

COPY

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2007-^{CA}~~CV~~-00806
TRIAL COURT NO: 2000-070

GREGORY HILL

APPELLANT

FILED

VS

MAR 03 2008

DURENDA RAMSEY, ET AL

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEE

BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF NOXUBEE COUNTY, MISSISSIPPI

OF COUNSEL:

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COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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GREGORY HILL

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certified that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge of this Court may evaluate possible disqualification or recusal.

PERSONS OR OTHER ENTITIES

CONNECTION AND INTEREST

- | | |
|---|------------------------------------|
| 1. Gregory Hill | Plaintiff/Appellant |
| 2. Bennie L Jones, Jr | Attorney for Plaintiff/Appellant |
| 3. Hon. Jack Hayes | Attorney for Durenda Ramsey |
| 4. Hon. Marc E. Brand | Attorney for Deviney Equipment |
| 5. Hon. Everette White
Hon. Robert F. Walker | Attorneys for Ford aka New Holland |



BENNIE L JONES, JR. MSB# [REDACTED]
ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE(S) ON APPEAL

The issue(s) presented by Plaintiff/Appellant in this Appeal are:

- I. Whether the Court erred in dismissing the Plaintiff's case for lack of prosecution under MRCP 41(b).
- II. Whether there was an abuse of discretion by the Court in dismissing the Plaintiff's case under the circumstances.

STATEMENT OF THE CASE

A) NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW.

On May 18, 2000, Plaintiff Gregory L. Hill filed this Civil Action against the Defendant, Durenda Ransey, alleging that Durenda Ramsey was grossly negligent for rear-ending Gregory L. Hill on U.S. Highway 45 South, near Macon, Mississippi in Noxubee County on April 18, 2000, R. P.2.

Durenda Ramsey was driving a Chevrolet Van and Plaintiff Hill was driving a 1989 Ford Backhoe. R. P.2.

On April 17, 2003 Plaintiff, pursuant to an agreed order filed an amended complaint adding as defendants, Ford Motor Company, Inc., and Deviney Equipment Company, and John Does one through Ten, as party Defendants. R.P.46 and R.P.50. They were the manufacturer and seller respectively.

Various actions took place during the interim time. Then on or about April 27, 2005 the Defendant Deviney Equipment Company filed a Motion For Judgment on the Pleadings or Alternatively For Motion To Dismiss for Failure to State a Claim upon which relief can be granted, with memorandum in support of. R. 167-172.

Plaintiff after filing several Motion for Enlargements of Time to Respond to the Motion for Judgment on the Pleadings, etc. of Deviney Equipment Company filed his Response on August 3, 2005. R.P.189-196.

On March 1, 2007, Hon. Jack Hayes, after having conferred with Plaintiff's counsel, filed a Motion for a status conference. Said Motion was dated February 27, 2007 and in error said counsel stated that no action had taken place in the case since March 22, 2004. R. 197.

When actually on August 3, 2005, Plaintiff had responded to a Motion for Judgment on the Pleadings filed by Deviney Equipment Company. R. 187-196.

On March 22, 2007 the Defendant, Ford Motor Company a/k/a New Holland North America, Inc. filed it's Notice of Hearing and Motion To Dismiss for failure to prosecute. R. P.201-206.

On March 28, 2007 Plaintiff filed his response to the Motion To Dismiss for alleged failure to prosecute R. 209.

On March 30, 2007 the hearing was had on the Motion To Dismiss. R. Vol 3 pages 1-18.

On April 13, 2007, the Court entered an Order dismissing case for want of prosecution. R. 212-213.

Aggrieved by the Court's decision Plaintiff perfected his appeal by filing his notice of appeal on Monday, May 14, 2007.

B. STATEMENT OF THE FACTS

Once the Defendants, Ford Motor Company, aka New Holland North America and Deviney Equipment Company were added as Defendants additional discovery began.

On March 22, 2004, Plaintiff served Notice of Service of Plaintiff's Responses to Ford Motor Company's interrogatories. R. 107.

On August 24, 2004 an Agreed Order was entered authorizing disclosure of protected Health Information (PHI) signed by counsel for the Plaintiff in reference to the Plaintiff. R. 111-114.

Then in September 2004 a series of subpoenas duces tecum were issued and served on various entities, Health Care Providers, etc. copies were filed with the Circuit Clerk's office. R. 117-150. R. 151-166.

Activity continued in to 2005. On April 27, 2005 a Motion was filed by Defendant, Deviney Equipment Company for Judgment on the pleadings or Alternatively, for Motion To Dismiss for failure to state a claim Upon Which Relief Can Be Granted, with Memorandum in Support Of. R. 167-172.

Following this, Motions for Enlargement of Time were filed by Plaintiff seeking time to respond to the Motion for Judgment on the Pleadings, etc, of Deviney Equipment Company. R. 174-185.

In August 2005 Plaintiff responded to the Motion for Judgment on the Pleadings of Deviney Equipment Company. R. 189-196.

The next item was filed by counsel for Defendant, Durenda Ramsey, Hon. Jack Hayes dated March 01, 2007 - a Motion for a Status Conference. In which he alleges no action had been taken since March 22, 2004. R. 197.

Further in the Motion To Dismiss for Failure to Prosecute filed by Defendant, New Holland North America, Inc., ("New Holland") referred to in the Complaint as Ford Motor Company ("Ford"). It is stated in items 4 and that : " on September 3, 2003, Deviney Equipment Company filed it's answer to Plaintiff's Amended Complaint." Item 5 "since filing the Amended Complaint nearly four (4) years ago, Plaintiff has taken no further action whatsoever to prosecute his claim....." R.203.

Again this is obviously in error. See above indicating actions taken in 2004 and as late as August 2005.

SUMMARY OF THE ARGUMENT

That dismissal of the cases against Deviney Equipment Company and Ford Motor Company, aka New Holland, under the circumstance was a harsh sanction; in effect it does not give the Plaintiff his day in court concerning the defendants Ford Motor Company, Inc. also known as New Holland North America, Inc., and Deviney Equipment Company.

Since there had been action of record as late as August 2005 that there was an abuse of discretion on the part of the court and/or the error on the part of the court amounted to an abuse of discretion.

That these matters should be considered on a case by case basis.

ARGUMENT

I. WHETHER THE COURT ERRED IN DISMISSING THE PLAINTIFF'S CASE FOR LACK OF PROSECUTION UNDER MRCP 41(B)

In the case of Cucos, Inc. v. McDaniels, 938 So2d 238 (Ms. 2006) the Jackson County Circuit Court reinstated a case on January 10, 2005 that arose out of a slip and fall accident that happened on June 8, 1997. The Plaintiffs filed their Complaint on May 18, 2000 (hereinafter this case will be referred to as "McDaniels"). McDaniels P. 239. After two years of no action the Clerk entered a Motion To Dismiss For Want of Prosecution on October 16, 2002. On November 13, 2002 the McDaniels sent a letter to the Circuit Clerk requesting that the case not be dismissed. On November 22, 2002 unaware of the McDaniels' letter to the Clerk, the trial Court entered an order dismissing the case for want of prosecution. On or about August 20, 2004 the McDaniels sent a letter to Cucos regarding settlement. The McDaniels were unaware of the dismissal, the Clerk having failed to send notice of the Order and having placed the incorrect docket number on the order, until Cucos responded on or about August 24, 2004 saying the case was dismissed. McDaniels 240.

On August 30, 2004 the McDaniels filed a Motion to Set Aside Dismissal. A hearing was held on Dec. 9, 2004. By order dated January 10, 2005 the court entered an order reinstating the case. Cucos appealed to the Supreme Court which affirmed the trial court reinstating the case. McDaniels 240.

The Court looked at a Louisiana case (McDaniels p. 243) for guidance in the above matter and stated "Accordingly, dismissal should be considered as a last resort, and any dispute about satisfaction of the rule that can be resolved in favor of the Plaintiff should be resolved in favor of the Plaintiff....." Citation omitted. The Court further stated " We adopt this view regarding satisfaction of Miss. Rule Civil Procedure 41(d). McDaniels p. 243.

This position by analogy can be used in reference to dismissals under Miss. Rule of Civil Procedure 41(b).

As in the McDaniels case, McDaniels 240, there were ongoing settlement negotiations between Plaintiffs and Defendants. see Vol 3, R. Page 6 and 9.

The evidence is preserved in the depositions concerning the condition of the tractor/backhoe including photographs. Vol 3, R. page 8.

Also see Vosbein v. Bellias, 866 So2d 489 (COA 2004).

For the above and foregoing reasons the Plaintiff herein would submit to this Honorable Court that the Defendants Ford Motor Company, aka New Holland North America and Deviney Equipment Company should be reinstated in the case.

Vosbein v. Bellias, 866 So2d 489 (COA 2004) and Cucos, Inc., v. McDaniels 938 So2d 238 (Miss. 2006).

II. WHETHER THERE WAS AN ABUSE OF DISCRETION BY THE COURT IN DISMISSING THE PLAINTIFF'S CASE UNDER THE CIRCUMSTANCES.

Each case should be considered on a case by case basis. Clearly under the circumstances as set out in this case the circuit court abused his discretion.

In the Order the Court assumed that there was no action taken in this case from September 4, 2003. Which is not the case. See Statement Of The Case And Statement Of The Facts as set out above. Further the court did not take into consideration that settlement negotiations had been going on as late as 2006 between counsel for Plaintiff and other counsel. See vol 3, p. 6-9.

Moreover, see Cucos Inc., v. McDaniels 938 So2d 238 (Miss. 2006) and Vosbein v. Bellias, 866 So2d 489 (COA 2004).

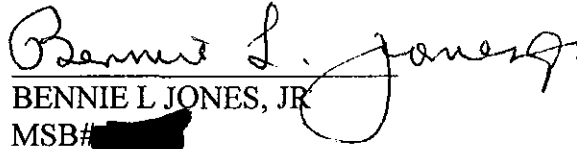
For the above and foregoing reasons the order of the trial court should be set aside and the defendants Ford aka New Holland and Devinney Equipment reinstated as defendants in this case.

CONCLUSION

This Honorable Court based on the reasons herein set out above should reverse the trial court and reinstate the defendants Ford Motor Company Inc. , aka New Holland North America, Inc., formerly "Ford" and Deviney Equipment Company, Inc. as defendants in this case and remand the case back to Noxubee County Circuit Court for further proceedings.

Respectfully submitted, this the 3rd day of March, 2008.

GREGORY HILL, PLAINTIFF/APPELLANT


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CERTIFICATE OF SERVICE

I, Bennie L. Jones, Jr, Attorney for Appellant, do hereby certify that I have this day mailed a true and correct copy of the Brief of Appellant via U.S. mail, postage prepaid, and/or via commercial carrier to:

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So certified on this the 3rd day of March, 2008.


BENNIE L JONES, JR

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SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

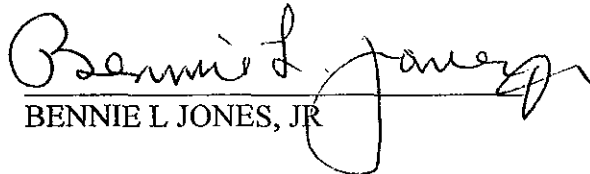
CASE NO: 2007-CA-00806
TRIAL COURT NO: 2000-070

CERTIFICATE OF SERVICE

I, Bennie L. Jones, Jr., attorney for Appellant, Gregory Hill, do hereby certify that I have
this day mailed a true and correct copy of the above and foregoing Record Excerpts of the
Appellant to the following by first class mail, postage prepaid to:

Hon. Lee J. Howard, IV
Circuit Court Judge
P O Box 1344
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Dated this the 6th day of March, 2008.


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