IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HELEN POWELS, ADMINISTRATRIX
OF THE ESTATE OF KATHRYN M. RICH — APPELLANT

VS. — CAUSE NO. 2010-CA-00337

JERRY W. ILES, M.D. — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF ADAMS COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. STATEMENT OF THE ISSUE

The Circuit Court erred in granting the Defendant, Jerry W. Iles, M.D.'s, Motion to Dismiss for Lack of Prosecution.

II. STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition of the Case Below

This is a medical malpractice action which is being prosecuted by Helen Powels on behalf of the estate of her mother, Kathryn M. Rich, against Jerry W. Iles, M.D. and Jefferson Davis Memorial Hospital. The case was tried before a jury and a verdict was rendered in favor of the health care providers. A Final Judgment was entered incorporating the jury verdict in favor of the health care providers on February 11, 1994. On June 12, 1994, a Notice of Appeal was filed. **(R at 1)** On June 3, 1997, the Court of Appeals affirmed the judgment in favor of Jefferson Davis Memorial Hospital, but reversed and remanded the judgment entered in favor of Dr. Iles. **(R at 21)** On August 26, 1997, the Court of Appeals denied the Motion for Rehearing. **(R at 38)** On September 16, 1997, the Court of Appeals issued its mandate and the case was remanded for trial between the Plaintiff and the Defendant, Jerry Iles, M.D. **(R at 39)**

In February 2003, attorneys for Plaintiff and Dr. Iles communicated about settlement of this case. On February 25, 2003, Plaintiff's attorney wrote Dr. Iles' attorney asking for Dr. Iles' position on settling the case and further advising that if the case was not settled, it needed to be set for trial. **(R at 68)** The record does not reflect a response to that communication. On December 7, 2007, a letter was sent by Plaintiff's counsel mistakenly to attorney Mark Carraway who had previously represented the hospital, requesting available trial dates. **(R at 78)** This letter should have been sent to Ray McNamara who is Dr. Iles attorney. On January 13, 2009, Plaintiff's attorney wrote Dr. Iles' attorney a letter advising of available trial dates. **(R at 67)** On

February 20, 2009, in response to that letter,, Jerry W. Iles, M.D. filed his Motion to Dismiss for Lack of Prosecution. **(R at 57)** On July 21, 2009, Plaintiff filed a response in opposition to the Defendant's Motion to Dismiss for Lack of Prosecution. **(R at 70)** On July 23, 2009, Dr. Iles filed his Reply Memorandum. **(R at 80)** Dr. Iles' Motion to Dismiss was initially heard by the trial court on August 10, 2009. During that hearing, the Court indicated that it would sign an Order to Dismiss the case for lack of prosecution because of the prejudice that resulted in the length of time that the case had been filed. On August 14, 2009, Plaintiff filed a Motion to Reconsider. **(R at 96)** On August 26, 2009, Dr. Iles' filed his Response to Plaintiff's Motion to Reconsider. **(R at 108)** A hearing was conducted on Plaintiff's Motion on November 23, 2009. At that time the Circuit Court reconfirmed its previous decision and entered a Final Judgment and Order of Dismissal on January 28, 2010. **(R at 135)** It is from this Final Judgment and Order of Dismissal that this appeal is taken.

B. ***Statement of the Facts***

It is the Plaintiff's claim that Dr. Jerry W. Iles and the Jefferson Davis Memorial Hospital emergency room personnel failed to timely diagnose a spinal injury that Kathryn Rich had sustained, resulting in irreversible partial paralysis.[1] The case was tried before a jury and a verdict was rendered in favor of the Defendant hospital and Dr. Iles. The case was appealed by the Plaintiff. The Court of Appeals affirmed the verdict in favor of the hospital, but reversed the verdict against Dr. Iles as a result of an improper jury instruction. The case was remanded to the Adams County Circuit Court on September 16, 1997. **(R at 39)** After the case was remanded, an

[1] Although the specifics of the claim are not probative as to the issue before the Court, the facts of this medical malpractice claim are succinctly set out in the Court of Appeals' opinion in this case. (R41)

extended period of time expired with no activity of record in the case. The record reflects that the next action taken was a telephone call made in February 2003 by Plaintiff's attorney to Dr. Iles' attorney inquiring about settlement and a February 25, 2003 letter inquiring about settlement and advising that if the case could not be settled then it needed to be set for trial. **(R at 57, 68)** The record does not reveal any response to that letter. The record reflects that the next action taken was a letter written on December 7, 2007, inadvertently sent to the previous counsel for the hospital, again requesting trial dates. **(R at 78)** Plaintiff was advised shortly thereafter that the letter had been sent to the wrong attorney. The record reflects that the next action taken was correspondence to Dr. Iles' attorney dated January 13, 2009, advising of specific court dates that the court had available for trial. **(R at 67)** The response to this letter by Dr. Ilse was the Motion to Dismiss for Lack of Prosecution filed by Dr. Iles. **(R at 57)**

Dr. Ilse's Motion to Dismiss for want of Prosecution was heard on August 10, 2009. Although in his Motion, Dr. Ilse raised the issue of accessibility of some of the witnesses, the Court indicated that it would sign an Order to Dismiss for Lack of Prosecution, simply because of the prejudice that resulted in the length of time that the case had been filed. Plaintiff filed a Motion to Reconsider on August 14, 2009. A hearing was conducted on Plaintiff's Motion to Reconsider on November 23, 2009, at which time the Court reconfirmed its decision to dismiss the case.

The Circuit Judge who ruled on the Motion to Dismiss was not the judge who had previously tried the case. Therefore, prior to making his ruling, in an effort to fully familiarize himself with the facts and proceedings that had occurred, the current Circuit Judge made a very thorough review of the case file, the previous trial transcript and the issues that remained to be tried. The Court made a record of the hearing on the Motion to Dismiss and the transcript of the

record is incorporated into the Final Judgment. In that hearing the Court found,

> But when I look at this old case, the totality of this case, number one, this is not a situation where the Plaintiff has filed a case and just totally sleeps on the rights or does actions that would merit the Court taking punitive action against it. This is a case for the reasons as cited, it was very unusual, but essentially the Plaintiff was left with really what I see as no viable claim once it was ruled on in the matter, it was by the Court of Appeals, and it sat there for a long period of time. Now, I see no reasonable basis to reinstate this claim to allow this claim to continue. By way of reconsideration of this and the record being fully complete at this time, I am going to do the same thing I did previously to order dismissal of this matter, recognizing that there are certain mitigating factors in this very clearly, being the fact that I saw no viable claim against Dr. Ilse given the sequence of events, the facts, and the way that this was remanded and, secondly, very clearly that there was none of the required or mandated notices sent out by the clerk's office at all during this entire period of time which if that had occurred, we would not be at this status up here today. It may have ultimately been the same– I am sure that it would have been the same result, but we would not have been up here today, and I taking into consideration the age of the case, but I want to emphasize for the record, that this is not so much punitive action by way of actions of the Plaintiff, but it simply an unusual set of facts, usual procedural situation, but I do not see any reason in my discretion to continue this matter on the docket, and it will be dismissed for that reason...So, I am not doing this as a punitive action against the Plaintiff, but simply because of the unusual nature and the passage of the time and for those reasons, and I do not really see - - - the only thing I see different about this case is this could have come to a head a little sooner, but the result would have been absolutely the same, because I have seen no viable claim. Where we're at right now could have just come to a head sooner with the Court, but I am absolutely convinced and so find that there would have been no difference in that.

(R at 123)

At no time after the case was remanded to Adams County Circuit Court did the Adams County Circuit Clerk mail the parties a M.R.C.P. Rule 41(d) notice, advising that if action was not taken that the case would be dismissed. The circuit judge in his ruling on the Motion to Dismiss for lack of prosecution found the following:

> There is another factor that I want to make a specific finding about, and I went back through the file myself just to make certain about this. Rule 41 of the Rules of Civil Procedure directs the circuit clerk twice a year to send out notices to the attorneys where there is no action taken. We go back at least one, I think

two clerks to get back to where this situation was, but it is obvious to me that there was no action taken by the clerks. This does not ultimately excuse the Plaintiff from prosecuting a claim, but it is a procedural matter that we have that calls each sides' attention to the fact that there has been no activity of record for a period of a year.

(R at 123)

Based upon the above facts and the Court's findings, the Circuit Court dismissed the case for lack of prosecution for the reasons stated at the hearing.

III. SUMMARY OF THE ARGUMENT

The Circuit Court abused its discretion in dismissing Plaintiff's Complaint for lack of prosecution. This case had already been tried before a jury, all the evidence preserved and the case appealed to the Mississippi Supreme Court. While Plaintiff's counsel acknowledges that he has the primary duty to move the case forward, there is no record of intentional delay, dilatory or contumacious disobedience of Court Orders, refusal to engage in discovery, nor any aggravating factors which warrant a dismissal of this action for lack of prosecution. Plaintiff had not failed to comply with any warning or order of the court to expedite this matter. The only activity which the record reflects to have occurred between the remand and the dismissal are Plaintiff's attorney's attempts to either settle the case or have it set for trial. The record does not reflect intentionally dilatory or contumacious actions. Additionally, lessor sanctions were not explored by the Court prior to dismissing this action, as is required by legal precedent. There is no evidence that the Defendant has been prejudiced by the length of time that has expired and there are no other aggravating factors present which would support dismissal of this action for lack of prosecution.

Finally, although M.R.C.P. Rule 41(d) provides that "in all civil actions wherein there has

been no action of record during the proceeding twelve months, the clerk of the court shall [emphasis added] mail notice to the attorneys of record that such case will be dismissed by the court for want of prosecution, unless within thirty days following said mailing, action of record is taken or an application in writing is made to the court and good cause shown by it should be continued as a pending case," the Adams County Circuit Clerk failed to comply with this notice requirement. While Plaintiff recognizes his responsibility to expedite the prosecution of this case separate and apart from this required notice, the mandated notice could have served as a warning or sanction to the Plaintiff that the case should be expedited. Based upon the foregoing factual background, the Circuit Court erred in dismissing the action for lack of prosecution.

IV. ARGUMENT

Helen Powels, Administratrix for the Estate of Kathryn M. Rich, request this court to reverse the Circuit Court's grant of the Defendant, Dr. Iles' Motion to Dismiss for Lack of Prosecution.

A. Standard of Review:

A trial court's decision under M.R.C.P. 41(b), may be reversed if the Appellant Court finds the trial court abused its discretion. Because the law favors a trial of the issues on the merits, a dismissal for lack of prosecution should be employed reluctantly. *American Telephone and Telegraph Company v. Days Inn of Winona, 720 So. 2d 178, 180 (Miss. 1998)* ¶*12.*

B. The Circuit Court erred in granting Dr. Ilse's Motion to Dismiss for Lack of Prosecution:

There is no set time limit on the prosecution of an action once it has been filed. Dismissal for failure to prosecute will be upheld only "where the record shows that a plaintiff has been

guilty of dilatory or contumacious conduct." *Watson v. Lillard,* 493 So. 2d, 1277, 1279 (Miss.1986) "This Court is mindful of the fact that dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases. *[Wallace v. Jones*, 572 So. 2d 371, 376 (Miss.1990)] (citing *Rogers v. Kroger Co.*, 669 F. 2d 317 (5th Cir. 1982)). What constitutes failure to prosecute depends on the facts of the particular case. *Am. Tel. & Tel.*, 720 So. 2d at 180-181." *Mississippi Department of Human Services v. Guidry,* 830 So. 2d 628, 632 (Miss. 2002) ¶13.

"In *AT&T* this Court set forth considerations to be weighed in determining whether to affirm a dismissal with prejudice under Rule 41(b): (1) whether there was a 'clear record of delay or contumacious contact by the Plaintiff'; (2) whether lessor sanctions may have better served the interest of justice; (3) the existence of other 'aggravating factors', *AT&T*, 720 So. 2d at 181(citing *Rogers v. Kroger Co.*, 669 F. 2d 317,-320(5th Cir. 1982))" *Cox v. Cox*, 976 So. 2d 869, 874, ¶14 (Miss. 2008).

In *Mississippi Department of Human Services v. Guidry*, the Supreme Court reversed a Chancellor's order dismissing a case for lack of prosecution. In *Guidry*, the Court set out a three (3) step procedure by which the Appellate Court would review whether the lower court had erred in granting a Motion to Dismiss for lack of prosecution. First the trial court must determine whether "the record reflects a clear showing of delay or contumacious conduct by the Plaintiff." *Guidry* at 633,¶15. Next the court must determine whether lesser sanctions would have better served the interest of justice. *Guidry* at 633,¶16. Lastly, if it is not clear from the record that the case fulfills either of the above two criteria, the Court should consider aggravating factors which

include "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, whether the delay was the result of intentional conduct. *Rogers v. Kroger Company*, 669 F. 2d 317, 320 *(5th Cir. 1982)" Guidry at 633,* ¶17.

In *Guidry*, the Chancellor on his own Motion dismissed the Department of Human Services (DHS) Petition for Contempt for failure to pay child support for lack of prosecution. The record in *Guidry* indicates that the petition was originally filed on January 9, 1989, by the mother of a child. The case was continued 18 times until April 24, 1992, and then after that time lay dormant for seven years and seven months, until November 22, 1999, when DHS filed its Petition for Contempt taking up the mother's petition. Approximately eighteen months later, on May 16, 2001, the Chancellor filed a Memorandum Opinion and Order dismissing the Petition, "stating that the original Petition filed in 1989 had been abandoned and was dismissed due to failure to prosecute and that the statute of limitations barred any debt owed by [the father] on February 1, 1998." *Id.* at 631, ¶7.

In reviewing these facts, the Supreme Court found that the record indicated that there was no clear record as to exactly what transpired during the seven years and seven months after the final continuance and before DHS filed its Petition on November 22, 1999. The Court found after reviewing the record, that it was unable to find contumacious conduct by the Plaintiff which would justify an involuntary dismissal. The Court then reviewed whether the trial judge had considered whether lesser sanctions would better serve the interest of justice. These lesser sanctions would include, "fines, costs, or damages against Plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice and explicit warnings.

Wallace 572 So. 2d at 377 (quoting *Rogers*, 669 F. 2d at 321) "*Guidry* at 633, ¶16. The Court, in determining that the lower court had failed to consider lessor sanctions, observed, "[w]here there is no indication in the record that the lower court considered any alternative sanctions to expedite the proceedings, appellate courts are less likely to uphold a Rule 41(b) dismissal. See, e.g. *Rogers*, 669 F. 2d at 321-22; *McGowan*, 659 F. 2d at 557; *Burden v. Yates*, 644 F. 2d 503, 505 (5th Cir. 1981)." *Id.* In that neither of the first two criteria had been met there was no need for the Court to determine whether there were any aggravating factors. Based upon the foregoing, the Supreme Court reversed the Chancellor's Order dismissing the case for lack of prosecution.

Applying the steps set out in *Cox* and *Guidry* to the facts of the present case:

1. The Plaintiff was not guilty of a clear record of delay or contumacious conduct.

While a significant amount of time passed between the remand of the case to Circuit Court and the time that Dr. Iles filed his Motion to Dismiss, there is no clear record of Plaintiff intentionally delaying the case. Although, Plaintiff's counsel may have been less than diligent, Plaintiff's counsel simply allowing time to pass does not represent conduct warranting a dismissal with prejudice. "The cases involving Rule 41(b) dismissal tend to indicate that negligence or inexcusable conduct on the part of Plaintiff's counsel does not in itself justify dismissal with prejudice. *American Tel. & Tel.*, 720 So. 2d at 181." *Hoffman v. Paracelsus Health Care Corporation*, 752 So. 2d 1030, 1035 (Miss. 1999) ¶18.

Plaintiff's counsel attempted to engage in settlement negotiations with the Defendant, however, the record does not reflect that opposing counsel responded to the attempts to bring the case to a conclusion by either settlement or trial. It was only when Plaintiff attempted to obtain

potential trial dates from opposing counsel for the last time, that a response was received in the form of a Motion to Dismiss for Lack of Prosecution. Although, it is primarily Plaintiff's counsel's duty to bring the case to trial and insure timely prosecution, a defendant and defense counsel should not be permitted to remain unresponsive when attempts have been made to settle or set the case for trial. Plaintiff's counsel has not requested continuances, failed to timely respond to discovery, ignored notices from the Circuit Clerk or Court or violated an order or rule of the trial court in an attempt to delay trial and obtain some tactical advantage. There have been no attempts to intentionally or willfully engage in dilatory delay tactics, and there are no other acts by the Plaintiff or Plaintiff's counsel favoring dismissal. There have been no attempts by the Defendant to set the case for trial, or otherwise bring this case to a conclusion prior to the Defendant filing his Motion to Dismiss in response to Plaintiff's request for settlement or to set the case for trial.

The record does not demonstrate any delay or contumacious actions by Plaintiff or her attorney during the time period between remand and dismissal. In fact, the only action which the record does reflect, is action by Plaintiff's counsel to either settle the case or set it for trial.

Finally, the language of M.R.C.P. 41(b) makes no mention of requiring action of record to avoid dismissal. While M.R.C.P. 41(d) does require action of record after receiving notice from the circuit clerk, Plaintiff was never sent any of the mandatory Rule 41(d) notices from the circuit clerk. As the trial court explained during the hearing on the Motion to Dismiss:

> There is another factor that I want to make a specific finding about, and I went back through the file myself just to make certain about this. Rule 41 of the Rules of Civil Procedure directs the circuit clerk twice a year to send out notices to the attorneys where there is no action taken. We go back at least one, I think two clerks to get back to where this situation was, but it is obvious to me that

> there was no action taken by the clerks. This does not ultimately excuse the Plaintiff from prosecuting a claim, but it is a procedural matter that we have that calls each sides' attention to the fact that there has been no activity of record for a period of a year.

(R at 123) In other cases the Rule 41(d) Notice of Dismissal given by the clerk has been considered a warning to the Plaintiff that the case needs to proceed. *Hastings v. Namihira*, 986 So. 2d 1036, 1041 (Miss. Ct. App. 2008) ¶18 In the present case, no such warning was given to the Plaintiff.

Based upon the above, there is no **clear record** of delay or contumacious conduct by the Plaintiff which would support a dismissal of this case for lack of prosecution.

2. Lesser Sanctions were not considered by the trial court.

Prior to the trial court dismissing this case, the trial court should have considered lesser sanctions to expedite the case and should have either utilized those sanctions or made a finding that they would not be useful before dismissing the case. "Lesser sanctions include fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings." *Hoffman*, 752 So. 2d at 1035 (citing *Wallace*, 572 So. 2d at 377). Sanctions and/or reprimand necessary to expedite the case should be employed **before** dismissal. This Court has repeatedly stated that it is "less likely to uphold a Rule 41(b) dismissal [w]here there is no indication in the record that the lower court considered any alternative sanction..." [citations omitted] *Cox* 976 So. 2d at 876, ¶24. Clearly, in the present case, Plaintiff's counsel was attempting to set the case for trial before the Defendant filed his Motion to Dismiss. The record is totally absent of any record of the trial court considering lesser sanctions to either expedite the case or lessen prejudice to the Defendant prior to dismissal. As

an example of a lesser sanctions that could have been considered, the trial court could have entered a conditional Order of Dismissal that the case would be dismissed if not tried or settled prior to a designated date, as stated in *Hastings v. Namihira*, a Rule 41(d) notice from the clerk could have served as a warning or sanction that the case should be expedited or dismissed, or the Court could require Plaintiff's counsel to pay additional costs caused by the delay associated with the Defendant seeking a new expert, if necessary. In that this Court requires that the trial court consider whether lesser sanctions would better serve the interest of justice and expedite the proceedings, and the trial court in this case failed to do so, the trial court's dismissal of this case for lack of prosecution should be reversed.

3. There is a lack of aggravating factors which would support dismissal.

"Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and is reserved for the most egregious cases, *usually where the requisite factors of clear delay and ineffective lesser sanctions are bolstered by the presence of at least one of the aggravating factors. . . .*" *Lone Star Casino Corp. v. Full House Resorts, Inc.*, 796 So. 2d 1031, 1032 (Miss. App. 2001)(citing *Rogers v. Kroger* Company, 669 F.2d 317 (5th Cir. 1982); *American Tel. & Tel.*, 720 So.2d at 180)(emphasis added). "These aggravating factors have been held to specifically include 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." *Id.* None of the aggravating factors exist in the present case.

a. The Plaintiff was not responsible for the delay.

The record does not reflect any evidence that the Plaintiff was personally responsible for

the delay in bringing the case to trial. Counsel for Plaintiff is charged with the duty of moving the case to trial, and "[w]here a litigant has not been an active participant in the fault, the sanction of dismissal with prejudice should be a last resort." *Cox v. Cox*, 976 So. 2d 869, 877, ¶29 (Miss. 2008). Plaintiff should not be punished and denied her day in court for the inaction of counsel in resetting this case for trial; particularly where there are lesser sanctions that were available to the trial court sufficient to expedite the case as is the purpose of Rule 41(b). In the present case, there were lesser sanctions available to the trial court which were neither considered nor utilized.

b. There is no actual prejudice to Dr. Ilse.

There is no actual prejudice that will result to Dr. Ilse by allowing this case to proceed to trial. In his motion, Dr. Isle claims prejudice has accrued to him as a result of the passage of time, however, all material witnesses' testimony has been preserved by the transcript contained in the record from the previous trial. "In *Lone Star Casino Corp v. Full House Resorts, Inc.*, the Court of Appeals found that a defendant was not prejudiced by the inability of a witness to testify in person, so long as all parties had an opportunity to pose questions and cross-examine the witness." *Cox*, 976 So. 2d at 877,¶34 (citing *Lone Star Casino Corp*, 796 So. 2d at 1033). In the record made at the hearing which is incorporated into the Judgement, the trial court, does not even discuss the merits of the Defendant's claim of unavailability of witnesses as grounds for dismissal of this action.

Dr. Iles in his response to this Court will cite the case of *Cox v. Cox* for the proposition that this case should be dismissed for the failure to prosecute simply because of the passage of time. In *Cox*, a son had filed a Complaint to set aside his mother's *inter vivos* transfer of

property to his sister alleging that his sister had used false representation and exerted undue influence on his mother to execute the conveyance. *Cox* at 871, ¶ 3. After nearly a fourteen year delay, the sister filed a motion to dismiss the Complaint, pursuant to M.R.C.P. Rule 41(b) based on the mother's unavailability to testify due to her death. *Cox* at 871 at ¶2. The Chancellor overruled the Motion to Dismiss, but reserved the right to dismiss the claim later, depending on the proof. In "overruling [the sister's] Motion to Dismiss, the Chancellor noted that the clerk had not moved to dismiss the action pursuant to Rule 41(d) of the Mississippi Rules of Civil Procedure and, therefore, the first notice that Plaintiff had of a possible dismissal came from the Defendant. The Chancellor also found that most of the delay in bringing the case to trial was not the Plaintiff's fault, but that of others. Notwithstanding these findings, the Chancellor stated that he "reserves the right to later dismiss the case if the delay is prejudicial to [the sister] and also reserves the right to impose **sanctions** [emphasis added] if the Court deems appropriate." *Cox* at 873, ¶ 7.

Approximately six months after the order was entered denying the Motion to Dismiss for Failure to Prosecute, the Chancellor tried the case. At the conclusion of the Plaintiff's case, the Defendant renewed her Motion to Dismiss for Failure to Prosecute. The Chancellor granted the Motion to Dismiss citing that the delay had prejudiced the Defendant due to the unavailability of the mother's (she had died during the delay), the unavailability of the physicians who could have examined [the mother] before trial, and the unavailability of the former family attorney. *Cox* at 873, ¶ 8. In reviewing the basis for the Chancellor's dismissal of the case this Court found that of the three reasons cited by the Chancellor as being prejudicial to the sister, only the mother's death was actually prejudicial to the sister. The basis for this prejudice was that the mother had

died prior to her testimony being preserved by way of deposition regarding the issues framed in the brother's claim. *Cox* at 878, ¶ 35-37. The Court in *Cox* continued and stated that although prejudice may be presumed from unreasonable delay, the preference for a decision on the merits "must be weighed against any presumed prejudice to the Defendant and the Court may decide to excuse Plaintiff's lack of diligence in the absence of any actual prejudice to the Defendant." (citations omitted) *Cox* at 879, ¶ 44. The Court also determined that because one of the sister's witnesses stated that he had difficulty remembering events that transpired long ago, the sister was due some measure of presumed prejudice. *Cox* at 879, ¶ 45. In the present case, since all relevant testimony has previously been preserved, there is no legitimate claim of actual prejudice or presumed prejudice that exists to Dr. Ilse.

There are two factors in *Cox* which distinguishes it from the present case. First, in *Cox*, the Chancellor considered lesser sanctions in making his ruling. *Cox* 876, ¶ 25. The Circuit Judge in the present case failed to consider any lesser sanctions to expedite the present action prior to dismissing the action. Secondly, in *Cox* the Court found that the Defendant was prejudice by the death of a witness without her testimony being preserved on the issues in the Complaint. *Cox* at 878, ¶37. In determining that the Defendant was prejudiced, the Court in *Cox* recognized that "a defendant was not prejudiced by the inability of a witness to testify in person, so long as all parties had an opportunity to pose questions and cross-examine the witness at the deposition. *Lone Star Casino, Corp.*, 796 So. 2d at 1033. *Cox* at 877,¶34. In *Cox,* although the mother's deposition had been taken, the purpose of the deposition was to establish that she had not authorized suit. "The purpose of the deposition was not to conduct discovery or elicit testimony for trial on the issues framed in [Plaintiff's] claim." *Cox* at 878, ¶35. In the

present case, all testimony was preserved during the previous trial. All parties had the opportunity to pose questions and cross-examine the witness on the issues framed in Plaintiff's claim.

These two distinguishing factors, the lack of the Court considering lesser sanctions and the preservation of meaningful testimony, distinguish the facts in the present case from the facts in *Cox*. Even if there was a clear record of dilatory contumacious conduct on behalf of Plaintiff's counsel, which is denied, the absence of these two factors precludes dismissal of this action.

c. There is no proof that the delay was the result of intentional conduct.

The record is completely silent as to any facts which would lead to the conclusion that any of the delay in this case was the result of any intentional acts on behalf of Plaintiff or her counsel. There were no Orders or notices which were disobeyed or ignored. There were no attempts by the Defendant to take any positive action to expedite the case or to move it toward a resolution, there was no additional discovery that was needed. The only thing remaining to be done was to try the case. The simple passage of time does not warrant dismissal of this action.

V. CONCLUSION

There is no clear record that either Plaintiff or Plaintiff's counsel engaged in dilatory or contumacious conduct warranting dismissal. There is a difference between the mere passage of time and a clear record of delay. No clear record of delay exists and the mere passage of time is insufficient to justify such a dismissal. Consideration or implementation of a lesser sanction employed to achieve the purpose of M.R.C.P. 41(b), which is to expedite the prosecution of a case, was not considered prior to the trial court employing the most severe form of sanction. Prior to dismissing an action, the trial court should employ those lesser sanctions that will

expedite the case and cure any prejudice to the Defendant, while also preserving the Plaintiff's right to his day in court, thereby, appropriately balancing the rights of both parties, as well as, the ends of justice. The facts in this case do not reflect that the delay in this case is so egregious as to support dismissal particularly without attempting a lesser sanction. Finally, the record does not reflect any aggravating factors which warrant dismissal of this action.

Based upon the foregoing, the trial court's dismissal of this action should be reversed and the case remanded to the Circuit Court of Adams County for trial.

DATED, this the 9th day of September, 2010.

Respectfully,

HELEN POWELS, ADMINISTRATRIX
OF THE ESTATE OF KATHRYN M. RICH

By: _____
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VI. CERTIFICATE OF SERVICE

I, Joseph E. Roberts, Jr., do hereby certify that I have this day forwarded, by United States mail, postage prepaid, a true and correct copy and an electronic copy of the above and foregoing Brief of Appellant to the following:

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Honorable Forrest A. Johnson
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THIS, the 9th day of September, 2010.

JOSEPH E. ROBERTS, JR.