THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

75192

Case No. 96-CP-40-1230

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

v.

Spring Valley Country Club . . . . . Respondent.

PETITION FOR REHEARING OF RESPONDENT SPRING VALLEY COUNTRY CLUB

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

ATTORNEYS FOR RESPONDENT
SPRING VALLEY COUNTRY CLUB

Respondent Spring Valley Country Club ("Spring Valley" or "Respondent"), pursuant to Rules 219 and 221 of the South Carolina Appellate Court Rules, requests that this Honorable Court grant a rehearing in this matter, and additionally requests that the hearing be conducted en banc. Appellant respectfully asserts that the issues set forth below warrant reconsideration by this Court.[1]

STANDARD FOR A PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR a properly drawn petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court." *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001); *see also* James A. Atkins, 16 S.C. JUR. APPEAL AND ERROR § 147 (2007). "The purpose of such a petition (for rehearing) is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

In applying the aforementioned concept of articulating points and issues which were "overlooked or misapprehended" the South Carolina Supreme Court has suggested that rehearing can be appropriate where the court issued a decision without keeping a material principle "fully in mind." *Green v. E.B. Gresham Co.*, 168 S.C. 395, 167 S.E. 659 (1933) (implying that decision by a court "unmindful" of legal principle, such as the availability of an affirmative defense, can be a candidate for rehearing).

[1] Respondent incorporates by reference its statement of facts and arguments set forth in its Final Brief on file with the Court.

STATEMENT OF THE CASE

Appellants filed this action nearly nineteen (19) years ago on April 11, 1996, alleging that water draining from Respondent's property encroached upon and damaged their property, and asserting trespass and nuisance causes of action. On June 17, 1998, the trial court granted Respondent's motion for summary judgment. Pursuant to Appellants' first appeal, this Court issued an opinion in 2001 affirming in part and reversing in part the trial court's decision, and remanding the nuisance action alone back to the Richland County Court of Common Pleas. S*ee Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001).

Following the February 12, 2001 remand, Appellants did not pursue or advance the case in any way for more than twelve (12) years. In April 2013, Appellants contacted the Richland County Court of Common Pleas to inquire of the status of the case. A Status Conference was held with Chief Administrative Judge L. Casey Manning on April 17, 2013, attended by the *pro se* Appellants and counsel for Respondent. Thereafter, Respondent filed a Rule 41(b), SCRCP motion to dismiss for failure to prosecute. That motion was heard on August 5, 2013. The trial court granted Respondent's motion and dismissed the action on August 6, 2013. Appellants filed their Notice of Appeal with this Court on September 3, 2013. On February 11, 2015, this Court reversed the decision of the circuit court in a per curiam, unpublished opinion.

Respondent hereby petitions for rehearing of this Court's reversal of the trial court's order dismissing the case due to the Appellants' failure to prosecute this decades-old lawsuit.

GROUNDS FOR PETITION

For the reasons set forth below, Respondent Spring Valley respectfully contends the Court misapprehended, misconstrued, or overlooked the laws and rules regarding the duty of the Appellants to timely to prosecute their case in the trial court.

A. The Court Failed to Give Deference to the Circuit Court's Ruling and Did Not Utilize the Applicable Standard of Review

Because the Court ignored the customary deferential standard of review, rehearing is warranted in order to properly examine the issues through the lens of the applicable standard of review.

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

This Court has stated:

> In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment. On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); *see also McClurg v. Deaton*, 395 S.C. 85, 92, 716 S.E.2d 887, 890 (2011) (characterizing the abuse of discretion standard of review has been characterized as "deferential").

This Court's per curiam ruling of February 11, 2015 made no finding of any abuse of discretion by the trial court. Further, in reversing the circuit court's order, this Court essentially made its own findings of fact and failed to give deference to the circuit court, which is admittedly in a better position to assess the facts and law as presented by the parties.

B. In Light of Appellants' Duty to Prosecute Their Case, and Their Failure to Do So, the Court Erred in Reversing the Circuit Court's Order Dismissing Appellants' Lawsuit

Respondent Spring Valley submits that had the Court deferred to the circuit court, as required by the applicable standard of review, it would have determined that the circuit court was correct in dismissing Appellants' lawsuit.

Respondent further respectfully asserts this Court's ruling overlooked and misapprehended the fact that the ruling has the practical effect of absolving Appellants of their responsibility to prosecute their case, and further erred by basing such absolution upon Rule 40, SCRCP alone. The provisions cited by the Court in its unpublished opinion correctly note a clerk of court's clerical responsibility for placing a matter on the trial roster. However, this Court appears to have overlooked or misapprehended the equally significant, if not more important, mandate of Rule 41, SCRCP, which requires a plaintiff to prosecute its case. Certainly the spirit and intent of the South Carolina Rules

of Civil Procedure is that plaintiffs, not the clerk of court, are ultimately charged with an affirmative duty to prosecute their civil actions.

Rule 41 of the South Carolina Rules of Civil Procedure provides that a defendant may move for dismissal of an action against him for failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure or any order of the court. Rule 41(b), SCRCP. The plaintiff has the burden of prosecuting the action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with the cause. *McComas*, 368 S.C. at 62, 626 S.E.2d at 904 (citing *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983)).

Dismissal with prejudice is warranted where the plaintiff has been given an "abundant opportunity" to litigate and has exceeded the "limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties." *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990); *see also Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997) (although Rule 41 allows a trial judge to dismiss an action upon a motion for the other party's failure to prosecute, the judge has the inherent power to, *sua sponte*, dismiss actions for a party's failure to prosecute the relevant claims). In *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983), the appellant served a summons but did not serve a complaint until twenty (20) months after service of the summons. *Id.* at 60, 301 S.E.2d at 758. The Court held that the plaintiff "failed to . . . timely prosecute the case" by taking no action between the service of the summons and the service of the complaint some twenty months later. *Id.*

The *Shevey* Court also rejected the notion that the respondent-defendant was required to proactively demand a complaint from the appellant:

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

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

As the circuit court correctly noted in its ruling, Appellants' status as *pro se* litigants does not exempt them from the requirement to monitor and prosecute their case and to adhere to the Rules of Civil Procedure. *See State v. Burton*, 356 S.C. 259, 266, 589 S.E.2d 6, 9, n.5 (2003) ("A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law."). Rather, "a party has a duty to monitor the progress of his case." *Goodson v. Am. Bankers Ins. Co. of Florida*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). "Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Id.*

Furthermore, the Appellants' status as *pro se* litigants does not relieve Appellants of their duty to inquire about or timely prosecute their case, which at times includes requesting a status report or hearing before the court. Certainly, an attorney admitted to practice before this Court would find it quite onerous, if not impossible, to convince the Court that his failure to prosecute, or even inquire about, a pending case for over twelve (12) years is to be excused, simply because of a clerk of court's oversight in failing to place the case on a trial roster. As courts have long recognized, the rules of court are not

suspended for plaintiffs who have chosen to proceed *pro se*, particularly when to do so places the defendants at an unjustifiable and undeserved disadvantage.

While it is a clerk of court's responsibility to manage the clerical entries on the jury roster pursuant to Rule 40, SCRCP, the Appellants as the plaintiffs-litigants had an absolute *duty* pursuant to Rule 41, SCRCP, to move this action forward and, at a minimum, to inquire about the status of the case at some point prior to 2013, over twelve (12) years after the remand of the case. Instead, Appellants allowed their case to remain completely dormant, and took no action to inquire of the court or counsel, to resolve this matter, or to prosecute the case and bring it to trial. Appellants did not communicate with the clerk or court, they did not communicate with opposing counsel, and they did not submit any correspondence or discovery that would indicate any intent to pursue this matter for over twelve (12) years. Rule 40, SCRCP addresses the role of a clerk of court in placing matters on the trial roster. However, it does not, and must not be construed to allow plaintiffs, whether *pro se* or represented by counsel, to abandon or disregard their duty to timely prosecute a matter. This Court erred in misconstruing the nature and gravity of Appellants' responsibility in this regard.

Appellants' longstanding and unexplained failure to prosecute their case for over twelve (12) years places the respondent Spring Valley in a significantly prejudiced position The allegations set forth in the Appellants' 1996 Complaint concern events that occurred in 1992. If this Court's reversal stands, Respondent Spring Valley will be required to reconstruct and defend allegations concerning events relating to the condition of real property and water drainage issues which are alleged to have occurred more than twenty (20) years ago. Appellants' complete inaction on this case for more than twelve

(12) years is neither simple oversight, error, nor misunderstanding. Rather, it is clearly dilatory. In light of the years of inactivity in this case and Appellants' lack of justification for it, dismissal is the only effective sanction.[2]

Respectfully, Respondent asserts the Court erred in misconstruing the nature and gravity of Appellants' duty to prosecute their case, and in reversing the order of the circuit court, which was in a better position to determine the issues at hand.

CONCLUSION

Based on the foregoing arguments, Respondent respectfully requests this Court grant its Petition for Rehearing and reconsider its decision en banc, or in the alternative, pursuant to oral argument as per the provisions of the South Carolina Appellate Court Rules.

Respectfully submitted,

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

ATTORNEYS FOR RESPONDENT
SPRING VALLEY COUNTRY CLUB

February 26, 2015

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

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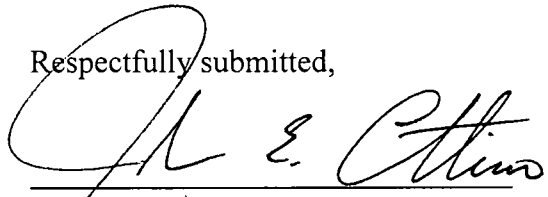

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Court of Appeals Case No.: 2013-001869

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v.

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that Petition for Rehearing of Respondent Spring Valley Country Club complies with Rule 211(b), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings."

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
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PROOF OF SERVICE

I certify that on February 26, 2015, I served a copy of Petition for Rehearing of Respondent Spring Valley Country Club, Proof of Service and Certificate of Counsel by United States mail, postage prepaid to the following:

Tom and Carolyn Silvester
12 Glenlake Road
Columbia, SC 29223

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
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SPRING VALLEY COUNTRY CLUB

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

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

February 26, 2015

VIA HAND DELIVERY

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 six (6) copies of Petition for Rehearing of Respondent Spring Valley Country Club's, Certification of Counsel and Proof of Service. Also enclosed is the $25.00 filing fee. 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/kle
Enclosures
cc: Thomas J. and Carolyn Silvester