ILLINOIS CENTRAL RAILROAD COMPANY APPELLANT

V.

MARTHA MOORE, ADMINISTRATRIX OF THE
ESTATE OF WILLIE B. MOORE, DECEASED APPELLEE

**BRIEF OF THE APPELLEE,
MARTHA MOORE, ADMINISTRATRIX OF THE
ESTATE OF WILLIE B. MOORE, DECEASED**

**On Interlocutory Appeal from the
Circuit Court of Amite County, Mississippi**

Wayne Dowdy, [redacted]
DOWDY & COCKERHAM
P. O. Box 30
Magnolia, MS 39652-0030
601/783-6600
601/783-6555

William S. Guy, [redacted]
LAW OFFICES OF WILLIAM S. GUY
909 Delaware Avenue (39648)
P. O. Box 509
McComb, MS 39649-0509
601/684-2793
601/249-2507

CASE NO. 2006-1A-00884-SCT

ILLINOIS CENTRAL RAILROAD COMPANY **APPELLANT**

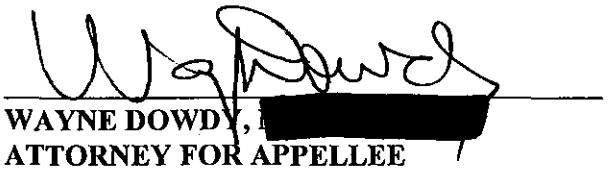
V.

MARTHA MOORE, ADMINISTRATRIX OF THE ESTATE OF WILLIE B. MOORE, DECEASED **APPELLEE**

I. 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.

1. Martha Moore, Administratrix of the Estate of Willie B. Moore, Deceased, Appellee
2. Illinois Central Railroad Company, Appellant
3. William S. Guy, Esq. and Wayne Dowdy, Esq. Attorneys for Appellee
4. Romney H. Entrekin, Esq. and Richard A. Follis, Esq. Attorneys for Appellant
5. Honorable Lillie Blackmon Sanders, Circuit Court Judge, Amite County, Mississippi



WAYNE DOWDY, [redacted]
ATTORNEY FOR APPELLEE

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IV. STATEMENT OF THE ISSUES

1. The trial court did not abuse its discretion in denying Illinois Central Railroad Company's Motion to Dismiss pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure.

2. The trial court did not abuse its discretion in denying Illinois Central Railroad Company's Motion to Dismiss pursuant to Rule 41(d) of the Mississippi Rules of Civil Procedure.

V. STATEMENT OF THE CASE

Martha Moore, Administratrix of the Estate of Willie B. Moore, Deceased, ("Plaintiff") filed her original complaint on February 5, 1997, (R.01) against the Defendant, Illinois Central Railroad Company ("ICRR") under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, 56, et seq.

Plaintiff's Decedent, Willie B. Moore, was an employee of ICRR and died while performing his duties with ICRR from a heart attack. Mr. Moore had been diagnosed with diabetes and cardiovascular disease both of which ICRR was, or should have been, aware. Plaintiff's lawsuit claimed injuries and damages resulting from ICRR's negligence in allowing the decedent to lay along the tracks without medical attention within a reasonably timely manner and assigning him to duties beyond his physical capacity.

Both sides served discovery with ICRR answering on April 25, 1997 and plaintiff answering on October 29, 1997. plaintiff moved for a case management order in January, 1998. In June, 1998, specifically June 16, 1998, ICRR took the deposition of Fraser MacKenzie, M.D., an autopsy protector for the Jefferson Parish Louisiana Coroner's Office. On October 6, 1998, Amite County Court Administrator notified the parties of a trial date, being **November 9, 1998**, as evidence by the General Civil Docket, Amite County, Mississippi.

On **October 7, 1998**, counsel for ICRR notified the court administrator that the parties had agreed to continue the November 9, 1998 trial setting and requested the matter to be removed from the trial docket. The letter also advised that an appropriate order resetting the trial date would be submitted. **(Addendum No. 1)**

Again, on **December 28, 1998**, Plaintiff filed a motion for case management order. On **January 6, 1999**, counsel for ICRR again corresponded with counsel for plaintiff requesting that the parties agree to changes in the proposed case management order that would allow for a trial setting sometime after **August 15, 1999**, being the proposed date to provide a list of witnesses delaying the trial for an additional year, if

2002, June 1, 2004 and June 1, 2005, with plaintiff requesting each time, in writing, that the case remain on the active docket.

In **October, 2005**, and entry of appearance by Wayne Dowdy, Attorney at Law, was filed, and, on **March 24, 2006** ICRR filed its Motion to Dismiss. The motion was heard by the court and ICRR's motion denied. At that hearing, the court gave the parties available dates in **October 2006** on which the trial could be scheduled. But, on **August 14, 2006**, ICRR's counsel wrote to the court advising that the attorneys were attempting to schedule depositions and "on behalf of the defendant, Illinois Central Railroad Company" requested that the matter be removed from the trial docket. **(Addendum No. 3)**

On **August 24, 2006**, this Court granted ICRR permission to appeal staying all proceedings in the matter. The defendant did not file the Designated of Record until **May 24, 2007, approximately nine months later.** This Court denied plaintiff's Motion to Dismiss Interlocutory Appeal for defendant's failure to complete the appeal process in the time allowed by the Rules.

The above clearly shows that the defendant has contributed to the delay in getting this case to a conclusion and the defendant has at no time since the filing of the complaint shown any prejudice that it has encountered during the previous months and none it will sustain should this Court fail to overturn the ruling of the lower court.

VI. SUMMARY OF THE ARGUMENT

In the present case, plaintiff's attorney of record made application in writing within the time limit satisfying the requirement of "action of record." The case law supports the proposition that the involuntary dismissal of an action is considered an extreme sanction and should be reserved for cases where a plaintiff has been guilty of dilatory or contumacious conduct and the law favors a trial on the merits. Although the Record cannot provide the evidence of the defendant's participation, the above Statement of the Case does provide that information. This defendant has requested and/or agreed to the delay in getting this case to trial and has failed to show any prejudice to the defendant caused by the delay.

A. Standard of Review

The standard of review for a Rule 41(b) dismissal is an abuse of discretion. Hine v. Anchor Lake Property Owners Ass'n, Inc., 911 So.2d 1001, 1003 (Miss. 2005) and, the trial judge will not be overturned unless there has been manifest error. Watson v. Lillard, 493 So. 2d 1277, 1279 (Miss. 1986).

B. The trial court did not abuse its discretion in denying ICRR's Motion to Dismiss pursuant to M.R.C.P. 41 (b).

This Court has previously held that the power to dismiss an action for want of prosecution is part of a trial court's inherent authority. Wallace v. Jones, 572 So.2d 371, 375. Dismissal with prejudice is an extreme and harsh sanction that deprives the litigant of the opportunity to pursue his claim and any dismissals with prejudice are reserved for the most egregious cases. Id. at 376.

The Record in this matter does not tell the whole story. Plaintiff does not deny that there were four separate notices to dismiss filed by the clerk from May 24, 1002 through June 1, 2005. But, as pointed out above in the Statement of the Case, the defendant has not only cooperated in the delay but has requested the delay. At no time, prior to March 24, 2006, did the defendant object to the case remaining on the active docket nor did it file a motion to dismiss. Each time the plaintiff attempted to get the case on track and obtain a trial date the defendant requested that the trial date be continued.

The trial court judge did not abuse her discretion in denying ICRR's Motion to Dismiss pursuant to M.R.C.P. 41(b).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ICRR'S MOTION TO DISMISS PURSUANT TO M.R.C.P. 41 (d)

regarding this case. At that time the parties **agreed** that the case should be continued from the November 9th trial setting. **(Addendum 1)** On **December 28, 1998,** plaintiff filed her second motion for a Case Management Order and again the defendant did not agree with the proposed order and suggested changes that would allow for a trial setting approximately one year later. **(Addendum 2)** It is not disputed that the clerk filed four separate notices to dismiss the case for lack of prosecution. But what is not reflected in the Record is the fact that the defendant has not only participated in the delay but has greatly contributed to the delay. At no time did the defendant object to the matter remaining on the docket and did not file a motion to dismiss during that time.

There has been no claim of prejudice or injury to the defendant caused by the delay. The discovery has been answered and the deposition of the coroner has been taken.

In **October, 2005**, an entry of appearance was filed by attorney Wayne Dowdy and in **March, 2006,** defendant moved to dismiss the case. After the court denied defendant's motion, the parties were advised that the case could be set for trial in **October, 2006.** But, **again** the defendant asked the court to remove the case from the October, 2006 trial docket. **(Addendum 3)**

To accuse this plaintiff of "dilatory or contumacious conduct" is outrageous. The defendant in this matter has done everything possible to delay the plaintiff's day in court and upon failing in the lower court to obtain a dismissal is now making an attempt to imply to this Court that the plaintiff, and only the plaintiff, has caused this case to sit on the court's docket for this long period. Delay would appear to be accepted practice by the defendant in the fact that it took more than nine months from the date this Court granted the petition for interlocutory appeal until the first action was taken by the defendant in meeting the first deadline by the Rules of Appellate Procedure.

The trial court judge, having all the facts before her, did not abuse the discretion extended to her by the law in denying defendant's motion to dismiss.

favors a trial on the merits, a dismissal with prejudice should be executed reluctantly.

M.R.C.P. 41(d) provides, "If action of record is not taken **or** good cause is not shown," (emphasis added) the clerk can dismiss the case. The defendant has incorrectly inserted "and" for "or", and has represented to the court that plaintiff took no action. There is no established definition of "action of record" and the clerk accepted the written request that the case remain on the docket and at no time has the defendant objected to plaintiff's request that the case remain on the docket. The letter responding to the clerk's notice was sufficient to satisfy the requirement of taking "action of record". Cucos, Inc. v. McDaniel, 938 So.2d 238.

Although the lower court's order does not include findings of fact this Court has held in Hine v. Anchor Lake Property Owners Ass'n, Inc., 911 So.2d 1001, 1005 as follows:

> [T]hat we will "assume that the trial judge made all findings of fact that were necessary to support his verdict'". *Watson*, 493 So.2d at 1279; *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss.1983); *Culbreath v. Johnson*, 427 So.2d 705, 707-08 (Miss.1983).

Further, the Watson Court also found that the trial judge's findings of fact were to be presumed. Watson, 493, at 1279.

The defendant argues that the plaintiff, and only the plaintiff, has caused the delay and has failed to prosecute. Although the Record does not reflect the actions of the defendant that caused or contributed to the delay, the fact remains that this defendant asked that each trial date that was set for this case be continued and cannot deny that each trial setting was continued either by agreement or at the request of the defendant and has failed to show any prejudice sustained by the defendant. In Peoples Bank v. D'Lo Royalties, Inc., 206 So.2d 836, (Miss.1968), a case in which attorneys for the parties agreed to events leading to the delay, the Court found that it was an abuse of discretion to dismiss the case with prejudice due to the fact that the attorneys had agreed to matters that affected the delay and there was no evidence of deliberate

CONCLUSION

The trial court judge did not abuse the discretion afforded her by the Rules and by the case law governing this decision in overruling ICRR's motion to dismiss and her ruling should be affirmed by this Court.

Respectfully submitted,

MARTHA MOORE, ADMINISTRATRIX OF THE ESTATE OF WILLIE B. MOORE, DECEASED

By _____
WAYNE DOWDY, MSBN 6177

Wayne Dowdy
DOWDY & COCKERHAM
P. O. Box 30
Magnolia, MS 39652-0030
601/783-6600

William S. Guy, MSBN 5083
LAW OFFICES OF WILLIAM S. GUY
P. O. Box 509
McComb, MS 39649-0509
601/684-2793

prepaid, a true and correct copy of Appellee's Brief to:

Romney H. Entrekin
Rochard A. Follis
GHOLSON BURSON ENTREKIN & ORR, PLLC
P. O. Drawer 1289
Laurel, MS 39441

THIS, the 20th day of November, 2007.

WAYNE DOWDY

PATRICK H. ZACHARY
VICKIE F. EGGETT
JAMES L. QUINN

Hattiesburg, MS

Telephone (601) 264-0300
Telecopier (601) 264-0311

Hattiesburg, MS 39403-5848

January 6, 1999

VIA FACSIMILE
Thomas W. Brock, Esquire
Law Offices of William S. Guy
P. O. Box 509
McComb, Mississippi 39648

RE: Martha Moore, Admx. of the Estate of Willie B. Moore v.
Illinois Central Railroad Company
Amite County Circuit Court; Civil Action No. 97-0006-S

Dear Tommy:

I received your motion and quite frankly, I see no reason why you and I cannot agree on the majority of the proposed Case Management Order. The only problem I have with agreeing to this type Order as it never fails that when I am trying to schedule depositions, the other side only gives me two or three dates that he or she may be available for the next three month period. I don't want to fall into that trap. Nevertheless, as long as you are willing to work with me in good faith in getting this discovery completed prior to trial, I have no problem with entering a Case Management Order. I would propose that we agree to the following: discovery to be completed by September 30, 1999; joinder of parties and amendments to be served on or before June 1, 1999; Plaintiff's experts should be designated by April 1, 1999 and Defendant's experts by May 1, 1999; and Plaintiff and Defendant to provide a list of all witnesses that they may call at trial by August 15, 1999.

As to any exhibits and objection thereto, it would appear to me that that would be spelled out in the pre-trial order, as I assume that you are referring to a pre-trial order similar to the ones in Federal Court. Thus, I do not think number 8 is necessary as the exhibits would have to be exchanged by the time of the pre-trial conference and any objections noted in the pre-trial order.

As to number 9, again, the pre-trial order would control the witnesses called and the documents utilized within exception of those witnesses and/or documents that would be utilized for impeach purposes. Therefore, I do not think number 9 is necessary.

After you have had an opportunity to review this letter, please give me a call and hopefully we can work out this matter without the necessity of a hearing.

Sincerely,

ZACHARY & LEGGETT

VICKI R. LEGGETT

VRL/rsh

Telecopier (601) 264-0311

August 14, 2006

Mrs. Bessie Bradley
Court Administrator
Post Office Box 1384
Natchez, Mississippi 39121-1384

RE: Martha Moore, Admx. of the Estate of Willie B. Moore v.
Illinois Central Railroad Company
Amite County Circuit Court; Civil Action No. 97-0006-S

Dear Mrs. Bradley:

The last time that we appeared before Judge Sanders, all attorneys were advised of some available trial dates in October, 2006, but no agreement was ever reached among the attorneys concerning a trial setting. In fact, we have been in the process of attempting to schedule depositions in this case over the last few weeks and accordingly, on behalf of the defendant, Illinois Central Railroad Company, I am respectfully requesting that this matter be removed from the trial docket.

By copy of this letter, I am advising counsel for the plaintiff of our position with the request that they notify me immediately should they disagree with same.

Sincerely,

ZACHARY & LEGGETT

VICKI R. LEGGETT

VRL/am

cc: William S. Guy, Esquire
Wayne Dowdy, Esquire