

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICHARD C. RASHID, M.D.,

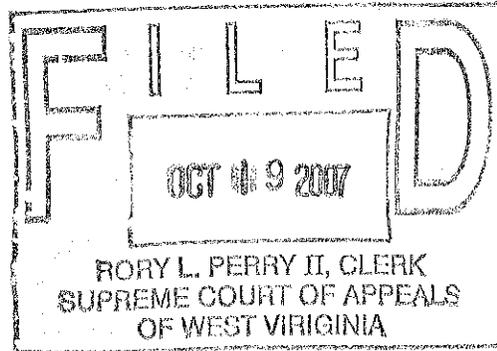
Appellant/Plaintiff,

Appeal No. 070444

v.

MUHIB S. TARAKJI, M.D.,

Appellee/Defendant.



BRIEF OF APPELLANT/PLAINTIFF, RICHARD C. RASHID, M.D.

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**I. THE KIND OF PROCEEDING AND NATURE
OF THE RULING IN THE LOWER TRIBUNAL**

This matter was pending before the Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County, West Virginia, on a Motion of the Appellant and Plaintiff below, Richard C. Rashid, M.D. (hereinafter "Dr. Rashid"), for reinstatement of his civil action against Appellee and Defendant below, Muhib S. Tarakji, M.D. (hereinafter "Dr. Tarakji"). The action had been involuntarily dismissed pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure on July 5, 2001, for failure to pay a twenty-dollar (\$20) fee in accordance with West Virginia Code section 59-1-11(b). Significantly, the dismissal of July 5, 2001, occurred without affording Dr. Rashid notice and an opportunity to be heard, in violation of Rule 41(b), thereby rendering the involuntary dismissal Order *void ab initio*.

On the Motion to Reinstate, Dr. Rashid raised the invalidity of the dismissal due to the lack of notice and opportunity to be heard. Alternatively, Dr. Rashid sought reinstatement under the "good cause" provisions of *Arlans Dep't. Store of Huntington v. Conaty*, 162 W.Va. 893, 253 S.E.2d 522 (1979).

The trial court did not apply the plain mandate of Rule 41(b) and the case law requiring notice and an opportunity to be heard prior to an involuntary dismissal. Further, the trial court refused to hold a hearing on the Motion for Reinstatement. Inexplicably, the trial court wrongly found as a matter of fact that Dr. Rashid did not file a memorandum in response to Dr. Tarakji's response in opposition to the motion to reinstate. (Record – Order at ¶ 17). In fact, Dr. Rashid did file a reply memorandum, including exhibits, as indicated on line 17 of the Circuit Clerk's docket sheet. (Record – Docket Sheet). This clearly erroneous finding of fact together with the absence of

a hearing, explains the numerous and significant omissions in the trial court's findings of facts which contributed to the erroneous conclusions of law in the determination to enter an "Order Denying Motion to Reinstate."

II. STANDARD OF REVIEW

The issues presented in this Petition require the Court to apply two distinct standards of review. In the first instance, the issue of whether the involuntary dismissal under Rule 41(b) was *void ab initio* for the failure to provide prior mandatory notice and opportunity to be heard presents the consideration of the application of the requirements of Rule 41(b) and the trial court's legal conclusion regarding the prerequisites that must be met prior to involuntary dismissal. Thus, this Court's review of the trial court's legal conclusion must be *de novo*. See, e.g., *Lacy v. CSX*, 205 W.Va. 630, 646, 520 S.E.2d 418, 434 (1999); *State ex rel. Orlofske v. City of Wheeling*, Syl. pt. 2, 212 W.Va. 538, 575 S.E.2d 148 (2002) (a *de novo* standard of review is applied to a clear question of law).

The other issues presented require application of the general standard of review under Rule 41(b) of the West Virginia Rules of Civil Procedure which is whether the ruling of the circuit court constituted an abuse of discretion. *Tolliver v. Maxey*, 218 W.Va. 419, 624 S.E.2d 856 (2005). While the trial court is vested with sound discretion in considering a motion to reinstate an action, that discretion can only operate on evidence tending to establish facts upon which a finding can be based. *Belington Bank v. Masketeers Co.*, Syl. pt., 185 W.Va. 564, 408 S.E.2d 316 (1991). Here, the trial court ignored evidence submitted by Dr. Rashid, failed to consider evidence and argument advanced by Dr. Rashid in his reply memorandum which the court erroneously found as a matter of fact had not been submitted or filed and failed to afford the opportunity for an evidentiary hearing. Further,

the trial court disregarded the law requiring notice and an opportunity to be heard prior to a Rule 41(b) involuntary dismissal. Thus, the trial court abused its discretion in denying Dr. Rashid's Motion to Reinstate.

III. STATEMENT OF FACTS

On March 14, 1997, Dr. Rashid filed a Complaint against Dr. Tarakji in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 97-C-725. This action arose out of Dr. Tarakji's opening his own medical practice following his resignation from Dr. Rashid's medical practice. Dr. Rashid alleged several causes of action in his Complaint, including breach of employment contract, fraud, violation of the Uniform Trade Secrets Act, tortious interference and unjust enrichment.

Dr. Rashid hired W. Bradley Sorrells, an attorney practicing in Charleston, West Virginia, as his counsel to prosecute the action. Mr. Sorrells, with the agreement of Dr. Rashid, subsequently retained Scott S. Segal, of The Segal Law Firm, to participate in the case as trial counsel. (Record - Affidavit of Scott S. Segal ["Segal Aff."], attached to Motion to Reinstate as Exhibit 1; Affidavit of Richard C. Rashid, M.D. ["Richard Rashid Aff."], attached to Motion to Reinstate as Exhibit 2). Since Mr. Sorrells was conversant with the facts surrounding Dr. Rashid's allegations, he would be responsible for development of the case, while Mr. Segal, being an experienced trial attorney, would have the limited responsibility of trying the case if the matter could not be resolved by settlement. (Record Segal Aff. at ¶ 4; Richard Rashid Aff. at ¶ 5). See *Armor v. Lantz*, 207 W. Va. 672, 682, 535 S.E.2d 737, 747 (2000) (noting that "a lawyer's duty may be limited by the terms of the attorney-client relationship").

Mr. Sorrells signed the Complaint for himself and for Mr. Segal (Record - Complaint). Mr. Sorrells subsequently entered into an agreement with counsel for Dr. Tarakji permitting an extension of time within which to answer. (Record - Stipulation).

Dr. Tarakji filed a counter-claim against Dr. Rashid, which was answered by Mr. Sorrells. (Record – Reply to Counterclaim). Mr. Segal did not sign this Answer. (*Id.*)

On November 25, 1998, Mr. Sorrells served Plaintiff's First Request for Production of Documents to the defendant. Neither a signature block nor a signature from Mr. Segal was provided on the discovery, nor was he listed on the Certificate of Service. (Record - attached to Motion to Reinstate as Exhibit 6).

On December 1, 1998, Mr. Sorrells and Jeffrey M. Wakefield, counsel for Dr. Tarakji, had a conversation wherein Mr. Sorrells agreed to give Dr. Tarakji an "open-ended extension of time within which to respond to the Request for Production of Documents served by the Plaintiff on November 25, 1998." (Record - Letter from Jeffrey M. Wakefield dated December 2, 1998, attached to Motion to Reinstate as Exhibit 7). Mr. Segal was not copied on this letter.

Subsequently, on April 7, 2000, Mr. Sorrells sent a second Request for Production of Documents to Dr. Tarakji. These requests were, more or less, identical to the first set filed in 1998. (Record - Plaintiff's Second Request for Production of Documents). Once again, Mr. Segal did not sign off on any of the pleadings, nor was he listed on the Certificate of Service. (*Id.*) Apparently, Mr. Wakefield and Mr. Sorrells once again conversed about these requests, as is evidenced by Mr. Wakefield's letter to Mr. Sorrells dated April 11, 2000. (Record - Letter from Jeffrey M. Wakefield, April 11, 2000, attached to Motion to Reinstate as Exhibit 8). Mr. Wakefield was seeking a six-month extension to answer the requests. Again, Mr. Segal was not copied on the April 11, 2000, letter. (*Id.*)

It appears from the Court's docket sheet (Record - Docket Sheet), that Dr. Tarakji never filed any response to Mr. Sorrells' Requests for Production of Documents. During the course of this time,

Dr. Rashid and Mr. Segal were advised by Mr. Sorrells that he was working on the case and that the same was proceeding. (Record - Segal Aff. at ¶ 5; Affidavit of Richard C. Rashid, M.D. at ¶ 6; and Affidavit of Charles Rashid ["Charles Rashid Aff.,"] at ¶ 6 - 7, attached to Motion to Reinstate as Exhibit 10).

On July 18, 2001, the trial Court entered an order dismissing the action, together with seventy-one (71) other cases, for failure to pay a twenty-dollar fee pursuant to West Virginia Code section 59-1-11(b)(11). (Record - Order attached to Motion to Reinstate as Exhibit 11). Significantly, a March 30, 2001 letter from the Kanawha County Circuit Clerk that was apparently intended to give notice of the required fee (Record - Clerk Letter, March 30, 2001, attached to Motion to Reinstate as Exhibit 12), and thus provide an opportunity for the twenty-dollar fee to be paid prior to dismissal, was not sent to Dr. Rashid's counsel prior to the July 18, 2001 dismissal order. Mr. Segal received the March 30, 2001 notice letter only on July 20, 2001, when it was forwarded to him together with a copy of the dismissal order. (Record - Segal Aff. at ¶ 6 - 7; and Affidavit of Earlena G. Titta, Legal Assistant ["Titta Aff.,"] at ¶ 7, attached to Motion to Reinstate as Exhibit 13).

On July 20, 2001, the day that Mr. Segal received the Dismissal Order, Mr. Segal made a contemporaneous, hand-written note to Mr. Staun, an attorney at The Segal Law Firm, indicating the fact that he did not get a request for the twenty-dollar fee. (Record - Attached to Rashid Reply as Exhibit 1). The docket sheet of the case as maintained by the Clerk does not indicate to whom the March 30, 2001 letter was allegedly sent. The docket sheet specifically states that the July 5, 2001, Dismissal Order was mailed to "S. Segal, J. Wakefield." Significantly, no such notation appears next to the Clerk's entry about the March 30, 2001 letter. (Record - Docket Sheet - compare line 13 to lines 10 and 11).

Before the trial court, Dr. Tarakji proffered that testimony from the Circuit Clerk's office would reveal that letters were sent to "counsel of record." Yet, the fact remains that Dr. Rashid's counsel did not receive the notice. Further, when Ms. Titta (Mr. Segal's paralegal) called the Circuit Clerk's office regarding the March 30, 2001 letter, she was told, unequivocally, that the letters were not mailed to Mr. Segal and Mr. Wakefield until July 18, 2001. (Record - *Titta Affidavit* at ¶ 7). It is also telling that Dr. Tarakji's counsel, Mr. Wakefield, does not provide an affidavit indicating that he ever received this notice.

For whatever reason, Mr. Sorrells was not even sent a copy of the Dismissal Order by the Clerk. Regardless, Mr. Sorrells was contacted by The Segal Law Firm about the matter whereupon Mr. Sorrells advised that he would take care of it. (Record - Segal Aff. at ¶ 8 - 9; Affidavit of Mark R. Staun ["Staun Aff."], ¶ 6, attached to Motion to Reinstate as Exhibit 14). Although Dr. Rashid was made aware of the dismissal of the case, Mr. Sorrells continued to advise him during the time period after the dismissal that he was taking care of the matter. At some point, Mr. Sorrells advised Dr. Rashid that he had a plan to refile the case in front of a different judge as the ten-year statute of limitations on his cause of action would not run until 2005. (Record - Richard Rashid Aff. at ¶ 8; and Charles Rashid Aff. at ¶ 8).

Apparently, Mr. Wakefield and Mr. Sorrells had a conversation on January 28, 2003 wherein Mr. Sorrells requested that Mr. Wakefield provide him with Dr. Tarakji's income tax records for the years 1995-97. (Record - Jeffrey M. Wakefield letter, attached to Motion to Reinstate as Exhibit 15). According to the letter, Mr. Sorrells advised Mr. Wakefield that he needed the income tax returns so that Dr. Rashid could determine whether or not he wanted to reassert the claims in another separate civil action. Despite the fact that Mr. Wakefield was given an open-ended extension to

reply to Plaintiff's First Request for Production of Documents, and a six month extension on the Second Set of Requests for Production of Documents, Mr. Wakefield refused to provide any information, taking the position that the Court had dismissed the matter on July 5. Mr. Segal was not copied on the letter reflecting the request, the discussion and the refusal on behalf of Dr. Tarakji. (*Id.*)

Prior to the expiration of the ten-year statute of limitations which governed the primary breach of contract claims, Mr. Sorrells filed a separate action, Civil Action No. 05-C-597, which was assigned to Judge Jennifer Bailey Walker. The Complaint in this second action, more or less, reasserted the same allegations as those put forward in Civil Action No. 97-C-725. Mr. Sorrells filed the Complaint, and unbeknownst to Mr. Segal, apparently "signed" Mr. Segal's name to the same and likewise placed Mr. Segal's name on the Summons. (Record - Complaint and Summons from Civil Action No. 05-C-597, attached to Motion to Reinstate as Exhibit 16).

Mr. Wakefield subsequently filed a Motion to Dismiss the matter on April 20, 2005, which was served on Mr. Segal. The receipt of the Motion to Dismiss caused Mr. Segal's office to contact Mr. Sorrells asking what was going on with the case and the dismissal, as Mr. Segal had not been advised of the refiling of the Complaint. (Record - Segal Aff. at ¶ 12; Staun Aff. at ¶ 9). Upon inquiry, Mr. Sorrells advised that he had refiled the case and again represented that he was "taking care of the matter." He further stated that he would be filing a response to Dr. Tarakji's Motion to Dismiss. (Record - Staun Aff. at ¶ 10). Mr. Sorrells represented that refiling of the case was proper and that he saw no merit in Dr. Tarakji's Motion. (Record - Staun Aff. at ¶ 10). Mr. Sorrells' analysis apparently was that the dismissal was "without prejudice" due to the language in the dismissal order, that it could be "reinstated" and relied on the fact that there was a ten year statute of limitations on the primary cause of action.

Mr. Wakefield contacted Mr. Sorrells' office regarding scheduling a hearing. Once again, he failed to copy Mr. Segal on the correspondence. (Record - Jeffrey M. Wakefield letter dated April 20, 2005, attached to Motion to Reinstate as Exhibit 17). On April 27, 2005, a Notice of Hearing was sent by Dr. Tarakji noticing the hearing on the Motion to Dismiss for June 24, 2005. Mr. Segal was included on this Notice. As a result, Mark R. Staun, one of the attorneys at The Segal Law Firm, contacted Mr. Sorrells' office and was reassured that a responsive pleading would be filed in advance of a hearing scheduled for June 24, 2005. (Record - Staun Aff. at ¶ 11). It was not.

Instead, Mr. Sorrells left the active practice of law for an extended period of time for personal health reasons. Upon learning of Mr. Sorrells' situation, Mr. Staun contacted Mr. Wakefield to advise him of the unfortunate circumstance with Mr. Sorrells and to request that the hearing be rescheduled. (Record - Staun Aff. at ¶ 12). The hearing on the Motion of Dr. Tarakji to dismiss was rescheduled for September 16, 2005. Subsequently, Mr. Sorrells' wife, Amy Sorrells, contacted Mr. Staun advising that Mr. Sorrells would no longer be working on the Rashid matter and requested that the file be removed from Mr. Sorrells' office and delivered to The Segal Law Firm. (Record - Staun Aff. at ¶ 13). A representative of Mr. Staun's office picked up the file on July 1, 2005. (Record - Titta Aff. at ¶ 5). That file included no notice of any Rule 41(b) action forthcoming for failure to pay a twenty dollar statutory fee.

Dr. Tarakji's Motion to Dismiss was subsequently re-noticed at the request of Mr. Wakefield for November 1, 2005. Mr. Segal and Mr. Wakefield conferred regarding Dr. Tarakji's Motion to Dismiss in Civil Action No. 05-C-597. Upon review of the proceedings and the law, Mr. Segal determined that it would not be appropriate to resist the motion to dismiss in that civil action in light of the trial court's prior dismissal and under West Virginia Rule of Civil Procedure 41(b). Instead,

it was determined that since the action was improperly dismissed with no prior notice and opportunity to be heard, reinstatement of Civil Action No. 97-C-725 should be sought. Accordingly, the undersigned was retained for the purposes of advancing reinstatement.

IV. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in ignoring the plain mandate of Rule 41(b) of the West Virginia Rules of Civil Procedure and case law requiring that prior to an involuntary dismissal for failure to pay a twenty-dollar fee, or for other reasons, notice and an opportunity to be heard must be provided to all parties of record.

2. The trial court erred in misapplying the case law to the facts in failing to find good cause for reinstatement notwithstanding the expiration of three terms of court due to accident, mistake and/or fraud.

3. The trial court erred in failing to provide a time and date for full hearing on the Motion for Reinstatement while at the same time making clearly erroneous findings of fact.

V. DISCUSSION OF THE LAW

A. THE ORDER OF INVOLUNTARY DISMISSAL ENTERED ON JULY 5, 2001, IS NULL AND VOID AND OF NO LEGAL EFFECT INASMUCH AS RULE 41(b) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE EXPLICITLY MANDATES THAT BEFORE A COURT MAY DISMISS AN ACTION UNDER RULE 41(b), NOTICE AND AN OPPORTUNITY TO BE HEARD MUST BE GIVEN TO ALL PARTIES OF RECORD AND NO SUCH REQUIRED PRIOR NOTICE WAS GIVEN TO APPELLANT, DR. RASHID.

The Circuit Clerk's docket sheet provides that on March 30, 2001, there was "Not[ice] of Three Year Rule." Unlike other entries on the docket sheet, there is no indication to whom such notice was sent. (Record - Docket Sheet line 10 and 11).

In the face of Affidavits that Dr. Rashid's trial lawyer, Mr. Segal and other counsel, did not receive notice and in the absence of a hearing, the trial court inexplicably found that "[a]ccording to the Court's docket, two letters were sent on March 31, 2001, informing the parties, through counsel, that the action would be dismissed unless twenty dollars was remitted to the Kanawha County Circuit Court Clerk by May 1, 2001, pursuant to W.Va. Code § 59-1-11(b)." Notably, counsel for Dr. Tarakji has not produced a copy of a notice letter sent to him.

West Virginia Code section 59-1-11 governs fees to be charged by the clerks of circuit courts. Specifically at issue here is the subdivision providing that fees shall be charged and collected "for additional service (plaintiff or appellant) where any case remains on the docket longer than three years, for each additional year or part year, twenty dollars." W.Va. Code § 59-1-11(b).

The Notice, which was a mass notice purportedly sent to parties for some seventy-two (72) civil actions and which was not received by Dr. Rashid's counsel prior to dismissal, provided that the twenty-dollar fee was to be paid by May 1, 2001. (Record - Notice Letter attached to Motion to Reinstate as Exhibit 12). Upon information and belief, this "mass notice" took place at a time when a newly-elected circuit court judge was undertaking to clean-up an inherited and reportedly large civil case docket backlog.

The mass notice, which was not received by any party in this litigation, stated that failure to pay the twenty dollars would result in referral to the court for dismissal pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. (*Id.*)

Rule 41(b) regarding involuntary dismissal provides in pertinent part that:

Any court in which is pending an action . . . wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be continued . . .

Rule 41(b) W. Va. R. Civ. Pro.

Significantly, Rule 41(b) explicitly provides that prior to such a dismissal, notice and an opportunity to be heard must be given to all parties. Specifically, Rule 41(b) by its explicit terms mandates as follows:

Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record.

Rule 41(b) W. Va. R. Civ. Pro. (emphasis added).

Here, there was no notice and no opportunity to be heard prior to dismissal. Accordingly, as a matter of law, the dismissal was of no legal effect.

Not surprisingly, and in accordance with the plain mandate of Rule 41(b), the West Virginia Supreme Court has held that a party must be given notice and an opportunity to be heard prior to any dismissal under Rule 41(b). *See Dimon v. Mansy*, Syl. pt. 2, 198 W.Va. 40, 479 S.E.2d 339 (1996) (reversing and remanding for predismissal hearing in case involving a Rule 41(b) dismissal for failure to prosecute). Significantly, the notion that the availability of possible reinstatement as a corrective remedy for a dismissal without prior notice and opportunity to be heard was soundly rejected by the Court in *Dimon*. As Justice Cleckley, writing for the Court, stated “today, we make explicit that before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record.” *Dimon*, 198 W.Va. at 49, 479 S.E.2d at 348. The Rule itself is explicit in this regard.

As discussed by the Court in *Dimon*, the reason for prior notice and opportunity to be heard is the fact that the judicial authority to dismiss under Rule 41(b) has harsh consequences in operating as an adjudication on the merits. The draconian consequences of a dismissal with prejudice under

Rule 41(b) should only be used in flagrant situations. The objective of the system of justice is to dispose of cases on their merits. *Dimon*, 198 W.Va. at 45-46, 479 S.E.2d at 344-45. "In our judicial system . . . it is apodictic that all parties receive adequate notice that a particular issue is being considered by the court, and an opportunity to present evidence on that issue before the court renders its ruling." *Dimon*, 198 W.Va. at 46, 479 S.E.2d at 345 (emphasis in original).

Dimon was in the context of a failure to prosecute. The issue here was the clerk's charging and collection of a twenty-dollar fee. For want of payment of twenty dollars, and without prior notice, Dr. Rashid's civil action, which had an unexpired ten year statute of limitation, suffered the consequence of a dismissal with prejudice. As the Court in *Dimon* acknowledged, a policy of stopping litigation does not outweigh the showing of the truth. The dismissal of Dr. Rashid's civil action was the most severe sanction that a litigant can suffer. And it was done without notice in contravention of the Rule and the case law.

Pursuant to the instructions set out in *Dimon*, even if the March 30, 2001 Clerk letter stating "[p]lease remit the appropriate court costs for your case(s) on or before May 1, 2001, or they will be referred to the court for dismissal pursuant to Rule 41(2)(b) of the Rules of Civil Procedure"(emphasis added) had been provided to Dr. Rashid and his counsel, it would not have constituted the required notice and opportunity to be heard. The Clerk does not have the power to dismiss actions for nonpayment of fees. If the Clerk properly sent letters and if parties failed to pay the fee, the proper course would have been for the Clerk to so inform the court. That is, the matter of nonpayment of fees should have been "referred" to the court. Upon such information and referral and pursuant to the procedure set forth in *Dimon* and the Rule, the court, if contemplating involuntary dismissal, was required to "send a notice of its intent to do so to all counsel of record." *Dimon*, at Syl. pt. 2.

The required pre-dismissal notice from the trial court is essentially a rule to show cause why the matter should not be dismissed. "The notice shall inform that unless the plaintiff shall file and duly serve a motion within fifteen days of the date of the notice, alleging good cause why the action should not be dismissed, then such action will be dismissed, and that such action also will be dismissed unless plaintiff shall request such motion be heard or request a determination without a hearing. Second, any party opposing such notice shall serve upon the court and the opposing counsel a response to such motion within fifteen days of the service of such motion, or appear and resist such motion if it be sooner set for hearing." *Id.* The *Dimon* syllabus point continues to explicitly set forth the mandatory pre-involuntary dismissal procedure. Here, it is undisputed that no such required notice was ever sent by the trial court to any party or counsel.

The trial court refused to address or acknowledge the requirement of pre-dismissal notice. The trial court, in the face of: (1) explicit Affidavits denying receipt of the so-called mass notice from the clerk's office; (2) no indication on the clerk's docket sheet regarding to whom the notice was purportedly sent; (3) no submission from counsel for Dr. Tarakji that they in fact received such a "notice"; (4) no prior notice and opportunity to be heard and (5) in the absence of a hearing, simply ignored the plain mandate of Rule 41 and the case law direction of the Supreme Court. The trial court also wholly disregarded the *Dimon* rejection of the notion that an opportunity for a post-dismissal hearing corrects the failure to provide pre-dismissal notice and opportunity to be heard.

As a result of the failure to provide pre-dismissal notice and opportunity to be heard, the Dismissal Order entered July 5, 2001, was *void ab initio*. It had no legal effect. It is an absolute nullity as it contravenes the statute and fundamental due process principles. *See, e.g. Black's Law Dictionary* (8th ed. 2004); *State v. Gaskins*, 210 W.Va. 580, 558, S.E.2d 579 (2001) (holding that a

citation that fails to contain a time within which the subject of the citation must appear as required by statute and due process principles embodied in the statute, renders the citation *void ab initio*); *Dimon, supra*. The trial court erred as a matter of law in refusing to apply the plain mandate of the Rule and the case law requiring pre-dismissal notice.

B. ALTERNATIVELY, REINSTATEMENT SHOULD HAVE BEEN GRANTED NOTWITHSTANDING THE EXPIRATION OF THREE TERMS OF COURT DUE TO GOOD CAUSE BASED UPON ACCIDENT, MISTAKE AND/OR FRAUD.

Alternatively, assuming for the sake of argument that this Court changes course, vitiates the plain language of the Rule, overrules prior precedent and permits dismissal under Rule 41(b) despite the lack of prior notice and opportunity to be heard, then it should find that the trial court abused its discretion in rejecting Dr. Rashid's "good cause" argument for reinstatement of his civil action despite the expiration of three terms of court.

In *Arlans Dep't. Store of Huntington v. Conaty*, 162 W.Va. 893, 253 S.E.2d 522 (1979), the Court explicitly adopted the generally accepted view that a court can reinstate an action after the expiration of the time specified in the rule for making a reinstatement motion where there is a showing of fraud, accident or mistake. *Arlans*, 162 W.Va. at 899, 253 S.E.2d at 526. The Court "[h]eld that when proper grounds are alleged and proven a circuit court has the power and authority to set aside a final order in a case discontinued after the time prescribed for filing reinstatement motions under R.C.P. 41(b) has expired." *Arlans*, 162 W.Va. at 900, 253 S.E.2d at 527. The "proper grounds" consist of "good cause" shown, such as fraud, accident or mistake. *Arlans*, Syl. pt. 1, 162 W.Va. 893, 253 S.E.2d 522.

While there has been no formal withdrawal of Mr. Sorrells as counsel, for all practical purposes, he is no longer serving as counsel. Upon information and belief, Mr. Sorrells has suffered from some incapacity or disability. When this incapacity or disability began is not known. What is known is that at some point in time, Mr. Sorrells absented himself from the practice of law. In the summer of 2005, his wife called an attorney at The Segal Law Firm to advise that Mr. Sorrells would no longer be working on the Rashid matter and further requesting that The Segal Law Firm, which had provided the services of Mr. Segal solely in anticipation of serving as trial counsel in the event the matter progressed to trial, pick up the file. The Segal Law Firm picked up the file from Mr. Sorrells' office on July 1, 2005. Subsequently, Mr. Segal proceeded to carry the water with respect to the Motion to Dismiss in the second action filed by Mr. Sorrells. Upon concluding that Mr. Sorrells' approach in refiling was misplaced, an Order Granting Motion to Dismiss was entered by Judge Walker. The undersigned counsel was retained for purposes of advancing the Motion for Reconsideration in the improperly dismissed action.

The present case should be reinstated notwithstanding the expiration of three terms of court because good cause exists on the basis of (1) mistake in the form of negligence (or perhaps impairment) on the part Dr. Rashid's former counsel, Bradley Sorrels; and/or (2) affirmative fraud on the part of Mr. Sorrells based upon representations made to his trial counsel and to Dr. Rashid regarding the handling of the dismissal.

In this case, assuming for the sake of argument, the validity of the trial court's Dismissal Order, Mr. Sorrels was at the very least negligent in failing to appreciate that even though there was a ten year statute of limitation, such Dismissal Order operated as an adjudication upon the merits, and that the only means of reviving the cause of action was to seek reinstatement within three terms

after entry of the dismissal order. Mr. Sorrels was possibly working under the misapprehension that because the Order made reference to the opportunity to seek reinstatement, which is otherwise provided in Rule 41(b), the dismissal did not operate as an adjudication upon the merits. Such failure to seek reinstatement clearly amounts to negligence on the part of Plaintiff's lawyer, Mr. Sorrels, which fulfills the requirement under *Arlan's* that the party seeking untimely reinstatement demonstrate a "mistake." Certainly, Dr. Rashid does not appreciate the distinctions between refile and reinstatement or what orders operate as adjudication on the merits. See *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988) (concluding in the analogous context of Rule 60(b)(1) that "when the party is blameless, his attorney's negligence qualifies as a 'mistake' or as 'excusable neglect'").

Importantly, the second action filed by Mr. Sorrels was otherwise within the applicable ten-year statute of limitation. See West Virginia Code section 55-2-6 (1923) (imposing 10-year statute of limitation on actions arising from written contract). There had also been discussion between Mr. Sorrells and counsel for Dr. Tarakji prior to the filing of the second action. Dr. Tarakji was therefore clearly placed on notice within the period of limitation that Dr. Rashid intended to further prosecute his causes of action. Moreover, it was Dr. Tarakji, through his counsel, who had sought and obtained an open-ended discovery extension, thus clearly demonstrating the absence of any desire for prompt adjudication of the instant case. Consequently, there was no substantial prejudice to Dr. Tarakji and the trial court abused its discretion, given the facts, in concluding that Dr. Tarakji would suffer prejudice if the action was reinstated.

Reinstatement is also justified in this case based upon the positive misconduct of Mr. Sorrels in informing his client and trial counsel that he was "taking care" of remedying the dismissal, when

in fact he apparently completely ignored the dismissal. Justice Starcher in his concurring opinion in *Covington v. Smith*, 213 W. Va. 309, 582 S.E.2d 756 (2003), recently outlined the “positive misconduct” rule that “where an attorney’s inaction rises to a level of active, positive misconduct, the ‘attorney’s authority to bind the client does not permit him to impair or destroy the client’s cause of action.’” 213 W. Va. at 326, 582 S.E.2d at 773 (Starcher, C.J., concurring) (quoting *Daley v. County of Butte*, 227 Cal. App.2d 380, 391, 38 Cal. Rptr. 693, 700 (1964)). In determining whether to immunize a party from the misconduct of his or her lawyer, “[t]he issue . . . [is] whether counsel’s conduct amounted to ‘positive misconduct’ by which plaintiff was “effectually and unknowingly deprived of representation.”” *Id.* at 327, 582 S.E.2d at 774 (quoting *Carroll v. Abbott Laboratories, Inc.*, 32 Cal.3d 892, 187 Cal. Rptr. 592, 592, 654 P.2d 775, 778 (1982)).

In this, case, while Dr. Rashid was made aware of the trial court’s dismissal, Mr. Sorrells continued to advise him during the time period thereafter that the matter was being taken care of, and that he intended to refile the case in front of a different judge prior to the running of the ten-year statute of limitations. (Record - Richard Rashid Aff. at ¶ 8; Charles Rashid Aff. at ¶ 8). The failure of Mr. Sorrells to discuss with his client the potential impact of the dismissal on the viability of any future action amounts not only to negligence, but to the sort of “positive misconduct” justifying the Court undertaking to remedy the harm that would otherwise be done to Dr. Rashid.

Likewise, Mr. Sorrells advised trial counsel that he was taking care of remedying the dismissal. Both Mr. Segal, whose role in the matter was limited by agreement to serving as trial counsel in the event the case did not resolve and proceeded to a jury trial, and the client, Dr. Rashid, relied on Mr. Sorrell’s representations that he was taking care of remedying the dismissal.

Mr. Sorrells' affirmative action in informing his client and co-counsel that he was "taking care" of remedying the dismissal when he in fact sought to file a new lawsuit, falls squarely within the definition of "fraud, accident or mistake." Clearly, Mr. Sorrells was mistaken in his belief that he could refile the case within the ten year statute of limitations. Mr. Sorrells' conduct essentially deprived Dr. Rashid, who is blameless in this matter, of representation.

The trial court concluded that this Honorable Court has not held, and it would not hold, "that a client is automatically absolved of the sins of the lawyer and thereby relinquished of an obligation to abide by court rules and orders." Of course, "automatic absolution" is not the standard for reinstatement. Dr. Rashid did not argue for an automatic absolution. Rather, Dr. Rashid sought reinstatement for good cause under the principles of *Arlans* and *Covington*. The conclusions of the trial court render the "good cause" reinstatement principles meaningless. It was an abuse of discretion to apply the "good cause" principles in the context of the facts as known here and certainly it was an abuse of discretion to fail to provide a requested hearing on the Motion for Reinstatement.

C. IT WAS AN ABUSE OF DISCRETION TO ENTER AN ORDER DENYING THE MOTION FOR REINSTATEMENT WITHOUT HOLDING A HEARING FOR THE DEVELOPMENT OF EVIDENCE.

In the first instance of the involuntary dismissal, there was a failure of process, procedure and fairness when no mandatory pre-dismissal notice and opportunity to be heard was provided to Dr. Rashid's counsel regarding the Clerk's demand for a twenty-dollar fee and the proposed sanction of dismissal in the event of non-payment. As addressed above, it is the position of Dr. Rashid that such pre-dismissal notice is mandatory and failure to provide it renders the dismissal order *void ab initio*.

If there is some conflict in the record regarding the giving of the notice as the trial court suggests there is, then a hearing should have been held on that issue.¹

The failure to provide pre-dismissal notice and opportunity to be heard was compounded when the trial court failed to afford Dr. Rashid a time and date for a hearing on the Motion for Reinstatement. The case law on the issue of good cause for reinstatement beyond three terms of court make plain that a hearing is required in order to afford an opportunity for the development of evidence and proper consideration of the circumstances. See, *Arlans, Covington* and *Tolliver, supra*, all of which properly included hearings on the motions for reconsideration. As the Court stated in *Covington*:

To assess whether a plaintiff has demonstrated good cause in a particular case requires the reviewing court to conduct a factual inquiry.

Covington, 213 W.Va. 309 at 322, 582 S.E.2d at 769.

The question of "good cause" is necessarily fact specific. When one couples the failure of the trial court to conduct a hearing with an erroneous finding that Dr. Rashid did not file a reply memorandum, it is apparent there was an abuse of discretion in failing to fairly conduct a factual inquiry into the assertion of good cause.

VI. CONCLUSION

WHEREUPON, based upon the foregoing, the Appellant/Plaintiff, Richard C. Rashid, M.D., respectfully requests that this Honorable Court reverse the July 5, 2001, Order of the Circuit Court

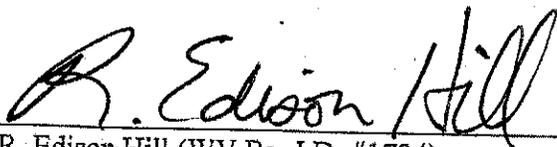
¹Dr. Rashid's position is that there is no conflict. Counsel has stated under oath that there was no notice received. Opposing counsel offered no evidence that he received such notice and the docket is at best equivocal. Nevertheless, if the trial court determined that there was conflict, then an evidentiary hearing should have proceeded.

of Kanawha County, West Virginia, involuntarily dismissing Civil Action No. 97-C-725, for failure to pay a twenty-dollar fee, and requests that this matter be remanded to the lower court for reinstatement and adjudication of the claim upon its merit.

Respectfully submitted,

RICHARD C. RASHID, M.D.,

By counsel:

A handwritten signature in black ink that reads "R. Edison Hill". The signature is written in a cursive style and is positioned above a horizontal line.

R. Edison Hill (WV Bar I.D. #1734)

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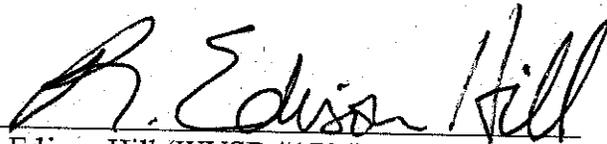
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CERTIFICATE OF SERVICE

I, R. Edison Hill, counsel for Appellant/Plaintiff, hereby certify that I have served the foregoing "*Brief of Appellant/Plaintiff, Richard C. Rashid, M.D.*," upon counsel of record for Respondent via U.S. Mail this 19th day of October, 2007 as follows:

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