IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00589

ANN ODEM HILLMAN — APPELLANT

VS

WILLIAM B. WEATHERLY — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE

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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 disqualification or recusal.

Ann Odem Hillman, appellant.

Carey R. Varnado, Montague, Pittman & Varnado, P.A., counsel for the appellant.

Shannon S. McFarland, McFarland & McFarland, counsel for the appellant.

William B. Weatherly, appellee.

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STATEMENT REGARDING ORAL ARGUMENT

The judgment below should be affirmed on the basis of the Circuit Court's well-reasoned opinion without requiring oral argument.

For five years after filing this suit, the plaintiff's only response to the defendant's timely discovery requests was to present herself for a deposition where she testified falsely about her medical history. Only after the motion to dismiss was filed did she provide medical records authorizations which allowed the defendant to discover two facts:

* That she had not told the truth about her medical history.

* That physicians and a hospital no longer had relevant records because of the passage of time.

The Circuit Court properly found that the plaintiff was clearly guilty of delay, that no sanction lesser than dismissal was appropriate, and that aggravating factors were present which justified dismissal.

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STATEMENT OF THE ISSUE

Whether the trial court acted within its discretion when it dismissed the plaintiff's case for failure to prosecute where:

* Eight years had passed since the defendant's alleged legal malpractice, i.e., failing to file suit for the plaintiff against the other party in a 1996 car accident.

* Five years had passed after the plaintiff had filed suit and yet the plaintiff had never answered defendant's formal discovery requests, and the testimony she gave in her deposition concerning her medical history was false.

* The defendant has been prejudiced by the passage of time and records relevant to her medical history have been destroyed by medical providers acting in the normal course and scope of their businesses.

STATEMENT OF THE CASE

1. Course of proceedings

The Circuit Court's opinion, CP 3:442, RE 9, sets out the course of proceedings in detail. An annotated time line is attached to this brief as an Appendix.

Briefly, the plaintiff filed suit in 2002. The Circuit Clerk filed motions to dismiss for failure to prosecute in 2005 and 2007. CP 1:27, 3:322. Plaintiff's only Mississippi-licensed counsel withdrew. Plaintiff failed to retain Mississippi

counsel despite the entry of three orders giving her time to do so. The defendant then filed his motion to dismiss for failure to prosecute. CP 1:49, RE 8.

Only after the motion was filed in 2007 did the plaintiff provide authorizations to obtain medical records which the defense had requested in 2002. When the defense sought to obtain the medical records, it discovered that the plaintiff had been untruthful concerning her medical history and that records relevant to that history had been destroyed in the ordinary course of business. CP 3:394.

2. Statement of facts

The accident. In 1996 plaintiff Ann Hillman passed a truck moving a house trailer and pulled in front of the truck. The truck then hit her sport utility vehicle. CP 2:250-52. The driver told the investigating officer that Ms. Hillman hit her brake when she pulled in front of him and so the collision was her fault. CP 2:256. She says the truck driver sped up and hit her. The accident caused roughly $600 in damage to her vehicle, which her insurer paid. CP 2:235-37. She drove home after the accident. CP 2:253. She says she suffered a whiplash injury in the accident, CP 2:253, her neck hurts, and she now is prone to falls. CP 2:169-72.

Suit not filed. In 1999, Ms. Hillman asked the defendant William B. Weatherly to sue the truck company. The statute of limitations deadline passed without suit having been filed. A few days short of another three years later, i.e.,

six years after the accident, she filed this suit which accused Weatherly of legal malpractice.

Claim against defendant Weatherly. She chose Louisiana counsel to handle this case for her. The complaint was signed by a Louisiana lawyer admitted in Mississippi, but he did not do any work on the case. Instead, all the work was done by Camille Salas, originally of the firm of Sessions, Fishman & Nathan LLP in New Orleans. Salas was not admitted to practice in Mississippi. He claims that he believed he had been admitted pro hac vice. *See* CP 1:13.

Promptly after the complaint was filed the defendant answered, propounded interrogatories, made document requests, and sought authorizations which would allow him to obtain plaintiff Hillman's medical records. The subsequent course of the case is set out in detail in the Circuit Court's opinion and in the Timeline Appendix to this brief. It can be summarized as follows.

At the time in September of 2007 when the defendant filed his motion to dismiss for failure to prosecute:

* 11 years had passed since the car accident.

* 8 years had passed after the statute of limitations had run on Hillman's claim against the trucking company.

* 5 years had passed after Hillman sued Weatherly for malpractice.

* 5 years had passed since defendant Weatherly first sought discovery, and despite eight requests for compliance by defense counsel and two motions to dismiss filed by the clerk:

- plaintiff had not answered defendant's interrogatories

- plaintiff had not responded to defendant's document requests

- plaintiff had not provided the requested medical records authorizations

* During the five years the only discovery given to the defendant was the plaintiff's deposition, in which she misrepresented her medical history as well as her propensity for falling before the accident. *See* p. 5-6, *infra.*

* Plaintiff had failed to comply with three court orders giving her time to associate counsel licensed in Mississippi.

Only after the filing of the motion did the plaintiff provide some of her medical records and supply the authorizations to obtain medical records. Defense counsel's inquiries were met, however, with statements from the physician who treated her in 1996 that he no longer had records concerning her treatment and a response from Forrest General Hospital that it no longer had records concerning prior surgeries she failed to reveal in her deposition. CP 3:394-425.

Misrepresentations in deposition testimony. Plaintiff Hillman said she had suffered from whiplash because of the accident. CP 2:253. In her deposition she said her neck hurt and her left arm becomes numb. She also said she is now

prone to falling. CP 2:169-72. To bolster her claim, she said that she had never had any other accidents, had never had any surgery other than minor gallbladder surgery, and never had a past problem with falling. None of this was true.

When asked about her medical and surgical history, she testified as follows:

> Q: * * * Let me ask you: Have you ever been involved in any other accidents, either before or after this automobile accident?
>
> A: No. No.
>
> ....
>
> Q: Have you ever had any hospitalizations?
>
> A: Gallbladder, and I was hospitalized for rotavirus.
>
> Q: A rotavirus. When was that?
>
> A: Oh, Lord. I don't know.
>
> Q: And the gallbladder was long ago?
>
> A: (Nodding head affirmatively)
>
> Q: Any surgeries, which I imagine would be the same as hospitalization?
>
> A: (Nodding head negatively).

CP 2:170. Later, she denied any prior falls:

> Q: Had you ever had any injuries on your farm with any of your livestock or just doing the normal day-to-day work on the farm?
>
> A: No.
>
> Q: No broken bones?
>
> A: (Nodding head negatively).

CP 2:171. *See also* CP 2:172.

When defense counsel finally got the requested medical records and authorizations, however, they learned that her post-1996 medical records referred to earlier events:

* In 1983, Hillman had a disc removed from her neck at the C-6-7 level and still had degeneration at the C5-6 level. CP 3:370, 371, 373.

* In 1985, Hillman fell off a ladder and had surgery for a broken right arm and crushed right ankle. CP 3:372, 379.

* Hillman at some point had her left rotator cuff repaired and she had been diagnosed as having carpal tunnel syndrome in her left hand. CP 3:342, 376.

When defense counsel sought records for these earlier surgeries, however, they were rebuffed because the medical professionals had destroyed the records in the normal course of their businesses. CP 3:395, 421.

SUMMARY OF THE ARGUMENT

The circuit court acted within its discretion in dismissing this case for want of prosecution as authorized by Miss. R. Civ. P. 41(b). The court considered the relevant factors and made reasonable evaluation of those factors.

1. The five year delay from the filing of the case until the filing of the motion to dismiss was "clear delay." For five years the plaintiff failed to answer interrogatories, respond to document requests or provide medical authorizations. The only things the plaintiff did during that period was to take one deposition and

move to substitute counsel. Both actions were taken only after the circuit clerk moved to dismiss the case for want of prosecution. Neither was sufficient. *Illinois Central R.R. Co. v. Moore*, 994 So.2d 723, 729 (Miss. 2008). *See also Hine v. Anchor Lake Prop. Owners Ass'n*, 911 So.2d 1001, 1006 (Miss. Ct. App. 2005) (conduct made 90-day discovery period "overrun and rendered meaningless").

It is not the defendant's job to advance the case. Moreover, plaintiff did not have to be legally sophisticated to understand that if she was the only plaintiff in the case and did not hear from her attorney over a period of several years her case was not being diligently prosecuted. *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 419 (5th Cir. 2006).

2. The record also supports the circuit court's determination that the delay has prejudiced the defendant and so no lesser sanction would serve the interests of justice. It was not until late 2007, after the motion to dismiss was filed, that the defendant learned the plaintiff had not told the truth in her 2005 deposition about her medical condition before the accident. It was then too late to get medical records concerning her prior surgeries. *See Grant v. Kmart Corp.*, 870 So.2d 1210, 1215 (Miss. Ct. App. 2001) (misrepresentations in deposition justified sanction of dismissal). Moreover, we are now 13 years away from 1996 and nine years away from 1999. This Court has been willing to presume prejudice from a delay shorter than that. *Illinois Central R.R. Co. v. Moore*, 994 So.2d 723, 729 (Miss. 2008) (seven-year period inherently prejudicial).

3. Each of the aggravating factors is also present.

The defense has been prejudiced because the defendant cannot now find all of those who witnessed the underlying accident, and medical records have been expunged.

Also, plaintiff is personally responsible for her decision not to tell the truth in her deposition. As the circuit court put it, she "implicate[d] herself in the spoliation of evidence." CP 3:447, RE 9.

Finally, neither plaintiff nor her counsel ever offered any reason to explain the delays in prosecuting the case. It can only be assumed that the delays were intentional. *See Illinois Central*, 994 So.2d at 729-30 (dismissal required where plaintiff failed to show "good cause" for delay after clerk moved for dismissal).

In sum, the circuit court applied the relevant factors. Its decision was certainly one reasonable conclusion that can be drawn from the evidence. That is all that is required for this Court to find that it did not abuse its discretion and to affirm.

ARGUMENT

When a trial court grants a motion to dismiss for want of prosecution, Miss. R. Civ. P. 41(b), the standard of review is abuse of discretion. The "Court will not disturb a trial court's ruling on a dismissal for want of prosecution unless it finds an abuse of discretion." *Cucos, Inc. v. McDaniel*, 938 So.2d 238, 240 (Miss. 2006). If the trial court applied the correct legal standard, then the Court is to

consider whether the decision was one of those several reasonable ones which could have been made. It will affirm unless it reaches a "definite and firm conviction that the court below committed a clear error in judgment in the conclusion it reached upon weighing of relevant factors." *Plaxico v. Michael*, 735 So.2d 1036, 1039 (Miss. 1999), *quoting Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 692 (Miss. 1990).

In this case the trial court considered the three relevant factors this Court has adopted from the federal Fifth Circuit as the test to be used when applying Rule 41(b), i.e., the reason for delay, the availability of lesser sanctions and certain "aggravating factors:"

> [1] First, it must be shown that there has been a clear record of delay or contumacious conduct on the part of the Plaintiff. [*Hine v. Anchor Lake Prop. Owners Ass'n*, 911 So.2d 1001, 1004 (Miss. Ct. App. 2005)]. [2] Second, it should be clear that lesser sanctions would not have sufficed to serve the best interests of justice in the present action. *Id.* [3] Also, this Court will look to whether certain "aggravating factors" are present. *Id.*

CP 3:446, RE 9. *See also American Telephone and Telegraph Co. v. Days Inn of Winona*, 720 So.2d 178, 181 (Miss. 1998) (listing factors); *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 417-18 (5th Cir. 2006) (same). The circuit court's application of those factors to this case was reasonable, particularly in light of the trial court's inherent powers to control its own docket to protect the orderly

administration of justice. *Cucos, Inc.*,938 So.2d at 240. Because it did not err in its judgment, the dismissal should be affirmed.

When it dismissed for want of prosecution, the trial court reasonably assessed each of the relevant factors and so did not abuse its discretion.

1. A five-year delay is "clear" delay.

The circuit judge found two facts sufficient to establish a clear pattern of delay. First the plaintiff delayed almost three years before doing anything in the case. The case was filed in September 2002 and the first thing the plaintiff did in the case was to propound discovery in March 2005, just after the circuit clerk first moved to dismiss the case for want of prosecution. CP 3:446, RE 9.

The circuit court also found clear delay in the plaintiff's failure to answer interrogatories, respond to document requests, or to provide medical authorizations until after the motion to dismiss was filed in 2007. *Id.* In fact, the interrogatories remain unanswered to this day. *See Hine*, 911 So.2d at 1004 (affirming dismissal where first set of interrogatories were answered but second set remained unanswered).

These periods are comparable to the periods of delay found "clear" in other Mississippi cases. After all, the time allowed for completion of discovery is 90 days after the answer is served. Unif. R. Cir. & Cty. Ct. Prac. 4.04 A. The plaintiff's conduct has "overrun and rendered meaningless" that deadline. *See Hine*, 911 So.2d at 1006. *See e.g. Hensarling v. Holly*, 972 So.2d 716, 719 (Miss.

Ct. App. 2007) (nothing filed with clerk for four year period); *Vosbein v. Bellias*, 866 So.2d 489, 491-92 (Miss. Ct. App. 2004) (nothing filed for six years except motion to set aside dismissal); *Tolliver v. Mladineo*, 987 So.2d 989, 997-98 (Miss. Ct. App. 2007) (two-year and five-month delay justified dismissal) (alternate holding).[1]

Plaintiff Hillman does not and cannot dispute the district court's calculations. She attempts to shift the burden to the defense by pointing out that the defense did not move to compel responses. But nothing in the cited cases requires such a motion before a case can be dismissed for want of prosecution. A defendant has no obligation to advance the case. *Bendix Aviation Corp. v. Glass*, 32 F.R.D. 375, 378 (E.D. Pa. 1961), *aff'd* 314 F.2d 944 (3d Cir. 1963). Here it is also clear such a motion would have been futile. Defense counsel sent a draft motion to plaintiff's counsel without any effect. CP 2:270. And if moving to dismiss is not going to prompt answers to interrogatories, then there is no reason to believe that a motion to compel would have been any more effective. The failure to respond adequately evidenced the failure to prosecute.

The delay is chargeable to plaintiff Hillman. She waited almost three years before filing this case against the defendant, and is charged with knowledge of her counsel's failure to act on the case after it was filed. "One does not have to be

[1] *Cf. Rogers v. Kroger Co.*, 669 F.2d 317, 321 (5th Cir. 1982) (error to dismiss only six months after parties joined issue).

legally sophisticated to understand that if he is the only plaintiff in the case and does not hear from his attorney for almost two years, his case is not being diligently prosecuted." *Sealed Appellant*, 452 F.3d at 419, relying on *Link v. Wabash R.R.*, 370 U.S. 626, 82 S.Ct. 1386 (1962).

2. A lesser sanction would not serve the interests of justice.

The circuit court held dismissal was the appropriate sanction because the plaintiff's actions have prejudiced the defense:

> [I]t would be prejudicial to Defendant to allow this matter to proceed when the record indicates that Plaintiff and Plaintiff's former attorney, Salas, have obstructed discovery and have failed to preserve the evidence needed to ensure a fair disposition of this case. Imposing lesser sanctions such as fines or costs would not serve the interests of justice in light of the prejudice to the Defendant and the unavailability and destruction of necessary medical information.

CP 3:446-47, RE 9. The plaintiff cannot deny that she obstructed discovery and failed to preserve evidence. The plaintiff certainly knew about her prior spinal surgery when she testified that she had never had any major surgery and claimed her neck problems were entirely due to accident-induced whiplash.

Her deception at her 2005 deposition is particularly important because it concealed the relevance of medical records dating before and at the time of her 1996 accident. If she had been telling the truth, there was no reason for the defense to care about her pre-1996 medical history. By the time the defense, in 2007, learned of her earlier surgeries it was too late. The hospital had destroyed its

pre-1996 records. Her physician at the time of the accident did not have his records either. CP 3:395. *See Carroll v. Kimmel*, 524 A.2d 954, 957 (Pa. Super. Ct. 1987) (dismissal affirmed where relevant medical records were destroyed during a five year delay).

A California court has affirmed a dismissal when the plaintiff's delay in providing authorizations to obtain medical records resulted in the loss or destruction of records relevant to the case. In *Adams v. Roses*, 228 Cal. Rptr. 339, 343 (Calif. Ct. App. – 2d Dist. 1986), the court affirmed a dismissal where the "plaintiff's attorney refused to provide medical authorizations to permit defendants to make discovery." That is what happened here.

The misrepresentations in this case resemble those in *Grant v. Kmart Corp.*, 870 So.2d 1210, 1215 (Miss. Ct. App. 2001). There a plaintiff in a slip and fall case swore under oath that she had not suffered from any other falls. On the eve of trial, the defendant found out about another occasion on which she had fallen and been taken to the hospital. The circuit court dismissed her case and the Court of Appeals affirmed. It rejected her argument that new depositions would suffice as a sanction. What the defendant might prove, the court said, was just a matter of conjecture and, in any event, only dismissal with prejudice would deter future misconduct. *Id.* at 1215-16. *See also Scoggins v. Ellzey Beverages Inc.*, 743 So.2d 990, 995-96 (Miss. 1999) (dismissal for failure to disclose prior treatments).

It is worth noting that we are now 13 years away from 1996 and 10 years away from 1999. Our courts have been willing to presume prejudice from delays shorter than those. *See Illinois Central*, 994 So.2d at 729 (7-year period inherently prejudicial); *Hine,* 911 So.2d at 1006 (7-year delay presumed prejudicial); *Hensarling*, 972 So.2d at 721-22 (9-year passage of time prejudicial).

For these reasons, the circuit court did not abuse its discretion when it found that lesser sanctions would not be sufficient to cure the harm caused by the plaintiff's misrepresentations and delay. As in *Grant* the plaintiff's conjecture that sufficient records might now be available is not adequate to impeach the validity of that evidence-based finding.

3. Aggravating factors are also present.

The evidence also supports the additional aggravating factors the circuit court found. Aggravating factors, which need not always be shown, include (1) prejudice to the defendant, (2) the plaintiff's personal participation, and (3) delay resulting from intentional conduct. *Tolliver*, 987 So.2d at 997; *Sealed Appellant*, 452 F.3d at 418. The circuit court's findings regarding "aggravating factors," CP 3:447-48, RE 9, may be grouped as follows:

Prejudice to the defendant

* The accident happened 11 years before the motion to dismiss was filed. CP 1:49, 2:256.

* Medical records have been expunged and are no longer available. CP 3:395.

Plaintiff's personal responsibility

* Plaintiff Hillman, by not telling the truth at her deposition, "implicat[ed] herself in the spoliation of evidence." CP 3:447, RE 9.

* Neither plaintiff nor her counsel ever responded to defense counsel's Rule 4.04 C. letters concerning discovery. CP 1:104-05,107, RE 8; 2:164.

Intentional conduct

* Neither plaintiff nor her counsel have ever offered any reason for the delays in prosecuting the case. *See Illinois Central*, 994 So.2d at 729 (dismissal required where party failed to show "good cause" after clerk moved for dismissal); *Guidry v. Pine Hills Country Club, Inc.*, 858 So.2d 196 (Miss. Ct. App. 2003) (same).

Moreover, because Salas never was admitted pro hac vice, the few discovery pleadings he prepared were invalid under Miss. R. App. P. 46(b)(8)(i). *See Taylor v. General Motors Corp.*, 717 So.2d 747, 749 (Miss. 1998) (enforcing rule).

For all of these reasons this case is distinguishable from the cases reversing dismissals on which the plaintiff relies. *See Miss. Dept. of Human Services v. Guidry*, 830 So.2d 628, 633 (Miss. 2002) (error to dismiss child support case where no prejudice or intentional conduct shown); *Wallace v. Jones*, 572 So.2d

371, 376-77 (Miss. 1990) (error to dismiss where merits had already been tried and rights of children were at stake).

The plaintiff's only additional response to these findings is to assert that the defense agreed during several months of 2006 to stay discovery pending settlement discussions. CP 1:103-105, RE 8. What defense counsel said, however, was that discovery would be stayed if plaintiff would make a settlement offer. *Id.* But plaintiff never made that offer. For that reason she should not now be allowed to take advantage of those letters.

CONCLUSION

The circuit court applied the relevant factors. Its decision is certainly one reasonable conclusion that can be drawn from the evidence. That is all that is required to find it did not abuse its discretion and affirm.

But on this evidence the proper conclusion is not just that its decision was reasonable. In light of the precedents, its decision was also manifestly correct.

This the 4th day of February, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Brief of Appellee has been served via U.S. Mail, postage prepaid, on the following:

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This the 4th day of February, 2009.

LUTHER T. MUNFORD

Timeline Appendix

	Plaintiff	Court	Defendant
1996	9/04/1996 Accident (CP 1:8)		
1997			
1998			

1999	7/07/1999 Plaintiff went to attorney Weatherly 9/04/1999 Limitations ran on original claim		9/20/1999 Weatherly returned file (CP 1:10, 1:148-49)
2000			
2001			

2002	9/04/2002	Complaint filed by Spyridon (CP 1:8) Motion pro hac vice for Salas without required affidavit (CP 1:18)		10/07/2002 Answer 12/16/2002 Defendant propounds interrogatories, document requests, requests for authority to obtain medical records (CP 1:61, 71, 84-85).
2003				3/11/2003 Defendant requests response to discovery, including requests for authority to obtain medical records (CP 2:164)

2004			
2005	3/04/2005 Plaintiff propounds discovery to Defendant 8/25/2005 Plaintiff deposes Defendant	2/04/2005 Clerk's motion to dismiss (CP 1:27)	6/24/2005 Defendant answers discovery and again requests authority to obtain medical records (CP 2:166) 7/18/2005 Defendant requests response to discovery, including requests authority to obtain medical records (CP 2:167) 8/25/2005 Defendant deposes Plaintiff (CP 2:169-72)

2006	No settlement offer made		1/03/2006 Defendant again requests authority to obtain medical records (CP 2:173) 3/15/2006 Defendant propounds supplemental discovery to Plaintiff (CP 2:174-97) 5/05/2006 Defendant subpoenas State Farm (CP 2:218) 5/23/2006 Defendant suggests stay if plaintiff will extend settlement offer (CP 1:103) 6/13/2006 Defendant requests authority to obtain medical records if plaintiff is not going to make settlement offer (CP 1:104) 12/12/2006 Defendant again requests authority to obtain medical records. Rule 4:04. (CP. 1:105)
2007			3/07/2007 Defendant requests discovery responses because plaintiff has not made settlement offer. Send draft motion to compel. (CP 1:107, 270)

	6/20/2007 Clerk's motion to dismiss (CP 3:322)
6/27/2007 Spyridon withdraws (CP 1:39-42)	
	7/02/2007 Plaintiff given to 8/02/2007 to find new counsel (CP 1:42)
7/05/2007 Plaintiff notices deposition of one of plaintiff's doctors (never taken)	
	7/24/2007 Plaintiff given to 8/16/2007 to find new counsel (CP 1:43-45)

	8/22/2007 Plaintiff given to 8/31/2007 to find counsel (CP 1:46)	
		9/26/2007 Defendant moves to dismiss for failure to prosecute (CP 1:49)
10/02/2007 Plaintiff gives defendant State Farm medical records and authorizations dated 5/10/2006 (CP 1:122-23; 2:232)		
10/11/2007 Plaintiff makes only settlement demand (CP 1:122)		
		10/24/2007 Defendant requests current authorizations (CP 3:387)
	10/30/2007 Hearing set for 12/13/2007	
10/31/2007 Updated medical authorizations produced		

		Medical providers say they no longer have records because of passage of time. (CP 3:394)
12/10/2007 Plaintiff retains Carey Varnado and Shannon McFarland		
	12/13/2007 Hearing on motion to dismiss. Motion granted	