

No. 34144 – *Jennifer L. Caruso v. Brian N. Pearce and P & T Trucking, Incorporated, v. Quality Machine Co., Inc., Garry K. Knotts and Joyce K. Hall*

Workman, J., concurring:

**FILED**

**May 5, 2009**

released at 10:00 a.m.

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I concur with the majority that the Plaintiff's inactivity in this case was not sufficiently lengthy or egregious to warrant dismissal. However, I cannot concur with the majority's conclusion that the lower court was partly responsible for the delay in this case because it had not yet entered a scheduling order.

The most recent compilation of Circuit Court County filings demonstrates that in calendar year 2008 there were 6,354 cases filed in the Kanawha County Circuit Court. Of that total, the circuit judge handling this matter had 917 of the cases filed assigned to her. West Virginia Rule of Civil Procedure 16 provides that "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 to limits the time[.]" *Id.* The current rule does not place any time limit for entering a scheduling order upon the circuit court, nor does it place the burden of setting a scheduling conference solely upon the circuit court. Our law, however, does place the burden upon the plaintiff to prosecute his or case. W. Va. R. Civ. P. 41(b). There is no evidence in this case that either party moved the Court either to set a scheduling conference or enter a scheduling order.

Consequently, given our current Rules of Civil Procedure, I believe that the majority opinion unfairly transfers part of the responsibility for the delay here from the lawyer to the court. For that reason, I write separately so as to make clear that the delays here were the fault of counsel, not the lower court.