

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

JENNIFER L. CARUSO,

Appellant,

v.

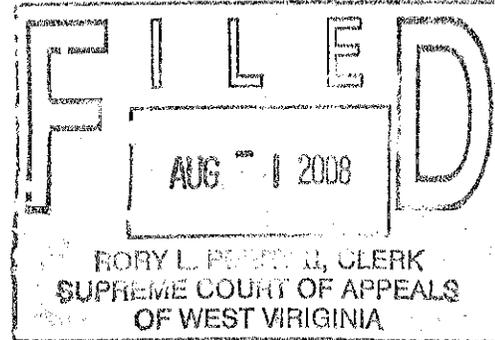
BRIAN N. PEARCE and
P&T TRUCKING, INCORPORATED,

Appellees,

v.

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

Third-Party Defendants/ Appellees.



REBUTTAL BRIEF OF APPELLANT, JENNIFER L. CARUSO

Now comes your Appellant, Jennifer L. Caruso, by her counsel, Frances C. Whiteman, and she does hereby provide her rebuttal brief in opposition to all of the Appellees' briefs.

The Appellees would like to confuse this Honorable Court into thinking that the Appellant never showed any good cause for reason why the underlying case should not be dismissed from the docket. The Appellant did show significant good cause in that the Appellant's case was ready for trial and Appellant's counsel came to the dismissal hearing asking for the trial Court to set a trial date. Further good cause was shown in that it was Appellees who came to the dismissal hearing saying that a great amount of

discovery needed to be done before proceeding to trial and it was really Appellee's discovery which needed to be completed —not Appellant's discovery. Appellant had tried to set up a deposition or IME of the Appellant for the Appellees' benefit, as well as witness and expert witness depositions for the benefit of Appellees, all to take place before the dismissal hearing, but Appellees refused to take advantage of these offers. Importantly, the circuit court refused to notice good cause shown by the lack of a mandatory Rule 16(b) scheduling order which would have indicated discovery deadlines for all counsel and a trial date.

Appellees' counsel want this Court to believe that if Appellant wanted a scheduling order, that counsel should have moved the trial court to get one. That is completely in opposition to and not in accord with Rule 16(b) of the Rules of Civil Procedure. When a case is instituted, the judge shall enter a scheduling order. The judge must not wait for counsel to call and asked for a scheduling conference. Judge Berger made an error of law in dismissing the Appellant's case by never entering a scheduling order and failing to recognize that Appellant's counsel had relied on getting a scheduling order to guide her through discovery deadlines and trial; and without having the relied-upon scheduling order from the Court, good cause was clearly shown. Judge Berger substantially abused her discretion by failing to enter a mandatory Rule 16(b) scheduling order and then dismissing the case without noticing Appellant's good cause for delay.

Appellant committed no flagrant action in causing a dismissal to occur. A year had barely passed before the dismissal notice was sent to Appellant. Appellant's counsel kept in contact with Appellant; Appellant's counsel spent money on a medical

expert for the case; Appellant's counsel conducted an investigation of the facts of the case with an eyewitness and an investigating State Trooper; Appellant's counsel spent money on the gathering of records for the case. Appellant's counsel did not let the case languish on the docket while doing nothing. Judge Berger's dismissal was a very harsh and severe sanction in the absence of any flagrant behavior.

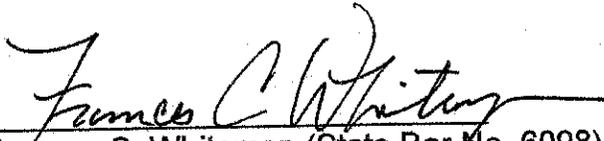
Appellees suggest that they would be prejudiced if the case were to continue because evidence may be stale, witnesses could be lost, or that memory may falter. For the matter, the sky could fall. Appellees have not stated that any particular evidence is "stale" or that they have tried to locate any one witness who was "lost." Appellees have not tried to test any witnesses' memories, and thus Appellees' assertions of what "could" result in prejudice lacks any basis in fact. The sky is definitely not falling.

Several of the Appellees incorrectly assert that Appellant filed a motion for reinstatement after the case was dismissed from the trial court's docket. Therefore the cases cited to advance those Appellees arguments are not applicable. The Appellant received notice that the Court was considering a Rule 41(b) dismissal and thereafter filed a motion and amended motion to keep the case active on the docket. Appellant took great pains to then pave the way for Appellees to conduct necessary discovery and Appellant's counsel would have even paid for her own expert to be deposed (with no expense to the Appellees except the cost of a copy of a transcript). During the time between the notice from the Court and the October 4th hearing, the case was still active on the docket and did not need reinstatement in order to proceed with Appellees' "necessary," but avoided, discovery.

CONCLUSION

Wherefore, in consideration of the facts and arguments of Appellant in her Brief and Rebuttal Brief, the Appellant prays that this Honorable Court will reverse the dismissal order entered by the trial court and remand the case to the active trial docket.

JENNIFER L. CARUSO,
Appellant by Counsel



Frances C. Whiteman (State Bar No. 6098)
Whiteman Burdette, PLLC
229 Jefferson Street
Fairmont, WV 26554
304-366-2116

Counsel for Appellant Jennifer L. Caruso

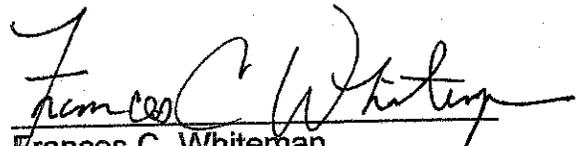
CERTIFICATE OF SERVICE

I, Frances C. Whiteman, counsel for Plaintiff, Jennifer L. Caruso, do hereby certify that I transmitted the foregoing "Rebuttal Brief of Appellant, Jennifer L. Caruso" to the following counsel, this 31st day of July, 2008, by first class mail, postage prepaid, as follows:

Teresa Kleeh, Esq.
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588

George A. Halkais, Esq.
Martin & Seibert, L.C.
300 Summers St., Suite 610
BB&T Bldg
Charleston, WV 25301

Stephen F. Gandee, Esq.
Robinson & McElwee
P.O. Box 128
Clarksburg, WV 26302-0128



Frances C. Whiteman
Counsel for Jennifer L. Caruso