2007-CA-00806 E

NO. 2007-TS-00806

IN THE SUPREME COURT OF MISSISSIPPI

GREGORY LAMAR HILL — PLAINTIFF-APPELLANT

v.

FORD MOTOR COMPANY, et al. — DEFENDANTS-APPELLEES

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 judges of this Court may evaluate possible disqualification or recusal.

1. New Holland North America, Inc. (f/k/a Ford Motor Company), Appellee/Defendant;
2. Deviney Equipment Company, Appellee/Defendant;
3. Gregory Lamar Hill, Appellant/Plaintiff;
4. Walker W. Jones, III and Everett E. White, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel of record for New Holland North America, Inc., Appellee/Defendant;
5. Marc E. Brand, counsel of record for Deviney Equipment Company, Appellee/Defendant;
6. Bennie L. Jones, Jr., Law Offices of Bennie L. Jones, counsel of record for Gregory Lamar Hill, Appellant/Plaintiff;
7. Jack H. Hayes, Jr., Stone & Hayes, counsel for Durenda Ramsey, Defendant; and
8. Honorable Lee J. Howard, Circuit Court Judge, Noxubee County, Mississippi.

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STATEMENT OF THE ISSUE

WHETHER THE LOWER COURT ABUSED ITS DISCRETION BY DISMISSING PLAINTIFF'S CLAIMS AGAINST NEW HOLLAND NORTH AMERICA, INC. WITHOUT PREJUDICE FOR FAILURE TO PROSECUTE, WHEN PLAINTIFF DID NOT TAKE A SINGLE STEP TO PROSECUTE HIS CLAIMS FOR FOUR YEARS.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from the lower court's dismissal of Gregory Lamar Hill's claims against New Holland North America, Inc. ("New Holland") without prejudice under MRCP 41(b) for failure to prosecute. The underlying suit arises from a motor vehicle accident in which Durenda Ramsey ("Ramsey") negligently rear-ended Plaintiff at approximately 65 miles an hour while he was operating a 1989 Ford Backhoe ("Backhoe"). (R. 2). Plaintiff originally sued Ramsey for the injuries he suffered as a result of the wreck (R. 2), but three years later amended his Complaint to assert product liability claims against New Holland (the manufacturer of the Backhoe) and Deviney Equipment Company ("Deviney") (the alleged seller). (R. 50).

Since filing suit against New Holland in 2003, Plaintiff has not taken a single affirmative act to prosecute his claims: no discovery requests have been served, no depositions noticed, no subpoenas issued, and no substantive motions filed. In fact, the only type of motion Plaintiff has filed is, ironically, a Motion for an Enlargement of Time to serve a party or file a response. To date, he has filed seven (7) of these motions. (R. 64, 100, 174, 176, 184).[1]

Other than filing Motions for Enlargements of Time, the only action Plaintiff has taken since 2003 has been reactionary in nature. He partially responded to New Holland's Discovery Requests;[2] responded to two Motions to Dismiss (R. 167, 209); and executed a release of his medical information (R. 111). Those are, literally, the only actions Plaintiff has taken in the four

[1] The other two Motions for Enlargement of Time were to file the Appellant brief and are thus not in the record.

[2] Plaintiff never responded to the Requests for Production and his response to the Interrogatories was over five (5) months late, and only received after New Holland filed a Motion to Compel. (R. 11).

(4) years since filing his Amended Complaint. None of these actions constitutes a positive step towards prosecuting his claims against New Holland.

Moreover, in addition to not taking the initiative in prosecuting this lawsuit, Plaintiff's counsel has been unresponsive to requests from New Holland's counsel to move this case forward. In August of 2006, counsel for New Holland asked Plaintiff's counsel to send a proposed scheduling order, photographs of the Backhoe and accident scene, and a settlement demand articulating why Plaintiff was seeking to hold New Holland liable. Plaintiff's counsel, while friendly and professional, never sent the proposed scheduling order or photographs, and the one-paragraph settlement demand he sent was quickly rejected.

After four (4) years of inactivity, and a failed attempt to advance the case, New Holland finally filed a Motion to Dismiss for Failure to Prosecute on March 22, 2007. (R. 203). Based on this record of dilatory conduct, the lower court would have been justified in dismissing the entire case with prejudice. Instead, it mercifully allowed Plaintiff to pursue his claims against Ramsey and applied the lesser sanction of dismissing his claims against New Holland and Deviney *without* prejudice. (R. 212) (R.E. 2). This Court should now affirm the lower court's lenient ruling.

II. COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

On April 18, 2000, Plaintiff Gregory Hill was traveling south on U.S. Highway 45 in the Backhoe when he was rear-ended by a Chevy van traveling 65 miles an hour. (R. 2). A month later, Plaintiff sued the driver of the van, Durenda Ramsey, for personal injuries allegedly sustained as a result of the wreck. (R. 2). On April 17, 2003, after receiving worker's compensation payments from his employer, the Mississippi Department of Transportation

(MDOT), and after Ramsey's insurance policy limits were tendered, Plaintiff amended his Complaint to assert product liability claims against New Holland and Deviney. (R. 50).

The next activity in this case came on July 7, 2003, when Plaintiff filed the first of his many Motions for Enlargement of Time — this one for more time to serve Deviney. (R. 64). After filing its answer on August 12, 2003 (R. 66), New Holland served Plaintiff with written discovery on October 9, 2003. (R. 87). Plaintiff did not respond timely and, after several letters, New Holland filed a Motion to Compel on February 13, 2004. (R. 91). On March 4, 2004, Plaintiff filed a Motion for Enlargement of Time to respond to these discovery requests (R. 100) (Motion No. 2). When Plaintiff finally responded on March 22, 2004, he did not respond to New Holland's Requests for Production of Documents. The only other activity in this case prior to April 2005, was an Agreed Order authorizing disclosure of Plaintiff's health information and the issuance of several subpoenas by New Holland. (R. 111).

On April 27, 2005, Deviney filed a Motion for Judgment on the Pleadings because Deviney did not have any control over the manufacturing of the Backhoe and there was no evidence that it even sold the Backhoe to MDOT. (R. 167). Not surprisingly, Plaintiff filed a Motion for Enlargement of Time to respond on June 6, 2005 (R. 174) (Motion No. 3). On May 9, 2005, Plaintiff filed another Motion for Enlargement of Time (R. 176) (Motion No. 4). And on June 27, 2005, Plaintiff filed yet a third Motion for Enlargement of Time to Respond to Deviney's Motion (R. 184) (Motion No. 5). Plaintiff finally responded on August 3, 2005. (R. 193).

In sum, all of the limited activity in the case that occurred from April 2003 through August 3, 2005, was initiated by one of the Defendants. Plaintiff either responded to a Motion filed by one of the Defendants or filed a Motion for an Enlargement of Time. Neither action

should be considered prosecuting his claims because neither advanced the case forward. Moreover, from August 2005 to March 2007 there was absolutely no activity in this case.[3]

On March 1, 2007, counsel for Ramsey filed a Motion for a Status Conference because there had been no real activity in the case for almost four (4) years. (R. 197). New Holland followed this Motion with a Motion to Dismiss for Failure to Prosecute on March 22, 2007, for the same reason. (R. 203). Plaintiff responded to these Motions on March 28, 2007 (R. 209), and the Court heard oral argument on March 30, 2007. At the hearing, Plaintiff's counsel offered no viable explanation for the delay in prosecuting his claims (R. Vol. III, p. 1-18)[4] and, consequently, the lower court entered an order on April 13, 2007 dismissing Plaintiff's claims against New Holland and Deviney. (R. 212). Fortunately for Plaintiff, the lower court did not dismiss his claims against Ramsey and used the lesser sanction of dismissing his claims against New Holland and Deviney without prejudice. (R. 212).

Aggrieved by the dismissal without prejudice, Plaintiff filed his notice of appeal to this Court on May 14, 2007. (R. 214). After two (2) more motions for enlargement of time to file (Motions No. 6 & 7), Plaintiff finally filed his Appellant Brief on March 3, 2008. As discussed below, Plaintiff does not point to a single positive action he took to advance this case and offers no explanation for his failure to do so. As a result, the lower court's dismissal was entirely proper.

SUMMARY OF THE ARGUMENT

This Court should affirm the lower court's dismissal without prejudice because (1) there is a clear record of delay; (2) the lower court applied lesser sanctions; and (3) an aggravating

[3] As previously noted, counsel for New Holland tried to move this case forward in 2006, but was unsuccessful.

[4] The transcript of the march 30, 2007 hearing is found in Volume III of the record, but is not numbered to correspond with the rest of the record.

factor is present. First, there is a clear record of delay because Plaintiff did not take a single positive step to prosecute his claims for four years; responding to motions to dismiss and filing motions for enlargement of time to file a response are not steps toward prosecuting claims. But even if they were, Plaintiff did absolutely nothing for 18 months prior to New Holland filing the subject Motion to Dismiss. This period of inactivity is, by itself, a clear record of delay.

Next, the court applied lessor sanctions by not dismissing Plaintiff's claims against Ramsey and only dismissing Plaintiff's other claims without prejudice. Considering the record before it, this was a most generous ruling. The lower court could have easily dismissed the entire case with prejudice.

Finally, even though the presence of an aggravating factor is not necessary to sustain a dismissal under Miss. R. Civ. P. 41(b) — especially a dismissal without prejudice — there is an aggravating factor present here. Plaintiff's delay in prosecuting his claims severely prejudices New Holland because the witnesses are not likely to remember details from eight (8) years ago, and the evidence (e.g., the Backhoe) has not been preserved. Therefore, this Court should affirm the lower court's dismissal without prejudice for failure to prosecute under Miss. R. Civ. P. 41(b).

ARGUMENT

I. LEGAL FRAME WORK

When this Court reviews a trial court's dismissal for failure to prosecute pursuant to Rule 41(b), it will reverse only if it finds the trial court abused its discretion. *Wallace v. Jones,* 572 So. 2d 371, 375 (Miss. 1986). Under Mississippi Rule of Civil Procedure 41(b), a complaint may be dismissed "[f]or failure of the plaintiff to prosecute or comply with these rules or any

order of court . . .". In other words, a "plaintiff has an obligation to diligently prosecute his case." *Bosch v. America Online, Inc.* 2004 WL 1293243, * 1 (S.D.N.Y. 2004).

Trial courts also have the inherent authority to dismiss cases for lack of prosecution as a means of controlling the court's docket and ensuring the "orderly expedition of justice." *Watson v. Lillard,* 493 So. 2d 1277, 1278 (Miss. 1986). Dismissal for failure to prosecute is appropriate when (1) there is a clear record of delay or contumacious conduct by the plaintiff; and (2) lesser sanctions would not "serve the best interests of justice." *Hine v. Anchor Lake Property Owners Ass'n, Inc.* 911 So. 2d 1001, 1004 (Miss. App. 2005).

In addition to this two-part test, Mississippi courts also look at whether there are any "aggravating factors," such as "the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct." *Id.* at 1004. The presence of aggravating factors, however, is not necessary to sustain a dismissal with prejudice under Rule 41(b), *id; ergo* it is certainly not necessary to sustain a dismissal without prejudice.

II. THE LOWER COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS AGAINST NEW HOLLAND BECAUSE PLAINTIFF DID NOT PROSECUTE HIS CLAIMS FOR FOUR YEARS.

Applying the standard provided above, this Court should affirm the lower court's dismissal for the following reasons: (a) there was a clear record of delay; (b) the court used lesser sanctions; and (c) aggravating factors are present.

A. THERE IS A CLEAR RECORD OF DELAY.

As noted, Plaintiff had not taken a single positive step to prosecute his claims for almost four (4) years when New Holland filed its motion to dismiss in March of 2007. The following are examples of this:

- Plaintiff has still not served any discovery requests, noticed a single deposition, issued a single subpoena, or otherwise initiated formal discovery.
- Plaintiff's Responses to New Holland's Discovery Requests were five (5) months late, incomplete, and only served after New Holland filed a Motion to Compel.
- The only type of motion Plaintiff has filed is, ironically, a motion for enlargement of time to respond to a motion or to serve a party. He has filed seven (7) much Motions since 2003. (R. 64, 100, 174, 176, 184).
- Plaintiff's counsel did not respond to numerous requests to move this case forward.

A number of Mississippi courts have recently found that similar records of a plaintiff's dilatory conduct qualified as a "clear record of delay."[5] One case that is particularly instructive here is *Hine v. Anchor Lake Property Owners Ass'n, Inc.*, in which the Court of Appeals affirmed a dismissal with prejudice for failure to prosecute. 911 So. 2d 1001, 1004 (Miss. App. 2005). There are at least three key similarities between *Hine* and this case.

First, in both cases there was an extended period of time when plaintiffs did not take a single affirmative action to advance the case: over three (3) years in *Hine* and almost four (4) years here. Second, the pattern of dilatory conduct began early in each case. Both the Plaintiff here and the plaintiffs in *Hine* required an extension of time to properly serve a defendant. (R. 64); *Hine*, 911 So. 2d at 1004. And third, the plaintiffs in both cases were extraordinarily delinquent in responding to basic, written discovery requests. Each served their interrogatory responses almost five months late, and the Plaintiff here did not respond at all to New Holland's Requests for Production of Documents. *Id.*

Moreover, Plaintiff here filed seven (7) separate Motions for Enlargement of Time to respond to a motion or serve a party. That is a clear pattern of dilatory conduct. Therefore,

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[5] *Hasty v. Namihira*, 2008 WL 170806, * 3 (Miss. App. 2008); *Tolliver v. Mladineo*, 2007 WL 2034622, * 6 (Miss. App. 2007); *Hine v. Anchor Lake Property Owners Ass'n, Inc.*, 911 So. 2d 1001, 1004 (Miss. App. 2005); *Hensarling v. Holly*, 972 So. 2d 716, 721 (Miss. App. 2007).

under established Mississippi precedent, including *Hine*, the inactivity in this case constitutes a clear record of delay. Thus, the first part of the Rule 41(b) analysis is satisfied.

Nevertheless, despite the plain record before the Court, Plaintiff argues that (1) there is no clear record of delay and (2) if there was, it was excusable. Plaintiff's Brief at p. 8. Plaintiff is mistaken on both counts. In his Brief, Plaintiff seems to argue that there was no clear record of delay because he responded to Defendant's Motions to Dismiss, responded to Interrogatories (after a Motion to Compel was filed), agreed to execute an order releasing his medical information, and filed several motions for enlargement of time. *Id.* All of these actions, however, are reactionary and do not constitute a positive step towards prosecuting his case. And not advancing the case for such an extended period of time is sufficient to establish a clear record of delay; evidence of intentional acts to delay a trial is not required.[6] Moreover, even if Plaintiff's actions somehow qualified as prosecuting his claims, there was still an 18-month period of total inactivity in this case (August 2005 – March 2007); this, by itself, is a clear record of delay. *Tolliver v. Mladineo*, 2007 WL 2034622, * 6 (Miss. App. 2007).

Additionally, contrary to his assertions, Plaintiff has offered no explanation for his delay. He claims in his Brief that settlement negotiations excuse the delay, Plaintiff's Brief at p. 8, but this is disingenuous at best. In 2006, Plaintiff submitted a one-paragraph settlement demand that was quickly rejected. That hardly constitutes ongoing settlement negotiations and, in any event, does not excuse the four-year delay in prosecuting his claims. Further, the two cases cited by Plaintiff do not support his argument.

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[6] *See, e.g., West v. City of New York*, 130 F.R.D. 522, 525 (S.D.N.Y. 1990) ("'[F]ailure to prosecute' under the rule does not mean that the plaintiff must have taken any positive steps to delay the trial . . . [i]t is quite sufficient if he does nothing, knowing that until something is done, there will be no trial.") (internal citations omitted); *Folk v. Rademacher*, 2005 WL 2205816, * 2 (W.D.N.Y. 2005) ("Rule 41(b) does not define what constitutes failure to prosecute. However, the second circuit has stated that failure to prosecute can evidence itself in an action lying dormant with no significant activity to move it or in a pattern of dilatory tactics.'") (internal citations omitted).

The first case Plaintiff cited, and the only one he discussed, was *Cucos, Inc. v. McDaniels*, 938 So. 2d 238 (Miss. 2006). Plaintiff argues that "[a]s in the McDaniels case . . . there were ongoing settlement negotiations between Plaintiffs and Defendants." Plaintiffs' Brief at p. 8. As noted, the "ongoing settlement negotiations" occurred in 2006 and consisted of a one-paragraph demand that was quickly rejected. This stands in stark contrast to the exhibits submitted in *McDaniels* documenting extensive settlement negotiations between the parties. *Cucos, Inc.*, 938 So. 2d at 240. In addition, *McDaniels* is easily distinguishable on other grounds as well. One basic distinction is that the case dealt with an affirmance of the lower court's reinstatement of a case that was dismissed under Rule 41(d). After being informed that the clerk had failed to place a letter from plaintiff's counsel in the court file, and hearing argument regarding the settlement negotiations, the lower court reinstated the case. *Id.* at 245. The Mississippi Supreme Court simply affirmed this decision, recognizing that lower courts are "afforded great discretion in the second function of Rule 41(d), which is to control its own docket." *Id.* at 242. It is difficult to conceive how this case could possibly support Plaintiff's argument here that the lower court abused its discretion in dismissing a case under Rule 41(b).

Plaintiff also references, in passing, *Vosbein v. Belhias*, 866 So. 2d 489 (Miss. App. 2004). His Brief merely states "Also see *Vosbein* . . .". Plaintiff's Brief at p. 8. No discussion of the case follows. Plaintiff's reliance on *Vosbein*, however, is even more misplaced than his reliance on *McDaniels*. In *Vosbein*, the appellate court affirmed a dismissal with prejudice for failure to prosecute under Rule 41(b). Indeed, when examined, *Vosbein* actually supports New Holland's position. Like Plaintiff here, the plaintiff in *Vosbein* had done nothing but respond to a few motions in the six years since filing his Complaint. *Id.* at 492. The fact that Plaintiff here had only delayed four years instead of six is inconsequential; as shown above, four years of

inactivity is a clear record of delay.

Finally, at the hearing on New Holland's Motion, Plaintiff also implied that workers' compensation issues contributed to the delay. (R. Vol. III, p. 8-14). As the Court clarified, however, all of the alleged workers' compensation issues occurred in 2000 and 2001 before New Holland was named as a Defendant. *Id.* Thus, any workers' compensation issues that existed did not cause the delay in prosecuting Plaintiff's claims against New Holland.

Therefore, for the reasons set forth above, this Court should find that the lower court did not abuse its discretion in finding that there was a clear record of delay in this case.

B. THE LOWER COURT USED LESSER SANCTIONS.

The next issue is whether lesser sanctions may have better served the interests of justice. *Wallace,* 572 So. 2d at 377. Lesser sanctions include "fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings." *Hensarling v. Holly,* 972 So. 2d 716, 721 (Miss. App. 2007). Although not mentioned in Plaintiff's Brief, the lower court here applied lesser sanctions in two ways. First, it dismissed Plaintiff's claims against New Holland and Deviney without prejudice, which is a significant distinction because, unless barred by the statute of limitations, a plaintiff can usually refile if the dismissal is without prejudice. *See Hasty v. Namihira,* 2008 WL 170886, *2 (Miss. App. 2008). Second, the lower court chose not to dismiss Plaintiff's claims against Ramsey even though Plaintiff had not prosecuted his claims against her either.

In light of the inexcusable four-year delay, these rulings were exceedingly lenient; the lower court would have certainly been justified in dismissing all of Plaintiff's claims with prejudice. Therefore, because the lower court applied lesser sanctions even though it did not have to, this Court should affirm its dismissal of Plaintiff's claims against New Holland.

C. AGGRAVATING FACTORS ARE PRESENT HERE.

This Court has explained that dismissals with prejudice under Rule 41(b) are, in most cases, only affirmed if there is at least one "aggravating factor" present. *AT&T Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (Miss. 1998). The *AT&T* Court went on to provide the following three examples of aggravating factors: (1) whether delay was caused by the party as opposed to his counsel, (2) whether there was actual prejudice to the opposing party, and (3) whether the delay was an intentional attempt to abuse the judicial process. *Id.* at 182. Since this dismissal was *without* prejudice, however, the Court does not need to analyze whether an aggravating factor was present. Nevertheless, if the court deems this analysis necessary, an aggravating factor is clearly present here. Namely, the severe prejudice New Holland suffered as a result of Plaintiff's dilatory prosecution.

Because Plaintiff did not prosecute his claims against New Holland for almost four (4) years, the memory of any potential witnesses will be substantially impaired and the physical evidence was not preserved. *Hensarling v. Holly*, 2007 WL 1599555, * 4 (Miss. App. 2007) ("It is unclear how anyone's memory will be tested in discovery at this point, or whether any evidence is still available."). Plaintiff asserts that information about the subject Backhoe was preserved in deposition testimony and photographs, but this is not true. Plaintiff's Brief at p. 8. The depositions were all taken prior to 2003; that is, before New Holland was added as a Defendant. Thus, the depositions did not focus on the condition of the Backhoe and were certainly not taken with New Holland's interests in mind. Moreover, the Backhoe was repaired after the wreck and the photographs (which were never produced) were, like the depositions, not taken to preserve information about the Backhoe's condition; therefore, they would be insufficient for New Holland's experts to base an opinion on. Consequently, New Holland would

be severely prejudiced if it were required to defend itself in this lawsuit after such a prolonged delay.

CONCLUSION

For the reasons set forth above, New Holland respectfully requests that this Court affirm the lower court's dismissal without prejudice of Plaintiff's claims against New Holland, and allow Plaintiff to proceed with his claims against the real culprit, Durenda Ramsey.

THIS the 2 day of April, 2008.

Respectfully submitted,

NEW HOLLAND NORTH AMERICA, INC.

By Its Attorneys,
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CERTIFICATE OF SERVICE

I certify that I have this day forwarded *via* U.S. mail, postage prepaid, a true and correct copy of the foregoing *Brief of Appellee New Holland North America, Inc. f/k/a Ford Motor Company* to the following:

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THIS the 2 day of April, 2008.

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