IN THE SUPREME COURT OF MISSISSIPPI

CAUSE No. 2007-CA-0218

LINDA STACY	APPELLANT
V.	NO. 2007-CA-0218
WILLIAM JOHNSON, M.D., Et. Al.	APPELLEE

APPEALED FROM THE CIRCUIT COURT OF ALCORN COUNTY
CASE NO. CV980348GA

BRIEF OF APPELLANT

Dana J. Swan, Esquire
CHAPMAN, LEWIS & SWAN
Post Office Box 428
Clarksdale, MS 38614
662-627-4105

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LINDA STACY — APPELLANT

V. — NO. 2007-CA-0218

WILLIAM JOHNSON, M.D., Et. Al. — APPELLEE

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 this Court may evaluate potential disqualifications or recusal.

Thomas J. Gardner III
Circuit Judge
P.O. Drawer 1100
Tupelo, MS 38802

Harold W. McLeary, Esquire
Victoria S. Rowe, Esquire
McLeary, Domico & Kyle, PLLC
The Tower at Peabody Place,
100 Peabody Place, Suite 1250
Memphis, TN 38103

Kimberly Howland, Esquire
Wise, Carter, Child & Caraway
401 Capitol Street, Suite 600
Jackson, MS 39205

Dana J. Swan, [redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF MISSISSIPPI

LINDA STACY — APPELLANT

V. — NO. 2007-CA-0218

WILLIAM JOHNSON, M.D., Et. Al.
COMPANY — APPELLEE

BRIEF OF APPELLANT

COMES NOW THE APPELLANT/PLAINTIFF, by and through counsel, and files this her Brief of Appellant and would show unto the Court that the trial court was in error in dismissing this cause with prejudice for failure to appear at a status conference when the Appellant/Plaintiff's attorney received no notice of the hearing and in failing to grant the Appellant's motion to reinstate, after having previously granted said motion.

I.

COURSE OF PROCEEDING BELOW

This medical malpractice action was filed against William Johnson, MD and the Magnolia Regional Health Center (Appellees) on or about October 16, 1998. The complaint alleged that the Appellees treatment of Stacy resulted in the loss of her child. After numerous attempts on the part of Stacy's attorney to take the deposition of Dr. Johnson, the trial court apparently scheduled a show cause hearing on November 2, 2006, but no such notice was received by Stacy's counsel. A review of the docket sheet also indicates that no such notice was ever mailed out. On December 1, 2006, an order was entered by the Honorable Thomas Gardner, Circuit Judge dismissing the cause with prejudiice for failure to attend the show cause hearing. (R. 173). The receipt of the order of dismissal was the first time that Stacy's counsel learned of the show cause hearing on December 7, 2006, filed a motion to reinstate. (R. 175).

Initially, no objection was made to the motion to reinstate and the trial court granted the motion by order signed August 6, 2007 (R. 247). The Appellees then objected to the order, and the trial court entered a second order denying the motion on October 24, 2007 (R. 238). Stacy's attorney then filed a motion to extend time to take appeal which the trial court granted on November 29, 2007

(R. 258) and an appeal was quickly taken on November 29, 2007. The trial court later denied the motion to extend time to appeal, after the appeal was actually filed, but later vacated the order upon learning that the court had previously granted the motion.

II.

FACTS

As previously stated, this cause of action arose from alleged malpractice by Appellees in delivering the Appellant's child. After suit was filed, the usual discovery took place. Initially, the Appellant designated Shane Bennoch, MD as an expert, on March 7, 2005. (R. 135). Later, Dr. Cohn was designated as additional expert on June 23, 2005 (R. 137) and his opinion was supplemented on December 27, 2005 (R. 147). His opinion in the form of an affidavit is was also filed on February 17, 2006 (R. 149). Dr. Bennoch was withdrawn as an expert on May 22, 2006 (R. 217).

The Appellant's attorney made numerous attempts to take Dr. Johnson's deposition, but each time Johnson's attorney either cancelled the deposition or failed to respond to Appellant's request. See Notice of Deposition filed on September 2, 2003 (R. 94), re-notice of deposition filed on November 26, 2003 (R. 96), re-notice of deposition filed on January 12, 2004 (R. 97). See also request for mediation filed on December 29, 2004 (R. 119). On March 7, 2006, Stacy's counsel wrote Appellees' attorney and requested that Dr. Johnson's deposition be scheduled. (R. 219). On October 23, 2006, Stacy's attorney again requested deposition dates. (R. 203). On October 31, 2006, Appellees' attorney requested dates for depositions. On November 8, 2006 Stacy's attorney again contacted Appellees' attorney and gave dates for depositions. (R. 200).

During this time period, the trial court apparently scheduled a show cause hearing for numerous cases filed in Alcorn County, Mississippi for November 2, 2006. However, Stacy's counsel received no such notice of the hearing, or else he would have attended the hearing. A review of the docket sheet also indicates that no such notice was ever sent out. On December 1, 2006, the trial court entered an order dismissing this cause for failure to attend the show cause hearing. On December 7, 2007, Stacy's counsel filed a motion to reinstate and called to the Court's attention that

he did not receive any notice of the show cause hearing. Although the Court initially granted the motion, later a second order was entered denying the motion. From that denial, this appeal is taken.

III.

SUMMARY OF ARGUMENT

The order dismissing his cause was void because the Appellant's counsel received no notice of the hearing in violation of the Rules of Civil Procedure, the Mississippi Constitution and the United States Constitution, therefore the trial court erred in denying the motion to reinstate. *Bryant Inc. v. Walters*, 497 So.2d 933 (Miss. 1986). Alternatively, dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue her claim and should be reserved for the most egregious cases. *Wallace v. Jones*, 572 So.2d 371 (Miss. 1990).

IV.

ARGUMENT

Because Stacy's attorney received no notice of the show cause hearing, the order dismissing her cause is void. At a minimum, due process requires notice. *State v. Blenden*, 748 So.2d 77, 90 (Miss. 1999); *Mississippi Power Co. v. Goudy*, 459 So.2d 257, 271 (Miss. 1984). A judgment is void if it is acted on in a manner inconsistent with due process of law. *Soriano v. Gillispe*, 857 So.2d 64, 69 (Miss. Ct. App. 2003). If a judgment is void, there is no discretion in the trial court, it must be vacated. *Bryant Inc. v. Walters*, 493 So.2d 933, 937 (Miss. 1986). Because no notice was received of the hearing, the trial court erred in not vacating the order of dismissal.

Alternatively, dismissal with prejudice is an extreme remedy and should be reserved for the most egregious conduct, because it deprives a litigant of her day in court. *Wallace v. Jones*, 572 So.2d 371, 376 (Miss. 1990). See Also *A.T. & T v. Days Inn*, 720 So.2d 178, 180 (Miss. 1998); *Watson v. Lillard*, 493 So.2d 1277, 1278 (Miss. 1998). There is nothing in the record to reveal any such egregious conduct. Indeed, during the time that the trial court was conducting the show cause hearings, Stacy's counsel was attempting to schedule depositions. The Court of Appeals has even held that a delay of twenty months is not sufficient to dismiss with prejudice. SEE *Lone Star Casino Corp. v. Full House Resort, Inc.,* 796 So.2d 1031, 1033 (Miss. App. 2001). After the order of

dismissal was entered, the Appellees' counsel informed Stacy's counsel by letter dated February 5, 2007, "I do not believe the scheduling of depositions is necessary at this time." (R. 244).

There are no sanctions that are appropriate in the case *sub judice*. The docket sheet reveals and court file reveals that no notice was mailed to Stacy's counsel informing him of any show cause hearing. Indeed, counsel's actions reveal at that time that he was repeatedly attempting to set up depositions of the Defendant.

No time limit has been set by this Court for prosecution of an action once it has been filed. *A.T. & T.*, 720 So.2d at 180. This Court has also articulated certain factors as "aggravating factors" to consider whether any sanctions are appropriate. These are "the extent to which 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." *Id. at 181.* When these factors are examined, the sanction of dismissal with prejudice is simply not appropriate. The Plaintiff was not personally responsible for any delay. Neither she, nor her counsel, were aware of any show cause hearing. The Defendants would not be prejudiced by allowing reinstatement. Defendants had an additional attorney admitted *pro hac vice* on or about October 10, 2006 (R. 204). This was less than three weeks prior to the show cause hearing. Further, there is no finding or record of intentional delay on the part of Stacy's counsel. Indeed, the opposite is true, as counsel was repeatedly attempting to schedule depositions.

V.

CONCLUSION

Dismissal with prejudice as a sanction should only be affirmed upon a showing of "clear record of delay or contumacious conduct by the plaintiff. *Id.* No sanctions, or at least less severe sanctions are appropriate. The trial court abused its discretion in failing to vacate the order of dismissal. The Appellant would respectfully request that this cause be reversed and reinstated for a trial on the merits.

RESPECTFULLY SUBMITTED this the 28th day of May, 2008.

Respectfully submitted,

CHAPMAN, LEWIS & SWAN
Attorneys for Plaintiff
P. O. Box 428
Clarksdale, MS 38614
(662) 627-4105

By: Dana Swan

CERTIFICATE OF SERVICE

I, Dana Swan, do hereby certify that I have this day served via U.S. Mail, postage paid, a true and correct copy of the above and foregoing document to the following:

Thomas J. Gardner III
Circuit Judge
P.O. Drawer 1100
Tupelo, MS 38802

Harold W. McLeary, Esquire
Victoria S. Rowe, Esquire
McLeary, Domico & Kyle, PLLC
The Tower at Peabody Place,
100 Peabody Place, Suite 1250
Memphis, TN 38103

Kimberly Howland, Esquire
Wise, Carter, Child & Caraway
401 Capitol Street, Suite 600
Jackson, MS 39205

This the 28th day of May 2008.

Dana Swan