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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-TS-01267

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

VERSUS

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

APPEAL FROM THE CIRCUIT COURT OF
LOWNDES COUNTY, MISSISSIPPI
SIXTEENTH JUDICIAL DISTRICT

BRIEF OF APPELLEE, RUSSELL LINTON, M.D.

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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 Judges of the Court of Appeals may evaluate possible disqualification:

1. Delia Shepard, Plaintiff/Appellant;
2. Robert G. Germany, Esq., counsel for Plaintiff/Appellant;
3. Pittman, Germany, Roberts & Welsh, LLP, counsel for Plaintiff/Appellant;
4. Prairie Anesthesia Associates, Defendant/Appellee;
5. James Lawrence Wilson, IV, Esq., counsel for Prairie Anesthesia Associates;
6. Tommie G. Williams, Esq., counsel for Prairie Anesthesia Associates;
7. Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Prairie Anesthesia Associates;
8. Russell Linton, M.D., Defendant/Appellee;
9. Jeffrey Johnson Turnage, Esq., counsel for Russell Linton, M.D.;
10. Mitchell, McNutt & Sams, P.A., counsel for Russell Linton, M.D.;
11. Golden Triangle Regional Medical Center, Defendant/Appellee;

12. M. Jay Nichols, Esq., counsel for Golden Triangle Regional Medical Center;

13. Aubrey E. Nichols, Esq., counsel for Golden Triangle Regional Medical Center; and

14. Nichols, Crowell, Gillis, Cooper & Amos, counsel for Golden Triangle Regional Medical Center.

THIS the 7th day of October, 2010.

JEFFREY J. TURNAGE, ESQ.

STATEMENT REGARDING ORAL ARGUMENT

The judgment below should be affirmed on the basis of the Circuit Court's opinion without requiring oral argument. The Circuit Court properly found that the plaintiff was clearly guilty of delay. It also properly found that no lesser sanction was appropriate and that the factors to consider in such cases were met. The Court was manifestly correct and its judgment is patently clear from the record without hearing argument from the parties.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF THE ISSUE:

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

- Eighteen years, ten months, and 13 days passed following the original alleged tort until the case was dismissed for failure to prosecute;
- Four clerk's motions to dismiss were filed;
- The Plaintiff, on multiple occasions failed to comply with Court ordered deadlines.

STATEMENT OF THE CASE

A. INTRODUCTION

The medical care that is the subject of this case was provided during the same year the Soviet Union collapsed and splintered into fifteen sovereign republics. The United States invaded Iraq in the first Gulf War. George Herbert Walker Bush, successor in office to Ronald Reagan, was president. The year was 1991[1]. Almost exactly two years after the medical care was rendered, when the Plaintiff filed suit in October of 1993, President Bush had lost his bid for reelection to William Jefferson Clinton. Fast-forward from that date seventeen years, and the Appellee, Russell Linton, M.D. is submitting his brief of the Appellee, herein.

B. COURSE OF THE PROCEEDINGS BELOW

Delia Shepard, the appellant herein, filed this suit on October 1, 1993, naming Prairie Anesthesia Associates (Prairie), Russell M. Linton, M.D. (Linton), Golden Triangle Regional Medical Center (GTRMC), Eddie Johnson d/b/a Holifield Funeral Home, and John Does 1-5. (R. 14-17)[2]. Suit was filed, just barely shy of the limitations period for filing medical suits, as the

[1] The undersigned counsel was in his second year of law school at the University of Mississippi in 1991. he has now been a lawyer for 18 years.

[2] Citations to the Record on Appeal shall be cited to herein as R. Citations to the Record Excerpts shall be cited to as R.E.

decedent passed away on October 3, 1991. (R. 16). In spite of the obvious venue being in Lowndes County, the Plaintiff filed this suit in Scott County and named the medical provider defendants in this case, as well as the funeral home handling the burial, presumably under the theory that the claims against the funeral home arose out of the same transaction or occurrence as the medical treatment. (R. 14-17). Because all medical care, witnesses, and parties were in Lowndes County, Mississippi, and the allegations against the funeral involved a different transaction or occurrence, the medical defendants moved to sever the medical case from the funeral home case and to transfer it to Lowndes County. After all the briefing was complete and a hearing, the Circuit Court of Scott County entered it's Opinion in April, 1994 and the medical case was transferred to the right venue, Lowndes County. (R. 10) (R. 143-144).

When the case arrived in Lowndes County, Mississippi from Scott County in May of 1994 there was already pending in Circuit Court, a case for the same alleged event. That case, styled Kierra Brachell Jones by and through her mother, versus Prairie Anesthesia Associates, Russell Linton, M.D., Golden Triangle Regional Medical Center[3], and John Does 1-5 had been earlier filed by different counsel from the appellant, claiming that Kierra Brachell Jones was an illegitimate daughter of the decedent, Rodney Stowers. (R. 36-44). Understandably, the Defendants in this case filed motions to dismiss or for summary judgment for the reason that there can be but one action for alleged wrongful death and the alleged illegitimate daughter, Kierra Brachell Jones was the first to file suit and therefore the first in right to prosecute the case. (R. 24-114).

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[3] In 1993 the Board of Supervisors of Lowndes County and the Board of Trustees of the Golden Triangle Regional Medical Center entered into a Lease Agreement with Baptist Memorial Hospital Golden Triangle and took over operation of the hospital and GTRMC has long since ceased operations.

Thereafter, both Kierra Brachell Jones and the appellant herein, through counsel, asked the Court to stay both of the cases while they litigated to a resolution on the issue of whether the decedent was, or was not, the father of Kierra Brachell Jones. (R. 115-142). On November 4, 1994 the Court in Lowndes County entered a stay of the case until "further notice of the Court." (R. 147). In August of 1995 the case was assigned to John M. Montgomery due to his having a number of required recusals. (R. 154-155). Shortly thereafter, on August 25, 1995 (15 years ago) Lee J. Howard reassumed responsibility "*in the interest of a speedy resolution*" of the case. (R. 156-160). In 1996, after it was ordered by the Supreme Court that further paternity testing be done, it was finally determined that Kierra Brachell Jones was not the decedent's child.

On August 15, 1996 (five years after the alleged malpractice and fourteen years ago), Prairie moved that the stay be lifted and for the first time argued that the Plaintiffs' delays had prejudiced the defendants' case. (R. 161-170)[4]. In its motion, Prairie, through counsel, stated "Only two factual depositions have been taken yet with regard to this litigation. ... Nevertheless, Delia Shepherd and Kierra Jones want to stay the sole remaining action that is presently pending, in the face of the Defendants' numerous attempts to move this matter towards trial." *(Id.)* In February of 1997, it having been determined for several months that Kierra Jones was not the decedent's child, Dr. Linton, through counsel asked that the stay be lifted, that a scheduling order be entered and that the matter be litigated. (R. 172-189). The other defendants filed similar motions. (R. 191-198). Then in July of 1997, thirteen years ago, the stay was lifted and a scheduling order was entered. (R. 199-200). Shortly thereafter, in August of 1997 the Defendants answered the Complaint and the discovery process began. (R. 201-219).

[4] Although Prairie's 1996 motion was the first time Prairie had alleged prejudice, it was not the first time that Prairie had been to the Court pleading for assistance in getting the Plaintiff to participate in discovery. On March 7, 1995, Prairie moved for an order compelling discovery or for Summary Judgment as a result of the Plaintiff's failure to provide expert interrogatory answers or otherwise participate in setting the Plaintiff's expert's deposition. (R. 149-152).

In December of 1997, Dr. Linton, through counsel, filed a motion for an order dismissing the case or in the alternative, to compel the plaintiff to answer his Discovery which has been outstanding since September 10, 1997, and further, that the Plaintiff had not designated her expert witnesses within the time required by the Court's scheduling order and filed no motion to enlarge the time for doing so, and in the further alternative, for sanctions for these failures. (R.E. Tab 1) (R. 220-249). The Court then ordered a hearing on Dr. Linton's motion, to be heard on January 6, 1998. (R. 254). On the day of the hearing, at the request of the Plaintiff, the hearing was then postponed to the following month, to be heard February 9, 1998. (R. 269). The Plaintiff then filed a short response to the motion stating that he'd been too busy to work on discovery for the prior six months and asked for an enlargement of time to disclose experts and also said he should not have to answer expert interrogatories until he did some more depositions. (R.E. Tab 2) (R. 271-274).

Dr. Linton filed a rebuttal and therein argued that the Plaintiff should have to disclose the theory of liability before being allowed to depose him and that the plaintiff's interrogatory answers were incomplete and non-responsive and that this case had been pending since 1993, over four years at that point, and under Rule 11, she should have already done sufficient analysis of his case to know the basis of her claims. (R. 275-312).

Following the February 9, 1998 hearing, the Court did not dismiss the case, but entered an amended scheduling order, on February 23, 1998, authorizing the Plaintiff more time to designate experts and cutting off discovery in September of 1998. (R. 314-315). The Circuit Court did not end there. Noteworthy is the fact that the Court also entered an order compelling Plaintiff to respond to the Defendants' discovery, and to respond substantively to the expert

interrogatories, before Dr. Linton or other defendants had to submit to depositions. In this Order, the Court reserved the issue of sanctions for a later date. (R.E. Tab 3) (R. 316-318).

No filings were made from that date (February 23, 1998) until January 13, 2000, when the Circuit Clerk filed a **clerk's motion to dismiss** for failure to prosecute, there having been no activity in the 12 months prior to the clerk's motion. (R.E. Tab 4) (R. 319-320). Counsel for Plaintiff, nearly 30 days later, on February 11, 2000 filed a motion for a trial setting, but took no action to have the matter taken up by the Court. (R. 321). Then on April 11, 2001 the Circuit Clerk filed another **clerk's motion to dismiss** for failure to prosecute. (R.E. Tab 5) (R. 323-324). The next day, Counsel for Plaintiff filed a motion for status conference and for a trial setting, but took no action to have the matter taken up by the Court. (R. 325). The lead counsel for Dr. Linton, having relocated his practice, withdrew as counsel for Dr. Linton in April of 2001. (R. 327). In September of 2001, the parties then executed an agreed order for a pretrial conference to be held on November 19, 2001. (R. 329).

On November 14, 2001 counsel for Plaintiff wrote to the Court stating he was too busy to complete his portion of the pretrial order in time for the pretrial conference and asked to cancel the pretrial conference. (R.E. Tab 6) (R. 337). On April 7, 2004, the Circuit Clerk filed a third **clerk's motion to dismiss** for failure to prosecute. (R.E. Tab 7) (R. 338-339). On April 14, 2004, counsel for Plaintiff filed a motion for a status conference but took no action to have the matter heard. (R. 340). On May 18, 2004, the Court *sua sponte* ordered that mediation be scheduled within 20 days of the court's order and completed within 90 days from the Order and that if the parties failed to comply with its order, it would enter such order as it determined was necessary. (R.E. Tab 8) (R. 342-343). On August 12, 2004 Counsel for Plaintiff wrote the Court and stated he was too busy to mediate the case within 90 days of the April 14 order. (R.E. Tab 9)

(R. 344-345). No court filings were filed after that letter until August 12, 2005, a full year later, when the Plaintiff filed a motion for a pretrial conference. (R. 346). The Court then ordered a pretrial conference to be held on November 14, 2005. (R. 349). Apparently the pretrial conference was never held, in spite of the order setting the same. The undersigned then entered his appearance on February 6, 2006, as a result of counsel for Dr. Linton's (Lauren J. Hutchins, Esq.), scaling back her practice of law to care for her aging father. (R. 350)[5].

On February 22, 2006, the Court again ordered that the parties had 20 days to schedule mediation and that it be held within 90 days of the court's order and stated again that if the parties failed to abide by the order that the Court would enter such order as it deemed necessary. (R.E. Tab 10) (R. 352). On May 30, 2006, Prairie, through a letter from its counsel, reminded the Plaintiff about dates for the mediation and renewed its request for substantive information (none had been given) about one of his expert's opinions (David Channell) requested dates to take his deposition. (R.E. Tab 11) (R. 521-522, 663-664). On October 11, 2006, Prairie filed another motion to compel, with exhibits, stating the Plaintiff had failed to answer expert interrogatories, the autopsy report, funeral bills and other materials, thereby prohibiting the deposition of those experts in the years preceding the motion. (R. 666-668). Attached to the motion were the original discovery requests, as well as 6 letters seeking information on the expert opinions and seeking dates for depositions. (R. 669-678).

On March 28, 2008, the Circuit Clerk entered a fourth **clerk's motion to dismiss** for failure to prosecute the case. (R.E. Tab 12) (R. 353-354). As each preceding clerk's motion, this one again stated that the Defendants would be dismissed unless action of record was taken within 30 days, or written application was made to the Court and good cause shown why the case should not be dismissed. The Plaintiff failed to take action of record within thirty days after the

[5] The undersigned is thus the third lead attorney in the case since suit was filed.

date of that notice. On April 29, 2008, (*more than 30 days after the fourth clerk's motion*), Plaintiff filed another motion for a pretrial conference and for other relief and stated therein that he had attempted by letter to obtain trial dates from the defendants several months earlier in 2007. (R.E. Tab 13) (R. 358-359). The undersigned did not receive any such letter. (R. 409-410). On May 19, 2008, Prairie filed its motion to dismiss for failure to prosecute. (R. 367-373). Dr. Linton joined in the Motion on May 30, 2008. (R. 374). GTRMC filed a joinder in said motion on June 12, 2008. (R. 376). On June 19, 2008, the Court set the matter to be heard on August 22, 2008. (R. 378).

That hearing was apparently cancelled and re-set for November 21, 2008. On November 20, 2008, the Plaintiff filed a response to the motion. (R. 379-400). On November 21, 2008, the Court heard arguments on the motions. Finally, after having the case on the Court's docket for more than 15 years, the Court entered a 4 page memorandum opinion and dismissed the case on December 18, 2008. (R.E. Tab 14) (R. 402-405). The Plaintiff then filed a motion to alter or amend on December 30, 2008. (R. 406-408). Each of the Defendants responded in opposition and the Court set another hearing for April 29, 2009 on the Motion to Alter or Amend. (R. 409-422). On May 28, 2009 the Plaintiff submitted a "supplement to the motion to alter or amend" and provided the Court with discovery materials produced by the parties over the years and some additional correspondence. (R. 425-458). The hearing was held the following day on May 29, 2009 and the Court on June 29, 2009 denied the Motion to alter or amend. (R.E. Tab 15) (R. 462-463).

The Plaintiff timely appealed on July 28, 2009 and designated the entire record. (R. 464-466). After the clerk calculated the cost, because of the failure of Shepherd to pay it, the Clerk had to file a motion for an order to pay the same on August 11, 2009. (R. 470-47). The Court

then set a hearing on the Clerk's motion for an order directing the Plaintiff to pay the appeal costs, to be heard on September 3, 2009 (R. 483) and following a hearing, entered an order requiring the Plaintiff to pay the appeal costs. (R. 489-490).

After the Plaintiff paid her appeal costs, she then sought to supplement the record on appeal with additional items, some of which were never filed in the trial court nor considered by the trial court in ruling on the Motion to Dismiss or on the Motion to Alter or Amend. The parties agreed to some of the sought-after supplementation, but objected to others because the documents were not part of the trial court record and had not been considered by the trial court. (R. 495). Finally after a hearing on that motion before the trial court, the Court ordered that, even though the Court did not consider the supplementary materials, and the supplementary materials were not part of the record in the court file, that the court would allow the supplementation so that the appellate court could consider them if it wanted to[6]. (R. 495-496). Shortly thereafter, the revised Record on Appeal was compiled and the appellant filed her brief in this Court on August 16, 2010, a date six thousand eight hundred ninety two days after the conduct complained of occurred.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's dismissal of this case. The obvious reason the Supreme Court adopted Rule 41(b) of the Mississippi Rules of Civil Procedure was to discourage dilatory conduct and to protect defendants from the prejudice that undoubtedly results from delays and to give trial courts "inherent authority" to dismiss actions for failure of the plaintiffs to prosecute their claims in a timely manner.

Although the appellant disputes it, there can be no logical argument that there is not a manifest record of delay in the prosecution of this case. Dismissal is appropriate upon the trial

[6] Russell Linton, M.D. filed a motion to strike most of these materials on August 24, 2010.

court's finding of a clear record of delay ***or*** the presence of dilatory or contumacious conduct. Since there most certainly was a patently obvious record of delay, the trial court's order of dismissal is supported by ample evidence even without a finding of dilatory conduct.

Likewise, the Appellant argues that her lawyer's conduct was not dilatory. The Circuit Court found to the Contrary, based upon the passage of over ten years from the lifting of the stay until Prairie filed its motion to dismiss, 4 clerk's motions to dismiss and filings by the Plaintiff with no efforts on the part of the plaintiff have motions heard. The record contains other examples of dilatoriness as well, such as the repeated failure of the Plaintiff to answer letter requests to supplement discovery, to set depositions, orders compelling discovery, and the holding in abeyance by the Court of sanctions following orders compelling discovery.

Ms. Shepard attacks the trial court's dismissal by arguing that clerk's motions are not lesser sanctions (in spite of *Jenkins v. Tucker*, 18 So. 3d 265, 271-72 (Miss. Ct. App. 2009) and that the Court did not consider lesser sanctions. In considering this issue, this Court should not have to look any further then the Memorandum Opinion of the Court dismissing the action to know and understand that the Circuit Court did in fact weigh and consider lesser sanctions under the facts presented. (ROE, 402). Those lesser sanctions were 4 clerk's motions filed in 2000, 2001, 2004 and 2008 (the Court had probably, due to the passage of time, forgotten that it had held in abeyance the issue of sanctions in connection with the Order compelling discovery, entered in September of 1998, which the undersigned counsel was not even aware of from not being involved in Dr. Linton's defense at that time).

Even if the Court had not considered a variety of lesser sanctions, recent case-law states that this Court will presume the trial court made the requisite findings to support a ruling that lesser sanctions would have been insufficient.

The Appellant also argues that the Court erred in finding that the Defendants were prejudiced by the delays and argues that the positions were "unsubstantiated claims" of "unnamed witnesses losing their memories and being difficult to locate." To the Contrary, Prairie and all the Defendants argued prejudice in their motions and at the hearing, named names and provided details. The Court referenced it in its Memorandum Opinion, stating that the stay had been lifted in 1997, more than ten years before its Opinion, and that the alleged malpractice occurred "even more" longer ago than that. (ROE, 405). In advancing this argument, the Plaintiff fails to recognize that prejudice may be presumed from unreasonable delays.

Finally, the Appellant seems to be arguing that the nurses who provided medical care, and other factual witnesses involved in the decedents' care are irrelevant. Thus, the appellant argues in effect that, whether they've forgotten anything or not, or are lost or dead, does not matter. In doing so, she argues that the expert testimony based solely on the records, is all that is needed. If this court were to reverse the dismissal of this case and send it back for trial, it would mandate the reversal of prior precedent, and the repeal of Rule 41.

While factors other than delay are not required to support a decision to dismiss a case for failure to prosecute, those factors are manifestly met when a case has not been tried for ten years after a stay is lifted and discovery answers have still not been given. The trial court was correct to dismiss the Plaintiff's case because of her failure to prosecute it in a timely manner.

ARGUMENT

A. STANDARD OF REVIEW OF A RULE 41(b) DISMISSAL

In 1981, when this Court adopted the Mississippi Rules of Civil Procedure, it did so pursuant to its "inherent authority", "to promote justice, uniformity, and the *efficiency* of courts." [*emphasis added*]. Rule 41(b) of the Mississippi Rules of Civil Procedure provides "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 for any claim against him." Miss. R. Civ. P. 41(b). Also, the "power to dismiss for failure to prosecute is granted not only by Rule 41(b), but is part of a trial court's inherent authority necessary for 'the orderly expedition of justice and the court's control of its own docket.'" *Cox v. Cox*, 976 So. 2d 869, 874 (Miss. 2008) (quoting *Wallace v. Jones*, 572 So. 2d 371, 375 (Miss. 1990)). See also, *Cucos, Inc. v. McDaniel*, 938 So. 2d 238, 240 (Miss. 2006) (the "court will not disturb a trial court's ruling on a dismissal for want of prosecution unless it finds an abuse of discretion.").

On an appeal from a dismissal under Rule 41(b) for failure on the part of the Plaintiff to prosecute, this Court should affirm unless it is evident that the trial court abused its discretion. *Id.*, (citing *AT&T v. Days Inn of Winona*, 720 So. 2d 178, 180 (Miss. 1998)). This Court can therefore "only reverse when there has been an abuse of that discretion." *Roebuck v. City of Aberdeen*, 671 So. 2d 49, 50 (Miss. 1996).

This Court has established the considerations to be weighed in determining whether to affirm a dismissal with prejudice under Rule 41(b) as follows: (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 "aggravating factors." *Cox v. Cox*, 976 So. 2d 869, 874 (Miss. 2008).

If the trial court applied the correct legal standard, then the appellate court should consider if the decision was one of several reasonable ones which could have been made. It will affirm in the absence of reaching a definite and firm conviction that the court below committed a clear a clear error in judgment in its consideration of the relevant factors. *Plaxico v. Michael*, 735 So. 2d 1036, 1039 (Miss. 1999).

While it is true that there is no set time limit on the prosecution of an action once it is filed, dismissal with prejudice for failure to prosecute will be upheld when the record shows that a plaintiff was guilty of "dilatory ***or*** contumacious conduct" or "has repeatedly disregarded the procedural directives of the court." In such cases, "dismissal is likely to be upheld." *Vosbein v. Bellas*, 866 So. 2d 489, 493 (Miss. Ct. App. 2004).

B. DELAY or CONTUMACIOUS CONDUCT

The sole issue on appeal as stated by the Appellant is *"Whether the Circuit Court abused its discretion by dismissing with prejudice Plaintiffs' wrongful death suit for failure to prosecute absent a finding of egregious or contumacious conduct by the Plaintiffs or their counsel?"* With due respect, egregious conduct and contumacious conduct is not required in order for this case to have been dismissed. The Plaintiff would have precedent re-written to also require, on top of delay and dilatory conduct, that the conduct must have been egregious or contumacious. This is simply not the law.

The Appellant argues also that the dismissal is too harsh a sanction and that reluctance to dismiss a case should have prevented this case from being dismissed. There is no question that the Mississippi Supreme Court has said that dismissals for lack of prosecution are to be employed reluctantly. However, as stated, if this Court concludes that there was a clear record of delay, this Court should affirm the trial court's dismissal pursuant to Rule 41(b). Dismissal for failure to prosecute pursuant to Rule 41(b) is appropriate when there is a clear record of delay ***or*** contumacious or dilatory conduct by the Plaintiff. *Hasty v. Namihira*, 986 So. 2d 1036, 1040 (Miss. Ct. App. 2008). *See also, Cox v. Cox*, 976 So. 2d at 875. Further, "where a clear record of delay has been shown, there is no need for a showing of contumacious conduct." *Hine v. Anchor Lake Property Owners Association, Inc.*, 911 So. 2d 1001, 1005 (Miss. Ct. App. 2005).

Here, no contumacious conduct was ever alleged. Nor did the trial court find any to have existed. However, such conduct is not required.

Amazingly, Ms. Shepard does not acknowledge that her counsel was responsible for substantial delays in the case. In stead, she defends the delays, offering, among other things, a letter that her attorney sent to the Defense counsel in 2007, as proof of her efforts to move the case along. The undersigned never received the letter and as a result, did not respond. Apparently Ms. Shepard argues that the mailing of this letter discharged her duty to prosecute the case from September 13, 2007 until March 28, 2008 when the Circuit Clerk filed its 4th Motion to dismiss for failure to prosecute. Such conduct, offered as evidence of non-dilatoriness, is non-persuasive according *Hasty v. Namihira*, 986 So. 2d 1036 (Miss App. 2008). In *Hasty,* the appellant whose case was also dismissed for failure to prosecute argued she was not dilatory because she had written seeking to schedule depositions. However, she did nothing else until the clerk's motion was filed. The Court said with regard to that excuse "[T]his can clearly be seen as dilatory conduct." *Id.*

Furthermore, a casual review of the Statement of the Case as outlined in this Appellate Brief makes it obvious that most, if not all, delays in this case were the result of the Plaintiff's prior commitments, overly busy schedule, venue shopping, requests for stays, discovery non-responsiveness, motions for continuance, motions without bringing them to the Court's attention, Motions to Stay, and other such similar conduct, which the trial court, after analysis of the record, found to be dilatory.

The record of delays was covered in detail in Dr. Linton's Statement of the Case filed herein. At the risk of redundancy, after the first Clerk's Motion to Dismiss for Want of

Prosecution, filed over 10 years ago on January 13, 2000, the Plaintiff filed a two-line Motion, seeking a trial setting that did nothing to bring the Motion on to be heard.

Thirteen months later, on April 11, 2001, a second Clerk's Motion to Dismiss for Want of Prosecution was filed. The Plaintiff, again, promptly filed a Motion for Status Conference and Trial Setting in April 2001. However, not until October 11, 2001, did the Plaintiff even seek an Order setting a Pretrial Conference for the following month. Then as stated in the Counter-statement of the Case and as submitted in this Brief, shortly before that Pretrial Conference, the Plaintiff's counsel told the Court he was too busy to circulate the Pretrial Order and requested that the Court cancel the Pretrial Conference set for later that month. Nothing of record occurred following that letter from the Plaintiff until the third Clerk's Motion to Dismiss filed over two years later on April 7, 2004. Following the Plaintiff's standard Motion for a Status Conference and Pretrial Conference, the Court *sua sponte* ordered mediation to be scheduled within 20 days and completed within 90 days of its Order on May 18, 2004. On August 12, 2004, with the deadline for mediation approaching and none scheduled, Ms. Shepard, through counsel, again wrote to the court stating she would be unable to comply with that Court deadline.

Another year passed, and the Plaintiff filed a Motion for Pretrial Conference on August 12, 2005, and the Court, on August 23, 2005, entered an Order setting another Pretrial Conference for November 14, 2005. Then, with no other activity on the docket, on February 22, 2006, the Court again ordered *sua sponte*, the parties to schedule mediation within 20 days and complete it within 90 days of its Order on February 22, 2006. Again, without any further activity on the docket following that Order, the Circuit Clerk again filed a Motion on March 28, 2008, to dismiss the case for failure to prosecute.

If the Plaintiff's attorney was not guilty of dilatory conduct under those facts, then no case exists where it can be found. "Dilatory" is defined as "tending or intending to cause delay, or to gain time or to put off a decision." BLACK'S LAW DICTIONARY, 457 (6th Ed. 1990). This case is compelling for the number of times the Plaintiff excused himself from pursuing the case, in the face of orders to the contrary, due to her lawyers other commitments in other matters.

Ms. Shephard also relies upon this Court's decision in *American Tel. and Tel. Co. v. Winona,* 720 So. 2d 178 (Miss. 1998), to support her position that dismissal was not warranted. The failure of this argument however, is that it ignores the more recent decision of *Cox v. Cox*, 976 So. 2d 869 (Miss. 2008). *Cox* stands for the proposition that, while factors other than delay are typically found in dismissals with prejudice, factors other than delay ***"are not required."*** *Id.* at 875-76. Hence, the argument that "egregious or contumacious" conduct must be present, as stated in Plaintiff's *statement of the issue*, has been rejected by the Supreme Court. *Cox*, 976 So. 2d 875. *See also Hine v. Anchor Lake Property Ass'n, Inc.*, 911 So. 2d 1001 (Miss. Ct. App. 2005) (same). In *Hine*, the Court considered the argument that delay must be accompanied by contumacious conduct and rejected it, stating:

> [t]his argument overlooks the fact that the test for dismissal under Rule 41(b) does not require contumacious conduct. Rather, the test is whether there is a clear record of delay or contumacious conduct by the plaintiff. In this case, where a clear record of delay has been shown and even admitted, there is no need for a showing of contumacious conduct. ***This argument is without merit***.

Hine, 911 So. 2d at 1005 (emphasis added). *See also, Holder v. Orange Grove Medical Specialties, P.A.*, 2008-CA-01442-COA, 2010 WL 11267 (Miss. Ct. App. 2010) ("While there may be instances where delay, under the circumstances, may be excusable, we can say unequivocally that the asserted reason for the delay as stated by counsel for the plaintiffs, which

he attributed to staffing difficulties at his law office and his having other trials to contend with, warrants no such consideration.")

In regard to the pursuit of Ms. Shepard's claims in this case, there is a clear record of extensive delay. The standard is not whether there was delay AND contumacious conduct. In stead, the Court only needed to find that there was a showing of delay OR contumacious conduct. Based upon that standard, and the facts underlying the dismissal, this Court should affirm. The periods of delay directly attributable to the Plaintiff have been defined as "clear" in other reported Mississippi cases. Indeed, the time allowed for completion of discovery is 90 days after the Answer is served. Unif. R. Cir. & Cty. Prac. 4.04A. The Plaintiff's delays in this case have "overrun and rendered meaningless" that deadline. *Hine*, 911 So. 2d at 1006. *See also Stacy v. Johnson,* 25 So. 3d 365 (Miss. 2009) *cert. dismissed* (2010) (affirming dismissal after 9 year delay from filing complaint); *Hillman v. Weatherly*, 14 So. 3d 721, 725 (Miss. 2009) ("This Court finds that the more than five-year record in this case substantially supports the circuit court's finding of a clear record of delay."); *Hill v. Ramsey*, 3 So. 3d 120, 122 (Miss. 2009) (delay between August of 2005 and March 2007, "standing alone" is sufficient to warrant dismissal); *Hensarling v. Holly*, 972 So. 2d 716, 719 (Miss. Ct. App. 2007) (four year delay sufficient to justify dismissal); *Tolliver v. Mladineo*, 978 So. 2d 959, 997-998

(Miss. Ct. App. 2007) (two year and five month delay warrants dismissal); and *Vosbein v. Bellas*, 866 So. 2d 489, 491-492 (Miss. Ct. App. 2004) (6 year delay sufficient to dismiss). *Cf Doll v. BSL, Inc.*, 2009-CP-01306-COA, 2010 WL 3310229 (Miss. Ct. App. 2010) (case dismissed under rule 41(b) after 4 years and 7 months for failure to show cause for failure to show up for trial).

C. SANCTIONS

Ms. Shepard next argues that the four Clerk's Motions that were filed in this case should not constitute "lesser sanctions" because after each Clerk's Motion, the Plaintiff filed Brief pleadings with the Court. According to Ms. Shepard, the filing of these pleadings some how eliminates the possibility of a dismissal for failure to prosecute. This makes little sense, particularly given that in Lowndes County, in order to have a Motion heard and considered, a movant must bring the Motion to the Court's attention by way of a request for a hearing or otherwise. According to the Memorandum Opinion in this case issued by the Circuit Court dismissing this case with prejudice, "It does not appear that any action was taken to bring these Motions to the Court's attention or to request a hearing thereon. The Court finds that, since no action was taken after the Clerk's Motions to Dismiss, besides requesting a court date, that the Plaintiff's conduct was dilatory in nature." (R.O.E. 403-404). In any case, it is clear from the Trial court's ruling in the Memorandum Opinion that the Court did consider sanctions. *Id.* Regardless, Mississippi case law indicates that even if the Trial court did not make specific findings of fact, the Court on Appeal will "assume that the Trial Judge made all findings of fact that were necessary to support his verdict." *Hine v. Achor Lake Prop.*

Owners Ass'n, Inc., 911 So. 2d 1001, 1005 (Miss. Ct. App. 2005). Furthermore, on appeal from a dismissal for failure to prosecute, the Appellate Court will "presume that the Trial court made the requisite findings to support his ruling that lesser sanctions would have been insufficient." *Hensarling v. Holly*, 972 So. 2d 716, 721 (Miss. Ct. App. 2007).

1. ***BARRY V. REEVES* SUPPORTS AFFIRMANCE.**

On September 30, 2010, the Supreme Court decided *Barry v. Reeves*, 2009-CA-01124-SCT (Miss. 2010). The Appellee Dr. Linton assumes that the Appellant will argue that *Reeves* requires this Court to reverse and remand the dismissal. Thus, while *Reeves* does not appear to reverse any prior precedent, discussion would seem to be in order. In *Reeves*, the Mississippi Supreme Court reversed the trial court's dismissal of a legal malpractice case for failure of the plaintiff to prosecute. That case had been on the Court's docket from 2001, with a 14 month stay in the middle, until 2009. Subtracting for the stay of 14 months, the case was on the Court's active docket for approximately seven years. The case on appeal here however, was filed in 1993 (had a 2 ¾ year stay) and was dismissed in 2008. So, the case now on appeal was on the active docket of the Court, for nearly twice as long as *Reeves* was.

Notably, when the trial court in *Reeves* dismissed the Plaintiff's case, the Supreme Court had already issued a writ of mandamus ordering the trial court to rule on the Plaintiff's motion for a trial date. The pending motion was apparently "under advisement" of the Court as contemplated by Rule 15 of the Mississippi Rules of Appellate Procedure. In *Reeves,* the Supreme Court issued the writ only after the Plaintiff sent a letter to the Administrative Office of the Courts pursuant to Rule 15(a) of the Mississippi Rules of Appellate Procedure. The Plaintiff apparently did that because he didn't get any relief in the trial court after the filing of his motion.

In the face of the writ of mandamus, the trial court, rather than obey the writ and rule on the motion for a trial date, dismissed the case for failure of the Plaintiff to prosecute.

Contrary to *Reeves, t*he appellant in this case never made any effort to have the Administrative Office of the Courts push the trial Court for an order. Rather, the appellant here simply filed her perfunctory motions for status conferences, pretrial conferences and trial settings, but did nothing to seek a hearing or an order on the motions or to bring them to the attention of the trial court judge, the Court administrator or the Administrative Office of the Courts.

Noteworthy also in *Reeves* was the fact that the Court stayed the case at the request of the Defendant and the Court lifted the stay at the request of the Plaintiff. That is totally backwards from the facts in this case. Here, the Court ordered the stay at the request of the Plaintiffs and lifted the stay only after the Defendants asked that it be lifted.

Also of importance to the Court in *Reeves* was the fact that it was unclear that the delays in the case were attributable to the plaintiff's conduct. Here however, the record is full of documents tending to show that the Plaintiff was the cause numerous delays spanning many years. On numerous occasions the Plaintiff ignored court imposed deadlines, wrote to the Court explaining its inability to comply, failed to timely answer discovery requests, failed to respond to clerk's motions in timely fashion, ignored letters requesting discovery, ignored requests for dates for depositions and failed to call motions up for hearings or to otherwise bring them to the Court's attention. The undersigned admits that he did not answer one letter from the Plaintiff over the years, but that is because he did not receive the letter. In the face of this rare non-response, the Plaintiff has not indicated that she placed a phone call, sent a fax, or an e-mail inquiring about the status of the letter request. Now, the Plaintiff blames her failure to prosecute

the entire case on one unanswered letter to the undersigned in a span of move than 13 years. Surely that is not sufficient to avoid dismissal.

The *Reeves* decision also placed emphasis on the fact that there was no effort to employ lesser sanctions. Clerk's motions however, are lesser sanctions. *Jenkins v. Tucker*, 18 So. 3d 265, 271-72 (Miss. Ct. App. 2009). The Court *sub judice* employed that form of lesser sanctions four times. The Plaintiff did not even answer the last clerk's motion within 30 days after it was entered, which motion said, in mandatory fashion, that if action was not taken within the time prescribed, then the case "shall be dismissed (as required by Rule 41(d) of the Mississippi Rules of Civil Procedure)." In a nutshell, the contrast between *Reeves, supra* and the case now on appeal is glaring in its differences between itself and this case. In fact, the Supreme Court's ruling in *Reeves* will not be undermined in any fashion whatsoever by affirming this case.

D. PREJUDICE TO DR. LINTON

Finally, Ms. Shepard contends that there was no proof offered of prejudice by the parties other than "unidentified witnesses losing their memories without any evidentiary basis." It appears from the language of the Memorandum Opinion and Order that the issue of prejudice was argued at the hearing before the Trial court on the Defendants' Motions to Dismiss. Further, the Trial court actually did address the issue of prejudice in its Memorandum Opinion under the heading "Aggravating Circumstances". (R.O.A. 404).

Additionally, even if the Circuit Court had not found prejudice, there is no requirement that prejudice be found in order to sustain a dismissal for failure to prosecute. Even if this were not the case, however, any court should take judicial notice that a span of 18 years, 10 months, and 13 days from the date of the alleged tort to trial to the Defendants and that memories fail long before 18 years passes. The Supreme Court has been willing to presume prejudice from a

much shorter delay. See e.g. *Illinois Central RR Co. v. Moore*, 994 So. 2d 723, 729 (Miss. 2008)(seven year period inherently prejudicial). Further, the burden was really on the Plaintiff to show good cause for her delay in answer to the Clerk's Motion, which she failed to do. In that case, dismissal is

required. *Illinois Central*, 944 So. 2d at 729-730. Ms. Shepard has not, in the trial court or before this court, offered any reason for her delays in prosecuting this case. In fact, rather than concede the obvious, the Appellant defends her actions, denying dilatory conduct. No good cause for the delays has been shown and dismissal appears, therefore, to have been required. *Illinois Central*, 994 So. 2d at 729. See also *Guidry v. Pine Hills Country Club, Inc.*, 858 So. 2d 196 (Miss. Ct. App. 2003) (same).

E. MOTION TO STRIKE PARTS OF RECORD THAT WERE NOT PART OF THE TRIAL COURT'S RECORD AT TIME OF DISMISSAL.

Pages 686 – 779 of the record on appeal were not filed of record and were never attached to any motion filed in the trial court below until after the Court had dismissed the case for failure to prosecute. Nor were those materials available to, or even presented to the trial court when the trial court took up the Plaintiff's Motion to Alter or Amend the Judgment of Dismissal for Failure to Prosecute. (R.E. Tab 16) (R. 495-497).

In spite of the Appellant's failure to ever present the documents comprising Pages 686 – 779 of the record on appeal to the trial court, after she perfected her appeal, the Appellant sought to amplify the record on appeal with additional papers. Although the Circuit Court of Lowndes County, Mississippi, was reluctant to allow the extraneous documents to be admitted into the record, the Court was concerned that, if for some reason those documents were appropriately to be considered by the Appellate Court, it would be better to have these available to the Appellate Court rather than having the case reversed and remanded to the Lowndes County Circuit Court

solely for that issue. Thus, the Circuit Court ordered that the Circuit Clerk compile a copy of its Order and the pages objected to herein and transmit them as part of the record on appeal in this case. These items should not have been included in the record on appeal. Pursuant to Rule 10 of the Mississippi Rules of Appellate Procedure, Russell L. Linton previously moved that Pages 686 – 779 of the record on appeal be stricken from the record on appeal, ignored by this Appellate Court and discarded. On September 7, 2010, the Court determined it would consider the motion along with the merits of the appeal.

Out of an abundance of caution, Dr. Linton renews in this Brief his motion that the extraneous materials be stricken. It is an elementary principal of appellate procedure that documents and materials that were not part of the trial court's record cannot be added to the record after the final judgment is entered. Doing so would be akin to the appellant allowing testimony at trial without objection, and then arguing on appeal that the admission of the evidence was error. Such conduct constitutes a waiver of the objection as well as to any prejudice from the entry of the evidence. *Madison HMA, Inc. v. St. Dominic – Jackson Memorial Hospital*, 35 So. 3d 1209, 1217, N.4 (Miss. 2010).

Rule 10(f) of the Mississippi Rules of Appellate Procedure does not empower the parties or any court to add to the record on appeal documents which were not considered by the court in the course of the underlying trial court proceedings. *Loden v. State*, 971 So. 2d 548, 564 (Miss. 2007); *Craig v. State*, 44 So. 2d 860 (Miss. 1950); *KBL Properties, LLC v. Bellin*, 900 So. 2d 1160, 1163 (Miss. 2005).

Likewise, federal courts considering the identical issue have stricken supplemental materials sought to be added to the appellate record. See e.g. *Bath Junky Branson, LLC v. Bath Junky, Inc.*, 528 F.3d 556 (8th Cir. 2008). *See also, Naer Jewelers, Inc. v. City of Concord*, 538

F.3d 17 (1st Cir. 2008) (documents never presented before district court as part of a Motion for Summary Judgment are not properly considered on appeal). Based upon these principals, authorities and arguments, pages 686 – 779 of the record on appeal should be stricken from the Record, disregarded and ignored.

CONCLUSION

Ms. Shepard has failed to establish any reason for reversal of the Trial court's judgment dismissing the Defendants in this case. The power to dismiss a case under Rule 41(b) is obviously within the Trial court's inherent authority. Such a dismissal should only be overturned when the appellant meets her burden of showing an abuse of discretion. In the instant case, the trial court found a clear record of delay. The Trial court properly weighed the possibility of sanctions and resulting prejudice to the Defendants. As a result, the Trial court's ruling should be affirmed. The Plaintiff expends much effort distinguishing the case now before the Court from prior precedent on failure to prosecute. Dr. Linton is certainly in agreement that this case is unique. In not a single decided case on appeal to either the Court of Appeals or the Supreme Court, has any case been on the docket for such a lengthy period of time following the alleged malpractice. In fact, none of the prior precedent cited by the Appellant comes anywhere close to an 18 year span. The dilatory conduct exhibited by the Plaintiff and as revealed in the record on appeal, leads to only one logical conclusion. That conclusion is that the Circuit Court's decision dismissing this case should be upheld and that litigants in the future should know better than to allow four Clerk's Motions with no bona fide effort to advance the case to trial. The after-the-fact attempt by the appellant to supplement the record on appeal with additional materials does nothing to undermine the foundation of the trial court's judgment. There is no valid excuse for this case having sat idle for nearly two decades without resolution. The trial court was

manifestly correct to exercise its discretion as it did in this case and its decision should be AFFIRMED.

Respectfully submitted,

RUSSELL L. LINTON, M.D., ***Appellee***

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CERTIFICATE OF SERVICE

I, the undersigned, **JEFFREY J. TURNAGE,** do hereby certify that I have this day mailed, postage prepaid, U.S. Mail, a true and correct copy of the foregoing to:

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So certified on this the 7th day of October, 2010.

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