IN THE SUPREME COURT OF MISSISSIPPI

CAUSE No. 2007-CA-0218

LINDA STACY — APPELLANT

V. — No. 2007-CA-02185

WILLIAM JOHNSON, M.D., and
MAGNOLIA REGIONAL HEALTH CENTER — APPELLEE

APPEALED FROM THE CIRCUIT COURT OF ALCORN COUNTY
CASE NO. CV980348GA

BRIEF OF APPELLEES

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IN THE SUPREME COURT OF MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or recusal. See M.R.A.P. 28(a)(1).

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes Page

STATEMENT OF ISSUES

Whether the Trial Court abused its discretion in dismissing Plaintiff/Appellant's cause of action based on failure to comply with Orders of the Trial Court.

STATEMENT OF CASE

On October 16, 1998, the Plaintiff/Appellant (hereinafter "Plaintiff") filed her Original Complaint alleging medical malpractice against Defendants/Appellees, William Johnson, M.D., and Magnolia Regional Health Center[1] (hereinafter "Defendants") arising from the labor and subsequent delivery of her minor child. (TR-6) Since the inception of this action, Plaintiff has never propounded any written discovery to any Defendant, completed any deposition, caused the entry of any scheduling order, moved for a status conference or moved for a trial setting in the lower court proceeding. (TR-3, 3B, 4 and 5) The Trial Court twice dismissed Plaintiff's cause of action for violation of the Court's Orders Regarding Expeditious Handling of Civil Cases. (TR-129, TR-173.) The last reinstatement by the Trial Court was conditioned upon entry of a scheduling order for court approval on or before September 6, 2007. (TR-247.) Upon failure to comply with that conditional reinstatement and consideration of the entire record, the Trial Court reinstated its prior dismissal and affirmed the same. (TR-223, TR-256) After obtaining an extension of time to appeal, Plaintiff now appeals from the Trial Court's October 2, 2007, Order. (TR-258, TR-252)

Procedural History

Defendant, William Johnson, M.D. (hereinafter "Dr. Johnson), filed his Separate Answer on December 14, 1998. (TR-25). As evidenced by the Notice of Filing Discovery, Dr. Johnson propounded discovery to Plaintiff on December 14, 1998. (TR-37) Defendant, Magnolia Regional Health Center, (hereinafter "Magnolia") filed its Separate Answer and Defenses on December 16, 1998. (TR-41.) As evidenced by its

[1] Original Co-Defendants, Alcorn County, Mississippi, by and through its Board of Supervisors, and City of Corinth, were voluntarily dismissed with prejudice by Order dated August 25, 1999. (TR-73)

Notice of Service filed on December 16, 1998, Magnolia also propounded discovery including requests for admissions. (TR-21).

First Dismissal

In compliance with the Trial Court's Order Regarding Expeditious Handling of Civil Cases Filed Prior to December 31, 2002, a show cause hearing was set for February 22, 2005. (TR-129) Court documents reveal that the last date any proceedings were filed was on April 16, 2004. (TR-128) The show cause hearing was set for February 22, 2005, and on that date, the Trial Court entered its Order dismissing Plaintiff's cause of action with prejudice based on the finding that "[c]ounsel for Plaintiff failed to appear before this Court." (TR-129) Thereafter, Plaintiff filed a Motion to Reconsider and Motion to Reinstatement (sic) asserting that her counsel's secretary was specifically advised by the Court Administrator that because a motion to compel mediation had been filed, it was not necessary to attend the show cause hearing. (TR-131) On March 14, 2005, the Trial Court set aside its previous dismissal by entry of an Order To Set Aside. (TR-141)

On February 17, 2006, more than seven (7) years and four (4) months from the inception of the lawsuit, Plaintiff for the first time filed with the Trial Court an expert witness affidavit. After receiving no additional pleadings from Plaintiff for more than six (6) months, the matter was again placed on the dismissal docket. (TR-172)

Second Dismissal

The Circuit Court Docket Sheet reflects that notice of a second Show Cause Hearing was sent on July 13, 2006. (TR- 4) The Clerk's cover sheet states that the last date any proceedings were filed was February 17, 2006. (TR – 172) On November 2,

2006, the Trial Court again entered its Order dismissing the cause of action with prejudice based on the finding that "[c]ounsel for Plaintiff failed to appear before this Court." (TR-173)

Plaintiff again filed a Motion to Reinstate, this time asserting that she did not receive notice of the show cause hearing. (TR-175.) On August 6, 2007, the Trial Court entered an Order Reinstating Cause which included a requirement that the parties enter a scheduling order within thirty (30) days of said order. (TR-247) Plaintiff neither filed this Order with the Clerk of the Court nor served this order on opposing counsel. (TR-3, 3B, 4 and 5) No such scheduling order was ever submitted by Plaintiff's counsel to either defense counsel or the Trial Court for its approval. (TR-3, 3B, 4 and 5) On September 4, 2007[2], Dr. Johnson, joined by Magnolia, filed his opposition to Plaintiff's Motion to Reinstate. (TR-4) In those motions, Defendants urged the Trial Court to affirm the prior dismissal based on Plaintiff's failure to prosecute the case and failure to comply with the August 6, 2007, Order requiring submission of a scheduling order for approval by the Trial Court.

Affirmation of Second Dismissal

On October 2, 2007[3], the Trial Court denied reinstatement of the cause of action. (TR-223) The Trial Court's denial was based upon consideration of the entire record in this cause including Plaintiff's failure to comply with August 6, 2007, Order reinstating this cause. Plaintiff filed both a Motion to Reconsider (TR-225) and Motion for Extension to Appeal. (TR – 228) On October 24, 1007, the Trial Court entered an Order

[2] The pleadings identified herein are referred to by the date said pleadings were filed with the clerk of Court consistent with M.R.C.P. 5(e).

[3] Brief of Appellant contains a clerical error in the last statement on page 1 of her brief identifying the referenced Order as being entered on October 24, 2007, rather than October 2, 2007. (TR-238, TR-5)

Granting Extension to Appeal[4],[5] (TR-258). On October 31, 2007, Dr. Johnson filed his motion and memorandum of law opposing Plaintiff's third Motion to Reinstate based upon Plaintiff's failure to comply with orders of the Trial Court. (TR -230)

Reaffirmation of Second Dismissal

On November 1, 2007, the Trial Court, upon consideration of the submissions of all the parties and the entire record before the Court, again denied Plaintiff's Motion for Reconsideration. (TR-265) On November 29, 2007, Plaintiff filed her Notice of Appeal based on the Trial Court's October 2, 2007, Order Denying Plaintiff's Motion to Reinstate. (TR-252)

The tables below represent a breakdown by year of all documents filed with the clerk of the Trial Court by the Plaintiff.

PLEADINGS FILED BY PLAINTIFF IN 1998

Date	Pleading	Trial Record
October 16, 1998	Complaint	TR-6
December 29, 1998	Notice of Service (Plaintiff's Responses to Magnolia Regional's RFA's)	TR-59

PLEADINGS FILED BY PLAINTIFF IN 1999

Date	Pleading	Trial Record
January 13, 1999	Notice of Service (Plaintiff's Responses to William Johnson, M.D.'s Discovery Requests)	TR-61
January 19, 1999	Notice of Service (Plaintiff's Responses to Magnolia Regional's Discovery)	TR-63

[4] The Trial Court did not rule on the pending Motion to Reconsider.
[5] The Trial Court erroneously entered an Order Denying Plaintiff's Motion for Extension to Appeal (TR-259) but vacated that order *sua sponte*. (TR-263.)

PLEADINGS FILED BY PLAINTIFF IN 2000

Date	Pleading	Trial Record
NONE	NONE	NONE

PLEADINGS FILED BY PLAINTIFF IN 2001

Date	Pleading	Trial Record
NONE	NONE	NONE

PLEADINGS FILED BY PLAINTIFF IN 2002

Date	Pleading	Trial Record
November 21, 2002	Notice to Take Deposition of William Johnson, M.D.	TR-74

PLEADINGS FILED BY PLAINTIFF IN 2003

Date	Pleading	Trial Record
January 2, 2003	Notice of Service (Plaintiff's Responses to Canal Insurance's Discovery)	TR-76 *Erroneous filing of pleading in unrelated case.
August 13, 2003	Notice to Take Deposition of William Johnson, M.D.	TR-92
September 2, 2003	Notice to Take Deposition of William Johnson, M.D.	TR-94
November 26, 2003	Re-Notice to Take Deposition of William Johnson, M.D.	TR-96

PLEADINGS FILED BY PLAINTIFF IN 2004

Date	Pleading	Trial Record
January 14, 2004	Re-Notice to Take Deposition of William Johnson, M.D.	TR-97
December 29, 2004	Motion to Order Mediation	TR-119

PLEADINGS FILED BY PLAINTIFF IN 2005

Date	Pleading	Trial Record
March 4, 2005	Motion to Reconsider and Motion to Reinstatement	TR-131

March 7, 2005	Plaintiff's Designation of Expert (Shane Bennoch, M.D. w/o Resume or Opinion)	TR-135
June 23, 2005	Plaintiff's Re-Designation of Expert (Howard L. Cohn, M.D. w/o resume or opinion but does provide Shane Bennoch's resume)	TR-137
December 27, 2005	Notice of Service (Supplemental Response to Defendant's Interrogatories)	TR-147

PLEADINGS FILED BY PLAINTIFF IN 2006

Date	**Pleading**	**Trial Record**
February 17, 2006	Affidavit (of Howard L. Cohn, M.D.)	TR-149
December 7, 2006	Motion to Reinstate	TR-175

PLEADINGS FILED BY PLAINTIFF IN 2007

Date	**Pleading**	**Trial Record**
October 15, 2007	Motion to Reconsider	TR-225
October 29, 2007	Motion for Extension to Appeal	TR-228
November 29, 2007	Notice of Appeal	TR-252
November 29, 2007	Compliance with Rule 11(b)(1)	TR-254
November 29, 2007	Designation of Record	TR-256

All remaining documents included in the record before the Trial Court were either filed by various Defendants or the Trial Court itself. Finally, the record also includes various letters or miscellaneous correspondences copied to the Trial Court.

I. SUMMARY OF ARGUMENT

The Trial Court did not abuse its discretion in dismissing this cause of action where the record before the Court supported the conclusion that the Plaintiff had not advanced her claims. The Trial Court was also proper in affirming that dismissal where Plaintiff had failed to comply with an Order of the Court that required the submission of a Scheduling Order on or before September 6, 2007. Defendants move this Honorable Court to hold that the Trial Court's dismissal of complaint was not an abuse of discretion and affirm the rulings of the Trial Court.

ANALYSIS OF PLAINTIFF'S PLEADINGS

Beyond filing of the Complaint in 1998 and over the course of more than nine (9) years of pending litigation, Plaintiff had filed only two (2) pleadings with the Trial Court that advance her claim to an ultimate conclusion. Of the documents filed before the Trial Court, Plaintiff filed four (4) Notices of Service evidencing service of her discovery responses to various Defendants in this cause. (TR-59, TR-61, TR-63 and TR-147) Plaintiff had also filed what appears to be one (1) erroneous Notice of Service dated January 2, 2003, indicating service of discovery responses to a non-party to this litigation. (TR-76)[6] Although Plaintiff's counsel had agreed not to proceed with the deposition of Dr. Johnson until Plaintiff identified her expert witness, she filed five (5) Notices to Take Deposition of William Johnson, M.D. (TR-74, TR-92, TR-94, TR-96, TR-97). Therefore, these notices cannot and should not be considered as pleadings that

[6] On January 2, 2003 a document titled "Notice of Service" was filed with the Trial Court. That document indicates that Plaintiff's Responses to Defendant/Counter-Plaintiff Canal Insurance Company's Second Set of Interrogatories were served. Canal Insurance Company was never a party to this litigation. This party has received no document on or about January 2, 2003, indicating service of discovery on any party to this cause.

meaningfully advance her cause, because each document was filed before any expert was designated. Counsel's agreement not to proceed with the deposition of Dr. Johnson is evidenced in the trial record as correspondences dated December 19, 2002, and February 26, 2004. (TR-124, TR-125) Although an expert designation was filed on March 7, 2005 (TR-135), Plaintiff withdrew that designation by correspondence dated May 22, 2006. (TR-217) While Plaintiff did initially identify her expert on June 23, 2005 (TR-137), the designation was not complete until the substance of those opinions was disclosed on December 27, 2005, in the form of Supplemental Response to Defendant's Interrogatories. (TR-147) While Plaintiff did file the affidavit of her expert on February 17, 2006, it was merely duplicative of the information served on opposing counsel on December 27, 2005, and, therefore, should not be considered as a separate action that meaningfully advances her cause. (TR-149.) Plaintiff's counsel filed three (3) documents requesting reinstatement of the case or reconsideration of Orders effecting dismissal. (TR-131, TR-175, TR-225) Finally, Plaintiff's counsel filed four (4) documents related to the appeal of this matter.

There are, therefore, basically two (2) documents that meaningfully advance her cause: 1) the December 27, 2005, Notice of Discovery Affidavit of Howard L. Cohn, M.D. (TR-149), which completed the expert designation of June 23, 2005 (TR-137); and 2) Motion to Order Mediation which was never set for hearing. (TR-119)

Conspicuously missing from the record is any effort by the Plaintiff to propound any discovery to any defendant since the inception of this lawsuit. No efforts were made by Plaintiff to depose any personnel of the defendant hospital or any subsequent medical

providers on any issue related to this litigation. Moreover, there were no efforts made by Plaintiff to enter a scheduling order or set this matter for trial.

II. STANDARDS OF REVIEW

The standard of review applicable to a trial court's dismissal of a case for want of prosecution is an abuse of discretion standard. *AT&T v. Days Inn of Winona*, 720 So. 2d 178 (Miss. 1998) *citing Wallace v. Jones*, 572 So. 2d 371, 375 (Miss. 1990.)

The standard of review applicable to a trial court's dismissal of an action with prejudice as a result of discovery violation is abuse of discretion. *Beck v. Sapet,* 937 So. 2d 945, (Miss. 2006) *citing Salts v. Gulf Nat'l Life Ins. Co.*, 872 So. 2d 667, 670 (Miss. 2004).

III. ARGUMENT

A. Trial courts have an inherent authority and duty to control their dockets.

It has been a long standing principal in Mississippi jurisprudence that trial courts have an inherent authority and duty to control their dockets in such a manner to provide for the orderly progression of cases to resolution. *Mallet v. Carter,* 803 So. 2d 504 (Miss. Ct. App. 2002); *Harris v. Fort Worth Steel and Machinery Co.*, 440 So. 2d 294 (Miss. 1983); *Grady v. Summers*, 243 Miss. 318, 138 So. 2d 294 (Miss. 1962); *May v. Hubbard*, 94 Miss. 456, 49 So. 619 (Miss. 1909.)

1. Plaintiff failed to comply with terms of the August 6, 2007 Order.

It is undisputed that the Trial Court entered an Order Reinstating Cause on August 6, 2007. (TR-227) The Trial Court's reinstatement was conditional in that it required "within 30 days of the entry of this Order, the Parties enter into a Scheduling Order, to be approved by this Court." The record is devoid of any effort or attempt by Plaintiff to

submit any proposed scheduling order for approval to the Court or defense counsel prior to the September 6, 2007, deadline or anytime thereafter. Moreover, the record is devoid of any effort by Plaintiff, who procured the entry of the Order Reinstating Cause, to either file a copy of said Order with the clerk or serve opposing counsel with the same. Therefore, it is reasonable and appropriate that Plaintiff is the party sanctioned with violating this provision of the August 6, 2007, Order.

2. The record supports a finding that Appellant received notice of the November 2, 2006, Show Cause hearing. Therefore, the abuse of discretion standard applies.

The standard of review applicable to a trial court's dismissal of a case for want of prosecution is an abuse of discretion standard. *AT&T v. Days Inn of Winona*, 720 So. 2d 178 (Miss. 1998) *citing Wallace v. Jones*, 572 So. 2d 371, 375 (Miss. 1990.) The record before this Court supports a finding that the Trial Court gave proper notice of the November 2, 2006, Show Cause Hearing as evidenced by the Circuit Court Docket Sheet, which reflects that Notice of the Show Cause Hearing was sent on July 13, 2006. (TR- 4) The Trial Court, pursuant to its Order regarding Expeditious Handling of Civil Cases Filed Prior to December 31, 2004, instructed the attorneys and parties involved to appear at a show cause hearing and, upon failure of counsel to appear at that hearing, entered its order of dismissal. (TR-173) The Docket Report reflects entry of a Notice of Show Cause hearing. (TR-3) The copy of the Original Docket Book reflects that a letter regarding Show Cause was sent on July 13, 2006. (TR-4) The forms issued by the Court clerk show the correct address and telephone number of Plaintiff's counsel of record. (TR-128, TR-172) Significantly, counsel for Plaintiff acknowledges having received notices from the clerk in the past as evidenced by the affidavit of counsel's legal

secretary. (TR- 133) Absent from the record is any indication that any notice or mailings attempted on Plaintiff's counsel were returned or refused. Under Mississippi Law, presumption that mail deposited, postage prepaid and properly addressed is timely delivered to the person addressed. *Thames v. Smith Insurance Agency, Inc.*, 710 So. 2d 1213, 1216 (Miss. 1998) *citing Hagner v. United States*, 285 U.S. 427, 430, 52 S. Ct. 417, 418, 76 L. Ed. 861 (1932); *Threatt v. Threatt*, 212 Miss. 555, 559, 54 So. 2d 907, 908-09 (1951). Therefore, Plaintiff's misplaced reliance on a legal conclusion that no notice was received is not supported by the record.

A review of the record supports that the Trial Court acted within its discretion in dismissing Plaintiff's cause of action. The record evidences the Trial Court repeatedly gave Plaintiff and her counsel the benefit of the doubt by twice reinstating this cause of action after dismissal. Those dismissals had been based on the Trial Court's request that counsel "take immediate action by voluntary dismissal, mediation, settlement or by setting the case for trial on dates mutually acceptable to both parties."[7] (TR-5) Despite these reinstatements, Plaintiff never took immediate action by voluntary dismissal, mediation, settlement or by setting the case for trial on dates mutually acceptable to both parties. Plaintiff never provided any explanation for her continued pattern of mere sporadic activity on this file.

[7] On July 1, 2006, the Clerk of the Court was Ordered to "send a written notice, in the form prescribed and attached hereto, and a copy of this Order to each attorney of record in each active civil case filed prior to December 31, 2004, advising the attorney of record to take immediate action by voluntary dismissal, mediation, settlement or by setting the case for trial on dates mutually acceptable to both parties." (TR-5)

3. The Trial Court was proper in dismissing this claim as the record supports a finding that Plaintiff has failed to prosecute her action.

It is within the sound discretion of the trial court to dismiss a case for want of prosecution and such a dismissal will not be overturned absent a finding of abuse of discretion. *AT&T v. Days Inn of Winona*, 720 So. 2d 178 (Miss. 1998) *citing Wallace v. Jones,* 572 So. 2d 371, 375 (Miss. 1990). It is a well settled principle of law that "[t]he power to dismiss for failure to prosecute is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket." See *Walker v. Parnell*, 566 So. 2d 1213, 1216 (Miss. 1990). While there is no set time limit on the prosecution of an action once it has been filed, dismissal for failure to prosecute will be upheld where the record shows that a plaintiff has been guilty of dilatory or contumacious conduct. *AT&T v. Days Inn of Winona*, 720 So. 2d 178 (Miss. 1998) *citing Watson v. Lillard*, 493 So. 2d 1277, 1279 (Miss. 1986.) The record supports the finding that Plaintiff herein demonstrated dilatory conduct and ultimately contumacious conduct before the Trial Court.

The lawsuit was initially filed against the Plaintiff in October 1998. At the time of the Trial Court's first dismissal on February 22, 2005, no action was taken by the Plaintiff to carry her action forward to an ultimate conclusion. Plaintiff never propounded any discovery to any party. No pleadings whatsoever were filed by Plaintiff for a period of more than two (2) years and eleven (11) months, between January 19, 1999, and November 21, 2002. Although Plaintiff had filed multiple notices for the deposition of Dr. Johnson, she did so without first disclosing her expert. (TR-124, TR 125) In fact, it was not until after the Court Ordered a Show Cause hearing that Plaintiff file her Motion for Mediation. Dr. Johnson later joined by Magnolia immediately

opposed the motion based on Plaintiff's failure to disclose its experts. (TR-121, TR-126) Plaintiff never set this motion for hearing and mediation was never ordered in this cause.

While the Plaintiff relied on four documents that were filed with the Trial Court beginning on August 4, 2006, in support of her December 7, 2006, Motion to Reinstate, it is significant to note that there was no substantive action taken on this case during that time frame. Each of those documents cited to the Trial Court relate to the withdrawal and substitution of various defense counsel. Those documents are best characterized as a monument to the age of this case as opposed to a showing of substantive action. More importantly, Plaintiff failed to demonstrate to the Trial Court any just cause for mere sporadic activity in pursuit of this lawsuit over the course of that eight (8) year span. Therefore, the Trial Court reasonably concluded in its discretion that dismissal was warranted.

B. The Defendants were unduly prejudiced by Plaintiff's dilatory conduct.

It was not until March 2005, more than seven (7) years after Ms. Stacy's hospitalization that Plaintiff provided the name of any expert expected to testify against these Defendants. (TR-135) However, it was not until December 27, 2005, that the substance of those opinions was disclosed. (TR-147) Such delays in pursuing her claim are unreasonable and prejudicial to the Defendants and particularly to the interests of Dr. Johnson.

Plaintiff's complaint arises from hospitalization of Ms. Stacy, more than a decade ago on July 15, 1997. Presumably during the last ten (10) years the memories of relevant witnesses have faded and the ability to locate and/or compel such witnesses to testify in this cause has been impeded. As stated previously no depositions were taken, Plaintiff

filed no discovery, never submitted a scheduling order, or procured a trial setting. In December 1998, both Defendants had propounded discovery seeking the identification of expert proof. (TR-21, TR-37) Over the course of almost a decade since this lawsuit was filed, Dr. Johnson has risked professional repercussions as a result of the pendency of this litigation which include issues of insurability, credentialing, re-credentialing, provider applications, and hospital privileges. Plaintiff's continual delays in making a meaningful disclosure of her expert proof or, otherwise, proceeding with her case, has no doubt prejudiced these Defendants, and also impeded the Trial Court's ability to achieve the interest of judicial economy and efficiently and effectively manage its docket. The Trial Court was proper in dismissing Plaintiff's claim.

C. Abuse of discretion standard applies.

Plaintiff's reliance on *Bryant v. Walters*, 493 So. 2d 933, (Miss. 1986)[8] and *Soriano v. Gillespie*, 857 So. 2d 64 (Miss. Ct. App. 2003) is misplaced because those cases are wholly inapplicable to the case at bar. Both cases deal with appellate courts' fact-specific analyses of whether judgments entered by the trial court were void under Mississippi Rules of Civil Procedure 60. In determining whether a judgment is "void," thereby relieving the trial court of any discretion in vacating it, the analysis focuses on whether the trial court had jurisdiction of the subject matter and/or parties. In the case at bar, there has never been any contention that the Trial Court has lacked jurisdiction over the subject matter or parties to this litigation.

In *Bryant*, the issue before this Court was whether the trial court erred in vacating a default judgment. *Id.*, 935. This Court applied an abuse of discretion standard in

[8] Appellant's Brief contains a clerical error citing *Bryant, Inc. v. Walters* as 497 So.2d 933 (Miss. 1986); however, the proper citation is 493 So. 2d 933 (Miss. 1986.)

reviewing the trial court's actions in declining to set aside the judgment. *Id.*, 937. It appears that the Plaintiff is relying on *Bryant* for the proposition that the Trial Court's November 2, 2006, dismissal should be considered void and, therefore, a different standard of review should be applied on review. This argument is misplaced and inapplicable for two reasons: 1) this Court applied an abuse of discretion standard in reviewing the actions of the trial court; and 2) the order reviewed was a default judgment.

In *Bryant*, a default judgment was entered in favor of a creditor against a debtor for open account due and debtor filed a motion to set aside judgment on two grounds: 1) summons was returnable for August 20, 1984; therefore, debtor thought no answer was due until that date; and 2) the pleadings served on debtor did not conform with the requirements of Miss. Code Ann. § 11-7-45 in that there was not a copy of the account or bill of particulars filed with the complaint. The trial court conducted a hearing which ultimately resulted in the Order setting aside the default judgment. The trial court set aside the judgment on the basis that no proper itemized account was attached to the complaint as required by Miss. Code Ann. § 11-7-45. The matter proceeded to trial where a verdict was returned in favor of the defendant, Walters. Judgment was entered and from that judgment Plaintiff, Bryant, thereafter appealed. This Court conducted a thorough analysis of the possible bases the trial court could have relied upon under Rule 60 to set aside a default judgment where the order was silent as to which clause of Rule 60 it was relying on in vacating its default judgment. Significantly, this Court found that, having entered a final judgment, the trial court could not then vacate it on the basis that it was "void" because the trial court had the authority under the law to enter that judgment. *Id.* at 939.

This Court in *Bryant* also considered whether the trial court had the authority to consider its entry of the default judgment void where the underlying Complaint did not contain as an attachment the itemization required by statute. This Court declined to find that the Complaint was so defective as to render the judgment an absolute nullity. *Id.*, 939. This Court noted that "[a] 'due process' violation so gross as to make the judgment void is extremely rare," *citing Windsor v. McVeigh*, 93 U.S. (3 Otto) 274, 23 L.Ed. 914 (1876); *Bass v. Hoagland*, 172 F. 2d 205 (C.A. 5th 1949). Here, it is undisputed that the Trial Court had jurisdiction over the subject matter and parties herein at the time of dismissal and subsequent affirmations. Moreover, it was not until Plaintiff failed to submit a scheduling order for Court approval within the deadline that the Trial Court reinstated its dismissal of this action. (TR-223.) That ruling was based on consideration of the "entire record in this cause." (TR-223.)

Similarly, *Soriano v. Gillespie*, 857 So. 2d 64 (Miss. Ct. App. 2003) is a Court of Appeals opinion considering the Circuit Court's authority to set aside a default judgment. The fact pattern in *Soriano* deals with the jurisdictions of two competing courts and is wholly distinguishable from the case at bar where there is no issue of jurisdiction, much the same as *Bryant*. Again, there is no contention by any party that the Trial Court in this cause lacked jurisdiction.

Plaintiff cites *State v. Blenden*, 748 So.2d 77 (Miss. 1999), stating "[a]t a minimum due process requires notice." However, Plaintiff's reliance on *Blenden* is misplaced because, as discussed *supra,* the record supports a finding that Plaintiff was given notice and opportunity to be heard. Additionally, the record demonstrates that the Trial Court did, in fact, hear Plaintiff's objection to dismissal as evidenced by the Trial

Court's August 6, 2007, conditional order reinstating this cause. After Plaintiff failed to comply with the conditions of the August 6, 2007, Order Reinstating Cause, the record supports a finding that all parties' submissions, as well as the entire record in this cause, were considered when the Trial Court affirmed the dismissal of this cause.

D. Plaintiff has demonstrated dilatory conduct before the Trial Court.

An analysis of the Trial Court's record demonstrates that no pleadings were filed by the Plaintiff for a period of more than two (2) years and ten (10) months, no discovery was ever propounded to any defendant in this cause and no effort was made by the Plaintiff to designate an expert witness for more than six (6) years after discovery seeking such disclosure was propounded; and even that designation was withdrawn by Plaintiff. Despite this conduct, Plaintiff relies on the Court of Appeals decision in *Lone Star Casino Corp. v. Full House Resort, Inc.,* 796 So. 2d 1031 (Miss. App. 2001) as support for its position on appeal stating "a delay of twenty months is not sufficient to dismiss with prejudice." In *Lone Star*, suit was filed in the Chancery Court of Harrison County against various defendants. After the case was transferred to Circuit Court, summary judgment was granted, appealed and finally remanded back to the Circuit Court on April 28, 1998. No further action was taken on the matter by either party until December 22, 1999, when Lone Star filed a motion to substitute counsel. In response to that motion, the defendants filed a motion to dismiss for failure to prosecute. The trial court granted the dismissal and Lone Star appealed. The Court of Appeals reviewed the actions of the trial court apparently under an abuse of discretion standard. The Court of Appeals found that a delay of approximately 20 months did not clearly constitute dilatory or contumacious conduct where Lone Star had filed an affidavit with the trial court

demonstrating its difficulty in retaining counsel to represent its interests in the matter. After securing counsel, motions were filed to set a trial date and scheduling order.

More importantly, the Court of Appeals analyzed whether the lower court in *Lone Star* had considered lesser sanctions and upon review determined that it has not. *Id.* In its analysis, the Court of Appeals stated "(g)enerally, this Court is less likely to uphold a Rule 41(b) dismissal when the lower court does not consider alternative sanctions. *Hoffman v. Paracelsus Health Care Corp.,* 752 So. 2d 1030 (¶ 16) (Miss. 1999).

The *Lone Star* case is clearly distinguishable from the case at bar. First, the subject dismissal on November 2, 2006, was based on the Trial Court's Order of Expeditious Handling rather than a party's motion under Rule 41(b). (TR-173) Second, upon Motion for Reinstate, the Trial Court did enter its August 6, 2007, Order that not only reinstated the case but also required submission of a Scheduling Order for approval by the Court on or before September 6, 2007. (TR-227)

The record before this Court evidences not only support for the Trial Court's initial dismissal but also evidences that the Trial Court did actually consider "lesser sanctions." After no effort was made to submit a Scheduling Order, the trial court affirmed its prior dismissal on October 2, 2007. (TR-223) The Trial Court's reinstatement of its prior dismissal was based upon consideration of the entire record in this cause including Plaintiff's failure to comply with August 6, 2007, Order reinstating this cause.

1. Clarification of Plaintiff's characterizations of the record.

Defendants take issue with the characterization of certain aspects of the record contained in the Brief of Appellant. The opening paragraph of that Brief states that "the

trial court was in error in dismissing this cause with prejudice for failure to appear at a status conference when the Appellant/Plaintiff's attorney received no notice of the hearing and in failing to grant the Appellant's motion to reinstate, after having previously granted said motion." The record shows the Trial Court required appearance at a "Show Cause" hearing, not a status conference. (TR-4, 5) The characterization of the Trial Court's Order is significant because the show cause hearing imposes an affirmative obligation upon the Plaintiff to take specific action to progress the case. This was not done.

Plaintiff contends that "A review of the docket sheet also indicates that no such notice was ever mailed out." (Brief of Appellant, P. 1) The record supports a finding that the Trial Court gave proper notice of the November 2, 2006, Show Cause Hearing as evidenced by the Circuit Court Docket Sheet which reflects that Notice of the Show Cause Hearing was sent on July 13, 2006. (TR-4)

Finally, Plaintiff contends that "(t)he trial court later denied the motion to extend time to appeal, after the appeal was actually filed, but later vacated the order upon learning that the court had previously granted the motion." (Brief of Appellant, P.2) This is a mischaracterization of the record where the Trial Court had inadvertently entered an Order Denying Plaintiff's Motion for Extension to Appeal on November 5, 2007 (TR-259). However, the Notice of Appeal was not filed until twenty-four (24) days later on November 29, 2007. (TR-252) The Trial Court did acknowledge this clerical error in entering its Order of November 5, 2007, by properly vacating the Order on December 1, 2007. (TR-262)

IV. CONCLUSION

Based on the foregoing, the Defendants, William Johnson, M.D., and Magnolia Regional Health Center, respectfully request that this Court affirm the Trial Court's dismissal of Plaintiff's Complaint, as the Trial Court did not abuse its discretion in dismissing Plaintiff's case for failure to prosecute the cause and failure to comply with the orders of the Court.

RESPECTFULLY SUBMITTED, this 30th day of July, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victoria S. Rowe, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing pleading to the following counsel:

Thomas J. Gardner, III
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So certified this the 30th day of July, 2008.

Victoria S. Rowe
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