IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CA-00473

HARVEY DANIEL HASTY, MACK ARTHUR HASTY,
LOUIS GENE HASTY, HUGH ALLEN HASTY,
ROGER WAYNE HASTY, PLEZY LEON HASTY,
BEVERLY LORRAINE HASTY, TIMOTHY WAYNE HASTY,
Individually and as the Wrongful Death Beneficiaries of
ARTHUR I. HASTY
APPELLANTS

V.

YOSHINOBU NAMIHIRA, M. D., and
THE BETTER LIVING CLINIC--
ENDOSCOPY CENTER, P. A.
APPELLEES

AN APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

Oral Argument is Requested.

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INTRODUCTION

In the *Brief of Appellees* filed herein, very few points were made that were not fully addressed by the *Brief of Appellants*. The few issues raised by the *Brief of Appellees* which do warrant further discussion or clarification are set forth below.

1. Underlying basis for Trial Court's ruling

In the *Brief of Appellants,* the point was made that the Trial Court's Rule 41 dismissal of this case was the result of the Trial Court's erroneous belief, coming into the hearing, that the Plaintiffs were solely at fault and wholly without justification for their failure to respond to the subject Motion to Dismiss and in their delay in seeking relief from the dismissal. (*Brief of Appellant* at page 26) Further, Appellants made the point that it was clear from the Trial Court's tone that the Court was also under the impression that the Plaintiffs were attempting to shift blame for that delay to the Trial Court's Administrator. The one quote from the Trial Court's ruling that the Appellee chose to excerpt in the *Brief of Appellee* clearly shows the basis for Appellants' belief concerning the Trial Court's erroneous pre-conceptions about the facts. (See *Brief of Appellee* at page 3.) As is fully briefed in the *Brief of Appellants*, the Trial Court's Administrator testified at a later hearing and under oath she confirmed the very telephone conversations which gave rise to the Plaintiffs' counsel's misunderstanding about the procedural posture of the case. After that testimony - during the hearing on the Plaintiffs' Motion to Reconsider - the Trial Court's general demeanor changed significantly. Apparently, that change in demeanor was as a result of what appeared to be the Court's first realization --

after hearing his Court Administrator's testimony -- that the Plaintiffs' actually had justification for being in this procedural posture. We also believe that it was that new realization which resulted in reconsideration by the Trial Court of the wisdom of its earlier rulings and which resulted in the fact that the Trial Court held the Plaintiffs' Motion to Reconsider under advisement for a full year thereafter. As explained in the *Brief of Appellants*, that passage of a year was many times longer than any period of alleged "delay" for which the Trial Court had previously found fault with the Plaintiffs.

In the *Brief of Appellees*, the Appellees cite authority for the proposition that a party has no right to rely upon court personnel for advice on how to prosecute their case. In the *Brief of Appellants,* however, the Appellants made it clear that we are not claiming that we relied upon court personnel for advice on how to prosecute the case. We simply state that we relied upon the court personnel's representations concerning the procedural posture of the case. We then made our own decisions about how to prosecute the case based on the Court Administrator's representations concerning facts that were within her ability to discern, but not ours. Again, the Appellants have gone to great lengths to be clear that the erroneous information received from the Court Administrator--which the Court Administrator truthfully testified to in corroboration of Appellants' position--simply illustrates the reason for Appellants' failure to act during the proceedings below. The fact that the Appellants had a reason for their failure to act nullifies the Appellees' argument that the failure to act was contumacious in nature.

2. The Appellee's characterization of the year prior to dismissal

In the *Brief of Appellees*, counsel for Appellees attempts to summarize the early proceedings in this matter in a way so as to bootstrap the facts into concordance with the very difficult standard of "contumacious" conduct required by previous rulings of this Court as a

pre-requisite to default. (See *Brief of Appellees* at page 13.) The facts as summarily stated by the Appellees are misleading in that they fail to fully address the numerous reasons why a Scheduling Order was not entered and why an appearance was not immediately entered upon Substitution of Counsel. They also fail to fully characterize the correspondence between plaintiffs counsel and defense counsel concerning the scheduling of a deposition and a trial setting during the year prior to the Rule 41 dismissal. It is that one year period that the Appellees rely so heavily upon throughout their *Brief* as it came after the Trial Court's previous Rule 41 notice - the "loud warning" described by the Appellees at page 15 of their *Brief.* It is that warning that the Appellees wrongfully argue that the plaintiffs "stubbornly disobeyed."

To the contrary, the Appellants described each of those important procedural circumstances in the detail necessary for an accurate consideration of this matter in *Brief of Appellants* at pages 10 through 14. While brief summaries of facts can be tempting to adopt as opposed to long, detailed recitations thereof, this is a case where an incomplete summary such as the one the Appellees set forth in their *Brief*, drastically misrepresents the situation in a way that has a bearing on the outcome. The Appellants would submit that in light of the extreme sanction of dismissal with prejudice imposed by the Trial Court, a full consideration of the detailed treatment of the time periods in question, as is set forth in the *Brief of Appellants,* is in order. When so considered, these facts make it clear that to the extent the Trial Court sent the plaintiffs a warning, the plaintiffs had justification for the fact that the warning was sent in the first place and the plaintiffs then attempted during the following year to take steps to prosecute the case in spite of a lack of cooperation from defense counsel.

3. Contact with defense counsels' office concerning a deposition and trial setting

In the *Brief of Appellants*, the contact between plaintiffs' counsel and defense counsel concerning scheduling of a doctor's deposition and a trial during the year prior to the Rule 41 dismissal was discussed at length. While the Appellees attempt to characterize those exchanges as being a few letters and a phone call, the full extent of those contacts are accurately set forth in the *Brief of Appellants*. (See *Brief of Appellants* at pages 11-14.) The most telling fact on the subject of those communications to be taken from the *Brief of Appellees* is that the Appellees still do not deny defense counsel's direct representation to counsel for plaintiff that defense counsel had represented this doctor before and would speak to him concerning the scheduling of this deposition as he would have better luck with the doctor than plaintiffs' counsel would. The Appellees only go so far as to artfully state that "...Dr. Namihira's attorney never agreed to schedule the doctor's deposition..." (See Brief of Appellees at page 12; emphasis added) Never during the hearings held before the Trial Court or in the filings now before this Court has Defense Counsel denied making the representations described in the *Brief of Appellant* as referenced above. Appellees do, however, acknowledge receipt of three letters and at least one of the phone calls initiated by the plaintiffs' counsel concerning that deposition and a trial setting and yet Appellees can point to no response to any of those overtures.

Appellants concede that there were other means of forcing this issue in the face of a refusal by defense counsel to cooperate in any way. In fact, the August 11, 2004 letter from plaintiffs' counsel to defense counsel, which apparently prompted the Defendants to file the Motion to Dismiss in question, gave defense counsel a short final deadline and described the measures that the plaintiffs would be taking in the event defense counsel continued to be uncooperative. The Appellants therefore still strongly assert that under those circumstances,

where during most of the time period in question the other side was doing just enough to prevent extreme measures and eventually those extreme measures were initiated by plaintiffs, there is not sufficient justification for a finding of contumacious delay justifying dismissal of this case with prejudice.

4. Lack of prejudice

The fact that the Appellees did not even argue prejudice in their original Motion to Dismiss and only half-heartedly did so thereafter is fully briefed in *Brief of Appellants*. The best that Appellees offer in the *Brief of Appellees* filed herein is the suggestion that extreme prejudice justifying dismissal should be assumed from the passage of time. For reasons which already have been briefed in the *Brief of Appellants,* that unsupported assertion should not be seriously considered by this Court. Appellees also now claim that they would be prejudiced by the fact that there are nurses and other medical personnel involved in the underlying medical procedure who have not been deposed and who would no longer have memory of the procedure. However, the Appellees go on to re-state the very argument made by the Appellants in the *Brief of Appellants* - that any such fact witnesses would be expected to testify solely on the basis of notes contemporaneously set forth on written medical charts and not from their direct memory. The Appellees state it this way: "Even with written entries in the record, most medical personnel have no independent recollection of patients, even one year later." (See *Brief of Appellees* at page 15.) Each of the wrongful-death beneficiary Plaintiffs was deposed by the Defendants. The Defendant physician was deposed by the Plaintiffs. Any other potential fact witnesses referred to by Appellees would not be testifying from specific recollection even if their depositions were being taken in the first year or two following the incident, as is routinely the case in litigation such as this.

The Appellees have never articulated any true prejudice that they would have suffered if this matter would have been allowed to proceed. To the extent they ever could articulate any prejudice at all, that prejudice would pale in comparison to the ultimate sanction of dismissal with prejudice which has been imposed upon the Plaintiffs/Appellants.

CONCLUSION

For all the reasons set forth herein and in the *Brief of Appellants*, this Court should reverse the judgment of the Circuit Court of Warren County, Mississippi, granting the Defendants' Motion to Dismiss for Failure to Prosecute, reverse its Order denying the Plaintiffs' Motion to Set Aside Rule 41 Dismissal, reverse its Order denying the Plaintiffs' Motion for Relief from Judgment and/or Alternatively Motion to Reconsider and thereby reinstate Plaintiffs' claims on the active docket of the Trial Court for trial on the merits of this matter.

Respectfully submitted, this the 30th day of April 2007.

HARVEY DANIEL HASTY, et al.

By: _____
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CERTIFICATE OF SERVICE

I, Tim Waycaster, attorney for Appellants Harvey Louis Hasty, et al., certify that I have this day forwarded via United States mail, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS** to the following counsel at the indicated address:

R. E. Parker, Jr.
Clifford C. Whitney III
VARNER, PARKER & SESSUMS, P.C.
Post Office Box 1237
Vicksburg, Mississippi 39181-1237

SO CERTIFIED, this, the 30th day of April 2007.

Tim Waycaster

CERTIFICATE OF FILING

I, Tim Waycaster, Attorney of Record for Appellants LOUIS DANIEL HASTY, ET AL., do hereby certify that I have this day mailed via an original and three (3) correct copies of the above and foregoing **REPLY BRIEF OF APPELLANTS** to the following person at the indicated address:

Ms. Betty Sephton
Office of the Clerk
Mississippi Court of Appeals
450 High Street
Jackson, Mississippi 39201

This, the 30th day of April 2007.

Tim Waycaster