
12 Glenlake Road
Columbia, SC 29223



John E. Cuttino

Columbia, South Carolina
May 15, 2014

RECEIVED

MAY 15 2014

SC Court of Appeals



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

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Telephone 803.779.1833
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www.GWBlawfirm.com

May 15, 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*
Case No.: 1996-CP-40-01230
Court of Appeals Case No.: 2013-001869
GWB File No.: 8642-1

Dear Ms. Kitchings:

Please find enclosed the original and seven copies of Respondent Spring Valley Country Club's Return to Appellants' Motion to Exclude Certain Matter from the Record on Appeal. Please file these documents and return clocked copies to this office via our courier.

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
E-Mail: jcuttino@gwblawfirm.com

JEC/sm
Enclosures
cc: Thomas J. and Carolyn Silvester

RECEIVED

MAY 15 2014

SC Court of Appeals