

IN THE SUPREME COURT OF MISSISSIPPI

CHARLES BARRY

APPELLANT

VS.

NO. 2009-CA-01124

JOHN R. REEVES

APPELLEE

**BRIEF OF APPELLEE
JOHN R. REEVES**

ORAL ARGUMENT NOT REQUESTED

**An Appeal From the Circuit Court of the
First Judicial District of Hinds County, Mississippi**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. Their representations are made in order that the Justices of the Supreme Court and/or the Justices of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Winston Kidd - Hinds County Circuit Court Judge
2. John Reeves - Appellee
3. John D. Moore - Attorney for Appellee
4. Charles Barry - Appellant
5. Joel W. Howell, III - Attorney for Appellant

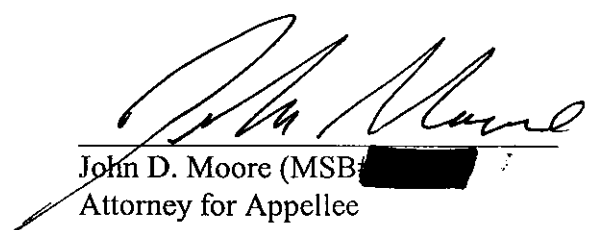

John D. Moore (MSB [REDACTED])
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I. STATEMENT OF ISSUES

- A. The trial court honored the mandate of the Mississippi Supreme Court to rule on Mr. Barry's motion to set the case for trial.
- B. Dismissal of Mr. Barry's case for failure to prosecute is valid
- C. The trial court correctly denied Mr. Barry's request to amend his complaint.

II. STATEMENT OF THE CASE

Appellant Charles Barry (Mr. Barry) filed a complaint against Appellee John Reeves (John) on August 17, 2001. (Clerk's Papers (C.P.), p. 4). John filed an answer denying that Mr. Barry should be afforded any relief. (C.P., p. 11). On June 10, 2003, the case was stayed. (C.P., p. 51). The case was stayed because John's insurer, American National Lawyers Insurance Reciprocal ("ANLIR") went into bankruptcy. On August 31, 2004, Mr. Barry filed a Motion for Leave to File Amended Complaint. (C.P., p. 54). Barry sought to amend the complaint by requesting punitive damages in the amount of one million dollars (\$1,000,000). (C.P., p. 59). On the same date, Mr. Barry also filed a motion to lift stay due to the fact that the insolvency of ANLIR had proceeded to liquidation. (C.P., p. 61). John filed a response noting that his insurer, ANLIR, had gone bankrupt and that Mr. Barry had offered no reason for which he sought to amend the complaint. (C.P., p. 63). On December 1, 2004, the stay was lifted and the case was restored to the active docket. (C.P., p. 83). On December 1, 2004, the court denied Mr. Barry's motion to amend his complaint. (C.P., p. 84). The order specifically noted that Mr. Barry failed to give any reason why the amendment should be allowed and that granting the motion would be unfair and prejudicial to allow an amendment requesting punitive damages three years after the lawsuit had been filed and John's insurance carrier had filed for bankruptcy. (C.P., pgs. 84-85). Almost one year later, on September 30, 2005, Mr. Barry filed a motion for trial setting and relief relating to discovery. (C.P., p. 86). John filed a response on November 14, 2005, noting that the time for discovery had expired and that Mr. Barry had not set forth any good cause why discovery should be reopened. (C.P., p. 88).

Mr. Barry took no further action and the case laid dormant for nearly 17 months. On April 10, 2007, John filed a motion to dismiss for failure to prosecute (C.P., p. 91). Mr. Barry responded

to the motion. (C.P., p. 95). The trial court granted John's motion and an Order Granting Motion to Dismiss for Failure to Prosecute was entered on February 11, 2009. (C.P., p. 102). Mr. Barry filed a notice of appeal on February 24, 2009.

III. SUMMARY OF THE ARGUMENT

This case involves a claim wherein Mr. Barry filed a lawsuit in 2001 but never pushed his case. Having not pushed his case, the trial court dismissed the lawsuit.

Before the case was dismissed, the Mississippi Supreme Court had mandated that the trial court rule on Mr. Barry's motion to set case for trial. The dismissal of the action for failure to prosecute obviated the need for that. Once dismissed, all pending motions and matters were made moot.

The dismissal of Mr. Barry's case itself is valid. Mr. Barry was dilatory in his actions. The court, by its own order of dismissal, considered the all motions before it before dismissing the action.

The trial court also correctly denied Barry's request to amend his complaint. Mr. Barry was dilatory in the prosecution of his case. Amendments are not automatic and the granting of an amendment would have severely prejudiced John. The trial court made an informed, correct decision.

No error being present herein, the trial court's actions should be affirmed.

IV. ARGUMENT AND AUTHORITIES

A. The trial court honored the mandate of the Mississippi Supreme Court to rule on Mr. Barry's motion to set the case for trial.

Mr. Barry suggests that the trial court was required to rule on his motion for a trial setting and that the court failed to address that motion. Mr. Barry's reasoning is flawed. In addition to Mr. Barry's motion for trial setting, John's motion to dismiss for failure to prosecute was pending. When the court granted John's motion to dismiss for failure to prosecute, that was effectively a ruling on Mr. Barry's motion for a trial setting. Granting the motion to dismiss made moot all other pending matters in the case. In other words, by dismissing the case there was nothing left to rule on - the case was over. Therefore, it was unnecessary to issue a ruling on the motion for trial setting. The act of dismissal denied the motion for trial setting. Since the case was dismissed, there was nothing to set for trial. The trial court did not disregard anything.

B. Dismissal of Mr. Barry's case for failure to prosecute is valid.

The standard of review for dismissals is abuse of discretion. Hine v. Anchor Lake Property Owners Ass'n, Inc., 911 So.2d 1001, 1008 (Miss. Ct. App. 2005). The appellate courts do not "disturb a trial court's ruling on a dismissal for want of prosecution unless it finds an abuse of discretion." Illinois Central Railroad Company v. Moore, 994 So.2d 723, 725 (Miss. 2008). The decision of the trial judge will not be overturned absent manifest error. Watson v. Frillard, 493 So.2d 1277, 1279 (Miss. 1986).

Mr. Barry raises these points in support of his position that dismissal was improper:

- Dilatory or contumacious conduct must be present for dismissal to be upheld.
- That the law favors a trial on the merits

- That the court must consider lesser sanctions.

For dismissal to be upheld it is not necessary for dilatory *and* contumacious conduct to be present; it is necessary to show dilatory conduct *or* contumacious conduct - one or the other. Mr. Barry's conduct was dilatory. It is well-settled that clear dilatory conduct on the part of the plaintiff establishes a record of delay. Vosbein v. Bellias, 866 So.2d 489 (Miss. Ct. App. 2004).

Nearly two years lapsed between the time that Mr. Barry filed his complaint and the proceedings were stayed because of ANLIR's insolvency. Mr. Barry did nothing on his case during these nearly two years. He allowed his own case to lie idle. In fact, John had to file a motion to compel to make him answer discovery. (C.P., p. 15). Significantly, John was fully insured during this time.

In Hasty v. Namihira, 986 So.2d 1036 (Miss. Ct. App. 2008), it was held that a medical malpractice case filed in 2001 was properly dismissed in July 2003 pursuant to MRCP 41(b) and (d) and Miss. Code Ann. § 11-53-25, both of which allow dismissal of stale cases. The Hasty court found that where the plaintiff's actions were dilatory, even if they were not contumacious, and where the defendant was prejudiced, even slightly, the trial court did not abuse its discretion in dismissing the case. So, in the instant case, is **nearly 14 years** after Mr. Barry was allegedly injured. Likely, the witnesses will not remember the facts of the case, assuming they can even be found. John's insurance company went bankrupt through no fault of John's and he must now personally pay for an attorney from his own pocket and would now be personally liable for any judgment. That certainly is prejudicial to John, and is made particularly significant when the fact is that Mr. Barry had nearly two years to press his case before the insurance company went bankrupt but did nothing. If Mr. Barry was truly interested in his case he would have pressed it as soon as he filed it. After all,

if somebody believes they have case, why do nothing on it for two years? Mr. Barry's actions were dilatory and clearly prejudicial to John. The case was rightfully dismissed. Mr. Barry has been dilatory from the very day this case was filed in 2001. John is prejudiced by the lapse of time and this court should affirm the trial court's decision to dismiss for lack of prosecution.

Mr. Barry also argues that the law favors a trial on the merits and that the trial court should have considered lesser sanctions. Regarding the law favoring a trial on the merits, it was up to Mr. Barry to push his case. He chose instead to do nothing for nearly two years and was dilatory even after that. Mr. Barry effectively waived his case when he chose not to prosecute it. Regarding his position that the court should have considered lesser sanctions, the court's order of dismissal reads in pertinent part:

THIS CAUSE having come on to be heard on Plaintiffs Motion to Dismiss for Failure to Prosecute. The Court, having reviewed the pleadings and other submissions, having heard the argument of the parties, and being otherwise advised in the premises, finds as follows:

1. The herein complaint was filed on or about August 16, 2001. The incident which is the subject of the lawsuit occurred on or about June 21, 1996.
2. At the time the complaint was filed, the defendant was insured by American National Lawyers Insurance Reciprocal (ANLIR). ANLIR subsequently filed for Bankruptcy and the Court entered an Order of Stay due to ANLIR's Insolvency on June 10, 2003.
3. On or about December 1, 2004, the Stay was lifted and the case was restored to the active docket.
4. The herein motion was filed on April 10, 2007. This was well over two years after the stay was lifted.
5. The plaintiff had every opportunity to conduct and complete discovery from August 16, 2001, the date the complaint was filed, through June 10, 2003, the date this matter was Stayed. A review of the file reveals that plaintiff did not take advantage of that opportunity.

6. The Court also finds that since the Stay was lifted on December 1, 2004, up to the filing of the herein motion to dismiss on April 10, 2007, this matter was not prosecuted.
7. It has been over twelve years since the incident herein occurred. The facts and circumstances surrounding the prosecution of this matter require that the hereinmatter be dismissed.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiffs Motion to Dismiss for Failure to Prosecute is hereby Granted and the herein action is Dismissed.

(C.P., p. 102).

The order of dismissal shows that the court considered all pending issues in their entirety and thoroughly. Any sanction lesser than dismissal would not have cured the prejudice to John by Mr. Barry's malfeasance. This is because John's insurance company was bankrupt and John is now personally liable. Whereas, had Mr. Barry prosecuted his case when he filed it he could have had it tried and over with in two years while insurance was in coverage. But, he did nothing. He even did nothing to push his case after the stay was lifted, as the court noted. So, Mr. Barry was dilatory twice and he somehow would now have this court believe that putting the case on the trial docket nearly 14 years after the alleged event is somehow fair.

There is nothing in the record to show that the trial court abused its discretion. In fact, the record shows that the court maturely exercised its discretion. There being no error, the trial judge's decision should be affirmed.

C. The trial court correctly denied Barry's request to amend his complaint.

Mr. Barry contends that the trial court erred by denying his motion to amend his complaint. Amendments to pleadings is a matter left to the discretion of the trial court. The trial court correctly denied Mr. Barry's request to amend his complaint and had just reason for its decision. It must be noted that Mr. Barry filed his complaint on August 17, 2001 (C.P., p. 4). He filed his motion to

amend on August 31, 2004. (C.P., p. 54). He waited three years to file a motion to amend the complaint. This is just another example of his dilatory tactics. First, he should have put all of his alleged claims in his initial complaint. Second, he certainly should have known before three years later of any amendment. Punitive damages is certainly something any litigant or his lawyer would know to include in the initial filing.

Mr. Barry is also incorrect in his apparent belief that MRCP 15 is a “rubber-stamp” mechanism whereby all amendments should be freely given. The rule reads in pertinent part:

(a) *Amendments.* A party may amend his pleading as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty days after it is served. Otherwise a party may amend his pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given **when justice so requires.**

M.R.C.P. 15 (Emphasis added). Mr. Barry never set forth why justice requires that he be allowed to amend his complaint to assert a claim for punitive damages either at the trial court level or now on appeal.

Amendments to pleadings are not automatic. The Mississippi Supreme Court has placed limits. “[A]n application to amend **should be prompt** and not the result of inexcusable want of diligence.” William Iselin and Company Inc. v. Delta Auction and Real Estate Co., 433 So.2d 911, 913 (Miss. 1983). (Emphasis added). Mr. Barry’s request to amend was delinquent - filed three years after he filed his complaint. He waited three years to try to amend the complaint to add a claim that John pay him \$1,000,000 for punitive damages. This three year gap between the filing of the complaint and the request to amend the complaint to add a claim for \$1,000,000 for punitive

damages, without providing a justifiable reason to amend, certainly empowered the court to exercise its discretion to bar the amendment. That is why the trial court ruled the way it did.

Allowing the complaint to be amended would have prejudiced John. In Natural Mother v. Paternal Aunt, 583 So.2d 614, 617 (Miss. 1991), the Mississippi Supreme Court held that “liberality in permitting amendments is not allowed to encourage delay, laches, and negligence.” The court went on to hold that “**an amended pleading may unfairly prejudice the adverse party.**” *Id.* (Emphasis added). If the amendment were allowed, John would have to defend a claim for \$1,000,000 for punitive damages, 14 years after the alleged act giving rise to the complaint occurred. Further, John would have to so defend while uninsured when the entire case could have been concluded, one way or the other, while John had insurance during the first two years after the complaint was filed. The case was not concluded during that time because Mr. Barry sat on his hands. Justice required that the amendment be denied and the trial court rightfully ruled so.

In Red Enterprises, Inc. v. Peashooter, Inc., 455 So.2d 793, 795 (Miss. 1984), the Mississippi Supreme Court, citing Forman v. Davis, 371 U.S. 178, 182 (U.S. 1962), held, “[I]n the absence of any apparent or declared reason--such as **undue delay, ... undue prejudice to the opposing party** by virtue of allowance of the amendment, ... the leave sought should be as the rules require, ‘freely given.’” (Emphasis added). The time between the filing of the complaint, August 16, 2001, and the request to amend by adding a claim that John pay Mr. Barry \$1,000,000 for punitive damages, August 31, 2004, constitutes undue delay and undue prejudice to John. Mr. Barry could have easily included the punitive damages claim in his original complaint. The lower court correctly found that there was no justifiable reason to not have sought to amend the complaint then and that John would

be unduly prejudiced by the requested amendment. The trial court correctly denied Mr. Barry's request.

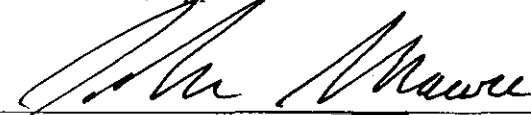
Moreover, the amendment of the pleadings is moot because Mr. Barry didn't timely prosecute his case. It was dismissed for failure to prosecute, so any amendments to the pleadings are meaningless.

V. CONCLUSION

The trial court committed appropriately exercised its discretion in managing this case. The trial court's dismissal of the case made all pending motions and matters moot. The dismissal was a valid exercise of discretion. Mr. Barry was dilatory in his prosecution of the case. The trial court considered all pending matters before dismissal. The trial court's denial of the motion to amend was well-reasoned. The appellant has failed to show why the trial court should be reversed. Accordingly, the decision of the trial court be affirmed.

Respectfully submitted,
John Reeves, Appellee

BY:



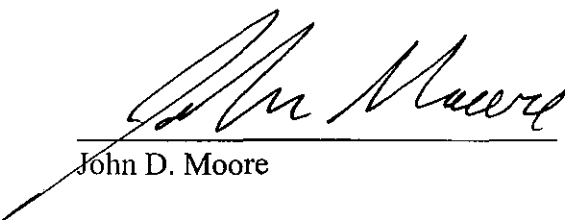
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Certificate of Service

I certify that on February 26, 2010, I mailed a true copy of this document via First Class U.S. Mail, postage prepaid, to:

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