

ON APPEAL TO THE SUPREME COURT  
OF THE STATE OF MISSISSIPPI

TERRI WILSON

APPELLANT

vs.

CIVIL ACTION NO: 2007-CA-01438

SHANE NANCE

APPELLEE

---

APPELLANT'S MEMORANDUM BRIEF OF LAW  
SEEKING REVERSAL AND REMAND  
OF THE ORDER OF THE TRIAL COURT

---

BRANDON SCOTT LESLIE  
ATTORNEY FOR THE APPELLANT  
SHELTON & ASSOCIATES, P.A.  
218 NORTH SPRING STREET  
P.O. BOX 1362  
TUPELO, MS 38802  
TELEPHONE: (662) 842-5051  
FACSIMILE: (662) 841-1941

ON APPEAL FROM THE  
CIRCUIT COURT OF BENTON COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

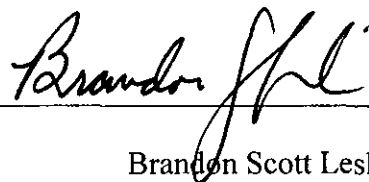
### CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of the case. These representations are made in order that the judge of this Court may evaluate possible disqualification or recusal.

1. Terri Wilson- Appellant
2. Brandon Scott Leslie- Shelton & Associates, P.A., Attorney for Wilson
3. Shane Nance- Appellee
4. Hon. Wendell H. Trapp, Jr- Mitchell, McNutt & Sams, P.A., Attorney Nance

Respectfully submitted, this the 7 day of April, 2008.

BY: \_\_\_\_\_



Brandon Scott Leslie  
Attorney for  
Appellant

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	1
TABLE OF CONTENTS	2
INDEX OF AUTHORITIES	3
I. ISSUES PRESENTED	4
II. STATEMENT OF THE CASE	5-6
III. SUMMARY OF THE ARGUMENT	7
IV. ARGUMENT AND AUTHORITIES	8-12
A. Standard of Review	8
B. Applicable Law	8-9
C. Argument	8-12
1. The Trial Court Abused its Discretion In Dismissing the Case	8-12
V. CONCLUSION	12-13
CERTIFICATE OF SERVICE	14
CERTIFICATE OF COMPLIANCE	15

## INDEX OF AUTHORITIES

### CASES CITED

<i>Hoffman v. Paracelsus Health Care,</i> 752 So.2d 1030 (Miss. 1999)	8, 9
<i>Pierce v. Heritage Properties, Inc.,</i> 688 So.2d 1385 (Miss. 1997)	8, 9, 10
<i>Wallace v. Jones,</i> 572 So.2d 371 (Miss. 1990)	10

### MISSISSIPPI RULES OF CIVIL PROCEDURE

<u>Miss. Rule Civ. Pro. 41(b)</u>	8, 9
-----------------------------------	------

I.  
ISSUE PRESENTED

- 1.) Under Mississippi Rule of Civil Procedure 41(b), did the trial Court err in dismissing the cause against Defendant, Shane Nance, when: 1.) the cause of action was brought by Plaintiff against Defendant as a result of an automobile accident caused by Defendant; 2.) the Plaintiff was a guest passenger in the motor vehicle which was driven by the Defendant; 3.) the accident was caused by Defendant when he drove recklessly while intoxicated; 4.) the Plaintiff suffered severe injuries, including brain damage, as a result of Defendant's negligence; 5.) the case had been set for trial; 6.) that due to new information discovered at the day of trial, Plaintiff's mental condition resulting from the accident and competency to testify was questioned; 7.) that the Court ordered a guardianship for the Plaintiff to be established within a certain time frame; 8.) that the Plaintiff's attorney filed for a Petition of Conservatorship within the time frame directed by the Court; 9.) that the Conservatorship was completed 64 days after the expiration of the Court's time frame; 10.) that the delay was not caused by the Plaintiff's negligence; 11.) that the Defendant was not unduly prejudiced by the delay; 12.) and that the trial Court dismissed Plaintiff's action for failure to comply with the previous Order of the Court?

II.  
STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Court Below.

This matter comes before this Honorable Court on appeal from the Circuit Court of Benton County, Mississippi. This matter was originally brought on behalf of the Plaintiff/Appellant, Terri Wilson regarding an automobile accident caused by the Defendant/Appellee, Shane Nance.

The matter was set before a jury in the Circuit Court of Benton County, Mississippi on October 4, 2006 in front of Circuit Judge Andrew Howorth. On that day, Plaintiff's counsel learned of new information that questioned the competency of Plaintiff, Terri Wilson. Upon a hearing brought forth by Plaintiff's counsel, Judge Howorth declared a mistrial and entered an Order that instructed Plaintiff to establish a guardianship within 90 days.

Plaintiff's counsel filed a Petition to Appoint Conservator on November 15, 2006 in the Chancery Court of Benton County, Mississippi. That a Decree Appointing a Conservator was signed by Benton County Chancery Judge Glenn Alderson on March 16, 2007.

That the Circuit Court of Benton County granted Defendant's Motion to Dismiss the action on April 3, 2007. Plaintiff then filed a Motion for Reconsideration on April 13, 2007. Plaintiff's Motion for Reconsideration was denied on June 27, 2007. On July 24, 2007 the Plaintiff/Appellant filed his Notice of Appeal to this Honorable Court seeking reversal of the trial court's order dismissing the action and requesting this Honorable Court remand the matter to the Circuit Court of Benton County to be set for trial.

B. Statement of the Facts.

On or about February 26, 2000, Terri Wilson was a guest passenger in a vehicle driven by Shane Nance that was involved in a one- car collision on Highway 4 in Benton County, Mississippi. R.E. at "A", *Complaint*. The accident was caused by the negligence of Shane Nance, who was intoxicated while operating the motor vehicle. *Id.*

As a result of the accident, Terri Wilson suffered severe physical injuries, including brain trauma, and was later placed on disability due to the injuries she sustained. *Id.*

On October 4, 2006, the matter was set for trial in the Circuit Court of Benton County, Mississippi. R.E. at "B". On that day, Plaintiff's counsel learned of new information that questioned the competency of Plaintiff, Terri Wilson. *Id.* Upon a hearing brought forth by Plaintiff's counsel, Judge Howorth declared a mistrial and entered an Order that instructed Plaintiff to establish a guardianship within 90 days. *Id.*

Plaintiff's counsel filed a Petition to Appoint Conservator on November 15, 2006 in the Chancery Court of Benton County, Mississippi. That a Decree Appointing a Conservator was signed by Benton County Chancery Judge Glenn Alderson on March 16, 2007. R.E. at "C."

That the Circuit Court of Benton County granted Defendant's Motion to Dismiss the action on April 3, 2007. R.E. at "D". Plaintiff then filed a Motion for Reconsideration on April 13, 2007. R.E. at "E". Plaintiff's Motion for Reconsideration was denied on June 27, 2007. R.E. at "F." On July 24, 2007 the Plaintiff/Appellant filed his Notice of Appeal to this Honorable Court seeking reversal of the trial court's and requesting this Honorable Court remand the matter to the Circuit Court of Benton County to be set for trial. R.E. at "G."

### III.

#### SUMMARY OF THE ARGUMENT

The Appellant contends that the trial court erred and abused its discretion in dismissing the action. Appellant asserts that she complied with the Order of the trial Court entered on October 4, 2006, showed good faith and full diligence in complying with said Order, and that any delay or noncompliance with the Order was not caused by dilatory actions or wanton disregard for the Order by the Plaintiff.

Appellant argues that any noncompliance of the Order did not prejudice the Defendant, or cause the Court burden. It is without dispute that a conservatorship had been established by the time the trial Court dismissed the action.

Furthermore, Appellant argues that less drastic sanctions were available had the Court found that Plaintiff was in violation of the Order entered on October 4, 2006.



IV.  
ARGUMENT AND AUTHORITIES

A. Standard of Review.

The standard of review of an involuntary dismissal is an abuse of discretion. *Wallace v. Jones*, 572 So.2d 371, 375 (Miss.1990).

B. Applicable Law.

Rule 41(b) of the Mississippi Rules of Civil Procedure provides for an involuntary dismissal with prejudice, “[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.” The rule also allows for the dismissal to operate as an adjudication on the merits. *Id.* However, because the law favors a trial on the merits, a dismissal with prejudice should be executed reluctantly. *Hoffman v. Paracelsus Health Care*, 752 So.2d 1030, 1034 (Miss.1999). It is an extreme and harsh sanction which is reserved for the most egregious cases. *Id.* “Moreover, dismissal for failure to comply with an order of the [court] is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice.” *Wallace*, 572 So.2d at 376.

“Dismissal is authorized only when the failure to comply with the court’s order results from willfulness or bad faith, and not from the inability to comply. Dismissal is proper only in a situation where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the party’s preparation for trial was substantially prejudiced. Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a

party's simple negligence is grounded on confusion or sincere misunderstanding of the court's orders." *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997).

C. Argument.

Appellant asserts that the trial court abused its discretion in dismissing the action set in the Circuit Court of Benton County.

1. The Trial Court Abused Its Discretion in Dismissing the Action.

The Circuit Court of Benton County Abused its discretion in dismissing the Plaintiff's action for failure to comply with a previous Order of the Court. Appellant asserts that she attempted to comply in good faith and any delay in complying with the Court's Order was not the result of negligence or dilatory conduct by the Appellant. In addition, the Appellant argues that the delay in complying with the Court's Order in no way prejudiced the Defendant/Appellee, and that had the Court found sanctions necessary, less drastic sanctions were available to the Court. The Appellant asserts that this Honorable Court should reverse the Order dismissing the Appellant's action, and remand the matter back to the Circuit Court of Benton County for a trial on the merits.

Rule 41(b) of the Mississippi Rules of Civil Procedure provides for an involuntary dismissal with prejudice, "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." The rule also allows for the dismissal to operate as an adjudication on the merits. *Id.* However, because the law favors a trial on the merits, a dismissal with prejudice should be executed reluctantly. *Hoffman v. Paracelsus Health Care*, 752 So.2d 1030, 1034 (Miss.1999). It

is an extreme and harsh sanction which is reserved for the most egregious cases. *Id.* “Moreover, dismissal for failure to comply with an order of the [court] is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice.” *Wallace*, 572 So.2d at 376.

“Dismissal is authorized only when the failure to comply with the court’s order results from willfulness or bad faith, and not from the inability to comply. Dismissal is proper only in a situation where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the party’s preparation for trial was substantially prejudiced. Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party’s simple negligence is grounded on confusion or sincere misunderstanding of the court’s orders.” *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997).

It can hardly be argued that the delay in establishing a conservatorship/guardianship for the Plaintiff in this matter was the result of “willfulness, bad faith” or “contumacious conduct.” The Plaintiff did in fact file her Petition to Appoint a Conservator well within the time frame designated by the Order entered on October 4, 2006. The delay in concluding the matter was outside the scope of the Plaintiff, as it had been set a total of three previous dates before the matter was finally resolved. In addition, the Appellant provided to the Court medical documentation and letters from treating physicians regarding her mental state and ability to handle her own affairs. The Plaintiff acted in good faith to comply with the Order.

Appellant also asserts that less drastic sanctions were available to the Court, and that the Court abused its discretion in dismissing the action. Appellant contends that the delay in complying with the Court's Order did not prejudice the Defendant/Appellee. The Appellee, however, will aver that the prolonged litigation prejudiced him by the necessity of additional costs and attorney fees. That may well be, however, the Court could have taxed those fees and costs to the Plaintiff instead of dismissing the action entirely. Other than costs and fees, Appellee cannot assert that he was prejudiced in any other such matter. The Circuit Court had, at its disposal, less drastic available sanctions to remedy this slight prejudicial impact, and it abused its discretion in not applying those means.

The undersigned further asserts that she is a "blameless client", and if any party is liable for the delay in complying with the Court's Order, it is not her. The Appellant contends that she acted in good faith in timely filing the Petition to Appoint a Conservator, had established the Conservatorship by the time the Court had dismissed the action, and the delay did not prejudice the Defendant or the Court. Matters brought before any Court, either Circuit or Chancery, are often and regularly delayed for reasons outside the Plaintiff's control. As has been stated, this matter was set in the Chancery Court of Benton County, Mississippi on three dates prior to the final disposition date. The Plaintiff/Appellant can hardly be blamed for the delay, and she is in fact a blameless client.

This Honorable Court should reverse and remand this matter to the Benton County Circuit Court. The trial court abused its discretion in dismissing the action when the Plaintiff/Appellant acted in good faith to comply, caused little if any prejudice to the Defendant/Appellee, the trial

Court had less drastic sanctions available to remedy the delay, and the Plaintiff/Appellant was a blameless client. The trial court's action does not meet the standard for dismissal, and as such, the Court's Order should be reversed and remanded.

V.  
CONCLUSION

The Appellant contends that the trial court erred and abused its discretion in dismissing the action. Appellant asserts that she complied with the Order of the trial Court entered on October 4, 2006, showed good faith and full diligence in complying with said Order, and that any delay or noncompliance with the Order was not caused by dilatory actions or wanton disregard for the Order by the Plaintiff.

Appellant argues that any noncompliance of the Order did not prejudice the Defendant, or cause the Court burden. It is without dispute that a conservatorship had been established by the time the trial Court dismissed the action.

Furthermore, Appellant argues that less drastic sanctions were available had the Court found that Plaintiff was in violation of the Order entered on October 4, 2006. This Honorable Court should reverse the trial court's Order and remand the matter to the Circuit Court of Benton for a trial on the merits.

RESPECTFULLY SUBMITTED, this the 7 day of April, 2008.

TERRI WILSON, APPELLANT

BY: Brandon Scott Leslie  
BRANDON SCOTT LESLIE  
ATTORNEY FOR PLAINTIFF

OF COUNSEL:

**SHELTON LAW FIRM, P.A.**  
**218 North Spring Street**  
**Post Office Box 1362**  
**Tupelo, Mississippi 38802-1362**  
**(662) 842-5051**  
**fax: (662) 841-1941**

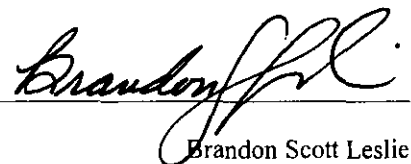
CERTIFICATE OF SERVICE

I, Brandon Scott Leslie, Attorney for the Appellant, hereby certify that I have placed, postage pre-paid, first-class, a true and correct copy of this instrument on the following at the usual business address of:

Hon. Wendall Trapp  
Mitchell McNutt & Sams, P.A.  
P.O. Box 1200  
Corinth, MS 38835

Hon. Judge Andrew Howorth  
Circuit Court of Benton County, Mississippi  
1 Courthouse Square, Suite 101  
c/o Lafayette County Chancery Court  
Oxford, Mississippi 38655

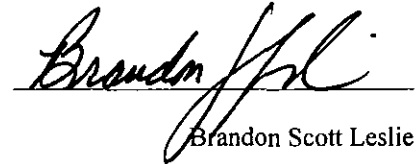
SO CERTIFIED, this the 7 day of April, 2008.

  
Brandon Scott Leslie

### CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record, do hereby certify that the foregoing instrument is in compliance with the Mississippi Rules of Appellate Procedure and has been compiled in a word processing program, using Word Perfect 9.0, double spaced using Time New Roman, 12pt. font.

So Certified, this the 7 day of April, 2008.

A handwritten signature in cursive script, reading "Brandon Scott Leslie", is written over a horizontal line.

Brandon Scott Leslie

Attorney for Appellant