IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLES BARRY PLAINTIFF-APPELLANT

VS. DOCKET NUMBER 2009-CA-01124 R+

JOHN REEVES DEFENDANT-APPELLEE

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 Judges of this Court may evaluate possible disqualification or recusal.

1. Charles Barry — Plaintiff-Appellant
2. Joel W. Howell, III — Attorney for Plaintiff-Appellant
3. John R. Reeves — Defendant-Appellee
4. John D. Moore — Attorney for Defendant-Appellee

SO CERTIFIED, this the 10th day of March, 2010.

Joel W. Howell, III
Attorney of Record for
Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. OVERVIEW

Appellee Reeves does not dispute the factual chronology of this action, which includes plaintiff Barry filing a motion on September 30, 2005 to re-open discovery and set the case for trial (R. 86-87), the failure of the Court to make any ruling thereon, and Barry filing a motion for a status conference on March 11, 2008, asking for a ruling on his motion for trial setting (R. 93-117). On February 4, 2009, the Mississippi Supreme Court issued a mandamus requiring the Circuit Court to rule on the motion for trial setting (R. 137). On February 17, 2009 without mentioning the mandamus to rule on the motion for trial setting, the trial judge granted the order to dismiss for failure to prosecute (R. 102).

As detailed more fully in appellant's initial brief and hereafter, the order that was issued by the trial court was void as a matter of law for failure to address the motion which was the subject of the mandamus. In a single paragraph, without any citation of authority, appellee asserts that the motion to dismiss for failure to prosecute was effectively a ruling on the motion for trial setting. That view is plainly erroneous.

II. REITERATION OF GROUNDS OF ERROR

A. Did the trial court err in failing to honor the mandate of the Mississippi Supreme Court to rule on Barry's motion to set this case for trial, instead dismissing the case for failure to prosecute?

As the Mississippi Supreme Court noted in Denton v. Maples, 394 So.2d 895,897 (Miss. 1981), execution of a mandate is a purely ministerial act and failure to do otherwise renders any other action void ab initio.

The Fifth Circuit is in accord, noting that a lower court may not disregard an explicit directive of an appellate court. U.S. v. Becerra, 155 F.3d 740, 753 (5th Cir. 1998). [As cited in Tollett v. City of Kemah, 285 F.3d 357, 364 (5th Cir. 2002)]

Appellee Reeves has presented no citation of authority in rebuttal to this argument. Given the plain error of law of the trial court, this Court should recognize that the order from which Appellant Barry has appealed is void; this Court should reverse and remand this case with express instructions to re-open discovery and set the case for trial as the docket of the court will allow, as well as such other relief as it deems appropriate under the circumstances.

B. Even if the dismissal order was not void as a matter of law, did the trial court err in dismissing the case for failure to prosecute?

Reeves' argument essentially consist of a factual recitation of the time period which elapsed. Significantly, it fails to mention Mr. Reeves was a member of the legislature and elected not to participate in discovery during those periods of time (R. 11-14). It also fails to note that the

motion to set the case for trial was filed on September 30, 2005 (R. 86-87). In responding to that motion, Mr. Reeves' attorney expressly asked "...that the parties be directed to consult with the court administrator regarding a trial date." (R. 90) Counsel for Barry sent a number of letters requesting that counsel for defendant contact him so that the case could be set for trial. No response was ever received. (R. 101, 127, 129, 130, 131). More than a year and half later, in April of 2007, the motion to dismiss for lack of prosecution was filed (R. 91).

Any factual analysis of the events surrounding Mr. Barry's attempts to set this case for trial clearly demonstrates no lack of effort to prosecute his action. Insofar as legal grounds are concerned, this point is mooted by the void order subsequently promulgated by the trial court. See the detailed discussion in appellant's initial brief at pages 7-13.

C. Did the trial court err in refusing to allow Barry to amend his complaint?

Much of Appellee Reeves' argument centers on the alleged failure of Plaintiff to pursue his claim during the period of time that Mr. Reeves supposedly had insurance. That issue, is, of course, irrelevant, as well as ignoring the fact that Mr. Reeves exercised his right to participate in a number of legislative sessions during that period time and

not participate in this litigation. Again, given the void order of the trial court, this error can be corrected by direction on remand.

Finally, there is no response to the elemental proposition in Mississippi Law that amendments to proceedings shall be liberally granted. Mississippi Civil Procedure Rule 15(b); Red Enterprises, Inc. v. Peashooter, Inc., 455 So.2d 793, 796 (Miss. 1984); See appellant's original brief at 13-14.

III. CONCLUSION

The trial court erred as a matter of law by not honoring the mandate of the Mississippi Supreme Court to rule on plaintiff's motion to set the case for trial and reopen discovery, instead dismissing for failure to prosecute. The order entered by the trial court was and should be held void ab initio. This Court should reverse and remand to the trial court with directions to allow plaintiff to amend his complaint, reopen discovery, and set this case for trial at an early date, as well as such other relief as is deemed appropriate under the circumstances.

Respectfully submitted,

Charles Barry, Appellant
By: Joel W. Howell, III,
His Attorney

By: Joel W. Howell III
Of Counsel

Of Counsel:

Joel W. Howell, III
5446 Executive Place
P.O. Box 16772
Jackson, Mississippi 39236
601/362-8129
MSB #[redacted]

CERTIFICATE OF SERVICE

I, Joel W. Howell, III, do hereby certify that I have provided a copy of the foregoing Brief of Appellant to:

Mr. John D. Moore, Esq.
741 Avignon Drive, Suite D
Post Office Box 3344
Ridgeland, Mississippi 39158-3344

Honorable Winston Kidd
P.O. Box 327
Jackson, Mississippi 39205

SO CERTIFIED, this the 10th day of March, 2010.

Joel W. Howell, III