**IN THE COURT OF APPEALS**
**OF THE**
**STATE OF MISSISSIPPI**
**NO. 96-CA-00492 COA**

**JESSE AND BEVERLY DURHAM, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, CHRISTIE DURHAM** — **APPELLANTS**

**v.**

**BENTON E. HEWITT, M.D.** — **APPELLEE**

**PER CURIAM AFFIRMANCE MEMORANDUM OPINION**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

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| DATE OF JUDGMENT: | 04/12/96 |
| TRIAL JUDGE: | HON. KEITH STARRETT |
| COURT FROM WHICH APPEALED: | PIKE COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANTS: | ROBERT O. HOMES JR. |
| ATTORNEY FOR APPELLEE: | DENNIS L. HORN |
| NATURE OF THE CASE: | CIVIL - MEDICAL MALPRACTICE |
| TRIAL COURT DISPOSITION: | COURT DENIED REINSTATEMENT OF CASE WHICH WAS DISMISSED AS STALE IN 1993. |
| DISPOSITION: | AFFIRMED - 12/16/97 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 2/4/98 |

BEFORE THOMAS, P.J., KING AND PAYNE, JJ.

PER CURIAM:

On November 16, 1993, the Pike County Circuit Court dismissed the appellants' suit as "stale." It was not until March 15, 1996 that the appellants sought to have the case reinstated. It is from the order denying the motion to reinstate that this appeal is taken. The appellants argue that the circuit court's action in dismissing their suit as "stale" was improper and without legal authority due to a lack of notice to the parties. They further argue that the court's denial of their motion to reinstate the case was erroneous. We find no error and affirm the decision of the circuit court.

The appellants brought suit against Dr. Benton Hewitt for personal injuries allegedly sustained by Christie Durham as a result of medical treatment. The complaint was filed in November 1988. On April 14, 1993, the attorney for the appellants was sent a letter by the court administrator reminding counsel of a previous letter that the circuit judge required an order of continuance if a case has been on the docket for more than a year. The second letter stated that if an order of continuance was not received by May 1, 1993, the case would be dismissed. On April 23, 1993, counsel filed a "Motion to Continue Trial and to Compel Pre-trial Order," but no order of continuance was filed or entered. The case was dismissed without prejudice along with other cases which the court considered as stale on November 12, 1993. The appellants contend that they were not notified that the case had been dismissed.

Counsel for the appellants filed a motion to reinstate on March 15, 1996 in which he related that in May 1993 his son was in an accident in New Orleans, which could have explained counsel's inattention to the case in 1993 but said nothing about the subsequent two years.

Appellants argue that Rule 41(d) of the Mississippi Rules of Civil Procedures requires that prior notice be given that a case is about to be dismissed for "want of prosecution." They contend that the dismissal was improper and without legal effect because of the lack of notice. The record reflects that the appellants were given notice more than six months prior to the dismissal that an order of continuance was necessary to keep the case on the docket of the court. Much of the appellants' argument is based on the lack of subsequent notice, which Rule 41(d) does not require. It should also be noted that the dismissal was by the circuit judge rather than the circuit clerk as Rule 41(d) contemplates.

In ***Walker v. Parnell,* 566 So. 2d 1213, 1216 (Miss. 1990)**, the supreme court stated:

> The power to dismiss for failure to prosecute is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket. *Watson v. Lillard*, 493 So.2d 1277, 1278 (Miss. 1986). That this Court will not disturb a trial judge's findings on appeal unless it is manifestly wrong is a doctrine too well known to require citation. *Id.* at 1279.

We cannot conclude that the circuit judge was manifestly wrong in dismissing the case.

Even if this Court were to conclude that the dismissal was either a mistake or the judgment void based on improper notice, Mississippi Rule of Civil Procedure 60(b) provides that motions for relief from judgment by accident or mistake must be brought within six months after the judgment or order. Where the reason is that the judgment is void, the"motion shall be made within a reasonable time." **M.R.C.P. 60(b).** The appellants make no argument that the time within which relief was sought was reasonable, and we will not disturb the judgment of the circuit court denying the motion to reinstate.

**THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY IS AFFIRMED. COSTS OF APPEAL ARE ASSESSED TO THE APPELLANTS.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**