

NO. 34144

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

JENNIFER CARUSO,

Appellant and
Plaintiff Below,

v.

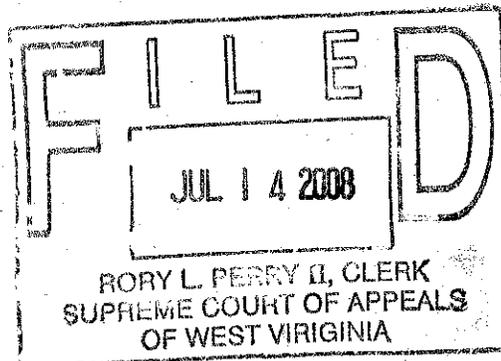
BRIAN N. PEARCE and
P&T TRUCKING, INCORPORATED,

Appellees and
Defendants Below,

v.

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

Appellees and
Third-Party Defendants Below.



BRIEF OF APPELLEE JOYCE K. HALL

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RULES

W. Va. R.Civ.P., 41(b) 1, 2, 3, 4, 5, 6, 7

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On October 12, 2004, the Appellant, Jennifer Caruso, filed a Complaint in the Circuit Court of Kanawha County, West Virginia alleging negligence against Brian N. Pearce and P&T Trucking Inc., as a result of an accident that occurred on Interstate 79 North on November 8, 2002. The Appellees answered the Complaint and filed a third-party action against Quality Machine Co., Inc., Garry K. Knotts and Joyce K. Hall. The third-party defendants timely answered the Third-Party Complaint, and the defendants and the third-party defendants engaged in discovery.

On July 31, 2007, the Clerk of the Circuit Court of Kanawha County served a Notice to the parties that this case would be dismissed pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure unless the Appellant could establish good cause for maintaining the civil action. *See Notice, attached hereto as Exhibit A.* The Appellant moved the Circuit Court of Kanawha County to stay the dismissal of her case, and a hearing was held on October 4, 2007. Subsequently, by Order dated October 12, 2007, the Honorable Irene C. Berger issued an Order dismissing the Appellant's action because the Appellant failed to show good cause for delaying the prosecution of her case. *See Order, attached hereto as Exhibit B.*

II. STATEMENT OF FACTS

The Appellant filed the civil action at issue on October 12, 2004. On November 10, 2004, the Appellees, Brian N. Pearce and P&T Trucking, Inc., served *Defendants, Brian M. Pearce's (Incorrectly Designated as Brian N. Pearce) and P&T Trucking, Incorporated's First Set of Interrogatories to Plaintiff, Jennifer L. Caruso.* Almost four months later, on March 8, 2005, the Appellant filed her responses to the Appellees' discovery requests. That was the last

activity by the Appellant until more than two years later when, on July 31, 2007, the Appellant received the Notice from the Clerk of the Circuit Court of Kanawha County, which stated that the Appellant's civil action would be dismissed if she did not promptly demonstrate good cause for her inactivity.

The Appellees participated in discovery during the Appellant's protracted dormancy, but the Appellant did not make any effort to move her case as required by law. She did not serve one set of interrogatories or requests for production of documents, nor did she attempt to schedule any depositions. Rather, the Appellant chose, at her own peril, to sit on her case. The Appellant did not awaken from her dormant state until after the aforementioned Notice was received. She then attempted to engage in a rash of activity, including noticing the deposition of her treating physician, a rather uncommon practice unless a trial is fast-approaching and an evidentiary deposition is scheduled. Obviously, that was not the situation here.

III. STANDARD OF REVIEW

The central issue for the purposes of this appeal is whether the Circuit Court of Kanawha County abused its discretion in dismissing the Appellant's Complaint pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. It is within the sound discretion of the trial court to dismiss a civil action for inactivity, and unless an appellant shows that the court abused its discretion, reinstatement of the action is not proper. *Covington v. Smith*, 213 W. Va. 309, 582 S.E.2d 756, 763 (2003).

IV. POINTS AND AUTHORITIES RELIED ON AND DISCUSSION OF LAW

The Circuit Court of Kanawha County properly exercised its discretion in dismissing the Appellant's case because the Appellant did not establish good cause for failing to prosecute her civil action. Rule 41(b) of the West Virginia Rules of Civil Procedure provides:

Any court in which is pending an action wherein for more than one year there has been no order or proceeding . . . may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued.

It is well-settled that to withstand an involuntary dismissal under Rule 41(b), a plaintiff must demonstrate good cause for her delay in prosecuting her case. *E.g., Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996). If a plaintiff does not show good cause, dismissal is proper.

The Appellant incorrectly argues that a circuit court should examine the inactivity of a plaintiff *and* prejudice to a defendant before dismissing a case under Rule 41(b). However, the proper standard for determining whether an action should be dismissed for failure to prosecute is the two-tiered approach set forth in *Dimon*. First, the plaintiff must satisfy her burden of demonstrating good cause for her delay in prosecuting her case. *Dimon*, 198 W. Va. at 50, 479 S.E.2d at 349. If the plaintiff is able to produce evidence establishing good cause, the burden shifts to the defendant to show prejudice. *Id.* Critically, if the plaintiff fails to carry her burden regarding good cause, then the burden never shifts to the defendant, and the second inquiry, i.e., whether the defendant was substantially prejudiced by the plaintiff's delay in pursuing her case, is not reached. Such is the case here. Accordingly, Judge Berger correctly 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."

The Appellant has not advanced one viable argument to demonstrate good cause for her failure to take any action to prosecute her case. She initially attempts to argue that the Circuit Court did not act properly in dismissing her case because of the "complex nature of the civil action" which led her to mistakenly believe that the Appellees had outstanding discovery responses. First, as civil actions go, this is a relatively uncomplicated legal matter. The salient issues are causation of the subject accident and the nature and extent of the Appellant's injuries, if any, that proximately resulted from the accident. Very simply, this case involves rather routine, straightforward issues.

Further, the fact that one Appellee may have owed another Appellee answers to discovery requests has no bearing on whether the Appellant could have taken action in her own case. The Appellant's argument is nonsensical. There is nothing in the West Virginia Rules of Civil Procedure that prevents a party from engaging in discovery merely because other parties have exchanged interrogatories and requests for production of documents. No statute, rule of civil procedure, case law, or any other legal authority limited the Appellant's ability to advance her action. Indeed, the Appellant could have, and most certainly should have, conducted discovery at the same time the Appellees were doing so.

Equally absurd is the Appellant's assertion that she did attempt to conduct discovery, but the Appellees impeded her efforts. Timing is everything, especially when it comes to attempting to withstand a dismissal under Rule 41. The focus must be on the relevant time period during which activity was undertaken. That time period is within one year from the last order or proceeding in a civil action. True, the Appellant tried to notice depositions and schedule mediation, but critically, she did not do so within the relevant time period. Rather, the Appellant's desperate flurry of activity did not occur until *after* she received notice that her case

was about to be dismissed, which was over two years since the Appellant made any effort to participate in her own case.

The Appellant's actions fly directly in the face of the purpose of Rule 41, which is designed to prevent plaintiffs from allowing their cases to languish, resulting in burgeoning circuit court dockets, evidence growing stale, and the continuous running of pre-judgment interest. Certainly it was not the intent of the drafters of Rule 41 to allow a plaintiff to be dilatory for years only to take action upon the realization that a dismissal of her case is imminent.

In another futile attempt to avoid dismissal of her case, the Appellant cites *Anderson v. King*, 210 W. Va. 170, 556 S.E.2d 815 (2001), arguing that "there must be consideration of the work done prior to the year of dormancy." The problem with the Appellant's reliance on *Anderson* is the glaring distinction between that case and the case at bar. The focus must be on *who* conducted the work before the year of inactivity. In stark contrast to the Appellant in this action, the plaintiff in *Anderson* actually engaged in discovery; he took depositions and served discovery requests. *Anderson*, 210 W. Va. at 172, 556 S.E.2d at 817. Here, the Appellant took no such action. The only significant activity that occurred was undertaken by the Appellees.

In addition, and rather amazingly, the Appellant tries to save her case by pointing the finger at Judge Berger for not issuing a scheduling order in her case. Somehow, the Appellant believes that it is acceptable to shift a burden to the trial court that the law squarely places on her shoulders. The Appellant's argument fails. The Court bears no responsibility in prosecuting a plaintiff's case. That burden rests solely with the plaintiff, and in this case, the Appellant made no effort to comply with her duty.

Moreover, whether Judge Berger issued a scheduling order does not relieve the Appellant of the obligation to move her case forward. Quite simply, this is another inexplicable argument

set forth by the Appellant in a desperate effort to make someone else responsible for her own inexcusable failure to act. The issuance of a scheduling order and the clear mandate of Rule 41 are wholly separate, one having nothing to do with the other. It is incomprehensible for the Appellant to contend that she was merely waiting for the scheduling order to arrive before engaging in discovery. Parties regularly serve written discovery and take depositions in cases before scheduling orders are entered. Indeed, the Appellees served interrogatories and requests for production of documents on each other, and the Appellant could have acted similarly.

The bottom line is whether the Circuit Court should have entered a scheduling order has no bearing on the Appellant's duty under Rule 41. Her duty was to prosecute her civil action, but she chose not to do so. Accordingly, the trial court's dismissal of the Appellant's case pursuant to Rule 41(b) was proper.

Finally, the Appellant claims that Judge Berger improperly dismissed her case because the Appellees were not prejudiced by the Appellant's extended delay. This argument rings hollow. As stated, a finding of good cause for dormancy is required before addressing prejudice. *Dimon*, 198 W. Va. at 50, 479 S.E.2d at 349. Based on the foregoing, an examination of whether the Appellees were prejudiced by the Appellant's dilatoriness is unnecessary because she failed to prove good cause for her delay in prosecuting her case.

However, even assuming the Appellant could somehow clear the good cause hurdle, she would crash squarely into the prejudice hurdle. The accident at issue occurred almost four years ago. The Appellant's undue delay has resulted in evidence growing stale and the potential for not being able to find pertinent witnesses. Further, if located, the memories of these witnesses may have been affected by the considerable amount of time that has passed. *See Rollyson v. Rader*, 192 W. Va. 300, 452 S.E.2d 391 (1994) (stating that the passage of several years after the

accident that was the subject of the plaintiff's claim could result in prejudice to the defendant because of the witnesses' fading memories).

In addition, if this matter were to proceed to trial and a verdict was rendered in favor of the Appellant, she would be entitled to pre-judgment interest from the date of the accident. In other words, she would actually benefit by her failure to prosecute her case by increasing the amount of pre-judgment interest she would receive.

V. CONCLUSION

Dismissal of the Appellant's civil action under Rule 41(b) was warranted. "A plaintiff has a continuing duty to monitor a case from the filing until the final judgment, and where he or she fails to do so, the Appellant acts at his or her own peril." *Callow v. Jacob*, 201 W. Va. 665, 500 S.E.2d 290, 291-292 (1997) (citing *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339, 344 (1996)). This burden is not to be taken lightly. To do so risks the viability of a plaintiff's case. Here, the Appellant completely ignored her responsibility under the law; she did nothing to advance her case from the date she filed her Complaint. For more than two years, the Appellant did not serve one interrogatory or request for production of documents, nor did she make any effort to depose any parties or witnesses. Rather, the Appellant, despite the clear mandate of Rule 41, chose to let her case grow stale without regard to the consequences of her inactivity.

This Appellee acknowledges that dismissal is a harsh sanction but that does not mean it is never to be granted, which it appears the Appellant is essentially arguing. If dismissal is not proper in this case where the Appellant has taken no action, then when would it be appropriate? Simply put, to accept the Appellant's argument is to basically render Rule 41(b) meaningless.

To prevail, the Appellant must establish that Judge Berger abused her discretion in dismissing the Appellant's civil action. The Appellant cannot satisfy this high standard. Judge

Berger properly applied the law in determining that the Appellant failed to establish good cause for allowing her case to languish. Accordingly, the Appellee, Joyce K. Hall, respectfully requests this Court to uphold and affirm the decision of the Circuit Court of Kanawha County.

Respectfully submitted,

JOYCE K. HALL

By Counsel

MARTIN & SEIBERT, L.C.

By:

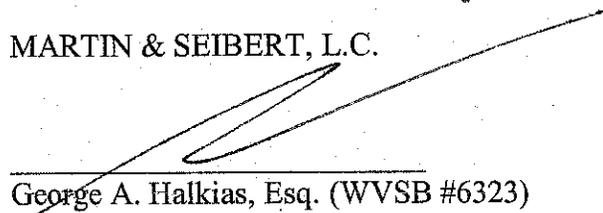

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EXHIBIT A

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2007 JUL 31 PM 1:02

Christina McComas <i>et-al</i>	v.	C & O Motors	04-C-2173
Allen L. Hanson <i>et-al</i>	v.	Paul Hanson	04-C-2344
Jennifer L. Caruso	v.	Brian N. Pearce	04-C-2728
Great Seneca Financial Corp.	v.	Rodney Hill	06-C-840
Contractor Yard	v.	Roy C. Clark <i>et-al</i>	06-C-1199
Arrow Financial Services LLC	v.	Andrew A. Hager	06-C-1310

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

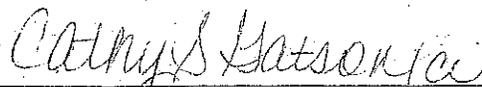
NOTICE

A review of the docket in this matter indicates that there has been no activity or prosecution of these cases in the past year. **Rule 41(b)** of the **West Virginia Rules of Civil Procedure** provides that a Court may order that an action in which there has been no order or proceeding in the last year be struck from its docket for the plaintiff's failure to prosecute the same.

Please take notice that unless the plaintiff files and duly serves a motion, within fifteen (15) days of this notice, alleging good cause why the action should not be dismissed, this action will be dismissed pursuant to **Rule 41(b)** of the **West Virginia Rules of Civil Procedure**. The motion may request a hearing on the same or request a determination by the court on the motion without a hearing. Any party opposing such motion shall serve upon the Court and the opposing counsel a response to such motion within fifteen (15) days or appear and resist such motion.

This notice shall be served on all counsel of record and all pro se parties.

Dated this 31st day of July, 2007.



Clerk of the Circuit Court

EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JENNIFER L. CARUSO,

Plaintiff,

v.

CIVIL ACTION NO. 04-C-2728

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

Defendants and Third-Party Plaintiffs,

v.

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

Third-Party Defendants.

FILED
2007 OCT 15 PM 9:03
CLERK OF COURT
KANAWHA COUNTY
WEST VIRGINIA

ORDER

The Court has reviewed the Plaintiff's Motion and Amended Motion Requesting Stay of Dismissal, together with the court file and oral arguments of counsel, and considers the matter ripe for ruling.

The Complaint in this matter was filed on October 12, 2004. Subsequent to the filing of the Complaint, the Defendants filed Third-Party Complaints in October 2005. Cross claims were also filed and discovery was conducted by these parties. No discovery was initiated by the Plaintiff. There has been no "order or proceeding" as contemplated by Rule 41(b) of the Rules of Civil Procedure, indicative of the Plaintiff's prosecution of the case, since its filing in October 2004. Specifically, a Notice of Dismissal was filed and mailed to counsel of record on July 31, 2007, by the Clerk of the Circuit Court of Kanawha County. The last filings, immediately prior to said Notice, were on July 11th, 12th and 13th, 2006. These filings were certificates

of service indicating the service of discovery and discovery responses between the Third-Party Plaintiff and the Third-Party Defendants.

On August 3, 2007, counsel for the Plaintiff timely filed a Motion Requesting Stay of Dismissal, and on August 11, 2007, served an Amended Motion Requesting Stay of Dismissal on opposing counsel. On August 30, 2007, and September 4, 2007, counsel for the Plaintiff filed several Notices of Deposition. This Court stayed all discovery by Order entered on September 5, 2007, pending hearing on the Motion and Amended Motion Requesting Stay of Dismissal scheduled for October 4, 2007.

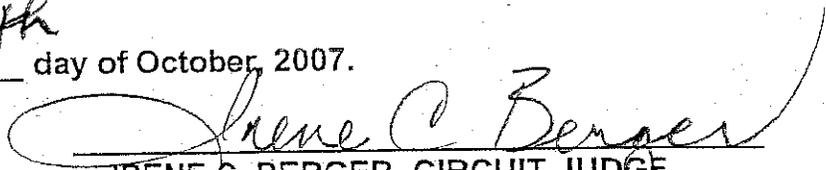
On October 4, 2007, counsel for the Plaintiff appeared for hearing, previously noticed, and counsel for the Defendant and counsel for the Third-Party Defendants appeared in opposition to the Amended Motion Requesting Stay of Dismissal. Although counsel for the Plaintiff argued that dismissal was a harsh sanction, that the Plaintiff had been in contact with her counsel, that counsel had contacted the Circuit Clerk's Office to inquire as to whether a scheduling order had been entered by the Court (as it was her experience in other circuits that courts entered scheduling orders sua sponte), this Court finds that counsel failed to establish good cause as to why the case had not been prosecuted by the Plaintiff during its pendency and, specifically, failed to establish good cause why the case had not been prosecuted during the one year immediately preceding the filing of the Notice of Dismissal. In other words, the Court finds that the Plaintiff has failed to move the case in a reasonable manner.

Specifically, this Court finds that no motion for entry of a scheduling order was filed by the Plaintiff, no discovery was initiated by the Plaintiff since the

Complaint was filed in October 2004, and no other "order or proceeding" was entered or conducted at the instance of the Plaintiff. 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. The Court does note that although counsel for the Defendants appeared at the hearing and argued in opposition to the Amended Motion Requesting Stay of Dismissal, none of the Defendants in this case filed a written response to the Motion or Amended Motion Requesting Stay of Dismissal. This Court finds that given that Rule 41(b) of the West Virginia Rules of Civil Procedure and the opinion of Dimon v. Mansy impose on a plaintiff the "continuing duty to monitor a case from the filing until the final judgment," and given that the Court has the duty to control and administer its docket, the Defendants' failure to file written responses is not a bar to dismissal. In its consideration of the law and arguments, the Court is mindful that dismissal pursuant to Rule 41(b) cuts against the law's preference for deciding issues on the merits, but finds dismissal is warranted in this case.

WHEREFORE, after careful and impartial consideration of all of the above, the Court ORDERS that the above-styled matter be dismissed and stricken from the docket of this Court. The Court preserves the objection and exception of the Plaintiff and ORDERS the Clerk of this Court to mail a certified copy of this Order to all counsel of record.

ENTERED this 12th day of October, 2007.



IRENE C. BERGER, CIRCUIT JUDGE
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT THIS 15
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF October 2007
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA ci

NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

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Appellant and
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GARRY K. KNOTTS, and JOYCE K. HALL,

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Third-Party Defendants Below.

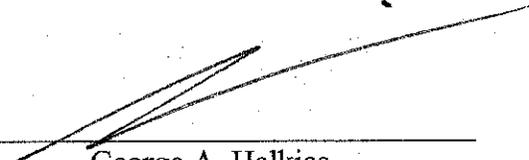
CERTIFICATE OF SERVICE

I, George A. Halkias, counsel for Appellee, Joyce K. Hall, do hereby certify that service of the foregoing *Brief of Appellee Joyce K. Hall* has been made upon the following, by placing true copies in the regular course of the United States Mail, postage prepaid, this 11th day of July, 2008:

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