

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

BRIEF OF APPELLANTS

Oral Argument is Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

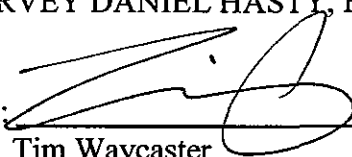
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11. Beverly Lorraine Hasty, Plaintiff
12. Timothy Wayne Hasty, Plaintiff
13. The Estate of Arthur I. Hasty, Deceased, Plaintiff
14. Yoshinobu Namihara, M.D., Defendant
15. The Better Living Clinic-Endoscopy Center, P.A., Defendant

Respectfully submitted,

HARVEY DANIEL HASTY, ET AL.

BY:


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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs believe that the issues dispositive of this matter are clear and that they are fully developed in this Brief of Appellant. However, because of the extreme sanction of dismissal with prejudice which was imposed against the plaintiffs by the Trial Court, this appeal is obviously of great importance to the plaintiffs. Therefore, to the extent this Court has any question whatsoever regarding the underlying facts and circumstances or any of the legal arguments made herein, the plaintiffs would request oral argument. While the lack of justification for the dismissal below is absolutely clear to us and we believe this Court could reverse without argument, to the extent the Court disagrees with that assessment to any degree, the plaintiffs would appreciate and welcome the opportunity to address the Court's questions or concerns, if any, at oral argument.

STATEMENT OF ISSUES

I. The Trial Court abused its discretion in ordering the original dismissal of this action for failure to prosecute. The facts and circumstances of the period of time relevant to this action were such that any delay was justified. Those facts and circumstances did not amount to the kind of dilatory, obstinate, willful conduct the authorities from this Court require to justify such an extreme and harsh sanction. Dismissal with prejudice is reserved only for the most egregious cases. These circumstances presented none of the required factors or severity.

II. The Trial Court abused its discretion in denying plaintiffs' Motion for Relief from Judgment pursuant to Miss. Rules of Civ. Pro. Rule 60. Here, the facts clearly showed exceptional circumstances existed such that mistake was a controlling factor in effectuation of the original dismissal order and in the Court's refusal to later grant relief therefrom. The mistake was not known at the time of the original dismissal and the mistake was not the result of a lack of diligence on the part of the plaintiffs. In fact, it was through the plaintiffs' diligent efforts, beginning with a routine due diligence call to the Trial Court's administrator, that the mistake was made.

III. The prejudice to the plaintiffs resulting from dismissal of their claim far outweighs any prejudice the defendants would have suffered had the case not been dismissed. While the plaintiffs have suffered the ultimate prejudice of dismissal, the defendants did not even mention prejudice in their original Motion to Dismiss for Failure to Prosecute. Here, the passage of time is not a legitimate element of prejudice as all fact witness depositions have been taken except one - that of a treating physician who would be expected to testify from his chart of the subject

treatment written contemporaneously with the treatment in question. Dismissal was not justified under the circumstances.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

The underlying cause of action in this matter is one of medical malpractice claimed by several wrongful death beneficiaries of Mr. Arthur Hasty (hereinafter “the Plaintiffs”). Mr. Hasty died after his esophagus was perforated during a dilation procedure performed by the Defendant Yoshinobu Namihira, M.D. (hereinafter “Dr. Namihira” or “the Defendant”) at the Defendant Clinic, the Better Living Clinic-Endoscopy Center, P.A., in Vicksburg, Mississippi (hereinafter “the Defendant”).

The lawsuit was filed in the Circuit Court of Warren County, Mississippi in 2001. (C. P. at 6). Thereafter, extensive written discovery and depositions, including the depositions of all eight plaintiffs and of the defendant Dr. Namihira, were taken over the course of the next two years. During the year and a half or so prior to July 1, 2003, while depositions were being taken during some of that period, there was limited action taken on the face of the court file, resulting in a Rule 41 Notice from the Trial Court on that date. (C. P. at 62). In response to that notice, counsel for plaintiffs responded to the Trial Court describing the actions that had been taken and that were still being undertaken to prepare the case for trial. (C. P. at 63). Apparently satisfied with that response, the Trial Court did not dismiss the case pursuant to the July, 2003 notice.

Thereafter, the plaintiffs continued their efforts to schedule the last remaining fact witness’s deposition and to obtain a trial setting through written correspondence and telephone calls to counsel for the defendants and through written correspondence with the Trial Court. After several attempts to get counsel for defendants to respond regarding those issues, counsel for defendants’ eventual first response was to file a Motion to Dismiss for Failure to Prosecute

on or about August 18, 2004. (C. P. at 57). Thereafter, on August 31, 2004, the Trial Court entered its Order Dismissing Case for Failure to Prosecute thereby granting the defendants' motion. (C. P. at 68). Counsel for plaintiffs had not responded to that motion at the time the Trial Court's order was entered because through conversations with the Trial Court's administrator, counsel for plaintiff's office had been advised that the case had been previously dismissed pursuant to an August, 2003 Rule 41 dismissal and was no longer on the Trial Court's docket. (Tr. at 33-34; R. E., Tab E, pages 33-34). Plaintiffs were further advised by the administrator that the court file was therefore in storage and, that the defendants' motion would therefore not be set for hearing until the court file could be located and the matter further investigated. (Tr. at 33-34; R. E., Tab E, pages 33-34).

After the entry of the Court's August 31, 2004 Judgment dismissing the case, neither plaintiffs' counsel nor defense counsel received a copy of the dismissal order from the Trial Court or the Trial Court Clerk. As further indication that neither party was aware of the entry of the dismissal order, counsel for defendants filed a Notice of Hearing on their Motion to Dismiss on September 10, 2004 setting the motion for hearing on October 15, 2004. (C. P. at 66). Defendants presumably had to obtain that hearing date from the Trial Court's administrator. Because counsel for plaintiffs had been told the case had been dismissed over a year earlier, the plaintiffs believed that the defendants' Motion to Dismiss filed in August 2004 was procedurally improper and plaintiffs believed, based on representations from the Trial Court's administrator, that the defendants' motion would not be heard. (Tr. at 32-34; R. E., Tab E, pages 32-34). Therefore, plaintiffs filed a Motion to Set Aside Rule 41 Dismissal on November 4, 2004. (C. P. at 69). The plaintiffs' motion not only asked the Court to set aside what the plaintiffs believed to have been an August 2003 Rule 41 dismissal, but it also pointed out the perceived resulting

procedural impropriety of the defendants' August 2004 Motion to Dismiss. After holding a hearing on the plaintiffs' motion, the Trial Court entered its Order Denying Plaintiffs' Motion to Set Aside Rule 41 Dismissal on December 14, 2004. (C. P. at 91). The Trial Court so ruled because the case had not been dismissed in August 2003 as the plaintiffs had been told, but had instead been dismissed on August 31, 2004 when the plaintiffs did not respond within 10 days to the defendants' Motion to Dismiss for Failure to Prosecute. It was during that 10 day period that the plaintiffs had been told about an August 2003 dismissal and about the fact that there could be no proceedings on the defendants' motion because the case had been previously dismissed a year earlier and the file put in storage. (Tr. at 31-32; R. E., Tab E, pages 31-32).

On December 28, 2004, plaintiffs filed a Motion for Relief from Judgment and/or Alternatively a Motion to Reconsider Motion to Set Aside Rule 41 Dismissal. (C. P. at 92). After a hearing on that Motion in which the Trial Court's administrator confirmed the conversations she had with plaintiff counsel's office regarding a Rule 41 dismissal in 2003 and regarding the file being in storage and in which the Trial Court's administrator confirmed that those conversations occurred prior to entry of the Trial Court's August 31, 2004 dismissal order, the Trial Court held the matter under advisement for a year and eventually entered an order on February 16, 2006 denying the plaintiffs' motion and affirming its prior dismissal.

The plaintiffs filed their Notice of Appeal of that order on March 17, 2006 initiating this appeal. (C. P. at 121).

B. Statement of Facts

There are four time periods, the facts concerning each of which are relevant to the various issues before this Court. The first time period is the time prior to July, 2003. In July of 2003,

the Trial Court issued a Rule 41 Notice to which the Plaintiffs responded by showing sufficient cause for the Trial Court to allow this case to continue on its active docket. Considering that showing of good cause, the Trial Court in fact allowed the case to go forward as an active case. The Plaintiffs' August 2003 response to the Rule 41 Notice sets forth in detail the significant progress that had been made toward prosecution of the case up to that date and the circumstances surrounding withdrawals of counsel and entries of appearance that – to make a long story short – resulted in no notice to the undersigned of a request for a scheduling order and other correspondence between the Trial Court, the Trial Court Clerk and the parties. Those facts are not restated here because, as stated, the Trial Court chose not to dismiss the case pursuant to that Rule 41 notice and, instead, left the case on the Trial Court's active docket. Therefore, we believe that the time period prior to July 2003 is no longer relevant to the matters before this Court. However, all of those facts are fully set forth in the appeal record in the Plaintiffs' Motion for Relief from Rule 41 Dismissal. (C. P. at 69).

The next relevant time period is the one from the Trial Court's Rule 41 Notice in July 2003 up to August 2004. As was set forth in great detail in the Plaintiffs' Motion to Set Aside Rule 41 Dismissal filed below, (C. P. at 69; see paragraphs 6 and 7 at pages 71-72), counsel for Plaintiffs continued to attempt to prosecute the case during that time period through three letters and at least two telephone contacts with counsel for defendant attempting to get a deposition scheduled and obtain a trial setting. Plaintiffs also contacted the Trial Court's administrator and obtained trial dates to propose to counsel for defendants. Counsel for defendant did not respond to those repeated efforts – a fact that counsel for defendants have never denied. That Motion to Set Aside also set forth information concerning other intervening serious personal circumstances which further explained and justified the Plaintiffs' actions during the time from July 2003 until

August 2004. (C. P. at 69; see paragraph 8 at page 72). Those factors all made it clear that Rule 41 Dismissal was clearly not in order based on the activity in the matter during that time period regardless of whether the activity appeared on the face of the Court file.

The third relevant time period is the one from August 11, 2004, when the defendants filed their Motion to Dismiss for Failure to Prosecute, up to the date of the plaintiffs' Motion to Reconsider the Trial Court's resulting August 31, 2004 dismissal order. During that time period, the office of plaintiffs' counsel had several conversations with the Trial Court's administrator in which the administrator represented that the case had been dismissed in August 2003 and the court file sent to storage, and that as a result there could be no proceeding on the defendants' Motion to Dismiss until after the file was located and the procedural posture of the matter was investigated. (Tr. at 32-34, 48-51; R. E., Tab E, pages 32-34, 48-51). Further, undisputed testimony from the Trial Court's administrator and plaintiffs' counsel's legal assistant confirmed that those calls took place before the Court entered the August 31, 2004 order of dismissal. (Tr. at 32, 36, 50-52; R. E., Tab E, pages 32, 36, 50-52).

The final relevant time period is the one year period from February 18, 2005 and February 16, 2006. On February 18, 2005, the Trial Court heard the plaintiffs' Motion to Reconsider and the above referenced testimony confirming the plaintiffs' assertions regarding their actions in this case. (T. at 21; R. E., Tab E, page 21). On that date, the Trial Court took under advisement the matter of whether the plaintiff had shown just cause for delay in missing the 10 day deadline saying it would issue an order in a few days. (T. at 61-62; R. E., Tab E, pages 61-62). The Trial Court did not issue its Order ruling against the Plaintiffs until one year later, on February 16, 2006.

ARGUMENT

I. The Trial Court abused its discretion in ordering the dismissal of this action for failure to prosecute.

A. The standard of review

The proper standard of this Court's review of the Trial Court's order dismissing this action for failure to prosecute is one of abuse of discretion. *American Tel. & Tel. Co. v. Days Inn of Winona*, 720 So.2d 178, 180 (Miss. 1998). The proper scope of a trial court's decision to enter such a dismissal has been recently and succinctly described by this Court in *Mississippi Department of Human Services v. Guidry*, 830 So.2d 628 (Miss. 2002). In *Guidry*, this Court held that while the power to dismiss an action for want of prosecution is part of a trial court's inherent authority, it is a power that should be employed reluctantly in light of the fact that the law favors trials of issues on their merits. *Id.* at 631-632. Such a dismissal shall be upheld "only where the record shows that a plaintiff has been guilty of dilatory or contumacious conduct." *Id.* at 632. In *Guidry*, the Court stated that "[t]he Court is mindful of the fact that 'dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases.'" *Id.* at 632. In *Am. Tel. & Tel.*, this Court adopted prior Fifth Circuit holdings that Rule 41 dismissals should be affirmed only where there has been a clear showing of delay or contumacious conduct by the plaintiff and where lesser sanctions would not serve the best interests of justice. *Id.* at 181. *Webster's II New Riverside Dictionary* defines "contumacious" as "obstinately disobedient, or insubordinate; incalcitrant." The *Am. Tel. & Tel.* Court cited *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982), in which the Fifth Circuit listed several aggravating factors to look for including whether the plaintiff – as distinguished from his counsel – was personally responsible

for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct.

When properly applied to the facts of this case, it is clear that the Trial Court here did not consider any of the above guidelines in granting the Rule 41 dismissal and, in fact, the Trial Court entered the dismissal when every one of the above factors should have dictated that it do otherwise. Therefore, the Trial Court abused its discretion and should be reversed.

B. The facts relevant to the time period prior to July 2003 did not justify dismissal

In July 2003, the Trial Court issued a Rule 41 Notice of pending dismissal for failure to prosecute if action was not taken. (C. P. at 62). Thereafter, counsel for plaintiffs replied to the Court setting forth various actions that had been taken in the matter which did not necessarily appear on the face of the court file and notified the Court of the relatively few additional actions necessary to be undertaken to get the matter prepared for trial. (C. P. at 63). That response also pointed out circumstances related to withdrawals of counsel and entries of appearance which further justified any delay in the matter. Those facts are set forth in detail in the plaintiffs' Motion to Set Aside Rule 41 Dismissal filed below (C. P. at 69; see paragraph 3, page 70), but they are not restated here because the Trial Court accepted the plaintiffs' response as adequate and did not enter a Rule 41 dismissal. Therefore, the plaintiffs believe the time period prior to July 2003 is not relevant to the issues presented on this appeal except to the extent that the Trial Court's decision not to dismiss the case amount to a finding by the Trial Court that sufficient justification for dismissal did not exist in the facts relevant to the time period prior to July 2003.

C. The facts relevant to the time period from July 2003 to August 2004 did not justify dismissal.

Immediately following the plaintiffs response to the July 2003 Rule 41 notice, plaintiffs began diligently pursuing the litigation through their efforts to obtain a trial setting and to schedule the only remaining fact deposition. It was set forth in filings below and never disputed by defendants that on August 4, 2003, the same date the plaintiffs' Rule 41 response was forwarded to the Court, the undersigned spoke to Gene Parker, counsel for defendants, and discussed the need to schedule the last remaining fact deposition the plaintiffs wished to take. (C. P. at 71-72). The remaining deposition was of one of the physicians who had treated the plaintiff in conjunction with the defendant Dr. Namihara. That physician's deposition was important to the plaintiffs' consulting expert. The plaintiff was discussing this case with an expert throughout this time period – a fact that cannot be reflected on the face of a Trial Court docket. The expert had indicated that he needed to hear specific facts from this treating physician's testimony in order to finalize his opinions. Mr. Parker indicated during the August 4, 2003 conversation that he felt he could get the agreement of that particular physician to appear for the deposition as he had a professional relationship with him. Plaintiff's counsel told Mr. Parker that we would give him an opportunity to contact the witness and be in touch regarding scheduling. That same date, the undersigned sent Mr. Parker a letter asking for dates for that deposition pursuant to the earlier telephone conversation.

Mr. Parker responded by return correspondence with some proposed dates for that deposition. Those dates included times through the end of October, 2003. Plaintiffs were unable to coordinate schedules in order to be able to schedule the deposition on the dates provided by defense counsel through the end of October. In December 2003, counsel for plaintiff spoke with

the Court's administrator concerning trial settings and on January 16, 2004 sent correspondence to Mr. Parker regarding two potential trial dates and again asked him for dates to schedule the deposition of the physician witness that had been previously discussed. Mr. Parker did not respond to that request concerning trial dates, nor did he respond to the request for additional dates on which the deposition could be taken. The plaintiffs were reluctant to force the treating physician to attend a deposition without Mr. Parker's agreement for two reasons. First, we wanted to be cooperative with the physician and Mr. Parker with regard to scheduling to the extent possible. More importantly, we were concerned that subpoenaing the physician to a deposition on a date when he had not agreed to attend would alienate him and prejudice our client. However, having still not gotten any cooperation, on August 11, 2004 the undersigned again wrote Mr. Parker again asking for dates for the deposition of the physician and asked that Mr. Parker let us know if he no longer could control the physician or could not give us dates. The plaintiffs no longer being able to be concerned about anyone else's schedule, that correspondence also indicated that if Mr. Parker did not respond by August 17, 2004, we would choose a date available to us and subpoena the physician to a deposition. Mr. Parker responded not by giving us dates, but by filing the defendants' Motion to Dismiss for Failure to Prosecute.

The Plaintiffs would assert that waiting for a response from Mr. Parker for some period of time after the January 2004 request concerning scheduling issues was clearly reasonable. Thereafter, in April and May of 2004, the undersigned experienced a series of personal family issues including the illness of my spouse requiring emergency surgery and a six week long illness and the eventual death of the child of the undersigned's brother Todd and his wife, JoAnn Waycaster. Those factors contributed to some delay in following up in the referenced matter. However, on August 11, 2004, the undersigned wrote Mr. Parker again asking for deposition

dates in an effort to get the scheduling back on track in this case. Again, the only response plaintiffs received to that letter was the filing by the defendants of their Motion to Dismiss for Failure to Prosecute one week later.

It was neither fair nor just for the Defendants to move for dismissal of the case and, in so doing, represent to the Trial Court that no action had been taken when the plaintiffs had undeniably been undertaking to schedule a deposition supposedly within the control of counsel for defendants and defense counsel had not responded to any of plaintiffs' requests for dates for that deposition or a request for a trial setting dating back to January 2004. For the defendants to make the argument that no action had been taken by the plaintiffs, they would have to take the position that the plaintiffs should have subpoenaed the witness that defense counsel had previously stated that he was going to deal directly with and notice the deposition without regard for defense counsel's schedule. Clearly, had the plaintiff attempted to do either of those things, counsel for defendant would have objected just as strenuously as defense counsel later argued the same facts against the plaintiffs.

It is clear from all that has been set forth above that the Plaintiffs were, in fact, undertaking efforts to take the necessary next steps to further the prosecution of this case. To the extent Plaintiffs were unable to take any concrete action in the form of scheduling and taking a deposition, getting a trial setting or some other matter that would appear of record in the Court file, it was because of the normal passage of time in the process of attempting to coordinate schedules, the failure of the defendants to respond for a long period of time to written and telephonic requests concerning scheduling and the unavoidable personal issues that resulted in some of the delay in following up when defense counsel did not respond. To the extent that those reasonable delays leave any part of the year in question unaccounted for, it would not be a

significant period of time and it certainly would not be more than the approximately six weeks prior to the August 11, 2004 letter the undersigned sent to defense counsel again asking for deposition dates. Those six weeks would not justify the Trial Court's granting a Motion to Dismiss for Failure to Prosecute. That is especially true when, by doing so, the result was the forfeiture of the plaintiffs' cause of action. It is important for this Court to note that this order was not entered in a case where no action had been taken. It was entered after a great deal of time and money has been spent on prosecuting the case, including taking the depositions of eight plaintiffs and the deposition of the defendant physician and the retention of and extensive consultation with an expert. Under the circumstances, there is no reasonable justification for the Trial Court's decision to dismiss this action.

D. The facts relevant to the time period from August 2004 to February 2005 did not justify dismissal.

It is clear from the Court's ruling at the hearing held on December 14, 2004 on the plaintiffs' Motion to Set Aside Rule 41 Dismissal, that the Court placed a great deal of importance on the failure of the Plaintiffs to respond in any way to the Defendant's Motion to Dismiss for Failure to Prosecute within the ten day period provided for by Rule 4.03 of the Uniform Circuit and County Court Rules. (See Tr. at 17, lines 25-29, and at 18, lines 1-8; R. E., Tab E, page 17, lines 25-29, and page 18, lines 1-8). In order to understand the actions or inactions of Plaintiffs' counsel with regard to that motion and up to the day of the Court's order denying plaintiffs' relief from dismissal, it is necessary to consider what transpired after August, 2004, as those circumstances clearly explain the reasonableness of the Plaintiffs' actions and amount to more than reasonable justification which the Trial Court should have considered. The Trial Court's failure to do so amounted to an abuse of discretion.

As stated above, on August 11, 2004 the undersigned wrote defense counsel what amounted to a fifth request for deposition dates. In that correspondence, it was stated that failing a prompt response, the plaintiff would be forced to notice the deposition without regard for defense counsel's schedule. Instead of responding to that letter in any substantive way, the Defendant instead filed its Motion to Dismiss for Failure to Prosecute one week later, on or about August 18, 2004.

After receiving service of the August 2004 Motion to Dismiss, the undersigned was concerned that the Court may rule on that motion before the Plaintiff had an opportunity to respond to it because the undersigned was not familiar with this particular Trial Court's practices. Therefore, consistent with what the undersigned has done many times when practicing outside of the venues in which I am most familiar, and in an effort to comply with Rule 1.14 of the Uniform Circuit and County Court Rules, I instructed my legal assistant, Lisa Bunch, to talk to the Trial Court's administrator to determine whether there was any unique procedure or preferences of which we should be aware concerning responses to such a motion and the scheduling of such hearings. (Tr. at 31; R. E., Tab E, page 31).

Plaintiffs' counsel's legal assistant reported back that she had spoken with the Trial Court's administrator who indicated that unless a matter was set for hearing, the Court would not normally rule on such a motion before the parties had an opportunity to be heard. (Tr. at 32; R. E., Tab E, page 32). The administrator also indicated that if a hearing were set, the Court would likely rule at the time of a hearing whether or not a response had been filed and therefore, if a party was going to file a response, it needed to do so prior to a hearing. *Id.* That statement by the administrator led us to ask the question of her whether she had any information indicating that a hearing had been noticed by the Defendant or set by the Court because we were not aware that

such had occurred. *Id.* When the administrator checked on that issue she indicated that no hearing had been set, but that **her information reflected that the case had been dismissed in August of 2003 pursuant to the previous Rule 41 notice.** *Id.* (emphasis added). We indicated that we felt that was probably a mistake in light of the fact that we had never gotten any notice of such a dismissal and that we had promptly and properly responded to the August, 2003 Rule 41 Notice and had been corresponding with her and defense counsel about the case throughout the year since August, 2003. (Tr. at 31-32; R. E., Tab E, pages 31-32). Obviously, the defendants were also under the impression that the case had not been dismissed in 2003 as we had been told by the administrator because counsel for defendants had filed their Motion to Dismiss for Failure to Prosecute just a few days earlier in August 2004. At that point, the administrator indicated that she needed to check into the matter to see what the proper status of the case was and that she would either get back to us or that we could check back with her. (C. P. at 109). It is extremely important to note that this conversation with the administrator occurred within what would have been the 10 day period to respond to the defendants' Motion to Dismiss, because it was primarily as a result of what later proved to be mistaken information received by the plaintiffs during that conversation that resulted in the decision that there was no reason to file a response to the motion. If the case had been dismissed without the knowledge of the parties or the administrator a year prior to the date the motion in question was even filed, it seemed reasonable to conclude that first the erroneous dismissal we believed to have occurred had to be corrected and then the defendants could pursue a Motion to Dismiss if they so chose.

Based on all of that information, plaintiffs in fact reached that reasonable conclusion - that the Defendant's Motion to Dismiss for Failure to Prosecute was moot in light of what we understood to be a 2003 Rule 41 dismissal pre-dating the defendants' motion by a year. The

administrator apparently reached the same reasonable conclusion based on all of her herein referenced representations to plaintiffs. That, along with the information concerning the Trial Court not ruling unless a hearing was set, led us to the reasonable decision to wait until we talked back to the Administrator regarding the results of her checking into the status of the case before taking any further action.

Having not heard back from the Administrator after approximately ten days, plaintiffs' counsel's legal assistant placed another call to the Administrator to follow up. (C. P. at 109; Tr. at 34; R. E., Tab E, page 34). During that conversation, the Administrator stated that she had not been able to determine anything about the status of the file because it had already been moved to storage as it had apparently been dismissed over a year earlier. *Id.* The administrator was again asked about the necessity of a response to the Motion to Dismiss and she stated that if we filed one she didn't know where they would file it because there was not a file to put it in. She again said that she would have to retrieve the file from storage before she could let us know something about the 2003 Rule 41 dismissal. *Id.*

Thereafter, on or about September 13, 2004, plaintiffs received a Notice of Hearing which was served by the Defendants setting their Motion to Dismiss for Failure to Prosecute for hearing on October 15, 2004. (C. P. at 66; 109). While receipt of a Notice of Hearing from the Defendants on their Motion to Dismiss was inconsistent with the information we had been given by the administrator about the case having been previously dismissed a year before the subject Motion to Dismiss was even filed, receipt of that notice did at least indicate to us that the Defendants were likewise unaware of any previous dismissal of the case. Therefore, out of an abundance of caution until we could determine otherwise, and consistent with the information we had previously gotten from the administrator concerning responding to the defendants' motion

prior to the date of a hearing, the undersigned decided to prepare a Motion to Set Aside the Rule 41 Dismissal and incorporate therein a response to the Motion To Dismiss. However, receipt of the Notice of Hearing prompted another call to the Court Administrator who was again asked if there had been a change in the status of the case and whether the Court was going to hold a hearing on the Motion to Dismiss. (C. P. at 109; Tr. at 34; R. E., Tab E, page 34). The Administrator again confirmed that the case was not on the Court's active docket and that the hearing as noticed by the Defendants was not on the Court's hearing docket because of the previous 2003 Rule 41 dismissal of the case. *Id.* Having never been told otherwise, it was the plaintiffs' understanding that the previous dismissal in question was an August 2003 Rule 41 dismissal. During that conversation, we again inquired as to what, if anything, we could do to attempt to get the case back on the Court's active docket so that we could take the steps necessary to move the case forward. *Id.* The Administrator indicated to us that if we had responded to the Rule 41 Notice back in August of 2003, she felt certain that the Court would just place the matter back on the active docket. She said she would check on that further and let us know what, if anything, the Court wanted us to do. (C. P. at 109-110).

My legal assistant again contacted the Administrator in October just prior to the date of the October 15th hearing that had been noticed by the Defendant in order to confirm that there was not going to be a hearing. (C. P. at 110). The administrator again confirmed that there would be no hearing. *Id.* Thereafter, the plaintiffs filed their Motion to Set Aside the Rule 41 Dismissal. (C. P. at 69). In that Motion, plaintiffs incorporated a response to the defendant's Motion to Dismiss for Failure to Prosecute believing that when the Court set aside what we understood to have been an August 2003 Rule 41 dismissal, the Defendant's Motion to Dismiss would then be properly before the Court and would then require a response.

After filing the Motion to Set Aside Rule 41 Dismissal, we again inquired of the Trial Court's administrator as to whether the Court was going to grant the Motion to Set Aside without a hearing or whether we should obtain a hearing date and notice the motion for hearing. (C. P. at 110). The administrator indicated that we may as well notice the matter for hearing so that we could know that the matter would be concluded at least by the date it was set for hearing. *Id.* We obtained the December 14th setting from the administrator and sent our notice to the Defendant. (C. P. at 89).

On November 10, 2004 the Defendant served a response to plaintiffs' Motion to Set Aside the Rule 41 Dismissal and in it alleged that the Court had previously granted its Motion to Dismiss on August 31st and that plaintiffs' Motion must therefore be considered in light of the requirements for setting aside a judgment under Rule 60 and not as a Rule 41 Motion. (C. P. at 78). The undersigned was still under the impression from the information obtained from the Trial Court's administrator that this matter had been dismissed pursuant to Rule 41 back in August of 2003 and that as a result, the Court had undertaken no proceedings on the Defendant's subsequently filed Motion to Dismiss. It is clear from the fact that the Defendant's noticed their Motion to Dismiss for hearing weeks after the Court apparently entered its Judgment on August 31st, 2004 that they were also unaware that the Court had entered that Judgment. As set forth above, the Plaintiffs attempted on at least four or five occasions to get information about the status of the case before and after that same time period but was unable to do so because we were told the file was in storage pursuant to an August 2003 Rule 41 dismissal. Apparently, at some time prior to the Defendant's filing their response to the plaintiffs' Motion to Set Aside the Rule 41 Dismissal, the file was retrieved from storage and the Defendants were able to ascertain that the Court had entered the August 31, 2004 Order granting their Motion to Dismiss. At no time

during any of our conversations with the administrator however, were we made aware that the file had been located or that it had been determined that the case had, in fact, not been dismissed in August of 2003, but that it had been dismissed by Final Judgment entered on August 31, 2004 for failure of the plaintiffs to respond within 10 days to the Defendant's Motion to Dismiss. (Tr. at 35; R. E., Tab E, page 35). Under those circumstances, the undersigned – apparently wrongfully – assumed that counsel for defendants were simply unaware of the August 2003 Rule 41 dismissal and were mistaken about the Court having granted their Motion to Dismiss. Again, the Defendant apparently had gotten access to the file and was able to make that determination and therefore was operating with better information than the plaintiffs had in spite of our many attempts to obtain the status of the matter directly from the Court's administrator. At hearing, counsel for the defendants suggested that the plaintiffs could have, at any time, driven to the Trial Court Clerk's office in Vicksburg and seen the file for themselves and ascertained the true procedural posture of the case. (Tr. at 54; R. E., Tab E, page 54). While technically true, that can hardly be a justification for dismissal in light of the fact the Trial Court's personnel was telling us that there was no file that we could come and look through because it had been sent to storage a year earlier and was unavailable even to her. Further, we were told that she would let us know when she found it – which never happened in spite of the fact that we were talking with her with considerable regularity during the relevant time period about this very matter. Under those circumstances, forfeiture of the plaintiffs' cause of action was clearly not the appropriate sanction.

It was not until counsel for plaintiffs appeared before the Court at the hearing on the Motion to Set Aside Rule 41 Dismissal that it became apparent that the information we had been given concerning an August 2003 Rule 41 dismissal was erroneous, that the Court had, in fact,

considered and granted the Defendant's Motion to Dismiss for Failure to Prosecute on August 31, 2004 and that the Court based its decision to grant that motion at least in substantial part on the fact that the plaintiffs had not responded to the motion within the ten days provided by the uniform rules for doing so. While the undersigned felt certain during the hearing that plaintiffs had acted properly based on the information that we had been given concerning this matter for all the reasons set forth above, I did not arrive at that hearing prepared to discuss with the Trial Court the details of the timing of the various conversations my office had had with the administrator and the exact representations that had been made in each call which caused us to handle this in the way it has been handled. I was not prepared to do that because, as discussed above, I had no idea those circumstances were in issue until the hearing was under way.

The plaintiffs adamantly maintain that from August 2004 to the date of the Trial Court's eventual affirmance of its dismissal of this action, the plaintiffs had been doing all that could reasonably be expected to not only move the case forward but also to attempt to communicate and cooperate fully with the Trial Court through its staff. In its comments during the hearing on December 14th, the Trial Court made it clear that it felt that the Plaintiffs had not been diligent in failing to respond to the Motion to Dismiss causing the Trial Court to enter its August 31st Judgment and that the plaintiffs had then failed to diligently respond to the entry of that judgment because the Plaintiffs did not file their motion for relief therefrom until November 4, 2004. (Tr. at 18; R. E., Tab E, page 18). As shown by all of the above information, it is clear that the Trial Court's perception of a lack of diligence was not accurate. The Plaintiffs' failure to respond to the Defendant's Motion to Dismiss was based on what later proved to be erroneous information concerning the fact that the Motion to Dismiss was not properly before the Court because the matter had already been dismissed a year earlier. Instead of sitting back and doing

nothing however, as outlined above, the Plaintiff made numerous contacts with the Court's staff attempting - diligently - to ascertain the proper status of the matter and to determine the proper procedures to proceed. Similarly to the steps we eventually took in August of 2004 to bring the issue of scheduling a deposition to a head with counsel for Defendant, we took steps beginning in October 2004 to bring this matter before the Court by preparing the Motion to Set Aside the Rule 41 Dismissal and noticing it for hearing. It should be clear to this Court based on all of the above that to the extent the Plaintiffs failed to respond in a timely fashion to the Motion to Dismiss or otherwise did the things we did or failed to do, it was not through a lack of diligence but through reliance on mistaken information we gained from numerous communications with the Court.

With regard to those communications specifically, we can only represent to the Court what we were told. By doing so, we by no means intend to shift blame to the Trial Court's personnel or avoid responsibility. However, we must rely on what we took from those conversations because they clearly amount to an explanation and justification for the actions we took or didn't take in this case. We understand that the administrator fields calls such as the ones described above everyday. However, as this is the only case we had in that Trial Court and the only one we had in this critical procedural posture, those conversations were especially important and therefore memorable to us because we were naturally very concerned that we were doing everything we could possibly be doing to get this case back on track. It is even evident from the actions we took, or alternatively the ones we didn't take, that we were, in fact, acting in reliance on what we were being told. But for the fact that we were led to believe that the Motion to Dismiss was not properly before the Court and that we had the threshold issue of an earlier Rule 41 dismissal to deal with, we would have responded to the Motion to Dismiss and would

probably have pressed for a hearing on that motion. Further, if we had been aware of the Court's dismissal of the case on August 31, 2004, we would have obviously filed an appropriate motion for relief from that judgment within the time allowed for such motions and brought all of these issues before the Court at that time. That did not occur because neither the Court nor the Clerk sent notice of the entry of the August 31, 2004 Judgment of Dismissal to either party. If we had not been under the impression that the Court staff was simply trying to determine why a Rule 41 dismissal had been entered in August of 2003 before returning the case to the active docket, we would have filed the Motion to Set Aside the Rule 41 Dismissal prior to when it was eventually filed.

E. The facts relevant to the time period from February 2005 to February 2006 underscore the fact that dismissal of this case was not justified.

The Trial Court heard the plaintiffs' Motion for Relief from Judgment on February 18, 2005. At that hearing, the Trial Court heard the above mentioned testimony from plaintiff counsel's legal assistant and the Trial Court's administrator. At the conclusion of the hearing, the Trial Court took the matter under advisement and stated it would issue its ruling in a few days. (Tr. at 62; R. E., Tab E, page 62). At the time, plaintiffs' counsel felt that it was the Trial Court's administrator's complete affirmation of the testimony of plaintiffs' counsel's legal assistant that gave the Trial Court pause and prevented an adverse ruling at that time. However, instead of recognizing the just cause that had been affirmed by the administrator's testimony, the Trial Court issued its one paragraph Order on February 16, 2006 – one year after the hearing – without any discussion of the substantial proof that had presented at hearing. Besides the obvious disagreements we have with that Order, all as set forth above, it should be noted by this Court that in deciding to dole out the ultimate sanction of dismissal of the plaintiffs' claim using

a period of delay of days in responding to a motion as justification for same, the Trial Court took a year to enter its two sentence ruling.

II. The Trial Court abused its discretion in denying Plaintiffs' Motion for Relief from Judgment.

A. The standard of review

The standard of this Court's review of a trial court's ruling on a motion for relief from judgment is that of abuse of discretion. *Jenkins v. Jenkins*, 757 So.2d 339, 342 (Miss. 2000). In *Jenkins*, this Court set forth the proper analysis to be undertaken by the trial court when considering a motion pursuant to Miss. Rules of Civ. Pro. Rule 60. Rule 60 provides for extraordinary relief and should be granted only upon an adequate showing of exceptional circumstances justifying the relief. *Id.* at 343. When such a motion is based on mistake, the mistake must have been the controlling factor in the effectuation of the order in question, without which the order would not have been made. *Id.* Further, the facts justifying the relief must not have been known to the moving party at the time of the original order and ignorance of the facts must not have been from want of diligence. *Id.*

B. Exceptional circumstances existed here such that mistake was a controlling factor in effectuation of dismissal.

1. The plaintiffs were under the mistaken impression that there had been an August 2003 Rule 41 dismissal and that there could therefore be no proceedings on the defendants' Motion to Dismiss.

As set forth fully in the previous sections of this brief, plaintiffs' counsel was under the erroneous impression that the Trial Court could not and would not proceed on the defendants' Motion to Dismiss because the case was previously dismissed a year earlier in August 2003.

Further, the plaintiffs were under the impression that as a result of that earlier dismissal, the court file had been sent to storage and would have to be retrieved before any further proceeding could be held on the defendants' motion. Those beliefs were the direct result of representations made by the Trial Court's administrator in response to inquiries by plaintiffs' counsel concerning when and how we should respond to that motion. It was as a direct result of those representations that no response was filed to the motion within the 10 day period provided by the Uniform Rules of Circuit Court Practice. When, as a result of plaintiffs' failure to respond to the motion, the Trial Court entered its order granting defendants' motion and dismissing the case, the plaintiff still did not respond by immediately filing a motion for relief from that order. Such a motion for relief was not filed until about 2 months later because neither the plaintiffs nor defendants were provided any notice that the order had been entered, a fact acknowledged by the Trial Court. (Tr. at 18-19; R. E., Tab E, pages 18-19). Such notice was not given to plaintiffs in spite of plaintiffs' counsel's repeated efforts through communication with Trial Court personnel to get information about the procedural posture of the case. Therefore, not only was the original failure to respond the result of mistake as contemplated by Rule 60, the delay in asking for relief was likewise the result of mistake.

The Trial Court's ruling on the plaintiffs' Motion to Set Aside made it very clear that the Trial Court relied heavily on the lack of a response by the plaintiff to the defendants' Motion to Dismiss and further, that it was of further importance to the Trial Court that after the entry of the order, the plaintiffs did not ask for relief for two months. (Tr. at 18-19; R. E., Tab E, pages 18-19). It is clear that the issues relied upon by the Trial Court in ordering dismissal of the case and in later refusing relief from that order were the result of mistakes – the mistaken beliefs by the plaintiffs resulting from the information conveyed by the administrator and the clerk's mistake in

not complying with the rules by sending notice to the parties of the entry of the order. It is likewise clear from the Trial Court's rulings that those mistakes effectuated the entry of the dismissal order and the later denial of relief therefrom.

2. The Trial Court was under the mistaken impression that plaintiffs' counsel had simply failed to respond to the Motion to Dismiss with no justification, had delayed unreasonably in asking for relief from the dismissal and then had tried to blame that failure on the Trial Court's administrator.

It became clear during the hearings held on the plaintiffs' Motion to Set Aside Rule 41 Dismissal, that the Trial Court – who, at the time was obviously not fully aware of all the communications that had gone on between plaintiffs and the administrator concerning a 2003 Rule 41 dismissal that had not really happened and concerning the missing court file – believed that plaintiffs were simply attempting to blame the Trial Court's administrator for their own failures. (Tr. at 8, lines 21-24; R. E., Tab E, page 8, Lines 21-24; R. E., Tab E, page 9 at Lines 5-10). During the December 14, 2004 hearing on the plaintiffs' Motion to Set Aside, it was clear not only from the above referenced words spoken by the Trial Court, but also from the tone with which they were spoken, at tone that is clear even from the transcript, that the Trial Court came into the hearing with a belief that the plaintiffs were solely at fault and without justification for the failure to respond to the motion and the delay in seeking relief from the dismissal. However, the testimony of plaintiffs' counsel's assistant and the Trial Court's administrator herself during the later hearing on the plaintiffs' Motion for Relief from Judgment clearly proved the facts exactly as plaintiffs had consistently represented them to the Trial Court. Therefore, the Trial Court was no longer justified in holding to its prior ruling and abused its discretion in doing so.

C. The facts justifying relief were not known to the plaintiffs at the time of entry of the original order.

As has been made clear from all of the above, the plaintiffs failed to respond to the defendants' Motion to Dismiss within 10 days because of the mistaken understandings resulting from the communications with the administrator. It is also clear that neither party knew the order had been entered on August 31, 2004. There is no indication that the Clerk sent such notice to the parties, there is testimony outlined above that it was not received, the defendants noticed their hearing on the motion weeks after the motion had been granted indicating they had no notice of the order and the Trial Court itself acknowledged that failure by the clerk's office. Therefore, it cannot be seriously disputed that the facts justifying relief were not known to the plaintiffs – or any of the parties or the Trial Court for that matter – at the time of the entry of the original order of dismissal.

D. Ignorance of the facts justifying relief was not the result of a lack of diligence.

It was not through a lack of diligence on the part of plaintiffs that the mistaken beliefs about the procedural posture of this case were held. In fact, the opposite is true. It was as a result of the many communications between plaintiffs and the administrator, which originated with a routine due diligence call about local procedures, that the mistaken beliefs arose. Defendants have suggested that by driving to Vicksburg and checking the court file for ourselves, plaintiffs could have avoided the confusion that resulted in the mistaken beliefs. While that is an easy argument to make in retrospect, plaintiffs suggest that under the circumstances with which we were presented – the Trial Court's administrator telling us that there was no file to come up and review because it had been sent to storage after an earlier dismissal – it was not reasonable to assume that we should have second-guessed that information and driven to Vicksburg and

demanding to do our own search of the Clerk's files and/or storage areas for the missing court file. The plaintiffs were diligent in trying to determine the posture of the case even though, in spite of that diligence, we eventually proved to be wrong about what we reasonably believed the posture of the case to be.

III. The prejudice to plaintiffs from dismissal far outweighs the prejudice, if any, to the defendants.

Based on the lack of complete and clear information the Court had upon which to base its decision, it may be at least understandable why the Trial Court initially ruled the way it did on the Plaintiffs' Motion to Set Aside Rule 41 Dismissal. However, for all the reasons set forth above, it is not understandable nor was it reasonable that the Trial Court failed to reverse itself after being made aware of the circumstances which justified reversal. The Trial Court's failure to do so amounted to an abuse of discretion and should now be reversed by this Court.

As a result of the Trial Court's ruling, the Plaintiffs are obviously ultimately prejudiced through the loss of their claim when the case has been substantially prepared for a trial. Unless this Court grants relief from the dismissal, the Plaintiffs will suffer the forfeiture of the claim prior to having an opportunity to present it to the Trial Court for determination. Another unjust result of the Trial Court's ruling is that the Defendants will unjustly benefit from the dismissal of the Plaintiffs' claims at a stage of the litigation where all of the many fact witness depositions with the exception of one treating physician which the Plaintiffs had been trying to schedule, had already been taken. The Defendants will also enjoy the benefits of that ruling even though they do not deny offering to facilitate the scheduling of that deposition and then refusing to respond in any way to numerous requests by Plaintiffs for deposition dates and trial settings. Finally, a less important but equally unjust result if the Court does not grant relief from its prior rulings, will be

that in spite of counsel for plaintiffs' efforts to cooperate with counsel for defendant and obtain a trial setting and deposition dates and in spite of counsel for plaintiffs' efforts to communicate with the Court to ascertain the proper method for handling of the case, counsel for plaintiffs could be subjected to bar complaints and/or negligence claims, all of which would be unjustified under these circumstances.

While the plaintiffs suffer all of the above prejudice, the defendants would have suffered none had the Trial Court not dismissed the case. The defendants did not even mention prejudice of any kind in their original Motion to Dismiss for Failure to Prosecute and only mentioned it very generally in their response to the plaintiffs' Motion to Set Aside. Their claim of prejudice from passage of time causing loss of memory of the facts is not convincing in light of the fact that all fact witnesses have been deposed except one treating physician who would likely have testified from his chart and not from his specific memory even if he had been deposed only a few months after the treatment in question. It is not at all uncommon in cases such as this one for doctors to have to testify about treatment given years earlier. Again, they do so from their charts of information developed contemporaneously with the treatment in question.

In *Mississippi Department of Human Services v. Guidry*, the facts of that case involved the passage of seven years and seven months with no action being taken. 830 So.2d at 630. There, it was only after eighteen continuances that the Trial Court entered an order of dismissal for failure to prosecute. *Id.* at 630-631. Even then, this Court, in a unanimous opinion, reversed that dismissal saying that the Trial Court had not considered whether alternative sanctions should have been applied, had not found contumacious conduct, the delay was not caused by the plaintiff as opposed to plaintiffs' counsel, there was no intentional misconduct, and there was no real prejudice to the defendant in the case proceeding to trial, and therefore this Court found that

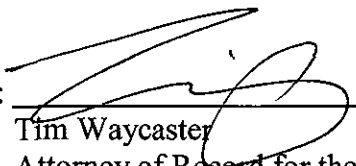
the Trial Court had abused its discretion. *Id.* at 633-634. In the case now before this Court, the Trial Court made no findings whatsoever. Had it done so, all of the same factors that dictated reversal in *Guidry* would have dictated that the Trial Court reverse its prior dismissal. Therefore, for all of those reasons, but much more clearly so even than in *Guidry*, dismissal of the plaintiffs' claims in the case now before the Court was an abuse of discretion and should be reversed so that the minimal remaining proceedings can be held in this matter and the plaintiffs' claims can be determined on their merits at trial.

CONCLUSION

For all the reasons set forth herein, plaintiffs ask that this Court 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 a trial on the merits of the matter.

Respectfully submitted, this the 18th day of December 2006.

HARVEY DANIEL HASTY, et al


By: 
Tim Waycaster
Attorney of Record for the Appellants

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 **BRIEF OF APPELLANTS** to the following persons at the indicated addresses:

R. E. Parker, Jr.
Clifford C. Whitney, III
VARNER PARKER & SESSUMS
Post Office Box 1237
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Attorneys for Appellees

SO CERTIFIED, this, the 18th day of December, 2006.



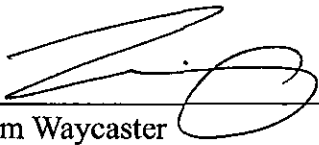
Tim Waycaster

CERTIFICATE OF FILING

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

Ms. Betty Sephton
Supreme Court Clerk
Post Office Box 249
Jackson, Mississippi 39205-0249

This, the 18th day of December, 2006.



Tim Waycaster