IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01442

MARGUERITE B. HOLDER AND
HERBERT HOLDER

APPELLANTS

v.

ORANGE GROVE MEDICAL SPECIALTIES, P.A.,
BOYD BENEFIELD, M.D., AND DOES ONE THROUGH FIVE

APPELLEES

BRIEF FOR APPELLEES, ORANGE GROVE MEDICAL SPECIALTIES, P.A. AND BOYD BENEFIELD, M.D.

ORAL ARGUMENT REQUESTED

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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 possible disqualification or recusal.

1. Marguerite B. Holder, Plaintiff/Appellant,
2. Herbert Holder, Plaintiff/Appellant,
3. L. Christopher Breard, Attorney for Plaintiff/Appellant,
4. Boyd Benefield, M.D., Defendant/Appellee,
5. Orange Grove Medical Specialties, P.A., Defendant/Appellee,
6. Stephen G. Peresich, Attorney for Defendants/Appellees,
7. Harry J. Schmidt, III, Attorney for Defendants/Appellees,
8. Hon. Jerry O. Terry, Circuit Court Judge

DATED this the 1st day of June, 2009.

STEPHEN G. PERESICH
Attorney for Appellees,
Orange Grove Medical Specialties, P.A.
and Boyd Benefield, M.D.

STATEMENT REGARDING ORAL ARGUMENT

The Appellees assert that oral argument would be beneficial to clarify the point that lesser sanctions must only be considered rather than applied. Moreover, oral argument would assist the Court in further establishing the parameters of a "clear record of delay."

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STATEMENT OF ISSUES

1. The trial court did not err when it granted Dr. Boyd Benefield and Orange Grove Medical Specialties, P.A.'s (hereinafter "Defendants") Motion to Dismiss With Prejudice, as the court performed the requisite analysis, and in particular, considered lesser sanctions, and determined that in light of the Plaintiffs' failure to pursue the case and the prejudice this caused the Defendants, dismissal with prejudice was proper.

STATEMENT OF THE CASE

The Plaintiffs, Marguerite and Herbert Holder filed a medical negligence suit against Dr. Boyd Benefield (hereinafter "Dr. Benefield") and Orange Grove Medical Specialties, P.A. (hereinafter "Orange Grove Medical") as a result of treatment Mrs. Holder initially sought for a new onset of atrial fibrillation on September 21, 2004. (R. 11). Mrs. Holder stated she was originally admitted to Garden Park Medical Center on September 21, 2004, and after being discharged on September 26, 2004, she was placed on Coumadin, a blood-thinning medication. (R. 11). Plaintiffs allege that the Defendants failed to properly monitor Mrs. Holder's Coumadin levels. (R. 12). Specifically, they allege that on October 13, 2004, she arrived at Orange Grove Medical and was told by an unnamed nurse employee that additional blood work to test her Coumadin levels was not necessary that day. (R. 12). Mrs. Holder stated that she suffered from a seriously debilitating hemorrhagic stroke on October 14, 2004. (R. 12). The Plaintiffs claim negligence on the part of the Defendants, stating that the Defendants, including the unnamed nurse employee, failed to monitor Mrs. Holder's Coumadin levels, thus causing Mrs. Holder's stroke. (R. 13-14). The Defendants deny any negligence in the care of Mrs. Holder. (R. 28-9).

Plaintiffs filed their Complaint in this matter on December 7, 2006, asserting a cause of action for medical negligence against Orange Grove Medical and Dr. Benefield. (R. 9-15). The

Defendants timely filed their Answer and Defenses to Plaintiffs' Complaint on February 12, 2007. (R. 26-34). Also on February 12, 2007, in an effort to require the Plaintiffs to support their unfounded allegations, the Defendants propounded their First Set of Interrogatories and Requests for Production of Documents to the Plaintiffs, seeking answers to well-pointed interrogatories, responses to requests for production of supporting documents, and document production from the Plaintiffs. (R. 100-101). Plaintiffs failed to timely respond to the Defendants' discovery requests, failing to answer a single interrogatory or produce a single document. On March 8, 2007, counsel for Plaintiffs sent correspondence to counsel for Defendants advising that counsel for Plaintiffs was in trial for the next couple of days and would not be able to respond to discovery until the trial was concluded. (R. 98). This correspondence confirms that Plaintiffs received the Defendants' discovery requests and knew the need for timely response. Having received no further response from Plaintiffs, thereafter, counsel for the Defendants, and in an attempt to secure responses from the Plaintiffs, sent correspondence to counsel for Plaintiffs on numerous occasions requesting responses to Defendants' discovery requests. In particular, counsel for the Defendants sent correspondence on May 4, 2007, to Plaintiffs' counsel inquiring when Plaintiffs' responses to Defendants' discovery requests will be completed. (R. 88). This request was ignored. Counsel for the Defendants resent the same correspondence as a reminder on May 24, 2007, again inquiring when Plaintiffs' discovery responses would be complete. (R. 92). This request was ignored as well. Counsel for the Defendants then resent the same correspondence a third time as a reminder on June 4, 2007, inquiring when Plaintiffs' discovery responses would be provided. (R. 96). Again, the request was ignored. These Defendants never received a response to these discovery requests nor to counsel's correspondence. Then, instead of answering Dr. Benefield's discovery, on May 7, 2008, the Plaintiffs filed their Interrogatories and Request for Production of Documents. (R. 41-2).

On May 9, 2008, the Defendants filed a Motion to Dismiss for Failure to Prosecute, pursuant to Miss. R. Civ. Pro. 41(b). (R. 43-99). Faced with this Motion to Dismiss, the Plaintiffs filed their Answers to First Set of Interrogatories and Answers to First Set of Request for Production thirteen (13) days later, on May 22, 2008. (R. 100-1). Apparently further compelled by the Motion to Dismiss, on May 29, 2008, the Plaintiffs filed a Motion to Compel the deposition of Dr. Benefield. (R. 102-3). The Defendants responded with a Motion to Strike Plaintiffs' Motion to Compel Deposition. (R. 106-9). The Plaintiffs did not respond to Defendants' Motion to Dismiss for Failure to Prosecute until July 24, 2008, the day before the matter was heard by the trial court. (R. 110-165).

On July 25, 2008, Dr. Benefield's Motion to Dismiss for Failure to Prosecute came before Judge Terry in the Circuit Court of Harrison County, Mississippi. After both sides presented their arguments, the Trial Court ordered the case dismissed with prejudice holding, "I feel like that the delays in responding to the discovery and not pursuing the case as it should have been for this period of time is certainly sufficient for the Court to deem that the case was not pursued properly; that it should be dismissed for failure to prosecute the case." (Tr. 30). Upon request from Plaintiffs' counsel that a statement of findings of fact be made by the Court, the Court stated, "I'm not going to make a finding of fact and conclusion of law any further than adopting the argument of counsel for the defendant, the cases that he has cited as to the basis for the dismissal. And the record speaks for itself. That's it." (Tr. 30-1).

The Plaintiffs filed their Notice of Appeal on August 19, 2008. (R. 168-9). On September 25, 2008, the Clerk of the Mississippi Supreme Court filed a Notice of Dismissal for failure to properly and timely pay appellate fees. See Dismissal Notice. The case was reinstated by Order of the Mississippi Supreme Court on October 21, 2008. See Order Granting Motion to Reinstate

Appeal. The Plaintiffs filed their Appellants' Brief on April 2, 2009.

SUMMARY OF THE ARGUMENT

The trial court properly dismissed this case pursuant to Miss. R. Civ. Pro. 41(b) for failure of the Plaintiffs to prosecute the case. The Plaintiffs filed their complaint on December 7, 2006, alleging a claim of medical negligence for actions which occurred in October 2004. (R. 9-15). After the Defendants answered the complaint and propounded interrogatories and requests for production of documents, the Plaintiffs failed to further prosecute their case. The Defendants requested the Plaintiffs respond to this important discovery on numerous occasions to no avail. (R. 88, 92, 96). Ultimately, the Defendants filed a Motion to Dismiss for Want of Prosecution after a fifteen (15) month period of dormancy with no discovery responses or any other action on behalf of the Plaintiffs to pursue the case! (R. 43-99).

The trial court properly dismissed the case with prejudice after finding the Plaintiffs actions were dilatory and determining that lesser sanctions were not a sufficient remedy. (Tr. 22-31). Mississippi law provides that a case may be dismissed with prejudice for failure to prosecute when there has been a "clear record of delay." *Hine v. Anchor Lake Prop. Owners Ass'n*, 911 So.2d 1001, 1005 (Miss. Ct. App. 2005). In determining the parameters of a "clear record of delay" the Mississippi Court of Appeals found in *Tolliver v. Mladineo*, that a seven (7) month period of dormancy in a case amounted to a clear record of delay. *Tolliver v. Mladineo*, 987 So.2d 989 (Miss. Ct. App. 2007). Reasonably, the trial court determined that a fifteen (15) month period of dormancy in the matter at hand also amounted to a clear record of delay.

Lesser sanctions would not have served the best interests of justice, and aggravating factors which bolster the Defendants' claim are present. The Plaintiffs argue that lesser sanctions must be applied before a dismissal with prejudice may be granted. This, however, is incorrect. Mississippi

law provides that lesser sanctions must be considered, not that they must be applied. *AT&T v. Days Inn*, 720 So.2d 178 (Miss. 1998). The trial record clearly shows that lesser sanctions were considered by the court and that the court asked each party for their recommendation as to the potential sanction. (Tr. 22-6). No evidence has been provided by the Plaintiffs to show that lesser sanctions were not properly considered by the trial court. The Defendants have been prejudiced by the extensive period of time since the alleged negligence occurred in 2004 and the failure of the Plaintiffs, for fifteen (15) months, to provide any answers to interrogatories, any responses to requests for production of documents, and any document production whatsoever to support their spurious allegations.

The trial court sufficiently stated its findings of fact in support of its Order of Dismissal. After extensive oral argument from both parties, the trial court explained the basis of its ruling on the record. (Tr. 22-31). While the trial court considered the lesser sanctions on the record, the Mississippi Court of Appeals has previously upheld a motion to dismiss where the record did not even indicate whether the trial court considered the lesser sanctions. *Hensarling v. Holly*, 972 So.2d 716, 719 (Miss. Ct. App. 2007). In the matter at hand, the trial court clearly considered all of the issues and stated as such on the record, clearly establishing a sufficient finding of fact in support of the Order of Dismissal. (Tr. 29-31).

While the Plaintiffs provided the trial court with extensive excuses as to why the case was not pursued for fifteen (15) months after the complaint was filed, they provided nothing to justify the clear record of delay. As the trial court found that fifteen (15) months of dormancy was a clear record of delay and that lesser sanctions would not serve justice, the trial court properly entered an Order of Dismissal with Prejudice.

STANDARD OF REVIEW

The standard of review for a Rule 41(b) dismissal is abuse of discretion. *Vosbein v. Bellias,* 866 So.2d 489, 492(¶ 5) (Miss. Ct. App.2004). This Court applies a substantial evidence/ manifest error standard of review to the trial court's grant or denial of a motion to dismiss pursuant to Rule 41 of the Mississippi Rules of Civil Procedure. *Sanders v. Riverboat Corp.,* 913 So.2d 351, 354 (Miss. Ct. App.2005), citing *Century 21 Deep S. Properties, Ltd. v. Corson,* 612 So.2d 359, 369 (Miss.1992).

ARGUMENT

I. THE PLAINTIFFS' CASE WAS PROPERLY DISMISSED FOR FAILING TO PROSECUTE THE CASE.

A. INTRODUCTION

Mississippi Rule of Civil Procedure 41(b) provides that "[f]or failure of the plaintiff to prosecute or comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Miss. Rule. Civ. P. 41(b). The trial court is further vested with the inherent power to dismiss Plaintiffs' case against the Defendants in light of Plaintiffs' failure to prosecute. Dismissal for failure to prosecute has been regarded "as a means necessary to control the court's docket and promote the orderly expedition of justice." *Hensarling*, 972 So.2d at 719. In determining whether to dismiss a matter for failure to prosecute, the Court considers three (3) factors: "(1) whether the conduct of the plaintiff can be considered contumacious or dilatory; (2) whether lesser sanctions could be applied; and (3) other aggravating factors." *Hasty v. Namihira,* 986 So.2d 1036, 1040 (Miss. Ct. App. 2008). While these three factors are typically considered, "factors other than delay are not required." (emphasis added) *Cox v. Cox,* 976 So.2d 869, 875 (Miss. 2008). "Aggravating factors" only "bolster" a case for dismissal, but they are also not required. *Id.* The trial court properly adhered to this analysis, applied the proper review as

documented in the transcript, and did not abuse its discretion in dismissing the Plaintiffs' case.

B. THE PLAINTIFFS' CONDUCT WAS DILATORY

The Mississippi Court of Appeals has held that "where a clear record of delay has been shown . . . there is no need for a showing of contumacious conduct." *Hine*, 911 So.2d at 1005. Plaintiffs' counsel seeks to excuse his failure to prosecute this case by arguing that "there is no rule that says a case will be dismissed with prejudice for a twelve or thirteen-month delay in prosecution particularly when the case was only fifteen months old." Appellants Brief, p. 13. The Plaintiffs further maintain that "[w]hile the discovery in the case *sub judice* should have been answered, the delay was not intentional." Appellant's Brief, p. 8. However, there is no exception for unintentional neglect, and the Mississippi Supreme Court clearly states that while "'[t]here is no set time limit on the prosecution of an action once it has been filed,' an action must, at some point in time be prosecuted after its filing or dismissed." *Tolliver*, 987 So.2d at 998, quoting *AT&T*, 720 So.2d at 181. As discussed *infra*, the fact that the case in *Tolliver* was only seventeen months old is irrelevant. The only standard required for dismissal is a "clear record of delay."

Mississippi case law clearly establishes that a fifteen (15) month period of dormancy in a cause where action by the Plaintiff is required, along with repeated requests for action from counsel opposite are unanswered and ignored, subjects a plaintiff to potential dismissal with prejudice. See *Tolliver* 987 So.2d 989 (Miss. Ct. App. 2007). The facts of the *Tolliver* decision show that no activity took place in that case between September 1, 2004, and April 21, 2005, when plaintiffs' counsel failed to appear at a docket call. *Tolliver*, 987 So.2d at 998. The Court stated in its decision, "[t]he time between the change in counsel and the docket call amounted to seven months wherein activity on the case lay entirely dormant. We find that the record sufficiently shows a clear record of delay." *Id.*

Plaintiffs' counsel seeks to distinguish the present case from *Tolliver* by arguing that the *Tolliver* case was pending for two years and five months, while the Holder case had only been pending for a year and five months. Appellant's Brief, p. 8. As the Court is aware, the total pendency of the case is not the issue, rather the period of delay or dilatory conduct is the issue. The Court clearly states in *Tolliver* that seven months of dormancy showed a clear record of delay. *Id.*

The facts of this case show that the Defendants filed their Answer to Complaint along with their First Set of Interrogatories and Request for Production of Documents on February 12, 2007, seeking answers to well-pointed interrogatories, responses to requests for production of supporting documents, and document production from the Plaintiffs. And, the Plaintiffs subsequently failed to take any action to prosecute the case. Plaintiffs' counsel acknowledged receipt of the discovery requests in his fax dated March 8, 2007. (R. 98). However, despite repeated correspondence sent to the Plaintiffs on May 4, 2007, May 24, 2007, and June 4, 2007, inquiring when Plaintiffs' responses to discovery would be completed, no response was ever received from Plaintiffs. (R. 88, 92, 96).

The Plaintiffs initiated this case, making serious charges of medical neglect against these defendant health care providers, and then essentially dropped the case for fifteen (15) months. The Plaintiffs' Complaint contains allegations that on October 13, 2004, Mrs. Holder was told by an unknown nurse employee of the clinic that additional blood work would not be necessary because it had been performed the week before. (R. 12). The Plaintiffs allege that the failure to perform this study on October 13, 2004, constituted negligence. (R. 13). The Defendants' First Set of Interrogatories and Request for Production requests the Plaintiffs identify all persons with knowledge of the Plaintiffs' allegations and specifically with knowledge of the allegations related to the clinic visit on October 13, 2004, when she alleges she was told that additional blood work was

not necessary. (R. 70-2, 74). Additionally, the Defendants requested the identity and contact information for all of the Plaintiffs' medical providers related to this incident. (R. 79). This information was specifically requested by the Defendant in order to obtain the identity of the individuals allegedly involved, further investigate the claims, and begin preparing a defense to the allegations. The plaintiffs in a medical negligence action bear the burden of establishing a doctor-patient relationship, identifying the requisite standard of care, establishing a failure to conform to this standard of care, as well as injury and damages. *McCaffrey v. Puckett*, 784 So.2d 197, 206 (Miss.2001). The Defendant's interrogatories and requests for production of documents seek to obtain the basis for the Plaintiffs' allegations of medical negligence. However, as the Plaintiffs refused to respond to these discovery requests, the Defendants were left in a position of waiting an inordinate amount of time to even begin a defense to the case.

Furthermore, the Plaintiffs fail to cite any relevant case law which supports their position that there is no clear record of delay when one files suit and then fails to pursue the case for fifteen months after the complaint is answered. The cases cited in Appellants' brief, *Comacho v. Chandler Homes*, 862 So. 2d 540 (Miss. Ct. App. 2003) and *Lone Star Casino Corp. v. Full House Resorts, Inc.*, 796 So. 2d 1031 (Miss. Ct. App. 2001) are irrelevant to this case, as they both pertain to cases in which the plaintiffs were seeking new representation by counsel. In this matter, the Holders were represented by the same counsel from the beginning, but still failed to prosecute the case.

Similar to *Tolliver*, the Plaintiffs here certainly established a clear record of delay by failing to prosecute their case for nearly fifteen (15) months despite repeated requests for action made by the Defendants, all of which were ignored. This clear record of delay alone is a sufficient basis for dismissal. *Cox*, 976 So.2d at 875.

C. *LESSER SANCTIONS WERE CONSIDERED BY THE TRIAL COURT BUT THEY WOULD NOT CURE THE PREJUDICE TO THE DEFENDANTS*

The Court must consider whether lesser sanctions would better serve the interests of justice. These sanctions include "fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings." *AT&T*, 720 So.2d at 181-2. The Plaintiffs are incorrect in arguing that lesser sanctions must be applied and supporting this argument by citing factually different cases in which lesser sanctions have been applied. In fact, a Court must only consider whether lesser sanctions would better serve the interests of justice. *AT&T*, 720 So.2d at 181. There is no requirement that a court actually apply lesser sanctions. Where the court finds that lesser sanctions would not suffice under the circumstances, as when they could not cure the prejudice cased by the delay, a court has no duty to employ lesser sanctions. *Cox*, 976 So.2d at 876.

The trial court sufficiently considered lesser sanctions, but ultimately chose not to employ a lesser sanction. While the Mississippi Supreme Court is less likely to uphold a dismissal based upon Miss. R. Civ. Pro. 41(b) "where there is no indication in the record that the lower court considered any alternative sanctions," that is not the case in this matter. *Cox*, 976 So.2d at 876, quoting *AT&T*, 720 So.2d at 181. The trial record shows that lesser sanctions were considered by the judge and discussed by all parties at the hearing. (Tr. 23-27). Counsel for the Plaintiffs specifically requested a warning when asked by the trial court what sanction would be appropriate. (Tr. 22-3). The trial court then asked counsel for the Defendants what sanctions should be imposed. Counsel argued that no lesser sanction other than dismissal would be appropriate, given recent case law and the prejudice which had been incurred by the Defendants. (Tr. 24-6).

While the Plaintiffs requested the trial court merely issue a warning, the actions of Plaintiffs ignoring the Motion to Dismiss further illustrate why lesser sanctions would not serve justice. The

Defendants filed their Motion to Dismiss on May 9, 2008. The Plaintiffs failed to file any response to the Motion to Dismiss within the requisite ten days provided in Uniform Circuit and County Court Rule 4.03. Then, after receiving no response from counsel opposite regarding a date for setting of the hearing, notice was provided on June 5, 2008, of the hearing to be held on July 25, 2008. (R. 104-5). The Plaintiffs did ultimately file a response to the motion, but not until late on the afternoon of July 24, 2008, the day before the hearing. Interestingly, the Plaintiffs' Response did not cite a single case in support of their argument to deny the Motion to Dismiss. The Plaintiffs' Response only argued that the Defendants' cases were factually distinguishable and showed a requirement for application of lesser sanctions. (R. 11-114) This, in fact, is a misstatement of the law, as discussed *supra.*

Plaintiffs' counsel takes the position that a Plaintiff can file a lawsuit alleging that medical providers committed medical malpractice causing serious injury, refuse to provide sworn interrogatory answers of the facts supporting the allegations, refuse to respond to document production, refuse to produce a single document, all needed to investigate and defend the allegations, ignore repeated requests for the discovery, and essentially drop the case for fifteen (15) months with impunity; and when a motion to dismiss is filed for failure to prosecute take the position that the trial court can do nothing about that except issue a "warning". Any such notion should be quickly quelled by this Court and not condoned. Clearly, in light of the Plaintiffs' failure to adhere to the Mississippi Rules of Civil Procedure, ignoring counsel's repeated requests for discovery, the inordinate delay of fifteen (15) months, the failure to timely respond to the motion to dismiss pursuant to the Uniform Circuit and County Court Rules, and given the prejudice already placed upon the Defendants by the Plaintiffs' dilatory actions, the trial court properly determined that lesser sanctions would not better serve the interests of justice.

D. AGGRAVATING FACTORS ARE PRESENT AND THEY BOLSTER THE DEFENDANTS' CASE FOR DISMISSAL, THOUGH THEY ARE NOT NECESSARY FOR DISMISSAL.

Finally, the Court must consider whether any aggravating factors are present. *Hasty*, 986 So.2d 1036 at 1040. "Aggravating factors supportive of a dismissal with prejudice are (1) delay caused by the plaintiff personally, (2) delay causing prejudice to the defendant, and (3) delay resulting from intentional conduct." *Tolliver*, 987 So.2d at 997. Aggravating factors are not required, though their presence strengthens the Defendants' case for dismissal. *AT&T*, 720 So.2d at 181 (Miss. 1998).

The medical treatment giving rise to Plaintiffs' claims allegedly occurred in September and October of 2004, and suit was not filed in this matter against Orange Grove Medical and Dr. Benefield until December of 2006. The information and memory of the events surrounding this litigation has grown stale and thus creates actual prejudice to the Defendants. While the Plaintiffs take the position that another year will not affect the memory of the Defendants and their witnesses, the Mississippi Court of Appeals supports the notion that unreasonable delay is prejudicial to defendants. In *Hasty v. Namihira*, the defendant argued that he faced actual prejudice because medical personnel would not be able to remember facts about a procedure and that the memories of the plaintiffs' treating physicians would have faded. *Hasty*, 986 So. 2d at 1041. The plaintiffs maintained that these care providers would be testifying from their notes, and therefore there would be little or no prejudice to the defendant. *Id.* The Court held that "it would not seem inappropriate to weigh, even if slightly, the prejudice factor in favor of Dr. Namihira since he was not responsible for the delay." *Id.* The Court went on to specifically note that aggravating factors "are not required even in a harsher case of dismissal with prejudice." *Id.*, citing *Hine v. Anchor Lake Prop. Owners Ass'n*, 911 So.2d 1001, 1006 (Miss. Ct. App. 2005). Notably in *Hasty*, the Court found prejudice despite the fact that nearly all of the fact witnesses had been deposed. In the matter at hand, not one

deposition has taken place for an incident that allegedly occurred four and a half years ago.

While not even necessary for dismissal, aggravating factors are present in this case, and they bolster the Defendants' claim for dismissal. As noted at the hearing, while responsibility falls on Plaintiffs' counsel for failing to prosecute the case, the Plaintiffs themselves must accept some of the burden of pursuing the case, as it is their case. (Tr. 24). The delay has caused actual prejudice to the Defendants, as the case was hardly in a position to be defended when the case was ignored by the Plaintiffs and counsel opposite for fifteen (15) months. Surely, the Plaintiffs themselves must have wondered why no activity was occurring with their case. They had waited more than two years to file the lawsuit and after it was filed, nothing occurred for fifteen (15) months! Not surprisingly, while Plaintiffs' counsel incorrectly suggests that providing a medical authorization provides some sort of promotion of the case, counsel well knows that such medical authorizations are useless if one does not know the identify of the medical providers from which to request the records. The identity of relevant medical providers was requested through the propounded discovery, but remained unanswered and ignored for fifteen (15) months. No discovery responses were provided by Plaintiffs at the time of the filing of the Motion to Dismiss, thus, the medical authorizations provided no use to the Defendants. Furthermore, these Defendants were made to suffer with being charged with medical negligence causing serious injury, and suffer a continuing threat of prosecution, for a year and a half, without any prosecution occurring and without being provided any discoverable information, data, sworn answers to interrogatories, information to identify the alleged unknown nurse employee, responses to document requests, or a single document, by which they could investigate the allegations. These Defendants were ultimately prejudiced by the vast amount of time which has passed before which they can even begin investigate the allegations of the Plaintiffs' claims.

II. THE TRIAL COURT'S FINDINGS OF FACT WERE APPROPRIATE AND SUFFICIENT TO AFFIRM AN ORDER OF DISMISSAL.

The Plaintiffs allege that the trial court did not make sufficient findings of fact to support its Order of Dismissal. When the Judge was asked for findings of fact, he stated, "I'm not going to make a finding of fact and conclusion of law any further than adopting the argument of counsel for the defendant, the cases that he has cited as to the basis for the dismissal. And the record speaks for itself. That's it." (Tr. 30-1). The record shows that the trial court clearly established its findings in stating, "In any event, in this particular case, I feel like that the delays in responding to the discovery and not pursuing the case as it should have been pursued for this period of time is certainly sufficient for the Court to deem that the case was not pursued properly; that it should be dismissed for failure to prosecute the case." (Tr.30).

While the trial court provided a clear finding of fact in support of its ruling, an explicit finding of fact is not required. In *Hensarling*, a case which was dismissed with prejudice, the record did not indicate whether the lower court specifically considered lesser sanctions. *Hensarling*, 972 So.2d at 721. The dismissal order merely stated that the court "reviewed the file and the motion to substitute counsel, denied the motion, and dismissed the case for failure to prosecute." *Id.* However, the Court noted that the trial court need not make a showing that lesser sanctions would not suffice. *Id.*, citing *Hine,* 911 So.2d at 1005. When a trial judge does not make specific findings of fact, the Mississippi Supreme Court held that it will assume that the trial judge made all findings of fact that were necessary to support his verdict. *Id.*, citing *Watson v. Lillard,* 493 So.2d 1277, 1279 (Miss. 1986). Therefore, in *Hensarling*, the Court stated it "must presume that the trial court made the requisite findings to support his ruling that lesser sanctions would have been insufficient." *Hensarling*, 972 So.2d at 721. Therefore, while the trial court clearly explained the basis of its ruling in this matter, such a precise finding of fact is not required for the Mississippi Court of

Appeals to affirm the Order of Dismissal.

III. THE PLAINTIFFS HAVE FAILED TO MAKE A SHOWING OF ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT.

The Mississippi Supreme Court has held that "[a]buse of discretion is found when the reviewing court has a 'definite and firm conviction' that the court below committed a clear error of judgment and the conclusion it reached upon a weighing of the relevant factors." *McCord v. Healthcare Recoveries*, 960 So.2d 399, 405 (Miss. 2007). The Plaintiffs maintain that the trial court erred by not ordering a lesser sanction and by not issuing more extensive findings of fact. However, the Plaintiffs' fail to provide any Mississippi law in support of their position. As previously detailed, the Plaintiffs cite irrelevant case law pertaining to the delay of a party in replacing counsel, however, they provide no law which justifies filing of a suit and then failing to pursue the case for the next fifteen (15) months. In order to show that the trial court committed a clear error of judgment, the Plaintiffs must provide some basis in the law for their position. The Plaintiffs fail to establish such a basis for their position, as the trial judge clearly followed Mississippi law in finding a clear record of delay, and after considering lesser sanctions, given the totality of the circumstances, determined that dismissal of the case was proper.

IV. THE PLAINTIFFS' REFERENCE TO THE DECISION IN *TINNON V. MARTIN* IS IRRELEVANT TO THE MATTER AT HAND.

The Plaintiffs raise the issue that Plaintiffs' counsel has previously had a case dismissed with prejudice by the same trial court. In the *Tinnon* case, thirteen years ago, counsel for the Plaintiff wrote a letter to a treating physician which the trial court interpreted as a violation of the court's order waiving medical privilege. *Tinnon v. Martin*, 716 So.2d 604, 610 (Miss. 1998). Feeling as though the court's order was willfully violated and the defendants were prejudiced by the actions of plaintiff's counsel, the trial court dismissed the case. *Tinnon*, 716 So.2d at 607-8. The Plaintiffs

appealed and the Mississippi Supreme Court ultimately held that plaintiff's counsel was attempting to clarify the order for Dr. Gary, while protecting the plaintiff's interests and was not an attempt to limit the disclosure of relevant information. *Tinnon*, 716 So.2d at 612.

The *Tinnon* decision has no relation to the matter at hand, other than it took place before the same trial court and involved one of the same defense attorneys. The subject matter in *Tinnon* was a discovery order which was alleged to be violated, not Mississippi Rule of Civil Procedure 41 failure to prosecute, which is what was violated in this case.

CONCLUSION

Mississippi law provides a trial court the power, upon its own motion or that of a party, to dismiss a case for failure of the plaintiff to prosecute the case. Miss. R. Civ. Pro. 41. This power stems from a court's right to control its docket and to see that justice is properly served. See *Hensarling*, 972 So.2d 716 (Miss. 2007). The trial court in this matter was presented with evidence that the Plaintiffs' conduct was dilatory, lesser sanctions would not serve justice, and that aggravating factors were present. Upon review of the facts of the case and after being presented with all of the relevant case law by the Defendants, the trial court properly dismissed this case with prejudice.

The Plaintiffs filed suit against the Defendants and took no other action to pursue or promote the case for fifteen (15) months. Despite repeated requests, counsel for the Plaintiffs refused to provide the Defendants with the most basic of discovery responses by which to begin to defend their case. The Plaintiffs admit that "while counsel for the Holders may not have 'pursued properly' the case as found by the trial judge (Tr. 20), this does not amount to a clear record of delay. . ." Appellant's Brief pp. 16-17. The Mississippi Court of Appeals, however, views such facts differently. In *Tolliver*, the Court stated, "[t]he time between the change in counsel and the docket

call amounted to seven months wherein activity on the case lay entirely dormant. We find that the record sufficiently shows a clear record of delay." *Tolliver*, 987 So.2d at 998. Our case lay dormant twice as long as the case lay dormant in *Tolliver* before it was dismissed with prejudice. The Holders let their case lay dormant from its earliest stage, ignoring repeated requests for discovery, all before the Defendants could even begin putting together a defense.

The Plaintiffs have offered no evidence to show that the trial court abused discretion in dismissing the case. Rather, the Plaintiffs provide a litany of *excuses* and astonishingly go so far as to question "whether the trial court actually reviewed the case law presented by the Defendant or took counsel's word for its applicability. . ." Appellant's Brief, p. 20. Such baseless allegations, along with case law which clearly supports dismissal, are the extent of the Plaintiffs' argument that the trial court abused its discretion in granting the Motion to Dismiss. As illustrated above, the cases cited by the Defendants support the ruling of the trial court, clearly showing that the trial court acted properly and without manifest error in dismissing this matter with prejudice.

RESPECTFULLY SUBMITTED on this the 1st day of June, 2009.

ORANGE GROVE MEDICAL SPECIALTIES, P.A.
AND BOYD BENEFIELD, M.D.

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APPENDIX I: RULE 41, MISSISSIPPI RULES OF CIVIL PROCEDURE

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof.
(1) *By Plaintiff; By Stipulation.* Subject to the provisions of M.R.C.P. 66, or of any statute of the State of Mississippi, and upon the payment of all costs, an action may be dismissed by the plaintiff without order of court: (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or
(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.
(2) *By Order of Court.* Except as provided in paragraph (a)(1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action may be dismissed but the counterclaim shall remain pending for adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. 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. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in M.R.C.P. 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under M.R.C.P. 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Dismissal on Clerk's Motion.
(1) *Notice.* 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. The cost of filing such order of dismissal with the clerk shall not be assessed against either party.
(2) *Mailing Notice.* The notice shall be mailed in every eligible case not later than thirty days before June 15 and December 15 of each year, and all such cases shall be presented to the court by the clerk for action therein on or before June 30 and December 31 of each year. These deadlines shall not be interpreted as a prohibition against mailing of notice and dismissal thereon as cases may become eligible for dismissal under this rule. This rule is not a limitation upon any other power that the court may have to dismiss any action upon motion or otherwise.

(e) Cost of Previously Dismissed Action. If a plaintiff whose action has once been dismissed in any court commences an action based upon or including the same claim against the same defendant, the court may make such order

for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Comment

The purpose of M.R.C.P. 41 is to establish a uniform rule governing voluntary and involuntary dismissals of actions.

M.R.C.P. 41(a), which permits a plaintiff voluntarily to dismiss his action, is intended to give him the right to take the case out of court if no other party will be prejudiced. The right is limited by the rule to the period before answer or motion for summary judgment; thereafter dismissal can be had only with consent of the court and on such conditions as are just.

M.R.C.P. 41(a)(1) provides two methods by which a plaintiff may dismiss an action without obtaining the consent of the court: He may do so at any time by stipulation of all the parties; he may do so prior to service of an answer or of a motion for summary judgment by his own unilateral act of filing a notice of dismissal with the court.

The defenses listed in M.R.C.P. 12(b) may, at the option of the defendant, be asserted in an answer or by motion to dismiss. If they are included in an answer, the service of the answer terminates plaintiff's right to dismiss by notice. Plaintiff's right of voluntary dismissal is not cut off if the defense is put forward by motion to dismiss. A motion to dismiss is neither an answer nor, unless accompanied by affidavits stating matters outside the pleadings that are not excluded by the court, a motion for summary judgment; a motion to dismiss does not terminate the right of dismissal by notice, nor does a motion for a stay or a motion for change of venue.

The other procedure for voluntary dismissal, in addition to dismissal by notice, a dismissal by stipulation of all the parties. Dismissal by stipulation may be had at any time. A stipulation will not be construed as being for dismissal in the absence of an unequivocal statement by the parties that it was so intended.

Dismissal by stipulation is without prejudice unless the stipulation provides that it is to be with prejudice. A voluntary dismissal by stipulation is effective immediately and does not require judicial approval.

The procedure under M.R.C.P. 41(a)(1) is contrary to past Mississippi nonsuit practice, which permitted the plaintiff to voluntarily dismiss his suit without prejudice at any time before the case was submitted to the jury. Miss. Code Ann. § 11-7-125 (1972); *see also* Miss. Code Ann. § 11-7-127 (1972) (plaintiff may take a nonsuit before the clerk in vacation); Allison v. Camp Creek Drainage Dist. of De Soto County, 211 Miss. 354, 51 So. 2d 743 (1951) (plaintiff in chancery action may nonsuit without prejudice up to time cause is submitted to chancellor for final decision on the merits); *but see* Adams v. Lucedale Commercial Co., 113 Miss. 608, 74 So. 435 (1917). It is also contrary to practice under Fed. R. Civ. P. 41(a), which permits only one voluntary nonsuit at any time before defendant's responsive pleading is made.

Although Miss. Code Ann. §§ 11-27-125 and 11-27-127 (1972) are couched in terms ostensibly granting an absolute right to the plaintiff to nonsuit before the cause is submitted, the statutes have not been so interpreted, particularly in chancery practice: "When in any respect the cause has proceeded to that point ... that the defendant has ... secured some substantial right which would be destroyed by the dismissal, it should not be permitted." Mitchell v. Film Transit Co., 194 Miss. 550, 13 So. 2d 154 (1943). *See also* V. Griffith, Mississippi Chancery Practice, § 534 (2d ed. 1950).

The trial court has no power to impose terms and conditions if a plaintiff properly dismisses by notice under M.R.C.P. 41(a)(1). Nor may the plaintiff seek to make a conditional dismissal under that portion of the rule. If dismissal is by stipulation under M.R.C.P. 41(a)(1), the parties work out for themselves the conditions on which they will enter into the stipulation. Accordingly, the authority of the court to require "such terms and conditions as the court deems proper" is limited to a motion for dismissal under M.R.C.P. 41(a)(2).

The terms of conditions that may be imposed upon the granting of a motion for voluntary dismissal are for the protection of the defendant, although if one of several plaintiffs moves for dismissal conditions may be imposed for the protection of the remaining plaintiffs. The court may dismiss without conditions if they have not been shown to be necessary, but should at least require that the plaintiff pay the costs of the litigation. In imposing conditions the court is not limited to taxable costs, but may require the plaintiff to compensate for all of the expenses to which his adversary has been put; the court may require plaintiff to pay the defendant's attorney's fees as well as other costs and disbursements.

Dismissal on motion under M.R.C.P. 41(a)(2) is within the sound discretion of the court, and its order is reviewable only for abuse of discretion. The discretion given the court by M.R.C.P. 41(a)(2) is a judicial, rather than an arbitrary, discretion. If necessary, a hearing should be held and the court should endeavor to ensure substantial justice to both parties.

The purpose of M.R.C.P. 41(a)(2) is primarily to prevent voluntary dismissal which unfairly affects the other side, and to permit the imposition of curative conditions. Accordingly, the dismissal should be allowed generally unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit. It is not a bar to dismissal that plaintiff may obtain some tactical advantage thereby.

The second sentence of M.R.C.P. 41(a)(2) provides that if a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. The purpose of the rule is to preserve the court's jurisdiction over the parties and the counterclaim. Ordinarily the counterclaim can stand on its own and dismissal can be granted without affecting the counterclaim. If the counterclaim is compulsory, the court has jurisdiction to decide it even though the plaintiff's claim is dismissed; if the counterclaim is permissive, it will ordinarily require independent grounds for jurisdiction and these independent grounds permit it to remain pending. Thus, the rule applies only when there is a permissive counterclaim that can be maintained without an independent ground of jurisdiction, as when it is a setoff, or in other unusual circumstances in which the counterclaim would fall if the plaintiff's claim were dismissed.

M.R.C.P. 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; *see* Sherwin Williams Co. v. Feld Bros. & Co., 139 Miss. 21, 103 So. 795 (1925) (plaintiff may be nonsuited by the court for failure to comply with order to make declaration more specific). Unless otherwise specifically ordered by the court, an involuntary dismissal under M.R.C.P. 41(b) ordinarily operates as an adjudication upon the merits and is with prejudice. *See* 9 Wright, Miller & Cooper, Federal Practice and Procedure, Civil §§ 2369 to 2373. However, past Mississippi practice has tempered this harsh result by allowing dismissed cases to be reinstituted, except in extreme situations. *See,* e. g., Ross v. Milner, 194 Miss. 497, 12 So. 2d 917 (1943) (where order did not recite that cause was dismissed without prejudice, it was considered as being dismissed with prejudice); Peoples Bank v. D'Lo Royalties, Inc., 206 So. 2d 836 (Miss. 1968) (dismissal is a drastic punishment which should not be invoked except where conduct of parties has been so deliberately careless as to call for such action).

M.R.C.P. 41(c) provides that the other subdivisions of M.R.C.P. 41, stating the procedures for and consequences of dismissals, apply to the dismissal of a counterclaim, cross-claim, or third-party claim.

One exception is allowed for M.R.C.P. 41(c) matters because the right of voluntary dismissal with notice, M.R.C.P. 41(a)(1), is terminated by an answer. This will not work for counterclaims, cross-claims, or third-party claims, since defendant will ordinarily assert these with or subsequent to his answer. Accordingly, M.R.C.P. 41(c) provides that a voluntary dismissal by a defendant, or other claimant, of a counterclaim, cross-claim, or third-party claim must be made before a responsive pleading is served or, if none, before the introduction of evidence at the trial. M.R.C.P. 41(a)(2) also provides that the service of a motion for summary judgment also terminates the right to dismiss by notice. As a matter of logic and judicial consistency, if a motion for summary judgment defeats plaintiff's right to dismiss, then it should also defeat the right of a defendant to dismiss his counterclaim, cross-claim, or third-party claim. *See* 9 Wright, Miller & Cooper, Federal Practice and Procedure, Civil § 2374.

M.R.C.P. 41(d) authorizes the clerk to move for dismissal of cases in which there has been no action of record during the preceding 12 months. The clerk is required to give notice of such action to the opposing parties who may counter the clerk's motion to retain the case on the court's docket. This provision supersedes Miss. Code Ann. § 11-53-25 (1972) (clerk shall move for dismissal of any cause pending in which no action has been taken for the two preceding terms). The statute did not require notice of the dismissal—the parties were deemed to be before the court in cases pending on the active docket. *Ross v. Milner,* above.

Under M.R.C.P. 41(e), if a plaintiff who has once dismissed an action in any court commences another action on the same claim against the same defendant, the court may require the payment of costs in the prior action before proceeding with the latter. The matter is discretionary with the court. M.R.C.P. 41(e) by its terms is applicable only when the plaintiff "has once dismissed an action;" thus, it does not cover cases in which there was an involuntary dismissal of the prior action by the court. This accords with prior practice pursuant to Miss. Code Ann. §§ 11-7-127 and 11-53-25 (1972).

APPENDIX II: UNIFORM CIRCUIT AND COUNTY COURT RULE 4.03

The provisions of this rule shall apply to all written motions in civil actions.

1. The original of each motion, and all affidavits and other supporting evidentiary documents shall be filed with the clerk in the county where the action is docketed. The moving party at the same time shall mail a copy thereof to the judge presiding in the action at the judge's mailing address. A proposed order shall accompany the court's copy of any motion which may be heard ex parte or is to be granted by consent. Responses and supporting evidentiary documents shall be filed in the same manner.

2. In circuit court a memorandum of authorities in support of any motion to dismiss or for summary judgment shall be mailed to the judge presiding over the action at the time that the motion is filed. Respondent shall reply within ten (10) days after service of movant's memorandum. A rebuttal memorandum may be submitted within five (5) days of service of the reply memorandum. Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagreement that such facts are undisputed and material. Copies of motions to dismiss or for summary judgment sent to the judge shall also be accompanied by copies of the complaint and, if filed, the answer.

3. Accompanying memoranda or briefs in support of other motions are encouraged but not required. Where movant has served a memorandum or brief, respondent may serve a reply within ten (10) days after service of movant's memorandum or brief. A rebuttal memorandum or brief may be served within five (5) days of service of the reply memorandum.

4. No memorandum or brief required or permitted by this rule shall be filed with the clerk. Memoranda or briefs shall not exceed 25 pages in length. If any memorandum, brief or other paper submitted in support of a legal argument in any case cites or relies upon any authority other than a Mississippi or federal statute, Mississippi or federal Rule of Court, United States Supreme Court case, or a case reported in the Southern or Federal Reporter series, a copy of such authority must accompany the brief or other paper citing it.

5. All dispositive motions shall be deemed abandoned unless heard at least ten days prior to trial.

CREDIT(S)

[Adopted effective May 1, 1995; amended May 23, 2002.]

Uniform Circuit and County Court Rule 4.03, MS R UNIF CIR AND CTY CT Rule 4.03

Current with amendments received through June 1, 2008

CERTIFICATE OF SERVICE

I, STEPHEN G. PERESICH, of the law firm of Page, Mannino, Peresich & McDermott, P.L.L.C., do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing **Brief of the Appellees** to L. Christopher Breard, Esquire, at his usual mailing address of P.O. Box 7676, Gulfport, MS 39506; and to Honorable Jerry O. Terry, Harrison County Circuit Court Judge, at his usual mailing address of Post Office Drawer 1461, Gulfport, MS 39502.

This, the 1st day of June, 2009.

STEPHEN G. PERESICH

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