THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Court of Appeals Case No.: 2013-001869

Thomas J. and Carolyn Silvester, ... Respondents

v.

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

PETITION FOR WRIT OF CERTIORARI
OF PETITIONER SPRING VALLEY COUNTRY CLUB

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SPRING VALLEY COUNTRY CLUB

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CERTIFICATE OF COUNSEL

Counsel for Petitioner, Spring Valley Country Club, certifies that the Petition for Rehearing was made on February 26, 2015 and finally decided and ruled upon by the Court of Appeals on April 30, 2015.

QUESTION PRESENTED

I. DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT'S ORDER DISMISSING RESPONDENTS' CASE PURSUANT TO RULE 41(b), SCRCP, FOR FAILURE TO PROSECUTE IN LIGHT OF RESPONDENTS' FAILURE TO TAKE ACTION TOWARDS PROSECUTION OF THEIR CASE FOR MORE THAN TWELVE YEARS?

STATEMENT OF THE CASE

Respondents filed this action on April 11, 1996 in the Richland Court of Common Pleas in 1996, alleging damage to their property as a result of water draining from Petitioner's adjacent property. Petitioner's motion for summary judgment was granted by the Circuit Court on June 17, 1998. Pursuant to Respondents' first appeal, the Court of Appeals issued an opinion in 2001 which affirmed in part and reversed in part the grant of summary judgment and remanded the case back to Circuit Court. *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 to Circuit Court, Respondents failed to take action regarding this matter for twelve (12) years and there was no activity in the case. In March of 2013, Respondents contacted the Circuit Court to inquire about the status of their case. A status conference was held with the Chief Administrative Judge of the Fifth Judicial Circuit on April 17, 2013. Thereafter, Petitioner filed a motion to dismiss pursuant to Rule 41(b), SCRCP,

for failure to prosecute. The motion was heard on August 5, 2013 and the Circuit Court granted Petitioner's motion and dismissed the action on August 6, 2013.

Respondents filed a Notice of Appeal with the Court of Appeals on September 3, 2013. On February 11, 2014, without oral argument, the Court of Appeals issued a half-page, unpublished, *per curiam* opinion reversing the action based upon Rule 40, SCRCP. Petitioner timely filed a Petition for Rehearing *En Banc* on February 26, 2015. The Court of Appeals denied the Petition for Rehearing by Order of April 30, 2015.

STATEMENT OF THE FACTS

Respondents filed the Complaint nearly eighteen (18) years ago, on April 11, 1996, alleging the construction of a draining system in 1992 on Petitioner's property damaged their property. (R. pp. 46-52). Following Respondents' first appeal, the case was remanded to the Circuit Court on February 12, 2001. Thereafter, no action was taken by the Respondents for more than twelve (12) years. (R. pp. 24-25). In April of 2013, Petitioner's attorney received a phone call from the Chief Administrative Judge's law clerk, indicating that Respondents had called the court inquiring into the status of their case. (R. p. 25, lines 12-15). Thereafter, the parties met with the Chief Administrative Judge 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, Petitioner filed a motion to dismiss pursuant to Rule 41(b), SCRCP. (R. p. 10). The hearing was held on August 5, 2013. Respondents attempted to argue the merits of the underlying case, as opposed to the narrow issue before the Circuit Court

concerning their over twelve (12) year delay in prosecuting the case. (R. pp. 30-38). After hearing the parties' arguments, the Circuit 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

Pursuant to Rule 242, SCACR, Petitioner respectfully moves for a Writ of Certiorari and for this Court to review and reverse Court of Appeals Opinion No. 2014-UP-072. The Court of Appeals erroneously reversed the Circuit Court's grant of Petitioner's motion to dismiss and, in doing so, conducted a *de novo* review of the Circuit Court's findings, which were supported by the evidence and Respondents' blatant lack of prosecution. The Court of Appeals Opinion conflicts with existing precedent, and in the brief analysis undertaken, creates novel issues for which no precedent exists. The Court of Appeals' analysis is fundamentally flawed and in contravention to principles of judicial efficiency and finality, and this Court should review the issues and reverse.

I. The Court of Appeals Erred in Reversing the Circuit Court's Order Dismissing Respondents' Case Pursuant to Rule 41(b), SCRCP, For Failure to Prosecute in Light of Respondents' Failure to Take Action Towards Prosecution of Their Case For More Than Twelve Years.

In reversing the Circuit Court's grant of Petitioner's motion to dismiss for failure to prosecute, the Court of Appeals deviated from binding precedent regarding the applicable standard of review and the necessarily utilization of Rule 41(b), SCRCP in circumstances that clearly warrant its application. Thus, for the reasons set forth below, the Court of Appeals erred in reversing the Circuit Court's order dismissing Respondents' case and Petitioner's Petition for Writ of Certiorari should be granted.

A. The Court of Appeals Opinion Conflicts with Binding Precedent Concerning Rule 41, SCRCP Dismissal for Lack of Prosecution and the Standard of Review Applicable Thereto.

"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).

Our appellate courts have 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").

The Court of Appeals's *per curiam* ruling of February 11, 2015 made no finding of any abuse of discretion by the Circuit Court. Further, in reversing the Circuit Court's order in the unpublished opinion, the Court of Appeals 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. Thus, the Court of Appeals erred in contradiction to well-established precedent regarding the standard of review to be applied in reviewing an order granting a Rule 41, SCRCP, motion.

B. In light of Respondents' Duty to Prosecute this Action, and Their Failure to Do So For Over Twelve Years, the Court of Appeals Erred in Reversing the Circuit Court's Order Dismissing Respondents' Case Pursuant to Rule 41(b), SCRCP.

Respectfully, Petitioner submits that had the Court of Appeals deferred to the Circuit Court as required by the applicable standard of review, and deferred to prior court precedent regarding Rule 41, SCRCP, it would have determined that the Circuit Court did not abuse its discretion in dismissing Respondents' lawsuit after twelve (12) years of inactivity.

Rule 41, SCRCP, 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, Respondents' 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.*

Here, Respondents failed to take any actions with respect to their case for over twelve (12) 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 Respondents' inexcusable delay of over a decade. Furthermore, the Court of Appeals ignored the purpose of Rule 41, SCRCP—to promote judicial efficiency and finality. If the Court of Appeals reversal stands, Petitioner, and all litigants who would find themselves in a similar situation, 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. Respondents' complete inaction on this case for more than twelve (12) years was neither simple oversight, error, nor misunderstanding—it was dilatory. In light of the years of unjustified inactivity in this case, and the purpose of Rule 41, SCRCP, dismissal is the only effective sanction.

The Court of Appeals opinion contradicts *Shevey* and other precedent regarding the purpose of Rule 41, SCRCP, and its mandate of dismissal for woefully untimely failures to prosecute in light of a clear duty to do so.

Furthermore, in summarily reversing the Circuit Court, the Court of Appeals created a novel issue of law, essentially ignoring longstanding precedent and holding that clerical errors of a clerk of court relieve litigants from their duties to prosecute their case. Respondents' status as *pro se* litigants does not relieve Respondents of their duty to inquire about or timely prosecute

their case, which at times includes actively monitoring their case and following up with the clerk of court. While it is a clerk of court's responsibility to manage the clerical entries on the jury roster pursuant to Rule 40, SCRCP, Respondents', 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. Respondents 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. Petitioner submits that 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.

Rule 40, SCRCP, addresses the role of a clerk of court in placing matters on the trial roster. It does not, as the Court of Appeals opinion holds, permit plaintiffs, whether *pro se* or represented by counsel, to abandon their responsibility to timely prosecute a matter. The Court of Appeals created new law and erred in misconstruing the rules and the gravity of plaintiff-litigants' duty in this regard.

CONCLUSION

The findings and conclusions in the Court of Appeals unpublished opinion should be reviewed by this Court. The Court of Appeals deviated from binding precedent and essentially created novel issues of law. Petitioner therefore respectfully requests that this Court grant the

relief sought herein, inquire further into these matters, and ultimately reverse the Court of Appeals and reinstate the Circuit Court's grant of Petitioner's motion to dismiss for lack of prosecution.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER SPRING VALLEY COUNTRY CLUB

May 27, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Court of Appeals Case No.: 2013-001869

Thomas J. and Carolyn Silvester, ... Respondents

v.

Spring Valley Country Club . . . . . Petitioner,

PROOF OF SERVICE

I certify that on May 27, 2015, I served a true and correct copy of *Petition for Writ of Certiorari of Petitioner Spring Valley Country Club and Appendix*, via Hand Delivery to the following:

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201
(Including Appendix)

I certify that on May 27, 2015, I served a true and correct copy of *Petition for Writ of Certiorari of Petitioner spring Valley Country Club*, by United States mail, postage prepaid to the following:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211
(Served Petition, Proof of Service and No Appendix)

Tom and Carolyn Silvester
12 Glenlake Road
Columbia, SC 29223
Pro Se Respondents
(Served Petition, Proof of Service and Appendix)

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May 27, 2015
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May 27, 2015

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
SUPREME COURT OF SOUTH CAROLINA
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

Re: *Thomas J. and Carolyn Silvester v. Spring Valley Country Club*
Richland Common Pleas Case No.: 1996-CP-40-01230
Court of Appeals Case No.: 2013-001869
GWB File No.: 8642-1

Dear Mr. Shearouse:

With reference to the above case, pursuant to Rule 242, SCACR, enclosed for filing please find the following documents:

1. One unbound, original and seven (7) bound copies of Petitioner's Petition for Writ of Certiorari;
2. One original and two (2) copies of the Proof of Service;
3. One unbound and one bound copy of the Appendix; and,
4. Firm check for $100.00 for the filing fee.

Please return a filed copy of the Petition for Writ of Certiorari and Certificate of Service to our awaiting runner. By copy of this correspondence, copies of the enclosed Petition, Certificate of Service, and Appendix are being served on Pro Se Respondents. By separate cover I am filing a copy of our Petition for Writ of Certiorari and Certificate of Service with the Court of Appeals.

Very truly yours,

Jessica Ann Waller
Direct Dial: 803-724-1722
E-Mail: jwaller@gwblawfirm.com

JAW/kle
Enclosures
cc: Thomas J. and Carolyn Silvester
The Honorable Jenny Abbot Kitchings (Petition and Certificate of Service, w/out Appendix, Via U.S. Mail)

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