IN THE SUPREME COURT OF MISSISSIPPI

GWEN JENKINS, ON BEHALF OF THE DEATH BENEFICIARIES OF THOMAS JENKINS, DECEASED — APPELLANT

VS. — Case No.: 2007-CA-01273

FRANK TUCKER, M.D., AND JEFF ANDERSON REGIONAL MEMORIAL CENTER D/B/A ANDERSON INFIRMARY BENEVOLENT CORP ASSOCIATIONS — APPELLEES

BRIEF OF APPELLEE, JEFF ANDERSON REGIONAL MEMORIAL CENTER d/b/a ANDERSON INFIRMARY BENEVOLENT CORP ASSOCIATIONS

ROMNEY H. ENTREKIN {MB [redacted]
GRAYSON LACEY {MB [redacted]}
GHOLSON BURSON ENTREKIN & ORR, PA

535 N. 5th AVENUE
P.O. Box 1289
Laurel, MS 39441-1289
(601) 649-4440

Attorneys for the Appellee, Jeff Anderson Regaional Memorial Center d/b/a Anderson Infirmary Benevolent Corp Associations

IN THE SUPREME COURT OF MISSISSIPPI

GWEN JENKINS, ON BEHALF OF THE DEATH BENEFICIARIES OF THOMAS JENKINS, DECEASED — **APPELLANT**

VS. — **Case No.: 2007-CA-01273**

FRANK TUCKER, M.D., AND JEFF ANDERSON REGIONAL MEMORIAL CENTER D/B/A ANDERSON INFIRMARY BENEVOLENT CORP ASSOCIATIONS — **APPELLEES**

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 disqualifications or recusal.

1) Plaintiff, Gwen Jenkins, on behalf of the Death Beneficiaries of Thomas Jenkins, deceased;

2) Attorney for Plaintiff, Honorable Kenneth C. Miller, Danks, Miller, Hamer & Cory, Jackson, Mississippi;

3) Attorney for Plaintiff, Honorable Don Evans, Attorney at Law, Jackson, Mississippi;

4) Defendant, Jeff Anderson Memorial Center d/b/a Anderson Infirmary Benevolent Corp Associations, Meridian, Mississippi;

5) Attorneys for Appellee, Romney H. Entrekin and Grayson Lacey, Gholson Burson Entrekin & Orr, PA, 535 W. 5th Street, P.O. Box 1289, Laurel, MS 39441-1289;

6) Defendant, Frank Tucker, M.D., Meridian, Mississippi;

7) Attorneys for Frank Tucker, M.D., Christ J. Walker and John L. Hinkle, IV, Markow Walker, P.A., Jackson, Mississippi;

8) Honorable Larry E. Roberts, Circuit Court Judge, Lauderdale County, Mississippi.

Grayson Lacey
One of the Attorneys of Record for Appellee

GHOLSON BURSON ENTREKIN
& ORR, PA
535 N. 5th Avenue
Post Office Box 1289
Laurel, MS 39441-1289
Telephone: (601) 649-4440
Facsimile: (601) 649-4441

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF THE CASE

Plaintiff, Gwen Jenkins, commenced the instant medical negligence action against Jeff Anderson Regional Memorial Center d/b/a Anderson Infirmary Benevolent Corp. Associations ("Jeff Anderson") and Dr. Frank Tucker ("Dr. Tucker") by filing her Complaint on February 20, 2001. Jeff Anderson filed its Answer to Plaintiff's Complaint on March 22, 2001.

On August 24, 2001, Jeff Anderson filed its Responses to Plaintiff's First Set of Interrogatories and Request for Production of Documents. Jeff Anderson later filed its First Set of Interrogatories and Requests for Production to Plaintiff on August 30, 2001. Other than Dr. Tucker's several Requests for Subpoena Duces Tecum filed on October 4, 2001, there was no further activity in this matter for the next twenty-one (21) months until Jeff Anderson filed its Motion to Stay Proceedings and Other Relief based on the insolvency of its insurance carrier on May 12, 2003. Plaintiff never responded to Jeff Anderson's Motion to Stay and no order was entered by the trial court.

On June 23, 2003, Jeff Anderson filed a second Motion to Stay Proceedings and Other Relief, requesting a six (6) month stay from the date of the liquidation order, or until December 20, 2003. (R., at 143-49). Again, Plaintiff filed no response and no order was entered by the trial court.

Another year and nine (9) months of inactivity passed before the Clerk of Lauderdale County filed its first Motion to Dismiss for Want of Prosecution on March 24, 2005. (R., at 157). Nearly three (3) weeks after the Motion to Dismiss had been filed, Plaintiff's counsel, Don Evans, submitted a letter to the Court on April 12, 2005, stating that he was unaware that the stay had been lifted (despite the fact that Jeff Anderson only requested a stay until December 20, 2003) and informed the Court that he was attempting to schedule depositions in this matter. (R., at 158-59).

Once again, Plaintiff took no further action for one (1) year and (3) months following Mr. Evans' letter to the Court. The Clerk of Lauderdale County filed its second Motion to Dismiss for Want of Prosecution on July 13, 2006. (R., at 161). Six (6) days later, on July 19, 2006, Plaintiff filed a Motion for Trial Setting and an entry of appearance by Kenneth C. Miller, Esq. (R., at 162-65).

On August 31, 2006, Jeff Anderson filed its Motion to Dismiss for Failure to Prosecute (R., at 166-85). Dr. Tucker filed a joinder in the same. After considering the parties' briefs and conducting a hearing on the same, the Circuit Court entered its Memorandum Opinion and Judgment dismissing the action for Plaintiff's failure to prosecute on June 20, 2007. (R., at 234-48). The instant appeal followed.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's dismissal of the instant matter. Rule 41(b) of the Mississippi Rules of Civil Procedure discourages dilatory conduct and protects defendants from the prejudice that necessarily arises from it by granting "inherent authority" to the trial court to dismiss an action for failure of the plaintiff to prosecute his claim in a timely manner.

Plaintiff does not dispute that a clear record of delay existed at the time that the Court dismissed the instant action. Dismissal is appropriate upon the trial court's finding of a clear record of delay or the presence of contumacious conduct. Since it is undisputed that a clear record of delay was present, the trial court's order of dismissal is supported by sufficient evidence.

While Plaintiff attempts to discredit the Court's dismissal by arguing that lesser sanctions were not considered, this Court need not look any further than the trial court's fifteen (15) page Memorandum Opinion and Judgment to realize that the trial court indeed weighed the sufficiency of lesser sanctions and found them to be "futile." Even if the trial court had not included an exhaustive list of the lesser sanctions considered, recent caselaw suggests that the appellate court will presume that the trial court made the requisite findings to support a ruling that lesser sanctions would have been insufficient. Plaintiff's argument in this regard is clearly without merit.

Plaintiff also suggests that the substantial delays were attributable to Plaintiff's counsel, as opposed to herself. While that may be true to some extent, at some point Plaintiff must have realized that her attorney was not actively pursuing her claims. After all, by the time the trial court dismissed Plaintiff's action, over five (5) years had passed since her Complaint had been filed. At some point, both the Plaintiff and her attorney share the burden of ensuring that her claims are prosecuted.

The next point of error that Plaintiff argues is the lack of "aggravating factors." Plaintiff's argument, however, is clearly contrary to the recent decisions of the Supreme Court of Mississippi. While "aggravating factors" are present in the instant action, the trial court's dismissal may be affirmed even in the absence of the same.

Finally, Plaintiff claims that dismissal was inappropriate, because Jeff Anderson did not demonstrate that it was prejudiced by Plaintiff's delays. To the contrary, prejudice was argued by Jeff Anderson and considered by the trial court in its Memorandum Opinion and Judgment. Moreover, by the time the trial court dismissed Plaintiff's action for failure to prosecute, seven (7) years had passed since the contested treatment was rendered in this matter. It is hard to imagine how a medical malpractice defendant is not prejudiced by such a significant time lapse.

In summary, the trial court did not err when it entered a fifteen (15) page Memorandum Opinion and Judgment dismissing Plaintiff's case for failure to prosecute. The trial court found a clear record of delay in Plaintiff's prosecution of this matter. It noted that three (3) separate Motions to Dismiss for failure to prosecute were filed by either the clerk or Defendants, yet Plaintiff made no effort to prosecute her case. Ultimately, the Court pointed out that Plaintiff delayed an additional fourteen (14) months following the clerk's first Motion to Dismiss. Additionally, the Court considered the fact that as of the filing of Jeff Anderson's Motion to Dismiss, Plaintiff had not yet responded to Jeff Anderson's discovery requests filed some five years earlier. While factors other than delay are not required to support a dismissal for failure to prosecute, they were clearly present in this matter. Therefore, the trial court properly dismissed Plaintiff's action due to her failure to prosecute the same in a timely manner.

ARGUMENT

A. *Standard of Review for a Rule 41(b) Dismissal*

Rule 41(b) of the Mississippi Rules of Civil Procedure provides in pertinent part: "For 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." Miss. R. Civ. P. 41(b) (emphasis added). "The power to dismiss for failure to prosecute is granted not only by Rule 41(b), but is part of a trial court's inherent authority and is necessary for 'the orderly expedition of justice and the court's control of its own docket.'" *Cox v. Cox*, 976 So.2d 869, 874 (Miss. 2008) (quoting *Wallace v. Jones,* 572 So.2d 371, 375 (Miss.1990)).

When reviewing a trial court's Rule 41(b) dismissal for failure to prosecute, this Court should affirm unless it is evident the trial court abused its discretion. *Id.* (citing *AT &T v. Days Inn of Winona,* 720 So.2d 178, 180 (Miss.1998)). This Court also applies an abuse of discretion standard when reviewing a lower court's decision not to make specific findings of fact and conclusions of law regarding a dismissal for failure to prosecute pursuant to Rule 41(b). *Id.* (citing *Tricon Metals & Services, Inc. v. Topp,* 516 So.2d 236, 239 (Miss.1987)).

B. *It is Undisputed that the Dismissal is Supported by a Clear Record of Delay*

As a threshold issue, if this Court finds that a clear record of delay exists, then it should affirm the trial court's dismissal pursuant to Rule 41(b). Dismissal for failure to prosecute pursuant to Rule 41(b) is appropriate when there is "a clear record of delay *or* contumacious conduct by the plaintiff...." *Cox*, 976 So.2d at 875 (quoting *AT &T,* 720 So.2d at 181)(emphasis in original). "[W]here a clear record of delay has been shown and even admitted, there is no need for a showing of contumacious conduct." *Hine v. Anchor Lake Property Owners Association, Inc.,* 911 So.2d 1001, 1005 (Miss. App. 2005).

It is undisputed that a clear record of delay exists in the instant action. Plaintiff admits as much in her brief. "There is no dispute that this case sat idle at various times, and that at other times the case was not aggressively pursued by Plaintiff's counsel." (Appellant's Brief, at 8).

In fact, the record is replete with substantial delays caused by Plaintiff's inactivity. For example, following Dr. Tucker's Requests for Subpoena Duces Tecum filed on October 4, 2001, there was no activity in this matter for approximately twenty (20) months until Jeff Anderson filed its Motion to Stay Proceedings and Other Relief based on the insolvency of its insurance carrier on May 12, 2003. Plaintiff did not file any response to this Motion and no order was entered by the Court. A month later, Jeff Anderson filed a second Motion to Stay Proceedings and Other Relief, specifically requesting a limited stay of six (6) months, or until December 20, 2003. (R., at 143 – 149). Once again, Plaintiff filed no response and no order was entered by the Court.

After another year and nine (9) months of inactivity, the Clerk of Lauderdale County filed its first Motion to Dismiss for Want of Prosecution on March 24, 2005. (R., at 157). Three (3) weeks later, having not taken any formal action of record since filing a Notice of Service of Discovery on July 27, 2001, Plaintiff's counsel, Don Evans, submitted a letter to the Court on April 12, 2005, stating that he was unaware that the stay had been lifted (despite the fact that Jeff Anderson only requested a stay until December 20, 2003) and informed the Court that he was attempting to schedule depositions in this matter. (R., at 158-59). However, continued unsuccessful attempts to schedule depositions over an extended period of time, without taking any formal action to subpoena the deponent "can clearly be seen as dilatory conduct." *Hasty v. Namihira*, 2008 WL 170886 at *3 (Miss. App. January 22, 2008)(petition for cert. filed).

Plaintiff obviously disregarded the underlying warning of the Clerk's first Motion to Dismiss for Want of Prosecution, because Plaintiff again allowed the case to lay idle for an additional one (1) year and three (3) months before the clerk filed its second Motion to Dismiss for Want of Prosecution on July 13, 2006. Despite Plaintiff's minimal attempts to create the appearance of actively pursuing her claims by filing an entry of appearance by Mr. Miller and a Motion for Trial Setting, Jeff Anderson's discovery requests propounded to Plaintiff some sixty (60) months earlier remained unanswered. Consequently, on August 31, 2006, Jeff Anderson filed its Motion to Dismiss for Failure to Prosecute (R., at 166-85) asserting, *inter alia,* that Plaintiff's failure to respond to discovery for five (5) years, was yet another example of Plaintiff's dilatory conduct which warranted dismissal pursuant to Rule 41(b) . The Court correctly granted Jeff Anderson's Motion and dismissed Plaintiff's action for failure to prosecute and specifically held, "not only has the Plaintiff been dilatory in taking no action to prosecute this matter, she has also been dilatory in not responding to discovery in a timely manner." (R., at 247).

The trial court did not abuse its discretion when it held that Plaintiff's repeated extended periods of inactivity in this case – one (1) year and eight (8) months, one (1) year and nine (9) months, and one (1) year and three (3) months – amount to a clear record of extensive delay on Plaintiff's part. Moreover, Plaintiff's disregard for time limits for responding to discovery requests pursuant to Rules 33 and 34 of the Mississippi Rules of Civil Procedure is further evidence of her dilatory conduct in this matter. While an examination of the Memorandum Opinion and Judgment clearly indicates that the trial court considered other factors when dismissing Plaintiff's action for failure to prosecute pursuant to Rule 41(b), its finding of a clear record of delay on Plaintiff's part is sufficient in and of itself to support its dismissal of Plaintiff's claims. See, *Cox*, 976 So.2d at 875. Therefore, the trial court's holding should be affirmed.

C. *Aggravating Factors Only "Bolster" the Case for Dismissal, but are Not Required*

Plaintiff argues that the this Court should reverse the trial court's dismissal, because there is no evidence in the record of any "aggravating factors" such as "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." *Cox*, 976 So.2d at 876. Plaintiff's argument is misplaced as there are multiple examples of "aggravating factors" located throughout the record.

However, even if Plaintiff was correct and no evidence of "aggravating factors" existed in the record, such a conclusion would not be automatic grounds for reversal of the trial court's dismissal for failure to prosecute. Again, "factors other than delay are not required." *Id.* at 875. In fact, the Supreme Court of Mississippi recently addressed the role of "aggravating factors" in the review of a Rule 41(b) dismissal and held that "'aggravating factors' serve to 'bolster' the case for dismissal, but are not required." *Id.* (citing *AT & T,* 720 So.2d at 181). Therefore, while there is ample evidence to support the existence of "aggravating factors" in the instant action, even in the absence of the same, dismissal of Plaintiff's claims would not have been an abuse of the trial court's discretion.

D. *Lesser Sanctions Were Considered by the Trial Court and Found to Be "Futile"*

While the availability of lesser sanctions is but one of three factors that may be considered when reviewing an order of dismissal pursuant to Rule 41(b), "it should be noted that the [trial court] need not make a 'showing' that lesser sanctions would not suffice." *Hine,* 911 So.2d at 1005.

Despite Plaintiff's arguments to the contrary, the trial court did consider whether lesser sanctions would be appropriate in its Memorandum Opinion and Judgment and specifically found them to be "futile." (R., at 247). Plaintiff's argument in this regard is further discredited by the fact that the trial court examined the lack of effect that the clerk's two previous Motions to Dismiss for Want of Prosecution had on Plaintiff's dilatory approach to pursuing her claims. It would have been nothing short of unreasonable for the trial court to impose lesser sanctions when two previous attempts to do so had failed to motivate Plaintiff. Such consideration is sufficient to support dismissal. *See, e.g.*, *Hasty v. Namihira*, 2008 WL 170886 at *3(Miss. App. January 22, 2008)(petition for cert. filed)(prior imposition of lesser sanctions such as a clerk's notice of dismissal is sufficient to demonstrate that lesser sanctions were considered and deemed to be insufficient).

Again, an exhaustive list of the lesser sanctions considered is not required. *Hine,* 911 So.2d at 1005. Even if the trial court's Memorandum Opinion and Judgment had been silent on the issue of lesser sanctions – which it was not – this Court "must presume that the trial court made the requisite findings to support his ruling that lesser sanctions would have been insufficient." *Hensarling v. Holly*, 972 So.2d 716, 721 (Miss. App. 2007). Accordingly, Plaintiff's argument in this regard is without merit.

E. *The Substantial Delays, At Least in Part, are Attributable to Plaintiff, Individually*

Contrary to Plaintiff's argument, the repeated substantial periods of inactivity present in the instant matter are attributable, at least in part, to Plaintiff, individually. Plaintiff admits in her brief that "this case sat idle at various times, and that at other times the case was not aggressively pursued by Plaintiff's counsel." (Appellant's Brief, at 8). Plaintiff cannot pass all the blame to her attorney as it is hard to accept that Plaintiff was not aware of the inactivity regarding the pursuit of her claims in this case. At some point during the six years that had passed between the filing of her Complaint and the dismissal, the responsibility must shift to Plaintiff for failing to hold her counsel accountable for his failure to pursue her claims in a timely manner. Under the circumstances, Plaintiff should share the blame along with her attorney for the repeated substantial delays throughout the course of this litigation.

While there is no requirement that Plaintiff must have personally contributed to the extensive delays in the prosecution of her case in order to support a dismissal pursuant to Rule 41(b), delays that are attributable to Plaintiff, as opposed to her attorney, may constitute an "aggravating factor" that the Court can take into consideration. See, e.g., *AT&T,* 720 So.2d at 181. Thus, regardless of whether any of the delays are attributable to Plaintiff, individually, dismissal was still appropriate. See, *Cox*, 976 So.2d at 875 ("'Aggravating factors' serve to 'bolster' the case for dismissal, but are not required.").

F. *<u>While Not Required, Jeff Anderson Was Prejudiced by Plaintiff's Substantial Delays</u>*

Despite Plaintiff's attempts to argue otherwise, Jeff Anderson argued in its Motion to Dismiss for Failure to Prosecute that substantial delays in prosecuting her action were prejudicial to its ability to adequately defend against Plaintiff's claims. (R., at 166-85). The Court obviously considered the parties' arguments on this issue as it noted Jeff Anderson's argument "that the **Walker** Court recognized the presumption of prejudice to a Defendant when there is such a lengthy delay in prosecuting an action." (R., at 220).

While there is no requirement that a finding of prejudice exist in order to affirm a dismissal, Plaintiff would be hard-pressed to argue that the lengthy delays have not prejudiced Jeff Anderson. After all, the instant action arises out of medical treatment rendered in 1999. The memory of healthcare providers and potential witnesses fades with each passing year, further complicating an already complex area of litigation – medical malpractice. Thus, Plaintiff's argument in this regard is also without merit.

CONCLUSION

"The power to dismiss for failure to prosecute is granted not only by Rule 41(b), but is part of a trial court's inherent authority and is necessary for 'the orderly expedition of justice and the court's control of its own docket.'" *Cox*, 976 So.2d at 874. Plaintiff has failed to prove that the trial court abused its discretion in dismissing her claims against Jeff Anderson due to her failure to prosecute the same in a timely manner, and therefore, the trial court's dismissal should be affirmed.

CERTIFICATE OF SERVICE

I, Grayson Lacey, hereby certify that I have this date served a true and correct copy of Brief of Appellee, Jeff Anderson Regional Memorial Center d/b/a Anderson Infirmary Benevolent Corp Associations to the following via United States Mail, postage prepaid:

Honorable Lester F. Williamson, Jr.
Circuit Court Judge
Post Office Box 86
Meridian, MS 39302-0086

Kenneth C. Miller
Danks, Miller, Hamer & Cory
Post Office Box 1759
Jackson, MS 39215-1759

Don Evans
500 East Capitol Street
Jackson, MS 39201

Chris J. Walker, Esq.
John L. Hinkle IV, Esq.
Markow Walker, P.A.
Post Office Box 13669
Jackson, MS 39236-3669

This the 7th day of July, 2008.

GRAYSON LACEY
ATTORNEY FOR APPELLEE,
JEFF ANDERSON REGIONAL
MEMORIAL CENTER d/b/a
ANDERSON INFIRMARY
BENEVOLENT CORP ASSOCIATIONS