

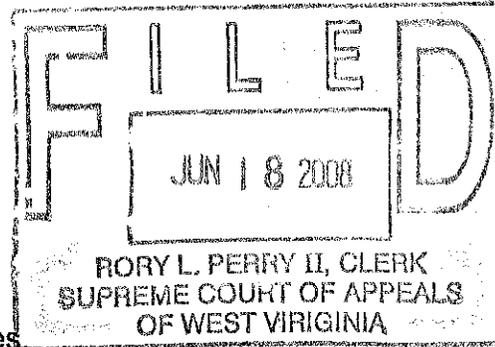
IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
CHARLESTON

JENNIFER L. CARUSO,  
Plaintiff/Appellant,

v.

BRIAN N. PEARCE and  
P&T TRUCKING, INCORPORATED,

Defendants/Third-Party Plaintiffs/ Appellees



v.

QUALITY MACHINE CO., INC.,,  
GARY K. KNOTTS and JOYCE K. HALL,

Third-Party Defendants/ Appellees.

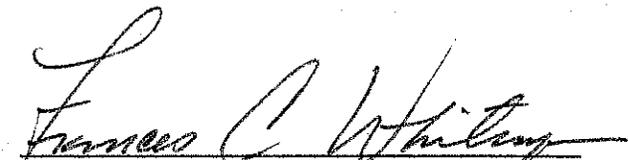
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FROM THE CIRCUIT COURT OF KANAWHA COUNTY  
CASE NO. 04-C-2728

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**BRIEF OF APPELLANT, JENNIFER L. CARUSO**

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## KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal from the Circuit Court of Kanawha County wherein this Honorable Court is being asked to review whether the Court below abused its discretion by dismissing a case under Rule 41(b) when there was good cause shown for the dormancy and delay, and there was no prejudice to the Appellees (Defendants below), and the dismissal order was entered in a case where the Court *failed* to enter any Rule 16(b) scheduling order.

## STATEMENT OF FACTS

This case was initiated by and through a civil case which was filed in the Circuit Court of Kanawha County, West Virginia, on October 12, 2004. After the complaint was filed, Appellees Pearce and PG&T filed third-party complaints against Appellees Quality Machine and Knotts on November 22, 2004. Appellees Quality Machine and Knotts filed their answers to the third-party complaint on January 14, 2005. The Court never scheduled a scheduling conference or entered a Rule 16(b) scheduling order. Appellees served upon Plaintiff's counsel interrogatories and requests for production on November 10, 2004, which Appellant answered and served upon Appellees on March 8, 2005, after an agreed extension, and after an agreement by the Appellant and Appellee to permit the filing of third-party complaints by the Appellee against others. The Circuit Court of Kanawha County entered an Order on July 25, 2005, permitting the filing of a third-party complaint by Appellees P&T Trucking and Pearce against Joyce K. Hall, said Order having been signed by Mr. Gandee (counsel for Appellees Pearce and P&T Trucking), Terri Tichenor (of the law firm of Whiteman Burdette, PLLC, who was counsel for Appellant), and Ms. Hall's counsel, Ms. Klee and Mr. Waller. On October 7, 2005, a third-party

complaint was filed by Appellee P&T against Appellee Hall. Appellee Hall filed her answer to the third-party complaint on November 3, 2005. On November 28, 2005, Appellees Quality Machine and Knotts filed a cross claim against Defendant Hall. On December 6, 2005, Appellee Hall filed her answer to the cross claim and her own cross claim against Appellees Quality Machine and Knotts. Appellees Quality Machine and Knotts filed their answer to the cross claim on December 27, 2007. Basically, up to that point, the Appellees and Third-Party Appellees were filing claims and answers against each other, positioning themselves for further litigation against each other.

Thereafter, on March 25, 2006, Appellees Quality Machine and Knotts sent discovery requests to Appellee Hall and Appellees Pearce and P&T. Appellee Hall responded to those requests on May 31, 2006. Appellee Hall sent Discovery requests to Appellees Pearce and P&T and Appellees Quality Machine and Knotts on June 9, 2006. Appellees Quality Machine and Knotts responded on July 10, 2006 and July 11, 2006. Appellees Pearce and P&T responded to discovery requests on July 12, 2006. Due to the complex nature of the litigation and the number of parties involved, Appellant's counsel, Ms. Tichenor, mistakenly believed that some written discovery responses were still outstanding and did not realize that all written discovery had been concluded in July, 2006.

On July 31, 2007, the Circuit Court of Kanawha County, Judge Irene Berger presiding, served Notice to the parties stating that a review of the docket showed that there had been no activity in the case during the prior year, and that pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, the matter would be dismissed from the docket unless the Appellant's counsel filed and duly served a motion alleging good cause why the action should not be dismissed.

Appellant's counsel did file a Motion Requesting Stay of Dismissal on August 10, 2007, and Amended Motion Requesting Stay of Dismissal, on August 16, 2007. The Court scheduled a hearing to hear the motion on October 4, 2007.

Appellant and Appellant's counsel did take the Court's Notice of its consideration of a Rule 41(b) dismissal very seriously, and accordingly did not want to appear before the Court on October 4<sup>th</sup> having to say that she nor counsel did nothing between the time of the Court's Notice (July 31, 2007) and October 4<sup>th</sup> to prosecute this case. Once the Notice was received by Appellant's counsel, Attorney Terri Tichenor did cause to be filed the above-referenced Motion and Amended Motion, which did provide good cause why the case should not be dismissed. Thereafter, the Partner of the law firm, Kristine Burdette, took over the representation in the case and began her efforts in scheduling depositions. The following efforts took place between July 31, 2007 and October 4, 2007:

1. Immediately, on August 1, 2007, after receiving the Court's Notice, counsel for Appellant contacted defense counsel and offered the Appellant for deposition or an independent medical examination. Appellant's counsel also requested that mediation be scheduled. Appellant's counsel again contacted defense counsel on August 16, 2007, to inquire regarding mediation, an Independent medical examination or discovery that the Appellee requested.
2. On August 22, 2007, Appellant's counsel's secretary, Candi, called Mr. Halkias (for Appellee Hall) and left a message for him inquiring about available dates for depositions.
3. On August 24, 2007, Appellant's counsel's secretary, Candi, called Mr. Halkias and left a message, again inquiring about available dates for depositions. Mr. Halkias

returned the phone call and indicated that he and Ms. Klee (for Appellees Quality Machine and Knotts) did not want to do anything in the case inasmuch as they were waiting for the outcome of the hearing scheduled for October 4, 2007.

4. On August 24, Appellant's counsel's secretary, Candi, called Mr. Gandee (for Appellees P&T Trucking and Pearce) and left him a message inquiring about available dates for depositions. There was no return phone call on that date.
5. On August 24, 2007, Appellant's counsel's secretary, Candi, called Ms. Klee and left her a message inquiring about available dates for depositions. There was no return phone call on that date.
6. On August 28, 2007, Appellant's counsel requested dates to depose each Appellee and by separate letter on the same date, counsel requested dates for mediation. There was no response.
7. On August 29, 2007, Appellant's counsel's secretary, Susie, called Mr. Gandee and left him a message inquiring about his availability for depositions, specifically for James Taylor (witness) and Trooper J.E. Elmore, on September 12, 2007, at 3:00 p.m. and 3:30 p.m.. There was no return phone call from Mr. Gandee on that date. Mr. Gandee did fax a letter to Appellant's counsel indicating that he thought the depositions were not proper and should be cancelled. Appellant's counsel faxed a letter to Mr. Gandee indicating the depositions would not be cancelled and she intended to proceed with litigation pending the Court's ruling. Appellant's counsel again requested cooperation in agreeing to a mediator. By letter dated August 30, 2007, Mr. Gandee again requested that all discovery cease and finally, advised Appellant's counsel that he was unavailable on September 19, 2007, the date which

was set for the deposition of the Appellant's physical therapist. Appellant's counsel responded by letter dated August 30, 2007, and August 31, 2007, again, asking for Mr. Gandee's availability so that the September 19, 2007, deposition could be moved to accommodate his schedule. Appellant's counsel also asked Mr. Gandee to supply any law supporting his position that discovery was not appropriate pending the Court's ruling.<sup>1</sup> Mr. Gandee confirmed by letter dated August 31, 2007, that he would not supply any alternative dates for the September 19, 2007 deposition.

8. On August 29, 2007, Appellant's counsel's secretary, Susie, called Mr. Halkias and left him a message inquiring about his availability for depositions, specifically for James Taylor (witness) and Trooper J.E. Elmore, on September 12, 2007, at 3:00 p.m. and 3:30 p.m. . . There was no return phone call from Mr. Halkias on that date.
9. On August 29, 2007, Appellant's counsel's secretary, Susie, called Ms. Kleeh and left her a message inquiring about her availability for depositions, specifically for James Taylor (witness) and Trooper J.E. Elmore, on September 12, 2007, at 3:00 p.m. and 3:30 p.m. There was no return phone call from Ms. Kleeh on that date.
10. On August 30, 2007 Mr. Gandee's office was contacted, and Appellant's counsel's secretary, Susie, spoke to Diane. Two dates (September 19 and October 2, 2007) were provided to Diane for desired depositions of Appellant's expert and Appellees' expert witnesses, and she indicated she would call back with Mr. Gandee's answer.

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<sup>1</sup>Appellant's counsel's review of the applicable law regarding Rule 41(b) dismissals led counsel to believe that counsel's efforts pending the Court's hearing were entirely relevant to whether or not the Court should dismiss Appellant's claim. In addition, as indicated, Appellant and Appellant's counsel took the Court's Notice very seriously and did not want to appear before the Court without taking action responsive to the Court's Notice.

On August 30, 2007, Mr. Gandee sent a letter by fax transmission indicating he did not want to schedule any depositions and that he would be out of town on September 19.

11. On August 31, 2007, Ms. Kleeh's office was contacted by Appellant's counsel's secretary, Susie and secretary, Tammy, took the message that Appellant's counsel desired to schedule several witness depositions. Ms. Kleeh did not return the phone call on that date.

12. On August 31, 2007, Mr. Halkias office was contacted by Appellant's counsel's secretary, Susie. Susie spoke with secretary Carol who indicated that it was okay with Mr. Halkias to schedule the depositions of Appellant's expert, Dr. David Lynch, and Appellee's expert, John Spadafore on October 2, 2007 and September 19, 2007, respectively.

13 Without the cooperation of Mr. Gandee and Ms. Kleeh, Appellant's counsel pressed forward to prosecute the case. Appellant scheduled the following depositions, sent notices of same to counsel, and issued subpoenas as follows:

- a. John Spadafore September 19, 2007, at 11:00 a.m.
- b. Dr. David Lynch October 2, 2007, at 3:00 p.m.
- c. James Taylor September 12, 2007, at 3:00 p.m.
- d. Trooper J.E. Elmore September 12, 2007, at 3:30 p.m.

14. In scheduling Appellant's expert, Dr. Lynch, for deposition, Appellant's counsel understood very well, that Appellant's counsel would be paying for his fees for the deposition. Typically, Appellee will schedule the deposition of Appellant's expert and accordingly will pay for that expert's fee for the deposition. Appellant and

counsel desired to have her case in a posture to resolve the case following the October 4 hearing date, if the Court had granted the Appellant's prayer.

15. Appellant's counsel scheduled the appearance of court reporters for each of the depositions.
16. By Order entered September 5, 2007, the Circuit Court of Kanawha County stayed all discovery pending the October 4, 2007, hearing on Appellant's Motion and Amended Motion Requesting Stay of Dismissal.
17. In response to the Court's Notice, Appellant's counsel had also attempted to scheduled mediation. Appellant's counsel contacted all counsel in an attempt to coordinate dates for mediation. There was no response to Appellant's counsel's request for available dates. Appellant did advise all counsel that, given the Court's Notice and the pending motion, the Appellant had no objection to scheduling mediation after the October 4 hearing, but Appellant's counsel wanted to advise the Court of a scheduled mediation date at the October 4 hearing.
18. Appellant's counsel also requested dates that the Appellees would be made available for deposition. There was no response to Appellant's request. Appellant's counsel, by her actions and in response to the Court's notice, has intended to take aggressive action by doing every single thing possible to litigate the case to its resolution. If the depositions had proceeded as scheduled and/or defense counsel had cooperated to choose mutually acceptable dates, every deposition that Appellant's counsel could anticipate which would be necessary to the defense would have been taken by the October 4, 2007 hearing. The only action left to take would have been to mediate the case. Appellant's counsel anticipated that if the

case was not then resolved by mediation, it would be *immediately* ready for trial.

## ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL

- I. The Court below erred by finding that Appellant's counsel failed to establish good cause why dormancy or delay existed, and then refusing to address the issue of Appellees' prejudice, if any.
- II. The Court below erred by entering a 41(b) dismissal order when there had been no Rule 16(b) scheduling order entered by the Court.
- III. Rule 41(b) dismissals should only be instituted when there are flagrant actions.

## POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

- I. The Court below erred by finding that Appellant's counsel failed to establish good cause why dormancy or delay existed, and then refusing to address the issue of Appellees' prejudice.

The Supreme Court of Appeals of West Virginia has recognized in Gray v. Johnson, 165 W. Va. 156, 163 (1980), that "[i]nvoluntary dismissal [under Rule 41(b) of the West Virginia Rules of Civil Procedure] for failure to prosecute should only occur when there is a lack of diligence by the Plaintiff and demonstrable prejudice to Defendant." (Emphasis added.) See also State ex rel. Lloyd v. Zakaib, 216 W. Va. 704 (2005). In the Court below, the Court failed to address both issues and ruled "Having found that no good cause for the dormancy or delay exists, this Court does not address the issue of the Defendant's prejudice, if any." Thus, the Court below, specifically refused to follow this Supreme Court of Appeals directive in Gray and Zakaib.

Judge Berger's dismissal in the case at bar was not legally appropriate when it is considered that the Appellant's counsel did everything to bring the case to the position of trial on October 4, 2007, if Appellees' counsel would have cooperated in scheduling depositions and mediation. Appellees' counsels' stonewalling and refusals to respond to requests to set depositions, as well as the Court's ordered stay of discovery, tied the Appellant's hands to argue at the October 4<sup>th</sup> hearing that the Appellant had acted with diligence in response to the Court's notice and that the case was ready to be resolved.

The Appellees failed to file any responsive pleadings to show that they were actually prejudiced by the dormancy of the proceedings of one year. In fact it would be difficult for the Appellees to argue that the dormancy prejudiced them at all because they did not seek to depose the Appellant's expert, treating physical therapist, an eyewitness to the accident

nor the investigating State Trooper. Appellees would be hard pressed to argue prejudice when they were not taking any action to proceed with their cases.

Further, Appellees were not prejudiced by the attempted actions of Appellant's counsel between July 31, 2007 and October 4, 2007, because Appellant's actions clearly were designed to meet the needs of Appellees Quality Machine and Knotts whose attorney, Teresa Kleeh, by her letter of August 6, 2007, indicated that if the Court (below) refrained from dismissing the case, it would appear that there was significant discovery remaining in the case. As Appellant's counsel, Ms. Burdette, indicated in her argument to the Court, "the second point is prejudice, is [sic] the Defendant has repeatedly indicated that they are not ready to proceed on the case." (Transcript at pp 10-11.) "At this particular point, your Honor, we are actually ready to proceed on the case and would ask the Court for a trial date." (Transcript at p 11, emphasis added.) It was further pointed out to the Court at the same time that "I'm sure the Court is familiar with the case of *Lloyd v. Zakaib* which did indicate if the Plaintiff is ready and approaches the Court for a trial date -- in that particular case this (sic) Court noted that a trial date was not given although Plaintiff would be ready." *Id.* Counsel further indicated to the Court that from the Plaintiff's (Appellant's) perspective there was nothing left to do to get ready for trial. All that we would be waiting for would be for the Appellees to get ready to try the case. The depositions which had been set, were attempted to be scheduled by Appellant's counsel to aid the Appellees in their own discovery regarding Appellant's expert and Appellant's treating physical therapist, both of which Appellant's counsel had access to and spoke with on numerous occasions, as well as the investigating officer and an eyewitness. *Id.*

The Appellant's counsel reemphasized again during the October 4 hearing, that "my

point is this: We would be ready to go to trial at any time. What we were waiting on at the time and what we let lapse was whether or not the Appellees would be ready to meet any type of settlement demand that we had and whether they were done with their discovery.” Id. at 12. Thus there would not have been any prejudice to the Appellees at that point in time on October 4, 2007. There would have been no prejudice suffered by the Appellees because all of the witnesses were still in tack, all of the evidence was still in tack, and the only issues in litigation were liability issues by and between the Appellees; not liability issues regarding the Appellant. Furthermore, the delay in the case could have only helped the Appellees because, as Appellant’s counsel indicated to the Court, the Appellees had repeatedly indicated that they were the ones who were not ready to proceed to trial – which is precisely why the Appellees cannot argue that they were prejudiced because if they were prejudiced, it would be by their own actions or, in this case, inaction.

When arguing to the Court regarding good cause for the delay, Appellant’s counsel laid out a number of reasons to find good cause. First, there had been a mistake made by trial counsel, Ms. Tichenor, who believed that there was outstanding discovery between the Appellees as liability had been argued between them. Second, it was argued that the Appellant should not be punished for trial counsel’s mistaken belief. Third, the good cause was that the Appellees needed to finish conducting their own discovery to resolve liability issues before they could respond to any demand which the Appellant would have sent to them. Fourth, and very importantly, trial counsel believed that the Court below should have entered a scheduling order pursuant to Rule 16(b) of the West Virginia Rules of Civil Procedure and counsel was waiting for that scheduling order to arrive which would indicate discovery deadlines and a trial date. From the Appellant’s side and perspective, the

Appellant caused no delay because Appellant was ready to proceed.

II. The Court below erred by entering a 41(b) dismissal order when there had been no Rule 16(b) scheduling order entered by the Court.

In regard to Rule 16(b) of the West Virginia Rules of Civil Procedure, it is provided that:

(b) Scheduling and Planning. Except in categories of actions exempted by the Supreme Court of Appeals, the judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time:

- (1) To join other parties and to amend the pleadings;
- (2) To file and hear motions; and
- (3) To complete discovery.

The scheduling order also may include:

(4) The date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) Any other matters appropriate in the circumstances of the case.

A schedule shall not be modified except by leave of the judge.

(Emphasis added.)

In the case at bar, Judge Berger never entered a Rule 16(b) scheduling order which would have clarified for all counsel the time in which discovery would be limited. In fact, Judge Berger erroneously indicated that if trial counsel had called her office that trial counsel would have been instructed to schedule a scheduling conference. This directive is in direct contravention of Rule 16(b) which is clearly not allowed pursuant to the rule. Inasmuch as the Court apparently is not in the routine of conducting scheduling conferences or issuing scheduling orders, in violation of Rule 16(b) of the West Virginia Rules of Civil Procedure, it is no wonder that trial counsel was not operating under any assumption of time limitation. Therefore, good cause has certainly been shown on this

issue.

Further, as Justice Davis indicated in her delivery of the opinion of the Court in State ex rel. Pritt v. Vickers, et al., 214 W. Va. 221, 226 (2003), “[u]nder Rule 16(b), it is mandatory that trial courts enter a scheduling order that limits the time to join parties, amend pleadings, file and hear motions, and complete discovery.” Accordingly, there is no discretion in whether a court can decide whether or not to enter a scheduling order. See Elliott v. Schoolcraft, 213 W. Va. 69, 73 n.5, (2002) (per curiam) (reversing summary judgment in part because the trial court did not enter a scheduling order in the case). In Drake v. Snider, et al., 216 W. Va. 574 (2004), the Court indicated that it has previously “cautioned” that it is mandatory that Circuit Courts must enter Rule 16(b) scheduling orders, and in that case since no scheduling order was entered, the Rule 56 dismissal was reversed. Since there was no scheduling order entered in the case at bar, and there was substantial abuse of discretion by not entering such an order and then dismissing the case at bar for “dormancy or delay,” the Appellant has shown another reason for good cause for the dormancy or delay. Finally, inasmuch as there was a substantial abuse of discretion in dismissing the case while no scheduling order existed, the decision of the Court below must be reversed.

III. Rule 41(b) dismissals should only be instituted when there are flagrant actions.

The Supreme Court of Appeals of West Virginia has recognized in Dimon v. Mansy, 198 W. Va. 40, 45 (1996), that dismissal pursuant to Rule 41(b) is a harsh sanction and should be considered only in flagrant cases. Dismissal should only be of last resort, and the Court should consider equitable principles, specifically, that the case should be

resolved by final judgment as opposed to a dismissal, and that the case should only be dismissed in flagrant cases. In Howerton v. Tri-State Salvage, Inc., 210 W. Va. 233, 236 (2001) (per curiam), no litigation was performed in the case for fourteen (14) months. This Court reversed a dismissal below indicating that the dismissal was unwarranted. ("Because dismissing an action for failure to prosecute is such a harsh sanction, dismissal with prejudice is appropriate only in 'flagrant' cases." (citation omitted)).

In Anderson v. King, 210 W. Va. 170, 172 (2001), the Court stated that there must be consideration of the work done prior to the year of dormancy. In the case at bar, written discovery was completed, and substantial amendments to pleadings were done. The Appellant's counsel had repeatedly spoken with the Appellant, the Appellant's expert, the Appellant's treating physical therapist, an eyewitness and the investigating State Trooper. The Appellees had failed to take any of the depositions of those persons.

In Callow v. Jacob, 201 W. Va. 665, 667 (1997), this Court ruled that "placing the burden of case perpetuation through the circuit court docket entirely upon the plaintiff, however, is unreasonable." This Court also recognized in Dimon v. Mansy, 198 W. Va. 40, 45 (1996), that "[t]he sanction of dismissal with prejudice for the lack of prosecution is most severe to the private litigant and could, if used excessively, disserve the dignitary purpose for which it is invoked. It remains constant in our jurisprudence that the dignity of a court derives from the respect accorded its judgment."

In Vozniak v. Winans, 191 W. Va. 228, 229-30 (1994), a year and 24 days had passed since the dormancy first began. This Court overturned the dismissal order entered by the Circuit Court and ruled that where the one year time period had barely passed before the dismissal occurred, there was no lack of diligence on the part of the Plaintiffs

in view of the discovery undertaken and the initiation of settlement procedures, and the Defendants failed to demonstrate any prejudice which would have resulted from reinstatement of the case.

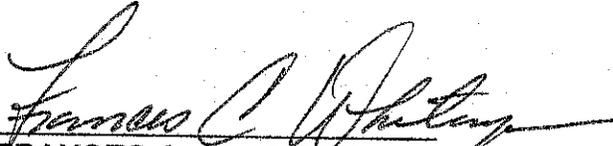
Importantly, in Syl. Pt. 3, Covington v. Smith, et al., 213 W. Va. 309 (2003), this Court indicated that in weighing the evidence of good cause for the delay in the case and the substantial prejudice to the Defendant in allowing the case to proceed, the court should also consider "(1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice." The Court acknowledged that Rule 41(b) does not exist in a vacuum and other considerations should come to bear on the decision. Id. at 319.

In the case at bar, the actual amount of time involved in the dormancy was one year and 18 days. The Appellant had kept in contact with trial counsel via telephone calls and email. The Appellant's counsel had responded to written discovery, had conducted an investigation regarding the eyewitness and investigating State Trooper, had retained and paid an expert, had gathered medical records and had been in contact with the Appellant's treating physical therapist. The Appellant's counsel had prepared the Appellant's case for trial and was ready for trial at the time of receiving the Court's Notice. The Appellant nor Appellant's counsel had engaged in any flagrant conduct to warrant dismissal. The Court's 41(b) dismissal stopped the showing of the truth in favor of stopping the litigation, which erodes the trustworthiness of our justice system. Dismissal of this action was a severe sanction in the absence of flagrant behavior, and thus the decision of the Court below should be reversed.

**CONCLUSION**

Wherefore, your Appellant, Jennifer L. Caruso, in consideration of the above assignments of error and other errors as they appear, prays that based upon the record in this case, the Order of Circuit Court of Kanawha County, West Virginia, dated the 12th day of October, 2007, be reversed and that the case be remanded with instructions to reinstate the case to the docket and to enter a scheduling order.

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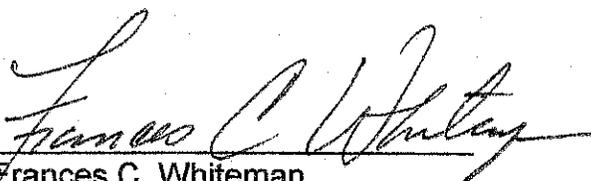
**CERTIFICATE OF SERVICE**

I, Frances C. Whiteman, counsel for Appellant, Jennifer L. Caruso, do hereby certify that I transmitted the foregoing "BRIEF OF APPELLANT, JENNIFER L. CARUSO" to the following counsel, this 17<sup>th</sup> day of June, 2008, by first class mail, postage prepaid, as follows:

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