SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.: 2008-CA-01442

MARGUERITE B. HOLDER AND HERBERT HOLDER ~~APPELLANT~~ RT

VERSUS

ORANGE GROVE MEDICAL SPECIALTIES, P.A., BOYD BENEFIELD, M.D., AND DOES ONE THROUGH FIVE **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellants, L. Christopher Breard, certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualification or recusal. The persons are:

Stephen G. Peresich, Esq.
Page, Mannino, Peresich & McDermott, P.L.L.C.
P.O. Drawer 289
Biloxi, MS 39533

Honorable Jerry O. Terry
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

RESPECTFULLY SUBMITTED,

L. CHRISTOPHER BREARD
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

APPELLEES' RESPONSE TO STATEMENT OF FACTS

In Appellee's Statement of the Case, they made the erroneous assertion that Plaintiffs "knew the need for timely response" to discovery requests (Appellee's Brief P. 2). The record is completely devoid of any notice of urgency or alleged potential prejudice due to any delay nor was there a threat of filing a Motion to Compel for the lack of answering discovery. In addition, the Defendants failed to mention in their brief Plaintiffs requested, both in writing and via telephone, the deposition of Dr. Benefield prior to Plaintiff's filing of any discovery or filing their Motion to Compel the deposition of Benefield.

COUNTER ARGUMENT

I.

A. The Plaintiff's Case Was Not Properly Dismissed For Failure To Prosecute

Defendants begin their argument by citing *Hensarling v. Holly,* 972 So. 2d 716, 719 (Miss. Ct. App. 2007), noting dismissal for failure to prosecute has been regarded "as a means necessary to control the court's docket and promote the orderly expedition of justice". While this very broad and general principal of law is true, *Hensarling* along with a long list of cases also stands for the proposition that the law favors trial of the issues on the merits and dismissal is to be reluctantly applied (*Hensarling* at 720 ¶8). It should be noted the facts in *Hensarling* were significantly more egregious than in the case *sub judice* in that *Hensarling* involved over a four-year delay in diligent prosecution and nine years had passed since the initial complaint (*Hensarling* at 721 ¶17).

Defendants also claim "factors other than delay are not required." citing *Cox v. Cox,* 976 So. 2d 869, 875 (Miss. 2008). A more detailed analysis shows this is generally not true. A Rule 41 Dismissal based solely on delay alone would be a rare exception to a more lenient approach favoring a trial on the issues. Even *Cox* analyzed the facts in greater detail than a mere delay.

Defendants failed to note in their argument the line of cases that state "Rule 41(b) Dismissals with Prejudice will be affirmed only upon a showing of 'a clear delay or contemptuous conduct by the Plaintiff,'... **and** where lesser sanctions would not serve the best interests of justice (see *American Telephone & Telegraph Co. v. Days Inn of Winona,* 727 So. 2d 178, 181 (¶13) (Miss. 1998); *Hine v. Anchor Lake Property Association, Inc.,* 911 So. 2d 1001, 1004 (¶10) (Miss. Ct. App. 2005); *Tolliver v. Mladineo,* 987 So. 2d 989, 997 (¶21) (Miss. Ct. App. 2007). In *Cox* there was actually a fourteen (14) year delay and the chancellor in fact found the extensive delay caused prejudice (*Cox* at 874 (¶15)). This fourteen (14) year delay constitutes a substantial and critical distinguishing fact between *Cox* and the case *sub judice.* Defendants' argument would open the door for any delay to form the basis of a Rule 41(b) Dismissal regardless of the facts.

B. **Plaintiff's Conduct Was Not Sufficiently Dilatory For Dismissal With Prejudice**

The Defendant cites cases to support his position quoting abstract statements of law which are not consistent with the facts in this case. While Defendant cites *Hine v. Anchor Lake Property Owner's Association,* 911 So. 2d 1001 (Miss. Ct. App. 2005) at page 7 of their brief, they fail to note the *Hine* court found a continued history of delay including a three (3) year period from the last activity of record and a four (4) year lack of prosecution prior to that (*Hine* at 1003 (¶7)). No such delay exists in the case *sub judice.*

In citing *Tolliver Ex Rel. Green v. Mladineo,* 987 So. 2d 989 (Miss. 2007), the Defendants also fail to note the court utilized lesser sanctions first by warning Tolliver of an impending dismissal should counsel fail to appear at the mandatory docket call. Although there was a two (2) year and five (5) month delay, the case was actually dismissed for failure to attend the docket call (*Tolliver* at 998 (¶23)). In addition, the court found the delay was also actually

partially caused by the Plaintiffs personally due to the fact the wrong party in interest had filed the wrongful death action and the case became time barred by the statute of limitations (*Tolliver* at 998 (¶24)). Without question, *Tolliver* is factually distinguishable from the case *sub judice.*

Defendants continually want to cite *Tolliver* as support for the proposition that a mere seven (7) month delay in and of itself being sufficient to support dismissal. Defense told the trial court as much. A plain reading of the facts and ruling in *Tolliver* does not even come close to supporting this proposition. The Court in *Tolliver* noted

> "Dismissals for failure to comply with a court's order and docket procedure is a sanction a trial court may impose in certain circumstances. However, we recognize that a dismissal of an action is a drastic remedy which should be used only in extreme situations." In this case, the trial court warned that sanctions and/or a dismissal with prejudice would occur for failure to attend the mandatory mass docket call. The Court utilized this sanction to articulate the seriousness of failure to appear at a docket call.

(*Tolliver* at 998 (¶25))

A clear review of the facts and rationale of the *Tolliver* court shows it is completely distinguishable from the case *sub judice* and does not stand for the proposition a mere seven (7) month delay is sufficient to support a Rule 41(b) Dismissal.

Defendants further make the specious argument that they were completely in the dark regarding Plaintiff's allegations and the basis for those allegations. The Complaint (R.52) was very detailed and it is clear from the record the Complaint made against the Defendants was based on Defendant's actions which should be contained in the Defendants' own medical records and treatment of the Plaintiff by the Defendants in the hospital. The hospital records at Memorial Hospital and office records note any consulting doctors including the cardiologist, Dr. Shah. This was also argued in Plaintiff's Response to the Motion to Dismiss and the attached discovery responses (R.124) (RE 26). Even the trial court specifically agreed with Plaintiff's counsel in that he believed the doctor should know who his nurses were on a specific date

enough to make an investigation and that Plaintiff's counsel's statements in that regard were true (Tr.23). The allegations by Defendant that discovery was required to begin their investigation is just baseless. Defendant knew Ms. Holder as his patient and was well aware Ms. Holder had been hospitalized for the stroke and had previously been hospitalized by him including the cardiologist, Dr. Shah, and consulting doctors for atrial fibrillation. The medical authorization provided by Plaintiff would give the Defendants the ability to obtain those hospital records knowing when and where the Plaintiff had been hospitalized as a patient of his. The Complaint shows that Ms. Holder was hospitalized at Memorial Hospital for the stroke and subsequent crainostomy. From those records Defendants could easily obtain the names of any consulting doctors they were unaware of. If time was of the essence, this investigation should have been begun. It should also be noted that even after discovery was answered there was no indication the investigation was actually hampered or information lost. Defendants flatly denied Ms. Holder's version of what the nurse told her. Plaintiffs would show that there is no evidence of significant delay based on the facts of this case which would support dismissal with prejudice especially since the medical authorization was provided pursuant to discovery in mid 2007.

.

C. Lesser Sanctions Were Not Reasonably Considered By The Trial Court And There Was Absolutely No Prejudice To The Defendants

The Defendants are correct on Page 10 of their brief wherein they state "the Court must consider whether lesser sanctions would better serve the interests of justice." There is no evidence the Court sufficiently or reasonably considered lesser sanctions or any sanctions particularly after the Court failed to provide Findings of Fact and Conclusions of Law as requested by the Holders' counsel. If the trial court adopted Defense counsel's argument to support 'its' opinion then that argument and ruling is clearly wrong and an abuse of discretion

based on a review of the actual facts and law cited. Mr. Peresich stated to the trial court "in none of these cases did the Court of Appeals or the Supreme Court say that a lesser sanction or what your honor just asked me would prevent them from upholding the dismissal that the judge enters in these cases because of the fact that the case lay dormant" (Tr.24). This is not true. Defense counsel advising the trial court that *Tolliver* stood for the fact a mere seven (7) month delay and nothing more would support a Rule 41(b) Dismissal was a gross misstatement of the law and facts.

An analysis of the record shows counsel for Defendants never gave a clear assertion that prejudice had in fact been suffered or that the nurses had not been contacted or could not be contacted for interview after notice of the suit was given. As previously stated even the trial court recognized an investigation could have been instituted by the Defendant. One would be hard pressed to believe such an investigation was not immediately conducted when the lawsuit was served. It is common knowledge when a lawsuit such as this is filed or when notice is given under the malpractice statute an investigation should and usually does begin. There was not one assertion to this court that an investigation had or had not been conducted and/or could not be conducted because the nurse was not identified or could not be found. Counsel for the Defendant was very careful and in retrospect illusive in his statements. Equally important is Defense counsel's affirmative statement to the court that "Dr. Benefield and the clinic deny that any nurse told her (Ms. Holder) that" (Tr.25). To make such a definitive statement to the trial court clearly indicates some investigation took place about that conversation. If the Defendants deny the conversation took place, it does not matter who Plaintiffs say the nurse was since the Defendants are taking the position the conversation didn't happen and the nurse did not say what the Holders' assert was said. This assertion was made to the trial judge after the nurse was identified in discovery responses. This sets up the classic "he said, she said" situation that

creates a jury question not prejudice. Regardless, based on the information in the Complaint and in the Defendants' own records, armed with the medical authorization, the investigation could begin.

As to the lesser sanction of a warning, this court has a long history of advocating such a warning before dismissal. This is certainly evident from the cases cited herein including Rule 41(d) M.R.C.P. In addition, this court has routinely required a Motion to Compel discovery and an Order Compelling Discovery before cases are dismissed for discovery violations (See *Caracci v. International Paper Co.,* 669 So. 2d 546, 557 (¶19) (Miss. 1997)). Part of what the Defense complains of in this case and mentioned by the trial court is a discovery violation. However, no Motions to Compel were filed and no order entered compelling discovery. Instead, the Defense took a lay and wait approach hoping to obtain a dismissal for failing to prosecuted. This approach was somewhat frustrated when Plaintiffs began to take action before the clerk sent out a Rule 41(b) Notice of Dismissal for failure to prosecute and before the Defense filed their own 41(b) motion.

Defendants at Page 13 of their Brief acknowledge aggravating factors may be considered. For the first time Defendants contend the Plaintiffs themselves must accept some burden of pursuing the case. Defendants did not argue the Plaintiff should be personally held responsible for the delay and the only argument before the court in this regard was from Plaintiff's counsel affirming Plaintiffs were blameless (Tr.16). Since the Defendant did not specifically raise the issue of the Plaintiffs being partially to blame and there was no such evidence, the trial court could not have used this as a basis for its decision.

Again, Defendants suggested at Page 13 of their Brief that medical authorizations are useless if the Defendant does not know who the medical providers are. As has been shown, this is an outright misrepresentation to the court since the Defendant was the treating physician of

Plaintiff both in and out of the hospital. She was initially hospitalized for atrial fibrillation and that resulted in the blood thinning drugs given and managed by Dr. Benefield that led to the stroke. They all knew, at least from the Complaint and notice letter, Ms. Holder was hospitalized at Memorial for the stroke (R.12, 16). The investigation could and should start there. Defendant also knew the treating consulting cardiologist in this case because Benefield was treating Ms. Holder along side of the cardiologist, Dr. Shah (R.53). This information was in Benefield's own medical records and detailed in the Complaint (See Discovery provided and Complaint R. 9, 16, 53). To make an argument that the Defendant doctor in this case was completely in the dark about Ms. Holder's treatment and who was providing it at the time is more than a misrepresentation. It is true the Defendants may not have known who all the subsequent treating physicians were far removed from the incident in question but that goes more to damages and not as to what happened to Ms. Holder and why. It is disingenuous at best for these Defendants to claim as they did at Page 13 of their Brief that "these Defendants were ultimately prejudiced by the vast amount of time which is passed before which they can even begin (sic) investigate the allegations of the Plaintiff's claims". Even the trial court, as previously stated, disagreed with that statement (Tr. 23). It is obvious Defendants armed with the medical authorization could have begun to collect the medical records which they were aware of including the doctors' own medical records and those of Ms. Holder's hospitalizations in which Dr. Benefield and others along with Dr. Benefield were involved. Defendants also knew of the Memorial Hospital hospitalization for the stroke (R. 13). The Defense asked for the medical authorization as a part of their discovery which had been produced back in mid 2007, not terribly long after the discovery request (R. 27). For prejudice to exist there must be some reasonable factual basis to claim it and not mere speculation or fabrication. There was no prejudice.

II. The Trial Court's Ruling Did Not Have Sufficient Findings Of Fact Or Conclusions Of Law To Affirm The Order Of Dismissal Particularly In Light Of Defense Counsel's Arguments

The mere fact Judge Terry may have adopted arguments of counsel and the cases cited by him as to the basis for his dismissal this alone should not be sufficient to support his opinion in this case since those cases are clearly distinguishable. As previously stated arguments and representations by counsel of the facts and the law do not mean they are correct interpretations of the law or accurate facts. The record itself in this case shows that there was an erroneous representation by counsel for the Defense of the law as it relates to lesser sanctions (Tr.24), the ruling in *Tolliver* and an out and out misrepresentation that Benefield could not begin his investigation of this case without answers to discovery. As stated, Benefield knew who his employees were, he knew when Ms. Holder was treated, he knew when and where she was hospitalized by him for atrial fibrillation, he knew who the consulting physicians were at the time of her hospitalization by him including the consulting/treating cardiologist. Certainly the medical information authorization produced by Plaintiffs through discovery in this case produced no additional information that Defendants could not have obtained prior to the discovery answers if they were already aware where that information could be located. They already had the medical authorizations.

Defendants cite *Hensarling v. Holland,* 972 So. 2d 716 (Miss. 2007) for the proposition and an explicit finding of fact is not required. Again, Defendants attempt to compare apples to oranges disregarding the facts of the case. The *Hensarling* malpractice lawsuit was filed September 11, 1998, alleging medical negligence which occurred September 12, 1996. By the time service of process was obtained the 120 days to serve the Defendants had passed as well as the statute of limitations. The *Hensarling* court stated

> "as the lower court noted, *Hensarling* failed to timely serve process on *Holly,* failed to conduct any sort of discovery within the required time, and failed to diligently prosecute the case for four (4) years. Almost nine (9) years had passed since the initial complaint was filed. The passage of time in this case may have altered the physical evidence available" (Hensarling at 72, ¶17).

There are no facts in the case *sub judice* that even remotely approach the severity of those in *Hensarling.* The only alleged loss of information would be the ability to confer with the nurse and the trial court acknowledged in the record the Defendants should have been able to conduct an investigation regarding any conversation the nurse may have had with Ms. Holder. There is no proof they did not talk to the nurse or could not talk to the nurse. The Defendants in fact denied the substance of that conversation (Tr. 25). Any claims of prejudice should be more than allegation or fabrication. The substance of that conversation was set forth in the complaint and could have easily been investigated by reasonable inquiry of employees. Under the facts of the case *sub judice* there should be no automatic presumption that lesser sanctions would have been ineffective or that Defendant suffered any more prejudice than he would have in the normal course of litigation. This distortion of the facts and misrepresentation or misinterpretation of the law shows the importance and need for specific findings of facts and conclusions of law.

III. Plaintiffs Have Made A Showing Of Abuse Of Discretion On The Part Of The Trial Court

Contrary to the assertions of the Defendants, Plaintiffs not only maintain the trial court erred by not ordering a lesser sanction and by not issuing Findings of Fact and Conclusions of Law, the Plaintiffs further alleged the trial court erred in apparently concluding there was a substantial delay in prosecution and/or dilatory conduct sufficient to support dismissal relating to a discovery violation. There is no indication the court found any prejudice whatsoever but on the contrary the court acknowledged an investigation could have been started by the Defendants

including talking to the nurse employees (Tr. 23). Plaintiffs have set forth sufficient law and facts to support their position that there was an abuse of discretion by the trial judge.

CONCLUSION

Plaintiffs would show the trial court in this matter grossly abused its discretion in dismissing Plaintiff's malpractice case for failure to prosecute. There is no evidence that Plaintiff's conduct was so dilatory as to rise to the level supporting dismissal nor that Plaintiffs personally contributed to any delay. There is no evidence that lesser sanctions were reasonably considered or would not have served the interest of justice under the facts of this case. There is no evidence other than speculation and fabrication that the Defendants in this case suffered any prejudice due to the delay. Merely having to defend a malpractice lawsuit is not the prejudice contemplated in these case analyzing a 41(b) dismissal. There is, in fact, sufficient factual evidence that if Defendants did not begin to conduct their investigation at the time the detailed complaint was filed and served on the Defendants, they were themselves complacent and partially if not totally responsible for any alleged prejudice. Plaintiffs in their original Brief set forth the reasoning for the delay in responding to discovery which had nothing to do with the Plaintiffs personally. Plaintiffs, however, did timely provide Defendants with a medical authorization allowing them to begin their investigation which they apparently did not do. If the Defendants did begin an investigation as they should have, they intentionally misled the court of this fact. Regardless of what Dr. Benefield's nurse may have told Ms. Holder about the need for blood work and her coumadin levels, neither Benefield nor his medical records ordered any further blood work or adjustments to her coumadin. This failure by Benefield led to Ms. Holder's stroke.

Defendants throughout rely heavily on the Court of Appeals' holding in *Tolliver* claiming Tolliver states a mere seven (7) month delay is sufficient for dismissal. Defendants' review and

legal analysis of *Tolliver* is misplaced as it relates to its applicability to this case. *Tolliver* neither legally or factually stands for the simple proposition that a mere delay of seven (7) months in and of itself is a basis for dismissal. The Defendants failed to note the wrongful death action was filed by the wrong party in interest, the statute of limitations had subsequently run and the failure of counsel to attend the mandatory docket call after having been advised failure to attend could result in sanctions including dismissal. These critical facts were in addition to the fact the case had laid dormant for two (2) years and five (5) months prior to the mandatory docket call and dismissal. It was Defense counsels' erroneous argument that helped lay the basis for Judge Terry's ruling if in fact he relied on Defense counsel's argument. For the trial court to rely on *Tolliver* as authority for dismissing a case for lack of prosecution for merely a seven (7) month delay in and of itself shows an abuse of discretion. Without findings of fact and conclusions of law we have no idea what the trial court in fact relied upon and it would be unjust to speculate now that the trial court must have had some good basis for his ruling when reviewing this record. Plaintiffs stand by the cases he cited in the original brief including the comments to Rule 1 M.R.C.P. which states in part:

> **"... directing that the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice and facilitates decisions on the merits rather than determinations on technicalities.** See e.g. Miss. Code Ann. §11-5-13 (1972) (statute setting forth requirements of bill of complaint). Perhaps the most important of these statements is the provision of Rule 61 which, directs that **"the Court at every stage of a proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties.** (Emphasis added).
>
> ...The Rules will remain a workable system only so long as trial judges exercise their discretion intelligently on a case by case basis; **application of arbitrary rules of law to particular situations will have a debilitating effect on the overall system"** (Emphasis Added)

Comment to M.R.C.P. Rule 1

Plaintiff would show based on the facts and the law the trial court in this case abused its discretion in dismissing the Holders' malpractice claim and this case should be reversed and remanded for trial on the merits.

RESPECTFULLY SUBMITTED this the 20th day of July, 2009.

L. CHRISTOPHER BREARD
Attorney for Appellant

CERTIFICATE OF SERVICE

I, L. CHRISTOPHER BREARD, do hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of **Reply Brief of Appellants** to the following:

Stephen G. Peresich, Esq.
Page, Mannino, Peresich & McDermott, P.L.L.C.
P.O. Drawer 289
Biloxi, MS 39533

Honorable Jerry O. Terry
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

SO CERTIFIED, this the 20th day of July, 2009.

L. CHRISTOPHER BREARD

Breard Law Firm, Ltd.
1643 East Pass Road
Post Office Box 7676
Gulfport, Mississippi 39506-7676
Telephone: 228-897-2222