NO.: 2008-CA-01442

MARGUERITE B. HOLDER AND HERBERT HOLDER — **APPELLANT**

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 CASES

OTHER AUTHORITIES

for Want of Prosecution with prejudice without considering lesser sanctions and erroneously failed to give findings of fact and conclusions of law to support its decision when specifically requested by Plaintiffs' counsel.

Marguerite B. Holder and husband, Herbert Holder, against Orange Grove Medical Specialties, PA, Boyd Benefield, M.D., and Does 1 through 5 (R.9). Ms. Holder had been a long time patient of Dr. Benefield leading up to the incident giving rise to this claim. On September 21, 2004, she was diagnosed with a new onset of atrial fibrillation and admitted to Garden Park Medical Center. She was discharged from Garden Park on or about September 26, 2004, by Dr. Benefield and placed on the blood thinning medication, Coumadin. Dr. Benefield was to monitor the Coumadin levels to assure blood levels were not so high as to unreasonably increase the risk of hemmoragic stroke (R.11). Between the time of discharge and October 13, 2004, blood tests showed an increase of her anticoagulation status yet no adjustments to her medication were made. On October 6, 2004, Ms. Holder's blood test showed an INR was 3.5 which indicated the Coumadin therapy was therapeutically too high for her condition and placing her at greater risk for stroke. No change in her therapy was ordered but a follow-up appointment was made for October 13, 2004. When Ms. Holder presented for the appointment, she was told by an employee nurse of the clinic that additional blood work would not be necessary because it had been performed the week before. Ms. Holder did not see the doctor that day and no adjustments were made to her Coumadin therapy. Although an appointment had been scheduled with her cardiologist, Dr. Shah, that appointment did not take place before Ms. Holder suffered a seriously debilitating hemmoragic stroke on October 14, 2004. At the time she was admitted to Memorial Hospital, her INR was greater than 9 which is critically above therapeutic levels (R.12).

Defendants filed their Motion for Enlargement of Time reserving Rule 12 objections and

Defendants filed a Motion to Compel Waiver of Medical Privileges Reserving All Rights and Defenses on February 12, 2007 (R.35). The Certificate of Service was dated the 8th day of February 2007 (R.38). No order was ever entered and no hearing noticed. Defendants filed their First Set of Interrogatories and Requests for Production of Documents to Plaintiff on February 12, 2007 (R.39).

On March 8, 2007, the Paralegal for the Holders' counsel faxed a letter to counsel for Defendants advising them the Holders' lawyer, Mr. Breard, was in trial and would not be able to complete discovery until he was out of trial (R.86-87). On May 4, 2007, counsel for Defendants requested when he could expect responses to Dr. Benefield's discovery (R.88). On May 24, 2007, counsel for Defendant re-faxed his May 4, 2007, inquiry regarding Plaintiffs' discovery responses (R.92). Again on June 4, 2007, counsel for Defendants re-faxed the May 4, 2007, inquiry regarding discovery (R.96). In March of 2007 and/or May 2007, Plaintiff provided Defendant with an Authorization to Disclose, Release and Furnish Protected Health Information (R.115 and R.151).

After Plaintiffs had requested a status report on their case, counsel made telephonic requests for the deposition of Dr. Benefield to which there was no response (Tr.16). Counsel for Plaintiff then faxed a request on May 5, 2008, to counsel for Defendant, requesting deposition dates for Defendant Benefield as soon as possible (R.152).

On May 7, 2008, counsel for Plaintiffs filed Interrogatories and Requests for Production of Documents to the Defendants (R.154 and R.41). In a retaliatory response, Defendants filed their Motion to Dismiss for Failure to Prosecute on May 9, 2008, pursuant to M.R.C.P. 41(b)

propounded by Defendants (R.117). Plaintiffs then filed a Motion to Compel the Deposition of Dr. Benefield on May 29, 2008 (R.1002). This was followed by Defendant's Motion to Strike Plaintiffs' Motion to Compel the Deposition (R.106). Plaintiffs filed their Response to Defendant's Motion to Dismiss for Failure to Prosecute on July 24, 2008 (R.110). In that response counsel for the Holders' set out the fact he had out of state medical malpractice trials in February and March and another malpractice trial in May of 2007. During this time there was also an appeal brief due to the Supreme Court in another malpractice case (R.110). Plaintiff further argued the Paralegal attending to this matter resigned in August of 2007, and counsel for plaintiff was under the mistaken impression the discovery had been responded to, especially since no further requests had been made by the Defense. Difficulties with office staffing and malpractice trial preparations in September, October and November 2007 were set forth in the response as partial reasons for any delay (R.111).

Counsel explained that realizing the case needed to be moved forward and at the request of the clients, counsel for Plaintiffs personally attempted to contact Stephen Peresich, counsel for Defendant, by phone on several occasions in an effort to schedule the deposition of Dr. Benefield (R.111). It was specifically set forth in the response that the Defense filed no motions to compel discovery and that action of record was taken by Plaintiffs prior to any threat of dismissal for lack of prosecution.

Arguments Of Counsel And Findings/Comments By The Court At The July 25, 2008 Hearing

Counsel for Defendants argued Plaintiffs waited longer than two (2) years to file the

done absolutely nothing to prosecute the case and had not given the defense notice of who this nurse employee was (Tr.4). Arguments by counsel for the Defendants centered largely around Plaintiffs' failure to answer interrogatories and requests for production of documents until after the Motion to Dismiss was filed (Tr.8-9). The Court determined Plaintiffs answered the original discovery thirteen (13) days after the Motion to Dismiss for Failure to Prosecute was filed and the preliminary discovery responses were already loaded in the computer (Tr.15 and Tr.21). The Court was advised by counsel for Plaintiffs of office staffing difficulty as well as his hearing/trial calendar. It was uncontradicted that Plaintiffs personally have been cooperative at all times and were not at fault for any delay (Tr.16). The Court was advised of Plaintiff's request for the deposition of Dr. Benefield, and that the request and discovery requests by the Holders' stimulated the Motion to Dismiss (Tr.16). At the hearing on the Motion to Dismiss was the first notice of the alleged urgent need for the nurse's name as it was not mentioned in their written motion.

The Court was advised by Plaintiffs' counsel that the cases cited by the defense were not analogous to the case *sub judice* and that prior lesser sanctions rather than dismissal should be considered (Tr.17-18). The Court was also advised Plaintiffs had provide counsel for defense a medical authorization in 2007 so medical records could be gathered (Tr.18). The Court was advised that there were no motions to compel and no requests for a scheduling order nor was a trial set in this case (Tr.19). It was reiterated the Plaintiffs as opposed to counsel were absolutely blameless for any delays (Tr.19). The Court was made aware that Plaintiffs took action of record in this matter before the defense filed their Motion to Dismiss (Tr.20).

conversations they may have had as set out in the Complaint (Tr.20). There is no evidence this investigation did not take place. The Court was advised by counsel for Plaintiff he believed the discovery had been answered in 2007 and in fact, when he realized it had not been answered, it was filed within thirteen (13) days because it had already been preliminary put into the computer by one of counsel's former paralegals (Tr.21).

The Court asked counsel for Plaintiff what sanctions he believed would be appropriate, and a lesser sanction of a warning of dismissal was suggested as one option as set forth in the various Court of Appeals and Supreme Court opinions. The trial judge was very clear that he disagreed with the Courts of Appeal in giving a warning. It was stated that everyone is supposed to know the rules and obviously the trial court did not believe a warning should be considered as a lesser sanction regardless of the facts (Tr.23). The trial court did specifically agree with Plaintiffs' counsel in that he believed the doctor should know who his nurses were on a specific date enough to make an investigation. The Court admitted that Plaintiffs' counsel's statement was true in that regard (Tr.23). When asked by the trial court defense counsel's position on a lesser sanction, Mr. Peresich stated "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 trial judges entered in these cases because of the fact that the cases lay dormant" (Tr.24). Counsel for the Defendant clearly announced to the Court Dr. Benefield and the clinic denied as a matter of fact that any nurse told Ms. Holder what she alleged (Tr.25). There was no allegation that the medical records showed a blood test to check Ms. Holder's coagulation level had been ordered. Defense argued there was no lesser sanction

the date of the event cannot be taken back nor can any sanction cure that (Tr.26).

Counsel argued to the Court that *Tolliver Ex Rel. Green v. Mladineo*, 987 So. 2d 989 (MS 2007), was sufficient authority to support dismissal. The Defense argued *Tolliver* stated merely letting a case lay dormant for seven months was sufficient in itself to support dismissal with prejudice (Tr.27). The Court was again notified that medical authorizations were provided to counsel opposite in 2007. The Court was also advised there was no assertion by the Defense that they attempted to locate the nurse or whether she has a memory of the event or if she was a current employee at this time. It was shown that the delay allegedly caused by Plaintiff was not 48 months as alleged by the Defense but was actually about only thirteen months from when the discovery was originally due to the filing of the Motion to Dismiss (Tr.27). It was argued even if discovery had been answered in May or June of 2007, it is unreasonable to argue that the memory of the nurse would have been any clearer in June of 2007 than it would be in 2008. The few additional months delay would not have reasonably made any difference in the nurse's memory (Tr.28). There was no response by counsel for Defendants to that argument.

Counsel for the Defense acknowledged he did not follow up on his Motion to Waive the Medical Privilege by acknowledging Plaintiffs sent him authorizations and it was not necessary (Tr.29).

The Court in its ruling stated on the record

> "In this particular case, I feel like the delays in responding to the discovery and not pursuing the case as it should have been pursued for this period of time is certainly sufficient for the Court to deem that the case was not pursued properly; and it should be dismissed for failure to prosecute the case. And then you don't come in after the fact and start trying to mend the fences. They've already been breached, so that's the end of it. So I sustain you motion. Give me an Order"

cited as the basis for dismissal (Tr.30-31). The Court finally cautioned counsel for Defense not to quote him because the record will speak for itself (Tr. 31). No other findings were made or alluded to by the Court.

The judgment granting Defendant's Motion to Dismiss was entered on July 29, 2008 (R.166). That Judgment was entered with prejudice. Notice of Appeal was timely filed on August 19, 2008 (R.168).

ARGUMENT AND AUTHORITIES

Whether The Trial Court Abused Its Discretion In Granting Defendant's Motion To Dismiss For Want Of Prosecution With Prejudice Without Considering Lesser Sanctions And Erroneously Failed To Give Findings Of Fact And Conclusions Of Law To Support Its Decision When Specifically Requested By Plaintiffs' Counsel.

The Defense argued as authority for its Motion to Dismiss for Failure to Prosecute *Tolliver Ex. Rel. Green v. Mladineo,* 987 So. 2d 989 (Miss. COA 2007). In *Tolliver* the Court of Appeals reiterated the following:

> "Mississippi Rules of Civil Procedure 41(b) provides for the dismissal of a stale lawsuit for the failure of the Plaintiff to prosecute the case. However, we are mindful that "the law favors trial of issues on the merits and dismissals for want of prosecution are therefore employed reluctantly." *AT&T v. Days Inn,* 727 So. 2d 178, 180 (¶12) (Miss. 1998) (Citing *Watson v. Lillard*, 493 So. 2d 1277, 1278 (Miss. 1986)). A trial court's order of "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 v. Jones,* 572 So. 2d 371, 376 (Miss. 1990). We review a trial court's dismissal pursuant to Rule 41(b) for failure to prosecute for abuse of discretion. *AT&T v. Days Inn,* 727 So. 2d at 180 (¶12); *Miss. Dep't of Human Servs. v. Guidry*, 837 So. 2d 628, 632 (¶13) (Miss. 2002).

Tolliver v. Mladineo at 997 (¶20)

The *Tolliver* Court stated further:

> Fifth Circuit) (Citing *Rogers v. Kroger Co.,* [illegible]
> 837 So. 2d at 633 (¶14). An affirmance of a dismissal with prejudice usually [illegible] when **clear delay** or contemptuous conduct has been shown, **and** there **is at least one aggravating factor warranting the harshest sanctions**. *AT&T,* 727 So. 2d at 181 (¶13) (Citing *Rogers,* 669 F. 2d at 320). Aggravating factors supporting of a dismissal with prejudice are (1) delay caused by the Plaintiff personally, (2) delay causing prejudice to the Defendant and (3) delay resulting from intentional conduct. (Emphasis added).

Id. *Tolliver* at 977 (¶22).

Tolliver as cited and argued by counsel for the Defense is distinguishable from the case *sub judice.* First, the *Tolliver* case had been pending two years and five months. The Holder's case had been pending a year and five months or a year and three months from the answer of the Defendants. There was, in fact, approximately a thirteen month delay in answering Defendant's discovery from the date the discovery was due and approximately a ten-month delay from the last informal request for the discovery responses by the Defendant. While the discovery in the case *sub judice* should have been answered, the delay was not intentional. There was no notice of the urgent need of the nurse's name until the Motion to Dismiss was argued. Even so, her name was provide in Answers to Interrogatories. Equally important is the fact that there was no argument by the Defense that the medical records of Benefield showed lab tests to check coagulation levels had been ordered or that Ms. Holder failed to follow the doctor' advice. Lab tests can not be performed without a doctor's order so the testimony of the nurse becomes somewhat important since there is no allegation Ms. Holder failed to meet a scheduled appointment or appear for lab tests. The trial court dismissed *Tolliver's* case holding that a delay in prosecution had clearly occurred and made a specific factual finding in that regard and failing to attend a required docket call. *Tolliver* at 997 (¶23). The finding of the trial court in the case [illegible] is less certain and confusing at best. The Court stated "In any event, in this particular

case **was not pursued properly**; that it should be dismissed for failure to prosecute the ... (Tr.30). (Emphasis added.) This ruling was after the Court acknowledged the Defense could have easily conducted an investigation and questioned the employees (Tr.23). The Holders would submit this is not a clear finding of delay contemplated by the M.R.C.P. 41(b) sufficient to sustain a Motion to Dismiss for Failure to Prosecute. There was no finding or allegation of intentional delay and no consideration of the fact the Holders did provide a medical waiver to the Defendant. Benefield certainly was aware as Ms. Holder's treating doctor, her hospitalizations relative to the atrial fibrillation, her lab tests and later her stroke.

The *Tolliver* Court went on to say

> "For an appellant court to affirm a dismissal with prejudice based on a record of clear delay or contemptuous conduct, an aggravating factor is usually present. Our Supreme Court has held that if the Plaintiff personally contributed to the delay, that this action can warrant dismissal with prejudice of his case. In this case, we find that delay, in this case, was caused by the Plaintiff (Plaintiffs personally)."

Tolliver at 998 (¶24)

In the case *sub judice* it was denied the Plaintiffs had done anything to cause or contribute to the delay. In fact, it was argued to the Court the clients were the ones who helped spur activity by inquiring about the status of the case (Tr.16). There was no allegation and no finding by the Court that the Holders' were personally responsible in any way for the delay as an aggravating factor or otherwise. This in and of itself distinguishes the case *sub judice* from *Tolliver* and shows one of several flawed basis for the ruling of the trial Court in the case *sub judice.*

Furthermore, the Court of Appeals in *Tolliver* noted

Tolliver at 998 (¶25)

It should further be noted that the *Tolliver* decision to dismiss the case was actually affirmed on other grounds and not on the failure to prosecute contrary to what Defense counsel inferred to the Trial Court.

Again, it is clear the trial court in *Tolliver* utilized a less drastic sanction than dismissal by first issuing a warning that failure to attend the docket call could result in dismissal. This lesser sanction of a warning of dismissal has been uniformly recognized by the Courts of Appeal and the Mississippi Supreme Court but flatly rejected by the trial court in this case. Recently, the Mississippi Supreme Court in *Hill v. Ramsey,* 2009-MS-0227.150-SCT ¶12 in referring to the dissents' comments stated the following:

> "The dissent provides an excellent analysis of a case that is not before us today. Had the judge dismissed the case with prejudice, we might agree with the dissent's logic. However, the case before us today involves a dismissal without prejudice which is hardly a "nuclear option" *Hill* at (¶11).
>
> The dissent claims that "we are consistently required that a trial court's dismissal for failure to prosecute necessarily abuses its discretion when it does not first consider lesser sanctions." However, all of the cases cited by the dissent involves dismissals *with* prejudice. Indeed, the "common thread" running through all of the cases is not, as a dissent incorrectly perceives, that Rule 41(b) dismissal could not be employed as a first response, but only when all other attempts to move the case along have proved fruitless"; rather, it is that all of the cases involve dismissals with prejudice."

Hill at ¶12.

Of important note is that *Hill* involved a case that had been pending for nearly seven years. The Defense claimed there had been no real activity for four years. It was undisputed there was no action at all for nineteen months leading up to the dismissal. *Hill* at (¶7). This is [illegible] from the case *sub judice* in that the delay and facts in the Holders'

sanctions after a relatively short delay compare to [illegible]

years.

The Defense also cited *Hine v. Anchor Lake Properties Ass'n, Inc.*, 911 So. 2d 1001 (Miss. P. App. 2005). *Hine* involved a Rule 41(b) dismissal for failure to prosecute when a motion was filed after three years of inactivity and the dismissal occurred four years after the last prosecution of the case. In that case discovery responses were not provided even after the motion to dismiss was file. *Hine* at 1003 (¶7). The *Hine* Court went further in stating

> "Rule 41(b) Dismissals with prejudice will be affirmed only upon a showing of "a clear record of delay or contemptuous conduct by the Plaintiff"...**and** where lesser sanctions would not serve the best interest of justice." *Am. Tel.*, 727 So. 2d at 181 (¶13) (Quoting *Rogers v. Kroger Co.*, 669 F. 2d 317, 320 (5th Cir. 1982)). Whether a dismissal is affirmed also turns on the presence of certain "aggravating factors" including "the extent to which the 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." (Quoting *Rogers,* 669 F. 2d at 320). (Emphasis added.)

Hine at 1004 (¶10)

In the *Hine* case the Appellate Court found due to Mr. Hine's financial problems it was unlikely he would timely prosecute the case if it was reinstated. *Hine* at 1006 (¶20). In *Hine* there was also a specific finding of actual prejudice as the passage of time may have altered the physical evidence of the landscape and the dam. *Hine* at 1006 (¶18). In the case *sub judice* unlike the Court in *Hine* the trial court clearly agreed with Plaintiffs' counsel that the failure to identify the nurse would not have prevented Benefield and the clinic from talking to the nurses and investigating the claim (Tr. 23). In fact, there was absolutely no showing by the defense nor a response made by the defense to Plaintiffs' argument that an additional thirteen-month delay in identifying the nurse certainly would not have affected the nurse's memory as there had already

ascertain if any blood work was ordered in addi...

failure to question the nurses exhibits some amount of fault applicable to the Defendants during the alleged time of delay. Equally important is Defense counsel's affirmative statement that "Dr. Benefield and the clinic deny that any nurse told her that" (Tr.25). To make such a definite assertion to the Court would clearly indicate there must have been some investigation about the conversation. If the Defendants flatly deny the conversation took place, it would not matter when the nurse was identified and no prejudice results.

There was no finding by the Court of actual or implied prejudice and the record shows the Defense did not bring up the need for the nurse's name until the motion was argued. Obviously, this was a specious attempt to bolster his case for dismissal.

As noted in the comment to Rule 1 of the Mississippi Rules of Civil Procedure

> "The keystone to the effective functioning of the Mississippi Rules of Civil Procedure is, obviously, the discretion of the trial court. The Rules grant considerable power to the judge and only provide general guidelines as to the manner in which it should be exercised. Accordingly, judges must view the Rules with a firm understanding of the philosophy of the Rules and must exercise a wise and sound discretion to effectuate the objective of the simplified procedure. The Rules will remain a workable system only so long as a trial judge exercises 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."

Prejudice can be claimed and speculated upon in virtually every case. Just because there is a claim by the Defense and a finding by the Court of prejudice does not mean it is substantiated by the record. The Courts should not dismiss a case based on speculation. That would be contrary to the spirit of the Mississippi Rules of Civil Procedure. The Appeals Courts must be ever vigilante to review such cases taking into consideration the life of a lawyer in the trenches and the intent of M.R.C.P. when deciding the issues.

2007). That case involved a dismissal for failure to prosecute [illegible]

years. *Hensarling* at 721 (¶17). *Hensarling* is obviously distinguishable from the case *sub judice* not only based on the four-year lack of prosecution but also due to the fact the case was dismissed without prejudice giving the Plaintiff the option to re-file the case but Plaintiff failed to take any action whatsoever. *Hensarling* at 722 (¶21).

This Appellate Court should be cautious when presuming to a party's detriment that a Court properly considered the use of lesser sanctions or properly made a finding of prejudice when an innocent party's day in court is about to be stripped from them. In questioning the purpose of giving a warning as a lesser sanction, the trial court stated "every body is supposed to know the rules – and comply with the rules. And they say on the one hand the rules are to be enforced and not to be scoffed at" (Tr.23). The Plaintiffs would show there is no rule that says a case will be dismissed with prejudice for a twelve or thirteen-month delay in prosecution particularly when the case was only fifteen months old. In fact, heretofore, such a result was unheard of. In this case, medical authorizations were provided during that time of delay. In fact, M.R.C.P. and the case law clearly support that "there is no set time on the prosecution of an action once it has been filed and dismissal for failure to prosecute will be upheld only where the record shows that a Plaintiff has been guilty of dilatory or contemptuous conduct." *Hill v. Ramsey* at ¶6 (Citing *AT&T v. Days Inn,* 727 So. 2d 178, 180 (Miss. 1998)) (Quoting *Watson v. Lillard,* 493 So. 2d 1278, 1279 (Miss. 1986)). When viewing this language against the trial court's pronouncement that everyone knows the rules, the Plaintiffs have no clear guidance and all lawyers are now practicing in a mine field.

In this particular case, the clerk would have had just enough time, that being a twelve-

Plaintiffs would have been action or receive [illegible]

prosecution. To allow the trial court's ruling to stand at this point in time would allow a Defendant to file a Rule 41(b) Motion to Dismiss in virtually every case where discovery is not answered in a timely fashion rather than filing a Motion to Compel. One can only guess if the same Motion to Dismiss would have occurred had the discovery been answered in September, October, November, December or January. There are no guidelines to when a Rule 41(b) delay is too long. It is known a clerk's 41(d) Notice of Dismissal will come shortly after twelve months. There is no just distinction between a Rule 41(b) and 41(d) dismissal in light of the clear intent of the Mississippi Rules of Civil Procedure to assure a just and liberal appreciation of the rules. That is the reason counsel in this case knew it was time to get this case moving.

As it relates to delays in prosecution or retention of counsel, the Court of Appeals in *Camacho v. Chandler Homes,* 862 So. 2d 540 (COA 2003)(¶17) found a five-month delay in acquiring counsel was relatively short particularly when there was no finding of prejudice. In this case, there was no specific finding of prejudice by the trial court and in fact, it was found, as previously argued, the Defense could have investigated the memory of the nurse had they chosen to do so. In addition, as has been previously stated, counsel for the Defense affirmatively denied the conversation took place, period. Similarly, the Court of Appeals in *Lone Star Casino Corp. v. Full House Resorts, Inc.,* 796 So. 2d 1031 (COA 2001), found a twenty-month delay to retain counsel was not so egregious to result in dismissal (¶6).

The Court of Appeals in *Harvey v. Stone County School District,* 862 So. 2d 545 (COA 2003) (¶6) stated:

> "Accordingly, Rule 37(b)(2) gives the Circuit Judge several options to compel a [illegible] discovery. Rule 37(b)(2)(C) and Rule 41(b) provide that a

Harvey at 545 (¶6).

In reviewing arguments of Defense counsel and the opinion of the trial court in the case *sub judice* there is a co-mingling of Complaints of a discovery violation for failure to answer interrogatories and requests for production and for failure to prosecute as a basis for the dismissal. Certainly, an order compelling discovery and a warning of dismissal was more fitting considering the ends of justice.

Counsel for the Defense also cited to the trial Court *Hasty v. Namihira,* 2008-MS-A0123.003 (COA 2008). In the Court of Appeals analysis in *Hasty* (¶12) they noted the trial court's dismissal was without prejudice. The *Hasty* Court also noted (¶18) that the trial court twice considered lesser sanctions being a threat of dismissal after two delays in excess of a year each. Further, it should be noted there was three years and five months between the filing of the lawsuit in *Hasty* and the dismissal of the case. Even so, that case was dismissed without prejudice. Even though the *Hasty* Court and others clearly tried lesser sanctions first, the trial Court in the case *sub judice* flatly rejected a "warning" as an option regardless of what the Appellate Courts have said (Tr.23). How can it be said the trial court properly considered lesser sanctions when on the record he clearly disagrees with Appellate and Supreme Court rulings finding warnings and threats of dismissal are viable sanctions. As argued to the trial court in the case *sub judice,* none of the cases cited by the Defendant are applicable to the Holders' case much less justify a dismissal with or without prejudice.

The Supreme Court in *Caracci v. International Paper Co.*, 699 So. 2d 546, 556 (Miss. 1997) noted:

> [I]n that *Denham v. Hardy*, 437 So. 2d 426, 429 (Miss. 1983),

party alleging the inadequateness to make a motion for a court order [illegible] further discovery information to be disclosed before sanctions may be imposed. Id. However, the former statutory distinction between "totally" failing to respond or responses of "absolutely no substance" versus incomplete or evasive "answers to discovery requests with regard to the remedy for such has been dissolved by

M.R.C.P. 37(a)(3), which considers evasive or incomplete answers to be treated as a total failure to answer.

Caracci at 556 (¶18)

> Under our Rules of Civil Procedure, failure to make or cooperate in discovery should be resolved by making a motion in the proper court requesting an order compelling such discovery. See M.R.C.P. 37(a)(2). The remedy for failing to comply with discovery requests when the Court grants an order to compel falls under M.R.C.P. 37(a)(4) in the form of awarding the moving party the expenses of such motion. After such an order to compel has been granted under M.R.C.P. 37(a)(2), and the party ordered to answer fails to respond, then the remedy may be sanctions in accordance with M.R.C.P. 37(b)..."

Caracci at 557 (¶19)

Certainly under these circumstances particularly when the issue truly involves failure to answer discovery the Defense should be required to file a Motion to Compel rather than fast-forwarding to the nuclear option of Motion to Dismiss for Failure to Prosecute and the ultimate sanction of dismissal with prejudice.

The Mississippi Supreme Court in *MS Dept. of Human Services v. Helton,* 741 So. 2d 240, 243 (¶13 and ¶14) (Miss. 1999) found that the DHS attorney's actions were nothing other than neglectful and the conduct of the DHS attorney should not be attributable to the two-year old child even though there were eleven continuances granted and after the Chancellor dismissed the matter for want of prosecution, DHS did not move to set aside the judgment for one year and nine months. Accordingly, while counsel for the Holders may not have "pursued properly" the [illegible] Judge (Tr 30), this does not amount to a clear record of delay which has

delay.

This is not the first time counsel for Holders' has felt the bite of this trial court's dismissal with prejudice of a medical negligence case as a sanction at the request of counsel opposite. In *Tinnon v. Martin*, 716 So. 2d 604 (Miss. 1998) counsel opposite filed a Motion for dismissal pursuant to M.R.C.P. 37(b)(2)(C) and 41(b) for "willful, contemptuous action of Plaintiff's counsel." *Tinnon* at 607 (¶16). The analysis of whether the dismissal for a discovery violation pursuant to M.R.C.P. 37(b)(2)(C) and/or 41(b) are virtually the same. In the *Tinnon* case it was argued a letter written by Plaintiff's counsel was in violation of a Court's order waiving the medical privilege and that it prejudiced the Defendants by chilling the testimony of treating physician, Dr. Gary. Id at 608 (¶17). Although undersigned counsel for Tinnons' suggested a lesser sanction was available, the judge specifically rejected that possibility stating "the skunk is already in the jury box." Id at 608 (¶20). The Court further found counsel's actions were "either a willful disregard for the Court's order, or to say the least, it was the most reckless disregard that I have ever seen..." "I don't see how to rectify a matter such as this. I don't know of any other sanction that can be imposed that would rectify the matter..." Id at 608 (¶21). The Supreme Court stated in Tinnon

> "Dismissal with prejudice typically is appropriate only if the refusal to comply results from willfulness or bad faith and is accompanied by a clear record of delay or contemptuous conduct." *Federal Deposit INS. Corp. v. Connor*, 20 F. 3d 1378, 1380 (5th Cir. 1994) (Quoting *Coane v. Ferrara Pan Candy Co.*, 898 F. 2d 1030, 1032 (5th Cir. 1990)). The Court finds that the letter was not written in bad faith or in willful violation of the lower court's order yet this Court understands and appreciates the trial judge's interpretation."

Tinnon at 611 (¶38).

The same trial judge as in the case *sub judice* offered a more clear and concise record for

and reversed the dismissal for a trial on the merits. As stated in [illegible]

Mississippi Rules of Civil Procedure:

> "It is intended that these rules be applied as liberally to civil actions as is judicially feasible, whether in actions, at law or in equity....
>
> The salient provision of Rule 1 is the statement that "These rules shall be construed to secure the just, speedy and inexpensive determination of every action." There is probably no provision in these rules more important than this mandate: It reflects the spirit in which the rules were conceived and written and in which they should be interpreted. The primary purpose of procedural rules should be to promote the ends of justice; these rules reflect the view that this goal can be best accomplished by the establishment of a single form of action, known as a "civil action", thereby uniting the procedures in law and equity through a simplified procedure that minimizes technicalities and places considerable discretion in the trial judge for construing the rules **in a manner that will serve their objectives.** (Emphasis added).
>
> **Properly utilized**, the rules will tend to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies. The mandate in the final sentence of Rule 1 is only one of a number of similar admonitions scatters throughout the rules **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"

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

CONCLUSION

The Plaintiffs would show the delay in this case was relatively short considering the

conversations with Ms. Holder and their nurse employees. There was nothing to stop them trom doing so. The trial court acknowledged this fact. If they did not conduct such an investigation, then the Defendants themselves are at least partially responsible for faded memories if any. Certainly, doctors and nurses routinely rely on accurate and complete medical records which is mandated both by law and ethics to aid their memories. This is no different from any other medical malpractice claim in that regard. Doctors routinely rely on the medical records because due to patient load it is impossible to remember all important events. The medical records should have verified is the required lab tests were ordered or not. Furthermore, the Defendants denied flatly that any such critical conversation took place. It is inconceivable, since the identity of the nurse was known months before the hearing, that defense counsel would not have presented an affidavit or other proof concerning the memory of the nurse regarding the conversation if it was such an issue other than to flatly deny the conversation took place in argument. Equally important, it was not until the motion was actually argued that Defendants specifically raised the issue of the importance of the nurse's identity to their investigation. This also suggests some culpability on the part of the Defendants. In addition, the Holders' would suggest that this argument was specious at best, and a veil attempt to create the aura of prejudice where none existed.

In a situation where lesser sanctions than dismissal with prejudice should be considered, it is obvious the trial court abused its discretion by ignoring completely the availability of a warning of dismissal as a viable sanction even though such has been recognized by both the Court of Appeals and the Mississippi Supreme Court. The Court's refusal to enter findings of

reviewed the case law presented by the Defendant or took counsel's word for its applicability when it clearly appears the Court did not follow the facts and legal analysis presented in those cases.

While a trial judge's discretion can be a valuable thing in the administration of justice it can also be used by Defendants and the Court as a means of unjustly depriving a litigant of their day in court. The Holders' would argue this case is an example of how the interpretation of a rule of procedure can gradually be transformed from a tool to advance cases to trial, to a sword used to cut off a litigants rights. If this case stands, every case that is allowed to lay dormant for twelve or thirteen months or less from the date of Defendant's answer would be subject to dismissal with prejudice without a warning that action must be taken. It would not be long before the courts are flooded with Motions to dismiss cases that have been inactive for one hundred twenty days or even ninety days. Defendants will jump on the opportunity to claim a case is stale at any opportunity and claim they have suffered substantial prejudice until this Court gives everyone clear guidance as to when they are realistically subject to the ultimate sanction. Certainly, the Holders' should not have their case dismissed under this set of facts and hopefully, a clearer set of guidelines will be provided to help both litigants and trial courts alike.

Although, Plaintiffs believe that this case should be reversed for a trial on the merits, due to the trial court's abuse of discretion, should this Court decide to dismiss Plaintiffs' claim without prejudice, Plaintiffs respectfully requests to be immediately directly notified so that the case may be immediately re-filed without delay since we are faced with a short window of opportunity to re-file. Plaintiffs believe reversal for a trial on the merits would be the most

of a dismissal without prejudice is imperative ...

RESPECTFULLY SUBMITTED on this the 1st day of April, 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 **Brief of Appellants** to the following:

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Honorable Jerry O. Terry
Circuit Court Judge
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SO CERTIFIED, this the 1st day of April, 2009.

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