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IN THE SUPREME COURT OF MISSISSIPPI

A. JENNINGS COX, JR.

FILED

APPELLANT

VERSUS

JUL 18 2007

CASE NO. 2006-CA-01786

MARGARET LOUISE PEGGY COX

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

APPELLEE

BRIEF OF APPELLANT

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Table of Contents.....	i
Certificate of Interested Persons.....	ii
Table of Authorities.....	iii
Statement of the Issues.....	1
Summary of the Case.....	1
Statement of Facts.....	2
Summary of the Argument.....	4
Argument.....	5
Conclusion.....	12
Certificate of Service.....	14

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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 the case. These representations are made in order that the judge of this court may evaluate possible disqualification or recusal.

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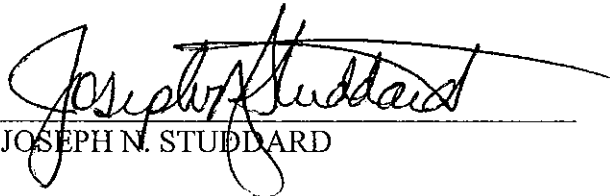

JOSEPH N. STUDDARD

TABLE OF AUTHORITIES

<u>American Telephone and Telegraph Company v. Days Inns of Winona</u>	6
720 So.2d 178, 180 (Miss. 1998)	
<u>Camacho v. Chandeleur Homes, Inc.</u>	12
862 So.2d 540 (Miss.Ct.App. 2004)	
<u>Century 21 Deep South Properties, Ltd. v. Corson</u>	12
612 So.2d 359 (Miss. 1992);	
<u>Hoffman v. Parcelsus Health Care Corporation</u>	11
752 So.2d 1030 (Miss. 1999)	
<u>Lone Star Casino Corporation v. Full House Resorts, Inc.</u>	12
796 So.2d 1031 (Miss.Ct.App. 2001)	
<u>Lowery v. Lowery</u>	12
657 So.2d 817 (Miss. 1995)	
<u>Tims v. City of Jackson</u>	11
823 So.2d 602 (Miss.Ct.App. 2002)	
<u>Wallace v. Jones</u>	5
572 So.2d 371, 375 (Miss. 1990)	

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BRIEF OF APPELLANT

STATEMENT OF THE ISSUES

On July 25, 2006, at the conclusion of A. Jennings Cox, Jr.'s (hereafter "Jennings") presentation of his case in chief at the trial of this matter, Margaret Louise (Peggy) Cox (hereafter "Peggy") renewed her previous Motion to Dismiss the case based on Rule 41(b), Miss.R.Civ.P., which the Chancellor granted. In prosecuting the instant appeal, Jennings states the issues on appeal as follows:

1. Whether dismissal of the case for failure to prosecute by the Chancellor pursuant to Rule 41(b) was proper under the circumstances presented.
2. Whether the Chancellor erred in failing to "find the facts specially and state separately [his] conclusions of law thereon" as requested by Jennings and provided in Rule 52(a), Miss.R.Civ.P.

STATEMENT OF THE CASE

A. Jennings Cox, Jr. (hereafter "Jennings") filed a Complaint to Set Aside Warranty Deed to institute the present action in the Chancery Court of Lowndes County, Mississippi, on November 5, 1992. Jennings filed an Amended Complaint to Set Aside Warranty Deed and for Other Relief on July 7, 1993. The Complaint and Amended Complaint were based upon a warranty deed executed by Jennings' and Margaret Louise

(Peggy) Cox's (hereafter "Peggy") mother on or about August 4, 1992, which transferred title to certain land located in Lowndes County, Mississippi, to Peggy. On August 2, 1993, Peggy filed her Answer and Counterclaim. Subsequent to Jennings' submitting discovery requests and a Motion to Compel responses to same, Peggy filed her Motion to Dismiss for Failure to Prosecute on October 5, 2005. A hearing was held on said Motion on January 12, 2006. The Chancellor overruled the motion but reserved his right to revisit the issue at a later date. The trial of the case began on July 24, 2006, and at the conclusion of Jennings' case in chief, the Chancellor granted the Peggy's Motion to Dismiss based on Jennings' alleged failure to prosecute. Final Judgment based thereon was filed on August 1, 2006. Jennings filed his Motion for Reconsideration, for a New Trial or For Findings of Fact and Conclusions of Law on August 11, 2006. An Order denying said Motion was filed on September 15, 2006, and Jennings subsequently filed his Notice of Appeal.

STATEMENT OF FACTS

The instant action was filed by Jennings in the Lowndes County Chancery Court on November 5, 1992. (Record, page 2 hereafter "R. 2") The case proceeded, with depositions being taken and other related activity up through November 27, 1996, at which time Peggy filed her Motion for Protection. R. 177. The case was then assigned to the present Chancellor on December 17, 2003. No activity is indicated on the docket of the case between those two dates. R. 1. Also on December 17, 2003, an Order was entered by the Court substituting Peggy's present counsel for her former counsel. R. 181. Until Peggy filed her Motion to Dismiss for Failure to Prosecute on October 5, 2005, neither Peggy's counsel, the Chancery Clerk or the Court *sua sponte* had ever moved to

dismiss this case for failure to prosecute. R. 205. In fact, Jennings filed his Interrogatories and Requests for Production herein on June 3, 2005, attempting to move this case forward to trial. R. 200. Peggy responded **not by filing** a Motion to Dismiss, but rather by filing her Motion for Protective Order to disallow the discovery. R. 182. Jennings filed his Motion to Compel discovery on September 21, 2005. R. 185. Peggy finally served her Motion to Dismiss on October 5, 2005, almost 2 years after her new counsel's initial appearance in this action, and only **after** Jennings' insistence on moving the case forward to trial. R. 205. In fact, Jennings **submitted his motion to have a trial setting** in his pleadings with the Court filed on September 21, 2005, **in advance of** Peggy's Motion to Dismiss. R. 185. At the hearing of this matter, Jennings testified (without contradiction and with cross examination being offered, yet waived, by Peggy) that after the last activity in the case, he diligently sought to have the case set for trial, but was unable to secure trial dates or progression of the case due to obstacles and delays that were not within his control. In fact, Jennings' position is supported by the letter from his former counsel, J. Joshua Stevens, Jr., which was attached to Jennings' Brief which was served on Peggy's counsel on January 16, 2006. R.E. 9. In that letter, Attorney Stevens supports Jennings' statement of the facts at the hearing. On January 25, 2006, the Court entered its Order Overruling Defendant's Motion to Dismiss based on the fact that "the clerk did not move to dismiss this action pursuant to Rule 41(d)' and the first notice that the Plaintiff had of a possible dismissal was from the Defendants and because most of the delay occasioned in bringing this case to trial was not the Plaintiff but others..." R. 212. The Chancellor went on to reserve his "right to later dismiss the case if the delay is prejudiced to the Defendant (sic)..." Id. The case was then set for and proceeded to trial

on July 24 and 25, 2006. At the conclusion of Jennings' case in chief, Peggy renewed her Motion to Dismiss, which the Chancellor then granted in his Final Judgment. R. 218. Following Jennings' filing of a post trial motion, including a request for findings of fact and conclusions of law, R. 220, the Chancellor entered his Order on September 15, 2006, summarily denying same. R. 241. Thereafter, Jennings filed his Notice of Appeal. R. 243.

SUMMARY OF THE ARGUMENT

The Chancellor abused his discretion in dismissing this matter for Jennings' failure to prosecute during the trial of the case on its merits. Longstanding, consistent precedent favors all cases to be tried on the merits, when possible. In the instant case, the relevant standard for dismissal was not met, and cannot be met, under the circumstances. In the case at bar, the only factor favoring dismissal is the passage of time. There can be no question that this case had been on the docket for an extended period of time. However, Mississippi Supreme Court precedent has noted that mere passage of time is not sufficient grounds for dismissal. The case at bar can be differentiated from all Mississippi cases involving Rule 41(b) dismissals by two facts. First, there is no Mississippi case in which a dismissal for failure to prosecute was actually granted during a trial of the case on its merits. Second, there is no Mississippi case in which the Plaintiff's case was dismissed after he/she actually attempted to move the case forward to trial prior to the Court's or the Defendant's filing motions or taking other action to have the case dismissed. In the case at bar, Jennings indeed was moving the case forward and had filed a Motion with the Court for a trial setting. Based on these circumstances, it

would be proper for the Court to reverse the Chancellor's decision and allow this case to proceed to judgment on its merits.

Additionally, the Chancellor was requested in Jennings' post trial motion to issue findings of fact and conclusions of law relating to his ruling. The Chancellor's failure to do so constitutes reversible error and the case should be reversed and remanded on that basis as well.

ARGUMENT

In reviewing a trial court's decision to dismiss under Rule 41(b), this Court may reverse only if it finds that the Chancellor abused his discretion. Wallace v. Jones, 572 So.2d 371, 375 (Miss. 1990)(citations omitted).

On or about August 4, 1992, Jennings' and Peggy's mother executed a warranty deed to Peggy transferring title to certain real estate located in Lowndes County, Mississippi. Believing that the warranty deed was the subject of an abuse of a confidential relationship and the product of undue influence by his sister, Jennings filed his Complaint in this action on November 5, 1992. R. 2. Other pleadings were filed by both parties, the issues were joined and the matter proceeded accordingly with regular filing activity by both parties in the case through late 1996. R.E. 1. After a delay in the proceedings, in 2005, Jennings hired new counsel and proceeded to have his case heard on the merits. At no stage during the delay did the Court, the Chancery Clerk or Peggy file a motion or take any other action to move the case forward or have it dismissed. *Id.* Only after Jennings' filing discovery, Peggy's objecting to answering it and Jennings' filing a Motion to Compel which included a motion for a trial setting did Peggy decide to file a Motion to Dismiss for Failure to Prosecute.

The starting point for any analysis of a motion to dismiss is the language of the applicable rule. The rule relied upon by the Chancellor in this case provides that “[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.” Rule 41(b), Miss.R.Civ.P. However, the comment to that rule cautions that “past practice has tempered this harsh result by allowing dismissed cases to be reinstituted, **except in extreme situations.**” See Comment to Rule 41(b), Miss.R.Civ.P. (emphasis added). Obviously, the Chancellor’s ruling in this case relates solely to whether Jennings failed to properly prosecute this action.

Mississippi appellate courts have addressed the issue of motions for dismissal by parties for an opposing party’s failure to prosecute pursuant to Rule 41(b), Miss.R.Civ.P., on a number of occasions and have consistently stated the prerequisites and applicable standards to be used by trial courts when ruling on such motions. Specifically, in interpreting the above quoted language from Rule 41(b), Miss.R.Civ.P., the Mississippi Supreme Court has stated that “the law favors trial of issues on the merits, and dismissals for want of prosecution are therefore employed reluctantly.” American Telephone and Telegraph Company v. Days Inns of Winona, 720 So.2d 178, 180 (Miss. 1998). That Court went on to note that:

There is no set time limit on the prosecution of an action once it has been filed, and dismissal for failure to prosecute will be upheld only where the record shows that the plaintiff has been guilty of dilatory or contumacious conduct. This 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. ...Rule 41(b) dismissals with prejudice will be affirmed only upon a showing of a clear record of delay or contumacious conduct by the plaintiff, and where lesser sanctions would not serve the best interests of justice. While the requirements of a

clear record of delay by the plaintiff and futile lesser sanctions have been articulated the most consistently, several other factors have been identified as “aggravating factors”. Specifically, these include the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to defendant, and whether the delay was the result of intentional conduct. ...[C]ases in which dismissals with prejudice have been affirmed on appeal illustrate that such a sanction is reserved for the most egregious of cases, usually cases where the requisite factors of clear delay and ineffective lesser sanctions are bolstered by the presence of at least one of the aggravating factors.

Id. at 180-81 (citations omitted)(emphasis added).

All cases dealing with Rule 41(b) dismissals have quoted approvingly from the above language.

In essence, the case law boils the issue down to a two part test consisting of (1) delay or contumacious conduct on the part of the plaintiff, and (2) the futility of lesser sanctions. Id. The Court should also consider those “aggravating factors” discussed above. In the present case, the Chancellor apparently relied primarily upon the passage of time from the filing of the lawsuit until the time of trial. This issue was addressed by the Mississippi Supreme Court in the AT&T case discussed above, wherein the Court stated that **there is no set time limit on the prosecution of an action once it has been filed...**, other factors must be present. Id. at 180 (emphasis added). Therefore, without more, this case was patently inappropriate for dismissal.

The Court also mentioned the fact of the death of Robin Weaver, a longtime family attorney for the parties’ parents. R.E. 21. For this factor to have any relevance to the proceedings, it must be related to some prejudice to Peggy as the Defendant. There is no such prejudice. In fact, on direct examination, Peggy admitted that in having the warranty deed in question drafted, by **her** attorney, neither she nor her mother had consulted with Mr. Weaver prior to its execution. Thus, by her own admission, there is

no fact that Mr. Weaver could've testified about relating to the transfer at issue in the case at bar. Thus, this fact does not support dismissal.

The Chancellor also mentioned the fact that the doctors of the parties' deceased mother were unavailable. There is simply nothing in the record to indicate this fact other than the argument of counsel. There is certainly no evidence that had such doctor(s) been available, he/she/they could've testified to any fact relevant to the evidence presented by Jennings in his case in chief. Thus, the dismissal was not supported by any admissible evidence and therefore, was patently in error.

However, to further show the impropriety of dismissal, Jennings would show that he has been guilty of no "delay or contumacious conduct", the first element of the two part test. As stated above, Jennings testified at the January 12, 2006, hearing on the motion in question, without contradiction and with Peggy waiving the Court's offer of cross examination, that he had repeatedly and consistently attempted to advance his case in this Court. T. 11 and 12. He testified further that he had been through 4 attorneys to attempt to have the case tried. T. 13 and 14. His rendition of the facts, while undisputed, is also supported by the letter submitted by an officer of this Court, Attorney Stevens.

The second factor for consideration is the availability and ineffectiveness of lesser sanctions. In this action, there was no exploration by the Chancellor of lesser sanctions for the simple reason that the Chancellor was not faced with dilatory or contumacious conduct by Jennings at any time during the pendency of the case. Peggy never argued what lesser sanctions should have been considered by this Court or when the Court has had that opportunity. Regardless of this omission, Jennings would submit that it is incumbent upon the Court based on Mississippi case law to consider said alternatives and

why they won't work in this case. Further, Jennings would submit that the most appropriate order from the Court was actually entered: the Court concluded discovery and set the matter for trial. Accordingly, the case did progress through the Plaintiff's introduction of evidence at trial before being dismissed by the Chancellor at the conclusion of Jennings' case in chief.

Likewise, the Court did not have before it any proof of the "aggravating factors" discussed in various cases by the appellate courts. The first factor, the responsibility of the party, as opposed to his counsel for the delay AT&T, 720 So.2d at 181., is to be weighed in favor of Jennings. Specifically, Jennings has testified, without contradiction, that he was not responsible for the delay. This testimony was supported by the letter signed by Attorney Stevens. Peggy submitted no evidence on this point.

The second factor is the degree of actual prejudice to the Defendant. Id. This factor is discussed above and also is to be weighed in favor of Jennings as Peggy produced or advanced no actual evidence, other than attorney argument at the hearing or at the trial of this matter, that she was actually prejudiced in any respect by the delay. The best that can be gathered from her argument is that there was the possibility of prejudice, but certainly no proof of same. Without such proof, it was an abuse of discretion for the Chancellor to weigh this factor in Peggy's favor.

The third and final factor is whether the delay was the result of intentional conduct. Id. As has been argued above, there was no proof or argument whatsoever along this vein at the hearing or the trial of this matter, and failing same, this factor is also to be weighed in Jennings' favor.

In sum, Peggy's proof in support of the dismissal of Jennings' lawsuit is the passage of time. The case law is clear and has stated that the passage of time is simply not sufficient reason, standing alone, to warrant dismissal. In light of this fact and the fact that Jennings requested a trial setting prior to Peggy's Motion to Dismiss, Jennings submits to the Court that this case should be remanded for the completion of the trial of this case on its merits.

In addition to the arguments advanced above, Jennings would show that there are absolutely no Mississippi cases wherein the appellate court has been faced with facts such as those presented by the case at bar. Specifically, no Mississippi case found by undersigned counsel dealing with a Rule 41(b), Miss.R.Civ.P., dismissal were the result of a defendant's motion to dismiss filed **after** the Plaintiff had actually prosecuted his case by filing discovery or a motion for a trial setting. In the case at bar, Jennings submitted discovery requests to Peggy to try to move this case toward a resolution. Peggy resisted responding to the discovery requests and filed her Motion to Quash same. In response, Jennings filed a Motion to Compel which included a request of the Court to set the matter for trial. Only at that time did Peggy decide to file her motion based on Jennings alleged failure to prosecute.

Likewise, there are no Mississippi cases found in which the case was actually dismissed for failure to prosecute **during** the trial. Based on these circumstances, the Court should reverse the lower court and remand this case for a completion of the trial on the merits.

Also in support of his request for reversal herein, Jennings would refer the Court to the AT&T case discussed above. In that case, the Mississippi Supreme Court reversed

a lower court's dismissal upon finding that although less than diligent, the plaintiff's failure to have his case set did not "constitute a contemptuous resistance to the authority of the trial court or a clear record of unilateral delay." AT&T at 181. The Court also discussed the lower court's failure to consider the applicability of lesser sanctions and describe the reason why such lesser sanctions would suffice. The same factors are present in the case at bar.

In Hoffman v. Parcelsus Health Care Corporation, 752 So.2d 1030 (Miss. 1999), the Mississippi Supreme Court reversed a lower court's dismissal upon finding that the plaintiff's actions did not merit such harsh result. In that case, the case was set for trial but continued several times. Two of the defendants then filed bankruptcy. The plaintiff's attorney failed to attempt to lift the automatic stay and merely inquired into the status of the bankruptcy by letter. The Court, in reversing dismissal, again noted the lower court's failure to consider and/or impose lesser sanctions, and the fault of the plaintiff's attorney as opposed to the plaintiff herself. The Court concluded by noting that dismissal is specifically reserved for "egregious cases of delay". As discussed in detail above, the case at bar did not meet that standard.

In Tims v. City of Jackson, 823 So.2d 602 (Miss.Ct.App. 2002), the Mississippi Court of Appeals found, in reversing the lower court's dismissal of the case, that the plaintiff's conduct did not warrant dismissal. Specifically, the Court noted the number of attorneys appearing in the case as well as the number of judges who had been called upon to preside at various stages of the case. The Court stated that "[b]ecause no time limits exist once a complaint has been filed, a dismissal for failure to prosecute will only be upheld in circumstances where the record shows that a plaintiff is guilty of dilatory or

contumacious conduct”. Id. at 604. For similar treatment, see also, Camacho v. Chandeleur Homes, Inc., 862 So.2d 540 (Miss.Ct.App. 2004); and, Lone Star Casino Corporation v. Full House Resorts, Inc., 796 So.2d 1031 (Miss.Ct.App. 2001).

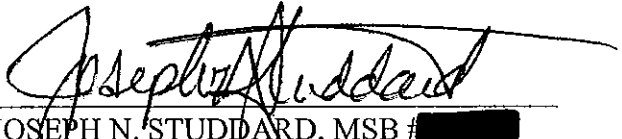
In the alternative, Jennings requests the Court to remand this case for specific findings of fact and conclusions of law as requested by Jennings in his Motion for Reconsideration, for a New Trial or For Findings of Fact and Conclusions of Law filed on August 11, 2006. In his Final Judgment and subsequent Order denying said Motion, the Chancellor clearly did not make such findings of fact and conclusions of law. The rule plainly states that “in all actions tried upon the facts without a jury the court may, and **shall upon the request of any party** ... find the facts specially and state separately its conclusions of law thereon... .” Rule 52(a), Miss.R.Civ.P. (emphasis added). Jennings would submit that the two references made in the Court’s oral opinion delivered on July 25, 2006, do not comply with this rule and thus, constitute a reversible abuse of discretion. See, e.g., Century 21 Deep South Properties, Ltd. v. Corson, 612 So.2d 359 (Miss. 1992); Lowery v. Lowery, 657 So.2d 817 (Miss. 1995).

CONCLUSION

In conclusion, the Mississippi appellate courts have uniformly made known the preference for a case to be tried on its merits. The remedy selected by the Chancellor should be reserved only for extreme and egregious cases. The present case is not such case. Undersigned counsel would submit this position is supported by the cases, and specifically, by the fact that Peggy’s first mention of such dismissal occurred **only after** Jennings’ attempts to move the case forward through discovery and his filing of a Motion for a Trial Setting. There is no Mississippi case in which the Plaintiff’s activities of this

nature were punished with dismissal. It would be incongruous for the plaintiff to have taken the first action toward having the matter set for trial and then reward the defendant for her failure to do so. Given these facts, the applicable law, as advanced above, and the fact that Peggy offered no evidentiary basis upon which to base a dismissal, Jennings would request the Court to reverse the Chancellor's decision and remand this matter for trial at the earliest possible date agreeable to the Chancellor, the parties and their attorneys.

Respectfully submitted, this the 18th day of July, 2007.


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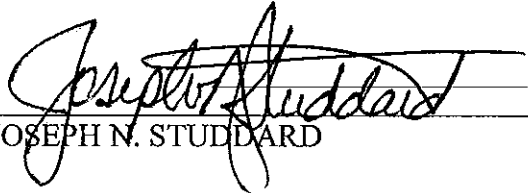
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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a true and correct copy of the foregoing Brief of Appellant to the Honorable Kenneth M. Burns, Chancellor, at P. O. Drawer 110, Okolona, Mississippi, 38860.

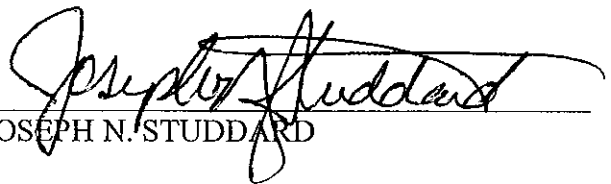
SO CERTIFIED this the 18th day of July, 2007.



JOSEPH N. STUDDARD

I hereby certify that I have this day hand delivered a true and correct copy of the foregoing Brief of Appellant to Gary L. Geeslin, Attorney for Appellee, at his office address located at 518 2nd Avenue North, Columbus, Mississippi, 39701

SO CERTIFIED this the 18th day of July, 2007.



JOSEPH N. STUDDARD