IN THE SUPREME COURT OF MISSISSIPPI

HARVEY DANIEL HASTY, ET AL. APPELLANTS

VS. CASE NO. 2006-CA-00473

YOSHINOBU NAMIHIRA, M.D. AND
BETTER LIVING CLINIC-ENDOSCOPY CENTER, P.A. APPELLEES

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY

BRIEF OF APPELLEES

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

Yoshinobu Namihira, M.D.
3000 Halls Ferry Rd.
Vicksburg, MS 39180

Better Living Clinic-Endoscopy Center, PA
3000 Halls Ferry Rd.
Vicksburg, MS 39180

Harvey Daniel Hasty

Mack Arthur Hasty

Louis Gene Hasty

Hugh Allen Hasty

Roger Wayne Hasty

Plezy Leon Hasty

Beverly Lorraine Hasty

Timothy Wayne Hasty

Estate of Arthur I. Hasty, Deceased

R.E. Parker, Jr.
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Respectfully submitted,

CLIFFORD C. WHITNEY III

THIS THE 13th DAY OF MARCH, 2007.

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ORAL ARGUMENT NOT REQUESTED

Appellee does not request oral argument or believe that oral argument would be helpful to the Court. The issues have been fully briefed and may be decided on the material submitted.

Respectfully submitted,
YOSHINOBU NAMIHIRA, M.D. AND
BETTER LIVING CLINIC-ENDOSCOPY
CENTER, P.A., APPELLEES

By: _____
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STATEMENT OF ISSUES

Whether the trial court abused its discretion in dismissing this case for failure to prosecute.

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition Below.

The Plaintiffs/Appellants in this case are the wrongful death beneficiaries of Arthur Hasty (the "Hastys"). Arthur Hasty was a patient of Yoshinobu Namihira, M.D. and his clinic, Better Living Clinic-Endoscopy Center, P.A., who are the Appellees/Defendants (and will be collectively referred to as "Dr. Namihira"). The Hastys filed this action on March 8, 2001 (at the last minute before the statute of limitations expired), with regard to medical treatment received by Arthur Hasty in March 1999. The last substantive activity of record in this case occurred in ***February 2002***.

This appeal concerns a litany of delays, excuses and especially blame offered by the Hastys to excuse their extended failure to prosecute this case, leading to its dismissal by the Circuit Court of Warren County in September 2004. Despite two notices – one in 2003 and another in 2004 – that the case would be dismissed if the Plaintiffs did not move the case forward, the Hastys failed to take any action of record or any significant off-the-record action. The first notice was on August 4, 2003, when the trial court issued a notice of contemplated dismissal under M.R.C.P. 41(d) (Appellees' Record Excerpts ["E."] 4). The trial court allowed the case to continue on the active docket after the August 2003 notice, because the Hastys' counsel wrote a letter stating that he would take certain concrete steps to advance the case. When the Hastys failed to take any further action of record *or any significant off-the-record action* in the ensuing year, Dr. Namihira filed a Motion to Dismiss for Failure to Prosecute on August 18, 2004. Plaintiffs could not even be bothered to respond to the Motion to Dismiss, and, after expiration of the 13 days (10 days, plus 3 for mailing) specified under

the Uniform Circuit and County Court Rules for the filing of a response, the trial court entered an order on August 31, 2004, dismissing the case without prejudice (E. 5). Sixty-six days later, on November 5, 2004, the Hastys filed a Motion to Set Aside Rule 41 Dismissal and Response to Defendants' Motion to Dismiss for Failure to Prosecute (Court Record ["R."] 69-77).

On December 14, 2004, Circuit Judge Frank Vollor entered an Order Denying Plaintiffs' Motion to Set Aside Rule 41 Dismissal (E. 6). Undaunted, the Hastys next filed a Motion for Relief from Judgment and/or Alternatively a Motion to Reconsider Motion to Set Aside Rule 41 Dismissal (R. 92-110), on December 28, 2004 – more than ten days after the order denying the motion to set aside the judgment. The trial court denied this motion by an Order dated February 17, 2006 (E. 7), from which the Hastys took the present appeal.

B. Statement of Facts.

1. Chronology.

The following chronology best illustrates the lack of diligence by the Hastys in prosecuting this case:

3-8-01	Complaint filed.
3-23-01	Answer filed.
3/01 - 2/02	Discovery conducted.
6-7-02	Motion by one of the Hastys' counsel, JoAnn Waycaster, to withdraw, with Tim Waycaster and Waycaster & Waycaster to remain as counsel for the Hastys.
6-30-03	Deadline set by Court for submission of Scheduling Order.
7-30-03	Order permitting withdrawal of JoAnn Waycaster, Esq. as attorney for the Hastys.

7-1-03	Notice of Rule 41 dismissal issued by Court Administrator, giving Plaintiffs until 8-4-03 to respond.
8-4-03	Letter to Court by Hastys' counsel promising to prosecute case.
8-18-04	Dr. Namihira's Motion to Dismiss for Failure to Prosecute.
9-21-04	Order Dismissing Case for Failure to Prosecute without prejudice (signed by Judge Vollor on 8-31-04).

As the Court can see, other than a motion and order regarding the withdrawal of one of the Hastys' attorneys, Plaintiffs took no action of substance in the case between February 2002 and the date of the dismissal of the case in September 2004 – a period of 2-1/2 years!

2. The Trial Court's Findings in Upholding the Dismissal of the Case.

Contrary to the Hastys' assertion in their brief, Judge Vollor's decision to uphold the dismissal of this case *was not* based on Plaintiffs' failure to respond to the Motion to Dismiss, nor was it caused by the failure of the circuit clerk to notify the Plaintiffs that the judgment had been entered. Judge Vollor's ruling was in fact based on the Hastys' lack of diligence in advancing their case for 2-1/2 years, even after the trial court had given them one previous chance to do so in 2003. The trial court's bench opinion denying the Hastys' Motion to Set Aside spells out the court's reasoning:

> THE COURT: You know, what I'm upset about is – and I didn't even give Mr. Whitney [Dr. Namihira's counsel] a chance to argue. But you're throwing it back on the Court. For two years you haven't done anything on this case, two years. We gave you a notice a year ago, and you still didn't do anything on this case. Mr. Whitney files a motion, serves you with a copy. The rules say within ten days an answer will be filed. That's not protocol of the Court. The rule says it. Rule 401 [sic] says, when a motion to dismiss is filed, within ten days you shall file a response.
>
> * * * * * * * * * * * *
>
> THE COURT: No response [to the Motion to Dismiss for Failure to Prosecute] was filed, so the Court entered an order giving you three days for mailing. The order was submitted with the motion. ***But more than that, this case – the Court has been trying like pulling teeth to get this case moved along***, in 2002 trying to get

> somebody to enter an attorney, tried to get some scheduling orders entered. None were entered.
>
> The thing rocked along for a year, then started – the clerk – I reckon the clerk of Court sent out notice under Rule 41 for dismissal [in 2003]. That should have been a bright red line. Then you [the Hastys' counsel] wrote me the letter, said there were these problems. I backed off, said, okay, I won't enter the Rule 41.
>
> But you should have been knocking the door down getting this thing – another year rocks along, and I get another – I get this motion to dismiss, again, after a whole – another year after the first year. And then the motion is filed. You get a copy of that motion. You should have been beating feet up here to tell the Court, but then nothing is filed for ten days. It's not responded to. The Court enters an order. It wasn't sent out by the clerk, evidently, to you. You say you called and got notice. Two months later there's this motion, November, after you knew about it in September.
>
> This is way – way too – there's been no diligence. The Court is not going to set aside this motion to dismiss.

Transcript of 12/14/04 Hearing at 8-9, 18-19 (E. 10-13) (emphasis added).

3. Lack of Diligence Prior to August 2004.

The Hastys seek to justify their failure to act for 2-1/2 years with two excuses: (1) they communicated a few times during the 2-1/2 years with Dr. Namihira's counsel about a deposition and about trial dates, and (2) they did not answer the Motion to Dismiss because of statements made to them by the circuit court administrator. Focusing on item number 1, the Hastys never attempted to prove the communications among counsel or the substance of these communications through witness testimony or exhibits. All we really have to go on regarding these matters is the rambling discourse in Plaintiffs' brief, making sundry unsubstantiated and inaccurately reported descriptions of the alleged communications.

To recap the history of Plaintiffs' inaction, the trial court had been trying for years to get the Hastys to submit a scheduling order. Trans. of 12/14/04 at 18 (E. 12). The record includes a letter

written on June 20, 2002 by Dr. Namihira's counsel to the Hastys' counsel, Mr. Waycaster, enclosing a proposed scheduling order and requesting that Mr. Waycaster sign the scheduling order and return it to Judge Vollor's administrator by the **deadline set by the trial court of June 30, 2002**. E. 17. Plaintiffs' counsel never **ever** complied with the trial court's scheduling order requirement, as is evident from the absence of a scheduling order on the docket. If he had complied, there would have been a schedule in place to prevent the very problem with which the Hastys now find themselves confronted.

The Hastys' counsel claims that he was trying to advance the case by asking Dr. Namihira's counsel to schedule the deposition of Mr. Hasty's treating physician – with whom Dr. Namihira's counsel is not allowed to confer under *Scott By and Through Scott v. Flynt*, 704 So.2d 998, 1007 (Miss. 1996). However, there is nothing diligent about standing by for 2-1/2 years waiting on opposing counsel to schedule your own witness's deposition for you! The Hastys' counsel used the excuse of the doctor deposition in his letter to the trial court of August 4, 2003, in which he stated that "we [and not Mr. Parker, Dr. Namihira's counsel] are currently attempting to schedule the deposition of one of the decedent's prior attending physicians." He uses this same excuse for his failure to act over the following year, leading up to the Motion to Dismiss in August, *2004*.

Mr. Waycaster misrepresents to this Court that he wrote a letter (not in the record) to Dr. Namihira's attorney, Mr. Parker, on August 4, 2003, asking Mr. Parker to set up the treating physician deposition, and Mr. Parker supposedly responded with dates on which the doctor could be deposed. Although this letter is not in the record, we need to correct the false impression created by the Hastys' counsel about the substance of this letter. The real letter by Mr. Waycaster in no fashion asked Mr. Parker to schedule the treating physician deposition, but on the contrary it stated as

follows:

> *The plaintiffs are attempting to schedule the deposition* of Dr. Charles Marascalco in the referenced matter. Please check your calendar and give us some dates when you would be available to attend the deposition. *We will then coordinate these dates with everyone's schedule and get back with you on a date and time for this deposition.* (Emphasis added.)

This letter is included in an Appendix to this brief at 1. It clearly states that Mr. Waycaster – not Mr. Parker – was arranging the physician deposition!

Mr. Parker promptly responded on the same day with a hand-written response appended to the Waycaster letter, stating the dates which Mr. Parker had available. See Appendix at 1. Mr. Parker did not agree to set up the deposition; why would he agree to do opposing counsel's job for him? In fact, Mr. Parker wrote Judge Vollor two days later, on August 6, 2003, urging the trial court to dismiss the case under Rule 41 and stating that the first time he had heard anything about the treating physician deposition was in the previous week. E. 18-19. A year later, when the Motion to Dismiss was filed, Plaintiffs had still failed to schedule Dr. Marascalco's deposition or even give dates when this retired physician could be deposed. Mr. Waycaster has been a member of the Bar long enough to know that he had at his disposal the ability to subpoena the doctor and notice his deposition, if he had wanted to bring the matter to a conclusion.

The only other activity to which the Hastys can point to show any effort to prosecute the case between February 2002 and August 2004 was a lone telephone call in early 2004 to the court administrator to obtain possible trial dates, followed by a letter in January 2004 to Mr. Parker asking him about his availability on the dates. Mr. Parker already had trials set on the proposed dates. The Hastys' attorney never pursued the matter any further during the next seven months, even after the dates given by the court administrator had come and gone. Again, Mr. Waycaster had at his disposal

the right to notice a hearing for the purpose of setting a trial date but did not do so. This scant activity, which was not proved to the trial court in any event, hardly constitutes diligence in prosecuting a case. [1]

We will now address Plaintiffs' purported justification for failing to respond to the Motion to Dismiss in 2004.

4. Failure to Respond to Motion to Dismiss in August 2004.

Just as with the pre-dismissal activities of the Hastys, we are subjected to another tedious exercise of "who struck John" in the Appellant's Brief talking about why the Hastys' counsel defaulted in responding to the Motion to Dismiss for Failure to Prosecute. The bottom line is that, according to counsel opposite, it was court administrator's fault that the Hastys failed to respond.[2]

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[1] The Hastys' make the absurd argument in their brief that "the time period prior to July 2003 is not relevant to the issues presented on this appeal except to the extent that the Trial Court's decision not to dismiss the case [in 2003] amount [sic] to a finding by the Trial Court that sufficient justification for dismissal did not exist in the facts relevant to the time period prior to July 2003." Appellant's Brief at 10. In other words, the Hastys believe the Court should ignore their inactivity prior to August 2003, because the trial court – without any opinion blessing Plaintiffs' conduct – merely allowed the case to continue after issuing a Rule 41 notice. As Judge Vollor held in his bench opinion, he allowed the case to continue *not* because he determined that Plaintiffs had been diligent, but rather in order to give Plaintiffs a second chance to move the case, a second chance of which Plaintiffs failed to take advantage. Trans. at 18-19 (E. 12-13).

[2] A party has no right to rely upon court personnel for advice on how to prosecute their case. *See Finelli v. Paluzzi*, 372 A.2d 984 (Conn. Com. Pl. A.D. 1973) (default not vacated where defendants relied on advice of assistant clerk of circuit court that action had been reassigned for hearing on later date); *Libert v. Turzynski*, 262 N.E.2d 741 (Ill. App. 1970)(when one acts upon advice of deputy clerk of court, he does so at his own peril); *Abrams v. Gay Inv. Co.*, 251 A.2d 876 (Md. 1969)(insufficient excuse that the secretary of trial judge and assistant assignment commissioner both told plaintiff that case would not be tried on date set for trial). This is particularly true where the alleged advice conflicts with the rules of court. *Matter of Tenure Hearing of Cowan*, 541 A.2d 298 (N.J. Super. A.D. 1988). *See also*, *Darby v. Mississippi State Board of Bar Admissions*, 185 So. 2d 684, 687 (Miss. 1966) (clerk engages in unauthorized practice of law in giving legal advice).

Yet, the following undisputed facts clearly establish that the Hastys have no one to blame but themselves:

a. The Hastys' counsel received a copy of the Motion to Dismiss within three days of its filing on August 18, 2004. Trans. at 7 (E. 9).

b. The circuit court administrator **did not** tell the Hastys' attorney that he did not have to comply with the ten day deadline to respond to the Motion to Dismiss. Trans. of 2/18/05 Hearing at 38, 50 (E. 15, 16).

c. The Hastys **did not** file any response to the Motion to Dismiss or even send a letter to the Court confirming their supposed belief that no response was required, until two months after the dismissal order was entered. Circuit Court Docket (E. 3).

d. The truth is that Plaintiff's counsel felt that the August 18, 2004 Motion to Dismiss was moot, as he believed that a dismissal had been entered in 2003. Appellant's Brief at 16. This was counsel's election based on his own belief that the Motion to Dismiss was moot and not based on being told by the trial court that he did not need to respond.

What is more, it is irrelevant whether or not the Hastys were justified in defaulting in their response to the Motion to Dismiss, because the trial court clearly would have dismissed the case, even if they had filed a timely response. In other words, they were not prejudiced by their tardiness, even if it were warranted. Judge Vollor fully reviewed all of the Hastys' contentions in connection with their post-judgment motions and determined that they had received all of the opportunities to advance this litigation that they were entitled to receive and that the Hastys had failed to exercise reasonable diligence to take advantage of those opportunities.

5. Lack of Notice of Entry of Judgment.

The Hastys point to the fact that the circuit clerk did not notify counsel of the entry of the judgment, and they argue that this omission warrants setting aside the dismissal. However, the lack of notice did not prejudice the Hastys, because the trial court treated their Motion to Set Aside Rule

41 Dismissal and Response to Defendants' Motion to Dismiss for Failure to Prosecute as though it were a timely response to the motion to dismiss. In other words, the trial court applied the reasonable diligence standard in ruling on the motion, rather than the more stringent Rule 60(b) criteria reserved for enrolled judgments.

SUMMARY OF ARGUMENT

The trial court correctly found that the Hastys had been dilatory in failing to prosecute their case for 2-1/2 years, by deliberately and repeatedly ignoring their responsibilities, including the submission of a scheduling order (that the trial court required to be filed by June 30, 2002) and an entry of appearance. They also ignored a clear warning by the trial court to move the case forward, when the court refrained from dismissing the case in August 2003 based on assurances by the Hastys' counsel that he would advance the litigation. When the Hastys failed to honor their commitment to prosecute the case, Dr. Namihira filed a motion to dismiss, to which the Hastys attorneys decided not to respond on the basis of their unilateral decision that the motion was moot. Under these circumstances, the trial court was justified in dismissing this case for failure to prosecute, and this Court should affirm.

ARGUMENT

A. Applicable Standards.

1. Standard of Review.

The power to dismiss for failure to prosecute is inherent in the authority of a trial court, "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). Therefore, the decision of a trial court to dismiss for failure to prosecute is reviewed under an abuse of discretion standard and should

be reversed only for manifest error. *Curry v. Walls*, 871 So.2d 762, 763 (Miss. App. 2004). "Manifest error" means error that is "unmistakable, clear, plain, or indisputable." *Wolfe v. Wolfe*, 766 So.2d 123, 128 (Miss. App. 2000).

2. Standard for Setting Aside Judgment of Dismissal for Failure to Prosecute.

The granting of a motion to dismiss for failure to prosecute is governed by Mississippi Rule of Civil Procedure 41(b). *Watson*, 493 So.2d at 1278. Rule 41(b) provides that, "for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." The official comment to Rule 41 states as follows:

> Rule 41(b) allows the court to dismiss an action involuntarily for three different causes: dismissal at the close of the plaintiff's evidence for failure to show a right to relief, which operates as a decision on the merits; *dismissal for want of prosecution, which is a penalty for dilatoriness,* see Miss. Code Ann. § 11-53-25 (1972) (dismissal for want of prosecution); and dismissal for failure to comply with 'these rules' or any order of the court. . . (Emphasis added.)

Rule 41(d) also applies to dismissal for failure to prosecute and provides for dismissal after notice by the clerk, as follows:

> In all civil actions wherein there has been no action of record during the preceding twelve months, the clerk of the court shall mail notice to the attorneys of record that *such case will be dismissed by the court for want of prosecution unless within thirty days following said mailing, action of record is taken or an application in writing is made to the court and good cause shown why it should be continued as a pending case.* If action of record is not taken or good cause is not shown, the court shall dismiss each such case without prejudice. (Emphasis added.)

In *Watson*, the Mississippi Supreme Court held that whether dismissal for failure to prosecute is appropriate boils down to whether "the record shows that a plaintiff has been guilty of dilatory or contumacious conduct or has repeatedly disregarded the procedural directives of the court." 493 So.2d at 1279 (citations omitted). Contrary to what the Hastys would have the Court believe, the

word "or" connects the applicable criteria, and not the word "and." Thus, dismissal is proper if the plaintiff has been dilatory, **OR** if the plaintiff has been contumacious, **OR** if the plaintiff has repeatedly disregarded the directives of the court. *See Mississippi Dept. of Human Services v. Guidry*, 830 So.2d 628, 633 (Miss. 2002) (there must be clear record of delay *or* contumacious conduct). Other factors to be considered are whether lesser sanctions would be effective and whether there are "aggravating factors" regarding the plaintiff's conduct. *Vosbein v. Bellias*, 866 So.2d 489, 493 (Miss. App. 2004). However, applying lesser sanctions is not necessary, if they would not remedy the effects of the delay; and aggravating factors may be considered but are *not required* to uphold a dismissal for failure to prosecute. *Hine v. Anchor Lake Property Owners Ass'n, Inc.*, 911 So.2d 1001, 1007 (Miss. App. 2005).

B. The Trial Court Did Not Abuse Its Discretion In Dismissing this Case for Failure to Prosecute.

1. The Hastys Failed to Show Good Cause for their 2-1/2 Year Delay of the Case.

a. The Hastys Were Dilatory.

A factor which alone justifies a dismissal is whether the plaintiff was dilatory. Webster's Dictionary defines "dilatory" as "tending or intended to cause delay; characterized by procrastination." The Hastys' conduct in this case is rife with delay and procrastination, as the following history of their inaction reveals:

- Failed to conduct any discovery between the deposition of Dr. Namihira on March 15, 2002 and the filing of the Motion to Dismiss on August 18, 2004. See Plaintiffs' Re-Notice of Deposition, in the Trial Court Record ["R."] at 40; trial court docket, R. 5.

- Defaulted in responding to Dr. Namihira's Motion to Compel Discovery of February 15, 2002. R. 5, 43.

- Disregarded the letter of May 29, 2002, from the trial court requiring a

scheduling order by June 30, 2003 (Appendix at 2) and failed to respond to the letter from Dr. Namihira's counsel enclosing a proposed scheduling order for approval and signature (E. 17).

- Disregarded the trial court's directive of June 6, 2002 (Appendix at 3), for an entry of appearance by Tim Waycaster as precondition of the withdrawal of Jo Ann Waycaster, resulting in a one-year delay in the entry of an order permitting withdrawal. Docket, E. 3.

- Failed for a full year to fulfill Plaintiffs' promises to complete depositions and obtain a hearing on discovery disputes and a trial setting, which promises were made in Plaintiffs' response (E. 20) to the Notice of Rule 41(d) Dismissal by trial court of July 1, 2003 (E. 4).

- Defaulted in responding to the Motion to Dismiss for Failure to Prosecute filed by Dr. Namihira on August 18, 2004. Docket, E. 3.

The Hastys try to blame their dilatory behavior on everyone but themselves. Mostly, they allege, without support in the record, that their delay was the fault of Dr. Namihira's counsel (1) for failing to act on a request that he do their job and set up a physician deposition for Plaintiffs and (2) for allegedly failing to respond to their one request in early 2004 for a trial date, after another year of non-activity had passed. However, as we have already demonstrated, Dr. Namihira's attorney never agreed to schedule the doctor's deposition, and Mr. Parker had conflicts on the proposed trial dates, so he could hardly have agreed to the dates obtained from the court administrator on one occasion in January 2004.

The Hastys' attorney also blames problems in his law firm and family tragedies, which, in any event, only occupied a period of months out of the years of delay in question. While we are all sympathetic to anyone experiencing those situations, the fact is that many lawyers struggle with personal problems from time to time and do not expect to be excused from doing their jobs as a result. We submit that the Hastys' were obligated to do more than stand by for 2-1/2 years and do nothing, and their prolonged failure even to notice the treating physician deposition or schedule a

hearing to set a trial date was inexcusable delay on their part.

b. The Hastys' Delay Was Contumacious and Disobedient of the Directives of the Trial Court.

One of the criteria for a dismissal for failure to prosecute occurs when the plaintiff's delay is contumacious. *Webster's Dictionary* defines "contumacious" as "stubbornly disobedient." This criteria is very similar to the other criteria listed in *Watson*, to the effect that the plaintiff must have disobeyed the directives of the trial court. The Hastys conduct easily fits both of these criteria.

The first acts of "stubborn disobedience" came when the Hastys failed and refused for a period of more than two years to comply with the trial court's directive of May 2002 to submit a scheduling order. This refusal came despite Dr. Namihira's counsel presenting the Hastys' counsel with a completed scheduling order which they only had to sign to complete. The next act of disobedience involves the 2 years of refusal by Mr. Waycaster to enter his appearance in the case, despite being directed by the trial court to do so in June 2002, and despite his promise to do so in his letter of August 4, 2003 to the trial court. Then the Hastys violated their own promises to the trial court in August 2003 that they would take action to hasten the case to a resolution, and instead they did nothing for the ensuing year other than write a few letters to the undersigned and expecting us to take over their responsibilities for discovery and setting a trial date. All of these actions, or more correctly inactions, amount to stubborn disobedience of the requirements of the trial court continuing over a prolonged period, and they warranted the dismissal of this case for failure to prosecute.

c. The Trial Court Considered and Applied Lesser Sanctions Before Dismissing the Case.

The trial court considered "lesser sanctions" before dismissing for failure to prosecute. "Lesser sanctions include 'fines, costs, or damages against plaintiff or his counsel, attorney

disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings.' " *Vosbein*, 866 So.2d at 494, *quoting Wallace v. Jones*, 572 So.2d 371, 377 (Miss. 1990). Judge Vollor not only considered lesser sanctions, he in fact applied them. First, he allowed the case to remain on the docket for a full year after the first Rule 41 dismissal notice was issued, in order to give Plaintiffs a second chance to advance their case toward resolution. This was a wake up call and a warning to Plaintiffs' counsel to take action or face dismissal. When it came time to enter the judgment of dismissal, Judge Vollor also applied the lesser sanction of dismissing the case without prejudice, rather than with prejudice.

d. There Are Aggravating Factors.

The aggravating factors which can play a part in granting a dismissal for failure to prosecute – but are not required – include prejudice to the defendant from the delay and delay resulting from intentional conduct on the part of the plaintiff or his counsel. *American Tel. and Tel. Co. v. Days Inn of Winona*, 720 So.2d 178, 180 (Miss. 1998). In their brief, the Hastys attempt to trivialize the prejudice to Dr. Namihira caused by the eight year lapse of time that has now transpired since the medical procedure in issue, by contending that the witnesses have been deposed, so there is no danger of lapsed memory.

The fundamental flaw in the Hastys' reasoning is that many of the witnesses in this case have never been deposed. In fact, the **only** witness who was deposed by Plaintiffs was Dr. Namihira himself. Dr. Namihira's interrogatory answers filed in 2001 list five nurses/administrative personnel who have knowledge of the facts of this case, none of whom have ever been deposed by Plaintiffs (normally a doctor does not depose his own staff). In addition, Plaintiffs listed in their interrogatory

answers four medical fact witnesses and seven damages witnesses who have not been deposed.[3] It is obvious that, after eight years, these witnesses are not likely to have any significant memory of the key events surrounding the occurrence, and Dr. Namihira will be seriously prejudiced in his examination or cross-examination of these witness, if he can even find them.

Plaintiffs are wrong to suggest that Dr. Namihira's nurses can look at the medical records to refresh their memories. The procedure in question was not done in a hospital but was done as an out-patient office procedure at Dr. Namihira's clinic. See Complaint, ¶¶ 5-7 (R. 8). The procedure was fairly brief and is documented by two pages of nurses notes prepared by one of the nurses. It is highly improbable that all four nurses will remember the details of the procedure and the patient's condition after eight years, based solely on this documentation. Even with written entries in the record, most medical personnel have no independent recollection of patients, even one year later.

The same is true of the decedent's treating physicians. Despite the Hastys' contention that physicians only need to consult the medical records to refresh their recollection, it is possible that the doctors may have an independent memory of their patients outside their records, but those memories are not going to survive a lapse of eight years. There are no depositions taken closer to the time of the treatment of Mr. Hasty from which they may refresh their recollections. Thus, it is clear that Dr. Namihira has been prejudiced by the delay in the prosecution of this case.

Another aggravating factor in this case is that the Hastys' delay in this case was intentional. What else can be concluded from the fact that the Hastys' counsel ignored the loud warning from the trial court in 2003, when the Rule 41 dismissal notice was issued, and took no action of record in the

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[3] Of course, the interrogatory answers were not filed in the circuit court and do not appear in the official record. However, the relevant portions of the answers are included in the Appendix.

case for another entire year! What else can be concluded from the fact that, in the face of one warning in 2003 of impending dismissal, the Hastys ignored a motion to dismiss for failure to prosecute in 2004 and did not even respond to it! The Plaintiffs themselves knew of the protracted delay in the advancement of their case, yet they did nothing to cause their counsel to bring the matter to a head. These actions are necessarily intentional ones designed to delay and protract this case, and the trial court correctly determined that they warranted dismissal.

2. The Case Law Supports the Dismissal.

This case is analogous to *Vosbein v. Bellias*, which the Court of Appeals decided in 2004. There, the accident in issue and the filing of suit occurred many years before the dismissal, as is true with the present dismissal. 866 So.2d at 493. In *Vosbein*, the plaintiff failed to take action after being warned to prosecute the case; in this case the Hastys failed to do anything to advance the case for a year, after a clear warning from the trial court to bring their lawsuit to a conclusion. *Id.* The plaintiffs' only discovery occurred early in the case in *Vosbein,* just as occurred with the Hastys in this case.. 866 So.2d at 491.

Under these facts, the Court of Appeals affirmed the trial court's dismissal of Vosbein's case for failure to prosecute. The Court of Appeals held that the conduct of the plaintiff was dilatory and contumacious. 866 So.2d at 493. The Court found that the trial court, by giving the plaintiff a second chance to advance the litigation, has sufficiently applied lesser sanctions, and it held that the lengthy delay between the underlying occurrence and any possible trial had prejudiced the defendant and constituted an aggravating factor. 866 So.2d at 494. The same findings are warranted under the facts of this case, as we have discussed in detail above. *See Hine*, 911 So.2d at 1003, 1007 (affirming a dismissal for failure to prosecute, even where the plaintiff had not been given a prior warning, as

in the present case).

In addition, the present action is similar to two federal appellate decisions cited by the Mississippi Supreme Court in *Wallace*, 572 So.2d at 377. In *Ramsay v. Bailey*, 531 F.2d 706, 708-709 (5th Cir. 1976), the Fifth Circuit affirmed a dismissal for failure to prosecute, because, as in the present case, there had been repeated periods of inactivity by the plaintiff, as well as unheeded warnings and extensions of time by the trial court. In *Asociacion de Empleados Del Instituto De Cultura Puertorriquena v. Rodriguez Morales,* 538 F.2d 915, 917-918 (1st Cir. 1976), the First Circuit allowed the dismissal to stand, where the plaintiff failed to adhere to its commitment to the trial court, like the one made by the Hastys in August 2003, to accomplish a certain action to advance the case.

Mississippi Dept. of Human Services v. Guidry, 830 So.2d 628 (Miss. 2002), is the only decision discussed by the Hastys in their brief as authority for reversing a dismissal for failure to prosecute under the facts of the present case. However, *Guidry* is entirely distinguishable. First of all, the chancellor in this child support case based his decision to dismiss for failure to prosecute on there being eighteen continuances. However, the Supreme Court found that this was insufficient evidence of dilatory or contumacious conduct, given that there was nothing in the record to indicate that the continuances were sought by the plaintiff or whether they resulted from circumstances beyond the plaintiff's control. 830 So.2d at 633. The Supreme Court went on to find that there was no evidence that alternative sanctions were considered or that there were aggravating factors. *Id.* In sharp contrast, we have clear evidence in this case that the Hastys failed to prod their counsel to pursue this case, and they are ultimately the ones who are guilty of the delay that dictates a dismissal for failure to prosecute. Alternative sanctions and aggravating factors were also present, and the trial

court's judgment should be affirmed.

CONCLUSION

The trial judge gave the Hastys a one-year extension – from August 2003 to August 2004 – on their obligation to prosecute this case. Despite their promises to advance the litigation, the Hastys did nothing to prosecute the case for 2-1/2 years, and they even defaulted in responding to the motion to dismiss for failure to prosecute. Therefore, the trial court had ample basis to determine that the Hastys were dilatory or contumacious. The trial court therefore did not abuse its discretion in entering the judgment of dismissal.

Respectfully submitted,

YOSHINOBU NAMIHIRA, M.D., and
THE BETTER LIVING CLINIC - ENDOSCOPY CENTER, P.A.

By: _____
R. E. PARKER, JR., MSB #4011

By: _____
CLIFFORD C. WHITNEY III, MSB#10273

OF COUNSEL:

VARNER, PARKER & SESSUMS, P.A.
1110 Jackson Street
Post Office Box 1237
Vicksburg, MS 39181-1237
Telephone: 601/638-8741
Facsimile: 601/638-8666

CERTIFICATE OF SERVICE

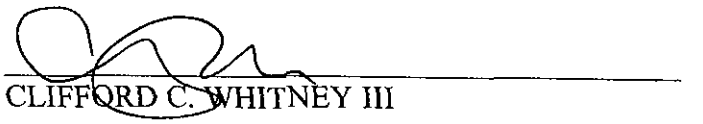
The undersigned attorney of record for Defendants does hereby certify that he has this day mailed, postage prepaid, by United States Mail a true and correct copy of the above and foregoing

document to the following counsel:

Tim Waycaster, Esq.
112 Main Street
Natchez, MS 39120

The Hon. Frank Vollor
Warren County Courthouse
Vicksburg, MS 39183

This the 13th day of March, 2007.



CLIFFORD C. WHITNEY III

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HARVEY DANIEL HASTY, ET AL. **APPELLANTS**

VS. **CASE NO. 2006-CA-00473**

YOSHINOBU NAMIHIRA, M.D. AND
BETTER LIVING CLINIC-ENDOSCOPY CENTER, P.A. **APPELLEES**

APPENDIX

W&W

WAYCASTER & WAYCASTER, PC

ATTORNEYS

112 MAIN STREET
NATCHEZ, MS 39120

PHONE: 601-442-6787
FAX: 601-442-6788
EMAIL: waycasterlaw@aol.com

August 4, 2003

VIA FACSIMILE

R. E. Parker, Esquire
VARNER, PARKER & SESSUMS, P.A.
1110 Jackson Street
Post Office Box 1237
Vicksburg, Mississippi 39181-1237

Re: Harvey Daniel Hasty, et al. v. Yoshinobu Namihira, M.D., et al., Warren County Circuit Court, Cause No. 01,0044-CI

Dear Gene:

The plaintiffs are attempting to schedule the deposition of Dr. Charles A Marascalco in the referenced matter. Please check your calendar and give us some dates when you would be available to attend the deposition. We will then coordinate these dates with everyone's schedule and get back with you on a date and time for this deposition.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Tim Waycaster/lb

Tim Waycaster

TW:lb

8-4-03

TIM
As of Today (these dates could change tomorrow) I have the following dates:

Possibly Sept 22 – 26 – A trial which may be cancelled

Oct 20 – 24 – (trial moved)

Oct 27 – 29

Gene

ATD 1

Lisa Counts
Court Administrator
Chambers of Judge Frank Vollor
Ninth Judicial District

P. O. Box 351
Vicksburg, MS 39181-0351
Telephone: (601) 638-8981
Facsimile: (601) 630-8033
E-Mail: circuitjudgefv@co.warren.ms.us

Circuit Court
Issaquena County
Sharkey County
Warren County

May 29, 2002

Hon. JoAnn A. Waycaster
112 Main Street
Natchez, MS 39120

Hon. R.E. Parker, Jr.
P.O. Box 1237
Vicksburg, MS 39181-1237

RE: ***Harvey Daniel Hasty, et al v. Yoshinobu Namihira and Better Living Clinic - Endoscopy Center, P.A.;*** No. 01,0044-CI-V

Dear Counsel:

The above styled and numbered cause has been assigned to Judge Vollor. Due to the new time standards imposed on the Mississippi legal system by the Mississippi State Supreme Court, it is more important than ever to manage pending cases in a timely manner. Therefore, Judge Vollor requires that a scheduling order be entered in all active cases. **Please submit a scheduling order to Judge Vollor on or before June 30, 2002.** A blank order is enclosed for your convenience.

Due to the limited number of civil trial dates as well as the new time standards mentioned above, the Court is interested in knowing if mediation may be beneficial in your case. Please indicate your interest in pursuing mediation and **return the enclosed form to Judge Vollor by June 30, 2002.**

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Lisa Counts

Lisa Counts
Court Administrator

/lac

Enclosures

ADD 7

Lisa Counts
Court Administrator
Chambers of Judge Frank Vollor
Ninth Judicial District

P. O. Box 351
Vicksburg, MS 39181-0351
Telephone: (601) 638-8081
Facsimile: (601) 630-8033
E-Mail: circuitjudgefv60@co.warren.ms.us

Circuit Court
Issaquena County
Sharkey County
Warren County

June 6, 2002

Hon. JoAnn Waycaster
P.O. Box 476
Natchez, MS 39121

Hon. Tim Waycaster
112 Main Street
Natchez, MS 39120

Hon. Mary Waycaster
112 Main Street
Natchez, MS 39120

RE: ***Hasty, et al v. Namihira, et ux***; No. 01,0044

Counsel:

The Court is in receipt of Ms. JoAnn Waycaster's Motion to Withdraw as Counsel of Record in the above styled and numbered cause. However, the Court will not enter an order allowing Ms. Waycaster's withdrawal until Mr. Tim Waycaster and Ms. Mary Waycaster enter an appearance in the matter.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Lisa Counts

Lisa Counts
Court Administrator

/lac

cc: Hon. R.E. Parker, Jr.

ADD 2

6/18/01
Waupaster

IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

HARVEY DANIEL HASTY, MACK ARTHUR HASTY,
LOUIS GENE HASTY, HUGH ALLEN HASTY,
ROGER WAYNE HASTY, PLEZY LEON HASTY,
BEVERLY LORRAINE HASTY, TIMOTHY WAYNE HASTY,
Individually and as the Wrongful Death Beneficiaries of
ARTHUR I. HASTY PLAINTIFFS

V. CAUSE NO. 01,0044-CI

YOSHINOBU NAMIHIRA, M.D. and
THE BETTER LIVING CLINIC –
ENDOSCOPY CENTER, P.A. DEFENDANTS

RESPONSE OF PLAINTIFF, HARVEY D. HASTY, TO
INTERROGATORIES PROPOUNDED BY DEFENDANT

COMES NOW, Harvey D. Hasty ("Plaintiff"), one of the plaintiffs in the above styled and numbered cause, by and through counsel, and responds to the Interrogatories Propounded by the Defendant, Yoshinobu Namihira, M. D., as follows, to-wit:

INTERROGATORY NO. 1: For each wrongful death beneficiary of Decedent and for Decedent's administrator(s)/Administratrix(s) executor(s)/executrix(s) state full names, ages, addresses, social security numbers, marital status, spouses name, his or her occupation, employer, and job description for the past ten years.

RESPONSE: Harvey D. Hasty, 128 Taylor Drive, Yazoo City, Mississippi 39194, Age: 54, SSN: 425-90-0433, Married – Spouse – Margie Hasty

Employment: 1998-2001 – Unemployed

1995-1997 – Midway Grocery & Garage, Benton, Mississippi,
Position: Mechanic

1995 - Injured hand and had surgery

1978-1994 - Unemployed

ADD 4

INTERROGATORY NO. 2: Please state the name, address, and resident telephone number of each and every person known or believed by you or your attorney to have information relevant to this lawsuit.

RESPONSE: Karen Hasty

Roger Hasty, 112 North Drive, Vicksburg, Mississippi 39180, (601)638-4990

Barry White, M.D., 1151 N. State Street, Suite 617, Jackson, MS 39202,

Nurses at Better Living Endoscopy Center, 3000 Halls Ferry Rd., Vicksburg, MS 39180,

C.R. Voyles, M.D., Surgical Clinic Association, P.A., Jackson, Mississippi 39202

Anthony B. Petro, M.D., Surgical Clinic Association, P.A., Jackson, MS 39202

Paul W. Pierce, III, M.D., The Vicksburg Clinic, P.A., P.O. Box 820154, Vicksburg, MS 39182.

INTERROGATORY NO. 3: For all medication taken by the Decedent in the last five years state the name and address of all pharmacies or drug stores where same were purchased and state all medications which Decedent was taking at the time of death.

RESPONSE: Upon information and belief, my father used the following pharmacies: Battlefield Discount Drugs, 3040 –A Indiana Ave, Vicksburg, MS 39182, Rite Aid, Clay Street, Vicksburg, Mississippi 39182. Plaintiff shall supplement this Interrogatory with any newfound information as necessary.

INTERROGATORY NO. 4: Give the date, time, place, persons present and substance of any and all conversation(s) or statement(s) or admissions (including telephone conversations) made by any of the Plaintiffs and Defendants regarding this matter, or their employees, agents or servants, to any person or witnesses (including Plaintiffs and Defendants) relative to the Decedent's treatment by Defendants, identifying to whom the statement was addressed and who was present or over heard the conversation.

RESPONSE: Dr. Namihara talked with Loraine and Roger Hasty after the procedure and said I think I may have perforated the esophagus. He showed the tape of the procedure and let Arthur Hasty go home.

INTERROGATORY NO. 5: For all damages and expenses which Plaintiffs will assert or claim at trial whether past, present or future for the wrongful death of Decedent, which Plaintiffs claim resulted from the negligence of the Defendants please state:

(a) the nature of such damages and expenses;

(b) the period of time such will be incurred;

(c) the name, address and specialty of any person who advised or will testify that such damages or expenses may be incurred;

(d) the amount of such damages and expenses; and,

(e) to whom the damages and expenses are due.

RESPONSE: (a) Time spent watching Arthur Hasty suffer in pain, not being able to eat, suffering through more surgeries resulting from the perforated esophagus. Loss of sleep and mental anxiety due to the suffering of Arthur Hasty. The monetary cost of the trips to and from the hospital as well as the care of a child left at home during this time.

(b) March 11, 1999 through the present

(c) Harvey Hasty, Jr., 2085 Davis Road, Benton, Mississippi, 39164

Troy Hasty, 2085 Davis Road, Benton, Mississippi 39194

Margie Hasty, 128 Taylor Drive, Yazoo City, Mississippi 39194

Sadie Hasty, 128 Taylor Drive, Yazoo City, Mississippi 39194

Grover C. Saxton, Jr., 127 Taylor Drive, Yazoo City, MS 39194

Catherine Eldridge, Wheelless Street, Yazoo City, MS 39194

(d) The amount of damages and expenses claimed has yet to be determined.

(e) The wrongful death beneficiaries of Arthur I. Hasty.

INTERROGATORY NO. 6: For each and every person whom you expect to call as an witness at the trial of this cause, please state the following:

(a) Their name, address, and telephone number

(b) The subject matter on which they are expected to testify;

(c) The substance of the facts and opinions to which they are expected to testify;

(d) A summary of the grounds for each of their opinions;

(e) A list of their qualifications as an expert including education, work experience, specialized training, and authorship of or contribution to professional or trade publication(s).

RESPONSE:

w Fredric Ippoliti, M.D., 100 UCLA Medical Plaza, Suite 510, Los Angeles, CA 90024, 24-1100. Dr. Ippoliti is expected to testify to all matters concerning the medical treatment ndition of Arthur I. Hasty including but not limited to the breach of the applicable rd of care by Dr. Hamihira and the Better Living Clinic. A current copy of Dr. Ippoliti's attached to Plaintiff's response to Defendant's Request for Process.

INTERROGATORY NO. 7: For the past ten years, in regard to Decedent, please list the ing:

(a) Each medical complaint, injury or problem (including medical, physical or mental) Decedent complained of;

(b) The date(s) on which it/they occurred;

Respectfully submitted,

BY: JoAnn Waycaster
JOANN WAYCASTER MSB #[redacted]

& WAYCASTER, LLP
ssippi 39120

VERIFICATION

The responses contained in the foregoing RESPONSE OF PLAINTIFF, HARVEY DANIEL HASTY, TO INTERROGATORIES PROPOUNDED BY DEFENDANT are true and correct to the best of my knowledge, information, belief and memory.

Harvey Daniel Hasty

HARVEY DANIEL HASTY