RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

G. Thomas Cooper, Fifth Judicial Circuit Judge

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

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

v.

SPRING VALLEY COUNTRY CLUB . . . . . .Respondent.

RECORD ON APPEAL

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas J. and Carolyn Silvester, Appellants,

v.

Spring Valley Country Club, Respondent.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3297
Heard October 12, 2000 - Filed February 12, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Thomas J. and Carolyn B. Silvester, both of Columbia, pro se.

John E. Cuttino, of Turner, Padget, Graham & Laney, of Columbia, for respondent.

STILWELL, J.: Thomas and Carolyn Silvester filed this action against Spring Valley Country Club for damages and injunctive relief for trespass and nuisance. The trial court granted the Club's motion to dismiss the action, finding all claims barred by the statute of limitations. The Silvesters appeal. We affirm in part, reverse in part, and remand.

FACTS

In 1983, the Silvesters purchased a residence in Spring Valley subdivision. The rear of their lot adjoins a portion of the Club's golf course. Water from the Club's land channels onto the Silvesters' lot, allegedly causing erosion, the deposit of trash, and a potentially hazardous condition due to standing water. The Silvesters maintain this water channels through a man-made ditch, while the Club argues the water channels through a naturally occurring stream. The problem manifested itself shortly after the Silvesters occupied the

house in 1984.

The Silvesters brought this action in April 1996. They alleged for a first cause of action a trespass occurring in 1992 when the Club constructed a french drainage system to collect and concentrate surface water, thereby exacerbating the Silvesters' drainage problem. They complain the Club failed to implement a proper storm drainage system to prevent water from taking over their property. The Silvesters argue that even if the Club has an easement to discharge storm water over their land, it has exceeded its rights. For their second cause of action, the Silvesters allege the Club's actions constitute a continuing nuisance affecting the enjoyment of their land.

On June 12, 1998, the Club filed a motion to dismiss the action "pursuant to Rules 41 and/or 56 of the South Carolina Rules of Civil Procedure." In its supporting memorandum, the Club argued the statute of limitations had expired.

The action was called to trial on June 17, 1998, with the Silvesters proceeding pro se. Prior to selecting a jury, the court heard the Club's motion to dismiss. During argument on the motion, Mr. Silvester admitted they realized the severity of the water problem by 1991. Mr. Silvester informed the court they received a copy of an engineering study commissioned by the Club in October or November 1991, but the Silvesters insisted the Club did not follow its own study's recommendations.

Mrs. Silvester argued the action should not be dismissed based on the statute of limitations because it was an ongoing nuisance. She stated if the court dismissed the action, the Silvesters would have to file a new action for the continuing nuisance. The trial judge stated, "You might have to do that." During the colloquy, the trial judge made some remarks which the Silvesters interpreted as being antagonistic toward them as pro se litigants. [1]

The trial court granted the motion to dismiss based on the statute of limitations. The Silvesters appeal.

STANDARD OF REVIEW

The Club filed the motion to dismiss pursuant to Rules 41(b) and 56, SCRCP. Rule 41(b) permits the defendant, "[a]fter the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence," to move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Rule 41(b), SCRCP (emphasis added); see Johnson v. J.P. Stevens & Co., 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992) (holding Rule 41(b), SCRCP, allows the judge as the trier of facts to weigh the evidence, determine the facts, and render a judgment against the plaintiff at the close of his case if justified).

Rule 56, SCRCP, allows a party to move, with or without supporting affidavits, for summary judgment in his favor. Under the circumstances present here, we conclude the trial court effectively ruled on the motion as if it were a motion for summary judgment under Rule 56. Accordingly, we utilize the standard of review governing motions for summary judgment. See McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994) (holding a motion for summary judgment can be used to raise the defense of statute of limitations).

In determining whether summary judgment is proper, this court must view all evidence in

the light most favorable to the non-moving party. Barr v. City of Rock Hill, 330 S.C. 640, 642, 500 S.E.2d 157, 158 (Ct. App. 1998). Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. City of Columbia v. ACLU of South Carolina, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id. Thus, we review the record in the light most favorable to the Silvesters.

LAW/ANALYSIS

I.

Trespass

The Silvesters pled trespass as the first cause of action in their complaint. However, at the hearing before the trial court, the continuing nuisance claim was the only issue clearly addressed. Additionally, the Silvesters' appellate brief does not raise as an issue on appeal error on the part of the trial court in granting summary judgment as to the trespass cause of action. Finally, at oral argument the Silvesters only argued the trial court erred in granting summary judgment to the Club on their continuing nuisance claim. We therefore find the grant of summary judgment to the Club on the trespass cause of action is not presented to this court as an issue appropriate for appellate review. See Rule 208(b)(1)(B), SCACR (stating "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal"); see Larimore v. Carolina Power & Light, 340 S.C. 438, 443-44, 531 S.E.2d 535, 538 (Ct. App. 2000) (noting an issue not raised to and ruled upon by the trial court is not preserved for appellate review).

II.

Nuisance

The Silvesters contend the trial court erred in granting the Club summary judgment on their continuing nuisance cause of action. We agree.

South Carolina follows the common enemy rule which allows a landowner to treat surface water as a common enemy and dispose of it as he sees fit. Glenn v. Sch. Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). However, an exception to this rule prohibits a landowner from using his land in such a manner as to create a nuisance. Id.; see Irwin v. Michelin Tire Corp., 288 S.C. 221, 224, 341 S.E.2d 783, 784 (1986).

The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land. See Ravan v. Greenville County, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993). The distinction between trespass and nuisance is that trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property, whereas nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. Id.

A nuisance may be classified as permanent or continuing in nature. A continuing nuisance is defined as a nuisance that is intermittent or periodical and is described as one which

occurs so often that it is said to be continuing although it is not necessarily constant or unceasing. 58 Am. Jur. 2d Nuisances § 28 (1989). A permanent nuisance may be expected to continue but is presumed to continue permanently, with no possibility of abatement. Id. § 27. As to a permanent nuisance, such as a building or a railroad encroaching on a party's land, the injury is fixed and goes to the whole value of the land. Id.

When the statute of limitations begins to run hinges on whether a nuisance is classified as permanent or continuing. Id. § 26; see Glenn, 294 S.C. at 535-36, 366 S.E.2d at 50-51. When the nuisance is permanent in nature and only one cause of action may be brought for damages, the applicable statute of limitations bars the action if not brought within the statutory period after the first actionable injury. 58 Am. Jur. 2d Nuisances § 307 (1989). When the nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the original intrusion on the property and cannot be a complete bar. Id. Rather, a new statute of limitations begins to run after each separate invasion of the property. Id.; see Cutchin v. South Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (citing Webb v. Greenwood County, 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956) (stating if the injury is permanent, the plaintiff has a single cause of action which cannot be split; however if the cause of the injury is abatable, each injury gives rise to a new cause of action)). A nuisance is continuing if abatement is reasonably and practicably possible. 58 Am. Jur. 2d Nuisances § 29 (1989).

In discussing the limitations period applicable in a continuing nuisance action, our supreme court has stated:

> Since every continuance of a nuisance is a new nuisance, authorizing a fresh action, an action may be brought, for the recovery of all damages, resulting from the continuance of a nuisance, within the statutory period of the statute of limitations, for which no previous recovery has been had, even though the original cause of action is barred, unless the nuisance has been so long continued, as to raise the presumption of a grant, or in case of injury to real property, unless the plaintiff's right of entry is barred. But when the injury is of such a nature, that all the damages resulting therefrom, whether past or prospective, are recoverable in one action, the statute of limitations begins to run, from the time of the completed erection of the nuisance. This rule, however, is subject to the modification, that when the cause of action is the consequential injury, from an act of erection which is not, in itself, an actionable nuisance, the statute does not begin to run, until the injury is actually inflicted.

Sutton v. Catawba Power Co., 104 S.C. 405, 408, 89 S.E. 353, 353 (1916).

In McCurley v. South Carolina Highway Dep't, the court stated that if the injury to neighboring lands is caused by negligence, or if the cause is abatable, then there arises a continuing cause of action. 256 S.C. 332, 335, 182 S.E.2d 299, 300 (1971). While the statute of limitations begins to run at the occurrence of the first actual damage, the landowner may at any time recover for injury which occurred within the statutory period. Id. Furthermore, although the statute of limitations may bar a nuisance action for damages, it "is not a defense in an action based upon nuisance for injunctive relief since such statutes do not bar the equitable relief of injunction." 58 Am. Jur. 2d Nuisances § 381 (1989); see Mack v. Edens, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (Ct. App. 1991) (stating injunctive relief is appropriate for continuous injury to land).

The Silvesters argue water channels from a man-made ditch dug by the Club onto their property. The Club maintains water channeling through a naturally occurring stream passes over a portion of the Silvesters' lot and only "occasionally" overflows their yard. However, Mr. Silvester testified at the hearing "there was an enormous amount of water coming through the property," and Mrs. Silvester stated "our property daily is being damaged." After reviewing the record, we find there exist genuine issues of material fact making summary judgment inappropriate in this case.

The Silvesters alleged a continuing nuisance and requested damages and injunctive relief. The trial court summarily applied the three year statute of limitations to the continuing nuisance cause of action without considering the possibility of abatement, the Club's alleged negligence, or the Silvesters' request for injunctive relief. Viewing the evidence in the light most favorable to the Silvesters, we agree the trial court erred in applying the statute of limitations to their continuing nuisance claim and accordingly reverse the grant of summary judgment on this issue.

III.

Bias

The Silvesters lastly argue the trial court erred in granting the Club relief due to his personal bias against pro se litigants. This argument is without merit. "Adverse rulings, even if erroneous, are insufficient to establish a trial judge's bias or prejudice." Reading v. Ball, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987). In support of their argument, the Silvesters rely on the trial judge's comments at the conclusion of the hearing regarding his advice they obtain an attorney. The trial judge merely related the old adage that "the man who is his own lawyer has a fool for a client." State v. Owens, 124 S.C. 220, 223, 117 S.E. 536, 537 (1922). We find no evidence in the record the trial judge's ruling was based on or influenced by any bias against either the Silvesters or pro se litigants as a class.

Based on the foregoing, the order on appeal is affirmed as to the dismissal of the trespass cause of action and reversed and remanded as to the nuisance cause of action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HOWARD and SHULER, JJ., concur.

1. During the colloquy the trial judge said:

Mrs. Silvester, let me say something. . . . If you don't want to hire a lawyer, that's fine. But let me tell you what Abraham Lincoln said one time. A man who represents himself has a fool for a lawyer. That was in my Daddy's law office when I was a kid. It's great advice. But if you don't want to hire a lawyer, that's fine. That's your business. If you pay your seventy bucks you can come over here and play this game just like everybody else.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

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October 25, 2001

John E. Cuttino, Esquire
R. Hawthorne Barrett, Esquire
Turner, Padget, Graham & Laney, P.A.
P O Box 1473
Columbia, SC 29202

Re: Silvester, Thomas v. Spring Valley
1996-CP-40-1230

Dear Counsel:

The Court has issued the following order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/ Jean H. Toal C.J.
For the Court

Justice Costa M. Pleicones,
not participating

October 25, 2001."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

DES/dmh

8/6/13

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FOR THE FIFTH JUDICIAL CIRCUIT
	CIVIL ACTION NO. 96-CP-40-1230
Thomas J. and Carolyn Silvester, Plaintiffs,	**ORDER GRANTING DISMISSAL PURSUANT TO RULE 41(b), SCRCP**
v.	
Spring Valley Country Club, Defendant.	

This matter came before the Court by way of the Defendant's Rule 41(b) Motion to Dismiss for failure to prosecute. The Motion was heard on August 5, 2013 in Columbia, South Carolina. Plaintiffs Thomas J. Silvester and Carolyn Silvester have no attorney of record and appeared pro se. Appearing on behalf of the Defendant Spring Valley Country Club was John E. Cuttino, Esquire, of Columbia, South Carolina.

After a review of the record, an analysis of the party's submissions to the Court, and careful consideration of the oral arguments of all parties and the applicable law, it appears to the Court as follows:

Plaintiffs Thomas and Carolyn Silvester filed their original Summons and Complaint, pro se, 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

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 Country 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

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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

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5/28/13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
	)	CIVIL ACTION NO. 96-CP-40-1230
	)	
Thomas J. and Carolyn Silvester,	)	
	)	**DEFENDANT'S MOTION TO DISMISS**
Plaintiffs,	)	**PURSUANT TO RULE 41(b), SCRCP**
	)	
v.	)	
	)	
Spring Valley Country Club,	)	
	)	
Defendant.	)	
	)	

Pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure, the Defendant Spring Valley Country Club moves for an Order dismissing the Plaintiffs' action. Plaintiffs' Complaint was filed in on April 11, 1996. Prior to the Status Conference of April 17, 2013, the last activity in this case took place on February 12, 2001. Plaintiffs' failure to prosecute their case for well over a decade warrants dismissal of their action for failure to prosecute. The grounds for this motion are stated more particularly and in detail in the accompanying memorandum of law, which is incorporated herein by reference.

TURNER, PADGET, GRAHAM & LANEY, P.A.

By: _____

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ATTORNEYS FOR DEFENDANT
SPRING VALLEY COUNTRY CLUB

Columbia, South Carolina
May 28, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
	)	CIVIL ACTION NO. 96-CP-40-1230
	)	
Thomas J. and Carolyn Silvester,	)	
	)	**MEMORANDUM IN SUPPORT OF**
Plaintiffs,	)	**DEFENDANT'S MOTION TO DISMISS**
	)	**PURSUANT TO RULE 41(b), SCRCP**
v.	)	
	)	
Spring Valley Country Club,	)	
	)	
Defendant.	)	
	)	

Defendant Spring Valley Country Club (hereinafter "Spring Valley" or "Defendant"), hereby submits this Memorandum in Support of its Motion to Dismiss pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure.

INTRODUCTION

This case was filed in 1996. Since 2001, it has remained dormant for approximately twelve (12) years without any action on the part of the Plaintiffs to advance the case toward resolution. Plaintiffs have unreasonably neglected to proceed with their claims and therefore dismissal is proper and warranted pursuant to Rule 41(b), SCRCP.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Plaintiffs filed their Summons and Complaint on April 11, 1996. The Plaintiff Silvesters own property which backs up to land owned by the Defendant Spring Valley, and allege that water draining from Spring Valley's property caused erosion of landscaping, the deposit of trash

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and the creation of potentially hazardous health conditions from standing water. The parties unsuccessfully mediated the case on June 11, 1998. On June 17, 1998, Circuit Judge Henry McKellar heard and granted Defendant Spring Valley's Motion for Summary Judgment.

Plaintiffs thereafter appealed and on February 12, 2001, the South Carolina Court of Appeals issued an opinion which affirmed in part, and reversed in part, Judge McKellar's decision, and remanded the action to the Richland County Court of Common Pleas. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001). The Plaintiff Silvesters did not prosecute their case following the remand of February 12, 2001. Apparently at some point in early 2013, the Silvesters contacted the Richland County Court of Common Pleas. Thereafter, a Status Conference was held by Judge L. Casey Manning on April 17, 2013.

ARGUMENT

Rule 41 of the South Carolina Rules of Civil Procedure provides that "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him."[1] 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 v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) (citing *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983)). Moreover, "trial judges possess the inherent power to dismiss actions *sua sponte* for a party's failure to prosecute the relevant claims." *Crestwood Golf Club v. Potter*, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997). 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

[1] The dismissal is generally without prejudice because "an order of dismissal for failure to proceed with the suit is in the nature of a discontinuance of the action and is not an adjudication of the merits." *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

upon a clear showing of an abuse of discretion. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

There is no universal standard that South Carolina courts apply in deciding motions to dismiss for failure to prosecute.[2] This circumstance is likely owing to the fact-specific nature of motions to dismiss for failure to prosecute. Notwithstanding that "failure to prosecute" scenarios can vary considerably, South Carolina appellate court decisions addressing motions to dismiss for failure to prosecute generally fall into two categories: (1) cases involving plaintiffs who are not present or able to proceed when their case is called for trial; and (2) cases involving plaintiffs who have failed to take actions concerning their case resulting in unreasonable delay.

The instant case falls into the latter category and the most factually analogous precedent is *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983). In *Don Shevey & Spires*, the plaintiff's case was dismissed without prejudice for failure to prosecute when, after serving the Summons, plaintiff neglected to file the document for fifteen months.[3] The Supreme Court affirmed the trial court's dismissal for failure to prosecute, noting that "[plaintiff] not only failed to timely file the Summons, **it also failed to otherwise timely prosecute the case**. **[Plaintiff] took no action between August 1976 and March 1978**, when a Complaint was finally served twenty months after service of the Summons." 279 S.C. 58 at 60, 301 S.E.2d at 758 (emphasis added). Thus, the Supreme Court approved of the dismissal based on the plaintiff's delay, citing the principle that "The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in

[2]The Fourth Circuit Court of Appeals has identified four factors to be considered in deciding motions to dismiss for failure to prosecute. This test has been cited by South Carolina appellate courts; to the extent it is now an expression of South Carolina law, it is discussed *infra*.

[3] *Don Shevey & Spires* was decided in 1983, prior to the adoption of the pleading procedures outlined in the South Carolina Rules of Civil Procedure.

proceeding with his cause." *Id.* (citing *Thomas & Howard Company v. Fowler, et al.*, 238 S.C. 46, 119 S.E.2d 97 (1961); *Small v. Mungo*, 254 S.C. 438, 175 S.E.2d 802 (1970)).

The approximately 20-month delay that resulted in dismissal in *Don Shevey & Spires* is trifling compared to the approximately 12-year delay in the instant action. Allowing over a decade to pass without taking any action cannot be explained as anything other than "unreasonable neglect" on the part of the Plaintiffs.

Moreover, the case law is clear that it is not the defendant's obligation to assist plaintiffs in prosecuting their case:

> **[I]t would be anomalous to require a defendant to force or encourage a plaintiff to proceed with his suit.** As we stated in *Thomas & Howard Company v. Fowler*, 238 S.C. at 52, 119 S.E. (2d) 97: "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."**

Don Shevey & Spires, 279 S.C. 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))(emphasis added).

Also illuminating are those cases in which courts have rejected "failure to prosecute" arguments based on plaintiff's unreasonable delay. One such example is *In re Miller*, 393 S.C. 248, 713 S.E.2d 253 (2011), which involved an appeal from the Circuit Court's order committing Miller to the custody of the Department of Mental Health under the Sexually Violent Predator Act (SVPA). Miller moved to dismiss the case under Rule 41, SCRCP, for failure to prosecute when the State failed to try the case within sixty (60) days of the probable cause hearing as mandated by the SVPA. The trial court denied the motion and the Supreme Court affirmed, noting that the State filed a motion for a continuance prior to the expiration of the sixty (60)-day time limit and had identified specific circumstances that had resulted in unforeseeable delays in

scheduling the civil commitment trial. 393 S.C. at 256-57, 713 S.E.2d at 257. Thus, *In re Miller* offers an example of circumstances in which dismissal for failure to prosecute is not appropriate; where a minor delay is accompanied by specific justification for the delay.

Based on those authorities and applying Rule 41(b) in the context of a plaintiff's failure to take action to prosecute its case, the instant case should be dismissed. The inaction of these Plaintiffs for over a decade is easily the most egregious example of failure to prosecute in the reported case law of South Carolina. Moreover, there are additional factors which may arguably bear on the analysis. In *McComas v. Ross*, the South Carolina Court of Appeals referenced a United States Fourth Circuit Court of Appeals opinion which outlined four (4) factors for federal district courts to consider 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 v. Ross*, 368 S.C. 59, 63, 626 S.E.2d 902, 904 (Ct. App. 2006)(citing *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990)).[4]

Examining the four factors outlined by the Fourth Circuit only further illustrates why this case should be dismissed. Plaintiffs' failure to take any action for over a decade reflects that Plaintiffs have a high degree of personal responsibility for the delay (factor 1) and amply demonstrates the presence of a drawn out history of delay (factor 3). Concerning factor 2, prejudice to Spring Valley is manifest in that it must defend against allegations concerning events which happened twenty (20) years ago. Plaintiffs' Complaint centers on alleged actions by Spring Valley concerning the construction of a drainage system in 1992. Spring Valley is

[4] These same factors were discussed in an unpublished Supreme Court opinion, *Channel Group, LLC v. Abbott*, 2012 S.C. Unpub. LEXIS 15 (Mar. 21, 2012).

prejudiced in that the evidence it would use to defend against the Plaintiffs' allegations has become stale or perhaps non-existent by virtue of the unreasonable and lengthy delay. *C.f. State v. McClinton*, 369 S.C. 167, 175, 631 S.E.2d 895, 899 (2006) (discussing policy underlying statutes of limitations: "Parties should act before memories dim, evidence grows stale or becomes nonexistent . . . . [F]urthermore, there is universal acceptance of the logic . . . that litigation must be brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.") Spring Valley should not be forced to yet again defend against allegations concerning events that occurred twenty (20) or more years ago where the delay is the result of Plaintiffs' failure to proceed with their case.

Because of the resulting prejudice to Spring Valley, any sanction less drastic than dismissal (factor 4) would not be an effective response to Plaintiffs' failure to prosecute. Moreover, the "harshness" of dismissal is mitigated in the instant action because of the nature of Plaintiffs' claims. While Plaintiffs would certainly be time-barred from pursuing the claims they have asserted in the instant lawsuit – which center on conduct and alleged damages occurring in the 1990s – they would not be barred from seeking a legal remedy for any current drainage issues (which arose within the current and applicable statute of limitations) by virtue of the Court of Appeals' characterization of their action as a "continuing nuisance". *See Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001).

CONCLUSION

Plaintiffs should not be permitted to proceed with their action. They seek a remedy for events that are alleged to have occurred approximately twenty (20) years ago. They have failed to prosecute their case for over a decade, taking no action whatsoever between February 2001 and early 2013. The Defendant Spring Valley respectfully requests that this Court use the

discretion it is afforded pursuant to Rule 41(b), SCRCP, to dismiss Plaintiffs' action in its entirety, without prejudice, for failure to prosecute.

TURNER, PADGET, GRAHAM & LANEY, P.A.

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ATTORNEYS FOR DEFENDANT
SPRING VALLEY COUNTRY CLUB

Columbia, South Carolina
May 28, 2013

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Thomas J. and Carolyn Silvester. Plantiffs, v. Spring Valley Country Club Defendant	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 96-CP-40-1230 PLAINTIFF'S MOTION FOR CONTINUANCE PURSUANT TO SOUTH CAROLINA COURT OF APPEALS OPINION 3297

Thomas J. and Carolyn Silvester, Plaintiffs, move for a Continuance of the above case and that the MOTION TO DISMISS made by the Defendant, Spring Valley Country Club be denied. The South Carolina Court of Appeals reversed and remanded the trial court's decision as to the continuing nuisance cause of action for Civil Action No. 96CP-40-1230. The Supreme Court of South Carolina denied the Petition for Writ of Certiorari, written by the attorneys for Spring Valley Country Club, on October 25, 2001. The Silvesters waited patiently to hear from The Richland County Court of Common Pleas, but never heard anything. In rebuttal to the Defendant's statement that Plaintiff's failure to prosecute their case warrants dismissal of their action for failure to prosecute , please be aware the Silvesters were never given an opportunity to prosecute their case. The Court of Common Pleas never scheduled the case. The Silvesters called the Richland County Court of Common Pleas office in March, 2013 to inquire why their case had not been scheduled. Thereafter, a status Conference was held by Judge L. Casey

Manning. The Court of Appeals issued their Opinion and The South Carolina Supreme Court agreed . These Opinions should be upheld by the Continuance of this case. The Plaintiffs, the Silvesters, respectfully request this Honorable Court deny the Defendants, Spring Valley Country Club's, Motion to Dismiss and grant the Motion by The Silvesters for Continuance.

THOMAS J SILVESTER
Thomas J. Silvester

Carolyn B. Silvester
Carolyn Silvester
12 Glenlake Road
Columbia, South Carolina 29223
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Pro Se Plaintiffs

July 30, 2013

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	1996-CP-40-1230
	)	
	)	
THOMAS J. AND CAROLYN SILVESTER,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
SPRING VALLEY COUNTRY CLUB,	)	
	)	
DEFENDANT,	)	

August 5, 2013
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE.

APPEARANCES:

CAROLYN SILVESTER, APPEARING PRO SE
THOMAS SILVESTER, APPEARING PRO SE

JOHN CUTTINO, ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

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INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

MS. SILVESTER: First of all, Judge, I would like to apologize for being here pro se.

THE COURT: All right. Well, just have a seat. Let me see what's going on here.

(Pause).

All right. Mr. Cuttino.

MR. CUTTINO: Thank you, sir.

Your Honor, this is a motion to dismiss pursuant to Rule 41, the failure of the plaintiffs to prosecute their claim for a period of about 12 years.

THE COURT: What is their -- what is their claim?

MR. CUTTINO: Their claim is this: They live on a fairway. The back of their residential yard backs up to a fairway at Spring Valley Country Club.

They contend that through some affirmative act that the Spring Valley Country Club over time has changed things and has intentionally channeled water through their backyard which causes their yard to flood at times and deprives them of the use of their yard and damages their property.

THE COURT: Okay.

MR. CUTTINO: That's the essence of it.

Your Honor, I think that in order to get us to today and for the Court to adequately understand what I'm asking and why I'm asking it, I need to give you a chronology of

the somewhat tortured history of this case.

There is a -- there is a Court of Appeals opinion that you may or may not have. I can hand it up to you. What I'm about to tell you, ours is, a lot of it is contained in this Court of Appeals opinion from 2001.

But, Your Honor, here is the -- here is the essential timeline: In 1983, the Silvesters purchased this house on Glenlake Road in Spring Valley.

As it's indicated in the Court of Appeals opinion, Mrs. Silvester acknowledged that as early as 1994, they had some water problems in that lot.

In 1996, 17 years ago, they filed their original summons and complaint, asserting causes of action for trespass, nuisance, and injunctive relief.

In 1998, we made a -- we had a mediation, Wilburn Brewer, the late Wilburn Brewer, mediated this case, and we were unable to come to any kind of resolution of it at that time.

THE COURT: That was in '98?

MR. CUTTINO: Yes, sir.

The plaintiffs were pro se at that time. They have been pro se throughout the whole course of this case.

In -- in June of '98, this case came up for trial. Judge -- then Judge Henry McKellar granted summary judgment to the Spring Valley Country Club based on the

statute of limitations.

In the colloquy that took place in the court on the record, Mrs. Silvester admitted that she knew of the problem in 1991, and Mr. Silvester said he had seen an engineering report also in 1991, and here they were bringing a case they filed in 1996.

Now, the Silvesters didn't like that result. They pro se appealed to the Court of Appeals. The Court of Appeals issued the opinion that you have before you in February of 2001 saying that -- that, you know, the cause of action for trespass was gone.

They said arguably that if this is a continuing trespass, there were factual -- could be factual issues of whether it could be abated, whether in fact, it was a nuisance.

So the court issued its order remanding the case on the issue of nuisance and I think injunctive relief, but that really wasn't discussed on the appeal.

Now, of course, the court made no ruling on the merits of the case. The court made no comment about whether it would succeed. It just said there was a possibility factual questions existed. That was in February of 2011?

Your Honor, from that point until April of this year, the Silvesters did nothing to pursue their case. Now, the

question can legitimately be asked where has this case been for the whole time.

THE COURT: The remand?

MR. CUTTINO: Yes, sir. Where has it been? I don't know. I don't know whether the clerk didn't put it back on the roster or what, but here is what we do know.

THE COURT: Has it been purged at this point?

MR. CUTTINO: Pardon me?

THE COURT: Has it been purged from the record at this point?

MR. CUTTINO: I do not know. What I do know is this: In April of this year, I got a phone call from Adam Ribock, Judge Manning's clerk, who said, "the Silvesters have called over here wanting to know the status of their case." It's 12 years later. "Could we meet with y'all?"

We came over. We met in Judge Manning's chambers with the Silvesters and Judge Manning and me, and everybody just, you know, wondered what to do.

Judge Manning said, "Well, I'm not going to issue any order at this time. I want y'all to talk to -- come to some accord on this case. I'll give you four months to do so."

I had conversations with the Silvesters, and I'll get into that in a minute, but as we were unable to do in '96 or '98, we can't reach a resolution because the Spring

Valley Country Club adamantly denies any liability for the water problems these folks are having, and we adamantly deny it today. We don't think that we should be forced after all this time to defend a case that was brought back in 1998.

Judge, it's important to know that in the time between the time we got this Court of Appeals opinion to early April of this year, I didn't hear from the Silvesters. They made no effort to prosecute their case.

I have no information that they contact the clerk or any judge. They never supplemented any responses to discovery, interrogatories, or requests for production. It was just nothing but silence.

I've been practicing 30 years, and so when I was faced with this situation, one of the first things I wondered was well, did I have some duty to force the case? You know, was I under some responsibility to bring it up?

The answer, I'm convinced, is absolutely not. In fact, there is a case that I cited in my brief that essentially --

THE COURT: You filed a brief?

MR. CUTTINO: Yes, sir.

That essentially says --

THE COURT: Where was it filed?

MR. CUTTINO: It was filed along with the motion. It

should be attached to the motion, the memorandum in support.

THE COURT: Okay. That's what you're talking about?

MR. CUTTINO: Yes, sir. I'm sorry.

It -- it says, basically, a lawyer can only represent one side, and a lawyer is under no -- a defense lawyer is under no duty to prosecute the plaintiffs' case, to urge that it be prosecuted. He may remain passive.

Hearing nothing from these folks who quite frankly, because they are pro se and because they had been difficult to deal with on many occasions, we said nothing, Your Honor. The Spring Valley Country Club, we closed our files, and not until April of this year has this come back up.

Now, I am sure that the pro se plaintiffs will argue in this hearing the merits of their case. They will say what they have always said; that they are pro se; that they didn't really understand the rules. They're waiting for their case to come up, any number of what I will term excuses for why so much time has passed.

But I will say this also: On just about every encounter that they have had with me, I have urged them to get a lawyer.

Judge -- Mr. Brewer, when he mediated the case, explained to them perils of proceeding without a lawyer.

Mr. -- Judge McKellar explained to them on the record the perils of proceeding without a lawyer.

Judge Manning recently explained to them the perils of proceeding without a lawyer, and for 17 years, they have made a conscious decision to proceed without a lawyer. Although, I think the facts suggest they have access to lawyers.

They pursued their own appeal in the Court of Appeals, which is not something most lay people can successfully do. They did have fleeting assistance of a lawyer whom they later discharged on the appeal, but the concepts of trespass, nuisance, and injunctive relief are such that -- and they're pled such that any case, it seems to me, they have -- that they have access to lawyers if they choose to do so.

In this circumstance, even today, Ms. Silvester before this hearing had said, again, after many, many years, the same thing: All they want is the water off their property.

Well, my experience is that that's an elusive -- that's an elusive concept. We thought we had a -- an agreement at mediation in 1998 with Mr. Brewer. They backed out of it.

They have had prior litigation with the homeowners association, and I think in one of the homeowners

association cases, they actually refused to sign either a release or an order of dismissal. The Court ordered it executed for them.

So the cases that I have cited in the brief in support of the motion to dismiss discussed unreasonable, unreasonable delay and unreasonable neglect in prosecuting the case.

Your Honor, I have to believe that the circumstances are such that maybe a one-year delay or an oversight is one thing, but two, three, four, five, six, seven, eight, nine, ten, 11, 12 years, there has to be conscious decisions made somewhere along the line by the pro se plaintiffs to not pursue the case, not check on it, not call or not call the clerk, not ask that it be put on the roster.

And at some point, Spring Valley is entitled to be done with this case. They thought they were done with this case. I don't know why the plaintiffs didn't pursue it for 12 years, but they haven't.

So we think it's unreasonable. We think that the law is that it is in your discretion about whether to dismiss a case for failure to prosecute.

The only cases reported that I can find was a case that was dismissed for failure to prosecute after only 20 months, and it's cited in my brief. This has been 12

years, 12 years; seventeen years since the filing of this lawsuit.

I don't know what the justification is. I'm not sure there is any justification other than they just didn't feel like pursuing it or made a conscious decision not to, but I'm not sure what the explanation is or if it rises to any formal excuse.

At some point, this case was over, and if they believe they have another case, I guess they can file another case, but this case that was filed in 1996 needs to be dismissed for failure to prosecute.

THE COURT: All right. Thank you, Mr. Cuttino.

Mrs. Silvester or Mr. Silvester?

MS. SILVESTER: Okay. I'm going to try to speak.

First of all, Spring Valley has had 11 years to correct, to abate their problem, and the Court of Appeals applied case law.

If you haven't had time to read it, maybe you should read their whole appeal because they gave the justification for why they remanded it back to the court.

Now, if it comes back to the court -- if this case is continued, I think that Spring Valley Country Club is trying to say you can't have any evidence as to what's happened to you. Nothing can be brought into the court to say that you have got damage to your property or that you

suffered any kind of injury. And so, hopefully, that won't go through, but they've had 11 years since the Court of Appeals to abate this problem.

And before that, they had an engineer's report that told them that they had 21-point-something acres going over, going into a ditch; that they had three pipes going into that ditch.

And when that ditch came to the Silvester's property, they ended the ditch and let the water flow in, flow across our yard. So that anybody else up the line, that ditch, they may think, well, they can put all their water into it, too, and just push it right over our head.

What happened, if you have got a picture -- if you have got a picture up there -- here is one right here if you'd like to see it of the lot, what's happening with the ditch and how they're channeling --

THE COURT: Well, wait. I'm --

MS. SILVESTER: Oh, but could I give it to you, or is that not allowed?

THE COURT: Well, I don't know if they object.

MR. CUTTINO: Your Honor, I -- I won't object, but it is totally irrelevant.

THE COURT: All right. I'll determine that.

That's fine. Hand it up, ma'am.

MS. SILVESTER: Okay.

THE COURT: Ma'am, this gentleman right here.

MS. SILVESTER: Oh, I'm sorry.

The engineer's report is before that where it tells you about this 21-acres. They've known this all the time, and they haven't chosen to abate it.

It's not man made. That report will tell you they have -- they've been collecting water into three pipes and discharged it into that ditch, and then since they had no right of way to our property -- and I tried -- I told them I will give them easement down my lot line to put their pipe so that all of their water that they're trying to get over the lake across the street from me, that I'll give them the right of way to put their pipe and carry their water.

They don't have to just dump it on me after they've collected it from 21 acres, from more than 21 acres, and they have three pipes. And the only reason this case has not been resolved is that they want me to take responsibility for their water.

They want to -- they might would -- they've offered me a little bit of money at times, but not enough to pay for those pipes -- or I wouldn't know. I wouldn't accept it because then it would be my responsibility to maintain their water. That's their water.

I will give them right of way across my lot. I will

deed them property so that they can take it across the street and not flood my property, and that has been the only reason it has not been resolved.

They've been aware of that from day one, and I've asked them to fix the problem, but I can't take on their responsibilities.

Okay. I heard you say -- you asked if this case had been purged. Well, I would assume it hadn't been purged or -- or Judge Manning would not have -- would not have called the status to go.

They know it's there. They know that it was sent to the court.

THE COURT: I have the file now.

MS. SILVESTER: Yeah. So it's not purged, and the appeal court, they applied case law. They're probably the best judge of anybody, and I deny that we have been difficult.

I have tried to help them. I wanted to help them do it as cheaply as they could do it. I have -- I -- I could ask for damages. I haven't chosen -- I don't want to ask for damages even though we have suffered greatly.

We have not been able to enjoy our property, and the reason I don't have a lawyer, the lawyer kind of messed up on that case with the Spring Valley Homeowners that he's talked about.

He said that we agreed to something that we hadn't, and then he also -- they had a hearing, and they didn't let us know. They can't find any record where they had sent us a hearing.

And so that case, I didn't do a good job with it, or it would have been appealed, too. It's just that -- I just didn't do a good job because the reason I -- I feel sure it would have been appealed is because we didn't agree to it.

And -- and it was still -- the homeowners is going to take care of the water when it gets to the easement from the front of our house. This water is coming across the back.

The homeowners will take care of the water from the time when it gets to these two pipes. They've dug this big hole in our front yard where this water is washing down, too.

And when it rained last time, I saw water coming in from four different ways because it had overflowed. Water came in four different ways to get in that pipe. So the homeowners, they put another pipe under the road to carry some of the water. So they felt like they had done their part.

Then they told us, "You go after Spring Valley Country Club because the water is theirs." That's what

they told us. I think you can probably find that in the record, somewhere that they did that, but we have been anything but hard to get along with. But we know what the fix is, and it needs to be done.

The reason we couldn't -- I don't know why we couldn't come to an agreement, why they wouldn't want to put that down the lot line. Bob Russell, who is a developer, lived next door to me at one time.

And he told me -- he developed property. He said that there should have been a pipe down the lot line. If they want to carry that water over to the lake across the street, then they should make provisions for it.

And nobody wants to be over with this case more than we do. We have suffered all these years. We have not been able to use our property to enjoy it. Like if you think you're going to have people over, you want to look and see, is it going to rain? Because we sure don't want them to see what happens here when it rains.

They can't deny that they have the ditch, and that they have three pipes coming into it. The ditch ends at my property. They made no provisions for that water after it came to my property.

They let it gush over, and it has made a stream, but it's not deep enough. And so it floods the water -- you know, it floods. Well, should I dig a ditch to carry

their water? I don't think so because I'm not collecting the water, putting it on them.

If it were the other way around, I think this case would have been settled a long time ago, but the reason I'm pro se is I'm trying to save them money. And I feel like I have a legitimate case. I sure don't want to.

Can you imagine having to go through with this if you were a lawyer? Can you imagine trying read this stuff and interpret it?

And so, I say that we move for a continuance of this case and that the motion to dismiss made by defendant, Spring Valley Country Club, be denied.

The South Carolina Court of Appeals reversed and remanded the trial court's decision as to the continuing cause of action for civil action case number 96-CP-40-1230.

The Supreme Court of South Carolina denied the petition for writ of certiorari written by the attorneys for Spring Valley Country Club on October the 21st, 2001.

The Silvesters waited patiently to hear from the Richland County Court of Common Pleas but never heard anything.

In rebuttal, the defendant's statement that plaintiffs failed to prosecute their case warrants dismissal of their action for failure to prosecute, please

be aware the Silvesters were never given an opportunity to prosecute their case.

The Court of Common Pleas never scheduled the case. The Silvesters called the Richland County Court of Common Pleas in March 2013 to inquire why their case had not been scheduled.

However, I will say I asked a prominent lawyer in this town -- you know, you hear of cases. The court is slow and cases don't come up.

So after about two years, I did ask a prominent attorney in this town, "You know, I don't understand." You know, it was just in passing. It wasn't a friend of mine or anything. It was just a question. "Why hasn't our case come up, and we -- what can we do about it?"

He didn't tell me what to do about it, but -- but you know, I kept waiting because I thought, "Well, you know, the court is slow."

I know people who have got DUIs and five years later the case didn't come up. So I didn't know if this was the same kind of situation or not why the court was so slow. I had no idea why it was slow, but I felt like it had a responsibility that whatever the South Carolina Court of Appeals says needs to be done.

But I don't feel like that it's any fault of ours the way he doesn't feel like it's any fault of theirs, but

they knew what the Court of Appeals said.

And if I had been in their shoes, I would have been tried to abate that situation. I would have been trying to fix the problem, because it cannot be denied that they have those pipes; that they were collecting that water and every time it rains that we get flooded and inundated.

There was some pictures sent to you. Your law clerk can show them to you there. That's my house there on the side, and the water was coming that close.

I actually have a picture where it's all the way up. I didn't bring it with me, but there's a picture where the water is already up to my house.

You know, we're old, and we can't go and go up under the house and find out how much water has washed up under there, but the next time it rains, I am going to hire somebody to go under there and see how much water is getting under the house with each rain. But I ask that you -- that you let this case go forward, let it continue on.

I think they pulled -- tried to pull the same trick the last time, and the Court of Appeals didn't go along with it. They may not go along with it this time, so I don't know.

Would the Court of Appeals go along with you, with this case being dismissed? I don't know.

THE COURT: All right.

Anything further, Mr. Cuttino?

MR. CUTTINO: Your Honor, as I predicted they would do, and as they have done every time I have dealt with them, they will discuss what they think are the merits of the case.

They will freely take little pieces of things they heard or engineer reports that they think they have seen and understood and build a case.

The Silvesters and I are both 17 years older than when this case originally got filed. They never named an expert witness. They have said the same thing over and over again with no willingness and no effort to prove it.

They -- mostly, Your Honor, with all due respect, just extremely hard headed about this process, and I think one of the questions before the Court is, is there a different set of procedural rules for pro se plaintiffs than for represented parties?

I dare say that if a licensed attorney had been on the other side of this case for 12 years and done nothing, not made any effort, it -- it just would be a different outcome.

I think there's a great temptation -- at least I've seen it in my career -- for courts to be sympathetic or -- or bend the rules somewhat for pro se parties, but in this

instance, Your Honor, this is over a decade, over a decade of a conscious decision.

And, you know it's rained several times in the last 12 years, so if they were really having this problem, you would think they would try to prosecute it.

The club needs an end to this 1996 lawsuit, and I guess, I guess, if they think they have a continuing nuisance, I understand the law to be that every time they think they have a nuisance, they have a new statute of limitations, a new encroachment, a new cause of action.

So, you know, when you dismiss this case, I guess they're free to bring another case that stretches back to whatever they think happened in the last three years, but to make the club defend claims that were brought in 1996 after these folks, people, have done nothing, nothing in the interim since this Court of Appeals opinion for 12 years, nothing, is unreasonable. It's unreasonable to Spring Valley Country Club.

You know, there is -- there is a suggestion by Ms. Silvester that if they really wanted to settle the case -- let me tell you what my experience has been. My experience has been --

THE COURT: I don't need it.

All right. Mrs. Silvester, I'm going to read the Court of Appeals opinion. It's my understanding -- I just

glanced at it briefly that they did not throw the case out saying there may be a continuing trespass.

A continuing trespass, if you do a little research on it, indicates -- it allows you to file a suit any time you feel there is an additional trespass in addition to the one that you filed suit on in 1996.

But this case, the 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.

I'm going to return this document to you, ma'am, and perhaps you can use it at some point in time in the future.

Thank you very much.

MS. SILVESTER: Can I say one other thing?

THE COURT: Well, you can but I've already ruled.

MS. SILVESTER: Okay. I'd like to know what rules have been bent.

THE COURT: What?

MS. SILVESTER: I'd like to know rules have been bent or what --

THE COURT: Read the book. Just read the book.

MS. SILVESTER: It says that rules --

THE COURT: You'll have to read the rules, ma'am. You can't come into court and ask me what the rules are. If you want to come to court, you've got to operate by the same rules that Mr. Cuttino's client does.

MS. SILVESTER: Well, sir, Your Honor?

THE COURT: Thank you very much.

MS. SILVESTER: It doesn't matter --

THE COURT: We are now --

MS. SILVESTER: -- what the -- it doesn't matter what the Court of Appeals said?

THE COURT: I said I'm going to look at it before I sign his order. If there's any reason not to sign the dismissal order, I will not sign it, but in the meantime, I'm going to ask him to prepare what I call a proposed order.

So I'll look at it. I'm going to read the Court of

Appeals opinion in greater depth than I've been able to do just scanning it this morning.

MS. SILVESTER: Okay. Thank you very much.

THE COURT: All right. We are down until 2:00.

MR. CUTTINO: Your Honor, Your Honor, excuse me. I will send them a copy of the order --

THE COURT: Please do.

MR. CUTTINO: -- via e-mail.

THE COURT: All right. Thank you very much.

(Whereupon, the proceedings were concluded.)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 5th day of August, 2013.

August 5, 2013

Karen Ambroziak

Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

Transcript - Hearing Judge L. Henry McKellar

STATUTE OF LIMITATIONS HAD RUN OUT?

THE COURT: NOBODY EVER RAISED THE ISSUE OF THE STATUTE OF LIMITATIONS TO ME. I DON'T READ THROUGH ALL THESE FILES. I'VE GOT FOUR THOUSAND CASES PENDING IN THIS COUNTY. I GET THE FILES OUT AND PEOPLE BRING THINGS TO ME ONCE A HEARING STARTS. I DON'T GO TO THE CLERK'S OFFICE AND READ THROUGH ALL THE FILES.

MRS. SILVESTER: HOW COULD THE STATUTE OF LIMITATIONS --

THE COURT: I JUST EXPLAINED IT TO YOU.

MRS. SILVESTER: BUT SINCE IT'S AN ONGOING NUISANCE AND THE STATUTE OF LIMITATIONS -- DAILY WE ARE BEING --

THE COURT: WELL, I SUGGEST YOU GET A LAWYER THIS TIME AND FILE ANOTHER LAWSUIT IF YOU THINK YOU HAVE AN ONGOING NUISANCE.

MRS. SILVESTER: WELL, SIR, I DON'T THINK IT SHOULD BE THAT WE SHOULD HAVE TO GET A LAWYER.

THE COURT: MRS. SILVESTER, LET ME SAY SOMETHING. WE'VE ALREADY HAD NUMEROUS CONVERSATIONS ON THIS CASE. IF YOU DON'T WANT TO HIRE A LAWYER, THAT'S FINE. BUT LET ME TELL YOU WHAT ABRAHAM LINCOLN SAID ONE TIME. A MAN WHO REPRESENTS HIMSELF HAS A FOOL FOR A LAWYER. THAT WAS IN MY DADDY'S LAW OFFICE WHEN I WAS A KID. IT'S GREAT ADVICE. BUT IF YOU DON'T WANT TO HIRE A LAWYER, THAT'S FINE. THAT'S YOUR BUSINESS. IF YOU PAY YOUR SEVENTY BUCKS YOU CAN COME OVER HERE AND PLAY THIS GAME JUST LIKE EVERYBODY ELSE.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FOR THE FIFTH JUDICIAL CIRCUIT**
THOMAS J. AND CAROLYN SILVESTER,	)	**CIVIL ACTION NO. 96-CP-40-** 96CP401280
Plaintiffs,	)	
vs.	)	**COMPLAINT** **(Jury Trial Demanded)**
SPRING VALLEY COUNTRY CLUB,	)	
Defendant.	)	

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.

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_____, 1996.

Certificate of Counsel

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 2, 2014

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Certificate of Counsel

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 6, 2014

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

G. Thomas Cooper, Fifth Judicial Circuit Judge

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

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

v.

SPRING VALLEY COUNTRY CLUB. . . . . Respondent

PROOF OF SERVICE

This is to certify that I, Carolyn Silvester, one of the Appellants pro se, have this day caused to be served upon the counsel of record named below the RECORD ON Appeal by placing a copy of same in the United States Mail, postage prepaid.

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May 6, 2014