IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLES BARRY — PLAINTIFF-APPELLANT

VS. — DOCKET NUMBER 2009-CA-01124

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 23rd day of November, 2009.

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

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2. 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?

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

II. STATEMENT OF THE CASE

In 1996, plaintiff Charles Barry was bitten by a snake while in the scope and course of his employment by Choctaw Maid Farms in Carthage, Mississippi. (R. 2) He later found that his leg was swelling and went to the Montfort Jones Hospital in Kosciusko, Mississippi because the pain and swelling had not subsided. Mr. Barry was told he had been bitten by a snake and was discharged in the care of Anson L. Thaggard, M.D. Dr. Thaggard released him to return to work after one week. Barry v. Thaggard, 785 So.2d 1107, 1108 (MS Ct. Appeal 2001)

Mr. Barry continued to have difficulty and several weeks later had to go to an emergency room. On August 17, 1996 he was sent to the University Hospital in Jackson for surgery. There he was treated by Kelvin Ramsey M.D., who

told Mr. Barry he had not received proper medical care. Barry at 1108. Mr. Barry subsequently retained John Reeves, defendant in this case, who filed suit against Dr. Thaggard and others on June 25, 1998 in Attala County Circuit Court. That complaint was subsequently non-suited. (R. 5)

The new complaint was refiled by Mr. Reeves on April 22, 1999 against defendants Thaggard and others. The Circuit Court of Attala County, Mississippi dismissed the complaint as being barred by the statute of limitations. (R. 5) Barry, supra.

Mr. Barry was forced to secure other representation and prosecuted an appeal of that dismissal. The Court of Appeals affirmed the trial court's grant of summary judgment on statute of limitations grounds. Barry, supra.

This suit was then timely filed by Mr. Barry against defendant John Reeves for legal malpractice in the Circuit Court for the First Judicial District of Hinds County on August 17, 2001. (R. 4-8)

At that time, Mr. Reeves was a member of the Mississippi State Legislature, and was precluded from participating in discovery during legislative sessions. He was represented by the Wise Carter law firm of Jackson, Mississippi. (R. 11-14)

Mr. Reeves' insurance carrier subsequently went into receivership and the proceedings were stayed on June 10,

2003. (R. 51-52)

The case was not restored to the active docket until late 2004, when plaintiff moved for Leave to Lift the Stay (R. 61-62), as well as to File an Amended Complaint (R. 84) At that time Mr. Reeves' counsel was Robert Ramsey of Hattiesburg, but on September 27, 2004, John Moore entered an appearance replacing Mr. Ramsey. (R. 79) No other attorney has entered an appearance.

The Motion for Leave to File an amended complaint was denied on December 1, 2004 on the grounds that "it would be unfair and prejudicial to allow the amendment to add a claim for punitive damages three years after the herein lawsuit was filed and after the defendant's insurance carrier filed for bankruptcy." (R. 84) Plaintiff subsequently filed a motion on September 30, 2005 to reopen discovery and to set the case for trial. (R. 86-87) While Reeves' attorney opposed an extension of the discovery period, counsel for defendant expressly said "...for these reasons, Mr. Reeves requested that the Plaintiff's motion to reopen discovery be denied and 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). The Hinds County Circuit Court took no ac-

tion on the motion to set a trial date and reopen discovery.

During the pendency of that motion in April of 2007, defendant filed a motion for failure to prosecute. (R. 91) On March 11, 2008, plaintiff filed a motion for a status conference and asked for a ruling on his motion for trial setting. (R. 93, 117) Having received no ruling, the appropriate administrative remedies were sought. (R. 109, 121). On February 4, 2009 this Court issued a Writ of Mandamus requiring the Circuit Court to rule on the motion for trial setting. (R. 137)

On February 17, 2009 without mentioning the mandamus or the motion for trial setting, the trial judge granted the motion to dismiss for failure to prosecute. (R. 102) (Curiously, that order began: "THIS CAUSE having come on to be heard on Plaintiff's Motion to Dismiss for Failure to Prosecute." (emphasis supplied) (R. 102) (Obviously, and just as erroneously as the failure even to mention the Mandamus order, this was defendant's motion.) Plaintiff timely filed a notice of appeal on February 24, 2009. (R. 104)

III. SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law by failing to honor the mandate of the Mississippi Supreme Court.

The mandate to rule on Barry's motion to set this case for trial was a purely ministerial action. When the trial court instead dismissed the case for lack of prosecution,

its order was void ab initio.

Finally, leave to amend pleadings is to be liberally granted, and the trial court abused its discretion in refusing to allow Barry to amend his complaint.

The foregoing require that this case be reversed and remanded with directions to allow Barry to amend his complaint, reopen discovery, and set the case for trial, all within tight time parameters, as well as allowing such other relief as this Court deems appropriate under the circumstances.

IV. ARGUMENT AND AUTHORITIES

A. The standard of review

In this instance, the trial court erred as a matter of law by failing to honor the mandate of the Mississippi Supreme Court. As will be discussed more fully immediately herein after, execution of a mandate is a purely ministerial act. Denton v. Maples, 394 So.2d 895, (Miss. 1981). Failure to do otherwise renders any other action void ab initio. Denton, 394 So.2d at at 897

B. 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?

The trial court in this case was required by writ of mandamus issued by the Mississippi Supreme Court to rule on

plaintiff's motion for trial setting and related relief. Instead of doing so, the trial court granted a motion to dismiss for failure to prosecute without mentioning the motion for trial setting. In this circumstance, the trial court had a ministerial duty to effect the mandate of the superior court and the failure to do so makes the ruling of the trial court dismissing the case. As the Mississippi Supreme Court noted in Denton, supra, "...the execution of the mandamus of this Court is a purely ministerial act."

The Fifth Circuit has held that the mandate rule "...provides that a lower court on remand must implement both the letter and spirit of the [appellate court's] mandate, and may not disregard the explicit directives of that court." [emphasis in the original] United States 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)]

In Denton, supra, the the Mississippi Supreme Court had issued its mandate affirming a sentence of confinement. Where the trial court ordered suspension of of the execution of the sentence of confinement, that order was held to be a nullity:

> The Circuit Court of Jackson County had neither authority nor jurisdiction to issue its order of August 18, 1977, suspending the execution of the sentence of confinement affirmed by this Court on August 10, 1977. The Order of the Circuit Court of August 18, 1977, was a nullity and void ab initio. [394 So.2d

at at 897]

Here, the trial court was expressly mandamused to rule on plaintiff's motion for trial setting and to reopen discovery. Instead, it dismissed the case for lack of prosecution without so much as mentioning the motion to set the case for trial and to reopen discovery. The order entered is void ab initio. Given the plain error of law of the trial court, this Court should recognize that the trial court's order is void, and, given the disregard of the trial court's failure to honor the mandate, reverse and remand this case with express instructions to reopen discovery and set the case for trial within a tightly specified time period, as well as such other relief as it deems appropriate under the circumstances.

C. 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?

The standard of review for dismissals is abuse of discretion. Hine v. Anchor Lake Property Owners Ass'n, Inc., 911 So.2d 1001, 1008 (Miss. Ct. App. 2005). The decision of the trial judge will not be overturned absent manifest error. Watson v. Lillard, 493 So.2d 1277, 1279 (Miss. 1986). However, given the strong policy in favor of adjudication on the merits, the permissible range of discretionary action is severely limited under Mississippi law. Here, moreover,

the case was dismissed in the face of a motion to set the case for trial, a motion which had been pending for more than three years.

Rule 41(b) of the Mississippi Rules of Civil Procedure provides that "for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." When paired with the Official Comment, this rule provides for dismissal implemented by the trial court, but cautions that "past Mississippi practice has tempered this harsh result by allowing dismissed cases to be reinstituted, except in extreme situations." Id. at 1278.

There also is no set time limit for the prosecution of an action once it has been filed, but, where dilatory or contumacious conduct, or where repeated disregard for the procedural directives of the court is present, dismissals under Rule 41(b) will likely be upheld. Id. at 1279. Thus, affirmation of dismissal must be reserved for the most egregious cases, usually where the mandatory elements are bolstered by at least one of the aggravating factors. Taylor v. GMC, 717 So.2d 747 (Miss. 1998). Accordingly, absent a detailed analysis of the factual issues surrounding the claim and procedure before the court, as well as consideration as to the well-known principles of just adjudication, a dismissal granted under the guise of 41(b)

constitutes an abuse of discretion and should be vacated.

The law favors a trial on the merits -- a just adjudication on the factual issues in dispute with dismissals for want of prosecution only "reluctantly" granted. American Telephone and Telegraph Co. v. Days Inn of Winona, 720 So.2d 178, 180 (Miss. 1998). Furthermore, 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" will Rule 41(b) dismissals be affirmed. Id. at 181 (quoting Rogers v. Kroger Co., 669 F.2d 317, 320 (5th Cir. 1982) (emphasis supplied)) Because dismissals may be upheld "only" where the two parts of the Rogers test are satisfied, courts must, as a matter of course, impose that two-part test where a question of affirmation arises. Rogers, supra, 669 F.2d at 320 (emphasis supplied); American Telephone, supra, 720 So.2d at 195

First, the record must show the clear presence of delay or contumacious conduct. Second, the court must consider lesser sanctions. American Telephone, Id. Because the two parts of this test for affirmation of the Rule 41(b) dismissal are requirements, failure to meet either requirement mandates reinstatement of the cause. As additional consideration, certain "aggravating factors" may act to bolster the two requisite elements for affirmation.

1) No Clear Record of Delay

A well settled notion is that clear dilatory conduct on the part of the plaintiff establishes a record of delay. Vosbein v. Bellias, 866 So.2d 489 (Miss. Ct. App. 2004). In Mississippi, there is no set time limit on the prosecution of an action once a complaint has been filed. Tims v. City of Jackson, 823 So.2d 602, 604 (Miss. Ct. App. 2002). Because of the fact that no set time limit for prosecution of an action is a readily accepted practice, absent clear dilatory conduct on the part of the plaintiff, a clear record of delay cannot not be found. How can plaintiff here be dilatory when attempting to prosecute a motion to set the case for trial, pending over three years?

In support of the notion that any delay was not intentional in nature, 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" must be analyzed. Rogers v. Kroger Co., 669 F.2d 317, 320 (5th Cir. 1982). No indications in the order or trial court's opinion indicate this has occurred.

Additionally, nothing in the record demonstrates any evidence which may lead to a conclusion that the plaintiff, or his counsel, acted intentionally to delay the action. Neither the time associated with this action, nor the con-

duct on the part of the plaintiff promote delay. In fact, the action taken by the plaintiff, first to file a motion to set the case for trial, and, second, to file a motion for status conference after the first motion had been pending over years, shows anything but delay.

The court clearly erred via its failure to consider the plaintiff's positive actions directed towards adjudication. Accordingly, no clear record of delay exists, and, absent contumacious conduct, the first requisite part of the affirmation test fails. This failure alone supports a decision by this court to reinstate the action.

2) Absence of Contumacious Conduct

The first part of the test for affirmation of a Rule 41(b) motion may be met by either a clear record of delay or contumacious conduct on the part of the plaintiff. Rogers, supra, 669 F.2d at 320. As previously discussed, here there is no delay, but rather ongoing efforts to set the case for trial.

Where the plaintiff has taken prompt and positive steps toward the disposition of the cause, and has not deliberately created delay, no plaintiff-culpability is established. Vosbein, 866 So.2d at 493. As previously discussed, the record clearly indicates positive actions on the part of the plaintiff directed towards a just resolution of the cause. Accordingly, no contumacious conduct on the part of the

plaintiff is present and the first requisite part of the affirmation test fails.

3) Lesser Sanctions Not Considered

Dismissal is inappropriate where lesser sanctions are not considered. Harvey v. Stone County Sch. Dist., 862 So.2d 545 (Miss. Ct. App. 2003); Hoffman v. Paracelsus Health Care Corp., 752 So.2d 1030 (Miss. 1999). Moreover, a dismissal under Rule 41(b) for failure to prosecute is executed in error "especially where the trial court failed to consider other less severe sanctions." Camacho v. Chandeleur Homes, Inc., 862 So.2d 540 (Miss. Ct. App. 2003) (emphasis supplied). The consideration of other procedural options, as a matter of course, must precede a dismissal with prejudice. The error propagated through the failure of meeting this requirement alone provides adequate grounds for reinstatement. Id. at 551.

Though a trial judge's findings of fact are to be presumed where Rule 41(b) dismissals are concerned, the failure to both consider and implement available lesser sanctions which are free of prejudicial effect is both factual and procedural error. Even if the trial court had performed the requisite analysis, other available sanctions without prejudicial repercussions were still available. These other options include the assessment of fines, costs, damages, conditional dismissal, dismissals without prejudice, and/or

warnings. Wallace v. Jones, 572 So.2d 371, 377 (Miss. 1990). The failure to implement any of these more appropriate sanctions is inherent in the granting of the prejudicial dismissal. Furthermore, no indications or allegations as to any resulting prejudice from any such options to the defendants have been directed by any party or administrator to this action.

Because the trial court obviously had other sanctions available which were more appropriate given the circumstances, failed to implement them, and did free of the just motivation of avoidance of prejudicial effect, the discretion of the court was abused. As such, the second element of the affirmation test fails -- a fact giving just cause for this court to reinstate the action.

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

The trial court denied plaintiff's motion for leave to file an amended complaint on the grounds that "...it would be unfair and prejudicial to allow the amendment to add a claim for punitive damages three years after the herein lawsuit was filed and after the defendant's insurance carrier filed for bankruptcy." (R. 84-85)

The law does not support this view. The Mississippi Supreme Court noted in Simmons v. Thompson Machinery of Miss., Inc., 631 So.2d 731 (Miss. 1974):

> Mississippi Rule of Civil Procedure 15 provides, inter alia, that '...leave [to amend] shall be freely given when justice so requires.'...[I]f the underlying facts or circumstances relied upon by the plaintiff may be a proper subject of relief, he sought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as -- undue prejudice to the opposing party by virtue of allowance of the amended, futility of the amendment, etc. -- the leave should, as the rules require, be 'freely given.' [631 So.2d at 800]

While noting that the matter of amendments to pleadings is properly addressed to the discretion of the trial court, the Mississippi Supreme Court expressly held: "Nothwithstanding [the discretion of the trial court], Rule 15(b) provides that the Court is to be liberal in granting permission to amend when justice so requires." Red Enterprises, Inc. v. Peashooter, Inc. 455 So.2d 793, 796 (Miss. 1984).

Given the foregoing, this Court should recognize as void the dismissal order entered and remand this case for trial with directions to allow plaintiff to amend his complaint.

V. 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,

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CERTIFICATE OF SERVICE

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

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SO CERTIFIED, this the 23rd day of November, 2009.

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