

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

G. Thomas Cooper, Fifth Judicial Circuit Judge

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Case No.: 96-CP-40-1230  
Appellate Case No. 2013-001869

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THOMAS J. AND CAROLYN SILVESTER ..... Appellants,

v.

SPRING VALLEY COUNTRY CLUB ..... Respondent.

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**FINAL BRIEF OF APPELLANTS  
THOMAS J. AND CAROLYN SILVESTER**

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May 26, 2014

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**SC Court of Appeals**

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**STATEMENT OF ISSUES ON APPEAL**

- I. **DID JUDGE G. THOMAS COOPER ERR IN DISMISSING THIS CASE SINCE IT HAD BEEN REMANDED BACK TO THE COURT BY THE SOUTH CAROLINA COURT OF APPEALS?**
- II. **SHOULD THE COURT'S ORDER BE DISTURBED BECAUSE OF A CLEAR ABUSE OF DISCRETION, AND ERROR IN APPLICATION OF THE LAW ?**
- III. **SHOULD THE COURT BE HELD TO ANY LESSER STANDARDS THAN IS APPLIED TO AN ATTORNEY OR LAYMAN?**
- IV. **DISMISSAL IS A HARSH SANCTION WHICH SHOULD NOT BE RESORTED TO ONLY IN EXTREME CASES .**

## STATEMENT OF THE CASE

This appeal arises from The Honorable Judge G. Thomas Cooper's Order of 8/05/13 Granting Dismissal of Civil Case No. 96 CP-40-1230, a remand from The South Carolina Court of Appeals. Using Rule 41(b), SCRCP in error the court dismissed the case for failure of the Plaintiff to prosecute. (R. pp 8, 9)

Plaintiff's Thomas and Carolyn Silvester filed their original case, on April 11, 1996. On June 17, 1998, Circuit Judge Henry McKellar heard and granted Defendant Spring Valley Country Club's Motion for Summary Judgment. The Plaintiffs, Thomas and Carolyn Silvester, thereafter appealed Judge McKellar's Order for Summary Judgment. On February 12, 2001 The South Carolina Court of Appeals issued its Opinion No. 3297, reversing Judge McKellar's Summary Judgment decision as to the nuisance cause of action and remanded the case back 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). (R. p5) The Spring Valley Country Club requested a Writ of Certiorari and the case was reviewed by the South Carolina Supreme Court which affirmed the Court of Appeals Opinion on October 25, 2001.

The Silvesters waited trustingly and patiently for their case to be called. Based on a statement by Judge McKellar at the Hearing with him, that "he had 4,000 cases pending." The Silvesters assumed they might have to wait for their case to be scheduled. (R. p. 45) Finally, in early March, 2013, the Silvesters thought they had waited long enough and called the court to ask why the case had not been scheduled. A status conference was held by Judge Casey Manning, and a Hearing was scheduled. The defendants, Spring Valley Country Club filed a Motion to Dismiss and the plaintiffs, the Silvesters, filed a Motion to Continue. (R. pp. 18, 19) A Hearing was held on August 5, 2013 with the Honorable Judge G. Thomas Cooper where the plaintiffs and the respondent presented their oral arguments. (R. pp 30-36) On August 6, 2013, The Honorable Judge G. Thomas Cooper ordered for the case to be dismissed for failure to prosecute by the plaintiffs, even though The South Carolina Court of Appeals had remanded the case back to be retried. Judge Cooper completely disregarded the remand of the South Carolina Court of Appeals, ignored the fact that the court had erred in not setting the case for trial, and that the Silvesters never had an opportunity to prosecute their case. It is from this Order that the Silvesters appeal. (R. pp 7-9)

## ARGUMENT

### **I THE CIRCUIT COURT ERRED IN DISMISSING THIS CASE WHICH HAD BEEN REMANDED BACK TO THEM BY THE COURT OF APPEALS AND AFFIRMED BY THE SOUTH CAROLINA SUPREME COURT**

The Trial Court did not meet its obligation to set the case up for trial that The Court of Appeals had remanded back to them. (R. pp. 24 line25,p. 25 lines 1-11)

### **II. THE COURT'S ORDER SHOULD BE DISTURBED BECAUSE OF A CLEAR ABUSE OF DISCRETION, AND ERROR IN APPLICATION OF THE LAW**

Rule 41 (b) SCRPC nor any of the cases cited in the Order to Dismiss are applicable or relative because in every case cited the Court did its duty by bringing these cases to trial. The court did not do its duty to bring the present case to trial. Citing these rules and cases is an error in application of the Law. The Circuit Court never scheduled the present case and ignored the remand from the South Carolina Court of Appeals. The Appellants, the Silvesters, never made any mistakes similar to the mistakes cited, nor even had the opportunity to make these mistakes because they never had a chance to prosecute their case. The Court denied them that right.

*Goodson vs. American Bankers Insurance Company of Florida, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988)* cited in the Order to Dismiss is not applicable to this case because the American Bankers Insurance Company of Florida had a chance to prosecute their case. Their case was dismissed because they failed to appear at the trial. The Court had fulfilled its duty by scheduling the Goodson vs American Bankers Insurance Company's case. In contrast, because of a procedural error by the court, the Silvester case was never scheduled for trial affording them the opportunity to prosecute.

*Don Shevey & Spires, Inc. vs American Motors Realty Corporation and American Motors Sales Corporation*, 279 S.C. 58, 301 S.E.2d 757 (1983) is not a valid citation to use as justification for dismissing the present case. The Appeal was denied in *Don Shevey & Spires, Inc. vs American Motors Realty Corporation and American Motors Sales Corporation* because Appellant failed to timely file the Summons which was necessary before the case could be prosecuted. The Silvesters met all their obligations timely for their case to proceed. It was only because the Court failed in its obligation to schedule this case. The Silvesters did not have an opportunity to prosecute their case. There was not failure to prosecute by the Silvesters. The Court failed in its obligation to set this case up for trial.

**III. THE COURT SHOULD NOT BE HELD TO ANY LESSER STANDARD THAN IS APPLIED TO AN ATTORNEY OR LAYMAN.**

If the court fails to call a case it shouldn't turn around and blame the problem on the layman. It should be held to the same standard as an attorney or layman. (R. p. 8)

**IV. DISMISSAL IS A HARSH SANCTION WHICH SHOULD BE RESORTED TO ONLY IN EXTREME CASES**

*Sabrina McComas, Appellant, v. Chris Ross, Respondent*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006) is a valid citation for the present case. The circuit court dismissed the victim's case for failure to prosecute *under S.C. R. Civ P. 41(b)* because the victim was late and arrived a few minutes after her case had been dismissed. On appeal, The Court of Appeals reversed the trial court's decision and ruled that the trial court abused its discretion in dismissing the victim's case because she had put a lot of effort in discovery and subpoenaed witnesses for trial. The trial court abused its discretion in dismissing the Silvester case, too, because of all the time and effort the Silvesters have

exerted in the prosecution of their case. The Court of Appeals also ruled in the McComas case that under the facts of the case, dismissal of the victim's case was too harsh a sanction for her conduct and the conduct of her counsel. The same applies to the Silvester case, dismissal of the present case is too harsh a sanction.

The court in *McCargo v. Hedrick*, 545f, 2d 393, 396 (4<sup>th</sup> Cir. 1976) again held that dismissal is a harsh sanction which "should be resorted to only in extreme cases." and is another example why the Silvester case should not have been dismissed..

The Fourth Circuit has said 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. *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4<sup>th</sup> Cir. 1990). See also *Herbert v Saffell*, 877 F.2d 267, 270 (4<sup>th</sup> Cir. 1989);

In addressing **(1) the plaintiff's degree of personal responsibility**-- The Silvesters have exercised great responsibility in trying to get this case prosecuted and brought to trial. They successfully appealed the original case expending an extraordinary amount of time and effort in trying to get this case prosecuted. They were, however, too trusting of the circuit court and lenient in waiting for the court to call the case. **(2) the amount of prejudice caused the defendant**--the defendant has not been caused any prejudice. The defendant knew this case had been remanded back to the lower court and they knew the problem could have been abated. The defendant did nothing during this period of time to correct the

situation. According to the defendant they could have caused this case to be brought to trial sooner, but chose not to. (R. p. 14) The defendant nor the court have suffered, only the Silvesters have suffered. Dismissing this case would be a wonderful gift to the Respondents, Spring Valley Country Club **(3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion—** The Appellants have not drawn out the process, they have done everything they know to bring this case to trial. They have filed everything timely and have not asked for anymore extensions than the respondents, Spring Valley Country Club. The process has taken too long, but most of the delay has been due to the court not scheduling the case. **(4) the effectiveness of sanctions less drastic than dismissal—**The Silvesters worked very diligently to get this case remanded and since the court made the error of not setting the case up for trial, the court should have never dismissed the case.

## CONCLUSION

Appellants assert that the Court of Common Pleas misapplied Rule 41 (b) of the South Carolina Rules of Procedure, and the cases cited in the Order to Dismiss are not applicable to the present case.

Opinion No. 3297 by the South Carolina Court of Appeals and affirmed by The South Carolina Supreme Court should be honored. The Order to Dismiss by the circuit court on August 5, 2013 should be remanded. The Appellants met all the requirements for the prosecution of this case and waited patiently for the Richland County Court to fulfill their responsibilities of bringing this case to trial. The dismissal of this action was not warranted and was a harsh sanction, considering the amount of time and effort expended by the appellants trying to get this case prosecuted. The judgment of the lower court should be reversed and this case set up for trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THOMAS J. AND CAROLYN SILVESTER.....Appellants

v.

SPRING VALLEY COUNTRY CLUB..... Respondent

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief complies with Rule 210(b), and  
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PROOF OF SERVICE

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I certify that I have served a copy of the Final Brief, Final Reply Brief and Certificate of Counsel on John E. Cuttino, Esquire, attorney for Respondent on this 26th day of May, 2014 by depositing a copy of it in the United States Mail, postage prepaid addressed to the following:

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