IN THE SUPREME COURT OF MISSISSIPPI
2011-CA-00760

IN RE: THE LOLETA B. WING TRUST

TODD WING AND
TAMMY KINNEY **APPELLANTS**

v.

JIMMY R. WING **APPELLEES**

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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

- Todd Wing, Appellant;
- Tammy Kinney, Appellant;
- Jimmy Wing; Appellee;
- J. Hale Freeland and M. Reed Martz, Freeland Shull, PLLC, counsel for Appellants;
- Bradley Walsh and Scot Spragins, counsel for Appellee;
- James E. Justice, former counsel for Trust and for Jimmy Wing.

Attorney of Record for Appellants Todd Wing and Tammy Kinney

J. Hale Freeland
M. Reed Martz

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STATEMENT ON ORAL ARGUMENT

Pursuant to MISS. R. APP. P. 34(b), the Appellants request oral argument in this matter. The Appellants believe that due to the length and breadth of the record on appeal, the effect of the Court's ruling on the substantive rights of the Appellants, and the claim that the trial court erred in its application of law, oral argument would be helpful to the Court.

STATEMENT OF ISSUES

The issue on appeal is whether the trial court erred in dismissing the Beneficiaries' case with prejudice where a) the delay was largely attributable to Jimmy Wing's refusal to complete the court-ordered accounting which had been pending for several years, b) Jimmy was allowed to frustrate the Beneficiaries' proactive efforts to advance the litigation and set the matter for trial, c) the Beneficiaries were active and diligent in requesting tens of thousands of documents through subpoena and discovery, d) the Beneficiaries had to file three motions to compel information from Jimmy yet were not the subject of any such motions, e) the period of inactivity reflected in the trial court's docket was largely attributable to Jimmy's failure to participate in the litigation as well as the Beneficiaries' efforts to consult with a handwriting expert and geriatric psychologist (neither of which action would be reflected as activity of record), f) the trial court made several important factual mistakes in analyzing the happenings of the case, g) the trial court failed to adequately consider lesser sanctions, and h) there were no aggravating factors indicating a dismissal with prejudice would best serve the interests of justice.

STATEMENT OF THE CASE

The present case stems from a claim brought by two beneficiaries, Todd Wing and Tammy Kinney (Beneficiaries), of The Loleta B. Wing Trust (Trust) against the co-trustee, Jimmy R. Wing, for acts of self-dealing involving direct (but undisclosed) transfers to himself of cash well in excess of $500,000.00 plus hundreds of thousands of dollars of real property purportedly conveyed through an unrecorded deed.[1] The case was filed on February 21, 2008, shortly after Jimmy presented an inventory of the Trust's assets to the Beneficiaries which made no mention of the nearly one million dollars in assets he had received in the months leading up to Loleta's death, but did feign benevolence in offering to pay for "income taxes due and small amounts owed to the sitters" out of an *additional* $100,000.00 direct transfer to himself ***if*** the Beneficiaries would execute "an appropriate receipt and release" which would totally exonerate the Trust and its Trustees (Jimmy) from any and all claims of any sort for consideration of $6,800.00 each.[2]

Concurrent with their Complaint, on February 21, 2008, the Beneficiaries filed a motion for a temporary restraining order freezing all assets of the Trust.[3] Following a hearing on February 26, 2008, in which the Court received "credible evidence that the trust, under the care of Jimmy Wing, has wasted a corpus of approximately three million dollars down to, per Jimmy Wing's records, approximately $113,000.00" and that "Jimmy Wing has failed to account for valuable trust assets", the Court agreed that Jimmy Wing might attempt to hide assets upon discovery of the present suit.[4] Thus the Court, making no adjudication of the rights or interests

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[1] Record at page 1. See also Record at page 327 (request for admission responses establishing that the acts of self-dealing were not disclosed until the court-ordered accounting produced in the present litigation).
[2] Record at pages 9-14.
[3] Record at page 6.
[4] Record at page 16; Record Excerpts at page 16.

of any person, ordered all persons or entities holding assets of the trust immediately freeze the accounts or property.[5]

On May 5, 2008, the trial court entered an "Agreed Order of Preliminary Injunction" continuing the asset freeze, ordering the production of certain records, and compelling Jimmy to provide an accounting of all trust transactions for the period January 1, 1999 to the present (May 5, 2008).[6] As noted, this was an agreed order.

Prior to the subject suit, on February 25, 2005, the Beneficiaries and ten other concerned family members filed a conservatorship action involving Loleta in Lafayette County Chancery Court cause number 2005-39-R.[7] The trial court's Opinion found this significant, noting it on multiple occasions. Jimmy has and will again argue that the present suit is nothing more than a re-hashing of the 2005 suit. The trial court's Opinion says the allegations of the present suit are "strikingly similar to those" in the 2005 conservatorship action. However, this is plainly incorrect as will be demonstrated.

The 2005 suit asked for a conservatorship and an accounting from Jimmy "for all purchases, transfers and expenditures made as attorney in fact for Loleta Bard Wing".[8] The 2005 suit did not seek damages from Jimmy for improper conduct. The 2005 suit did not accuse Jimmy of, essentially, embezzlement. The 2005 suit did not accuse Jimmy of using Trust assets for his own benefit. The 2005 suit did not ask for repayment. Furthermore, the objectionable 2007 transfers totaling nearly one million dollars had not yet occurred and could not have been previously at issue. The assertion that the 2005 and 2008 suits are strikingly similar is incorrect.

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[5] Record at page 16; Record Excerpts at page 16.
[6] Record at page 71; Record Excerpts at page 20.
[7] Record at pages 667-680.
[8] Record at page 699.

Despite the fact that significant discovery involving twenty-eight separate subpoenas[9] and tens of thousands of documents had taken place, the failure of Jimmy to complete the court-ordered accounting, and that three distinct motions to compel information from Jimmy had to be filed, on May 5, 2011, the trial court dismissed the *Beneficiaries'* claim with prejudice, finding that the Beneficiaries had been dilatory in the presentation of their claims.[10] It is from this Opinion, and the subsequent "Final Order of Dismissal"[11] that the Beneficiaries appeal.

A. Brief Statement of Facts Relevant Issues Presented For Review

On December 12, 1996, Loleta B. Wing created a revocable trust into which she transferred most, if not all, her worldly belongings. Loleta was appointed trustee. The Trust directed that all assets be used for her benefit.[12] Following the death of Loleta's husband, W. R. Wing, Jimmy was appointed co-trustee and obtained a power of attorney over Loleta.[13] After W.R.'s death Jimmy had unfettered access to Loleta, who by this time was sick, aged and debilitated.[14] Jimmy systematically isolated all of Loleta's support structure until he and he alone had access to her. Literally within days of the execution of a power of attorney and trust amendment inuring the benefit of Jimmy, Loleta was found by her physicians to be both confused and forgetful; less than two months later she was admitted for in-patient psychiatric care and detoxification.[15] For the remainder of her life Loleta was dependent upon sitters and/or assisted living facilities. Jimmy has at various times, whenever it is convenient to his argument, contended that Loleta was always competent, or that while she was incompetent for a time she later regained her competency.

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[9] See Addendum A.
[10] Record at page 583; Record Excerpts at page 5.
[11] Record at page 593; Record Excerpts at page 15.
[12] Record at page 35.
[13] Record at page 405 and 416.
[14] Transcript at pages 15-16.
[15] Record at page 304 and references cited therein.

At the time of the objectionable March 2007 transfers Loleta was a patient at Graceland Care Center, having just been discharged from Baptist Memorial Hospital – North Mississippi following a nearly month-long hospitalization for a broken hip. Jimmy took calculated efforts to insulate these matters from scrutiny and told none of the Beneficiaries about them. While Loleta was a patient at the hospital, Jimmy arranged for Loleta to be interviewed by two attorneys he had hired.[16] According to the attorneys, they were representing the interests of the Trust at that time even though they had never read the Trust and did not know what it provided. Jimmy maintains that the attorneys represented Loleta in her personal capacity.[17]

In any event, these two attorneys spoke with Loleta for a brief moment – asking a list of questions prepared by Jimmy – but did not speak with her doctors about her competency. No cognitive testing was undertaken, nor was she advised of her right to obtain counsel. Later that month these same attorneys undertook to represent Jimmy's interests in the exact same matter – to the exclusion of the interests of the Trust and Loleta! – and even went so far as to write Loleta a letter providing in relevant part "At the request of your son Jimmy (acting in his personal capacity and not as trustee to the Loleta B. Wing Trust) . . . we are not representing you but Jimmy. . . Our goal is to protect Jimmy's personal interests by avoiding anything which might be seen as the appearance of impropriety."[18] In other words, within days of the supposedly "independent" consultation with Loleta these same attorneys were working to protect Jimmy's personal interest of making the gifts to himself appear appropriate – in the exact same matter for which they had been obtained to represent the Trust and/or Loleta.

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[16] Record at page 328.
[17] Record at page 420 (response to interrogatory 14 stating that attorneys "met with Ms. Wing independently and provided legal services to her.")
[18] Record at page 505; Record Excerpts at page 23.

In the week before the cash transfers (one for $244,577.75 and a second for $547,190.72 on March 29, 2007) and the execution of the unrecorded warranty deed,[19] Loleta was noted on at least three occasions to be suffering from delirium. The hospital discharge paperwork noted senile dementia was a significant problem.[20] Loleta's doctor, Robert Cooper, M.D., testified in his February 16, 2011, deposition that in her condition he would be very concerned with Loleta making financial decisions such as those listed above. Even a few days later, on April 4, 2007, Loleta was unable to execute a general medical consent.[21]

There is no dispute that Jimmy occupied a position of trust and owed a duty of loyalty to Loleta due to his dual roles as power of attorney and co-trustee.[22] Accordingly, at least as early as July 17, 2003, Jimmy Wing had a confidential relationship with Loleta, invoking a presumption of undue influence and a presumption of invalidity for any transfers, gifts or other conveyances from Loleta and/or the Trust to himself or his family. *Madden v. Rhodes*, 626 So.2d 608, 619 (Miss.1993); *Hendricks v. James*, 421 So.2d 1031, 1041 (Miss.1982). Thus, the burden then shifted to Jimmy to rebut the presumption ***by clear and convincing evidence.*** *Griffin v. Armana*, 687 So. 2d 1188, 1193 (Miss. 1996); *Estate of McRae*, 522 So.2d 731, 737 (Miss. 1988) ("the law declares that when there is a fiduciary or confidential relation, and there is a gift or conveyance of dubious consideration from the subservient to the dominant party, it is presumed void."); *Mullins v. Ratcliff*, 515 So.2d 1183 (Miss. 1987); *Murray v. Laird*, 446 So.2d 575 (Miss. 1984); *McDowell v. Pennington*, 394 So.2d 323 (Miss.1981).

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[19] Record at page 426.
[20] Record at page 398.
[21] Record at page 403.
[22] See Jimmy's *Motion for Summary Judgment* at paragraph 14, Record page 106 ("As a Co-Trustee of the Loleta B. Wing Trust, Jimmy Wing owed his mother, the Settlor/Beneficiary of the Trust, a Duty of Loyalty . . .")

The Beneficiaries filed a "Motion for Summary Judgment As To Liability Only" pertaining to this issue on September 30, 2009,[23] but it was never ruled upon by the trial court. Jimmy never filed a response of any sort to the motion.

During the course of litigation twenty-eight subpoenas[24] were issued to various persons and entities for financial, medical and other information relative to the multi-million dollar claims of this suit (see Addendum A for an itemization). The Beneficiaries propounded four sets of discovery to Jimmy and due to his failure to properly respond were forced to file three separate motions to compel. *See Motion to Compel Discovery Responses and Certificate of Good Faith Conference* filed on July 1, 2008;[25] *Renewed Motion to Compel Discovery Responses* filed on November 20, 2008;[26] and *Motion to Compel Information Relevant to Court Ordered Accounting* filed on December 21, 2010.[27] Preceding each such motion were several "good faith" letters as described in each motion. Repeatedly Jimmy disclosed documents for the first time in his response to a motion to compel. Of note, Jimmy did not file any motions to compel against the Beneficiaries.

On June 11 2009, the trial court instructed Jimmy's counsel to work with the accountant expert retained by the Beneficiaries to address the remaining deficiencies in his accounting.[28] The Court further instructed Jimmy, in the event he could not reasonably access some information, to file a motion for a protective order.[29] While the expert sent an itemized list to Jimmy's counsel of what information was still needed on June 15, 2009,[30] neither Jimmy nor his counsel ever responded despite the Court's instruction to "respond to those [deficiencies]

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[23] Record at page 296.
[24] See Addendum A.
[25] Record at page77.
[26] Record at page 129.
[27] Record at page 523.
[28] Transcript at page 112; Record Excerpts at page 24.
[29] *Id.*
[30] Record at page 559; Record Excerpts at page 25.

promptly."[31] Although Jimmy later complained about what information was being requested, he never filed a motion for a protective order as directed by the trial court, and he never responded to the request.[32] On December 13, 2010, the Beneficiaries emailed Jimmy's counsel to again request that he provide the accounting the trial court had twice ordered and which was long-overdue.[33] No response was received to this either. The amount still unexplained from the accounting is $467,824.85.

On December 16, 2010, the Beneficiaries submitted proposed trial dates in June 2011 to Jimmy's counsel. The trial dates were six months away, more than ample time for the remaining discovery to be completed. Brad Walsh, Esq. indicated the dates were acceptable. A phone message was left with the staff of Scot Spragins, Esq. concerning his availability. The following day, having received no response, the Beneficiaries followed up via email concerning Mr. Spragins' availability.[34] Counsel responded to this email stating that he intended to file a motion to dismiss and refused to indicate his availability for trial until that motion was resolved. Counsel was asked to reconsider but did not respond.

On December 21, 2010, the Beneficiaries filed their *Motion to Compel Information Relevant to Court Ordered Accounting.*[35] The same day Jimmy filed his *Motion to Dismiss for Want of Prosecution.*[36] The Beneficiaries responded to the motion to dismiss on January 4, 2011, arguing that it was Jimmy's dilatoriness and refusal to be transparent which was delaying trial of this matter, and that the motion was simply an effort to prevent a trial on the merits.

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[31] Transcript at page 112, lines 4-5.
[32] See Jimmy's *Answer to Motion to Compel Information Relevant to Court Ordered Accounting*, Record, Vol. 4, page 578 (in particular, paragraphs 3-4 acknowledge receiving the email but implicitly concedes it was never answered; Jimmy renewed his complaint about the requests for the first time in March 2011).
[33] Record at page 560; Record Excerpt page 26.
[34] Record at page 571; Record Excerpt page 27.
[35] Record at page 523. The trial court's Opinion states that "In apparent response [to Jimmy's Motion to Dismiss], plaintiffs filed an additional Motion to Compel more details regarding certain expenditures." Note is made that this information was requested eight days before the motion.
[36] Record at page 516.

On February 15, 2011, James Justice, Esq. was deposed. On February 16, 2011, Dr. Robert Cooper was deposed. On March 10, 2011, the Beneficiaries submitted proposed dates for the deposition of three of Loleta's sisters. On March 18, 2011, nearly three months after the motion was filed and just days before the hearing, Jimmy asked the Beneficiaries to supplement their discovery responses to assist him in completion of the accounting the trial court had ordered nearly three years earlier.[37]

On March 23, 2011, the Court held a hearing on the Beneficiaries' motion to compel a more complete accounting and Jimmy's motion to dismiss. At the hearing the Beneficiaries asked the trial court to set the matter for trial, which they had been unsuccessfully trying to do since December 16, 2010, due to Jimmy's obstinacy.[38] It is obvious from his refusal to set the matter for trial that Jimmy was not genuinely interested in advancing the litigation on the merits, but rather sought to take advantage of a perceived procedural error on the part of the Beneficiaries. On May 4, 2011, three of Loleta's sisters were deposed. The following day the trial court entered its Opinion dismissing the present action for failure to prosecute.[39]

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[37] Record at page 578.

[38] Transcript at page 131. "We don't want any delay. And in fact, what we would request today is that the Court enter a scheduling order which includes a trial date. I have my calendar with me and we're ready to set this matter for trial immediately, as soon as the Court can hear us. We're ready to forego any discovery that can't be completed within the parameters of the scheduling order."

[39] Record at page 583; Record Excerpts at page 5.

SUMMARY OF THE ARGUMENT

Jimmy Wing occupied a position of trust and confidence with respect to Loleta Wing due to his offices as both her power of attorney and co-trustee of her revocable trust. He took significant advantage of Loleta during her lifetime and after her death was allowed to escape accountability for his actions not because of an adjudication on the merits, but rather because the trial court incorrectly concluded that the Beneficiaries – who along with Loleta were cheated by Jimmy – were not diligent in pursuing their claim. In doing so, Jimmy was allowed to never have to give account for his deeds as co-trustee and power of attorney.

The trial court erred in multiple respects in its findings of fact and consequently reached an incorrect legal conclusion. The dilatory party in this matter was Jimmy. It was Jimmy who did not complete the court ordered accounting and/or who failed to file for a protective order as the court had instructed. It was Jimmy who did not properly respond to discovery requests on multiple occasions. It was Jimmy who failed to provide additional dates for his deposition. It was Jimmy who refused to set the matter for trial. Yet, it was the Beneficiaries' case which was dismissed.

The Beneficiaries did not commit inexcusable delay in the presentation of their claim. The trial court did not adequately consider lesser sanctions. No aggravating factors were present. This is not a most egregious case worthy of the "extreme and harsh sanction" of dismissal which would deprive the Beneficiaries' of the opportunity to pursue their claim. Thus, under the test set forth in *Am. Tel. and Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (¶12) (Miss. 1998), the trial court erred and this matter should be remanded for an immediate trial on the merits.

ARGUMENT

Standard of Review

A trial court's ruling on a dismissal for failure to prosecute is reviewed for abuse of discretion. *Hill v. Ramsey*, 3 So. 3d 120, 122 (Miss. 2009). What constitutes a failure to prosecute is considered on a case-by-case basis. *Am. Tel. and Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (¶12) (Miss. 1998). The law favors a trial of issues on the merits. Thus, dismissals for want of prosecution are to be employed "reluctantly" and "reserved for the most egregious cases," because of the "extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim." *Am. Tel. & Tel. Co.*, 720 So. 2d at 181; *Hillman v. Weatherly*, 14 So. 3d 721, 726 (Miss. 2009). A ruling dismissing the case with prejudice on this basis "will be affirmed only if there is a showing of a clear record of delay or contumacious conduct by the plaintiff, *and* where lesser sanctions would not serve the best interest of justice." *Hillman*, 14 So.3d at 726, citing *Am. Tel. & Tel. Co.* (emphasis in original).

The Court should not affirm a dismissal for failure to prosecute unless it is clear that the trial court has considered lesser sanctions and has concluded that "such sanctions would have been futile in expediting the proceedings." *Am. Tel. & Tel. Co.*, 720 So.2d at 181. "Dismissals for want of prosecution typically are affirmed only when there is a clear record of delay or contumacious conduct **enhanced by at least one aggravating factor**, and lesser sanctions would be ineffective." *Jackson Public School District v. Head*, 2009-IA-02022-SCT ¶ 11 (Miss. 2011), citing *Am. Tel. & Tel. Co.*, 720 So. 2d at 181 (Miss. 1998) (emphasis added) (citing *Rogers v. Kroger Co.*, 669 F. 2d 317, 320 (5th Cir. 1982)).

Rule 41 issues are to be considered on a case-by-case basis. *Am. Tel. & Tel. Co.*, 720 So. 2d at 181. A three-pronged test is utilized. *Cox v. Cox*, 976 So. 2d 869, 874 (Miss. 2008), citing the ATT factors. The first prong is whether there was a clear record of delay or contumacious

conduct by the plaintiff. Contumacious conduct is defined as "Willfully stubborn and disobedient conduct, commonly punishable as contempt of court." BLACK'S LAW DICTIONARY 330 (6th ed. 1990). The second prong is whether lesser sanctions may have better served the interests of justice. The third and final factor is whether there exist other aggravating factors which would militate toward dismissal.

The Trial Court's Opinion Was Based on Incorrect Facts

When examining a trial court's dismissal of a case for want of prosecution, the Court should affirm the trial court's findings of fact unless those findings are manifestly wrong. *Barry v. Reeves*, 47 So. 3d 689, 693 (Miss. 2010) (citing *Watson v. Lillard*, 493 So. 2d 1277, 1279 (Miss. 1986)). Where a chancellor's decision is not supported by substantial evidence but rather is based on a mistaken view of the evidence, the trial court's judgment must be reversed. *Browder v. Williams*, 765 So.2d 1288 (¶ 36) (Miss. 2000).

In the case of *Barry v. Reeves*, 47 So. 3d 689, 693 (Miss. 2010), the trial court was reversed (in part, affirmed in other parts) because its findings of fact regarding about what had transpired during the course of litigation were not supported by the record and were manifestly wrong. *Id.* at ¶11. The Court found that the trial court had: 1) incorrectly concluded that discovery had not taken place when "the record reveals that both parties actively participated in the discovery process; 2) neglected to acknowledge that the stay was lifted in response to the plaintiff's motion; 3) failed to note that the plaintiff had filed a motion for a trial setting which was heard by the court; 4) failed to note that the plaintiff had unsuccessfully "sought the aid of counsel opposite in selecting a date upon which the case could be tried"; and 5) failed to note that when this proved unsuccessful the plaintiff sent a letter to the court asking for a status conference. *Id.* The Court said "the trial court's failure to include these actions by Barry in its findings of fact was a very relevant omission amounting to manifest error." *Id.* at ¶12.

The Court in *Barry* went on: "the mere fact that delay occurs in the prosecution of a case is not sufficient to warrant dismissal for want of prosecution. It must be clear from the record that the delay was the result of the plaintiff's failure to prosecute the claim, rather than extrinsic factors beyond the control of the plaintiff." *Id.* at ¶14 (emphasis in original). "Thus, because there is no clear record of delay or contumacious conduct on the part of Barry, and the trial court did not consider lesser sanctions prior to its dismissal of the case for failure to prosecute, the trial court abused its discretion in dismissing this case." *Id.* at ¶14.

The Beneficiaries identify the following substantial errors in the trial court's Opinion:

1. The Present Case Is Not the 2005 Suit Repackaged

Foremost, and probably most important, the trial court states on page 3, paragraph IV, of its Opinion[40] that:

> These allegations are strikingly similar to those of a previous action filed with this Court, entitled In the Matter of the Conservatorship of Loletta Bard Wing, bearing cause number 2005-39R, and filed on January 25, 2005.

The trial court's Opinion then proceeds to discuss the 2005 suit in paragraphs VIII, IX, X, XI, XII, XIII, XIV, and page 9 (beginning "Here, the defendant has faced similar allegations since 2005.")

As explained in the Statement of Facts, the 2005 suit asked for a conservatorship and an accounting from Jimmy "for all purchases, transfers and expenditures made as attorney in fact for Loleta Bard Wing" but it did not ask for compensatory or punitive damages from Jimmy.[41] Nor did the *Complaint for Temporary Restraining Order and Preliminary Injunction* or *Petition for Appointment of Conservator* accuse Jimmy of utilizing the Trust assets for his own personal

[40] Record at page 583; Record Excerpts at page 5
[41] Record at page 699 to 700.

benefit. In this present case Jimmy was accused of malfeasance in his office of trustee and significant compensatory and punitive damages were prayed for.[42]

To say that the allegations between the two suits are "strikingly similar" is incorrect. Thus, the trial court's reliance on this suit being a continuation of the earlier suit[43] as a foundational element for dismissal was misplaced.

2. Jimmy Did Not Respond To The Court's Instruction To Complete The Accounting

In its *Opinion*, at page 7, the trial court stated that the Beneficiaries sought "to present expert testimony that had yet to be disclosed. But defendant responded to the request . . ."

Jimmy never responded to the request. To the contrary, he does not even argue that he responded to either the accountant's June 16, 2009, email[44] or counsel's December 13, 2010, email[45] even though he acknowledges he was under a court order to complete the accounting stemming back to 2008. See Jimmy's *Answer to Motion to Compel Information Relevant to Court Ordered Accounting*[46] and Transcript at page 136, neither of which dispute the assertion that no further information was offered after the June 11, 2009, hearing.

Furthermore, the accountant was offered to give testimony in support of the motion to compel about why the accounting was incomplete. He was not asked to give expert testimony at trial.[47] The trial court erred in not considering the accountant's testimony as the Beneficiaries were in full compliance with discovery and the court rules. Jimmy's Interrogatory No. 1 asked "Identify each person you intend to call as an expert witness *at trial*, . . ." (Emphasis added). Likewise, UCCR 1.10.A. provides "the court will not allow testimony *at trial* of an expert

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[42] Record at pages 1-4.
[43] Which was dismissed without prejudice, meaning that the earlier suit for all practical purposes is irrelevant.
[44] Record at page 559; Record Excerpts at page 25.
[45] Record at page 560; Record Excerpts at page 26.
[46] Record at page 578.
[47] Transcript at page 97.

witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial." (Emphasis added.)

Finally on this point, it is again noted that Jimmy never filed the motion for protective order the court instructed him to file in the event information was not available.[48] Jimmy just ignored the obligation to fill in the holes in his accounting and was allowed to get away with it.

3. The Trial Court Incorrectly States The Motion Was Undisputed

Another important error in the Opinion is the assertion that "The above facts [demonstrating inexcusable delay] were not disputed at the hearing or thereafter."[49] Again on the same page the trial court stated that the Beneficiaries "all but admitted" at the motion hearing that no action of substance was taken "in the months and years leading up to the Motion to Dismiss." Furthermore, the Opinion notes at footnote one on page 7 that "With the Court's permission, defendant provided the Court with a time-line and documentation of the above facts and plaintiffs failed to dispute a single representation."[50] The Opinion does not state that the Beneficiaries were given permission to file a correct timeline. Thus, the trial court faults the Beneficiaries for not responding to information provided after the hearing to which they were not authorized to respond anyway.

The trial court's assertions are manifestly in error as the transcript[51] and Beneficiaries' Response to the Motion to Dismiss[52] both contain several factual and legal disagreements which were brought to the Court's attention. The trial court apparently gave short shrift to the objections, so much so that the trial court formed the opinion that the Beneficiaries all but acquiesced to the averments of the Motion when this emphatically was not the case.

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[48] Record at page 112; Record Excerpt page 24.
[49] Record at page 589; Record Excerpt page 11.
[50] Record at page 589.
[51] Transcript at page 127. The "timeline" was presented for the first time at the hearing and the Beneficiaries were given no opportunity to respond.
[52] Record at page 566.

4. Jimmy Wing Was Deposed In January 2010, not October 2009, and Suspended His Deposition For Health Reasons

The trial court found that "The deposition of defendant was taken in October, 2009." Opinion at paragraph XXV.[53] In actuality, the deposition of Jimmy took place three months later, on January 7th and 8th, 2010,[54] and was continued by Jimmy at his request for health reasons. The Beneficiaries made several attempts to re-convene the deposition but were informed that due to Jimmy's health it would be months before he was able to sit again.[55] Jimmy's counsel never responded to the Beneficiaries' attempts to reschedule the deposition.

All this was brought to the attention of the trial court, yet on page 7 of the Opinion the trial court erroneously asserts that "More than a year passed, and almost the complete year of 2010, between defendant's deposition and the filing of the Motion to Dismiss. No action, of substance, was taken by the plaintiffs in the months and years leading up to the Motion to Dismiss."[56] The trial court was wrong about the date of the deposition, wrong about the interval time, and wrong that nothing took place in the months and years leading up to the motion. Just as in *Barry*, when the trial court's factual findings are mistaken a reversal is in order.

5. The Motion To Compel Was Not Filed In Response To The Motion To Dismiss. To The Contrary The Motion To Dismiss Was Filed In Response To the Beneficiaries' Attempt to Prosecute The Case

At paragraph XXVII, the Opinion states that "In apparent response," to Jimmy's Motion to Compel "plaintiffs filed an additional Motion to Compel more details regarding certain expenditures."[57] The trial court fails to note that eight days earlier – before the motion to dismiss was ever mentioned - the Beneficiaries sent follow up correspondence to Jimmy's counsel

[53] Record at page 588; Record Excerpt page 10.
[54] Record at page 511.
[55] Transcript at page 130.
[56] Record at page 589; Record Excerpt page 11.
[57] Record at page 588.

inquiring why they had never attempted to produce the information the trial court ordered.[58] As discussed elsewhere, the Beneficiaries were taking active, positive steps to advance the litigation, and this renewed request for long overdue information was not reactionary.

Still having received no response to that correspondence, and after verifying that Jimmy's counsel had not been working with the Beneficiaries' accountant as the trial court ordered,[59] the Beneficiaries sent an email to Jimmy's counsel on December 14, 2010,[60] for the accounting information, and on December 17, 2010, proposing June 2011 trial dates.[61] It was at this time, for the first time, that Jimmy's counsel mentioned the motion to dismiss. Jimmy's counsel then refused to set a trial date on the basis of their yet-to-be-filed motion to dismiss for want of prosecution. In other words, while Jimmy was complaining that the case was taking too long to resolve, he refused the Beneficiaries' affirmative steps to bring him the very resolution he pretends to have been seeking. It is not as if the Beneficiaries demanded the motion to be dismissed, they just asked Jimmy's counsel to put the trial on the calendar in the event the motion was unsuccessful. Alternatively, had Jimmy just agreed to the trial date this matter would have been tried on its merits long before this brief was ever written.

The trial court also faults the Beneficiaries for not setting this matter for trial, see Opinion at page 8,[62] but the Opinion does not discuss the fact that the Beneficiaries had prompted a proposed setting, only to be thwarted by Jimmy's delay, just as the Court noted in *Barry* at ¶11. When the Beneficiaries petitioned the trial court to set the matter for trial it instead dismissed the case with prejudice without ever giving any lesser sanctions.

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[58] Record at page 560; Record Excerpt page 26.
[59] Transcript at page 112.
[60] Record at page 560; Record Excerpt page 26.
[61] Record at page 571; Record Excerpt page 27.
[62] Record page 590; Record Excerpt page 12.

6. The Trial Court Erred In Calculating The Delay

The trial court stated that "No action, of substance, was taken by the plaintiffs in the months and years leading up to the Motion to Dismiss."[63] The clerk's docket indicates that the Beneficiaries issued a subpoena to Graceland Care Center on January 8, 2010. The docket is then silent until Jimmy's Motion to Dismiss on December 21, 2010. This is a period of less than a year during which Jimmy's deposition was attempted three times, the Beneficiaries consulted a handwriting expert and a geriatric psychiatrist, followed up on overdue accounting information, and attempted to set the matter for trial while simultaneously coordinating the final depositions necessary to complete discovery. These were actions of substance.

The trial court continued, "No excuse for delay was presented by plaintiffs, who simply say, in one breath, that, but for a few depositions, the case was ready for trial." Thus, the trial court put the burden of persuasion on the Beneficiaries even though it was Jimmy's obligation to prove all the factors necessary to establish that an involuntary dismissal was appropriate.

There Was No Contumacious Conduct or Inexcusable Delay

The first factor in the Rule 41 analysis is whether there was a clear record of delay or contumacious conduct by the plaintiff. "There is no set time limit 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 the plaintiff has been guilty of dilatory or contumacious conduct.'" *Miss. Dep't of Human Servs. v. Guidry,* 830 So. 2d 628, 632, ¶15 (Miss.2002) (chancellor's dismissal with prejudice of a petition for contempt was reversed despite a delay of seven years and seven months in prosecuting the claim because court was "unable to find contumacious conduct by the plaintiff, Victory Guidry, which would justify an involuntary dismissal.")

[63] Record at page 589; Record Excerpt page 11.

As the trial court did not find any contumacious conduct present, the dismissal can be upheld, if at all, only on the basis that there was a showing of ***inexcusable*** delay. *Holder v. Orange Grove Medical Specialties, P.A.*, 54 So. 3d 192, 199 (Miss. 2010).

In *Holder*, the Supreme Court held that delay alone may suffice for a dismissal under Rule 41(b). The trial court notes as much. However, the trial court then went too far by stating the "failure to prosecute due to delays [in *Holder* were] less egregious than our present facts."[64] That is clearly not the case.

In *Holder*, the following factors were noted in support of the dilatory conduct by those plaintiffs: a) plaintiff's counsel initially responded to the defendant's first set of interrogatories by "stating that he would not be able to complete discovery because he was in trial on another matter"; b) plaintiff's counsel then ignored three follow up letters about the responses; c) "counsel for the plaintiffs did not respond to the defendants' interrogatories and their three subsequent followup inquiries until thirteen days after the defendants had filed their motion to dismiss and 435 days past the deadline set by our Rules of Civil Procedure"; d) "plaintiffs' counsel failed to move for a continuance to allow for additional time to complete the defendants' discovery requests"; e) plaintiffs did not serve discovery requests upon the defendants within the time limit set out by the rules; and f) plaintiffs were late in responding to the defendant's motion to dismiss.

In the present matter, not a single factor (a) – (f) above was present. Not once did the Beneficiaries ignore a good faith effort to resolve a discovery dispute or fail to respond to discovery ((a), (b), (c) and (d)). The Beneficiaries immediately undertook extensive discovery

[64] The trial court's Opinion states "At the hearing, plaintiffs cited the Court only to the recent Mississippi Supreme Court decision of *Holder v. Orange Grove Med. Specialties, PA.*, 54 So. 3d 192 (Miss. 2011)." This is incorrect. The Beneficiaries also cited the cases of *Estate of Finley v. Finley*, 37 So. 3d 687 (Transcript at page 131) and **Error! Main Document Only.***Illinois Cent. R. Co. v. Moore*, 994 So. 2d 723 (Miss. 2008) (Record at page 568) to the court.

and issued twenty-eight subpoenas for records ((e)). Jimmy did not file a single motion to compel. The Beneficiaries' Response to the motion was timely filed, ((f)).[65] The dilatory factors in *Holder* are wholly distinguishable and entirely absent from the facts of the present case.

The Beneficiaries have found no case which would support the trial court's ruling that the delay alone in this case is sufficient to warrant a dismissal with prejudice. In *Illinois Cent. R. Co. v. Moore*, 994 So. 2d 723 (Miss. 2008), cited by Jimmy in his Motion to Dismiss for Want of Prosecution (Record at page 517), that case was dismissed *without prejudice* because "the only activity between December 28, 1998, and October 31, 2005, were the Clerk's Motions to Dismiss for Want of Prosecution and Moore's letters." *Id.* at 727. The delay in the prosecution of that case was nearly seven years.

In the more recent case of *Shepard v. Prairie Anesthesia Associates*, 2009-CA-01267-COA (Miss. Ct. App. 2011), the trial court's dismissal was affirmed when the delay was more than seventeen years between the incident and the dismissal. The clerk filed four motions to dismiss over a period of eight years (each preceded by inactivity exceeding one year), in addition to those filed by the parties. *Id.* at ¶9 - ¶12, ¶19. While the plaintiff responded to each motion with a request of some sort, "Shepard failed to take any action to bring [Shepard's] motions to the circuit court's attention or request a hearing on the motions." *Id.* at ¶19. Such is not the situation here. The Beneficiaries specifically asked the trial court to require Jimmy's counsel to agree to a trial setting, something the moving party had refused to do.[66]

In the case of *Hasty v. Namihira*, 986 So. 2d 1036 (Miss. Ct. App. 2008), a dismissal *without* prejudice was affirmed but only after the trial court gave the plaintiff an opportunity to

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[65] The motion to dismiss was filed December 21, 2010. This day is excluded by Miss. R. Civ. P. 6(a). Three days are added by Rule 6(3) due to mailing. This made the response due Monday, January 3, 2011. January 3, 2011, was a legal holiday (http://www.sos.ms.gov/education_and_publications_holidays.aspx?section=6&subsection1=6&subsection2=2) making the response due the following date per Rule 6(a).

[66] Transcript at page 131; Record at page 571.

move the case forward. In *Hasty* the trial court sent out a notice of impending dismissal dated July 1, 2003, and ultimately dismissed the case on August 31, 2004, due to "delay of the prosecution of this case since March 15, 2002." *Id.* at ¶12. The defendant supported the dismissal by arguing the plaintiff

> repeatedly delayed discovery, disregarded requests to comply with scheduling orders, and failed to respond to the motion for dismissal in a timely manner. Dr. Namihira argues that even after the trial court allowed the Hastys to proceed, following the issuance of the Rule 41 notice of dismissal, the Hastys still failed to take any action of record for another year.

Id. at ¶13. In *Hasty* the plaintiff squandered its opportunity for a second chance, e.g., to prosecute the case after receiving a "warning". *Id.* at ¶18. The Court noted this warning was a lesser sanction than dismissal, as will be discussed under the second *ATT* prong. No such opportunity was offered to the Beneficiaries in this case even though the alleged delay was less substantial.

It is said that turnabout is fair play. The trial court erred in not considering whether Jimmy's own conduct contributed toward the delay in the resolution of the matter. "[I]n deciding to impose [as] drastic [a] sanction as dismissal, the defendant's own dilatory conduct may become a relevant and mitigating factor if deemed outside the realm of reasonableness and acceptability." *Salts v. Gulf Nat'l Life Ins. Co.*, 872 So. 2d 667, 670 (Miss. 2004) (citing *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1370 (Miss. 1990)).

In the present matter, the Beneficiaries were required to file three motions to compel[67] and obtained an order compelling information from Jimmy when the motions themselves were not sufficient to procure the information.[68] Additionally, Jimmy failed to provide dates to re-convene his deposition and refused to set the matter for hearing.[69] Numerous other "good faith"

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[67] Record at pages 77, 129, and 523.
[68] Order on Petitioner's Motion to Compel at Record page 97
[69] Transcript at page 130; Record at page 571, Record Excerpt page 27.

letters and conferences are noted in the record concerning Jimmy's uncooperative discovery conduct. Cf. Record at pages 78 and 130 (listing numerous good faith attempts to resolve discovery disputes).

Not a single motion to compel information from the Beneficiaries appears in the record. Not once prior to his March 18, 2011, response to the third motion to compel[70] did Jimmy complain that information was not being produced (or request a discovery supplementation), nor did he ever attempt to re-set his motion for summary judgment for hearing. Following the allegation that information had not been produced, it was timely made available to Jimmy.[71] Jimmy took no steps to obtain the information even though he argued before the trial court that the lack of this information made it impossible for him to complete the accounting the court had ordered years prior.[72]

In the recent case of *Jackson Public School District v. Head*, 2009-IA-02022-SCT ¶ 14 (Miss. 2011), the Court found that there was a clear record of delay where nearly four years transpired with little or nothing happening of record. The Court, however, found this delay – many, many times more than the delay in the present case – was excusable because of extrinsic factors beyond the control of the plaintiff. The Court in *Head* did not once mention *Holder*'s 'delay is prejudice enough' ruling. The Court did say: "[T]he mere fact that delay occurs in the prosecution of a case is not sufficient to warrant dismissal for want of prosecution. It must be clear from the record that the delay was the result of the plaintiff's failure to prosecute the claim, rather than extrinsic factors beyond the control of the plaintiff." *Id.* at ¶15, citing *Barry v. Reeves*, 47 So. 3d 689, 693 (Miss. 2010).

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[70] Record at page 578.
[71] Transcript at page 135.
[72] Transcript at page 137; Record at page 580.

In *Barry* the case was dismissed after it had been pending for nearly seven and one-half years. *Id.* at 689. Determining that the trial court's findings of fact were not supported by the record[73] and thus were manifestly wrong, the Supreme Court went on to find that the trial court had abused its discretion in dismissing the case. *Id.* at ¶18. The Court also noted that "it is far from clear that the delay in the prosecution of this case is attributable to Barry. Indeed, each period of inactivity was interrupted by a positive action by Barry to expedite the litigation." *Id.* at ¶15. As discussed, the Beneficiaries took positive action to try to expedite this case prior to the filing of the motion to dismiss (not reactionary).

In *Head* the Court also discussed the case of *Hill v. Ramsey*, 3 So.3d 120, 122 (Miss. 2009). In *Hill* the dismissal was without prejudice for a delay from August 2005 to March 2007. The *Hill* Court "indicated it might not have affirmed a dismissal with prejudice." In the present case the trial court dismissed the case with prejudice for having no activity of record for approximately eleven months. One can only wonder how many cases are currently proceeding before courts of this State in which no activity of record appears for eleven months. It must be a substantial number, though, as we have a rule of civil procedure precisely for situations which continue for more than twelve months plus thirty days. *See* MISS. R. CIV. P. 41(d)(1) (providing for thirty day advance notice if no activity of record for twelve months, and for dismissal *without* prejudice if the notice is ignored).

When examining whether conduct is dilatory, this Court "may consider whether the plaintiffs' activity was reactionary to the defendants' motion to dismiss, or whether the activity was an effort to proceed in the litigation." *Holder v. Orange Grove Med. Specialties P.A.*, 54 So. 3d 192, 198 (¶22) (Miss. 2010). In *Hill*, the only actions of the plaintiff were reactionary and not designed to proceed with the litigation. *Hill*, 3 So. 3d at 122 (¶7). In this case, the Beneficiaries'

[73] See supra for a discussion of the trial court's factual mistakes in this case.

effort to set the matter for trial was not reactionary. To the contrary, the Plaintiffs attempted to set the matter for trial and were stymied by the refusal of one of Jimmy's attorneys to indicate his availability until after his yet-to-filed motion to dismiss was ruled upon.[74] Had he simply cooperated in the setting by indicating his availability all of this could have been avoided.

In no way was the Beneficiaries' attempt to set the matter for trial, or to continue with obtaining long overdue discovery information, reactionary. Both attempts preceded the first mention of the motion to dismiss.

Manifestly, the Beneficiaries in this case were taking "positive action" to prosecute their claims, unlike the situation in *Vosbein v. Bellias*, 866 So. 2d 489, ¶8 (Miss. Ct. App. 2004). In *Vosbein* multiple motions to dismiss were filed, as well as a motion to compel which followed two defendant good faith letters. These motions spanned the course of four years. The case was dismissed three times with the final dismissal coming eight years after suit was instituted. "Since the case was filed, Vosbein has taken virtually no positive action to prosecute his claim. We find that there was sufficient evidence to support the trial judge's finding of dilatory and contumacious conduct." *Vosbein*, 866 So. 2d at ¶8. The trial court in *Vosbein* attempted lesser sanctions before the dismissal with prejudice, which did not happen in the case at bar.

Sanctions Were Unnecessary, But Lesser Sanctions Were Available If Needed

The second factor in the ATT analysis is whether lesser sanctions may have better served the interests of justice. If lesser sanctions will serve the interests of justice better than dismissal, they must be imposed rather than the dismissal of the case. *Am. Tel. & Tel. Co.*, 720 So. 2d at 181. "Lesser sanctions include 'fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings.'" *Cox*, 976 So. 2d at 876 (citing *Am. Tel. & Tel. Co.*, 720 So. 2d at 181-82).

[74] Record at page 571; Record Excerpt page 27.

In its Opinion the trial court rejected lesser sanctions on the basis that: 1) the defendant has faced similar allegations since 2005; 2) the Beneficiaries had an opportunity to litigate "these damning allegations in 2005, while Ms. Wing would be alive" but instead dismissed the 2005 case without prejudice; 3) even after bringing the present claim the Beneficiaries have "done precious little over the years the present action has been pending"; and 4) neither "fines, costs, damages against plaintiffs or their counsel, or explicit warnings are suitable remedies."[75]

Addressing each in turn, the Beneficiaries respond: 1) the allegations between the conservatorship action and the present claim for damages are not the same as discussed elsewhere in this Brief; 2) the 2005 suit was entirely different in nature and moreover the most significant of all of the transactions would not take place for another two years, until March 2007; 3) the Beneficiaries issued twenty-eight subpoenas, received tens of thousands of documents, have now taken a total of seven depositions, have spoken with three different experts in three fields, filed an extensive motion for summary judgment, filed three motions to compel, and attended three different hearings on various motions; and 4) if the trial court was concerned about delay in bringing this matter to resolution on the merits, it should have granted the Beneficiaries' request for a trial setting.

In *Barry v. Reeves*, 47 So.3d 689 ¶ 18 (Miss. 2010), the trial court was found to have erred where it dismissed the case without considering lesser sanctions. In this case, while the trial court said lesser sanctions would not better serve the interests of justice, it went on to state that "At some point in time, defendant should be free from the clouds of suspicion, innuendos and expense attendant to this litigation."[76] Quixotically, the court then dismissed the case on a procedural basis rather than a substantive one, undermining its own expressed goal of removing

[75] Record at page 591.
[76] Record at page 591.

suspicion that would best be accomplished through a ruling on the merits, which is the preferred way for a case to be resolved.

Furthermore, sanctions are to cure the prejudice to the defendant. *Hillman*, 14 So. 3d at 728. Here the Defendant has shown no actual prejudice, and as such, sanctions are not appropriate.

No Aggravating Factors Exist

The third prong of the ATT analysis is whether there exist other aggravating factors which would favor dismissal. For a dismissal to be upheld, there must be at least one aggravating factor present in addition to a clear record of delay and ineffective lesser sanctions. *Head*, 2009-IA-02022-SCT ¶ 11. The Supreme Court elucidated three examples of aggravating factors in *ATT*, 720 So. 2d at 182 (¶ 19). These examples include: (1) whether delay was caused by the party as opposed to his counsel, (2) whether there was actual prejudice to the opposing party, and (3) whether the delay was an intentional attempt to abuse the judicial process. *See id.*

In *Miss. D.H.S. v. Guidry*, 830 So. 2d 628 (Miss. 2002), the chancellor's dismissal was reversed in part because no aggravating factors were present. Even though the delay in that case was seven years and seven months the Court found that "there is nothing in the record to suggest that Victory Guidry, as opposed to her counsel, was responsible for any of the delays. . . there would be little, if any, prejudice to Jackie, by proceeding to trial . . . [and] there is nothing in the record to indicate the delay was an intentional attempt to abuse the judicial process." *Id.* at ¶17.

Similarly, in *Hasty v. Namihira*, 986 So.2d 1036 (Miss. Ct. App. 2008), the Court of Appeals noted that the case lacked "any clear cut aggravating factors" because "While the delay was substantial, it does not appear to have been made for a tactical gain." *Id.* at ¶ 19.

While it is disputed that any unreasonable delay took place in this case – counsel was actively working with a handwriting expert and a geriatric psychologist during the period of "inactivity" reflected in the record, as well as awaiting Jimmy to provide new dates for his

deposition and complete the court-ordered accounting which he was supposed to be doing in conjunction with the Beneficiaries' accountant – it cannot be said that any such delay was the fault of the Beneficiaries themselves. There is no evidence that the Beneficiaries sought to prolong the case in order to gain some tactical advantage. Likewise, while Jimmy's counsel argued that he was prejudiced by the delay by mentioning certain unproven allegations, he failed to affirmatively offer any such proof to the trial court in support. As this Court knows, arguments are not evidence and thus Jimmy has failed to demonstrate any actual prejudice resulted from the delay in bringing the matter to trial.

In *Jackson Public School District v. Head*, the Supreme Court affirmed the trial court's refusal to dismiss a case for failure to prosecute because, inter alia, there was no proof of actual prejudice to the defendant. 2009-IA-02022-SCT at ¶ 23. The Court also found it significant that there was no proof that the delay was intentional. *Id.* at ¶ 24. Jimmy has failed to show that the delay was intentional.

This factor too must be resolved in favor of the Beneficiaries, meaning that the trial court's dismissal would be reversed and remanded for an immediate trial on the merits.

CONCLUSION

The trial court's dismissal should be reversed. Not only were there several mistakes in the trial court's findings of fact which undermine its conclusion about whether the delay was reasonable, the trial court did not adequately consider whether lesser sanctions – including specifically granting the Beneficiaries' positive action in trying to set the case for trial – would better serve the interest of justice. Furthermore, there are no aggravating factors present which would support a dismissal *with prejudice*. This is not a most egregious case and the matter should be remanded to the trial court for further handling and trial without instructions that it impose any lesser sanctions aside from the imposition of a strict scheduling order. Additionally, Jimmy should be ordered to complete the accounting that is now over three years past due.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellants, do hereby certify that I have this day served a true and correct copy of the forgoing Brief of Appellants upon the following persons via United States Mail, postage pre-paid, at the following addresses:

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This the 5th day of Oct, 2011.

J. HALE FREELAND
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Addendum A

Entity subpoenaed	Date subpoena issued	Record citation
Azalea Gardens	March 3, 2008	23
Oxford Police Department	March 3, 2008	24
Mississippi Department of Health	March 3, 2008	25
Cooper McIntosh, M.D.	March 6, 2008	60
Baptist Memorial Hospital East	April 8, 2008	74
Robert Buchalter, M.D.	April 25, 2008	64
St. Francis Hospital	April 25, 2008	68
Mississippi Attorney General Medicaid Fraud Control Unit	April 25, 2008	67
Alan Alexander, Esq.	April 25, 2008	63
Tim Kelly, M.D.	April 25, 2008	66
Claudio Feler, M.D.	April 25, 2008	65
First National Bank of Oxford	September 16, 2008	98
State Farm Bank	June 15, 2009	275
Charles Schwab	June 15, 2009	273
First Tennessee Bank	June 15, 2009	270
First Tennessee Back BankCard Center	June 15, 2009	276
Bancorp South Credit Card Center	June 15, 2009	277
Bancorp South	June 15, 2009	271
Oxford University Bank	June 15, 2009	269
Charles Schwab Office of Corporate Counsel	June 26, 2009	285
Baptist Memorial Hospital-North Mississippi	July 6, 2009	289
Charles Schwab & Co., Inc. Office of Corporate Counsel	July 6, 2009	290
The Charles Schwab Corporation	July 6, 2009	290
Charles Schwab Bank	July 6, 2009	290
First Tennessee Bank, N.A. Brokerage Department	October 8, 2009	506
The Charles Schwab Corporation	October 8, 2009	507
Bancorp South Credit Card Center	October 8, 2009	508
Graceland Care Center	January 7, 2010	515