

ILLINOIS CENTRAL RAILROAD COMPANY

APPELLANT

VS.

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

APPELLEE

**BRIEF OF THE APPELLANT,
ILLINOIS CENTRAL RAILROAD COMPANY**

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

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ATTORNEYS OF RECORD FOR APPELLANT

ILLINOIS CENTRAL RAILROAD COMPANY

APPELLANT

VS.

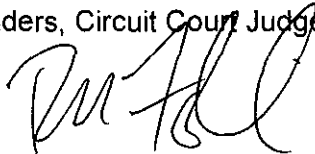
MARTHA MOORE, ADMINISTRATRIX OF THE
ESTATE OF WILLIE B. MOORE, DECEASED

APPELLEE

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Martha Moore, Administratrix of the Estate of Willie B. Moore, Deceased, Appellee.
2. Illinois Central Railroad Company, Appellant.
3. William S. Guy, Esq. and Wayne Dowdy, Esq., Attorneys for Appellee.
4. Romney H. Entrekin, Esq. and Richard A. Follis, Esq., Attorneys for Appellant.
5. Honorable Lillie Blackmon Sanders, Circuit Court Judge, Amite County, Mississippi.


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RULES

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1. Whether the Trial Court abused its discretion in denying Illinois Central Railroad Company's Motion to Dismiss pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure.
2. Whether the Trial Court abused its discretion in denying Illinois Central Railroad Company's Motion to Dismiss pursuant to Rule 41(d) of the Mississippi Rules of Civil Procedure.

Railroad Company (Illinois Central). On October 8, 1993, Moore died of a heart attack while on duty with Illinois Central. Martha Moore, Administratrix of the Estate of Willie B. Moore, ("Plaintiff") filed this lawsuit on February 5, 1997, alleging various theories of liability against Illinois Central pursuant to the Federal Employer's Liability Act ("FELA"). (R 01-06). Illinois Central answered Plaintiff's Complaint on March 17, 1997, and some discovery was conducted over the course of the following year.

Then, there was no activity in the case from December 1998 until the Amite County Circuit Clerk filed her first Motion to Dismiss for Want of Prosecution on May 24, 2001. (R 15; RE at 3). During this entire 2 year and 5 month period (December 1998 through May 24, 2001), no action of record was taken by Plaintiff to advance this suit. The Clerk's Motion, filed pursuant to the mandates of Rule 41(d) of the Mississippi Rules of Civil Procedure, contained the following "Notice": *"this case will be dismissed unless within thirty (30) days of the date of this Notice, action of record is taken, or written application is made to the Court and good cause shown while such case should not be dismissed."* (R 15; RE at 3). In response to the Clerk's motion, counsel for Plaintiff merely forwarded a letter to the Clerk requesting that the case remain on the court's active docket. Said letter was filed on June 4, 2001. (R 16; RE at 4).

Then, another year went by without the Plaintiff taking any action to advance the suit, and on May 24, 2002, the Clerk filed her second Motion to Dismiss for Want of Prosecution. (R 17; RE at 5). In response, Plaintiff's counsel sent another letter to the Clerk requesting that the case remain on the docket. Said letter was filed on June 6, 2002. (R 18; RE at 6).

Then, another two years went by without the Plaintiff taking any action of record to advance the suit, and the Clerk filed a third Motion to Dismiss for Want of Prosecution on June 1, 2004. (R 19; RE at 7). Plaintiff's counsel again only sent a similar letter to the Clerk's office which was filed on June 4, 2004. (R 20; RE at 8).

21, RE at 9). Plaintiff's counsel again did nothing more than write a letter to the Clerk requesting that the case remain on the docket, which was filed on June 20, 2005. (R 22; RE at 10).

On October 31, 2005, an entry of appearance was filed by Wayne Dowdy, Esq., as additional counsel for Plaintiff. (R 23). On March 24, 2006, Illinois Central filed its Motion to Dismiss for failure to prosecute pursuant to Rules 41(b) and Rule 41(d) of the Mississippi Rules of Civil Procedure. (R 24-45). Plaintiff responded to the motion to dismiss and a hearing was held on the motion before the Honorable Lillie Blackmon Sanders. (See Hearing Transcript). After hearing oral arguments of counsel, the trial court not only denied Illinois Central's Motion to Dismiss but also suggested an expedited trial setting. (See Hearing Transcript at p. 11). The trial court entered its order denying the Motion to Dismiss on or about May 11, 2006. (R 53; RE at 2). Illinois Central timely filed its Petition for Permission to Appeal from Interlocutory Order, which was granted by this Court on or about August 24, 2006.

The following timeline is provided to assist the Court in its analysis of this case:

October 6, 1995	Moore's death
February 5, 1997	Complaint filed
December 28, 1998	<i>Last action of record taken by the plaintiff to advance this case</i>
	<i>(no action of record to advance the case)</i>
May 24, 2001	Clerk's First Motion to Dismiss for Want of Prosecution
June 4, 2001	Plaintiff counsel's letter to the clerk
	<i>(no action of record to advance the case)</i>
May 24, 2002	Clerk's Second Motion to Dismiss for Want of Prosecution
June 6, 2002	Plaintiff counsel's letter to the Clerk
	<i>(no action of record to advance the case)</i>
June 1, 2004	Clerk's Third Motion to Dismiss for Want of Prosecution

June 1, 2005	Clerk's Fourth Motion to Dismiss for Want of Prosecution
June 20, 2005	Plaintiff counsel's letter to the Clerk <i>(no action of record to advance the case)</i>
October 31, 2005	Entry of Appearance of additional counsel for plaintiff (Wayne Dowdy, Esq.)
March 24, 2006	Illinois Central's Motion to Dismiss Pursuant to Rules 41(d) and Rule 41(b) of the Mississippi Rules of Civil Procedure.

The above clearly evidences dilatory conduct on behalf of the Plaintiff in prosecuting this case and it should therefore be dismissed.

plaintiff must move her civil action toward resolution and may not abuse the system via dilatory conduct. Prejudice to a defendant is presumed when there is a lengthy delay in prosecuting a case. A defendant has the right, pursuant to MRCP 41(b), to have a case dismissed if there is a clear record of dilatory conduct by the plaintiff. Furthermore, Rule 41(d) directs the trial court clerk to send notices to litigants in stale cases informing them that their case will be dismissed if, within 30 days, action of record is not taken or application in writing is not made to the court and good cause shown why the case should be continued as a pending case and to dismiss any such cases wherein this requirement is not met.

In the instant case, Illinois Central's Motion to Dismiss was preceded by seven (7) years of inactivity during which time four (4) motions to dismiss for failure to prosecute were filed by the Amite County Circuit Clerk. During this entire period, Plaintiff took no action of record to advance this suit. To say this demonstrates a clear record of dilatory conduct would be an understatement. Given these facts, the trial court abused its discretion and was manifestly wrong in denying Illinois Central's Motion to Dismiss pursuant to MRCP 41(b) and/or 41(d).

The power to dismiss a civil action for failure to prosecute is an inherent power of the court. Accord Watson v. Lillard, 493 So.2d 1277, 1278 (Miss. 1986). The plaintiff has the burden to prosecute her case, and Rule 41(b) of the Mississippi Rules of Civil Procedure is the procedural vehicle available to a defendant when faced with delay and dilatory conduct by a plaintiff. When a defendant moves for a dismissal for lack of prosecution, as in the instant case, Rule 41(b) governs the Court's analysis. Watson, 493 So.2d at 1278; see also American Telephone & Telegraph Co. v. Days Inn of Winona, 720 So.2d 178, 180 (Miss. 1998). A dismissal is appropriate if the record shows that the plaintiff has been guilty of dilatory or contumacious conduct. Accord Vosbein v. Belliaf, 866 So.2d 489, 493 (Miss. App. 2004) (citing Watson, 493 So.2d at 1279). Rule 41(b) prevents abuse of the system and dilatory conduct and protects defendants from the prejudice that necessarily results therefrom.¹

What constitutes failure to prosecute depends on the facts of each case. AT&T, 720 So.2d at 180-81. As to this case, Illinois Central respectfully suggests that one would be hard pressed to locate a case sanctioning such dilatory conduct as is presented herein. If there could be any doubt that the egregious facts underlying the instant appeal warrant a dismissal, similar and often much shorter delays are frequently held to justify dismissal for failure to prosecute. For example, in Hine v. Anchor Lake Property Owners Assoc., 911 So.2d 1001 (Miss. App. 2005), a dismissal for lack of prosecution under Rule 41(b) was upheld when the case was dormant for just over three years prior to the filing of the motion to dismiss.

Other courts have likewise had no difficulty recognizing and applying the mandate of Rule 41(b) in dismissing cases with far shorter delays than in this case. For example, the Fifth

¹ Prejudice to a defendant is presumed when there is a lengthy delay in prosecuting a case. Washington v. Walker, 734 F.2d 1237, 1239 (7th Cir. 1984) (citing 9 C. Wright & A. Miller Federal Practice and Procedure, § 2370 at 216 (1971)).

Hollenbach v. California Western RN, 400 F.2d 122 (9 Cir. 1972) (applying a Rule 41
dismissal when the case evidenced no activity for 26 months). The following quote from the
Seventh Circuit is instructive:

'[F]ailure to prosecute' under the rules does not mean that the plaintiff must
have taken any positive steps to delay the trial or prevent it from being
reached by the regular machinery of the court. It is quite sufficient if he does
nothing, knowing that until something is done there will be no trial.

Washington v. Walker, 734 F.2d 1237, 1238 (7th Cir. 1984).

The delay and dilatoriness underlying this appeal is enumerated in detail above (see
Statement of the Case). Illinois Central's Motion to Dismiss was preceded by seven years of
inactivity in this case. Plaintiff allowed seven years to pass without taking any affirmative action
to advance this case toward resolution. 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. ALTERNATIVELY, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ILLINOIS CENTRAL'S
MOTION TO DISMISS PURSUANT TO MRCP 41(d) 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

The trial court's refusal to dismiss this action is directly contrary to the mandate of MRCP
41(d). The Clerk below filed four (4) separate Motions to Dismiss for Want of Prosecution over
a five year period, and the Plaintiff never met the requirements of Rule 41(d) in response to any
of them. Rule 41(d) provides as follows:

² Rule 41(b) of the Federal Rules of Civil Procedure is the same as Rule 41(b) of the Mississippi
Rules of Civil Procedure, and the Mississippi Supreme Court has stated that it can look to federal
decisions for guidance in applying MRCP 41(b). Watson, 493 So.2d at 1278.

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.

MRCP 41(d)(1) (emphasis added). In determining whether a case should be dismissed following a Rule 41(d) motion, the court must consider: (1) whether the plaintiff took action of record within thirty (30) days following the mailing of the notice of the motion to dismiss or, alternatively, (2) whether the plaintiff made an application to the court showing good cause why the case should be continued as a pending case.

This case was ripe for dismissal when, following two and one-half years of inactivity, the Clerk filed her first Motion to Dismiss for Lack of Prosecution in 2001. No action of record was taken, and no good-cause was shown following that motion, nor was this requirement of Rule 41(d) met following any of the additional three motions filed by the Clerk. It was clearly an abuse of discretion and manifestly wrong for the trial court to deny Illinois Central's motion in light of these facts. See Accord Curry v. Walls, 871 So.2d 762 (Miss.App.Ct. 2004); Guidry v. Pine Hills CC, Inc., 858 So.2d 196 (Miss.App.Ct. 2003).

This Court's recent decision in Cucos, Inc. v. McDaniel, 938 So.2d 238 (Miss. 2006), also demonstrates that the instant case should be dismissed pursuant to Rule 41(d). In Cucos, the Court held that the facts presented *in that case* warranted a finding that the plaintiff's counsel's letter to the Jackson County Circuit Clerk responding to a motion to dismiss for want of prosecution satisfied the "action of record" requirement of Rule 41(d). However, the Cucos decision clearly does not stand for the proposition that a letter to the clerk requesting a case stay on the active docket is *per se* sufficient in every case to satisfy the requirements of Rule 41(d). Rather, the Court acknowledged that its holding was based on the facts of that particular case and it specifically stated that its holding was "considering the totality of the trial court's

action or record under Rule 41(d), which was, in turn, based on the fact that responding to a clerk's Rule 41 motion via a simple letter "was at the time a common and sufficient response in that circuit court district." Id. at 240. Indeed, the Cucos Court stated its limited holding as follows:

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.*

Id. at 244 (emphasis added).

When the facts in Cucos, as well the Court's analysis and holding therein, are applied to the instant case, Cucos actually provides further support for a dismissal herein. In the instant case, there was no proof or even suggestion by the Plaintiff or by the trial court,³ and there was certainly no finding by the trial court, that a letter such as that sent by the Plaintiff herein was a common and sufficient response to a Clerk's Rule 41(d) motion in Amite County. The trial court's basis for denying the Motion to Dismiss in this case was stated by the court at the hearing, as follows:

I don't need any more time. The Court is not going to dismiss the lawsuit. The Court is going to enter a scheduling order today.

This is a case that has clearly been worked on. I think the remedy of dismissal would be so unfair to the From a standpoint that the -- the person, the plaintiff, not the -- to dismiss a case that has been -- seems like there has been discovery done, it has been answered. All of a sudden you're just going to dismiss it. There has been all of these years in between, nobody has filed a Motion to Dismiss under Rule 41.

brought to the Court until this particular time.

The Court is going to enter a scheduling order and going to expedite this case and put it on the trial docket ...

See Hearing Transcript at pp.10-11.

The written order entered on the court's denial of the motion provides as follows:

THIS DAY, this cause came on to be heard on Motion of Defendant, Illinois Central Railroad Company to dismiss the above styled and numbered cause pursuant to Rule 41(d) and 41(b) of the Mississippi Rules of Civil Procedure and the Court, having considered the motion filed by the defendant, plaintiff's response thereto and having heard oral argument of counsel finds that said motion is not well taken and is hereby denied.

IT IS, THEREFORE ORDERED, that the Defendant's Motion to Dismiss pursuant to Rule 41(d) and 41(b) of the Mississippi Rules of Civil Procedure is hereby denied.

(R 53; RE at 2). The trial court below did not find that the letters sent by Plaintiff's counsel were sufficient "actions of record" under Rule 41(d). The trial court based its holding at least in part on a conclusion that "this is a case that has clearly been worked on ... " and that "... a remedy of dismissal would be so unfair" (See Hearing Transcript at p. 10) Illinois Central respectfully maintains that the trial court's holding in this regard was an abuse of discretion and manifestly wrong.

Furthermore, the holding in Cucos was also based in part on the fact that the clerk failed to send the plaintiffs notice of its dismissal of the case and the order of dismissal was misfiled because the incorrect docket number was put on the order. In contrast, notice is not an issue in this case; it is undisputed that plaintiff received all four (4) of the clerk's motions.

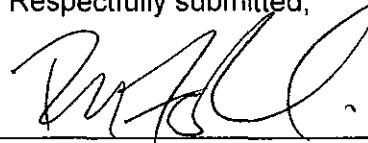
Lastly, the delay, dilatoriness, and failure to prosecute in the instant case is much more egregious than in Cucos, wherein the lawsuit was filed in May 2000, the last action recorded by the clerk was on July 6, 2001, and the case was dismissed for lack of prosecution on November 22, 2002. Cucos should not be extended to a holding that similar letters are sufficient in

Illinois Central respectfully maintains that the failure of the trial court to dismiss this case was contrary to the mandate of MRCP 41(d), an abuse of discretion and manifestly wrong. Accordingly, it 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 pursuant to said Rule.

VIII. CONCLUSION

Based on the above, 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 MRCP 41(b), or in the alternative, to reverse and render a judgment in its favor dismissing this action pursuant to MRCP 41(d).

Respectfully submitted,



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I hereby certify that I have, this date, filed the foregoing Appellant's Brief with the Supreme

Court of Mississippi, and served true and correct copies of same, via United States Mail, first class,
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This the 26th day of September, 2007.



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