

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-IA-00884-SCT

ILLINOIS CENTRAL RAILROAD COMPANY

APPELLANT

VS.

MARTHA MOORE, ADMINISTRATRIX OF THE  
ESTATE OF WILLIE B. MOORE, DECEASED

APPELLEE

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REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

On Interlocutory Appeal from the  
Circuit Court of Amite County, Mississippi

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ATTORNEYS OF RECORD FOR APPELLANT

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## II. TABLE OF AUTHORITIES

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### III. ARGUMENT

A. MRCP 41(B) REQUIRES A DISMISSAL IN LIGHT OF THE CLEAR RECORD OF DILATORINESS AND DELAY BY THE PLAINTIFF IN PROSECUTING THIS CASE.

Plaintiff actually argues in her brief that Illinois Central is to blame for the delay and dilatoriness in prosecuting her case against it. In support of this contention, Plaintiff attempts to present to the Court additional documents attached as "Addendums" to her brief (see "Addendum No. 1", "Addendum No. 2", "Addendum No. 3"). First, these documents (letters from Illinois Central's counsel<sup>1</sup>) should not be considered by this Court because they are not part of the record on this appeal. See Watson v. Lillard, 493 So.2d 1277, 1279 (Miss. 1986) ("[O]n appeal, this Court may take notice only of matters contained in the record.").

Secondly, the said letters simply don't support Plaintiff's assertion that the "defendant has not only cooperated in the delay but has requested the delay". They merely evidence Illinois Central's counsel's reasoned and good faith attempts to manage discovery and obtain a reasonable trial date. But, more importantly, the last applicable letter was dated January 6, 1999<sup>2</sup>, and thus they do not address the delay at issue herein, i.e., Plaintiff's failure to take any affirmative action to advance this case at any time over the following seven (7) years (through 2006). That seven (7) year delay is what Illinois Central's motion, and this appeal, is about.

The only case cited by Plaintiff in support of her argument that Illinois Central is responsible for the delay and thus not entitled to a dismissal is People's Bank v. D'Lo Royalties,

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<sup>1</sup> Illinois Central was previously represented in this action by the law firm of Zachary & Leggett, but the undersigned firm was substituted as counsel for Illinois Central by Order of this Court dated July 24, 2007.

<sup>2</sup> Plaintiff does attach a letter from Illinois Central's counsel dated August 14, 2006, but this was after the Court's ruling on Illinois Central's Motion and, in fact, after the Petition for Permission to Appeal from Interlocutory Order was filed. The August 14, 2006 letter thus cannot be relevant to the questions before this Court on appeal, i.e., (1) Whether the trial court abused its discretion in denying Illinois Central's Motion to Dismiss Pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure, and (2) Whether the trial court abused its discretion in denying Illinois Central's Motion to Dismiss Pursuant to Rule 41(d) of the Mississippi Rules of Civil Procedure.

Inc., 206 So.2d 836 (Miss. 1968). But while the Supreme Court did reverse a dismissal for lack of prosecution in People's Bank, the facts presented therein are not even remotely comparable to the facts in the instant case. In People's Bank, the lawsuit was filed on April 28, 1964 and the defendant served interrogatories to the plaintiff on January 18, 1965. The defendant's motion to dismiss (which was granted by the trial court) was filed 33 days later, on February 22, 1965, for failure of the plaintiff to answer the interrogatories within thirty (30) days. Id. at 836-37. People's Bank is not analogous to the instant case and does not support Plaintiff's argument in this regard. As stated in Illinois Central's principal brief, one would be hard pressed to locate a case sanctioning such dilatory conduct as is presented herein, and Plaintiff in fact has not yet offered any such case.

Presented with this extraordinary procedural history, the trial court abused its discretion and was manifestly wrong in denying Illinois Central's Motion to Dismiss. As such, Illinois Central respectfully requests this Court to reverse the trial court's denial of its Motion to Dismiss and to render a judgment in its favor dismissing this action with prejudice pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure.

B. MRCP 41(D) REQUIRES A DISMISSAL BECAUSE NO ACTION OF RECORD WAS TAKEN NOR WAS AN APPLICATION IN WRITING MADE TO THE COURT WITH GOOD CAUSE SHOWN AS TO WHY THE CASE SHOULD BE CONTINUED AS A PENDING CASE FOLLOWING THE CLERK'S FILING OF FOUR (4) SEPARATE MOTIONS TO DISMISS FOR WANT OF PROSECUTION.

With respect to the adequacy of the letters submitted by Plaintiff's counsel in response to the Clerk's four (4) Motions for Want of Prosecution, the Court was clear in Cucos that:

A letter in response to a Rule 41(d) Motion for Dismissal that simply requests that a case remain on the docket is an action of record **when the letter is** (1) timely sent within the 30-day period which begins on the filing of the motion, (2) found to be a sufficient action on the record and that finding is not in contradiction to an existing statute or decision of this court, and (3) considered as a part of a hearing where the trial court determined good cause existed for allowing the case to remain on its docket.

Cucos, Inc. v. McDaniel, 938 So.2d 238, 244 (Miss. 2006) (emphasis added). In Cucos, the Court noted that the trial court specifically found that a simple letter "was at the time a common

and sufficient response in that circuit court district,” and that was determinative to the Court’s decision. The fact that the trial court in the instant case made no such finding distinguishes this case from Cucos, and thus Cucos does not support the trial court’s refusal to dismiss this case.

Plaintiff cites Hine v. Anchor Lake Property Owners Assoc. for the proposition that a trial judge is presumed to have made all findings of fact necessary to sustain its ruling, but in Hine the Court specifically pointed out that the plaintiffs in that case raised the relevant law in their motion/response before the trial court. Hine v. Anchor Lake Property Owners Assoc., 911 So.2d 1001 (Miss. App. 2005) (“the [Plaintiffs], in their motion opposing [Defendant’s] Motion to Dismiss, raised the relevant law holding that a Chancellor should consider lesser sanctions.”). But Plaintiff in this case did not establish any proof before the trial court as to the relevant issue, i.e., whether just sending a letter to the clerk in response to the clerk’s Rule 41(d) Motion was a “common and sufficient response” in the Pike County circuit court district. Hine does not support Plaintiff’s position herein.

In the end, the letters Plaintiff sent to the Clerk in response to four (4) Motions to Dismiss for Lack of Prosecution over a five (5) year period, which resulted in a seven (7) year delay in this case, cannot reasonably be held to have been sufficient to meet the requirements of Rule 41(d)<sup>3</sup>. Illinois Central respectfully maintains that the failure of the trial court to dismiss this case was contrary to the mandate of Rule 41(d), an abuse of discretion and manifestly wrong.

Lastly, even if the Court were inclined to consider Plaintiff’s letters to the clerk as sufficient “actions of record” under Rule 41(d), this should still not affect the Court’s resolution of this appeal. That is, Illinois Central sought, and seeks, dismissal of this case under Rule 41(b) as well as under Rule 41(d). Rule 41(b) provides a separate an independent basis for

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<sup>3</sup> The Plaintiff’s suggestion at page 7 of her brief that Illinois Central misquoted Rule 41(d) and “incorrectly inserted ‘and’ for ‘or’...” is simply unexplainable and nonsensical. Illinois Central accurately quoted the language of Rule 41(d) each and every time it was referenced in its brief.

dismissing this case – the failure of the Plaintiff to prosecute this case for seven (7) years. In other words, the Court need not even consider Rule 41(d) to hold that the Plaintiff's actions (or inactions) in this case clearly require dismissal for failure to prosecute.

#### **IV. CONCLUSION**

Illinois Central respectfully requests this Court to reverse the trial court's denial of its Motion to Dismiss and to render a judgment in its favor dismissing this action with prejudice pursuant to Rule 41(b), or in the alternative, to reverse and render a judgment in its favor dismissing this action pursuant to Rule 41(d).

#### **ORAL ARGUMENT**


Oral argument should be permitted because the issue presented herein is significant to the fair, orderly and timely administration of justice in civil cases in the Courts of this State.

Respectfully submitted,

**Illinois Central Railroad Company, Appellant**

By:



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**ATTORNEYS OF RECORD FOR APPELLANT**

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this date, filed the foregoing Reply Brief of the Appellant with the Supreme Court of Mississippi, and served true and correct copies of same, via United States Mail, first class, postage prepaid, to:

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Honorable Lillie Blackmon Sanders  
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This the 26<sup>th</sup> day of December, 2007



RICHARD A. FOLLIS