

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

**GWENN JENKINS, ON BEHALF OF THE
DEATH BENEFICIARIES OF THOMAS JENKINS,
DECEASED
V.**

APPELLANT

**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**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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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. Gwen Jenkins, Plaintiff and Appellant;
2. Frank Tucker, M.D., Defendant and Appellee;
3. Jeff Anderson Regional Memorial Center d/b/a Anderson Infirmary Benevolent Corporation Association, Defendant and Appellee;
4. Don H. Evans, Attorney for the Appellant;
5. Kenneth Miller, Attorney for the Appellant;
6. Michael Cory, Attorney for the Appellant;
7. Danks, Miller, Hamer, & Cory, Attorneys for the Appellant;
8. Romney H. Entrekin and Grayson Lacey, Gholson, Burson, Enterkin & Orr, Attorneys for Jeff Anderson Regional Memorial center b/b/a Anderson Infirmary Benevolent Corp Associations;

REPLY

In applying the applicable law to the facts in this case, there is no question that the Circuit Court committed reversible error. The Mississippi Supreme Court has unequivocally stated that because the law favors a trial on the issues on the merits, a dismissal for lack of prosecution is employed reluctantly. *Mississippi Dept. of Human Services v. Guidry*, 830 So.2d 628, 632 (Miss. 2002). Although, the trial court did make a finding of clear delay, this finding was in error. The trial court also found that other sanctions available would be “futile.” This finding was an abuse of the discretion by the trial court. There is simply no indication that any alternative sanctions were considered by the Court to expedite the proceedings. Furthermore, there is no legal rational as to why alternative sanctions would not have been sufficient, in light of the fact that at the time of dismissal a Motion for Trial Setting was pending, all discovery had been responded to, experts had been identified by the Appellant and the case was ready to proceed to trial. Finally, the trial court failed to consider factors in its decision even though it had specifically stated in its Opinion that they had to be considered, including: the extent to which the plaintiff, as distinguished from her 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. None of these factors are present in this case.

A. There was no Clear Record of Delay Caused Solely by the Appellant

At the time of the hearing on the Appellees’ Motion to Dismiss, the case was ready to be set for trial. Although at times the case remained idle, at the time of the hearing the case was ready to be set for trial (the motion for trial setting had been filed prior to the filing of the Appellee’s Motion to Dismiss for Want of Prosecution), discovery had been answered and expert designations by the

Appellant had been filed. The Appellees in their Brief argue that a clear record of delay exists in this case that is attributable solely to the Appellant. However, a careful examination of the record, reveals that blame for the delay cannot be entirely placed upon the Appellant and that blame for the delay rests equally with the Appellees, and as such the Circuit Court's decision should be reversed.

In reaching a decision regarding the cause of the delay, this Court needs to analyze the reasons that led to the delays that ultimately resulted in the filing of the two clerk's motions to dismiss for want of prosecution. The record before this Court demonstrates that the Appellant was not solely responsible for causing these delays and that, in fact, the delays were equally attributable to the Appellees.

(i) Clerk's First Motion to Dismiss

The Clerk's first motion to dismiss was filed on March 24, 2005. (R., at 157). Prior to the clerk's filing of this motion, Jeff Anderson Hospital had filed two (2) motions to stay the proceedings, on May 12, 2003 and on June 23, 2003. (R., at 143-49). Jeff Anderson never sought a hearing on these motions and, furthermore, Jeff Anderson never informed Appellant's counsel that the stay had been lifted. On April 12, 2005, an attorney for the Appellant informed the Clerk that he was unaware that the stay had been lifted and that he was attempting to set up depositions with the Appellees' counsel. (R., at 158-59) The second motion for stay requested by the Appellees was for a six-month period and that the stay was to be lifted on December 20, 2003. However, without an order setting that deadline and without notice from Appellees' counsel that the stay had been lifted, it is completely understandable why the Appellant's attorney concluded or believed that the stay had not been lifted. It was entirely reasonable for the Appellant to rely on the Appellee to notify her attorney that the stay had been lifted, which the Appellees' attorney admittedly failed to do.

Therefore, the Appellees in their Brief (and the Circuit Court in its Order) were simply wrong to lay the blame for the delay entirely on the Appellant in this matter. The delay during this time period is largely attributable to the two motions to stay filed by Jeff Anderson, the failure of Jeff Anderson to have an order entered setting the stays deadline, and the failure of Jeff Anderson to notify the Appellant that the need for the stay no longer existed.

(ii) Clerk's Second Motion to Dismiss

Following, the Clerk's first motion to dismiss, the Appellant attempted to secure deposition dates from the Appellees. Specifically, the Appellant's attorney initially contacted Chris Walker, attorney for Dr. Tucker, and they agreed on deposition dates of April 20, April 21, and any day of the week of May 2nd, 2005. (R., at 158-160). These dates were provided to Jeff Anderson Hospital's attorney with a request for the attorney to check his calendar to see what dates were acceptable. Counsel for Jeff Anderson ignored the request.

Counsel for Jeff Anderson never responded to the request for deposition dates. Nevertheless, the Appellees argue that even though they ignored the request for deposition dates that the case should still be dismissed. In support of their argument the Appellees rely on the case of *Hasty v Namihira*, 2008 WL 170886 (Miss. Ct. App. January 22, 2008)(petition for cert. filed). However, *Hasty* is clearly distinguishable from this case. In *Hasty*, unlike the present case, the trial court had applied two separate lesser sanctions before dismissing the case outright. In this matter, there were no lesser sanctions applied by the trial court prior to the case being dismissed. The trial court's failure to address the fact that Jeff Anderson chose to ignore the Plaintiff's request for deposition dates also constitutes reversible error by the trial court because the Appellees' failure establishes that both parties were dilatory prior to the filing of the Clerk's second motion to dismiss. The

Mississippi Supreme Court unequivocally has stated that because the law favors a trial on the issues on the merits, a dismissal for lack of prosecution is employed reluctantly. *Mississippi Dept. of Human Services v. Guidry*, 830 So.2d 628, 632 (Miss. 2002). If a party is dilatory, as Jeff Anderson was in this case, it logically follows that that party should be prohibited from seeking dismissal of an action for want of prosecution.

(iii) Appellant's Action Following Clerk's Second Motion to Dismiss

Following the Clerk's second motion to dismiss, the Appellant filed an entry of appearance for Kenneth C. Miller and a Motion for Trial Setting. (R., at 162-65) This cured the second motion to dismiss. The Appellees then filed its Motion to Dismiss for Want of Prosecution. (R., at 166-85). The Appellant then noticed the motion to set the matter for trial prior to the Appellees noticing their Motion to Dismiss for Want of Prosecution. Further, the Appellant attempted to set various depositions with the Appellees, but were provided no dates for depositions during this time period. Again, these facts are undisputed. None of these facts were mentioned in either the Appellees' Brief or the Court's Order. The Court in its Order chose to ignore these facts, and as such committed reversible error in failing to appreciate the fact that following the Clerk's second motion to dismiss and prior to Appellees' Motion to Dismiss for Want of Prosecution, the Appellant had taken multiple steps to move the case forward, and at the time of the hearing the case was being vigorously prosecuted.

In its Brief, Jeff Anderson Hospital argues that the Appellee's failure to respond to its discovery responses is further evidence of dilatory conduct. The simple fact is that early on in the discovery process, the Appellant provided discovery responses to Dr. Tucker that contained full expert disclosures, including expert disclosures that were directed to the hospital's alleged

negligence. Moreover, at no time did Jeff Anderson approach the Appellant requesting responses to discovery and at no point did Jeff Anderson file a Motion to Compel. Finally, prior to the hearing on the Appellees' Motion to Dismiss for Want of Prosecution, Jeff Anderson was provided with full discovery responses.

The record clearly demonstrates that the inactions of both the Appellees and the Appellant contributed to the delay of this case. The Appellant never violated a Court Order in this matter. Further, the Appellees waited to file their Motion to Dismiss for Want of Prosecution until after the Appellant had taken active steps to get the case back on track and were actively prosecuting this case. As such, at the time of filing the Appellees' Motion, there does not exist a clear record of delay solely attributable to the Appellant. In *Vosbein v. Bellias*, 866 So.2d 489, 494 (Miss. 2004), this Court upheld a dismissal for want of prosecution because the Plaintiff was solely responsible for the delay. That simply is not the case here, and because there is no clear record of delay solely attributable to the Appellant, the Court's decision to dismiss must be reversed.

B. Aggravating Factors

The Appellees argue that aggravating factors only bolster a case for dismissal but are not required. This is a correct statement of the law and the Appellant concedes this point. *Cox v. Cox*, 976 So.2d 869, 876 (Miss. 2008). However, aggravating factors have always been something that this Court and trial courts look to when deciding cases like this and the presence of such factors either strengthens or weakens the case for dismissal under Rule 41(b). *Cox* at 876. Further, this Court has held that, what constitutes the failure to prosecute, and therefore what action or inaction warrants dismissal, depends on the facts of the particular case. *Wallace v. Jones*, 572 So.2d 371, 376 (Miss. 1990)(citing, *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir.1982)). In looking at the facts of

a particular case, the trial court and this Court must determine what aggravating factors exist, if any.

The Appellees argue that there are multiple aggravating factors located throughout the record. Interestingly, they fail to show any aggravating factor(s). Why? Because none exist. Simply put there are no aggravating factors to support this case. This Court should recognize that fact and in determining the facts of this particular case find that no aggravating factors supported dismissal.

C. Lesser Sanctions Were Not Truly Considered By the Trial Court

The law in Mississippi is clear. This Court has adopted the standard that prior to affirming a trial court's dismissal for want of prosecution, the trial court must show that lesser sanctions **would not serve the best interest of justice**. *American Tel. and Tel. v. Days Inn of Winona*, 720 So.2d 178, 181 (Miss. 1998)(citing, *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir.1982)(emphasis added). In *American Tel.*, the Mississippi Supreme Court made it clear that prior to affirming a dismissal, the trial court was required to show not only a clear record of delay but that lesser sanctions would have been futile and would not serve the best interest of justice. *American Tel. and Tel.*, 720 So.2d at 181. Where there is no indication in the record that the lower court considered any alternative sanctions to expedite the proceedings, appellate courts are less likely to uphold a Rule 41(b) dismissal. *American Tel. and Tel.*, 720 So.2d at 182.

The Appellees cite *Hine v. Anchor Lake Property Owners Association, Inc.*, 911 So.2d 1001,1005 (Miss. App. 2005) for the proposition that an exhaustive list of lesser sanctions considered is not required and that even if the trial Court's opinion had been silent on the issue of lesser sanctions, one could presume the trial court considered lesser sanctions. The problem with the Appellees' view, is that the trial court in this case prepared an extensive Order and in the Order only asserts that "other sanctions available would be futile." Therefore, it was the trial Court itself which

raised this appealable issue in its Order. *Hine* is simply not applicable here.

Instead, this Court must now determine factual and legal issues regarding the availability of lesser sanctions and whether these lesser sanctions would serve the best interest of justice. Clearly, in analyzing this issue, the trial Court fell below the requirements as set forth by the Mississippi Supreme Court. The failures include the fact that the trial court declined to state what other sanctions were considered. Further, the trial court declined to state why other sanctions be futile in getting the Appellant to diligently prosecute the case. Finally, the trial court incorrectly concluded that the purpose of a lesser sanction was to undue or remedy the previous delay. Mississippi Law is clear that the purpose of some lesser sanction is to hold the non-diligent party accountable if there has been a prolonged inexcusable prior delay while at the same time providing the Plaintiff with an incentive and warning to diligently prosecute the case going forward. The trial court simply misapplied the law and in doing so committed reversible error.

Most importantly, the finding of “futility” by the trial Court was simply wrong. In fact, the finding of “futility” stands in direct contradiction to the Appellant’s actions in response to the Clerk’s second motion to dismiss, which included the filing of an entry of appearance by new counsel, the filing of a motion for trial setting, responding to all discovery and requesting depositions. Clearly, given the efforts by Appellant’s counsel to advance the case after the filing of the second Clerk’s Motion, a lesser sanction, if necessary at all, would have been more than sufficient to accomplish the intended result without penalizing the Plaintiff herself. Therefore, the only conclusion that can be reached after reviewing the record is that the trial court did not have a basis for finding that lesser sanctions would have been futile, and would not serve the best interest of justice. Because the trial court’s finding in this regard is contrary to the evidence in the record, the decision of the trial court

to dismiss this case must be reversed.

D. The Delay was not Attributable to the Plaintiff

The Appellees on one hand argue that the Plaintiff cannot pass all the blame to her attorney because “it is hard to accept that Plaintiff was not aware of the inactivity regarding pursuit of her claims in this case.” (Appellee/Dr. Tucker’s Brief at 9) The Appellees later argue, that the delay attributable to the Plaintiff, herself as opposed to counsel, is simply an aggravating factor that is not required to dismiss the case. (Appellee/Dr. Tucker’s Brief at 9) The Appellees’ conclusion regarding the Plaintiff’s alleged blame is factually and legally without any support. In fact, there was no evidence presented in the briefs or during argument that the Plaintiff herself was to blame. Furthermore, the trial court ignored this fact in its Order. Mississippi law is clear and in *American Tel. and Tel. v. Days Inn of Winona*, 720 So.2d 178, 182 (Miss. 1998) the Mississippi Supreme Court stated that:

The theme running through the cases involving Rule 41(b) is that negligence or inexcusable conduct on the part of plaintiff’s counsel does not in itself justify dismissal with prejudice. *See, e.g., Rogers*, 669 F.2d at 322-23; *McGowan*, 659 F.2d at 558. This is not to say that the lower court is powerless to deal with derelictions of duty by counsel. We make clear that upon remand, the circuit court may impose such reasonable sanctions, short of dismissal, on AT& T or its present attorneys as the court may find appropriate. *See, e.g., Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 248 (5th Cir. 1980).

American Tel. and Tel. v. Days Inn of Winona, 720 So.2d 178, 182 (Miss. 1998); *see also, Anthony v. Marion County gen. Hosp.*, 617 F.2d 1164, 1168 n. 4 (5th Cir. 1980)(“we note that in at least four cases where dismissal was held to be inappropriate, a factor was the lack of indication in the record of the client’s knowledge of, or participation in, his attorney’s failure to prosecute”). The Appellees’

attempt to suggest that somehow the Plaintiff was at fault, is ingenuous and without any support in the record. The trial court failed to indicate any consideration of this important factor, even though the trial court indicated in its Order that it was an important factor to be considered. The trial court's failure to consider this factor bolsters the fact that this case must be reversed.

E. Appellees Were Not Prejudiced

There is no evidence in the record indicating that the Appellees were prejudiced. There is not a single affidavit or shred of evidence suggesting prejudice. Without any support in the record, Jeff Anderson states in its Brief that prejudice exists due to the length of time that has occurred between the alleged negligence and dismissal of this action. Moreover, in his Brief, Dr. Tucker argues that "it is apparent from the Order that the issue of prejudice was argued at the hearing and was considered in the trial court's ruling." (**Appellee/Dr. Tucker's Brief at 10**) The Appellees further argue that this is evident, because in the trial court's Order it was stated in passing that the "**Walker** Court recognized the presumption of prejudice to a Defendant when there is such a lengthy delay in prosecuting the action." However, the trial court's Order did not address whether prejudice was present in this matter. Why? Because prejudice simply does not exist and none was shown at any proceeding or in any filing with the trial court. The trial court's failure to consider this factor bolsters the fact that this case must be reversed.

CONCLUSION

The trial court's Order dismissing this matter should be reversed. The Circuit Court abused its discretion in dismissing this case for a want of prosecution because the delay was caused by both the Appellant and the Appellees. Further, the trial Court abused its discretion in finding that lesser sanctions would be futile when, in fact, the Appellant in response to the Clerk's second motion to

dismiss and prior to the filing of the Appellees' motion to dismiss for want of prosecution had filed an entry of appearance by new counsel, a motion for trial setting, and had responded to all discovery by the time of the hearing. Finally the complete lack of aggravating factors requires this case to be reversed. This case should be reversed, a scheduling order should be entered and a trial on the merits should proceed as soon as possible.

Respectfully submitted, this the 22nd day of August, 2008.



KENNETH C. MILLER, MSB No. [REDACTED]
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I, Kenneth C. Miller., counsel of record for the plaintiff-appellant hereby certify that I have this day mailed, by the United States Mail, a true and correct copy of the above and foregoing Brief of Appellant to the following:

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I also further certify that I have delivered the original and (3) three copies of the foregoing Brief of Appellant, via hand delivery, to the following:

Ms. Betty Sephton
Supreme Court Clerk
405 High Street
Jackson, MS 39201

This the 22nd day of August, 2008.


KENNETH C. MILLER