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nov 9, 2010*

**2009-CA-01267**

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DELIA SHEPARD, INDIVIDUALLY  
AND AS ADMINISTRATRIX OF THE  
ESTATE OF RODNEY STOWERS, DECEASED**

**APPELLANTS**

**VERSUS**

**CASE NO. : 2009-CA-01267**

**PRAIRIE ANESTHESIA ASSOCIATES,  
RUSSELL LINTON, M.D., AND GOLDEN  
TRIANGLE REGIONAL MEDICAL CENTER**

**APPELLEES**

**ORAL ARGUMENT NOT REQUESTED**

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**BRIEF OF APPELLEE PRAIRIE ANESTHESIA ASSOCIATES**

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**APPEAL FROM THE CIRCUIT COURT OF  
LOWNDES COUNTY, MISSISSIPPI  
CAUSE NO. 94-058-CV1**

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**APPELLEES**

**CERTIFICATE OF INTERESTED PERSONS**

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3. Pittman, Germany, Roberts  
& Welsh, LLP.....Attorneys for Appellant
4. Ashley Dejunae Stowers.....Alleged daughter of Rodney Stowers
5. Prairie Anesthesia Associates .....Appellee
6. Russell Linton, M.D.....Appellee
7. Golden Triangle Regional  
Medical Center .....Appellee
8. J. L. Wilson, IV .....Attorney for Appellee Prairie Anesthesia Associates
9. Tommie G. Williams .....Attorney for Appellee Prairie Anesthesia Associates
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12. Mitchell, McNutt & Sams, P. A.....Attorneys for Russell Linton, M.D.
13. Aubrey E. Nichols .....Attorney for Golden Triangle Regional Medical Center
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RESPECTFULLY SUBMITTED this the 9<sup>th</sup> day of November, 2010.

BY: \_\_\_\_\_

  
TOMMIE WILLIAMS, (7262)

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## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF THE ISSUES .....	1
STATEMENT REGARDING ORAL ARGUMENT .....	2
STATEMENT OF THE CASE .....	3
SUMMARY OF THE ARGUMENT .....	12
ARGUMENT .....	14
A.    MS. SHEPARD HAS CREATED A CLEAR RECORD OF DELAY .....	14
i.    Ms. Shepard's "True Timeline" Omits Approximately 9 Years of Docket Inactivity. ....	16
ii.   Ms. Shepard's Un-pursued Motions Are the Clearest Evidence of Delay .....	17
iii.  Contumacious Conduct is Irrelevant .....	19
iv.   A Single Trial Setting Cannot Establish Diligence in the Face of over 15 Years of Delay .....	19
v.    Prairie Anesthesia Never Requested or Was Granted a Continuance ...	20
B.    LESSER SANCTIONS HAVE BEEN CONSIDERED, WERE APPLIED, WERE INEFFECTIVE, AND DISMISSAL IS THE ONLY REMEDY WHICH SERVES THE INTERESTS OF JUSTICE .....	21
C.    THOUGH NOT REQUIRED FOR DISMISSAL, DEFENDANTS HAVE BEEN PREJUDICED, THEREBY AGGRAVATING MS. SHEPARD'S INORDINATE DELAY .....	23
i.    Prairie Anesthesia Has Claimed Prejudice for 14 Years and Has Demonstrated the Same .....	23
ii.   The Presence of Medical Records Cannot Remedy Prejudice .....	25

D.	THIS IS THE MOST EGREGIOUS CASE TO BE CONSIDERED BY THIS COURT .....	26
i.	This Case Lies Beyond the Parameters Already Determined by Mississippi Caselaw to Mandate Dismissal .....	26
a.	<i>Cox v. Cox</i> .....	27
b.	<i>Hasty v. Namihira</i> .....	28
c.	<i>Barry v. Reeves</i> .....	28
ii.	Cases Cited by Ms. Shepard Are Not Factually Applicable .....	29
E.	MOTION TO STRIKE PORTIONS OF THE RECORD NOT AVAILABLE FOR CONSIDERATION BY THE TRIAL COURT .....	31
	CONCLUSION .....	31
	CERTIFICATE OF SERVICE .....	33

## **TABLE OF AUTHORITIES**

### **CASES**

<i>AT&amp;T v. Days Inn of Winona</i> , 727 So.2d 178 (Miss. 1998) .....	14, 30
<i>Barry v. Reeves</i> , 2009-CA-01124-SCT (Miss. 2010) .....	28, 29
<i>Camacho v. Chandeleur Homes, Inc.</i> , 862 So.2d 540 (Miss. App. 2003) .....	30
<i>Cox v. Cox</i> , 976 So.2d 869 (Miss. 2008) .....	14, 19, 21, 27
<i>Estate of Stowers v. Jones by and through Jones</i> , 678 So.2d 660 (Miss. 1996) .....	5
<i>Hasty v. Namihira</i> , 986 So.2d 1036 (Miss. App. 2008) .....	14, 19, 22-24, 26, 28
<i>Hine v. Anchor Lake Property Owners</i> , 911 So.2d 1001 (Miss.App. 2005) .....	19, 22
<i>Hoffman v. Parcelus Heathcare Corp</i> , 752 So.2d 1030 (Miss. 1999) .....	30
<i>Illinois Central v. Moore</i> , 994 So.2d 723 (Miss. 2008) .....	15, 18, 26
<i>Jenkins v. Tucker</i> , 18 So.3d 265 (Miss.App. 2009) .....	22, 23
<i>Lone Star Casino Corp. v. Full House Resorts, Inc.</i> , 796 So.2d 1031 (Miss. App. 2001) .....	29
<i>Vobein v. Bellias</i> , 866 So.2d 489 (Miss. App. 2004) .....	15

### **RULES**

Mississippi Rule of Appellate Procedure 15 .....	29
Mississippi Rule of Civil Procedure 41(b) .....	14

## **STATEMENT OF THE ISSUES**

- I. The Circuit Court of Lowndes County, Mississippi properly exercised its discretion by dismissing Plaintiff's wrongful death suit with prejudice for the failure to prosecute the suit over the 15 years that it languished on the Court's docket.
- II. Contumacious conduct is unnecessary and irrelevant based on Ms. Shepard's patently dilatory conduct and the clear record of delay.
- III. Lesser sanctions were not only considered, but applied. As they were ineffective, dismissal best served the interests of justice and the trial court's inherent power to control its docket was properly exercised.
- IV. Defendants have per se suffered prejudice by Ms. Shepard delaying this case for almost twenty years after Rodney Stowers' death.

### **STATEMENT REGARDING ORAL ARGUMENT**

Prairie Anesthesia Associates respectfully submits that the fact that this case remains untried almost twenty years after the facts giving rise to suit is so plainly demonstrates a prejudicial lack of prosecution that no hearing would be helpful or is warranted. Any procedural complexities in this case arising from DNA testing and related stays were resolved prior to a two year stay being lifted in 1997. The record in this matter evidences that Delia Shepard did not prosecute her cause of action during the 11 years after all claimed procedural complexities were resolved or in the face of five motions to dismiss for lack of prosecution. As the failure to prosecute in this matter is more egregious than that every case wherein Mississippi Appellate Courts have sustained dismissal, oral argument would not add any understanding or alter the conclusion that the trial court properly exercised its discretion and dismissed this case with prejudice.



## **STATEMENT OF THE CASE**

### **A. Nature of Case**

The instant suit seeks recovery for the death of Rodney Stowers which occurred nineteen (19) years ago. Though personal recollections have evaporated in the interim, Rodney Stowers broke his leg while playing football for Mississippi State in 1991. Plaintiff Delia Shepard alleges that Dr. Russell Linton did not properly treat Mr. Stowers' broken leg during and after the game in Gainesville, Florida. She further alleges that Dr. Russell Linton improperly went forward with surgery upon return to Columbus, Mississippi and that Prairie Anesthesia Associates ("Prairie Anesthesia") breached the applicable standard of care in administering anesthesia. Claims against the Golden Triangle Regional Medical Center are for vicarious liability of the physicians.

Seventeen years after Rodney Stowers' death and after five motions to dismiss for lack of prosecution, the trial court dismissed the Plaintiff's claims based upon a finding that, despite the consideration and application of lesser sanctions, Delia Shepard delayed trial of this matter for long enough to have prejudiced the Defendants' ability to defend themselves. Based on those findings and the clear support in the record, Lowndes County Circuit Judge Lee Howard granted the Defendants' Motions to Dismiss for Lack of Prosecution.

### **B. Facts Relevant to the Issues Presented for Review and Course of Proceedings and Disposition Below**

The instant matter was filed over seventeen (17) years ago in Scott County, Mississippi on October 1, 1993, by Delia Shepard, as administratrix of the estate, seeking recovery for the wrongful death of Rodney Stowers. (R:14)<sup>1</sup>. In addition to claims of medical negligence against the present

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<sup>1</sup> Citations to the Record on Appeal are made herein as "R". In the interests of conservation and economy, no separate record excerpts are filed by Prairie Anesthesia. Where applicable, citation to the record excerpts of Dr. Russell Linton are made herein as "RE".

appellants, Ms. Shepard sought recovery from a Scott County funeral home based on unrelated allegations concerning the services the funeral home provided. (R14).

Prior to the filing of the instant suit, a suit for the wrongful death of Rodney Stowers had already been filed on June 10, 1993 in the Circuit Court of Lowndes County, Mississippi against the Dr. Russell Linton, Golden Triangle Regional Medical Center and Prairie Anesthesia on behalf of Kierra Jones – who alleged to be the sole wrongful death beneficiary of Rodney Stowers. On March 22, 1993, in the Scott County, Mississippi cause for the Estate of Rodney Stowers, the Chancellor determined that Kiera Jones was the natural child of Rodney Stowers. (R:119). That ruling was appealed by Estate Administrator Delia Shepard. (R:121).

On December 27, 1993, Prairie Anesthesia Associates moved to dismiss the instant case brought by Delia Shepard based upon the prior-filed wrongful death suit instituted on behalf of Kiera Jones. (R:24). Prairie Anesthesia sought dismissal for violation of § 11-7-13, Miss. Code Ann. (1972), as amended's mandate that there be but one suit for wrongful death. Prairie Anesthesia further sought severance from the claims against the Scott County funeral home and a change of venue to Lowndes County, where both the alleged medical negligence and death occurred. (R:27).

After other defendants filed similar motions (R:78, 107, 111), a hearing was held before the Scott County Circuit Court on February 28, 1994. By order filed April 27, 1994, that court ruled that the claims for medical negligence against Prairie Anesthesia, Dr. Russell Linton and Golden Triangle Regional Medical Center were separate and distinct from those against the Scott County Funeral Home and severed the medical negligence claims. (R:143). Without ruling on the Motions to Dismiss based on the priority of the *Jones* suit versus the instant suit, the court transferred all of the medical negligence claims in this suit to the Circuit Court of Lowndes County, Mississippi. (R:144).

This matter was docketed over sixteen (16) years ago in Lowndes County, Mississippi on May 23, 1994. (R:14). The outstanding Motions to Dismiss were set for hearing on July 7, 1994 in Lowndes County. (R:145). After a continuance of the hearing until October 11, 1994, the Court stayed proceedings in the instant suit by order filed on November 4, 1994. (R:147). The stay was entered at Plaintiff's request due to anticipated DNA testing that would determine if Kierra Jones was or was not Rodney Stowers' daughter.

Though not a part of the filings in this matter, Prairie Anesthesia filed a motion to dismiss the *Jones* suit for lack of prosecution on April 15, 1995. (R:166). On May 30, 1996, the Mississippi Supreme Court reversed and remanded the Scott County Chancery Court paternity case for DNA testing. See *Estate of Stowers v. Jones by and through Jones*, 678 So.2d 660 (Miss. 1996). (R:174). The *Jones* plaintiff then responded to Prairie Anesthesia's Motion to Dismiss for Lack of Prosecution with a Motion to Stay the *Jones* case on August 8, 1996 (R:166). That motion sought to stay the *Jones* action pending paternity testing. (R:166). Delia Shepard also moved to stay the *Kierra Jones* action, despite her lack of standing. (R:166).

On August 15, 1996, Prairie Anesthesia filed its opposition to the Motions to Stay in a consolidated pleading filed in both *Jones* and the instant matter. (R:164-168). Therein, Prairie Anesthesia noted that this case had been stayed for two years. **Defendant Prairie Anesthesia affirmatively stated that it continued to be prejudiced by the Plaintiffs' lack of cooperation in preparing the action for trial and would be severely prejudiced should this Court stay the entire course of proceedings involving the death of Rodney Stowers.** (R:166-167). Prairie Anesthesia noted that Delia Shepard was the administrator of the Estate of Rodney Stowers and had full authority to proceed with the prosecution of the case. (R:167-168). For that reason, Prairie Anesthesia contended that there was no basis for a stay regardless of the determination of who might

be the potential wrongful death beneficiaries. (R:167-168). After an August 19, 1996 joint hearing in both *Jones* and the instant case, the trial court continued the matter for 60 days. (R:171).

The DNA testing was performed in late 1996 and established that Kiera Jones was not the natural child of Rodney Stowers. (R:181-189). After Defendants were provided copies of the DNA testing results, Prairie Anesthesia and all other defendants herein moved the lift the stay and for entry of a scheduling order on February 10, 1997. (R:172, 191, R:194). A hearing was originally set for May 12, 1997 (R:190) but was rescheduled for July 22, 1997. (R:198). On that date, an order lifting the stay and setting deadlines was entered by the trial court. (R:199). Discovery was to be completed by May 29, 1998. (R:199). The Plaintiff was to designate experts by November 14, 1997; Defendants were to designate experts by January 30, 1998. (R:199-200).

Discovery was propounded to the Plaintiff by Prairie Anesthesia Associates on August 26, 1997. (R:259-65). Having not received any responses by December 22, 1997, Prairie Anesthesia Associates joined in the motion of Dr. Linton – another defendant whose discovery had gone unanswered – to dismiss or, in the alternative, to compel. (R:255). A hearing was originally set for January 6, 1998 but was continued to February 9, 1998 at the request of the Plaintiff. (R:269). On February 3, 1998, the Plaintiff responded to the motions, admitting she did not timely respond to discovery and seeking an extension of deadlines to designate expert witnesses after that deadline had passed. (R:271; RE tab 2). At the February 9, 1998 hearing, defendants' Motions to Compel were granted ordering Plaintiff to designate expert witnesses *and disclose their testimony* by April 15, 1998. (R:317). Though the Motions to Dismiss for the failure of the Plaintiff to comply with deadlines was not granted, the trial court expressly found that the Plaintiff had failed to comply and reserved the right to award sanctions at a later date. (R:317; RE tab 3).

Plaintiffs designated experts on April 15, 1998 by name only, with no opinions. (R:522). Defendant Prairie Anesthesia designated experts on June 19, 1998. (R:539-41). Dr. Russell Linton designated experts on July 14, 1998. (R:543-545). Prairie Anesthesia supplemented its expert designation with the opinion testimony of witnesses on July 14, 1998. (R:612-616). Golden Triangle Regional Medical Center joined in those designations on July 14, 1998. (R:655).

With no record activity for one and a half years, the clerk first began filing Motions to Dismiss for Want of Prosecution on January 13, 2000. (R:319; RE tab 4). In response thereto, the Plaintiff filed a one sentence motion for trial setting on February 11, 2000. (R:321). The motion was never pursued and did not make any showing of good cause. Without any intervening activity, the clerk again filed a second Motion to Dismiss for Want of Prosecution on April 11, 2001. (R:323; RE tab 5). Again the Plaintiff filed a one sentence motion for status conference and trial setting on April 13, 2001. (R:325). The motion was not pursued and no mention of good cause was made.

By agreement of the parties, a pretrial conference was set for November 19, 2001 (R:329), but later had to be cancelled by Ms. Shepard because of a busy schedule. (R:337; RE tab 6). With the busy schedule having continued for close to three years, the next substantive record activity in this case was the clerk's Third Motion to Dismiss for Want of Prosecution on April 7, 2004. (R:338; RE tab 7). This was again met by the Plaintiff with a one page motion for status conference and trial setting on April 15, 2004. (R:340). The motion was not pursued or noticed for hearing. No good cause showing was made.

Based upon the previous motions to dismiss for want of prosecution – i.e., an explicit warning to keep “proceeding forthwith to trial” – the trial court ordered on May 18, 2004 that the case be mediated within 90 days. (R:342-3; RE: Tab 8). On August 12, 2004, Ms. Howard's attorney notified the Court that he would not be able to meet that deadline due to a busy schedule.

(R:344-5; RE: Tab 9). The busy schedule continued for yet another year and Plaintiff moved for a status conference and other relief on August 12, 2005, just prior to another motion to dismiss for prosecution presumably being filed based on a year's inactivity. (R:346).

The case was set for a status conference on November 14, 2005 (R:349). No record was held of the November 14, 2005 status conference. However, the case was conditionally set for trial on November 27, 2006 as second setting to another Lowndes County matter involving both Judge Howard and counsel for Prairie Anesthesia, *Roebuck v. Gillespie*. (R:503; R:508). Plaintiff's counsel was to prepare the proposed scheduling order (R:506) which was initially sent to a co-defendant's counsel. (R:507-509). The order never made it any further that can be ascertained by any party. There is no record that the Plaintiff followed up on the proposed order or that the matter was actually set on the trial court's docket. Though never entered, the order set deadlines for plaintiff's designation of experts as February 1, 2006; the designation for defendant's expert as March 15, 2006; and discovery to be completed by September 15, 2006. (R:508).

As of the expiration of proposed Defendant's March 15, 2006 expert deadline, Plaintiff had still not identified opinions for David Channel, their expert economist, and a motion for extension of time in which to designate a rebuttal expert was filed by Prairie Anesthesia Associates. (R:680-81). Despite Plaintiff's prior designation of Dr. Barry Levine and the designation of David Channel in name only, the Plaintiff did not produce them for deposition and has never produced funeral bills, autopsy reports or correspondence identified between Plaintiffs and Mississippi State University regarding Rodney Stowers. (R:666). Accordingly, a Motion to Compel was filed on those bases (R:666-678) reflecting requests from January 16, 2006 through May 30, 2006 for that information.

On October 11, 2006, pursuant to the trial court's instruction, counsel for Prairie Anesthesia notified Judge Lee Howard that the *Roebuck v. Gillespie* case was proceeding to trial. (R:510). In

response thereto, Plaintiff's counsel notified the Court that he was of the opinion the case should be continued from the November 27, 2006 trial date. (R:512). When no order was entered, counsel for Prairie Anesthesia spoke with the court administrator to insure that the matter had been removed from the Court's docket. (R:513). It was the court administrator who requested an agreed order of continuance. (R:513). It was that order that was forwarded to the Court and continued the 2006 trial date. (R:516). The continuance was self executing and not as at any request of, or courtesy to, Prairie Anesthesia.

With no further activity of record over the next year and a half, the Circuit Clerk filed a Motion to Dismiss for Want of Prosecution yet again on March 28, 2008. (R:353; RE tab 12). The Plaintiff countered with a one page motion for a status conference and other relief. (R:355). Unlike the prior Motions to Dismiss for Want of Prosecution, Ms Shepard formerly responded to the Fourth Motion to Dismiss for Want of Prosecution, though out of the time required, and asserted that action of record was taken by verbally requesting trial dates from the court administrator in September of 2007. (R:358; RE tab 13). No argument was made as to good cause, and neither the motion for status conference or the response to the clerk's motion to dismiss was noticed for hearing.

On May 21, 2008, Prairie Anesthesia Associates moved to dismiss for want of prosecution. (R:367-R373). Dr. Linton moved to dismiss on May 30, 2008 (R:374), and Golden Triangle Medical Center joined into the motions to dismiss for want of prosecution on June 12, 2008. (R:376). The motions were set for hearing on August 28, 2008, but to accommodate the Plaintiff, were rescheduled to November 21, 2008. (R:401). Plaintiff filed an opposition to the motion to dismiss for lack of prosecution the evening before the hearing, November 20, 2008. (R:379)

As one of the central issues pertinent to the Motion, Prairie Anesthesia Associates demonstrated in its Motion to Dismiss and argued to the to the Lowndes County Circuit Court that

inquiry of counsel for Baptist Memorial Hospital-Golden Triangle, a co-defendant in this suit, revealed that numerous hospital employees no longer worked at the hospital and their present whereabouts were unknown. Nurse Willie Ervin, Nurse J. Gill, Nurse Melinda Clark, Nurse S. McKeithen, Nurse J. Baker, Nurse Vicki Hartman, Nurse Jacqueline Evans, Nurse Cydney Hudson, Nurse Terri Livingston, Nurse Debbie King, and Nurse Linda A. Bond no longer work at the hospital. The identity of some of the nurses whose writing documents treatment in the chart was not able to be determined. Presumably due to the passage of time, the hospital had no record whatsoever on Nurse M. Clark, Nurse R. Vaughn, Nurse M. Clark, Nurse J. Gede, Nurse E. Oxford, and Nurse Mary Sue Hoke. (R:371).

On December 19, 2008, the Circuit Court of Lowndes County granted Defendants' Motion to Dismiss for Lack of Prosecution, finding that the Plaintiff was guilty of dilatory conduct, not obeying prior lesser sanctions, and presuming prejudice due to the lengthy amount of time that has passed. (R:402-405; RE tab 14). The Plaintiff moved to alter or amend this order on December 30, 2008. (R:406). Oppositions were filed by Dr. Linton (R:409), Golden Triangle Medical Center (R:414) and Prairie Anesthesia Associates (R:417). The hearing on April 21, 2009 (R:423) was delayed to accommodate the Plaintiff, and was ultimately heard on May 29, 2009. (R:459). On June 29, 2009, the Court denied Plaintiff's Motion for Reconsideration and confirmed dismissal of the case. (R:462-463; RE tab 15). From that Order, Plaintiff appeals. (R:464).

Plaintiff's Notice of Appeal was filed on July 29, 2009. After a notice of deficiency was issued on August 14, 2009, the Supplemental Designation of the Record was filed by the Plaintiff on August 28, 2009. The record was filed and a briefing schedule was issued on January 14, 2010. On the same date a motion for time was filed by Defendant Prairie Anesthesia as Ms. Shepard had not forwarded the record to counsel for Prairie Anesthesia Associates for review, as was requested.



After a brief period of review, a Notice of Inspection and Proposed Corrections was filed by Prairie Anesthesia Associates. Plaintiff's first motion for time to file their brief came on March 22, 2010. Her second motion for additional time came on April 23, 2010. The next motion for additional time was filed May 19, 2010. The next motion for additional time was filed on June 4, 2010. The next motion for additional time was filed on August 11, 2010. After the first thirteen months of the appeal was spent in efforts to supplement the record with materials that were not available to the trial court when it ruled, Ms. Shepard filed her brief on August 16, 2010.

## SUMMARY OF THE ARGUMENT

Thanks to the internet – which wasn't a word in 1991 and which wasn't available to the public – events from 1991 can be recreated: Bill Clinton was the governor of Arkansas; Johnny Carson ruled late night; and Congress' efforts were focused on Anita Hill and Clarence Thomas. 1991 was before Waco, before Black Hawk Down and before the Perfect Storm happened – much less were made into movies. Babies born in 1991 are now graduating from college, getting real jobs and starting to have their own babies.

The obvious point is that no one knows what they were doing on any particular day in October of 1991 – over **Nineteen years ago**. The memories of those details have long since been erased by the passage of time. The attrition of those memories is the natural course of things. It is also the impetus for vesting trial courts with the discretion to dismiss cases in which the non-prosecuting party delays going forward long enough to deprive the opposing party of access to facts vital to defending the case.

This case has been on file longer than any case which has ever been analyzed by the Mississippi Supreme Court on a Motion to Dismiss for the failure to prosecute the action.

Lowndes County Circuit Judge Lee Howard properly exercised his discretion in dismissing for lack of prosecution in accordance with the case law decided by Mississippi Appellate Courts as applied to the facts of this case. The propriety of his discretion is supported by the facts that:

- The record in this matter clearly evidences a course of dilatory conduct. The Plaintiff concedes in her brief that discovery was complete (except for her continued failure to supplement expert opinions, arrange for her experts to be deposed and to produce documents identified long before) and the case was ready for trial in February of 2000 – over 8 years prior to the Defendants moving to dismiss for failure to prosecute. *Appellant's Brief, P. 5.*
- Lesser sanctions had previously been employed by the trial court and were not effective in prompting Ms. Shepard to prosecute her case. Despite the presence of five Motions to Dismiss for Lack of Prosecution, the presence of at least two Motions to Compel, a reserved

determination of sanctions, an Order compelling mediation and warning to proceed to trial, this matter was no closer to trial when it was dismissed in 2008 than it was when “discovery was complete” in 1998.

- Aggravating circumstances were *de facto* present due to the inordinate period of time during which this matter was not prosecuted. In addition to prejudice presumed from the mere passage of time, Prairie Anesthesia specifically identified witnesses who were no longer employees of the hospital and for whom no record can be found. Though the Plaintiff disputes this showing and calls it “unsupported”, she has not rebutted it, disproved the per se prejudice of twenty years passing since Rodney Stowers died, or shown good cause why this case was not timely pursued for the 15 years it was pending.

## ARGUMENT

Mississippi Rule of Civil Procedure 41(b) provides in relevant part that:

For the 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.

The Mississippi Supreme Court provided both the criteria necessary to support dismissal for failure to prosecute and the standard of review for such a dismissal in *Cox v. Cox*, 976 So.2d 869 (Miss. 2008). *Cox* upheld the dismissal for failure to prosecute pursuant to M.R.C.P. 41(b) under an abuse of discretion standard. *Cox*, 976 So.2d at 874. In determining when failure to prosecute justifies dismissal with prejudice, the Court reiterated the standards set forth in *AT&T v. Days Inn of Winona*, 727 So.2d 178, 180 (Miss. 1998):

- (1) Whether there was a clear record of delay or contumacious conduct by the plaintiff;
- (2) Whether lesser sanctions may have better served the interests of justice; and
- (3) The existence of other aggregating factors.

*Cox*, 976 So.2d at 875. Though not required, aggravating factors bolster the case for dismissal. *Id.* As is pertinent to this case, such factors include the degree of actual prejudice to the defendant. *Id.* at 876. In determining actual prejudice, the unavailability of witnesses who could have provided valuable testimony is of paramount concern. *Id.* at 877.

### **A. MS. SHEPARD HAS CREATED A CLEAR RECORD OF DELAY**

A clear record of delay has been created by Ms. Shepherd in this cause and was recognized and reflected in the trial court's Order Granting Defendants Motion to Dismiss for Lack of Prosecution. (R:402). In and of itself, the fact that this case was never brought to trial for fifteen years after it was filed carries all the evidence of delay and dilatoriness that need to be shown. Even a delay of one year is dilatory. *Hasty v. Namihira*, 986 So.2d 1036, ¶ 17 (Miss. App. 2008). See also

*Vobein v. Bellias*, 866 So.2d 489, 493 (Miss. App. 2004) (sufficient evidence to support finding of dilatory conduct is present when the events giving rise to suit occurred 11 years before the final Order of Dismissal); *Illinois Central v. Moore*, 994 So.2d 723 (Miss. 2008) (nine years of suit pending is sufficiently dilatory to impose sanction of dismissal).

Likewise, the sheer number of times that Ms. Shepard has had to entertain Motions to Dismiss for her failure to move forward, by definition, demonstrates a clear record of delay. Ms. Shepard did not answer discovery, resulting in Motions to Compel; was found to have violated scheduling orders, resulting in an Order Compelling (which wasn't complied with) and the reservation of an award of sanctions; had to defend a Motion to Dismiss for her failure to comply with discovery; was too busy to heed the trial court's Order demanding mediation to keep the case moving to trial forthwith; and had to defend four clerk's Motions to Dismiss for Failure to Prosecute and a Fifth Motion to Dismiss for Failure to Prosecute by the Defendants. Despite all of those measures, the lack of compliance with discovery requests identified between 2000 and 2006 still remains.

From Ms. Shepard's mid-1990's request for delay for DNA testing (despite her being a proper person to advance the suit), to her late-1990s failure to answer discovery and requests for additional delay, to her failure to advance her responses to the four Clerk's Motions to Dismiss between 2000 through 2008 – at every juncture Ms. Shepard has actively avoided progress and merely sought to prevent dismissal. Each of these delays were attributable to a busy schedule, failure to respond to discovery obligations and un-pursued, one sentence motions to avoid dismissal by the Clerk for lack of prosecution. Ms. Shepherd has delayed this matter longer than any other case in which Mississippi Appellate Courts have considered Motions to Dismiss for lack of prosecution.

**i. Ms. Shepard's "True Timeline" Omits Approximately 9 Years of Docket Inactivity.**

In an attempt to show diligence, Ms. Shepard posits a timeline of events which is asserted to be "true" and which begins in November of 2005 when the Circuit Court set the case for trial. This timeline ignores the first 14 years after Rodney Stowers' death and the first 12 years the case languished on the docket. The timeline does not address the Motions to Dismiss for failure to answer discovery, two Motions to Compel, an Order reserving the award of sanctions, explicit warnings in Orders compelling mediation and multiple Motions to Dismiss for Lack of Prosecution. It ignores the fact that those measures, caused by her delay, were the genesis for the trial court convening the November 14, 2005 hearing. The period of time between when this case was filed and when Ms. Shepard's timeline begins, all of which is ignored in her timeline, is longer than the period of delay involved in any of the Mississippi cases affirming dismissal for lack of prosecution.

The timeline does nothing to account for the numerous periods of inactivity which spanned between the various motions to dismiss:

- From June, 1998 to January 13, 2000 – nineteen months – there is no activity by the plaintiff to move the case forward or to include on a timeline.
- Between Ms. Shepard's February 11, 2000 response to the first Clerk's Motion to Dismiss and the Clerk's second Motion to Dismiss on April 11, 2001, there is no activity of record by Ms. Shepard and nothing to include on a timeline for a fourteen months.
- Between April 13, 2001 (the response to the second Motion to Dismiss) and April 7, 2004 (third Clerk's Motion to Dismiss), there is nothing for three years to include on a timeline except a pre-trial conference set by the trial court – which was cancelled due to the Plaintiff's busy schedule.
- Between that April 2004 third Motion to Dismiss for lack of prosecution and August 12, 2005, another sixteen months sailed by with no substantive effort to move the matter forward and nothing to include on a timeline.
- Between the November 14, 2005 status conference and the November 27, 2006 proposed trial date, Ms. Shepard continued to ignore the discovery requests which were outstanding

and which resulted in Prairie Anesthesia's Motion to Compel, *ergo*, nothing to include on a timeline.

- Between the continued November 2006 trial date and the March 28, 2008 fourth Clerk's Motion to Dismiss, another sixteen months with no activity of record is unaccounted for by any timeline.

The fact is, a "true" timeline would reflect twelve years which passed prior to a trial setting. It would further illustrate a cumulative nine-plus (9 +) years of inactivity identified in the bullet points above – **all of which occurred after the DNA related stay was lifted and any "procedural complexities" had resolved.** Since June of 1998, the Plaintiff has still not taken any substantive action other than seeking to prevent dismissal and has not addressed any of the previously identified discovery matters which the Defendant has been attempting to resolve for a decade.

The lack of merit of the Plaintiff's argument is demonstrated in pages 3 through 4 of her brief. In proving that she answered discovery propounded by each defendant, Ms. Shepard shows those responses were served in 1997 and 1998. She shows that experts were designated in 1998. Ms. Shepard concedes that depositions of the Defendants were taken 1998 and Defendants' experts were designated in 1998. With surprising candor, Ms. Shepard acknowledges that discovery was completed in 1998 and that the case was ready to be tried when the first Clerk's Motion to Dismiss was filed in January of 2000. *Appellant's Brief*, page 5. By her own admissions, this case could have, and should have, been tried back when the first Clerk's Motion to Dismiss was filed – over 8 years prior to the case being dismissed for lack of prosecution.

**ii. Ms. Shepard's Un-pursued Motions Are the Clearest Evidence of Delay**

Though Ms. Shepard's position is not entirely correct as she had not disclosed some expert opinions, arranged for her experts to be deposed and produced documents she had identified, had Ms. Shepard credibly pursued a trial setting, those things would have been accomplished or dealt

with by the trial court. Pursuit or prosecution of this matter would have entailed bringing the various Motions filed in response to Clerk's Motions to Dismiss to the attention of the Court and responding to the requests of other parties to engage in discovery. In truth, the handling of Ms. Shepard's *pro forma* Motions for Status Conference or Trial Setting demonstrates that her alleged efforts to secure a trial setting are actually the best evidence of her failure to prosecute.

The glaring omission in Ms. Shepard's rendition of the history of this case is the lack of any credible excuse why she did not advance her obligatory Motions for Trial Setting during the 8 years after which she contends discovery was complete and the case was ready for trial. The true purpose of those sequential Motions is illuminated by two facts: (1) they always followed a Motion to Dismiss for Lack of Prosecution, and (2) they were never advanced to hearing. Ms. Shepard never circulated proposed dates to have the matters heard. None of the Motions was noticed. Ms. Shepard never did anything other than attempt to foreclose dismissal for the lack of prosecution by taking the minimal step of filing a one sentence motion. In light of those facts, the Motions' purpose of merely delaying this matter and simultaneously avoiding trial and dismissal is clear.

Specifically, the trial court noted that the Plaintiff filed several motions in response to the Clerk's Motions to Dismiss. However, as the trial court also noted, filing of a motion without pursuit of that motion was not sufficient to prevent dismissal for lack of prosecution over the vast length of time that had expired. (R: 463; RE: tab 15). As is made clear by Mississippi law, simply filing motions for trial setting without advancing them does not demonstrate a sufficient effort to prosecute to avoid dismissal. See *Illinois Central Railroad Company v. Martha Moore*, 994 So.2d 723, 726-27 (Miss. 2008). In *Moore*, this Court found that permitting a party to perfunctorily respond to Clerk's Motions to Dismiss for nearly 7 years, **without any showing of good cause therefor**, mandated dismissal of the action for want of prosecution. *Id.*



**iii. Contumacious Conduct is Irrelevant**

There is no requirement that a Plaintiff act in an egregious or contumacious manner as long as there is a clear record of delay or dilatory conduct. See *Cox v. Cox*, 976 So.2d 869 (Miss. 2008); *Hasty v. Namahira*, 986 S.2d 1036, 1040 (Miss.App. 2008). Where that delay or dilatory conduct has been demonstrated, contumacious conduct is not necessary to support dismissal. *Hine v. Anchor Lake Property Owners*, 911 S.2d 1001, 1005 (Miss.App. 2005). Posturing the issues for appeal to be contingent upon a finding of contumacious conduct is Ms. Shepard's red herring, unsupported by any caselaw. Delay and dilatoriness are present without question in this case and mandated dismissal.

**iv. A Single Trial Setting Cannot Establish Diligence in the Face of over 15 Years of Delay**

Despite Ms. Shepard's unadvanced motions for trial settings and status conferences, Judge Howard convened a hearing on November 14, 2005 to set the matter for trial. Ms. Shepard contends that she was not dilatory and that a trial setting on November 27, 2006 somehow proves the same. The fact that there was a trial setting completely misses the point that the trial setting was over 13 years after the suit had been filed. *Cox* makes clear that a plaintiff's attempt to move a case forward after a lengthy, undue and prejudicial delay is not sufficient to prevent dismissal. *Id.* at 879-80.

Nonetheless, based on this trial setting, Ms. Shepard attempts to shift the burden of prosecution of her case to the Defendants in several respects. First, she makes much ado about Defendants not responding in opposition to the Motion for Trial Setting. What Ms. Shepard fails to acknowledge is that Defendants did not object to a trial setting. In fact, Defendants had been seeking advancement of the case since 1995 by opposing Plaintiff's request for a stay and arguing that Defendants were being prejudiced by unnecessary delay.

Ms. Shepard next argues that Defendants failed to object to a trial setting on the basis that the case was too old to go to trial or that any defendant suffered prejudice as the result of a passage of time. As no motion to dismiss for failure to prosecute was before the Court at that time, argument in that regard would not have been appropriate. Further, as shown in *Section B* of this brief, the scope of prejudice suffered by the Defendants was not evident until preparation for trial would begin.

**v. Prairie Anesthesia Never Requested or Was Granted a Continuance**

Ms. Shepard's next argument is the attempt to characterize continuance of the 2006 trial setting as the grant of professional courtesy by the Plaintiff to counsel for Prairie Anesthesia based on an "alleged" conflict. Ms. Shepard characterizes this continuance as being had at the request of Defendant Prairie Anesthesia. However, there was no "alleged" conflict or professional courtesy involved. There was an actual conflict that involved not only counsel for Prairie Anesthesia, but Judge Lee Howard and the Circuit Court of Lowndes County as well.

The continuance was a result of a self executing provision of the trial court's Order setting this matter for trial on November 27, 2006. At the time that the instant case was set for trial, it was a backup setting. Lowndes County Circuit Court case Roebuck v. Gillespie was a peremptory setting for a case to be tried by Prairie Anesthesia's counsel in front of Judge Howard. Recognizing the conflict of the two settings, the trial court provided that, if Roebuck v. Gillespie did not resolve by a date certain, the instant matter would not be tried on November 27, 2006. According to the trial court's instructions, counsel for Prairie Anesthesia advised the Court and the other parties that the Roebuck v. Gillespie case was proceeding to trial by the date on which Judge Howard specified. (R:396). Pursuant to the terms of the proposed order setting trial and the Court's verbal order, this continuance was automatic and self executing. (R:508).

The fact that, after twelve years and a third Motion to Dismiss for lack of Prosecution, Ms. Shepard secured a back-up trial setting that was automatically continued cannot be attributed to Prairie Anesthesia in mitigation of Ms. Shepard's dilatory conduct. Nor does the fact that this matter was continued from that trial setting relieve Ms. Shepard from the burden to prosecute her case.

Ms. Shepard's final contention – that she did not receive a response from Dr. Linton's counsel and was unable to reset this matter for trial – does not justify her failure to prosecute this matter for over 17 years after the death of Rodney Stowers, 15 years after the case was filed, and 11 years after all of the "procedural complexities" concerning DNA testing were resolved. Forwarding a proposed trial date to counsel opposite and remaining stagnant for two years because she did not receive a response from one of the three parties<sup>2</sup> does not equate to diligent pursuit of a trial setting. This is true whether you consider the matter to have been pending on the trial court docket for 15 years, consider the matter to have been pending for 11 years since the stay of this matter was lifted in 1997, or consider the eight years the matter sat after the date when Ms. Shepard contends the case was ready for trial (2000). In whatever light, it is objectively apparent that there has never been any real effort by Ms. Shepard to have this matter proceed to trial. Her delay is the sole reason why the trial court dismissed her claims.

**B. LESSER SANCTIONS HAVE BEEN CONSIDERED, WERE APPLIED, WERE INEFFECTIVE, AND DISMISSAL IS THE ONLY REMEDY WHICH SERVES THE INTERESTS OF JUSTICE**

Sanctions lesser than dismissal are not required to be utilized prior to a MISSISSIPPI RULES OF CIVIL PROCEDURE 41(b) dismissal. All that is required is an indication that the trial court

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<sup>2</sup> Counsel for Dr. Linton has advised that he did not receive the 2007 correspondence circulating a possible trial date.

considered lesser sanctions before dismissing a case. *Cox*, 976 So.2d at 876. While *Cox* determined that the Court must consider whether lesser sanctions would better serve the interests of justice, the *Cox* court found that where lesser sanctions were argued before the Court, the Court considered all arguments prior to dismissing, and where a motion for reconsideration was denied were all sufficient to show that lesser sanctions were considered and rejected. *Id.* See also *Hine v. Anchor Lake Property Owners, Assn.*, 911 So.2d 1001, 1005(Miss. App. 2005).

The trial court in this case went beyond the consideration detailed in *Cox*. In the instant case, as noted by the trial court, the four Clerk's Motions to Dismiss for Lack of Prosecution in 2000, 2001, 2004 and 2008 were all considered explicit warnings which constitute lesser sanctions. (R. 404). Accordingly, Judge Howard properly determined that lesser sanctions had already been applied, were ineffective and did not serve the interest of justice or were effective.

Lesser sanctions abounded prior to Judge Howard dismissing this case. Plaintiff has been notified 4 different times of potential dismissal. See *Hasty v. Namihira*, 986 So.2d 1036, ¶ 18. (Miss. App. 2008). Contrary to Ms. Shepard's assertion, a Clerk's Motion to Dismiss for Lack of Prosecution is an explicit warning and is the implementation of a lesser sanction. *Jenkins v. Tucker*, 18 So.3d 265, 271 (Miss.App. 2009). Monetary sanctions based on Ms. Shepard's delay had been considered, and the determination of whether to award them took place 10 years prior to dismissal. Building on the numerous Clerk's Motions to Dismiss, the trial court ordered mediation in order to keep the matter moving to trial forthwith.

Based on Ms. Howard's lack of any effort to pursue her Motions for Trial setting, the trial court properly determined that the threat of dismissal was of no moment to Ms. Shepard and did not serve the interests of justice. Having thrice warned Ms. Shepard of the peril of dismissal due to her delay and those warnings going unheeded, the trial court finally implemented the threatened

sanction. Doing so was consistent with the trial court's inherent ability to police its docket and to promote the ends of justice.

A bellwether concern that is dispositive in this case is that lesser sanctions cannot remedy the prejudice which has accrued to the Defendants. *Jenkins v. Tucker*, 18 So.3d 265, 271 (Miss.App. 2009). No amount of money, no amount of chastising, and no other measure can restore the recollections of the witnesses who can actually be located. At no instance of Prairie Anesthesia, it has been deprived of the ability to present the full version of the facts to a jury. That reason alone justifies affirming dismissal for Ms. Shepard's failure to prosecute.

Over a period of 8 years after the case was admittedly ready for trial, Ms. Shepard has repeatedly been the subject of lesser sanctions and has not been prompted to move the matter towards conclusion. As lesser sanctions have already been applied and were not effective, and as more than fair warning was given to Ms. Shepard, the trial court's order was a proper exercise of discretion and should be affirmed.

**C. THOUGH NOT REQUIRED FOR DISMISSAL, DEFENDANTS HAVE BEEN PREJUDICED, THEREBY AGGRAVATING MS. SHEPARD'S INORDINATE DELAY**

Aggravating circumstances are not required for the Court to properly exercise its discretion in dismissing a case for lack of prosecution. *Hasty*, 986 So.2d at 1040. Aggravating factors merely bolster the reasoning for dismissal. *Id.* In that respect, Mississippi law presumes prejudice to a party and the presence of aggravating circumstances based solely on the expiration of time. *Id.*

**i. Prairie Anesthesia Has Claimed Prejudice for 14 Years and Has Demonstrated the Same**

Ms. Shepard's argument that no one had raised the issue of prejudice at the time the case was set for trial is incorrect. As shown by the record, Prairie Anesthesia requested that the trial court

deny a stay of this matter as Ms. Shepard was a proper party to pursue it. Prairie Anesthesia based its argument on time related prejudice. Since August of 1996, it has been Prairie Anesthesia's position that it "continues to be prejudiced by the plaintiff(s) lack of cooperation in preparing this matter for trial, and will be severely prejudiced" by any further delay. (R: 167). As a harbinger of things to come, that exact prediction came to pass. It was only with rudimentary trial preparations that the scope of witnesses who were no longer available or who no longer had memory of the facts became apparent. That came after the matter was set for trial and is why Prairie Anesthesia echoed the Clerk's fourth Motion to Dismiss by filing a motion of its own.

As detailed in Prairie Anesthesia's Motion to Dismiss for Lack of Prosecution, efforts were made to contact witnesses by searching for them through the hospital who employed them at the time of Rodney Stowers' death. Counsel for Golden Triangle Medical Center investigated and learned that 11 of the nurses who cared for Rodney Stowers no longer worked at the hospital. Based on the passage of over a decade, the hospital had no record whatsoever on six of those nurses. At this late date, even the identity of some of the nurses whose writing documents treatment in the chart was not able to be determined.

The unavailability of witnesses in this case serves to materially prejudice Defendant Prairie Anesthesia. Were the whereabouts of these witnesses known, there is still no doubt that the expiration of time has obliterated the memories of the witnesses. Defendants have been objectively prejudiced by the dissipation of witnesses that can no longer be called to testify as to the facts of this case due to their unavailability. Even where medical personnel could testify from medical records and notes, the prejudice factor weighing in behalf of a physician defendant who is not responsible for the delay, though not necessary to support dismissal, plainly bolsters the propriety of dismissal.

*Hasty v. Namihira*, 986 So.2d 1036, ¶ 17 (Miss. App. 2008).

Even considering the latter date of 1997, when the stay was lifted, the trial court noted the Defendants' arguments with regards to prejudice of witnesses losing their memories and the span of over 10 years which had elapsed by the time the case was dismissed. Based upon this, the Court properly made an explicit finding that the Defendants had been prejudiced, thereby establishing that aggravating factors supporting dismissal were present. (R. 404-05). This prejudice is consistent with the de facto prejudice recognized by the Mississippi Supreme Court in past cases and justifies dismissal of Ms. Shepard's claims.

**ii. The Presence of Medical Records Cannot Remedy Prejudice**

Ms. Shepard's assertion that this case involves solely medical records is not credible in light of her own recitation of the statement of the case. She recounts vital areas of factual inquiry surrounding the football game in which Rodney Stowers was injured, his activities after his injury, his participation in post game activities, and his return to Starkville. Those witnesses are as scattered to the four corners of the Earth and will have compromised, if any, memory of facts vital to the defense.

Further, the assertion that a medical record memorializing medical treatment prevents prejudice to Defendants is suspect at best and false in reality. While medical records may memorialize certain vital signs and steps taken, the observations, impressions and actions of medical personnel treating Rodney Stowers far exceed the notations in medical records.

Ms. Shepard's attempt to constrain Prairie Anesthesia's defense solely to the literal content of medical records should no more be tolerated on appeal than would an attempt to constrain witnesses' testimony solely to written medical records were that attempted at trial. This position overlooks the obvious truth present in all cases: every observation, activity or recollection of medical providers is not contained in medical records. A myriad of details exists in the knowledge

and memory of witnesses – for a time. In this case, Ms. Shepard has delayed beyond that time and compromised Prairie Anesthesia’s ability to defend itself. Unless the trial court’s discretion is affirmed, she will gain a substantive advantage by procedural delay. As that would contravene the letter and spirit of the Mississippi rules of court, Judge Howard’s Orders dismissing this case should be affirmed.

**D. THIS IS THE MOST EGREGIOUS CASE TO BE CONSIDERED BY THIS COURT**

Though caselaw provides that dismissal for the failure to prosecute is reserved for the most egregious cases, this case is **the most** egregious. When compared with both the cases sustaining dismissal for failure to prosecute and those reversing dismissal, the time period of delay, the ineffectiveness of lesser sanctions and resulting prejudice to Prairie Anesthesia involved in the instant case eclipse the same factors from any case considered by Mississippi Appellate Courts. This case:

- Arose 19 years ago
- Was filed 17 years ago
- Was freed from any DNA procedural complexities 14 years ago
- Has been ready for trial over 12 years
- Last saw any activity from the plaintiff to participate in discovery 12 years ago
- Involves Orders compelling the Plaintiff to act and Orders explicitly warning the plaintiff to “proceed to trial forthwith”
- Involves **four** Clerk’s Motions to Dismiss for Lack of Prosecution that went unheeded

**i. This Case Lies Beyond the Parameters Already Determined by Mississippi Caselaw to Mandate Dismissal**

The facts of the instant case demonstrate a much longer period of time having passed than cases where Mississippi Appellate Courts have considered the passage of time as prejudicial or



aggravating and justifying dismissal. See *Hasty*, 986 So.2d at 1041 (3 years); *Illinois Central*, 994 So.2d at 7 (9 years); *Cox v. Cox* 976 So.2d 869 (Miss. 2008) (13 years). The passage of 19 years since the events giving rise to suit carries a presumption of prejudice and demonstrates, alone, why this Court should affirm the trial court's dismissal of this suit.

**a. *Cox v. Cox***

This case most mirrors *Cox v. Cox*, 976 So.2d 869 (Miss. 2008). In *Cox*, suit was filed on November 5, 1992. Activity on the case ceased in 1996 and no activity occurred until October of 2005 when a motion to dismiss for failure to prosecute was served. The case was not dismissed and proceeded through trial. At the conclusion of the Plaintiff's case in chief, the motion to dismiss for failure to prosecute was renewed and granted based on the extensive delay which prejudiced the defendant due to the unavailability of witnesses. *Cox*, 976 So.2d at 873. Even in the face of a plaintiff taking action which prompts the defendant to file the motion to dismiss, the Supreme Court found that it was an appropriate exercise of the Court's discretion to dismiss the case for failure to prosecute. *Id.* at 879. In so finding, the Court found that the defendant was entitled to a presumption of prejudice based solely by the expiration of time.

*Cox* involved a 14 year delay between filing and dismissal; this case involves a 15 year delay. *Cox* also established that lesser sanctions would not suffice where they could not cure the prejudice caused to a defendant by the delay. As noted by the *Cox* decision, prejudice may be presumed from unreasonable delay. *Cox*, 976 So.2 at 879. In the instant case, the Circuit Court explicitly found that the defendants had been prejudiced by the passage of nineteen years and the inherent attrition of witnesses and memories. Any lesser sanction than the dismissal entered by the Circuit Court could not have cured that prejudice. As in *Cox v. Cox*, lesser sanctions have been considered – even when

imposed, they were ineffective. Finally, as in *Cox*, a plaintiff's attempt to move a case forward after a lengthy, undue and prejudicial delay is not sufficient to prevent dismissal. *Id.* at 879-80.

**b. *Hasty v. Namihira***

*Hasty v. Namihira*, 986 So.2d 1036 (Miss. App. 2008) was docketed on March 8, 2001, involved a single clerk's Motion to Dismiss for Lack of Prosecution on July 1, 2003, and was the subject of an August 18, 2004, Motion to Dismiss for Failure to Prosecute filed by the defendant. *Hasty*, 986 So.2d at 1038. The Trial Court did not receive any response from the Plaintiff within the ten days provided therefor. *Id.* Accordingly, the case was dismissed for failure to prosecute. *Id.*

The facts of the instant case are much more compelling than those in *Hasty*. As opposed to a three year period during which there was no prosecution, the instant case spans over seventeen years and 8 years **after a Clerk's Motion to Dismiss for Want of Prosecution was filed**. Instead of one Clerk's Motion before the Defendant moved to dismiss, four Motions to Dismiss were filed by the Clerk in this matter. Like *Hasty*, no response was received to the Motion to Dismiss from Ms. Shepard within 10 days or at any time prior to the afternoon before the hearing. As in *Hasty*, dismissal is proper.

**c. *Barry v. Reeves***

The latest case issued by the Mississippi Supreme Court on failure to prosecute also illustrates the reasons Judge Howard's dismissal should be affirmed. *Barry v. Reeves*, 2009-CA-01124-SCT (Miss. 2010), in reversing a dismissal for failure to prosecute, affirms prior precedent on the issue and identifies the factors – which are conspicuously absent in the present case – that would prevent dismissal.

*Barry* involved a case that was docketed for 8 years, with an interim 14 month stay. *Barry*, 2009-CA-01124-SCT at ¶ 3-6. Despite the stay of this matter for less than three years, it was on the

trial court's docket twice as long as *Barry*. Further, this case has been ready for trial according to Ms. Shepard for longer than the *Barry* case was active on the docket.

*Barry* involved delay that was attributable to the trial court and not to the Plaintiff. *Id.* at ¶ 11. Most notable, the Plaintiff in *Barry* actually pursued her motion for a trial date, utilizing the accepted procedure specified by M.R.A.P 15 to seek a writ of mandamus directing the trial court to rule. *Id.* at ¶ 15 As shown above, the Motions for Trial Setting filed by Ms. Shepard created delay rather than resolved it. At every instance, the delay of this case was occasioned by Ms. Shepard. Repeatedly, Ms. Shepard ignored deadlines, failed to answer discovery, failed to respond to clerk's motions in timely fashion, ignored requests for discovery, ignored requests for depositions and did not pursue perfunctory requests for trial settings.

*Barry* involved a stay which was attributable to the Defendant which was lifted after request of the Plaintiff. The stay was entered in this case, despite the fact that Ms. Shepard could proceed in her representative capacity, overruling Prairie Anesthesia's objection based on the prejudice that would accrue from the delay. Unlike *Barry*, the stay was only lifted at the request of Defendant Prairie Anesthesia.

Finally, the trial court in *Barry* did not consider or employ lesser sanctions. *Id.* at ¶ 18 The Order compelling discovery, consideration of monetary sanctions, Order compelling mediation and the serial Clerk's Motions to Dismiss are at the opposite end of the spectrum, delineating the extensive, yet unsuccessful, attempts to ignite Ms. Shepard to fulfill her burden to prosecute.

The criteria for dismissal due to a lack of prosecution, unsatisfied by the facts in *Barry*, are all abundantly supported by the facts of this case. That support renders the trial court's exercise of discretion proper on the facts of this case. It provides that this Court should affirm dismissal.

**ii. Cases Cited by Ms. Shepard Are Not Factually Applicable**

The cases relied on by the Plaintiff are patently distinguishable on the facts. *Lone Star Casino Corp. v. Full House Resorts, Inc.*, 796 So.2d 1031 (Miss. App. 2001) involved 20 months of delay during which the plaintiff could not retain counsel. The witnesses involved in that case – unlike the people around Rodney Stowers during the football game and the nurses who treated him almost 20 years ago – had been deposed while their recollections were still in tact. Further, lesser sanctions were not considered. These facts are at the opposite end of the spectrum from the six different periods of inactivity that occurred after Ms. Shepard admits the case was ready to be tried and each of which is longer than a year.

*Camacho v. Chandeleur Homes, Inc.*, 862 So.2d 540 (Miss. App. 2003) involved delay of 5 months, again while the plaintiff sought to retain new counsel. Prejudice was not argued by the defendants and no such finding was made. Again, lesser sanctions were not considered. These facts are the polar opposite of the 17 years of delay, lesser sanctions which failed and prejudice involved in Ms. Shepard's failure to prosecute.

*AT & T v. Days Inn of Winona*, 727 2d 178 (Miss. 1998) involved the passage of three terms of court between a complaint filed in 1994 and a motion to dismiss filed in 1996. *Id.* at 179. There was no indication that sanctions lesser than dismissal had been considered. *Id.* at 182. Delay for the three terms of court was insufficient to show that the plaintiff was contumacious or dilatory, as the activities of the defendants were partly responsible for the passage of those terms. *Id.* Further there was no prejudice and no other aggravating factor present in *AT & T*. *Id.* The instant case involves over seven times lengthier delay, all at the instance of Ms. Shepard. It involves lesser sanctions gone unheeded. It involves aggravating prejudice incapable of remedy.

*Hoffman v. Parcelus Heathcare Corp*, 752 So.2d 1030 (Miss. 1999) involved a motion to dismiss for lack of prosecution filed six years after suit was filed, one year of which was consumed

by a bankruptcy stay. There was no indication that lesser sanctions were considered and dismissal was indicated only for the most egregious cases. *Hoffman*, 752 So.2 at 1035. Unlike *Hoffman* and all the other cases Ms. Shepard cites, the facts of Ms. Shepard's case make it **the most egregious case** which has made it before this Court.

**E. MOTION TO STRIKE PORTIONS OF THE RECORD NOT AVAILABLE FOR CONSIDERATION BY THE TRIAL COURT**

In the trial court, Prairie Anesthesia opposed Ms. Shepard's efforts to include matters which were not filed with the trial court or presented to the trial court at the time that Judge Howard granted Prairie Anesthesia's Motion to Dismiss for Failure to Prosecute. On appeal, Prairie Anesthesia joined in Dr. Linton's Motion to Strike those materials from the record. Rather than restating the same arguments, Prairie Anesthesia adopts and incorporates herein the arguments in the briefs of Dr. Russell Linton and Golden Triangle Medical Center seeking to strike pages 686 through 779 from the record. Prairie Anesthesia further requests the Court to disregard any argument premised on citations to pages 686 through 779 of the record.

**CONCLUSION**

Though it had employed lesser sanctions spanning from 1998's Order Granting Motions to Compel and reserving the right to sanctions, to compelling mediation, to four separate Clerk's Motions to Dismiss over a period of eight years, the Circuit Court of Lowndes County's warnings were unheeded. Since June of 1998, Ms. Shepard has not taken any substantive action in this matter other than filing perfunctory motions which have had the effect of delaying resolution of this case beyond the point at which Defendants have been *per se* prejudiced. As a result, the trial court took the only step that could both restore order to its docket, serve the interests of justice and address the prejudice caused Prairie Anesthesia by Ms. Shepard's dilatoriness. As the end result of enforcing

its multiple warnings over a decade, the trial court properly dismissed this case for the failure to prosecute.

Ms. Shepard had failed to make any showing to this Court to justify the clear record of delay, to explain why lesser sanctions were warranted when they have been ineffective in the past, or to rebut the known and real prejudice caused to Prairie Anesthesia by the nineteen years that have passed since Rodney Stowers' death. Ms. Shepard has demonstrated no credible effort to advance the cause to trial during that time. Her clear record of prejudicial delay not only bolsters the case for dismissal, but demands it.

The trial court's orders dismissing this case announce the proper standards for determination of whether the case should be dismissed for failure to prosecute. Judge Howard addressed each criteria and considered all factors which have been announced by Mississippi Appellate decisions as being pertinent to Prairie Anesthesia's Motion To Dismiss for the Lack of Prosecution. Based upon the expiration of an inordinate amount of time noted by the trial court, the lack of any effect by prior lesser sanctions considered and employed, and the prejudice suffered due to unavailability of witnesses and the dissipation of memories, Prairie Anesthesia submits that this Court should affirm dismissal of Ms. Shepard's case with prejudice for the failure to prosecute as an appropriate exercise of the Circuit Court of Lowndes County's discretion to control its docket.

RESPECTFULLY SUBMITTED this the 9<sup>th</sup> day of November, 2010.

UPSHAW, WILLIAMS, BIGGERS,  
& BECKHAM

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**CERTIFICATE OF SERVICE**

I, J. L. Wilson, IV, hereby certify that I have this day mailed with postage prepaid, a true and correct copy of the above and foregoing document into:

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SO CERTIFIED this the 9<sup>th</sup> day of November, 2010.

  
\_\_\_\_\_  
J. L. WILSON, IV