

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-CA-01273

GWENN JENKINS, ON BEHALF OF THE
DEATH BENEFICIARIES OF THOMAS JENKINS,
DECEASED

APPELLANT

VS.

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

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, FRANK TUCKER, M.D.

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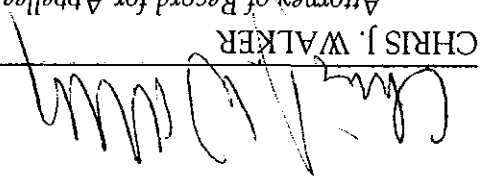
APPELLEES

I. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellee, Frank Tucker, M.D., 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. Gwen Jenkins, Appellant;
2. Kenneth C. Miller, with the law firm of Danks, Miller, Hamer & Cory, counsel for Appellant;
3. Don Evans, counsel for Appellant;
4. Frank Tucker, M.D., Appellee;
5. Chris J. Walker and John L. Hinkle, IV, with the law firm of Markow Walker, P.A., counsel for appellee, Frank Tucker, M.D.;
6. Jeff Anderson Regional Memorial Center d/b/a Anderson Infirmary Benevolent Corporation Association, Appellee; and
7. Romney H. Entrekin, with the law firm of Ferris Burson Entrekin & Follis, PLLC, counsel for Appellee, Jeff Anderson Regional Memorial Center d/b/a Anderson Infirmary Benevolent Corporation Association

CHRIS J. WALKER
Attorney of Record for Appellee
Frank Tucker, M.D.

A handwritten signature in black ink, appearing to read "Chris J. Walker", is written over a horizontal line.

II. TABLE OF CONTENTS

I.	CERTIFICATE OF INTERESTED PARTIES	i
II.	TABLE OF CONTENTS	iii
III.	TABLE OF CASES AND STATUTES.....	iv
IV.	STATEMENT OF THE CASE	1
V.	SUMMARY OF THE ARGUMENT	3
VI.	ARGUMENT	5
A.	RULE 41(B)	5
B.	DELAY OR CONTUMACIOUS CONDUCT.....	5
C.	SANCTIONS	8
D.	PERSONAL RESPONSIBILITY	9
E.	PREJUDICE TO DR. TUCKER	9
VII.	CONCLUSION	10
	CERTIFICATE OF SERVICE	12

III. TABLE OF CASES AND STATUTES

Cases

<i>American Tel. and Tel. Co. v. Days Inn of Winona</i> , 720 So. 2d 178 (Miss. 1998)	7,9
<i>Cox v. Cox</i> , 976 So. 2d 869 (Miss. 2008)	5,7
<i>Hasty v. Namihira</i> , 2008 WL 170886 (Miss. Ct. App. January 22, 2008)	6
<i>Hensarling v. Holly</i> , 972 So. 2d 716 (Miss. Ct. App. 2007)	8
<i>Hine v. Anchor Lake Prop. Owners Ass'n, Inc.</i> , 911 So. 2d 1001 (Miss. Ct. App. 2005)	7,8
<i>Roebuck v. City of Aberdeen</i> , 671 So. 2d 49 (Miss. 1996)	5
<i>Vosbein v. Bellias</i> , 866 So. 2d 489 (Miss. Ct. App. 2004)	6
<u>Rules of Civil Procedure</u>	
MISS. R. CIV. P. 41(B)	3,5,10

IV. STATEMENT OF THE CASE

The Complaint was filed on February 20, 2001, by the Plaintiff, Gwen Jenkins, against Jeff Anderson Regional Memorial Center d/b/a Anderson Infirmary Benevolent Corp. Associations ("Jeff Anderson") and Dr. Frank Tucker (R., AT 2-9). On March 20, 2001, Dr. Tucker filed his Answer to the Complaint (R., AT 33-39). On October 5, 2001, Dr. Tucker issued several subpoena duces tecum for medical records, and returns on those subpoenas were filed on October 18, 2001 (R, AT 63-89).

For approximately one (1) year and eight (8) months, nothing was filed in the present action. On May 12, 2003, Jeff Anderson filed a Motion to Stay Proceedings and Other Relief based on the insolvency of its insurance carrier (R., AT 90-92). Ms. Jenkins never responded to said motion, and the trial court never entered an order staying the case.

On June 23, 2003, Jeff Anderson filed a second Motion to Stay Proceedings and Other Relief, requesting a stay of six (6) months from the date of the liquidation order, or until December 20, 2003. (R., AT 143-49). Ms. Jenkins did not file a response to this Motion either, and no order was entered by the trial court granting the stay.

One (1) year and nine (9) months later, on March 24, 2005, the Clerk of Lauderdale County filed a Motion to Dismiss for Want of Prosecution (R., AT 157). Even though the Motion filed by Jeff Anderson only requested a stay until December 20, 2003, Don Evans, attorney for Ms. Jenkins, submitted a letter to the Court on April 12, 2005, nearly three (3) weeks after the Motion to Dismiss was filed, advising the Court that he had been unaware that the stay had been lifted and advised the Court that he was working to set various depositions (R., AT 158-59).

Following this letter of April 12, 2005, no action was taken by Ms. Jenkins for another one

(1) year and three (3) months. Subsequently, on July 13, 2006, the Clerk of Lauderdale County filed a second Motion to Dismiss for Want of Prosecution (R., AT 161).

On July 19, 2006, Ms. Jenkins filed a Motion for Trial Setting, as well as an entry of appearance by Kenneth C. Miller, Esq. (R., AT 162-65).

On August 31, 2006, Jeff Anderson filed a Motion to Dismiss for Failure to Prosecute (R., AT 166-185). Dr. Tucker filed a joinder in the Motion to Dismiss (R., AT 200-01). On June 20, 2007, the Circuit Court entered its Memorandum Opinion and Judgment dismissing the action (R., AT 234-48).

V. SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the trial court in its dismissal of this matter. Rule 41(b) of the Mississippi Rules of Civil Procedure provides the trial court with the inherent authority to control its docket and provide for orderly expedition of justice through the vehicle of dismissal for failure to prosecute.

Ms. Jenkins, in her argument for reversal of the trial court's ruling, admits that the trial court made a finding of clear delay. The case law provides that the only finding a trial court must make is that there has been a delay *or* contumacious conduct. When a clear record of delay is shown, that is all that is required to support the trial court's ruling.

Ms. Jenkins also contends that sanctions were not appropriately considered. The argument that the trial court failed in some way to outline all of the sanctions considered is without merit. The case law provides that the appellate court will presume that the trial court made the requisite findings to support its ruling that lesser sanctions would have been insufficient. It is apparent from the Memorandum Order and Opinion that the trial court did consider sanctions and determined them to be insufficient.

Additionally, Ms. Jenkins argues that "aggravating factors" were not present. Factors other than delay are not required to support dismissal.

Finally, Ms. Jenkins contends that no prejudice to Dr. Tucker was shown or argued. However, the Memorandum Order and Opinion reflects that prejudice was a consideration, both in the argument of Dr. Tucker and Jeff Anderson and in the ruling of the trial court.

The trial court found a clear, extensive, and repeated record of dilatory conduct on the part of Ms. Jenkins. Ms. Jenkins was provided with many opportunities to advance the present action and

failed to do so. She was even given at least one (1) warning from the trial court in the form of the first Motion to Dismiss for Lack of Prosecution. While other factors can support a dismissal, they are not required. Sanctions were considered by the trial court and were rejected as an appropriate avenue in the action. Finally, prejudice to Dr. Tucker was argued and weighed in the trial court's ruling. As the trial court properly considered the factors necessary to support dismissal, no grounds for reversal exist.

VI. ARGUMENT

A. RULE 41(B)

“Since the adoption of the Mississippi Rules of Civil Procedure, it is clear that the granting of motions to dismiss is subject to the discretion of the trial court. This Court can only reverse when there has been an abuse of that discretion.” *Roebuck v. City of Aberdeen*, 671 So. 2d 49, 50 (Miss. 1996).

“Rule 41(b) of the Mississippi Rules of Civil Procedure authorizes a defendant to move for the dismissal of an action ‘[f]or failure of the plaintiff to prosecute’ 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.’ What constitutes a failure to prosecute is considered on a case-by-case basis.” *Cox v. Cox*, 976 So. 2d 869, 874 (Miss. 2008).

The Mississippi Supreme Court set forth considerations to be weighed in determining whether to affirm a dismissal with prejudice under Rule 41(b): (1) whether there was a “a clear record of delay or contumacious conduct by the plaintiff”; (2) whether lesser sanctions may have better served the interests of justice; and (3) the existence of other “aggravating factors.” *Id.*

B. DELAY OR CONTUMACIOUS CONDUCT

Ms. Jenkins submits that the case law in Mississippi reflects that dismissals for lack or prosecution should be employed reluctantly (APPELLANT’S BRIEF, AT 7). While Ms. Jenkins is correct that dismissals for lack or prosecution are employed reluctantly, the Mississippi Court of Appeals has stated that “[t]here is no set time limit for the prosecution of an action once it has been filed, but where the records shows that a plaintiff has been guilty of dilatory or contumacious

conduct, or has repeatedly disregarded the procedural directives of the court, such a dismissal is likely to be upheld.” *Vosbein v. Bellias*, 866 So. 2d 489, 493 (Miss. Ct. App. 2004).

In regard to whether Ms. Jenkins actively prosecuted her claim, she indicated that because she wrote a single letter to Jeff Anderson in April 2005, this reflects that she was actively attempting to pursue her claim. However, this issue has already been explored in *Hasty v. Namihira*, 2008 WL 170886 (Miss. Ct. App. January 22, 2008) (petition for cert. filed). In *Hasty*, the plaintiffs argued that they had continued to attempt to schedule the deposition of the remaining physician and had asked opposing counsel to schedule said deposition. *Id.* at *3. Thus, the plaintiffs asserted that they were not contumacious or dilatory in their efforts to move the case forward. *Id.* In examining this reasoning, the Court of Appeals stated that “[w]hile [plaintiffs] understood they could have subpoenaed the physician to be deposed, they chose to attempt to schedule the deposition without taking such an action. One year later, when [defendant’s] motion to dismiss was filed, essentially nothing had occurred in this case. *This can clearly be seen as dilatory conduct.*” *Id.* (emphasis added).

Thus, the mere fact that Ms. Jenkins inquired one time via letter about deposing persons in the action, does not excuse her from not pursuing her claim in a timely manner. Clearly, if Ms. Jenkins did not get a response to her solitary letter, she could have chosen to unilaterally subpoena the requisite witnesses to a deposition. One letter in 2005, without any further action, does not excuse or permit dilatory conduct.

Further, as the Court of Appeals stated in *Vosbein*, a court can consider whether a plaintiff has repeatedly ignored procedural directives. *Vosbein*, 866 So. 2d at 493. As the record indicates, the Clerk of Lauderdale County filed its first Motion to Dismiss for Want of Prosecution on March

24, 2005 (R., AT 157). As discussed above, in response to this pending motion, the only action taken by Ms. Jenkins was to write one (1) letter. It was only after the filing of the Clerk's second Motion to Dismiss for Want of Prosecution on July 13, 2006 (R., AT 161), over one (1) year later, that attorney Don Evans associated Kenneth Miller (R., AT 164-65). In granting the Motion to Dismiss, it was clear that the trial court took this into account. The trial court noted that Ms. Jenkins made no efforts to prosecute the claim between the submission of its facsimile letter in April 2005, and the filing of the Clerk's second motion in July 2006 (R., AT 246).

Ms. Jenkins seeks to utilize the decision of *American Tel. and Tel. Co. v. Winona*, 720 So. 2d 178 (Miss. 1998), to bolster its position that dismissal was not warranted (APPELLANT'S BRIEF, AT 7-8, 10-11). The problem with Ms. Jenkins's argument, however, is that the Mississippi Supreme Court distinguished *Winona* with the more recent decision of *Cox v. Cox*, 976 So. 2d 869 (Miss. 2008). In *Cox*, the Court noted that factors other than delay are typically present when a dismissal with prejudice under Rule 41(b) is upheld. Nevertheless, factors other than delay *are not required.*" *Id.* at 875-76 (emphasis added).

Ms. Jenkins further contends that there is no evidence that the seven (7) year delay in prosecuting this action was the result of intentional conduct. However, there is NO requirement that the Court find that the delay was the result of anything intentional on the part of Ms. Jenkins. The Mississippi Supreme Court was clear in *Cox*, that "factors other than delay are not required. The standard is whether there is 'a clear record of delay *or* contumacious conduct.'" *Cox*, 976 So. 2d at 875. This position was further echoed by the Mississippi Court of Appeals in *Hine v. Anchor Lake Property Ass'n, Inc.*, 911 So. 2d 1001 (Miss. Ct. App. 2005). In *Hine*, the plaintiffs made the same argument as that of Ms. Jenkins, and the Court stated that "this argument overlooks the fact

that the test for dismissal under Rule 41(b) does not require contumacious conduct. Rather, the test is whether there is a clear record of delay *or* contumacious conduct by the plaintiff. In this case, where a clear record of delay has been shown and even admitted, there is no need for a showing of contumacious conduct. ***This argument is without merit.*** *Id.* at 1005 (emphasis added).

In regard to the pursuit of Ms. Jenkins's claim, there is a clear record of extensive delay. As the case law reflects, the standard is not whether there is a delay AND contumacious conduct. Rather, there only needs to be a showing of a delay OR contumacious conduct. As such, the holding of the trial court should be affirmed.

C. SANCTIONS

Ms. Jenkins also contends that the trial court declined to elaborate on what other sanctions were considered, and why they would have been futile in correcting Ms. Jenkins's failure to prosecute the claim (**APPELLANT'S BRIEF, AT 11**). Ms. Jenkins posits that this issue alone is an abuse of discretion that warrants reversal of the trial court (**APPELLANT'S BRIEF, AT 11-12**).

It is clear from the trial court's ruling in its Memorandum Opinion and Order that the trial court considered sanctions (**R., AT 248**). Regardless, despite Ms. Jenkins's assertions to the contrary, an examination of the case law in Mississippi indicates that even when the trial court does not make specific findings of fact, the appellate court will "assume that the trial judge made all findings of fact that were necessary to support his verdict." ***Hine v. Anchor Lake Prop. Owners Ass'n, Inc.***, 911 So. 2d 1001, 1005 (Miss. Ct. App. 2005). Further, the appellate court will "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. Ct. App. 2007). Thus, the argument presented by Ms. Jenkins that the trial court failed to some way to outline what other sanctions had been

considered, and why they would not have remedied the situation, is immaterial to the present appeal and is not abuse of discretion or grounds for reversal.

D. PERSONAL RESPONSIBILITY

Further, Ms. Jenkins presents the argument that she did not personally contribute to the delay in prosecution of her claim (**APPELLANT'S BRIEF, AT 12**). However, Ms. Jenkins cites no case law that evidences that failure to find that a plaintiff personally contributed to the delay is necessary to support a dismissal or is grounds for a reversal of the trial court. Rather, there is no requirement that the Plaintiff personally contribute to the delay in the prosecution of her claim. This can be an "aggravating factor" that the Court can take into account. See *American Telephone and Telegraph Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (Miss. 1998).

Thus, the fact that Ms. Jenkins may not have personally contributed to the delay in not grounds for reversal of the trial court's ruling either.

E. PREJUDICE TO DR. TUCKER

Finally, Ms. Jenkins contends that there was no specific claim by either Jeff Anderson or Dr. Tucker that they will suffer prejudice if the extensive delay were to be overlooked (**APPELLANT'S BRIEF, AT 12**). In fact, Ms. Jenkins contends that the issue of prejudice was not addressed at all (**APPELLANT'S BRIEF, AT 12**).

However, this contention is inaccurate as the Memorandum Opinion and Judgment reflects:

The Defendant argues that the *Walker* Court recognized the presumption of prejudice to a Defendant when there is such a lengthy delay in prosecuting an action. *Id.* at 1239. The Fifth Circuit also upheld a dismissal where there was no activity for 22 months. *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980). The Defendant argues that based on Rule 41 this case should be dismissed as to allow the Plaintiff to proceed would unduly prejudice the Defendant.

(R., AT 220).

It is apparent from the language of the Memorandum Opinion and Order that the issue of prejudice was argued at the hearing before the trial court on the Motion to Dismiss. Further, the issue of prejudice was a consideration in the trial court's ruling.

There is no requirement that prejudice be found in order to sustain a dismissal. However, it is easy to envision how a medical malpractice action that will rely heavily on the memory of medical personnel regarding an event that is now over nine (9) years old could easily prejudice Dr. Tucker.¹ This is especially true given the fact that in over seven (7) years of litigation, not a single deposition of witnesses and/or party defendants have been taken, and almost no discovery has been conducted.

VII. CONCLUSION

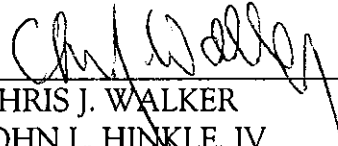
Ms. Jenkins has failed to establish any reason for reversal of the trial court's ruling in favor of Dr. Tucker. The power to dismiss pursuant to Rule 41(b) is within the trial court's inherent authority and should only be overturned upon a showing of abuse of discretion. In examining the overall prosecution of the claim, the trial court found that there was a clear record of delay. The trial court properly weighed the possibility of sanctions and the resulting prejudice to Dr. Tucker. As a result, the trial court's ruling should be affirmed.

¹The initial treatment by the deceased, Thomas Jenkins, was in February 1999.

RESPECTFULLY SUBMITTED, this the 29 day of May, 2008.

FRANK TUCKER, M.D.

BY:


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CERTIFICATE OF SERVICE

I do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

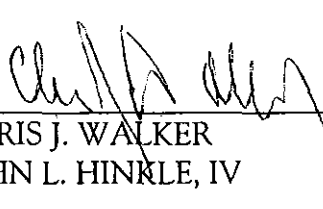
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This the 29 day of May, 2008.



CHRIS J. WALKER
JOHN L. HINKLE, IV