IN THE SUPREME COURT OF MISSISSIPPI

A. JENNINGS COX, JR. — APPELLANT

VERSUS — CASE NO. 2006-CA-01786

MARGARET LOUISE PEGGY COX — APPELLEE

REPLY BRIEF OF APPELLANT

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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A. THE CHANCELLOR'S DISMISSAL OF THE CASE AT BAR WAS AN ABUSE OF HIS DISCRETION.

In her brief filed herein, Appellee, Margaret Louise (Peggy) Cox (hereafter, "Peggy") ignores the arguments advanced by Appellant, A. Jennings, Cox, Jr. (hereafter, "Jennings") in his brief. Specifically, Peggy could direct this Court to no Mississippi appellate court decisions in which a case was actually dismissed during a trial on the merits. Likewise, Peggy could direct this Court to no Mississippi appellate court decisions in which the appellant attempted to move the case forward (in this case, by Jennings' filing additional discovery requests) and then faced dismissal for failure to prosecute. These factors differentiate the case at bar from those cases cited by Peggy and from practically all other Mississippi appellate court precedent.

Peggy first relies on a trio of Mississippi Court of Appeals decisions to support her argument (this Court being bound by such decisions only if adopted by this Court, Cuco's Inc. v. McDaniel, 938 So.2d 238,241 (¶10) (Miss. 2006)). The first of the cases relied upon by Peggy is Vosbein v. Bellias, 866 So.2d 489 (Miss.Ct.App. 2004). In Vosbein, the plaintiff failed to respond to discovery, was previously dismissed by the Court on motion of the Clerk pursuant to Rule 41(d), Miss.R.Civ.P., and failed to respond

to the lower court's request for a timeline of events. Id. at 491-492 (¶3). In fact, the Court found that the only action taken by the Plaintiff not related to the motion to dismiss was the filing of the Complaint. Id. at 492 ¶3. In her brief, Peggy notes the passage of time in her reference to the Vosbein case. However, a thorough reading of the decision shows that the Court placed little, if any, reliance on the passage of time. Rather, the Court focused on the fact that all factors necessary for a dismissal were present.

In fact, these factors distinguish the situation in Vosbein from that in the case at bar. As noted above, the plaintiff in Vosbein filed nothing to move the case forward prior to the defendant's filing of the motion to dismiss for failure to prosecute. Likewise, the plaintiff in Vosbein had not proceeded to trial. Moreover, the Vosbein case can be distinguished from the case at bar by the facts noted by the Court, being that the "same judge presided over the entire proceeding" (he did not in the case at bar); that the case was dismissed three times (the case at bar was only dismissed at trial); and that the Plaintiff failed to prosecute even after reinstatement of the case on more than one occasion (not present in the case at bar). Id. at 493 (¶8). Also, in Vosbein, the lower court clearly considered the imposition of lesser sanctions against the plaintiff there. In fact, the Court "warned" the Plaintiff several times by actually dismissing the case and later reinstating it. Id. at 494 (¶9). In the case at bar, the Chancellor below neither considered nor imposed lesser sanctions on Jennings. As a result of these facts, Vosbein is clearly distinguishable from the case at bar.

Peggy next relies on the Mississippi Court of Appeals decision of Hine v. Anchor Lake Property Association, 911 So.2d 1111 (Miss.Ct.App. 2005). Once again, the facts present in the Hine case are easily distinguishable from those present in the case at bar.

In Hine, the plaintiffs filed their Complaint and took no affirmative action to prosecute their case after propounding discovery requests approximately one year after filing their Complaint. Additionally, the plaintiffs were late in responding to requests for admissions and other discovery and almost four years late in responding to defendant's second set of interrogatories. Id. at 1004 (¶12). In Hine, the lower court noted the obvious prejudice caused by the Plaintiffs in that case, being a difference of evidence as that case involved a question of water level and other physically changing evidence. Id. at 1006 (¶18). The Court in Hine also noted that the plaintiffs had indicated little or no ability to proceed with the litigation had the lower Court not dismissed the case. Id. (¶19-21). Obviously, this fact was not present in the case at bar as Jennings had presented his proof at trial when the Chancellor dismissed the case.

Peggy also relies on the recent case of Hensarling v. Holly, 2003-CA-00096-CA, (Miss.Ct.App. 2007). As with the other cases cited by Peggy, the facts of the Hensarling decision are inapposite to the facts in the case at bar. Specifically, the Mississippi Court of Appeals in that case, in upholding a dismissal on the lower court's motion *sua sponte*, noted that the plaintiff therein had failed to serve timely process on one of the defendants, had failed to conduct any sort of discovery and failed to diligently prosecute the case for four years. Id. at (¶17). Other than the mere fact of the passage of time, the other facts present in the Hensarling case are not present in the case at bar.

This Court has stated that there is "no set time limit" on Jennings to prosecute the case at bar. American Telephone and Telegraph Company v. Days Inn of Winona, 720 So.2d 178,180 (Miss. 1998). In fact, the Court in the AT&T case went on to say that not only is there no time limit but dismissal is appropriate "**only** where the record shows that

a Plaintiff has been guilty of **dilatory or contumacious conduct**". Id. (citations omitted) (emphasis added). Ultimately, it is this precedent which mandates the result that the dismissal in the case at bar is an abuse of discretion and this Court should reverse and remand same for a conclusion of the trial on the merits. Stated another way, no action by Jennings for a period of time does not equate as a matter of law to "dilatory or contumacious conduct".

Additionally, as noted above, the present case is unique in that it was dismissed during the trial on the merits. As stated by this Court, "[u]nder 41(b) failure to prosecute implies that the case has not yet come to trial and the merits of the plaintiff's case have not yet been heard". Wallace v. Jones, 572 So.2d 371,376 (Miss.1990). In Wallace, a case involving a contempt action for failure of a party to pay child support, the lower court dismissed the case after acknowledging the plaintiff had established a right to relief at a hearing on the merits. In reversing and in addition to the language set forth above, the Court noted that "the case had come to trial and there was no want of prosecution". Id.

In the case at bar, Jennings, like the party in Wallace, had proceeded to trial in his case. Only after Jennings' presentation of evidence did the Court rule that a dismissal for failure to prosecute should be granted. It is also important to note that after the period of inactivity in the case, it was Jennings, not Peggy, who initiated activity to move the case forward by filing discovery requests. Jennings never failed to respond or delayed after the Chancellor's or Peggy's prompting, as neither took such action.

On the same day that this case was transferred from Chancellor Woodrow Brand to the current Chancellor, Peggy's current counsel filed a Notice of Appearance in the

case at bar. (Record, hereafter "R.", p. 180-181) He then took no action of record until after Jennings moved the case toward trial by serving discovery. In fact, Peggy only attempted initially to quash Jennings' discovery. (R. 182-184) Next, Jennings requested a trial date in his motion to compel. (R. 185-186 ¶5) Only after Jennings' request for a trial date did Peggy file her motion to dismiss pursuant to Rule 41(b), Miss.R.Civ. P. (R. 202-207) Much like the Court's discussion in Wallace, it strains common sense and is violative of Rule 41(b)'s specific language ("dismissal appropriate for failure of the Plaintiff to prosecute") for Jennings' case to be dismissed only after he moved the case forward and requested a trial on the merits of the case.

This Court has also noted that in addition to dilatory or contumacious conduct on the part of the Plaintiff, the lower court must also find that lesser sanctions against the Plaintiff "would not serve the best interests of justice". AT&T, 720 So.2d at 181. In the case at bar, the Chancellor below did not make any finding concerning available lesser sanctions, despite Jennings' request for findings of fact and conclusions of law pursuant to Rule 52, Miss.R.Civ.P.

In her brief, Peggy notes the language from the Hensarling for the proposition that even though the Chancellor below did not address lesser sanctions, this Court may presume that the Chancellor below considered and rejected the possibility of imposing sanctions less than a dismissal with prejudice, and that such finding is not necessary. First, it is not apparent from the opinion in Hensarling whether the plaintiff there requested specific findings of fact and conclusions of law pursuant to Rule 52, Miss.R.Civ.P., as Jennings did in the case at bar.

Second, of equal import, is the fact that this Court does not appear to have originated or subsequently followed this "presumption of findings" precedent with regard to the necessity of consideration of lesser sanctions in a Rule 41(b), Miss.R.Civ.P., context. The Mississippi Court of Appeals in approving such presumption in Hensarling quotes from a previous Court of Appeals decision, Hine, *supra*, and from this Court's decision in Watson v. Lillard, 493 So.2d 1277 (Miss. 1986). A cursory review of the Hine opinion shows that the Court of Appeals in that case also relied on the Watson decision. The Hine court also cited other cases that did not deal with a Rule 41(b), Miss.R.Civ.P., dismissal. Thus, the only Rule 41(b) Mississippi Supreme Court precedent for this purported presumption is the Watson decision.

A closer reading of the Watson decision shows the this Court was speaking to a different issue when it made the referenced statement. Specifically, the Watson court was addressing a dismissed plaintiff's failure to make a factual record below in support of its argument that its conduct should be excused by the Court. The statement had absolutely nothing to do with the fact that the lower court there had or had not considered lesser sanctions. Id. at 1279. Oddly in Watson, the Court never mentions the consideration of lesser sanctions regarding the dismissal in that case.

To the contrary, this Court in the AT&T case noted that "[w]here there is no indication in the record that the lower court considered any alternative sanctions to expedite the proceedings, appellate courts are less likely to uphold a Rule 41(b) dismissal". AT&T at 181 (citations omitted). In fact, the Court notes that its decision to reverse a lower court dismissal was, in part, was due to the fact that it could find support

for neither of the two factors required for dismissal under Rule 41(b). Id. at 182. Accordingly, the Court reversed and remanded that case.

This Court has consistently noted the requirement for a record of the lower court's consideration of lesser sanctions in other cases. See, e.g., Wallace, 572 So.2d at 377; Hoffman v. Paracelsus Health Care Corp., 752 So.2d 1030, 1035 (¶¶16-17) (Miss. 1999); Mississippi Department of Human Services v. Guidry, 830 So.2d 628, 633-34 (¶¶16-18) (Miss. 2002); Mississippi Department of Human Services v. Helton, 741 So.2d 240, 243 (¶13) (Miss. 1999). Thus, Jennings would submit that although the Mississippi Court of Appeals cases cited by Peggy do seem to say that the consideration of lesser sanctions by the Chancellor below may be presumed, there is precious little in the way of Mississippi Supreme Court or other precedent to support this position. In fact, Mississippi Supreme Court precedent affirmatively holds to the contrary.

Of particular note is the fact that even though the Mississippi Court of Appeals has allowed the consideration of less drastic sanctions to be presumed in the Hines and Hensarling cases, *supra*, there is a separate line of Court of Appeals cases in agreement with the precedent from this Court noted above. "Finally, and **perhaps most importantly**, the record is clear that the trial judge did not consider a less drastic sanction". Tims v. City of Jackson, 823 So.2d 602, 607 (¶19) (Miss.Ct.App. 2002). Based on these considerations, the Court should reverse and remand this case for a completion of the trial on the merits.

Also in her brief, Peggy alleges that undersigned counsel for Jennings never brought the issue of lesser sanctions before the Chancellor below and is therefore, barred from raising the issue on appeal. See Peggy's Brief, p. 12. The record below belies this

assertion. At the initial hearing on Peggy's motion on January 12, 2006, undersigned specifically called the issue to the Chancellor's attention by pointing out that "[t]he Court also has to find that lesser sanctions would not remedy the situation". (Transcript, hereafter "T." 7, lines 20-21) Undersigned counsel went on to go over the various options this Court has stated were appropriate. (T. 7, lines 21-28; T. 8 lines 17-19) The issue was also raised in Jennings post trial motion (R. 220-240)

As noted previously, undersigned counsel for Jennings clearly requested the Chancellor below to issue findings of fact and conclusions of law pursuant to Rule 52(a), Miss.R.Civ.P. (Id.) The language of the rule makes such findings and conclusions mandatory. In fact, had the Court complied with Jennings' request, many of the issues raised on appeal might have been avoided.

In addition to the specific provisions of Rule 52, the Chancellor's failure to make findings of fact and conclusions of law in spite of Jennings' request for same violates Rule 4.01, U.C.C.R. Said rule simply states that when requested pursuant to Rule 52, Miss.R.Civ.P., "the Chancellor shall find the facts specifically and state separately his conclusions of law thereon". Id, Accord, Patout v. Patout, 733 So.2d 770,773 (¶¶15-19) (Miss. 1999) (noting that the Chancellor there was in error for failure to issue findings of fact and conclusions of law as he "was required by our rules" to do). In light of the combination of the Chancellor's failure to make specific findings with regard to Rule 41(b) authority and Rule 52(a) authority, Jennings would submit that this case is appropriate to be reversed and remanded to the Lowndes County Chancery Court.

Peggy appears to claim prejudice to her case based on her questions about an old Sunflower County deed to Jennings. However, there was no evidence presented that

would indicate the deed was relevant to the present deed or how it could influence a finding concerning Peggy's undue influence in the instant case.

She also mentions prejudice by way the deaths of her mother and the family attorney. First, as to her mother, her assistance at trial would have been of little value to either party. Her 1993 deposition was presented at trial. A review of this deposition shows her inability to fully comprehend and appreciate the events of the day. As to the death of the family attorney, his presence would have been irrelevant as evidenced by Peggy's trial testimony which indicated that she chose another attorney to prepare the deed, Shields Sims, who was very much alive at the time of the trial. See discussion, *infra*. Based on these facts, Peggy has produced no evidence of prejudice. In fact, given her testimony discussed below, it is evident that she admitted all of the facts necessary for Jennings to prove his case. Accordingly, this Court should reverse this case and remand it to the Lowndes County Chancery Court.

B. THE RECORD OF THE PROCEEDINGS BELOW DOES NOT SUPPORT THE AFFIRMANCE OF THIS CASE BASED ON JENNINGS' FAILURE TO SHOW A RIGHT TO RELIEF.

Jennings clearly presented proof sufficient to allow this case to proceed beyond a Rule 41(b), Miss.R.Civ.P., motion to dismiss for failure to show his right to relief in the case at bar. With regard to the proof necessary in reviewing a Rule 41(b), Miss.R.Civ. P., motion of this nature, this court has stated:

> Unlike the standard of review for a motion for a directed verdict, a motion to dismiss in a non-jury case requires the trial court to consider the evidence fairly and to give it such weight and credibility as the trial judge finds is appropriate. The motion should be denied if the evidence viewed in that light and left unrebutted would entitle the plaintiff to judgment. On the other hand, the motion should be granted if the plaintiff has failed to prove one or more essential elements of his claim or if the quality of the proof offered is insufficient to sustain the plaintiff's burden of proof.

Buelow v. Glidewell, 757 So.2d 216,220 (¶12) (Miss.2000) (citations omitted).

As to the issue of Jennings' proof of a confidential relationship between Peggy and their mother in this case, Mississippi law is clear.

> This Court has long held that a confidential relationship does not have to be a legal one, but the relation may be moral, domestic, or personal. The confidential relationship arises when a dominant, over-mastering influence controls over a dependent person or trust, justifiably reposed.
>
> Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character.
>
> This Court has enumerated several factors to consider in determining whether a confidential relationship exists:
>
> (1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.

Wright v. Roberts, 797 So.2d 992, 998 (¶ 17-18) (Miss. 2001) (citations omitted).

In her brief, Peggy makes much of the fact that she was confused by the questions and they were basically being asked to "test" her memory. A plain reading of the record shows that not only were the facts clear, they were more than enough to establish a confidential relationship as described above. The following are examples from Peggy's testimony:

- Their mother needed assistance from her for doctor's appointments, keeping up with her house and didn't need to be left by herself (T. 24, lines 17-25).

- Peggy helped her mother clean house, mow and buy groceries. (T. 26, lines 18-22).
- Peggy moved back to Columbus, Mississippi, from Georgia to take care of their mother (T. 28, lines 22-24).
- Peggy testified that her mother had problems hearing. (T. 32, lines 12-17).
- Peggy cooked most, if not all, of her mother's meals. (T. 33, lines 1-11).
- Peggy took her mother to all of her doctor's appointments. (T. 34, line 16 – T. 35, line 9).
- Peggy took care of paying all of her mother's bills for a number of years before the deed in issue was executed. (T. 37, lines 10-13).
- Peggy was listed as a joint owner of her mother' bank account prior to her mother's execution of the deed. (T. 39, line 13 – T. 41, line 7).
- Peggy exclusively handled major remodeling of her mother's home (T. 41, line 3 – T. 44, line 27).
- Peggy testified that Jennings was not involved in the specific care of their mother. (T. 46, lines 13-21).
- Their mother sometimes confused what she read in books with reality. (T. 51, lines 11-21).
- Their mother became confused over whether her husband, who died in the 1970's, was still alive and sometimes confused Jennings for him. (T. 53, lines 3-15).

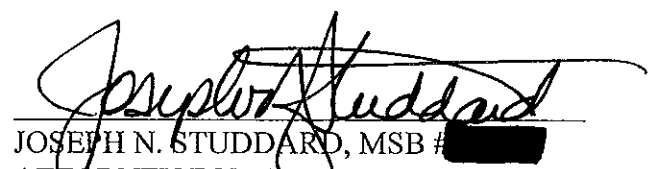
- Peggy had hired Shields Sims (the attorney who drafted the deed from the mother to Peggy) to advise her on the land situation. (T. 70, line 8 – T. 72, line 9).
- Prior to the execution, Peggy felt she had not been treated fairly in the disposition of her father's property. (T. 73, lines 3-20).
- Within one week of getting her name on her mother's bank account, Peggy had offered to sell Jennings one-half of the camp property, property actually owned by her mother at the time. (T. 76, lines 2-21).
- Peggy was instrumental in the drafting of the 1992 deed by her attorney, Shields Sims. (T. 78, line 14 – T. 82, line 12).
- Peggy kept the deed a secret for several months and decided to tell Jennings about its existence on their father's birthday. (T. 87, lines 7-18).

Peggy goes on in length to disparage the testimony of Jennings' "pathetic" witnesses. As this Court can readily see, Jennings proved all that was needed to get by a Rule 41 dismissal from the mouth of Peggy. No other witness was even necessary after her testimony. The facts above more than establish that a confidential relationship existed between Peggy and her mother. Once a confidential relationship is found, when addressing a deed, the instrument is "presumptively void" and the burden shifts to Peggy to prove by "clear and convincing evidence that the gift is free from the taint of undue influence...". Madden v. Rhodes, 626 So.2d 608,618 (Miss. 1993) (citations omitted). In this case the Chancellor below was presented more than enough evidence to deny Peggy's motion to dismiss for Jennings' failure to show his right to relief. Therefore, this Court should not affirm the Chancellor on said basis.

CONCLUSION

This case must be reversed and remanded to the Lowndes County Chancery Court for a trial on the merits. It is clear that the Chancellor erred in dismissing this case pursuant to Rule 41(b) as Jennings had taken action to move this case forward, even asking for a trial setting, prior to the motion to dismiss being filed by Peggy. Likewise, a dismissal would require a finding of dilatory or contumacious conduct by Jennings and the Chancellor had to consider less drastic sanctions. No such findings are present in the record before this Court. The Chancellor also was called upon to make findings of fact and conclusions of law, which he failed to do. Finally, this case should not be affirmed on Peggy's alternative grounds as Jennings proved all of the elements necessary for his case in chief through the testimony of Peggy.

Respectfully submitted, this the 10th day of September, 2007.



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CERTIFICATE OF SERVICE AND FILING

I, the undersigned, Joseph N. Studdard, Attorney for Appellant, do hereby certify that I have this day sent via Federal Express overnight delivery the original and three (3) copies of the Reply Brief of Appellant, along with an electronic diskette to the following:

Ms. Betty Sephton, Supreme Court Clerk
Mississippi Supreme Court
Carroll Gartin Justice Building
450 High Street
Jackson, Mississippi 39201
(Paper and Disk)

I further certify that I have on this day mailed, via United States First Class Mail, postage prepaid, a true and correct copy of the Reply Brief of Appellant (paper only) to the following:

Honorable Kenneth M. Burns, Chancellor
P. O. Drawer 110
Okolona, MS 38860

I further certify that I have on this day hand delivered a true and correct copy of the Reply Brief of Appellant (paper only) to the following:

Gary L. Geeslin, Attorney for Appellee
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SO CERTIFIED, this the 10th day of September, 2007.

JOSEPH N. STUDDARD