

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and / or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Plaintiff in the trial court and Appellant on Appeal

Carey R. Varnado
Attorney for Appellant

Shannon S. McFarland
Attorney for Appellant

William B. Weatherly
Defendant in the trial court and Appellee on Appeal

James G. Wyley III
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STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in dismissing this case with prejudice under M.R.C.P. 41(b).

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Below

This is a legal malpractice case. Plaintiff filed suit against William B. Weatherly for the alleged mishandling of her personal injury case stemming from a car accident in which she suffered injuries. William B. Weatherly successfully moved for dismissal of the case for failure to prosecute and this appeal ensued.

II. Statement of the Facts

On September 4, 1996, Plaintiff Ann Odem Hillman ("Plaintiff") was involved in a car accident in Forrest County, Mississippi. As a result of the accident, Plaintiff suffered permanent physical and mental damages. On July 7, 1999, William Weatherly agreed to represent Plaintiff in connection with the accident. William Weatherly failed to file suit against the alleged tortfeasors before the running of the applicable statute of limitations.

On September 4, 2002, Plaintiff filed a complaint asserting legal negligence against William Weatherly for his alleged mishandling of her case. (R. at 8-11). Plaintiff was represented in her legal malpractice suit by Camilo Salas, III, a foreign attorney licensed to practice in Louisiana. Mr. Salas retained the services of Greg Spyridon, a licensed Mississippi attorney, to serve as local counsel. The complaint filed against

William Weatherly was signed by Mr. Spyridon. At the same time that the complaint was filed, Mr. Spyridon filed an ex-parte motion for admission of Mr. Salas *pro hac vice*. (R. at 13-14). Apparently, the order was never entered admitting Mr. Salas to practice *pro hac vice* in the matter.

Defendant served its initial set of discovery requests on Plaintiff's counsel on December 16, 2002. The discovery propounded included requests for signed authorizations to obtain Plaintiff's medical and employment earnings records. Supplemental discovery requests were served on Plaintiff's counsel on March 15, 2006. Several good faith letters regarding Plaintiff's responses to the discovery requests were sent by Defense counsel to Mr. Salas between the dates of March 11, 2003 and March 7, 2007. However, Defendant never filed a motion with the trial court to compel discovery responses from Plaintiff. Mr. Salas stated in his affidavit that discovery was delayed pursuant to an agreement between counsel to suspend discovery while trying to settle the case. (R. at 114-124). Defendant also admits that on March 7, 2007, that he requested that Mr. Salas either engage in settlement negotiations or provide responses to Defendant's discovery. (R. at 430-440).

The Depositions of both the Plaintiff and Defendant were taken on August 25, 2005. During that deposition, Plaintiff was questioned extensively about the accident, and about her injuries and treatment, including the names of the doctors who treated her. Plaintiff never sought to depose any of the medical doctors identified in Plaintiff's

deposition.

On June 27, 2007, Greg Spyridon filed a Motion to Withdraw as Counsel for Plaintiff. (R. at 39-41). On July 2, 2007, Mr. Spyridon was authorized to withdraw as counsel and Mr. Salas was ordered to retain new Mississippi counsel. (R. at 42). Mr. Salas was never able to retain the services of local Mississippi Counsel.

On September 26, 2007, Defendant filed his Motion to Dismiss, or in the Alternative, Motion to Dismiss All Pleadings. (R. at 49-109).

On October 2, 2007, Plaintiff produced signed medical and earnings authorizations, which were signed by Plaintiff on May 10, 2006. Updated medical and earnings authorizations were provided to Defendant on October 31, 2007.

On December 10, 2007, Plaintiff retained undersigned counsel and Shannon McFarland, both licensed Mississippi attorneys as her counsel in her suit against Defendant.

On December 17, 2007, Plaintiff filed her Opposition to Motion to Dismiss. (R. at 114-124). In that pleading, Plaintiff points out that Defendant had ample opportunity to ask Plaintiff any and all questions included in Defendant's interrogatories during her deposition which took place on August 25, 2005. Plaintiff also points out that Defendant never filed a motion to compel discovery in this cause.

By Order dated February 29, 2008, the Circuit Court of Harrison County, Mississippi dismissed Plaintiff's suit against Defendant with prejudice. (R. at 441-447).

SUMMARY OF THE ARGUMENT

ARGUMENT

1. Standard of Review

The standard of review in a case involving a Rule 41(b) dismissal is abuse of discretion. *Wallace v. Jones*, 572 So.2d 371,375 (Miss.1990). The decision of the trial judge will not be overturned unless there is a showing of manifest error. *Watson v. Lillard*, 493 So.2d 1277, 1279 (Miss. 1986).

2. Analysis

The Trial Court Abused its Discretion in Imposing the Harsh Remedy of Dismissal in this Cause

M.R.C.P. 41(b) was the basis for Defendant's Motion to Dismiss for failure to prosecute. (R. at 49-109). Rule 41(b) provides that a court may dismiss a Plaintiff's claims "for failure of the Plaintiff to prosecute or to comply with these rules or any order of court."

Dismissals for want of prosecution are applied reluctantly, and the law favors a trial of the issues on the merits of the case. *Miss. Dept. of Human Svcs. V. Guidry*, 830 So.2d 628,632 (Miss. 2002). There is no set time limit under Mississippi law for the prosecution of an action once it has been filed. *Watson*, 493 So.2d at 1279. This Court has stated that "Rule 41(b) dismissals with prejudice will be affirmed only upon a showing of 'a clear record of delay or contumacious conduct by the Plaintiff,' ... and

where lesser sanctions would not serve the best interests of justice.” *Am. Tel. & Tel. Co. v. Days Inn*, 720 So.2d 178, 181 (Miss. 1998). The Mississippi Supreme Court recognizes that “Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases.” *Wallace*, 572 So.2d at 376. The issue of whether or not dismissal was appropriate also depends on certain aggravating factors, which include “the extent to which a Plaintiff, as distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the Defendant, and whether the delay was the result of intentional conduct.” *Id.*

A. Any delays in Discovery were in no way due to the fault of the Appellant

Appellant does not contest that there have been delays in providing discovery responses and signed authorizations in this case. However, Appellant does dispute that these delays were any fault of her own.

Plaintiff provided deposition testimony on August 25, 2005. At that deposition she was questioned extensively about the accident in question, her injuries and her medical treatment. Defense counsel had every opportunity at that deposition to ask any and all questions included in Defendant’s interrogatories to Plaintiff. Plaintiff also identified in that deposition all medical doctors from which she has sought treatment. Defendant never attempted to set the depositions of any of these medical providers. Plaintiff should not be punished due to Defendant not pursuing the deposition testimony of the identified

medical providers in order to learn the extent of her injuries attributable to the accident in question.

Defendant also argued in the Motion to Dismiss that he was not able to obtain the medical records from these providers due to the lack of a signed medical authorizations. Defendant did send good faith letters to Plaintiff's counsel requesting signed authorizations. However, Defendant never filed a motion to compel their production with the court. Defendant certainly had the option to do so and chose instead to only send good faith requests for the authorizations. It is also clear from the record that Plaintiff did execute medical and employment authorizations on May 10, 2006. However, these authorizations were not furnished to Defendant until October 2, 2007. It is certainly not the fault of the Plaintiff that these authorizations were not forwarded to Defense counsel when they were executed. The Mississippi Supreme Court has held that "the theme running through the cases involving Rule 41(b) is that negligence or inexcusable conduct on the part of Plaintiff's counsel does not in itself justify dismissal with prejudice." *AT&T*, 720 So.2d at 182.

B. Lesser Sanctions Would Have Better Served the Interests of Justice

The trial judge in this matter did consider the imposition of lesser sanctions in his order and concluded that the imposition of "lesser sanctions such as fines or costs would not serve the interests of justice in light of the prejudice to the Defendant..." (R. at 441-447).

Lesser sanctions have been held to include “fines, costs, or damages against Plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings.” *Vosbein v. Bellias*, 866 So.2d 489, 493 (Miss. Ct.App. 2004).

As stated previously, Defendant had every opportunity to depose the Plaintiff’s treating physicians, which were identified in her deposition. That deposition occurred in August of 2005. Therefore, Defendant had ample time to file motions to compel to secure the medical records and to depose the medical providers prior to the records being unattainable as alleged by the Defense. Plaintiff should not be punished with the harsh remedy of dismissal with prejudice when Defendant did not seek court intervention to obtain the records that he claims are essential to his defense.

Plaintiff has produced to Defendant numerous medical records and Defendant has obtained others pursuant to subpoena. Certainly the medical records available in this case would provide Defendant with ample information in order to defend the suit filed against him. Therefore, a lesser sanction such as entering a scheduling order, which would provide deadlines for bringing this case to a conclusion, would have been the more appropriate remedy. Defendant would have ample time to re-depose the Plaintiff and to question her about the contents of the medical records and to set the depositions of the medical providers identified by Plaintiff.

C. Aggravating Factors are not Present in This case

The presence of aggravating factors is not necessary to sustain a dismissal under Rule 41(b). *Hine v. Anchor Lake Prop. Owners Ass'n*, 911 So.2d 1001,1006 (Miss.Ct.App.2005). However, aggravating factors are often present in affirmed dismissals. *Am. Tel.*, 720 So.2d at 181 (citing *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir. 1982))(when dismissals are affirmed, aggravating factors are “usually” present).

Specific aggravating factors identified by the *Rogers* Court are “the extent to which the Plaintiff, as distinguished from her counsel, was personally responsible for the delay, the degree of actual prejudice to the Defendant, and whether the delay was the result of intentional conduct.” *Rogers*, 669 F.2d at 320.

In the case at hand there is no evidence that the Plaintiff was personally responsible for any of the delays in the case. The Plaintiff appeared for deposition and executed medical and employment authorizations at such a time that would have allowed counsel to obtain all of her pertinent records. There is no indication in the record of Plaintiff’s knowledge of, or participation in, her attorney’s alleged failure to prosecute her case.

There is also no evidence that Defendant will suffer any actual prejudice by allowing the case to proceed to trial. Defendant is in possession of numerous medical records both provided by Plaintiff and received pursuant to subpoena. Defendant has ample information to be able to depose the medical providers and determine the extent of

her injuries attributable to the underlying accident. Further, Defendant agreed to suspend discovery and engage in settlement negotiations in May and June of 2006 as pointed out in his Memorandum in support of Motion to Dismiss. (R. at 125-429). Clearly, Defendant had enough information at that time to assess the value of the case if he was willing to suspend discovery and enter into settlement negotiations.

D. In the Interests of Justice this Case Should not be Dismissed

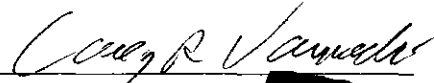
The Plaintiff was the victim of legal malpractice at the hands of the Defendant. It is not disputed by Defendant that he failed to file suit on behalf of the Plaintiff before the running of the applicable statute of limitation. Had it not been for the negligence of Defendant the Plaintiff would have had her day in Court against the tortfeasors who caused her injuries as a result of the September 4, 1996, automobile accident. If the Dismissal of this cause is upheld then Plaintiff will once again be denied her day in Court. Therefore, in the interests of justice the dismissal with prejudice should be overturned.

CONCLUSION

The trial court erred in dismissing Plaintiff's case with prejudice. Clearly there was insufficient evidence to indicate that the delays were intentional or the result of contumacious conduct. There is no evidence that Plaintiff was personally responsible for any of the delays in the case. Also, there was inadequate consideration of lesser sanctions than dismissal with prejudice. Further, there are no aggravating factors present in the record that support dismissal with prejudice. Finally, in the interests of justice, Plaintiff

should get her day in court.

Respectfully submitted this the ^{1st} ~~21~~ ^{December} day of ~~November~~, 2008.



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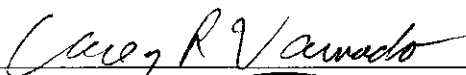
Certificate of Service



I, Carey R. Varnado, hereby certify that I have this day mailed a true and correct copy of the foregoing Appellants' Brief to the following by first class United States mail, postage prepaid.

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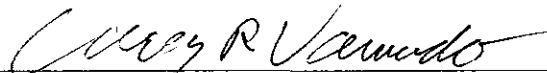
This the 1st ^{December} ~~November~~, 2008



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Certificate of Filing

I, Carey R. Varnado, hereby certify that I have this day filed with the Clerk of the Supreme Court of the State of Mississippi the foregoing Appellants brief by depositing an original and three copies of same in the United States mail, with all postage prepaid.



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