

**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**

**BRIEF OF APPELLANT
(Oral Argument Requested)**

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CERTIFICATE OF INTERESTED PARTIES

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 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; and
7. Danks, Miller, Hamer, & Cory, Attorneys for the Appellant.

SO CERTIFIED, this the 5th day of MAY, 2008.



Kenneth C. Miller, MSB No [REDACTED]

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
A. Statement of Proceedings Below and Timeline	1
B. Statement of Facts	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. The Trial Court Erred In Granting The Defendants’ Motion To Dismiss For Want of Prosecution	7
1. The was no clear record of delay attributable to the Plaintiff	8
2. The sanction of dismissal is clearly excessive and is unsupported by the record	10
3. The Plaintiff was not personally responsible for the delay	11
4. The Delay did not cause actual prejudice to any Defendant	12
5. The Delays in this were not the result of intentional conduct	12
CONCLUSION	13
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

CASES

<i>American Tel. and Tel. v. Days Inn of Winona</i> , 720 So.2d 178, 182 (Miss. 1998)	7,10,11
<i>Anthony v. Marion County Gen. Hosp.</i> , 617 F.2d 1164, 1168 (5 th Cir. 1980)	11
<i>Gray v. Fid. Acceptance Corp.</i> , 634 F.2d 226, 227 (5 th Cir. 1981)	5
<i>Luna v. I'ntl Ass'n of Machinists and Aerospace Workers</i> , 614 F.2d 529, 531 (5 th Cir. 1980) . . .	5
<i>McGowan v. Faulkner Concrete Pipe Co.</i> , 659 F.2d 554,556 (5 th Cir. 1981)	5
<i>Mississippi Dept. Of Human Services v. Guidry</i> , 830 So.2d 628,632(Miss. 20002)	5,7
<i>Pond v. Braniff Airways, Inc.</i> , 453 F.2d 347, 349 (5 th Cir. 1972)	5
<i>Rogers v. Kroger Co.</i> , 669 F.2d 317 (5 th Cir. 1982)	7,10
<i>Wallace v. Jones</i> , 572 So.2d 371, 376 (Miss. 1990)	7,8
<i>Watson V. Lillard</i> , 493 So.2d 1277 (Miss. 1986)	11
<i>Whitten v. Whitten</i> , 956 So.2d 1093 (Miss. App. 2007)	9

RULES

Rule 41(b) Mississippi Rules of Civil Procedure	4,5,10
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BRIEF OF APPELLANT

Statement of the Issues

1. Whether the trial court erred in granting the Defendants' Motion to Dismiss for Failure to Prosecute?

Statement of the Case

A. Statement of the Proceedings Below and Timeline.

1. On February 20, 2001, attorney Don H. Evans filed suit on behalf of the wrongful death beneficiaries of Thomas Jenkins (hereafter "the Plaintiffs") against Frank Tucker, M.D. and Jeff Anderson Regional Memorial Center d/b/a Anderson Infirmary Benevolent Corporation Association (hereafter "the Defendants"). (R. at 2-9; RE at 23). The Complaint alleged that the Defendants were guilty of negligence in their treatment and care of Thomas Jenkins which caused or contributed to his death. (R. at 2-9; RE at 23).

2. On March 20, 2001, Defendant Tucker filed an Answer (R. at 33) and on March 23, 2001, the Defendant Hospital filed its answer. (R. at 40).

3. On July 26, 2001, the Plaintiff filed responses to Dr. Tucker's discovery requests which

included the Plaintiff's initial expert designation. (R. at 53).

4. On October 4, 2001, Defendant Tucker issued various subpoenas which sought the production of deceased's medical records. (R. at 63-74).

5. On May 12, 2003, the Defendant Hospital filed a Motion for Stay of Proceedings due to the insolvency of its insurance carrier. (R. at 90-142). The Defendant Hospital never noticed this Motion for hearing. Rather, and as occurred in many similar pending cases, Plaintiff's counsel simply agreed to the stay request.

6. On July 23, 2003, the Defendant Hospital filed a second Motion for Stay of Proceedings and Other Relief. (R. at 143-56). The Defendant Hospital did not notice this motion for hearing as the Plaintiff again agreed to the stay.

7. On March 24, 2005, the Clerk of Lauderdale County filed a Clerk's Motion to Dismiss for Want of Prosecution. (R. at 157). In response, attorney Don Evans wrote the Circuit Clerk explaining the case had been delayed to the insolvency of the Hospital's insurance company and that he had recently requested dates for the depositions of the Defendants. (R. at 158-160). However, the Defendants never responded to this request for deposition dates.

8. On July 13, 2006, the Clerk of Lauderdale County filed a second Clerk's Motion to Dismiss for Want of Prosecution. In response to this second motion to dismiss, attorney Don Evans immediately associated Kenneth C. Miller to ensure that the case would be promptly moved toward trial.

9. On July 18, 2006, Kenneth C. Miller entered his appearance on behalf of the Plaintiff, and filed a motion for trial setting. (R. at 162-65).

10. On August 31, 2006, the Defendant Hospital filed its own Motion to Dismiss for Failure to Prosecute. (R. at 166; RE at 19).

11. On September 11, 2006, the Plaintiff timely file her Response to the Defendants' Motion to Dismiss for Failure to Prosecute. (R. at 186; RE at 39).

12. On October 18, 2006, the Plaintiff's Motion for a Trial Date was noticed to be heard on November 30, 2006. On October 23, 2006, the motion was re-noticed for November 30, 2006. (R. at 202). On November 15, 2006, the Defendants noticed their Motion to Dismiss for Failure to Prosecute for November 30, 2006. (R. at 206).

13. On November 27, 2006, the Plaintiff filed responses to Defendant Hospital's previously filed discovery. (R. at 208).

14. On April 25, 2007, the Motion to Dismiss for Failure to Prosecute was again re-noticed for hearing on May 17, 2007. (R. at 210). On May 10, 2007, the Plaintiff also re-noticed the hearing on the Motion for a Trial Date for May 17, 2007. (R. at 212).

15. On May 17, 2007, a hearing was held before the Circuit Court of Lauderdale County. On June 20, 2007, the Circuit Court dismissed the Plaintiff's Complaint and entered a Memorandum Opinion and Judgment. (R. at 216; RE at 4). The Plaintiff timely served her Notice of Appeal on July 19, 2006. (R. at 251).

B. Statement of the Facts

On February 20, 1999, Thomas Jenkins was admitted to Anderson Hospital with three gunshot wounds. Mr. Jenkins ultimately died on December 20, 1999, due to the alleged failure of the Defendants to recognized and treat certain complications from the initial gunshot wounds. An autopsy of Thomas Jenkins revealed that he died as a result of hemorrhagic necrosis, with the underlying cause being a post remote gunshot wound to his abdomen.

The Complaint was filed on February 20, 2001, in Lauderdale County. From the time of filing through October 18, 2001, the case proceeded in a timely manner with the parties filing

discovery and requesting by subpoena certain medical records of the deceased..

No action of record was taken between October 18, 2001 and May 12, 2003 when the Defendant Hospital filed its Motion to Stay Proceedings. Thereafter on June 23, 2003, the Defendant Hospital filed a second Motion to Stay Proceedings because its carrier had been placed in liquidation. Neither of these motions were set for hearing because the Plaintiff acquiesced in the requested stay.

There was no further action of record after the filing of the Defendant Hospital's second motion to stay until March 24, 2005, when the Lauderdale County Circuit Clerk filed its first Motion to Dismiss for Want of Prosecution. On April 12, 2005, the Plaintiff responded to the Motion by sending a letter to the Clerk requesting that the Clerk not dismiss the action for want of prosecution, and explaining that the Plaintiff had taken no action over the previous fifteen months because the Defendant's insurer had been in receivership and liquidation. The letter also advised the trial court that Mr. Evans had contacted defense counsel to set depositions. However, the Defendants never responded to this request.

On July 13, 2006, the Lauderdale County Circuit Clerk filed a second Motion to Dismiss for Want of Prosecution. In response to this second motion to dismiss, Don Evans immediately associated Ken Miller to ensure that the case was timely moved toward trial. Thereafter, on July 19, 2006, the an Entry of Appearance was filed by Kenneth C. Miller along with a Motion for Trial Setting.

On August 31, 2006, Anderson Hospital filed a Motion to Dismiss for Failure to prosecute which was joined by Defendant Tucker. The Defendants complained in this motion that the Plaintiff had failed to prosecute this case for approximately sixty-one months, and that the case should be dismissed because the Plaintiff's attempt to set the case for trial was too little too late.

The hearing on the Defendant's Motion To Dismiss For Failure to Prosecute was ultimately

heard on May 17, 2007. Thereafter on June 20, 2007, the Circuit Court granted the motion and dismissed the Plaintiff's Complaint. While the trial court in its Order dismissing the case correctly identified the various factors that must be analyzed when a motion to dismiss for failure to prosecute is filed under Rule 41(b), the trial court abused its discretion in concluding that these factors weighed in favor of dismissing the case. As the trial court correctly noted in its Order, the factors that are to be considered are: (1) whether there is a clear record of delay; (2) whether lessor sanctions would be futile; (3) the extent to which the Plaintiff, as distinguished from Plaintiff's counsel, was personally responsible for the delay; (4) the degree of actual prejudice to the defendant; and, (5) whether the delay was the result of intentional conduct. *Mississippi Dept. Of Human Services v. Guidry*, 830 So.2d 628, 632 (Miss. 2002). However, a review of the Order of the trial court reveals that the factors were not properly considered as the opinion is conclusory in nature and devoid of any actual factual findings.

Summary of the Argument

This Court should reverse the trial court's dismissal of this matter and remand this case back to the trial court. In reviewing a trial court's decision under Rule 41(b), this Court may only reverse the trial court if it finds that the trial court abused its discretion. *Mississippi Dept. Of Human Services v. Guidry*, 830 So.2d 628, 632 (Miss. 2002). Further, 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* at 632. In *Guidry*, the Mississippi Supreme Court analyzed Mississippi state case law and Fifth Circuit law and applied those standards to determine whether or not a Chancellor abused its discretion. *Id.* at 632-33. Importantly, the Mississippi Supreme Court found that Rule 41(b) dismissals with prejudice will be affirmed only upon a showing of a clear record of delay or contumacious conduct by the plaintiff and

where lesser sanctions would not serve the best interests of justice. *Id.* (Citing *Rogers*, 669 F.2d at 320(quoting *Pond v. Braniff Airways, Inc.*, 453 F.2d 347, 349 (5th Cir. 1972))). See also, *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 556 (5th Cir. 1981); *Gray v. Fid. Acceptance Corp.*, 634 F.2d 226, 227 (5th Cir. 1981); *Luna v. I'ntl Ass'n of Machinists and Aerospace Workers*, 614 F.2d 529, 531 (5th Cir. 1980). The Fifth Circuit also identified several aggravating factors which the Mississippi Supreme Court adopted and these include 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.* (Citing *Rogers*, 669 F.2d at 320).

In this case the trial court did make a finding of clear delay. Further, the trial court, also found that “considering the history of this case at bar, other sanctions available would be futile. To merely fine or sanction the Plaintiff for the delay in this action will not remedy the fact that the Plaintiff delayed for fourteen months in the prosecution of this action, after being provided by this Court another chance to do so after the Clerk’s first Motion to Dismiss.” The finding regarding the unavailability of a lesser sanction 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. Clearly it does not meet the *Guidry* guidelines. In fact, two sentences in a fourteen page decision is evidence itself that alternative sanctions were not truly considered. More important, is that there is no rationale provided by the Court as to why alternative sanctions would not have been sufficient, in light of the fact that a Motion for Trial Setting was pending, all discovery had been responded to by the time of the hearing, experts had been identified by the Plaintiff and the case was ready to proceed to trial after a few discovery depositions. Even more important is that the trial court failed to consider these factors in its decision when it had specifically stated in its Opinion that they were to be

considered: including 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. As to these factors none exist. There is simply no evidence that Plaintiff was personally responsible for the delay. There is simply no evidence that the Defendants suffered any actual prejudice, in fact their Motion does not reference any prejudice resulting from the delay. Finally, there is simply no evidence that the delay was the result of intentional conduct, especially given the fact that the Plaintiff was prepared to move this matter to trial of which the trial court was aware.

Argument

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTION TO DISMISS FOR WANT OF PROSECUTION

The only issue before this Court is whether the trial court abused its discretion by granting the Defendants' Motion to Dismiss for Want of Prosecution. In situations such as this, the Mississippi Supreme Court has a long established preference for a trial on the merits and has repeatedly stated that dismissals for lack of prosecution should be employed reluctantly. *Mississippi Dept. Of Human Services* at 632. The law favors a trial because dismissal is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and as such dismissals which terminate a Plaintiff's right to bring an action before the merits have been decided are reserved for the most egregious cases. *Wallace v. Jones*, 572 So.2d 371, 376 (Miss. 1990)(citing, *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir.1982). Further, what constitutes the failure to prosecute, and therefore what action or inaction warrants dismissal, depends on the facts of the particular case. *Wallace*, 572 So.2d at 376. Finally, 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).

In this case the record shows that the reasoning utilized by the trial court in dismissing this case was completely contrary to the actual facts, and was inconsistent with a fair and consistent application of the previous guidelines and decisions by this Court. *Wallace*, 572 So.2d at 376. In this case, this Court need look no further than the five factors set out by the trial court to be weighed and considered in reaching its decision which were: (1) whether there is a clear record of delay; (2) whether lessor sanctions would be futile; (3) the extent to which the Plaintiff, as distinguished from Plaintiff's counsel, was personally responsible for the delay; (4) the degree of actual prejudice to the defendant; and, (5) whether the delay was the result of intentional conduct.

(1) There was no clear record of delay attributable to the Plaintiff

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. However, looking at the numerous cases cited by the trial court in its opinion, that fact alone is not sufficient to support a dismissal for failure to prosecute. Nevertheless, the majority of the trial court's opinion is spent discussing the delay the trial court attributed to Plaintiff's counsel. But, in this case it is clear from the record that the delay that occurred prior to the filing of the first Clerk's motion to dismiss for want of prosecution was not entirely due to the failure of Plaintiff's counsel to push the case. Instead, this period of delay was

largely occasioned by the two motions to stay filed by the Defendant Hospital's as a result of its insurer becoming insolvent, and by the Defendant Hospital not notifying the Plaintiff that the need for the requested stay no longer existed.

With respect to the second motion to dismiss, the facts do not support the trial court's conclusion that Mr. Evans was the sole cause of the additional 14 month delay that occurred after the filing of the first Clerk's motion to dismiss. What the facts show is that Mr. Evans, by letter dated April 11, 2005, to the Defendant Hospital's attorney, made the following request for deposition dates:

I attempted to reach you by phone today to obtain some deposition dates. I am attempting to set the depositions of Brian Eifrt, M.D., Amanda Hajar-Hajan and Wanda Cooper in the above referenced civil action. I have consulted Chris Walker, attorney for Dr. Tucker, and he is available on 4/20 and 4/21 and any day of the week of May 2, 2005. Please consult your calendar as well as the above individual's calendars and see what dates are acceptable...

The Defendant's did not respond to this request. As any practicing civil attorney is well aware, civil cases are not simply a one-way street with the Plaintiff controlling all aspects of case management. Civil litigation is a two-way street, and unfortunately at times, cases get derailed when parties do not respond to one another discovery requests.

After receiving the second Clerk's Motion to Dismiss, Mr. Evans promptly associated Kenneth Miller, who immediately entered an appearance and filed a Motion for Trial Setting. Following these filings by the Plaintiff, the Defendants filed their Motion to Dismiss for Want of Prosecution. During this time period, and leading up to the hearing on the Motion to Dismiss, various conversations were initiated by Plaintiff's counsel to move the case forward, i.e. for deposition dates, and Plaintiff's counsel noticed the hearing for the Motion for Trial Date prior to the Defendants noticing their hearing on the Motion to Dismiss for Want of Prosecution. Further all discovery was answered, including the delinquent discovery responses owed to the Defendant hospital prior to the

hearing.¹

As a practical matter, if it is not the law in Mississippi, it should be the law that a Defendant waives its right to move to dismiss for failure to prosecute under the specific terms of Rule 41(b) if he/she waits to file such a motion until after the Plaintiff has taken active steps to get a case back on track and begins to actively prosecute the case. *Whitten v. Whitten*, 956 So.2d 1093 (Miss. App. 2007)(recognizing waiver of defenses in certain circumstances).

While this case did not progress in a timely manner, there was no clear record of delay attributable exclusively to Plaintiff's counsel. Rather, the record demonstrates that the actions and/or inactions of the Defendants also contributed to the delay. The Plaintiff never violated any order of the trial court while at the same time the Defendants never requested a scheduling order, filed a motion to compel, or took any other action to move the case forward. Because there is no clear record of delay attributable exclusively to the Plaintiff, the decision of the trial court to dismiss this case must be reversed.

(2) the sanction of dismissal is clearly excessive and is unsupported by the record

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). 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

¹ It should be notes that the Court in its memorandum noted the delay in answering the Hospital's discovery. However, it should be noted that the Hospital never filed a motion to compel in regards to the delinquent discovery.

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.

In this case the trial court's opinion only addresses this requirement in a conclusory manner.

The trial court, without discussion or explanation, simply stated its opinion that:

considering the history of this case at bar, other sanctions available would be futile. To merely fine or sanction the Plaintiff for the delay in this action will not remedy the fact that the Plaintiff delayed for fourteen months in the prosecution of this action, after being provided by this Court another chance to do so after the Clerk's first Motion to Dismiss.

First, the trial court declines to state what other sanctions were considered. Second, the trial court declines to state why other sanctions be futile in getting the Plaintiff to diligently prosecute the case. Third, the trial court incorrectly concludes that the purpose of a lesser sanction is to undue or remedy the previous delay. However, the purpose of some lesser sanction is to hold the Plaintiff 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. Furthermore, the finding of futility, stands in direct contradiction to the Plaintiff'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 for depositions. Clearly, given the efforts by Plaintiff'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.

(3) the Plaintiff was not personally responsible for the delay

There is no dispute in this matter that the Plaintiff, Gwen Jenkins, and the other wrongful death beneficiaries, did **nothing** to delay this case. However, the trial court in its opinion simply failed to address this factor. This is significant given that the Mississippi Supreme Court stated in *American Tel. and Tel.*, that a similar circumstance set that case apart from other cases in which Rule 41(b) dismissals had been affirmed. *American Tel. and Tel. v. Days Inn of Winona*, 720 So.2d 178, 182 (Miss. 1998). See, e.g., *Watson v. Lillard*, 493 So.2d 1277 (Miss. 1986)(Rule 41(b) dismissal of Plaintiff's case affirmed where it was found that the plaintiff herself was responsible herself for driving off two sets of competent counsel); *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 trial court's opinion completely fails to indicate any consideration of this important fact which weighs heavily against outright dismissal. Because the trial court's conclusion in this regard is contrary to the evidence in the record, the decision of the trial court to dismiss this case must be reversed.

(4) the delay did not cause actual prejudice to any defendant

There is no evidence in the record, and there is no specific claim by any Defendant, that the delay in this case has caused actual prejudice. The Defendants' motion does not mention -- let alone demonstrate -- any prejudice to its case or ability to defend. The trial court's opinion does not address or discuss this important fact despite recognizing that this is another factor to be considered. Because the trial court's conclusion in this regard is contrary to the evidence in the record, the decision of the trial court to dismiss this case must be reversed.

(5) the delays in this case were not the result of intentional conduct

Finally, while there were delays in moving this case toward trial, there is no evidence that these delays were the result of anything more than miscommunication and inadvertence. Furthermore, the Plaintiffs' actions at various times, as well as following the clerk's second motion to dismiss, were quite the opposite of intentional delay. As previously discussed, the record establishes that after receiving the Clerk's Motion to Dismiss, Mr. Evans associated Kenneth Miller, who immediately entered an appearance and filed a Motion for Trial Setting. Following these filings by the Plaintiff, the Defendants filed their Motion to Dismiss for Want of Prosecution. During this time period and leading up to the hearing on the Motion to Dismiss, various conversations were initiated by Plaintiffs counsel to move the case forward, i.e. for deposition dates, and Plaintiff's counsel noticed the hearing for the Motion for Trial Date. Further, an expert had been designated, and all discovery was answered, including the delinquent discovery responses owed to the Defendant hospital. There was no violation or disregard of any scheduling order or other order of the trial court. For these reasons alone, the decision of the trial court to dismiss must be reversed.

Conclusion

The trial court committed reversible error in granting the Defendants' Motion to Dismiss for Want of Prosecution. A review of the record shows that the trial court only considered that part of the record that supported its conclusion that the case should be dismissed for failure to prosecute. The decision is contrary to Mississippi law and principles of fundamental fairness. Although there was delay, the delay was both explainable and correctable. Further, there was no actual consideration as to whether lesser sanctions would have been appropriate. Clearly in this case, lesser sanctions would have been more than appropriate given the fact that the Plaintiff herself was not involved in the delay and there was no prejudice to the Defendants and no intentional misconduct. For these reasons, and

the others which are set forth in the Brief above, the Plaintiffs request reversal and remand of the Circuit Court of Lauderdale County. Finally, in addition to the fact that the record does not support the draconian remedy of dismissal employed by the trial court, the Plaintiff believes that the Defendants' motion to dismiss for failure to prosecute was untimely because it was filed shortly after the Plaintiff began taking steps to move the case toward trial.


For all of these reasons, the decision of the trial court must be reversed, and this case must be remanded for the completion of discovery and trial.

Respectfully submitted, this the 5th day of May, 2008.

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

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**APPEAL FROM THE CIRCUIT COURT
OF LAUDERDALE COUNTY**

CERTIFICATE OF FILING

I, Kenneth C. Miller, one of the attorneys for the Plaintiff/Appellant, Gwenn Jenkins, do hereby certify that I have this day hand delivered the original and three copies of the Brief of Appellant, Gwen Jenkins, to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi.


Respectfully submitted, this the 5th day of May, 2008.

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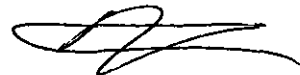
CERTIFICATE OF SERVICE

I, **KENNETH C. MILLER**, one of the attorneys for the Appellants, do hereby certify that I have, this day, May 5, 2008, caused to be delivered, via United States Postal Service, first class, postage prepaid, a true and correct copy of the above and foregoing Certificate of Filing and Brief of Appellant, to the following:

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Jackson, Mississippi 39236
Attorney for the Appellees

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Ferris Burson Entrekin & Follis
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Laurel, Mississippi 39441-1289
Attorney for the Appellees

THIS the 5th day of May, 2008.



Kenneth C. Miller