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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Court of Appeals Case No.: 2013-001869

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Thomas J. and Carolyn Silvester, . . . . . Respondents

v.

Spring Valley Country Club . . . . . .Petitioner,

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**APPENDIX**

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Thaoms J. and Carolyn Silvester
12 Glenlake Road
Columbia, South Carolina 29202
803-736-0715
RESPONDENTS PRO SE

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 PETITIONER
SPRING VALLEY COUNTRY CLUB

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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 JUDICAL 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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Thomas J. and Carolyn Silvester
12 Glenlake Road
Columbia, South Carolina 29202
803-736-0715

*pro se*

May 26, 2014

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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 pursuant to Rule 41(b), SCRCP for failure to prosecute.

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).* 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. *(Hearing Transcript, p. 12)* Finally, in

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**RULES**

## 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) SCRCP 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 subpoened 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 (4th 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 (4th Cir. 1990).* See also *Herbert v Saffell, 877 F.2d 267, 270 (4th 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 <u>not</u> 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,

THOMAS J. SILVESTER
Thomas J. Silvester

Carolyn B. Silvester
Carolyn B. Silvester
Thomas J. and Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715

pro se

Columbia, SC
May 26, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

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South Carolina Appeals Case No. 2013-001869

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

v.

SPRING VALLEY COUNTRY CLUB. . . . . .Respondent

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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:

John E. Cuttino
GALLIVAN, WHITE & BOYD
1201 Main Street, Suite 1200
Columbia, South Carolina 29201

Carolyn B. Silvester
Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 20223
803-736-0715
Appellant Pro Se

May 26, 2014

## CERTIFICATE OF COUNSEL IN FINAL REPLY BRIEF

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

G. Thomas Cooper, Fifth Judical Circuit Judge

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Case No: 96-CP-40-1230
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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 Reply Brief complies with Rule 210(b), and SCACR

Carolyn B. Silvester

Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715
Appellant Pro Se

May 26, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Case No. 96-CP-40-1230

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Thomas J. and Carolyn Silvester, Appellants,

v.

Spring Valley Country Club, Respondent.

---

FINAL BRIEF OF RESPONDENT SPRING VALLEY COUNTRY CLUB

---

John E. Cuttino (S. C. Bar No. 1519)
Jessica A. Wilder (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

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**Rules**

## STATEMENT OF ISSUE ON APPEAL

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

## INTRODUCTION

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

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

## STATEMENT OF THE CASE

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

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

## STATEMENT OF FACTS

Appellants filed the Complaint nearly eighteen (18) years ago, on April 11, 1996, alleging the construction of a draining system in 1992 damaged their property. (R. pp. 46-52). Following Appellants' first appeal, the case was remanded to the circuit court on February 12, 2001. Thereafter, no action was taken by the Appellants for more than twelve years. (R. pp. 24-25). In April of 2013, Respondent's attorney John E. Cuttino received a phone call from Judge Manning's law clerk, indicating that Appellants had called the court inquiring into the status of their case. (R. p. 25, lines 12-15). Thereafter, the parties met with Judge Manning, who in view of the unusual circumstances of the case and the advanced age of the matter, gave the parties four months to attempt to reach a resolution. (R. p. 25, lines 16-22).

Unable to reach a resolution, Respondent either filed a motion to dismiss pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure. (R. p. 10). The hearing was held on August 5, 2013. Appellants attempted to argue the merits of the underlying case, as opposed to the narrow issue before the court concerning their over twelve year delay in prosecuting the case. (R. pp. 30-38). After hearing the parties' arguments, the trial court ruled:

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

That's the only way the courts can operate in a – as I say, in a consistent and orderly fashion.

So I'm going to ask Mr. Cuttino to prepare me an order to dismiss this case.

(R. p. 41, lines 7-21). The written order dismissing the case was filed on August 6, 2013. (R. pp. 7-9).

## ARGUMENT

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

#### A. Standard of Review

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

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

Rule 41 of the South Carolina Rules of Civil Procedure provides that a defendant may move for dismissal of an action against him for failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure or any order of the court. Rule 41(b), SCRCP. The plaintiff has the burden of prosecuting her action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with her cause. *McComas*, 368 S.C. at 62, 626 S.E.2d at 904 (citing *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983)). Dismissal with prejudice is warranted where the plaintiff has been given an "abundant opportunity" to litigate and has exceeded the "limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties." *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990); *see also Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997) (although Rule 41 allows a trial judge to dismiss an action upon a motion for the other party's failure to prosecute, the judge has the inherent power to, *sua sponte*, dismiss actions for a party's failure to prosecute the relevant claims). The United States Fourth Circuit Court of Appeals has indicated the trial court should consider the following factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990).

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

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSION

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

Respectfully submitted,

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

ATTORNEYS FOR RESPONDENT
SPRING VALLEY COUNTRY CLUB

May 22, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Case No. 96-CP-40-1230

Court of Appeals Case No.: 2013-001869

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

v.

Spring Valley Country Club . . . . . Respondent,

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**CERTIFICATE OF COUNSEL**

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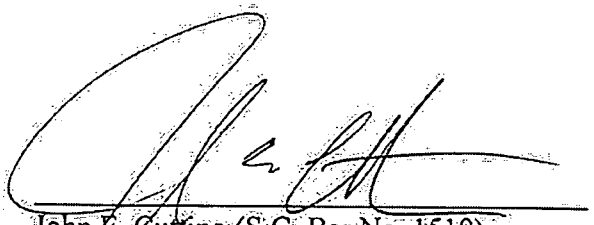
The undersigned counsel hereby certifies that Respondent's Final Brief complies with Rule 211(b), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings."



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
Telephone: (803) 779-1833
Facsimile: (803) 779-1767

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May 22, 2014

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**PROOF OF SERVICE**

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I certify that on May 21, 2014, I served a copy of Respondent's Final Brief 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

Columbia, South Carolina
May 22, 2014

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

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

v.

SPRING VALLEY COUNTRY CLUB . . . . . Respondent.

---

# FINAL REPLY BRIEF OF APPELLANTS THOMAS J. AND CAROLYN SILVESTER

---

Thomas J. and Carolyn Silvester
12 Glenlake Road
Columbia, South Carolina 29202
803-736-0715

*pro se*

May 26, 2014

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## TABLE OF AUTHORITIES

## STATEMENT OF THE FACTS

Ever since the Appellants filed their original Complaint against Spring Valley Country Club (SVCC). SVCC's attorneys have done everything in their power to keep this case from reaching trial. The original case was dismissed by the lower court and the Appellants appealed the dismissal. The Court of Appeals issued its Opinion No. 3297 reversing the Lower Court's Decision as to the continuing 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).* The Appellants gave the Court until early March, 2013 to set their case up for trial, at which time they called the court to ask why the trial date had not been set. At that time Judge Manning gave the Appellants and Respondents four months time to attempt to reach a resolution, or to set the case up for trial. The Respondents refused to try to resolve the case, and instead filed a Motion to Dismiss.

During the twelve years the lower court had to set this case up for trial the respondents never tried to settle the case even though the case had been remanded back to the lower court by The South Carolina Court of Appeals as to the continuing nuisance cause of action. *Silvester vs Spring Valley Country Club, 344 S.C. 280, 542 S.E. 2d 563 (Ct/ App. 2001).* They knew the charges were pending and the continuing nuisance damages which were abatable and were continuing.

The appellants realize that the narrow issue before the court is (1) What responsibility the lower court had to schedule a case remanded back to them by the South Carolina Court of Appeals and affirmed by the South Carolina Supreme Court, (2) Should the case be set up for trial.

## ARGUMENT

**I. The Trial Court Did Abuse Its Discretion In Dismissing This Action. Rule 41 (b) of The South Carolina Rules Of Civil Procedure Does not Apply To This Case. The Appellants Did Not Fail To Prosecute. They Were Never Given A Chance To Prosecute Because The Case Was Never Called To Trial.**

Rule 41(b), SCRCP does not apply to this case because Rule 41(b), SCRCP does not address a case that was never scheduled for trial. All the cases cited by the Respondents, had been set for trial and the cases were dismissed because of failure of one of the parties to either show up for trial, or meet a requirement of the court timely. This was not the case with the appellants. They spent months appealing their case and met every requirement for a successful appeal. It was ironic that even after The South Carolina Court of Appeals remanded the case back to the court, the lower court, without ever even setting it up for trial, dismissed it. This was an abuse of discretion. Just as the appellant in *Sabrina McComas, v. Chris Ross, 368 S.C. 50, 626 S.E.2d 902 (Ct App. 2006)* the Appellants had put a lot of effort in their case with their appeal and their case should be remanded back to the court for the second time. Also under the facts of this case, dismissal was too harsh a sanction just as in *Sabrina McComas, v. Chris Ross, 368 S.C. 50, 626 S.E.2d 902 (Ct App. 2006)*

Even if Rule 41 (b) SCRCP did apply to this case, an appellate court should reverse the trial's court's decision because of an abuse of discretion and dismissal of case being too harsh a punishment.

## II. The Trial Court did Err in Dismissing Appellants" Action for Failure to Prosecute

While the respondents statement that "Appellants' status as pro se litigants does not absolve them of the requirement to monitor and prosecute their case and to adhere to the Rules of Civil procedure," is accurate in cases that have been set for trial, but a case has to be set up for trial before it can be monitored or prosecuted. The respondents did not cite a Rule or case that said it was the responsibility of a pro se appellant to call the court and ask for their case to be scheduled for trial, especially one that had been remanded back by the South Carolina Court of Appeals, The Appellants assumed the court would obey the South Carolina Court of Appeals more so than obeying the appellants. Contrary to the respondents' accusations, the appellants complied with substantive and procedural requirements of the law as evidenced by their first appeal and the case being remanded back to the lower court.

"Abundant opportunity" was not given to the appellants to litigate. The case not being scheduled prolonged the case unnecessarily, not the appellants. All of the cases cited and Rule 41 (b) SCRCP were analyzed and interpreted incorrectly by the respondent and lower court..

In rebuttal to the respondent's statement," The *Shevey* Court also rejected the notion that the respondent-defendant was required to proactively demand a complaint from the appellant;" Don Shevey & Spires, Inc v. Am Motors Realty Corp. 279 S.C. 58, 301 S.E. 2d 757 (1983)

> "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.*"

Ld. 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)

The defendant should not complain about any prejudice caused them because they had the right to press for trial and maybe should have. The respondents had this case pending against them, and they should have remained ready to defend themselves until case was cleared. They knew the case had not been set for trial. They knew every time it rained, they were creating a nuisance for the appellants. This is a situation where Rule 41 (b) of the South Carolina Rules of Civil Procedure does ***NOT*** address. The trial court abused its discretion and this case should not be dismissed but set for trial.

## 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 Respondents Initial Brief and in the Order to Dismiss are not applicable in the way the respondents applied them 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 is a clear abuse of discretion and is a harsh sanction, considering the amount of time and effort expended by the appellants trying to get this case prosecuted. Based on the aforementioned, appellants respectfully request that the judgment of the lower court should be reversed and this case set up for trial as The South Carolina Court of Appeals ordered and The South Carolina Supreme Court affirmed.

Respectfully submitted,

THOMAS J. SILVESTER
Thomas J. Silvester

Carolyn B. Silvester
Carolyn B. Silvester
Thomas J. and Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715

pro se

Columbia, SC
May 26, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

G. Thomas Cooper, Fifth Judical Circuit Judge

---

Case No: 96-CP-40-1230

South Carolina Appeals Case No. 2013-001869

---

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

v.

SPRING VALLEY COUNTRY CLUB.....Respondent

---

PROOF OF SERVICE

---

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:

John E. Cuttino
GALLIVAN, WHITE & BOYD
1201 Main Street, Suite 1200
Columbia, South Carolina 29201

Carolyn B. Silvester

Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 20223
803-736-0715
Appellant Pro Se

May 26, 2014

**CERTIFICATE OF COUNSEL IN FINAL REPLY BRIEF**

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

G. Thomas Cooper, Fifth Judical 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

---

CERTIFICATE OF COUNSEL

---

The undersigned certifies that this Final Reply Brief complies with Rule 210(b), and SCACR

Carolyn B. Silvester

Carolyn B. Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715
Appellant Pro Se

May 26, 2014

**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

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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**

---

Thomas J. and Carolyn Silvester
12 Glenlake Road
Columbia, South Carolina 29202
803-736-0715
*Appellants pro se*

John E. Cuttino
Jessica A. Waller
GALLIVAN, WHITE & BOYD, P.A.
1201 Main Street, Suite 1200
Columbia, SC 29201
Telephone 803- 779-1833
Facsimile 803-779-1767
Attorneys for Respondent
Spring Valley Country Club

## INDEX

**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

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**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).



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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

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

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, | ) | |
| | ) | **ORDER GRANTING DISMISSAL** |
| Plaintiffs, | ) | **PURSUANT TO RULE 41(b), SCRCP** |
| | ) | |
| v. | ) | |
| | ) | |
| Spring Valley Country Club, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

RICHLAND COUNTY FILED
2013 AUG -6 PM 3:24
JEANETTE W. McBRIDE C.C.P. & G.S.

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

GTC

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

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

5/28/13

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|---|---|---|
| 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: _____

John E. Cuttino, Attorney
Joshua D. Shaw, Attorney
1901 Main Street, 17th Floor (29201)
Post Office Box 1473
Columbia, South Carolina 29202
(803) 254-2200
Email: jcuttino@turnerpadget.com
Email: jshaw@turnerpadget.com

ATTORNEYS FOR DEFENDANT
SPRING VALLEY COUNTRY CLUB

Columbia, South Carolina
May 28, 2013

10

| | | |
|---|---|---|
| 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

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.

By: _____

John E. Cuttino
Joshua D. Shaw
1901 Main Street, 17th Floor (29201)
Post Office Box 1473
Columbia, South Carolina 29202
(803) 254-2200
Email: jcuttino@turnerpadget.com
Email: jshaw@turnerpadget.com

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
(803) 736-0715

Pro Se Plaintiffs

July 30, 2013

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | COURT OF COMMON PLEAS |
| County of Richland | ) | 1996-CP-40-1230 |
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| | ) | |
| 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

# CONTENTS

## 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-** 96CP4001280 |
| **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.

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

Columbia, South Carolina
_____, 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

Carolyn Silvester

Carolyn Silvester
12 Glenlake Road
Columbia, SC 29223
803-736-0715
One of the pro se Appellants

# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 11, 2015

Thomas J. Silvester
12 Glenlake Road
Columbia SC 29223

Carolyn B. Silvester
12 Glenlake Road
Columbia SC 29223

Mr. John Edward Cuttino, Esquire
PO Box 7368
Columbia SC 29202

Ms. Jessica Ann Waller, Esquire
1201 Main St.
Suite 1200
Columbia SC 29201

Re: Thomas J. Silvester v. Spring Valley Country Club
Appellate Case No. 2013-001869

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny Abbott Kitchings

CLERK

cc: The Honorable Gordon G. Cooper

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Thomas J. Silvester and Carolyn Silvester, Appellants,

v.

Spring Valley Country Club, Respondent.

Appellate Case No. 2013-001869

---

Appeal From Richland County
G. Thomas Cooper, Circuit Court Judge

---

Unpublished Opinion No. 2015-UP-072
Submitted November 1, 2014 – Filed February 11, 2015

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**REVERSED**

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

Jessica Ann Waller and John Edward Cuttino, both of Gallivan, White & Boyd, PA, of Columbia, for Respondent.

---

**PER CURIAM:** Thomas and Carolyn Silvester (the Silvesters) appealed the circuit court's dismissal of their case under Rule 41(b), SCRCP, for failure to prosecute. We find the clerk of court failed to transfer the case to the jury trial

roster, and accordingly, the circuit court erred in dismissing the case for failure to prosecute. *See* Rule 40(b), SCRCP ("The clerk initially shall place all cases in which a jury has been requested on the General Docket. A case may not be called for trial until it has been transferred to the Jury Trial Roster. . . ."); Rule 40(f), SCRCP ("The clerk shall review the General Docket and shall transfer to the Jury Trial Roster all cases which have remained on the General Docket for 12 months and in which the court has not entered a Scheduling Order setting the date when the case is to be transferred to the Jury Trial Roster or in which there is no pending motion for a Scheduling Order in the file. The clerk shall notify counsel of record of the transfer, but publication of the Jury Trial Roster also shall be deemed notice of the automatic transfer.").

**REVERSED.**[1]

**WILLIAMS, GEATHERS, and McDONALD, JJ., concur.**

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Case No. 96-CP-40-1230

---

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

v.

Spring Valley Country Club . . . . . Respondent.

---

# 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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## CONCLUSION

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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, Circuit Court Judge

---

Case No. 96-CP-40-1230

Court of Appeals Case No.: 2013-001869

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

v.

Spring Valley Country Club. . . . . Respondent,

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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
Telephone: (803) 779-1833
Facsimile: (803) 779-1767

ATTORNEYS FOR RESPONDENT SPRING VALLEY COUNTRY CLUB

February 26, 2015

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,

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**PROOF OF SERVICE**

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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
Facsimile: (803) 779-1767

ATTORNEYS FOR RESPONDENT
SPRING VALLEY COUNTRY CLUB

February 26, 2015

# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 30, 2015

Mr. John Edward Cuttino, Esquire
PO Box 7368
Columbia SC 29202

Ms. Jessica Ann Waller, Esquire
1201 Main St.
Suite 1200
Columbia SC 29201

Re: Thomas J. Silvester v. Spring Valley Country Club
Appellate Case No. 2013-001869

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Thomas J. Silvester
Carolyn B. Silvester
The Honorable Gordon G. Cooper

# The South Carolina Court of Appeals

Thomas J. Silvester and Carolyn Silvester, Appellants,

v.

Spring Valley Country Club, Respondent.

Appellate Case No. 2013-001869

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ORDER

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After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Thomas J. Silvester
Carolyn B. Silvester
John Edward Cuttino, Esquire

FILED
April 30, 2015

Jessica Ann Waller, Esquire
The Honorable Gordon G. Cooper