

**BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO.: 2007-<sup>CA</sup>1438**

**TERRI WILSON,**

**APPELLANT**

**VS.**

**SHANE NANCE,**

**APPELLEE**

**BRIEF OF APPELLEE**

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**ORAL ARGUMENT NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for Appellee, Shane Nance, 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.

Terri Wilson - Appellant

Shelton & Associates - Attorneys for Appellant

Brandon Leslie - Attorney for Appellant

Jennifer Shackelford - Former Attorney for Appellant


Shane Nance - Appellee

State Farm Mutual Automobile Insurance Company – Insurance Carrier of Appellee

Wendell H. Trapp, Jr. - Attorney for Appellee

Mitchell, McNutt & Sams, P.A. - Attorneys for Appellee

This the 4<sup>th</sup> day of June, 2008.

  
WENDELL H. TRAPP, JR.  
ATTORNEY OF RECORD FOR  
APPELLEE, SHANE NANCE

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### **STATEMENT OF ISSUES**

Was dismissal of Appellant's case an abuse of discretion by the circuit judge under circumstances where the circuit judge declared a mistrial based upon testimony provided on behalf of Appellant that was, at a minimum, misleading and which dismissal was also based upon failure of Appellant to obey an order of the circuit court?

## **STATEMENT OF CASE**

This case involves a one-vehicle accident that occurred on February 26, 2000 (R. I. 1). Following the accident, Terri Wilson (Appellant/Plaintiff in the court below) filed suit against Shane Nance (Appellee/Defendant in the court below) for personal injury (R. I, 1). After trial of the case had been continued on two occasions, the case was scheduled once again for trial on October 4, 2006 (R. I, 51, 103, 132). After the Circuit Judge qualified the jury, the attorney for Wilson moved for a continuance, contending that Wilson was not able to assist in the presentation of Wilson's case at trial. The Circuit Judge received testimony from the mother of Wilson who testified that Wilson had recently undergone psychiatric consultations. Based upon that testimony, and that testimony alone, the Circuit Judge declared a mistrial (R. II, 248-250). In the Order Declaring Mistrial, the Circuit Judge clearly instructed that a guardianship for Wilson should be pursued and completed within 90 days or the case would be dismissed (R. II, 248-250). Wilson asserted no opposition to the Order. Wilson did not, however, pursue and complete the establishment of guardianship within the 90 day period. For that reason, Nance moved for dismissal (R. II, 284-285). The Circuit Judge sustained Nance's Motion to Dismiss (R. II, 337-341). Wilson then requested reconsideration (R. II, 342-346). After a hearing the trial court reaffirmed it's Order dismissing the case, declining to ignore the directive contained in the Order of Dismissal (R. III, 388-392). From that ruling, Wilson has sought this appeal.

## **SUMMARY OF ARGUMENT**

The Circuit Court of Benton County took extraordinary action in declaring a mistrial on October 4, 2006, after both parties appeared and announced ready for trial, and after the Court had qualified the jury. Only then did Wilson move for a continuance. In support of Wilson's motion, Wilson offered the testimony of her mother who testified that Wilson had been undergoing psychiatric consultations which prevented Wilson from assisting in the prosecution of her lawsuit (R. II, 248-250). No medical or medically-related testimony or proof was offered to support the position taken by Wilson. In response to the motion, Nance submitted to the court Wilson's discovery responses and deposition which did not reveal any psychiatric consultations since June, 2002, a date before the subject lawsuit was even filed (R. II, 144. R. II, 247). After considering the proof, the court declared a mistrial based upon Wilson's motion, and the testimony submitted in support thereof (R. II, 248-250). In view of the extraordinary action taken by the court, the court went further in its Order Declaring Mistrial and directed that a guardianship for Wilson be pursued and completed within 90 days from October 4, 2006, and ordered that the case would be dismissed if such did not occur (R. II, 248-250). Wilson did not object to the ruling of the court or the condition requiring the establishment of a guardianship within 90 days. A guardianship for Wilson, however, was not established within 90 days and upon motion of Nance to dismiss, the trial court dismissed the case (R. II, 337-341).

The Circuit Court of Benton County was well within its rights in dismissing the subject case. The Court granted to Wilson relief sought by Wilson (avoidance of the trial scheduled for October 4, 2006), but clearly and unequivocally conditioned that relief upon Wilson's pursuing and completing the establishment of a guardianship within 90 days from October 4, 2006. The court clearly and unequivocally also announced that failure to do so would result in dismissal of the action. The court's action was within the court's right to control its docket, to enforce its



orders, and to provide for an orderly progression of cases; and was also consistent with the Mississippi Rules of Civil Procedure. It is respectfully submitted that the action of the Circuit Court of Benton County in dismissing the subject action should be affirmed.

### FACTS

On February 26, 2000, a one-vehicle accident occurred (R. I. 1). At the time of the accident, Shane Nance was driving the vehicle and Terri Wilson was occupying it. Following the accident, Wilson filed suit in the Circuit Court of Benton County against Nance (R. I. 1). Trial of the case was scheduled and continued on two separate occasions. Finally, the case was once again scheduled for trial on October 4, 2006. On October 4, 2006, both parties appeared in court and announced ready to proceed. A jury panel likewise was present. The trial judge qualified the jury panel and took a break. Following qualification of the jury panel, Wilson moved for a continuance of the trial, claiming, through her attorney, that she was not able to assist in connection with presentation of her case at trial. Wilson offered her mother as a witness. Wilson's mother testified that Wilson had recently undergone psychiatric consultations. No medical or medically- related testimony (through a psychiatrist or psychologist or other health care provider) was supplied orally or in writing to support the contentions of Wilson's mother. Nance, however, offered the discovery responses of Wilson which did not indicate any recent psychiatric consultations, and in fact, evidenced that Wilson's last consult of any health care provider for psychiatric or psychological reasons occurred in June, 2002, prior to the filing of the subject case. Nance also showed that Wilson had participated in the pre-trial proceedings, including discovery and had testified by deposition.

After considering the proof, the trial court declared a mistrial (choosing to declare a mistrial rather than grant a continuance because the case had actually progressed to the point of qualification of the jury panel). In its Order Declaring Mistrial, the trial judge directed that

Wilson "pursue and complete" the establishment of a guardianship within 90 days or the subject action would be dismissed. Wilson did not object to the Order Declaring Mistrial, or any aspect thereof. After the passage of 90 days, with no guardianship having been pursued or completed, Nance moved to dismiss in accordance with the provisions contained in the Order Declaring Mistrial. A hearing on the Motion to Dismiss was conducted. The parties were permitted to present argument, after which the trial court entered an Order of Dismissal with Prejudice. The trial court specifically referred to the testimony of Wilson's mother regarding Wilson's psychiatric consultations and the discovery responses of Wilson which did not disclose any such consultations after June, 2002. The trial court, further, observed that a guardianship had not been pursued and completed by Wilson within the 90 days as ordered by the court. Wilson filed a Motion for Reconsideration. After a hearing on that motion, the court declined the relief sought by Wilson in Wilson's Motion for Reconsideration. From that ruling, Wilson has sought this appeal.

## ARGUMENT

### STANDARD OF REVIEW

Appellee agrees with Appellant's statement that "abuse of discretion" is the standard of review in this case. In that connection, guidance has been given with respect to that standard.

"This Court must 'decide whether the . . . court could have entered the order which it did.' *Id.* Under this standard, this Court will affirm unless there is a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors.'"

Cooper v. State Farm Fire & Cas. Co., 568 So.2d 687 (Miss. 1990). The standard is not whether the appellate court would have dismissed the action, but whether the trial court abused its discretion in so doing. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

**THE MISSISSIPPI RULES OF CIVIL PROCEDURE  
PROVIDE FOR DISMISSAL OF AN ACTION WHEN  
A PLAINTIFF FAILS TO ABIDE BY THE ORDER OF A COURT**

The issue in this appeal is whether or not a trial court may take action authorized by law to implement and enforce its orders under circumstances when the court has been misled, and where the party on whose behalf misleading testimony has been offered, has also failed to take action ordered by the trial court. This issue arises in this case in the context of a party (Wilson) who offered misleading testimony through her mother in support of a motion for continuance, and obtained an order of the trial court declaring a mistrial, but which order also required Wilson to pursue, and establish, a guardianship. When the order was entered by the court, Wilson gladly accepted, and took advantage of, the relief granted to her (mistrial), and did not oppose any of the mandates of the order, including the mandate that a guardianship be established. Should a trial court be deprived of the ability to implement its order by dismissing a case under these circumstances?

Rule 41 of the Mississippi Rules of Civil Procedure provides for dismissal of actions.

Involuntary dismissals appear in Section (b) where it is stated:

“For failure of the plaintiff to prosecute or to comply with these rules, or any order of a court, a defendant may move for dismissal of an action or of any claim against him”.

In the Comments to the Rule the following is provided:

“Rule 41 (b) allows the court to dismiss an action involuntarily for three different causes.

...

Dismissal for failure to comply with ‘these rules’ or any order of the court.

...

Unless otherwise specifically ordered by the court, an involuntary dismissal under Rule 41 (b) ordinarily operates as an adjudication upon the merits and is with prejudice.”

The foregoing is in keeping with recognition of the fact that a court must control its docket. Dew v. Langford, 666 So.2d 739 (Miss. 1995); In re: Merrell, 658 So.2d 50 (Miss. 1995); Liberty Savings and Loan Association v. Mitchell, 398 So.2d 208 (Miss. 1981); Koerner v. Crittendon, 635 So.2d 833 (Miss. App. 1994); Watts v. Pennington, 598 So.2d 1308 (Miss. App. 1992).

In the case sub judice, the Circuit Court of Benton County entered an Order Declaring Mistrial, Etc. (R.E.B). The Order Declaring Mistrial was entered in response to Wilson's motion for continuance which was made after both parties had appeared and announced ready for trial and after the jury panel had been qualified. (R.E.B). In support of Wilson's motion, Wilson's mother testified suggesting that Wilson was under the care of a psychiatrist. This factor was specifically incorporated into the trial court's Order Declaring Mistrial, Etc.

"On redirect examination, Kay Wilson testified . . . that the Plaintiff had been on medication since the day of the accident, and had been receiving psychiatric treatment. Dr. Rayudu was specifically mentioned by Kay Wilson as providing psychiatric treatment." (R. II, 249).

After considering the motion, the trial court declared a mistrial, with the court incorporating in its Order that the **sole** basis for declaring the mistrial was the claim that Wilson was in need of a guardian.

"Based upon the contention of Plaintiff's counsel that Plaintiff needs to have a guardian appointed, and based upon the fact that that is the sole reason for declaring a mistrial . . . ." (R. II, 249).

In view of such, the trial court directed that Wilson "pursue and complete" the establishment of a guardianship within 90 days of October 4, 2006.

"It is ordered that Plaintiff seek relief of the Chancery Court of the County of Plaintiff's residence and present the matter as to whether or not a guardian should be appointed for Plaintiff to said Chancery Court. Plaintiff is directed to pursue and complete such efforts within 90 days of October 4, 2006." (R. II, 249-250).

The trial court went even further and, on a crystal clear basis, advised Wilson of what would occur in the event that Wilson failed to take the action ordered by the court.

“In the event that Plaintiff fails to proceed as directed, or in the event that a guardian is not appointed for Plaintiff, the Court shall dismiss the cause of action, with prejudice.” (R. II, 250).

From the foregoing, it is clear that the Circuit Court of Benton County took extraordinary action by declaring a mistrial based solely and only upon the presentation of testimony that Wilson was receiving psychiatric treatment and needed a guardian. The trial court set forth in plain, simple, unequivocal terms that Wilson should “pursue and complete” the establishment of a guardianship within 90 days of October 4, 2006 and provided in simple, clear and unequivocal terms that the case would be dismissed with prejudice in the event that Wilson failed so to do. There was no objection by Wilson.

When Wilson failed to heed the plain, simple, unequivocal order of the court by which Wilson was granted the benefit of a mistrial, Nance moved to dismiss in accordance with the content of the Order Declaring Mistrial, Etc. Nance’s motion was scheduled for argument on March 20, 2007, at which time the parties appeared, and argued the motion. At the conclusion of the argument, the trial court entered its “Order of Dismissal with Prejudice” (R.E.D). In its Order of Dismissal with Prejudice, the court recounted the facts presented at the time the mistrial was declared.

“During a break, after the jury qualification, Plaintiff’s attorney orally moved for a continuance, it being contended that the Plaintiff was not psychologically prepared to go forward with the trial. In support of that argument, Kay Wilson (mother of Plaintiff) testified that the Plaintiff had recently undergone psychiatric consultations.” (R. II, 337)

The trial court noted that its Order Declaring Mistrial had directed Wilson to “pursue and complete” the establishment of a guardianship within 90 days of October 4, 2006, or her case would be dismissed with prejudice. The trial court correctly found that a guardianship had not

been pursued or completed within the 90 period. The court noted that a Petition for Conservatorship had been filed within the 90 day period, but a conservatorship was not established until March 16, 2007, which was 73 days after the date established by the court for the guardianship to be established. The trial court, further, addressed the issue of the proof offered by Wilson at the time the mistrial was declared, i.e.; Wilson's psychiatric consultations. The trial court specifically found an absence of any psychiatric consultations since June, 2002, a matter which conflicted with the testimony of Wilson's mother at the time the mistrial was declared, which was the sole reason for the mistrial.

“The Court further finds that the only records of any of Plaintiff's psychiatric consultations involved consultations that occurred in June, 2002, which documents are made exhibits to Plaintiff's Petition for Conservatorship. There has not been presented to the Court any records or testimony of any psychiatrist or psychologist of treatment of Plaintiff for any psychiatric or psychological condition after June, 2002. Hence, there is no proof before the Court of any psychiatric or psychological treatment sought or received by the Plaintiff since the date on which the subject suit was filed. The absence of such records of treatment/consultation are not consistent with testimony presented at the time the mistrial was declared, that the Plaintiff had recently consulted Dr. Rayudu, a psychiatrist (R. III, 338).

The Court further found that Wilson had failed to offer any proof to justify Wilson's noncompliance (R. III, 339). Accordingly, the Court dismissed Wilson's cause of action. (R.E.B). Wilson filed a Motion for Reconsideration which was argued. The trial court, however, refused to retreat from its ruling dismissing the case. (R.E.F).”

The action of the trial court in dismissing the case is in accord with Rule 41 of the Mississippi Rules of Civil Procedure. The trial court's action in dismissing the case under these circumstances was not an abuse of discretion, and the trial court's action should be upheld.

#### **Rule 4 Analogy**

The situation presented by the case sub judice can to some extent be analogized to cases in which a plaintiff fails timely to serve summons. Rule 4 of the Mississippi Rules of Civil

Procedure grants to a plaintiff 120 days to serve summons following the date on which the complaint is filed. Failure to serve summons within that period of time, by Rule, results in dismissal of the plaintiff's complaint. Watters v. Stripling, 675 So.2d 1242 (Miss. 1996).

In the case sub judice Wilson was given a 90 day period to take action ordered by the trial court. The action to be taken was clearly stated. The time period for the action to be taken was clearly stated, and Wilson was clearly advised that the case would be dismissed if Wilson failed to take that action. The trial court's order, therefore, contained the same components as Rule 4.

Rule 4 provides direction to a plaintiff of what to do (serve summons), the time by which it is to be done (120 days), and the consequences for a failure to do as directed (dismissal). Similarly, the trial court's Order Declaring Mistrial specified what Plaintiff was to do (pursue and complete establishment of a guardianship), the time by which it was to be done (90 days) and the consequences for failing to do as directed (dismissal). As Rule 41(b), equates disobedience of a Rule with disobedience of a court order, the subject order which was disobeyed by Wilson is deserving of the same standing as Rule 4 .

The trial court's dismissal of the subject case should not be overruled unless it is determined that there was an abuse of discretion, i.e., that an order was entered which could not have been entered. In fact, for reversal it must be found by a "definite and firm conviction" that the trial judge committed "clear error." Cooper v. State Farm Fire and Cas. Co., 568 So.2d 687 (Miss. 1990). The trial judge did nothing more than implement the consequences which he, in his Order Declaring Mistrial, specifically communicated directly to Wilson would be implemented. It is worthy of note that Wilson did not take issue with dismissal as a consequence at the time the mistrial was declared, nor did Wilson seek any qualification or otherwise. Wilson accepted the ruling of the Court without any opposition, thereby presumably agreeing that the

trial court had the authority to issue such an order and that such an order was reasonable, and appropriate.

It is recognized that Rule 4 provides a means of avoiding dismissal even when a litigant fails to adhere to its mandate. Rule 4 provides that upon a showing of “good cause” the litigant’s case will not be dismissed. The “good cause” standard, however, is a standard that is not lightly met for Rule 4 purposes. It imposes upon a plaintiff the burden of establishing good cause. Holmes v. Coast Transit Authority, 815 So.2d 1183 (Miss. 2002). It requires a plaintiff to demonstrate “at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel, or ignorance of the Rules usually does not suffice”. Bang v. Pittman, 749 So.2d 47 (Miss. 1999). It is recognized as a “very strict standard”. Moore v. Boyd, 799 So.2d 133 (Miss. App. 2001). Absence of “good cause” has been found in cases despite proof by plaintiffs that the plaintiff made efforts to comply with Rule 4. Holmes v. Coast Transit Authority, *supra*, in cases in which a defendant was alleged to be evading summons. Webster v. Webster, 2002 W.L. 31320504 (Miss. 2002); and in cases in which service of summons was partially complete. Collum v. Senholtz, 767 So.2d 215 (Miss. App. 2000).

It is respectfully submitted that the standard applicable to the case sub judice imposes an even greater burden upon a plaintiff, the burden of establishing an abuse of discretion. It is submitted that Wilson’s failure to perform as required by the Order Declaring Mistrial would not be excused even under the “good cause” standard applicable to Rule 4. Wilson, to this day, has not pursued or established a guardianship. Wilson offered little more than proof of some unsuccessful efforts to establish a conservatorship within the 90 day period. Unsuccessful efforts to accomplish details (such as service of summons) fail even to satisfy the good cause “standard”. Holmes v. Coast Transit Authority, *supra*. A mere effort to comply by Wilson would therefore certainly not suffice when abuse of discretion is the standard.



### **Commencing, but not completing action is not sufficient**

The mere fact that Wilson began (but did not finish within the 90 period), efforts to establish a conservatorship (not a guardianship) is not compliance with the trial court's order that a guardianship be "pursued and completed" within 90 days. The trial court's order was as explicit and unequivocal as it could be. It required the guardianship to be pursued and **completed** within the 90 day period. That admittedly did not occur.

"Now, did we comply with the 90 days? No." (R. IV, 12).

Even if the trial court's order had not been so explicit, Mississippi case law supports the proposition that the mere commencement of efforts to secure relief (such as the filing of a motion) is not the equivalent of taking the action. Curry v. Turner, 832 So.2d 508 (Miss. 2002), is a case in which a plaintiff filed a motion to amend a complaint within the limitations period (and attached a copy of the proposed Amended Complaint to the motion), but did not immediately obtain an order of the court sustaining the motion, and did not file the Amended Complaint within the limitations period. The Curry Court found that the mere filing of the motion (commencement of an action for relief) was not sufficient to toll the statute of limitations despite the fact that the motion to amend ultimately was sustained. Consequently, the Curry Plaintiff's case as to defendants sought to be added by the Amended Complaint was deemed barred by the statute of limitations.

In the case sub judice, Wilson did not comply with the trial court's order. Wilson did not "pursue or complete" the establishment of a guardianship at any time, and merely began the process to try to establish a conservatorship within the 90 day period mandated by the trial court, but did not complete that until 163 days after October 4, 2006. Wilson's actions are therefore, not compliant with the trial court's order, and the trial court was justified in taking the action it did.

Similarly, unsuccessful efforts to serve summons within the time provided by Rule 4 have been found insufficient to prevent a Rule 4 dismissal. Holmes v. Coast Transit Authority, 815 So.2d 1183 (Miss. 2002). In fact, a plaintiff's service of summons one day beyond the 120 day period provided by Rule 4 has resulted in dismissal. Collum v. Senholtz, 767 So.2d 215 (Miss. App. 2000) as has a plaintiff's service of summons two days beyond the 120 day period. Bang v. Pittman, 749 So.2d 47 (Miss. 1999). Certainly action (though not even the action mandated by the court) 73 days beyond the court ordered action date is more deserving of dismissal.

These cases clearly indicate that it is the end result that matters, not an effort to comply. Clearly, and admittedly, Plaintiff did not comply with the trial court's order and Wilson's allegations of efforts to comply are insufficient to prevent dismissal.

#### **Failure to prosecute analogy**

Would this case have been any different if the trial court had ordered Wilson to set the case for trial within a specified period of time or risk dismissal on grounds of failure to prosecute? Dismissal for such has been upheld. Hine v. Anchor Lake Property Owners Ass'n, Inc., 911 So.2d 1001 (Miss. App. 2005). The behavior of Wilson in the case sub judice is to some extent similar to such a situation. Wilson was granted a specified period of time within which to accomplish the establishment of a guardianship, or have her case dismissed. Wilson clearly did not obey that order of the trial court and the action of the trial court in dismissing the case was completely appropriate.

#### **Dismissal as a discovery sanction**

The case sub judice is much more extreme than cases in which dismissal has been found appropriate as a discovery sanction. In this case, Wilson sought a continuance for the first time after announcing ready for trial and after qualification of the jury panel. The court received

proof submitted by Wilson in support of Wilson's motion, and granted to Wilson the relief sought by Wilson (declaring a mistrial rather than a continuance since trial of the case had already started). The relief however, was accompanied with clear, simple obligations, and came with a statement as to precisely what would occur in the event that Wilson failed to take the action required by the trial court in return for declaring the mistrial, i.e., "pursue and complete" establishment of a guardianship for Wilson. Wilson was present, and did not object or seek any qualification, but rather accepted the order of the court. This case, therefore, does not involve unforeseeable consequences, but rather involves simply the implementation of a prior order of the trial court. It must be presumed that the court's action was reasonable when it was taken, because Wilson did not object, or take any issue whatsoever with the trial court's action. Had the trial court's action been unreasonable, certainly one would expect Wilson to have made a record to that effect. There is, however, no such record. Wilson did not challenge the court's order that a guardianship be established, the time period for establishing the guardianship, or the consequences for failing to establish the guardianship. By failing to object, Wilson consented to the court's order. Only **after** Wilson failed to take the action required, and only **after** the case was dismissed, as the trial court warned that it would be, did Wilson complain.

The action of the trial court in this case was justified even more so than in the cases where dismissal has been found to be an appropriate sanction for discovery violations. First of all, as discussed elsewhere, the "sole" basis for the trial court declaring a mistrial was testimony that Wilson was consulting a psychiatrist, and accordingly, needed a guardian (R. II, 249). Such proof was at odds with Wilson's discovery responses in which Wilson was requested to produce information relative to her medical treatment and produced psychiatric records ending in June,

2002 (R. II, 234-245)<sup>1</sup>. Further, since that date—June, 2002—Wilson had, without objection, participated in discovery by answering interrogatories and responding to requests for production of documents (R. III, 234-245). Also, Wilson, without any objection, testified by deposition and provided detailed responses to all questions asked (R. III, 146-233). Further, the subject case had already been scheduled for trial on two prior occasions with no similar motion having been filed, despite the fact that the psychiatric records relied upon as the basis for the declaration of mistrial already existed on all such prior occasions. There could be nothing more inconsistent than the position maintained by Wilson in her discovery responses and Wilson's actions leading to the October 4, 2006 trial date and the testimony provided on October 4, 2006 to secure the mistrial. The proof submitted had the effect of manipulating the court. Such manipulation cannot be tolerated.

#### **"Aggravating factors"**

Though this case is not one involving dismissal as a discovery sanction, Wilson has argued that dismissal is inappropriate by alleging certain factors discussed in some of the discovery sanction cases as "aggravating factors." For instance, Wilson contends that she is a "blameless client", that a lesser sanction than dismissal would have been appropriate, and otherwise. First of all, the case sub judice is not a discovery sanction case. The case sub judice is simply a case in which dismissal was clearly set forth as the trial court's intended result in the event that Wilson failed to take action ordered by the court. This was a plain, simple, direct ruling of the trial court made while all of the parties were before the court, which ruling was incorporated into the court's written order. Even though the case sub judice is not a discovery sanction case, and even though the court considered all of the factors raised by Wilson at the

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<sup>1</sup> The records submitted by Wilson in connection with her Petition for Conservatorship also reveal no psychiatric/psychological consults after June, 2002 (R.III,201-317).

time that the court dismissed the case, it is respectfully submitted that the “aggravating factors” are not really an issue in this case at any rate.

“The presence of aggravating factors is not necessary to sustain a dismissal under Rule 41(b).”

Hine v. Anchor Lake Property Owners, Assn., Inc., 911 So.2d 1001 (Miss. App. 2005). Despite such, the Court in the case sub judice did consider such factors (even if not required) and concluded that those factors required dismissal of the subject case.

In the case sub judice, the trial court made specific findings of fact that support the order dismissing the case. In its order dismissing the case, the trial court cited and discussed Gilbert v. Ireland, 949 So.2d 784 (Miss. App. 2006). The court specifically set forth in its Order of Dismissal with Prejudice that numerous of the factors discussed in Gilbert were considered by the court. The trial court specifically stated as follows:

“The Court finds that the Plaintiff’s failure to comply with the Court’s Order Declaring a Mistrial cannot be justified, and Plaintiff’s failure to comply with the Court’s Order did not result from the inability of Plaintiff to comply. The Court’s Order granted to the Plaintiff a liberal period of time for Plaintiff to comply with the Court Order, directing that the Plaintiff pursue establishment of a guardianship. Despite granting to Plaintiff a period of 90 days within which to pursue and complete the establishment of a guardianship, the Plaintiff did not pursue establishment of a guardianship, but rather chose to initiate (but not complete) proceedings for establishment of a conservatorship. The conservatorship, however, was not established until March 16, 2007, a date well beyond the period designated by the Court for the establishment of a guardianship. There has been no proof offered by Plaintiff to justify Plaintiff’s non-compliance with this Court’s Order. The Court, further, finds that dismissal under the circumstances presented by this case is proper in that appropriate relief cannot be substantially achieved by the use of less drastic sanctions. Further, the Court finds that the Plaintiff’s failure to comply with this Court’s Order resulted in prejudice to the Defendant, including the requirement that the Defendant incur needless litigation, costs, and expense, as well as loss of income. Further, allowing this case to proceed would subject the Defendant to the potential of confronting new and different proof from a psychologist or a psychiatrist despite the fact that no such proof has been identified by Plaintiff in Plaintiff’s discovery responses. The Court, further, finds that the Court’s action is not required because of attorney conduct, but rather is based upon the action/inaction of the Plaintiff and the testimony presented by Plaintiff in support of Plaintiff’s Motion for Continuance”. (R. III, 339-340).

It is clear that the Court considered other lesser sanctions as evidenced by the foregoing language and also by the following language which appears in the Order:

“As dismissal has been deemed appropriate, Defendant’s motion for costs and expenses is hereby overruled . . . .” (R. III, 340).

From the foregoing, it is clear that the trial court considered all factors conceivably required in the court’s determination to dismiss the subject case. Even if the court had not made the specific findings set forth hereinabove, the court’s Order of Dismissal would have been presumed to have considered such matters.

“When a trial judge does not make specific findings of fact, we will ‘assume that the trial judge made all findings of fact that were necessary to support his verdict’ ”.

Hine v. Anchor Lake Property Owners Ass’n, Inc., 911 So.2d 1001 (Miss. App. 2005), citing Watson v. Lillard, 493 So.2d 1277 (Miss. 1986). In the Hine case, a situation of some similarity was presented. Dismissal was challenged with a suggestion that a lesser sanction could have been imposed by the trial court. In that case, the Court of Appeals made the following statement, which is equally applicable to the case sub judice:

“ . . . it is clear that the Hines, in their Motion Opposing ALPOA’s Motion to Dismiss, raised the relevant law holding that a chancellor should consider lesser sanctions. Then, in the chancellor’s Order Granting ALPOA’s Motion to Dismiss, the chancellor specifically noted that he had considered ‘the evidence and the argument submitted’. The Hines filed a Motion for Reconsideration, which was also denied, and in that Order the chancellor again stated that he had ‘considered all and singular the statements and arguments presented by the Hines. If the Hines failed to argue, at the motion hearing, how lesser sanctions would have remedied the harm caused by their delay, they cannot then fault the chancellor for not considering their arguments. Likewise, if they did argue that lesser sanctions would have been effective, then the chancellor’s statements clearly show that lesser sanctions were considered and rejected. In either case, the result is the same: the chancellor ruled that the best interest of justice would be served if the case was dismissed.”

Even more so than in Hine, it is clear that the trial court in the case sub judice considered all factors arguably required for consideration, and after having so done determined that “the best

interest of justice would be served if the case was dismissed.” The trial court’s consideration of “aggravating factors” is much more specific and detailed in the case sub judice than in Hine. If the general statements of the Hine Court were sufficient to support dismissal, then certainly the specific statements of the trial court in the case sub judice are sufficient to establish that the factors were considered.

In the case sub judice, similar to Hine, Wilson filed a Motion for Reconsideration. In the trial court’s Order Overruling Wilson’s Motion for Reconsideration of Order Granting Dismissal, the trial court stated:

“The Court has considered all of the arguments submitted by Plaintiff in support of Plaintiff’s Motion for Reconsideration”. (R. III, 391).

Precisely such a statement by the trial court in Hine was deemed sufficient to support dismissal in Hine, documenting that the Hine Court had considered all relevant factors. Such should be likewise sufficient in the case sub judice. Wilson’s Motion for Reconsideration of Order Granting Dismissal submitted to the trial court all of the arguments now being made by Wilson. (R. III, 342-347). The trial court clearly considered all such arguments and after having done so, found dismissal to be appropriate. The action of the trial court was not an abuse of discretion, but rather was action consistent with Rule 41(b) and case law and therefore should not be overruled.

This is not a case of a “blameless client” as argued by Wilson. A review of the records involved in efforts to establish a conservatorship reveal that the attorneys representing Wilson attempted to establish the conservatorship on numerous occasions. Wilson, in fact, was served with a summons to appear on several occasions (R. III, 320-322, 326-327, 331-332, 335-336). This clearly establishes that Wilson was not “a blameless client” but in fact a/the root of the problem.

Nance has been prejudiced by the action of Wilson thereby rendering dismissal of the case appropriate. Nance prepared for trial and incurred the expenses in connection therewith, appeared at trial on the date designated for trial (without any prior notice of there being any issues with regard to case actually being tried on that date) only to have a mistrial declared, based in no way upon anything that Nance did or did not do. Not only did Nance incur expenses in preparation for trial, but Nance also missed work. Nance will incur significant additional fees and expenses in preparing for trial and will miss additional work and lose additional income if this case is scheduled for trial yet again. Further if Wilson seeks, at this late date (after this case has been set for trial on three separate occasions) to offer additional proof which was never identified at any stage of the proceedings, supportive of the reasons given on behalf of Wilson for a mistrial, then Nance will incur significant additional expense and fees in countering such proof. For a case to take a complete change in direction over three and one-half years after it has been filed and after it has been scheduled for trial on three occasions is unfair and prejudicial to Nance. Further, there is no assurance that witnesses who were available for trial on October 4, 2006, will still be available at a later date. Nance in no way engaged in any conduct that caused or contributed to this problem, nor did Nance in any way impede Plaintiff's ability to comply with the clear, unequivocal order of the trial court.

#### **Cases cited by Wilson**

Wilson has cited Hoffman v. Paracelsus Health Care Corporation, 752 So.2d 1030 (Miss. 1999). That case, however, is distinguishable from the case sub judice. The Hoffman case dealt with dismissal for want of prosecution, and involved a situation in which the plaintiff's delay was justified in part because of a stay of proceedings due to bankruptcy and other such actions. The case sub judice involves far more important principles than simple delay in bringing a case



to trial. The case sub judice involves issues of misleading a trial court and failure to obey a specific court order.

Plaintiff has also cited Pierce v. Heritage Properties, Inc., 688 So.2d 1385 (Miss. 1997). That case likewise is inapplicable to the case sub judice and involves a factual situation not nearly as severe or as important. The Pierce case involved dismissal as a discovery sanction. In the case sub judice, however, dismissal was based upon acts which misled the trial court in order to obtain a strategic advantage which was then compounded by Wilson's failure to take action she was directly ordered to take, with the consequences for failure to act being specifically communicated to her.

Wilson has also cited Wallace v. Jones, 572 So.2d 371 (Miss. 1990). That case likewise is inapplicable. That case involved dismissal of an action because of a party's exercise of the party's Fifth Amendment privilege. None of the cases cited by Wilson authorize a litigant, with impunity, to mislead (even manipulate) a trial court and then directly disobey an order of that court.

**THE TRIAL COURT'S ACTION WAS PARTICULARLY  
APPROPRIATE IN THIS CASE BECAUSE OF THE  
TESTIMONY OFFERED ON BEHALF OF WILSON  
TO SECURE THE MISTRIAL**

The trial court's action in this case was appropriate for many reasons. Not only did the court issue a clear, direct and unequivocal order as to precisely what Wilson was to do, and precisely provide the time by which it was to be done, and specify the precise action that would be taken by the court in the event that Wilson did not obey the court's order, but the action of the court is justified on a completely different basis as well. At the time that Wilson moved for a continuance, Wilson offered testimony in support of her motion. That testimony is referenced in the trial court's orders. The orders reflect that in support of Wilson's motion for a continuance, proof was offered through Wilson's mother (Kay Wilson) that Wilson had been on medication

since the day of the accident and had been receiving psychiatric treatment, with Dr. Rayudu specifically mentioned (R.E.B). In the Order of Dismissal with Prejudice, the trial court discussed such.

“In support of that argument, Kay Wilson (mother of Plaintiff) testified that Plaintiff had recently undergone psychiatric consultations”. (R.E.D).”

From the record in this case, it is clear that there is no proof whatsoever that Wilson had undergone psychiatric consultations since June, 2002 (R. IV, 13, 19). In addition, the records attached by Wilson to Wilson’s Chancery Court proceedings also document June, 2002, to be the most recent date on which Wilson sought or received psychiatric counseling (R. III, 301-318). That date is prior to the filing of the subject suit. Further, Wilson’s psychiatric consultations did not prevent Wilson from filing the subject suit, responding to discovery, or testifying by deposition. Likewise, such was never mentioned as an impediment to trial on the prior occasions that this case was scheduled for trial. As such proof was the “sole” reason the trial court declared a mistrial (R. II, 249-250), it was logical for the court to order that a guardianship be “pursued and completed.”

A case of some similarity to the case sub judice is Gilbert v. Ireland, 949 So.2d 784 (Miss. App. 2006). Though that case dealt with dismissal as a discovery sanction, it has applicability to the case sub judice. In Gilbert the plaintiff provided false testimony, and failed to disclose certain information in response to discovery propounded to her. Defendant moved to dismiss the case because of the plaintiff’s lack of honesty. The motion to dismiss was overruled. On appeal, the Court of Appeals held that the trial court should have dismissed the plaintiff’s case. In Gilbert, the plaintiff was untruthful with regard to matters pertaining to her medical history and psychological condition. In the case sub judice, testimony resulting in the trial court’s declaration of a mistrial was based upon testimony concerning Wilson’s psychological

condition/treatment. As dismissal was found appropriate in Gilbert it is likewise appropriate in the case sub judice.

In another case, Pierce v. Heritage Properties, Inc., 688 So.2d 1385 (Miss. 1997) dismissal by the trial court was found to be appropriate in a case in which false information was provided in discovery.

The case sub judice is not simply a discovery sanction case, but rather a case in which Wilson offered misleading testimony to secure an advantage and failed to obey a clear, simple, unequivocal order of the trial court, which presents a much more serious situation than a mere discovery sanction issue. In Gilbert, discussing dismissal as a discovery sanction, the Court of Appeals stated:

“An appellate court will affirm a trial court’s decision about dismissal as a sanction unless there is a ‘**definite and firm conviction** that the court below committed a **clear error of judgment** in the conclusion it reached upon weighing of relevant factors.’ ” (Emphasis added).

See also, Cooper v. State Farm Fire & Casualty Company, 568 So.2d 687 (Miss. 1990).

The trial court in the case sub judice did not commit a clear error of judgment, and as such its action in dismissing this case should be upheld. The trial court exercised extremely good judgment. The trial court accepted, at face value, the testimony provided in support of Wilson’s motion for continuance and took the extraordinary step of declaring a mistrial based “solely” upon such testimony (R. II, 249). The trial court went further and ruled that in view of Wilson’s motion for continuance (based upon her psychological condition) a guardianship should be “pursued and completed” within 90 days, or the subject case would be dismissed. The trial court, therefore, clearly provided what Wilson was to do, the time by which it was to be done, and the consequences upon Wilson’s failure to do so. How can such be deemed a clear error of judgment? Wilson and her representatives apparently did not consider the order to be a “clear error of judgment” for they did not object to the order or any part thereof. Then, when

Wilson admittedly failed to take the court ordered action, how can it be deemed a clear error of judgment for the trial court to act as it said it would?

The standard of review in a case such as this requires this Court to determine whether or not the trial court "could have entered the order which it did". Cooper v. State Farm Fire & Cas. Co., 568 So.2d 687 (Miss. 1990). Clearly the trial court "could have" entered the order which it did". Rule 41(b) of the Mississippi Rules of Civil Procedure specifically provides that a trial court may dismiss a case when a party fails to obey an order entered by the trial court. Further, dismissal of this action should have come as no surprise to Wilson as Wilson was told in plain and simple language, directed specifically to her, that dismissal would be the result if Wilson failed to obey the trial court's order that Wilson "pursue and complete" the establishment of a guardianship within 90 days. Wilson accepted the court's ruling, apparently considering it to be reasonable and made no protest whatsoever. Wilson did not challenge the court's ability to dismiss under such circumstances, nor does Wilson, in this appeal, suggest that the trial court was incapable of dismissing the subject case. The dismissal, therefore, had a legal foundation and was based upon the order of the trial court to which Wilson did not object.

**THE COMBINATION OF TESTIMONY OFFERED TO  
SECURE A MISTRIAL COUPLED WITH WILSON'S  
FAILURE TO TAKE THE ACTION REQUIRED BY  
THE COURT ORDER JUSTIFIED THE TRIAL  
COURT'S DISMISSAL OF THE SUBJECT CASE**

Rule 41(b) of the Mississippi Rules of Civil Procedure provides for dismissal of a case for failure to obey a court order. Likewise, there are cases that uphold dismissal as a discovery sanction. Scoggins v. Ellzey Beverages, Inc. 743 So.2d 990 (Miss. 1999); Pierce v. Heritage Properties, Inc., 688 So.2d 1385 (Miss. 1997); Gilbert v. Ireland, 949 So.2d 784 (Miss. App. 2006). The case sub judice presents a more egregious case than either failure to obey a court order or behavior requiring imposition of a discovery sanction. The case sub judice involves

psychological state and her alleged need of a guardian, the court required Wilson to take the steps that logically would be taken by one under those circumstances, the establishment of a guardianship. Wilson did not complain about this as a condition of the mistrial. Wilson gladly accepted, without any qualification, protest or argument, the order of the court. In essence, to grant the relief sought by Wilson in this appeal, this Court is asked to permit Wilson to garner the benefits of an order without fulfilling the corresponding obligations imposed by the court. Such should not be permitted.

### CONCLUSION

Wilson has wholly and totally failed to demonstrate that the trial judge abused his discretion in dismissing the case sub judice. Wilson's burden is to show that the trial court could not have entered the order that it entered, and show by a definite and firm conviction that the trial court committed a clear error of judgment. To so find is to ignore Rule 41(b) of the Mississippi Rules of Civil Procedure and to ignore case law dealing with dismissals involving much less egregious actions. When a party offers misleading testimony to secure an advantage and thereby prejudices the opposing party, and manipulates the court a significant wrong occurs. One should not be rewarded under such circumstances. Then, when that party compounds the problem by not performing as directed by a clear court order, little reason exists to grant any benefit of the doubt to such party. This is not just a case about whether or not to forgive a plaintiff and reinstate a case that has been dismissed by a trial judge who was "on the spot" and had the full "flavor" of the proceedings, but it is a referendum upon whether a trial judge has any authority to deal with serious matters (misleading/manipulating the court). If trial judges do not have the ability to take steps necessary to address problems such as those presented by the case sub judice, there is little reason to have judges. Without the authority necessary to manage proceedings and enforce orders, parties will "run the legal proceeding" not the judge.

There clearly was no abuse of discretion by the trial judge in this case. The trial judge granted extraordinary relief to Wilson by declaring a mistrial. Since the mistrial was declared solely on the basis of misleading testimony suggesting that Wilson was in need of a guardian, the Court ordered that a guardianship be established or her case would be dismissed. When Wilson failed to do as ordered, the trial court acted as it said it would, but only after granting Wilson every opportunity to justify her actions. The trial judge then went further and heard Wilson's motion for reconsideration. The trial judge received and considered all of the arguments submitted by Wilson, but after having so done did not find any of the arguments sufficient to reward the Plaintiff by reinstating her case.

This is certainly not a case where the trial judge abused his discretion. It is clear that the trial judge systematically and thoroughly considered the situation with which he was presented. The trial judge was present and able to consider all aspects of the matter. By his opinion, it is clear that the trial judge considered any and all aggravating factors (whether required by law to do so, or not). The trial judge also granted to Wilson a hearing on Wilson's Motion for Reconsideration. The trial judge therefore, considered the case thoroughly at the time the trial judge entered its Order of Dismissal, and reconsidered the case thoroughly again upon Wilson's Motion for Reconsideration. How can such be an abuse of discretion. Rather than abusing its discretion, the trial judge exercised appropriate judgment.

It is respectfully submitted that the action of the trial judge was absolutely correct and certainly not an abuse of discretion, and therefore, should be affirmed.

This 4<sup>th</sup> day of June, 2008.

RESPECTFULLY SUBMITTED,

MITCHELL, McNUTT & SAMS, P.A.

BY: 

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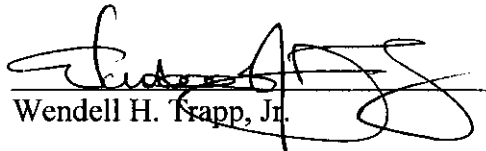
## CERTIFICATE OF SERVICE

I, Wendell H. Trapp, Jr., one of the attorneys of record for Defendant, Shane Nance, do hereby certify that I have this day mailed in the United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, Shane Nance, to Brandon Leslie, Esquire, attorney for Petitioner, and trial judge, Honorable Andrew K. Howorth, at their usual mailing addresses, addressed as follows:

Brandon Leslie, Esquire  
Shelton & Associates  
Post Office 1362  
Tupelo, Mississippi 38802

Honorable Andrew K. Howorth  
Circuit Court Judge  
Suite 201- One Courthouse Square  
Oxford, Mississippi 38655

This the 17<sup>th</sup> day of June, 2008.

  
Wendell H. Trapp, Jr.