

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JUL 07 2015

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Court of Appeals Case No.: 2013-001869

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Appellate Case No. 2015-001140

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

v.

Spring Valley Country Club ..... Petitioner,

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**PETITIONER'S REPLY TO RESPONDENTS' RETURN**

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John E. Cuttino (S.C. Bar No. 1519)  
Jessica A. Waller (S.C. Bar No. 100256)  
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ATTORNEYS FOR PETITIONER  
SPRING VALLEY COUNTRY CLUB

## ARGUMENT

### I. Petitioner Set Forth Appropriate Grounds for a Writ of Certiorari

Petitioner meets the necessary criteria for the grant of a writ of certiorari pursuant to Rule 242(b), SCACR. The Court of Appeals opinion erroneously applied a *de novo* review of the Circuit Court's findings, conflicts with existing precedent, and in the brief analysis undertaken, is fundamentally flawed while creating novel issues of law.

#### A. The Unpublished Court of Appeals Opinion Conflicts with Prior Precedent.

Despite Respondents' contention to the contrary, the unpublished, *per curiam* Court of Appeals opinion conflicts with prior precedent. It is well-settled that 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). The Court of Appeals made no finding of any abuse of discretion by the Circuit Court. Rather, in reversing the Circuit Court's order in the unpublished opinion, the Court of Appeals essentially made its own findings of fact and failed to give deference to the Circuit Court, which is in a far better position to assess the facts and law as presented by the parties.<sup>1</sup>

In their Return, Respondents continue to ignore controlling precedent and excuse themselves from the requirements of Rule 41, SCRCP. Despite Respondents' contention, Rule 40 does not alleviate Respondents from the duties of Rule 41, SCRCP. As discussed in the Petition, pursuant to 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

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<sup>1</sup> Respondents fail to address Petitioner's argument regarding the standard of review, and, as discussed more fully below, failed to comply with Rule 242, SCACR.

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)); *see also* *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (holding 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” (emphasis added)); *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).

Respondents' assertion that they were never given a chance to prosecute their case is baseless and their 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.”); *see also* *Goodson v. Am. Bankers Ins. Co. of Florida*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988) (holding “a party has a duty to monitor the progress of his case” and “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”).

Respondents failed to take any actions to bring their case to trial for over twelve (12) years. They cannot alleviate themselves of the responsibility to monitor and prosecute their case by relying on Rule 40, SCRPC. The Court of Appeals opinion

contradicts 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.

**B. The Unpublished Court of Appeals Opinion Created a Novel Issue of Law**

While Respondents contend Petitioner is trying to create novel issues of law, it was the Court of Appeals, in summarily reversing the Circuit Court, which created a novel issue of law in ruling that clerical errors of a clerk of court relieve litigants from their duties to prosecute their case. 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 during the twelve (12) years it was pending. Respondents contend they agonized over their case, yet 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 more than twelve (12) years. Rule 40, SCRCP, addresses the role of a clerk of court in placing matters on the trial roster. It does not 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.

**II. Respondents' Return Does Not Comply with Rule 242, SCACR.**

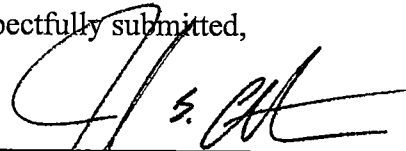
Respondents' conclusory allegations asserted in their Return do not comply with the requirements of Rule 242, SCACR. Rule 242(f) requires that the Return include an argument on each question presented in the Petition for Writ of Certiorari. In their two-page Return, Respondents fail to adequately address each point presented by Petitioner

and instead, present conclusory arguments which fail to adequately address the issues presented in the Petition and properly before this Court. Furthermore, Respondents completely fail to respond to Petitioner's argument concerning the standard of review. In addition to the substantive arguments asserted in the Petition and again in this Reply, Petitioner submits Respondents have failed to comply with Rule 242, SCACR. Petitioner requests that such failures be deemed lack of opposition to the Petition for Writ of Certiorari.

### 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 and in the Petition, 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,



John E. Cuttino (S.C. Bar No. 1519)  
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ATTORNEYS FOR PETITIONER SPRING  
VALLEY COUNTRY CLUB

July 6, 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

Appellate Case No. 2015-001140

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**PROOF OF SERVICE**

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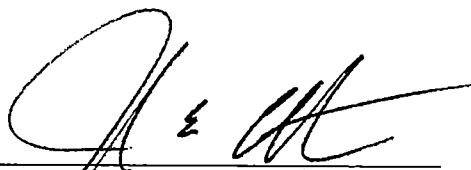
I certify that on July 6, 2015, I served a true and correct copy of **PETITIONER'S  
REPLY TO RESPONDENTS' RETURN**, via Hand Delivery to the following:

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

I certify that on July 6, 2015, I served a true and correct copy of **PETITIONER'S REPLY TO RESPONDENTS' RETURN**, 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

Tom and Carolyn Silvester  
12 Glenlake Road  
Columbia, SC 29223  
Pro Se Respondents



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ATTORNEYS FOR PETITIONER  
SPRING VALLEY COUNTRY CLUB

July 6, 2015  
Columbia, South Carolina



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

July 6, 2015

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The Honorable Daniel E. Shearouse  
SUPREME COURT OF SOUTH CAROLINA  
Supreme Court Building  
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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  
Appellate Case No. 2015-001140  
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 Reply to Respondents' Return;
2. One original and two (2) copies of the Proof of Service;

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

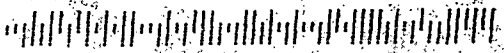
Very truly yours,

John E. Cuttino  
Direct Dial: 803-724-1714  
E-Mail: [jcuttino@gwblawfirm.com](mailto:jcuttino@gwblawfirm.com)

JEC/kle

Enclosures

cc: Thomas J. and Carolyn Silvester  
The Honorable Jenny Abbot



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07/06/2015

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