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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, GOLDEN TRIANGLE REGIONAL MEDICAL CENTER

M. JAY NICHOLS, MB[redacted]
NICHOLS, CROWELL, GILLIS, COOPER & AMOS, PLLC
POST OFFICE BOX 1827
COLUMBUS, MS 39703-1827
(662) 243-7330; (662) 328-6890 fax
jnichols@nicholscrowell.com

Attorney for Appellee, Golden Triangle Regional Medical Center

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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 L. 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 J. 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;

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

15. Lee J. Howard, Esq., Circuit Court Judge, Lowndes County, Mississippi, Sixteenth Judicial District.

SO CERTIFIED on this the 14th day of October, 2010.

M. JAY NICHOLS, *Attorney for Golden Triangle Regional Medical Center, Appellee*
MB [redacted]

STATEMENT REGARDING ORAL ARGUMENT

The trial court's Order of Dismissal with Prejudice should be affirmed without the necessity of oral argument. The record clearly evidences the lengthy delay in the prosecution of this case, as well as the fact that lesser sanctions in the form of four clerk's Motions to Dismiss for Want of Prosecution were insufficient to speed up the prosecution. This Court can practically take judicial notice that a lapse of approximately 17 years since the alleged negligence prejudices the defense, and oral argument is not necessary to conclude that the trial court did not abuse its discretion in dismissing this case.

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STATEMENT OF ISSUES

Whether the trial court abused its discretion by dismissing the case for failure to prosecute after:

- The Plaintiff routinely missed court-ordered deadlines;
- Four clerk's Motions to Dismiss for Want of Prosecution had been filed; and
- Over 17 years passed since the alleged negligence upon which this case is based.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This case arises out of the death of Rodney Stowers ("Stowers"). Mr. Stowers was 20 years old and playing football for Mississippi State University on Saturday, September 28, 1991, when he sustained an injury to his lower right leg during the first half of the game in Gainesville, Florida. After the injury, Stowers was removed from the field and taken to the locker room for x-rays. The x-rays revealed that Stowers had fractured his right tibia.

At the time of the x-ray, Dr. Russell Linton ("Linton"), team orthopedist, discussed the treatment options available for Stowers and advised that Stowers' fracture could be treated with a cast, or alternatively, that it could be treated with an open reduction and internal fixation. Linton also discussed the risks associated with the surgery and general anesthesia. No decision was made at that time as to the course of treatment.

In the early morning hours of September 29, 1991, while still in Gainesville, Linton was called to examine Stowers due to complaints of pain in his leg. Linton examined Stowers for evidence of potential compartment syndrome but found that Stowers' right leg and foot were not swollen and that there was no evidence of compartment syndrome.

Later that morning, Stowers rode the team bus to the airport. After arriving at the airport in Lowndes County, Mississippi, Linton personally drove Stowers to the Golden Triangle Regional Medical Center ("GTRMC") for admission to the hospital. During the drive, Linton and Stowers again discussed treatment options, and Stowers decided that he did want the internal fixation of the fracture, as this increased the possibility that he may play football before the end of that season.

Upon admission to the hospital a second x-ray confirmed that the tibial fracture was still in good alignment. Further examination revealed that all of Stowers' vital signs were normal and that he had no additional problems at that time. Stowers was scheduled for surgery on Monday afternoon, September 30, 1991.

When Stowers was admitted to his hospital room at approximately 3:30 p.m. on Sunday, his temperature was 98.5, his pulse was 83, and respirations of 18. Around 8:00 p.m. Sunday night, Stowers' condition was unchanged. Again at 11:00 p.m., Stowers was in no acute distress and his condition remained essentially unchanged from the time of his initial admission.

Around midnight, Stowers' vital signs were again checked and his temperature had increased to 102.9°. By 1:00 a.m., Stowers' temperature was recorded at 103.2°. At that time, the nurse notified Dr. Charles Rhea (Linton's partner who was on call at that time). Dr. Rhea ordered a

complete blood count with the results to be phoned in to Linton. Linton was called by the nurse and advised of Stowers' spike in temperature. By 2:00 a.m. Stowers' temperature had dropped back to 102.1° and the results of the blood count were essentially normal. Linton ordered Stowers to be given Tylenol every four hours as long as his temperature was above 101.5°. Stowers' temperature continued to drop down to 98° by 8:00 a.m. Linton personally checked on Stowers between 6:00 a.m. and 7:00 a.m. on September 30 and confirmed that his temperature had decreased and that he was in no acute distress.

During this time Dr. Robert Voller, the anesthesiologist, performed a pre-operative anesthesia evaluation on Stowers. Dr. Voller was aware that Stowers had experienced temperature elevation during the early morning hours, and for this reason he suggested that Linton order a chest x-ray. The chest x-ray was obtained around 9:00 a.m. and was read by both Dr. Voller and Dr. B. L. Sullivan as being normal. Based on the normal chest x-ray and normal blood count, Linton and Voller decided to proceed with the surgery as scheduled that afternoon.

Stowers received his pre-operative medications and was moved from his hospital room to the surgical suite at approximately 3:15 p.m. Around 3:35 p.m., Stowers was alert, oriented and able to identify the procedure he was about to undergo. In fact, Stowers moved himself onto the fracture table with assistance of the physicians.

In slightly over two hours the surgery was complete without complications. At the conclusion of the surgery, the nurse anesthetist advised Linton that Stowers' lungs sounded a little

"wet" indicating that there was some fluid in his lungs. Accordingly, breathing treatments were ordered to address this issue.

Stowers was awakened after surgery and sent to the recovery room. At this time Stowers' temperature was recorded at 99.2°. Stowers remained in the recovery room until 7:15 p.m. when he was returned to his regular hospital room. Around 9:15 p.m., Linton was notified that Stowers was again experiencing an elevated temperature of approximately 102.5°. Linton then contacted Dr. Brad Brown, an internist, to schedule a consultation the next morning regarding Stowers' condition. However, shortly before midnight, Linton was contacted and advised that Stowers was not doing well. Upon his arrival at the hospital, Linton found Stowers in respiratory distress and nonresponsive except to painful stimuli. Linton immediately contacted Dr. Brown and Dr. Michael White (an anesthesiologist) for consultation. Dr. Brown arrived at the hospital shortly after midnight and began his assessment of Stowers. Dr. Brown's examination led to a diagnosis of adult respiratory distress syndrome possibly related to fat emboli.

Stowers was transferred to the surgical intensive care unit around 12:45 a.m. where he was placed on a ventilator and aggressive respiratory support was begun. Stowers showed some improvement the following day, but by Wednesday, October 3, Stowers became progressively worse and more difficult to ventilate. He then suffered an episode of bradycardia, and his blood oxygen dropped significantly. Resuscitation was attempted, but Stowers was pronounced dead around 7:05 a.m. on Wednesday, October 3, 1991.

An autopsy performed that day found the cause of death as adult respiratory distress syndrome secondary to massive pulmonary fat emboli and associated pulmonary thromboemboli.

B. COURSE OF PROCEEDINGS

On June 10, 1993, a wrongful death complaint was filed in the Circuit Court of Lowndes County, Mississippi, styled "*Kyera Jones, et al, versus Prairie Anesthesia Associates, et al*" seeking recovery on behalf of an illegitimate child of Stowers. Subsequently, on October 1, 1993, the instant wrongful death action was filed in the Circuit Court of Scott County, Mississippi, styled *"Delia Shepard versus Prairie Anesthesia Associates, et al"* on behalf of a second illegitimate child of Stowers. (R. 14-18). On April 26, 1994, the Circuit Court of Scott County, Mississippi, transferred this cause of action to Lowndes County, Mississippi, where the first wrongful death complaint was filed. (R. 143-144). However, on November 2, 1994, the Circuit Court of Lowndes County, Mississippi, entered an order staying this action pending a determination as to whether one or both of the children involved in the two lawsuits were actually children of Stowers. (R. 147-148). At the conclusion of DNA testing, it was conclusively established that Stowers was not the father or Kyera Jones. (R. 181-189).

In July 1997, after a two year and eight month stay, the Circuit Court of Lowndes County, Mississippi, entered its order lifting the stay of this action and setting deadlines for responsive pleadings, discovery, expert designations, and all motions excluding *in limine* motions. (R. 199-200). Defendants Prairie Anesthesia ("Prairie") and Linton filed their answer to the complaint on August 27, 1997, and August 29, 1997, respectively. (R. 201-213). GTRMC filed its answer on

September 2, 1997. (R. 214). Defendants Prairie and Linton also propounded discovery on August 27 and September 10, 1997, respectively. Plaintiff has failed to timely respond to the written discovery throughout the course of this litigation. Prairie and Linton filed Motions to Compel (R. 220 and 255), and on February 9, 1998, the trial court granted the Motions to Compel and ordered the Plaintiff to provide discovery responses on or before February 27, 1998. (R. 316-318). The court also entered an Amended Scheduling Order extending expert, discovery, and motion deadlines, and setting this case for pretrial conference on "the regular pretrial date prior to the February 1999 term of court." (R. 314-315).

Also on February 23, 1998, the court entered its order on Linton and Prairie's Motions to Dismiss, Or in the Alternative, to Compel Discovery. (R. 316-318). In that order, the court specifically found that the Plaintiff had failed to comply with the prior scheduling order and failed to request an extension thereof. Id. The court denied Linton and Prairie's Motions to Dismiss, but did compel the Plaintiff to produce requested discovery, and reserved the issue of monetary sanctions in favor of Linton and Prairie for ruling at a later time. Id. All of the activity set forth above transpired over a decade ago.

Almost two years later, the clerk of the court filed its first of four Motions to Dismiss for Want of Prosecution. (R. 319-320). In response to the Clerk's Motion to Dismiss on February 11, 2000, counsel for Plaintiff filed a one sentence Motion for Trial Setting. (R. 321-322). However, no further action was taken by the Plaintiff to move this matter toward trial.

On April 11, 2001, the clerk filed its second Motion to Dismiss for Want of Prosecution. (R. 323-324). In response to this motion, counsel for Plaintiff again filed a Motion for Status Conference and Trial Setting but took no action to have the matter taken up by the court. (R. 325-326). A couple of weeks later, lead counsel for Linton, Taylor B. Smith, withdrew as counsel and advised the court that Lauren J. Hutchins would be continuing Linton's representation. (R. 327).[1]

At the end of September 2001, the parties reached an agreement and the trial court set a pretrial conference for November 19, 2001. (R. 329). However, five days prior to the scheduled pretrial conference, counsel for Plaintiff advised the court that he would be unable to complete the Plaintiff's version of the pretrial order prior to the scheduled pretrial conference, and requested that the conference be rescheduled for a later date (R. 337).

With no activity on record for the next two years and five months, on April 7, 2004, the clerk filed a third Motion to Dismiss for Failure to Prosecute. (R. 338-339). In response, counsel for Plaintiff filed another one-sentence Motion for Status Conference and Trial Setting, but again did not pursue setting a hearing on his motion. (R. 340).

On May 18, 2004, the court *sua sponte* ordered the parties to schedule a mediation, and for that mediation to be completed within 90 days of the date of the court's order. (R. 342-343). Almost three months after entry of the court's order, counsel for Plaintiff wrote the court stating that he was

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[1]Since that time, Lauren Hutchins has also withdrawn as counsel, and Jeffrey J. Turnage is now the third counsel involved in this matter on behalf of Linton.

not going to be able to comply with the mediation deadline because of his busy schedule. (R. 344-345).

Subsequent to this August 12, 2004, letter, a full year passed with no other filings in the record. On August 12, 2005, the Plaintiff filed a Motion for Pretrial Conference. (R. 346). Though the court did enter an order scheduling a pretrial conference for November 14, 2005 (R. 349), there is nothing in the record to suggest that the actual pretrial conference ever took place.

On February 6, 2006, Jeffrey J. Turnage entered his appearance in this case on behalf of Linton. Shortly after Mr. Turnage entered his appearance on behalf of Linton, the court entered another order on February 22, 2006, requiring the parties to mediate the case within 90 days. (R. 352). After this order to mediate, counsel for Prairie wrote Plaintiff's counsel renewing his request for expert information on one of the Plaintiff's experts, and asked for dates on which Plaintiff's expert would be available for deposition. (R. 521-522, 663-664). By October 11, 2006, almost eight months after the trial court ordered mediation, no mediation had taken place, and Prairie filed a Motion to Compel the Plaintiff to fully answer expert interrogatories and to provide various documents which had previously been requested. (R. 666-668). Counsel for Prairie attached to that motion six letters wherein he had sought information on the Plaintiff's experts, as well as deposition dates. (R. 669-678).

Meanwhile, nothing had been filed of record for over 13 months since the trial court's February 22, 2006, order to mediate. On March 28, 2008, the clerk entered its fourth Motion to Dismiss for Want of Prosecution. (R. 353-354). No response was forthcoming from Plaintiff's

counsel until April 29, 2008, when he filed another Motion for Pretrial Conference. (R. 358-359).[2] On May 19, 2008, Prairie filed its own Motion to Dismiss for Failure to Prosecute. (R. 367-373). Linton joined in the motion on May 30, 2008 (R. 374), and GTRMC joined in the motion on June 12, 2008. (R. 376). On June 19, 2008, the court ordered a hearing on the Motion to Dismiss for August 22, 2008. (R. 378).

At the request of Plaintiff's counsel, the hearing on the Motion to Dismiss was continued until November 21, 2008. On November 20, 2008, the Plaintiff submitted her Response to Defendant's Motion to Dismiss. (R. 379-400). After oral argument on the Motion to Dismiss, more than 15 years after this case was originally filed and over 17 years after the alleged negligence, the trial court entered its opinion dismissing the case with prejudice on December 18, 2008. (R. 402-405).

Subsequent to the trial court's dismissal of the case, counsel for Plaintiff filed a Motion to Alter or Amend the Judgment on December 30, 2008. (R. 406-408). The Defendants submitted responses in opposition (R. 409-422), and on February 4, 2009, the court entered its order setting a hearing on the Plaintiff's motion. (R. 423). Although the hearing was originally scheduled for April 21, 2009, it was apparently continued by agreement of the parties, as there was no filing on record until the Plaintiff filed her Supplement to Motion to Alter or Amend on May 28, 2009. (R. 425-458).

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[2]Attached to this motion was one letter dated September 2007 from Plaintiff's counsel to defense counsel inquiring about availability for trial dates. (R. 362). No other action had been taken by Plaintiff to set this matter for trial other than this letter.

The trial court again heard argument on the Plaintiff's Motion to Alter or Amend on May 29, 2009, and on June 29, 2009, denied the motion. (R. 462-463).

On July 28, 2009, the Plaintiff filed her Notice of Appeal and designated the entire record for appeal. (R. 464-466). Interestingly, after the Plaintiff finally paid the appeals cost, Plaintiff attempted to supplement the record on appeal with papers that were not filed with the trial court or even considered by the trial court in its ruling on the Motion to Dismiss. Although the Defendants agreed to allow some of the requested supplementation, many of the documents that the Plaintiff sought to include in the record were objected to on the basis that they were simply not part of the record, and that they had not been considered by the trial court in its ruling dismissing the case. (R. 495). The trial court conducted a hearing and entered an order finding that though the requested supplemental documents were not part of the record in the court file, it was going to allow the requested supplementation to be included for appeal purposes so that this Court would have the option to consider this issue. (R. 495-496).

Almost 19 years after the alleged negligence and 17 years after the complaint was filed in this matter, Plaintiff filed her Appellant's Brief, arguing that the trial court abused its discretion in dismissing her case for failure to prosecute.

III. SUMMARY OF THE ARGUMENT

Trial courts have the inherent authority to dismiss cases for failure of the plaintiffs to prosecute their claims in a timely manner. Sanctions in the form of dismissal are appropriate if the

trial court finds that there is a clear record of delay or if the trial court finds the presence of dilatory or contumacious conduct. The record in this particular case is clearly lacking any evidence on the part of the plaintiff to timely prosecute her case. Rule 41(b) of the Mississippi Rules of Civil Procedure specifically allows Defendants to move for dismissals of actions for failure of the Plaintiff to prosecute, and these rules were adopted to promote, among other things, the efficiency of courts.

Due to the length history of this case and the substantial delay in the prosecution of this action by the Plaintiff as evidenced by the filing of four Clerk's Motions to Dismiss for Want of Prosecution, it can hardly be said that the trial court abused its discretion in finding a clear record of delay. Plaintiff argues that there was no dilatory or contumacious conduct that should warrant the dismissal of her claims. However, the dismissal of a case is appropriate upon a finding of a clear record of delay, even if there was no finding of contumacious conduct. Though the Plaintiff also argues that her lawyer's conduct was not dilatory, the sheer fact that this cause of action accrued in 1991 and was filed in 1993, coupled with the fact that the case was finally dismissed in 2008, is evidence enough of the Plaintiff's dilatory conduct.

Although the case was stayed until 1998 as set forth in the procedural background, four Clerk's Motions to Dismiss for Failure to Prosecute were filed after 1998 without this case ever going to trial. In the face of these four Clerk's Motions to Dismiss for Want of Prosecution, the Plaintiff still argues on appeal that the trial court erred in not considering or applying lesser sanctions in this case. To the contrary, these Motions to Dismiss are "lesser sanctions" in and of themselves,

and the trial court specifically considered these Motions as such, citing Hasty v. Namihira, 986 So. 2d 1036 (Miss. Ct. App. 2008). (R. 402-404).

Lastly, the Plaintiff argues that the Court erred in finding that the lengthy delay in this matter created prejudice towards the Defendants. Plaintiff's argument is based on her assertions that medical malpractice cases are nothing more than "battles of the experts," and that availability and memories of various other witnesses are irrelevant. To the contrary, the trial court specifically and appropriately addressed the prejudice issue in finding that the length of the delay created prejudice to the defense.

Pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure, the trial court properly dismissed this case with prejudice. Considering 17 years had lapsed from the date of the alleged medical negligence, lesser sanctions in the form of four Clerk's Motions to Dismiss for Want of Prosecution had been filed by the Clerk in an effort to move the case along, and the prejudice to the defense as a result of the lengthy delay, it is hard to find support for Plaintiff's argument on appeal. As Rule 41 states, it is within the Court's inherent authority to dismiss a case under such circumstances, and the trial court clearly did not abuse its discretion in so doing.

IV. ARGUMENT

A. Rule 41(b) Considerations

Rule 41(b) of the Mississippi Rules of Civil Procedure specifically gives the Defendants the right to move for a dismissal of any action for failure on the part of the Plaintiff to prosecute. Miss. R. Civ. P. 41(b). In addition to Rule 41(b), the Mississippi Supreme Court has also noted that

it is within the trial court's inherent authority to dismiss a case for failure to prosecute to maintain the orderly expedition of justice and/or to control its docket, and the trial court's dismissal of an action for want of prosecution should not be overturned absent a finding of abuse of discretion. Cox v. Cox, 976 So. 2d 869-874 (Miss. 2008); Cucos, Inc. v. McDaniel, 938 So. 2d 238, 240 (Miss. 2006).

Though examination of what constitutes failure to prosecute a claim is considered on a case-by-case basis, the Mississippi Supreme Court has set forth the following considerations to be weighed in determining a dismissal with prejudice is appropriate:

1. Whether there was a clear record of delay **or** contumacious conduct by the Plaintiff;
2. Whether lesser sanctions may have better served the interest of justice; and
3. The existence of other aggravating factors.

AT&T v. Days Inn of Winona, 727 So. 2d 178, 181 (Miss. 1998); Cox v. Cox, 976 So. 2d 869, 874 (Miss. 2008).

It is clear from the trial court's December 18, 2008, Order granting the Defendant's Motion to Dismiss that the appropriate legal standard was applied. The trial court specifically considered and addressed the dilatory nature of the Plaintiff's conduct in the case *sub judice*, the fact that lesser sanctions in the form of conditional dismissals and the prejudice caused towards the Defendants. (R. 402-405).

B. Record of Delay

Though the Plaintiff advances the argument that the trial court abused its discretion in dismissing the case with prejudice absent a finding of egregious or contumacious conduct by the Plaintiff or her counsel, this argument misses the mark. The standard is not that there must be a finding of contumacious or egregious conduct by the Plaintiff. To the contrary, what is required is a clear record of delay **or** contumacious conduct by the Plaintiff. Cox, 976 So. 2d at 874. To that end, in its opinion the trial court specifically addressed this finding stating, "In the case *sub judice*, this Court finds that there is no evidence of the Plaintiff acting contumaciously; however, the Court does find that the Plaintiff's actions are dilatory in nature." (R. 403). In discussing the issue of dilatory conduct, the trial court went on to state:

> Even though the case was stayed due to issues regarding who the proper beneficiaries were in the case, there have been four Clerk's Motions to Dismiss for Lack of Prosecution beginning since 2000.
>
> The first Clerk's Motion occurred January 13, 2000, whereby Plaintiff filed a Motion for Trial Setting on February 11, 2000. On April 11, 2001, the second Clerk's Motion was filed, and Plaintiff filed on April 13, 2001, a Motion for Status Conference and Trial Setting.
>
> April 7, 2004, marked the third Clerk's Motion with the Plaintiff filing a Motion for Status Conference and Trial Setting on April 15, 2004. Finally the last Clerk's Motion occurred on March 28, 2008, with Plaintiff filing a Motion for . . . Trial Setting on April 29, 2008.
>
> 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. 403-404).

If this Court concludes that there was a clear record of delay, then it 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). "Where a clear record of delay has been shown, there is no need for a showing of contumacious conduct." Hine v. Anchor Lake Prop. Owners Ass'n, Inc., 911 So. 2d 1001, 1005 (Miss. Ct. App. 2005).

Accordingly, the case law is clear that the standard is not whether there was delay and contumacious conduct. Instead, it is sufficient for a dismissal with prejudice for the Court only to find that there was a showing of extensive delay. The facts set forth in the statement of the case herein, together with those facts set forth in the Co-Defendants' briefs make clear the Plaintiff's delay in prosecuting this case. Again, this case was dismissed over 17 years after the alleged medical negligence, and over 15 years after the initial Complaint was filed. Though the case was stayed for a number of years, the stay was lifted in 1997 and 10 additional years passed without this case going to trial. In Stacy v. Johnson, 25 So. 2d 365 (Miss. 2009) (cert. dismissed) (2010), a dismissal was affirmed after a 9-year delay from filing a Complaint. See also Hillman v. Weatherly, 14 So. 3d 721, 725 (Miss. 2009) (holding that more than a five year record of delay substantially supported circuit court's finding of clear record of delay); Hill v. Ramsey, 3 So. 3d 120, 122 (Miss. 2009) (holding delay of approximately two years, standing alone, was sufficient to warrant dismissal); Hensarling v. Holly, 972 So. 2d 716, 719 (Miss. Ct. App. 2007) (holding four year delay in prosecution sufficient to justify dismissal); Tolliver v. Mladineo, 978 So. 2d 959, 997-98 (Miss. Ct. App. 2007)

(holding two and a half year delay warrants dismissal; and Vosbein v. Bellas, 866 So. 2d 489, 491-92 (Miss. Ct. App. 2004) (holding six year delay sufficient to warrant dismissal).

In the present case, the sheer length of time that has passed since the alleged negligence in the filing of the Complaint, coupled with the fact that the Clerk filed four Clerk's Motions to Dismiss for Want of Prosecution make the record of delay in this matter abundantly clear.

In the very recent case of Barry v. Reeves, 2009-CA-01124-SCT (Miss. 2010), the Mississippi Supreme Court reversed a trial court's dismissal of a legal malpractice case for failure to prosecute. In Reeves, the case was filed in 2001 before being dismissed for failure to prosecute in 2009. However, the case did endure a 14-month stay during the interim. Accordingly, the Reeves case was on the trial court's active docket for approximately seven years.

Unlike Reeves, though the case *sub judice* did endure almost a three year stay, it was on the trial court's active docket for almost 14 years. Also unlike the case *sub judice*, in Reeves the Plaintiff had filed a Motion with the trial court for a trial date, and had even petitioned the Supreme Court for a Writ of Mandamus ordering the trial court to rule on Reeves' Motion for a Trial Date. The Supreme Court, in fact, issued the Writ after Reeves sent a letter to the administrative office of the Courts pursuant to Rule 15(a) of the Mississippi Rules of Appellate Procedure. Then, despite the Supreme Court's Writ of Mandamus requiring the trial court to rule on the Plaintiff's Motion for a Trial Setting, the trial court dismissed the case for failure to prosecute instead.

Accordingly, in Reeves it was apparent that Plaintiff was diligent in attempting to procure a trial date by getting the Supreme Court involved to the extent that it issued a Writ of Mandamus

ordering the trial court to rule on the Plaintiff's Motion for a Trial Setting. There is no proof of such conduct in the current record on appeal. In fact, Plaintiff in the case *sub judice* simply filed one sentence motions for a trial setting or status conference on four occasions after receiving the Clerk's Motions to Dismiss for Want of Prosecution, and took no further action with the court to have any of her motions heard or presented for adjudication.

Additionally, the Reeves decision also stressed the fact that there were no apparent efforts to utilize lesser sanctions prior to the trial court's dismissal of the case. In the present case, as addressed below, lesser sanctions in the form of four Clerk's Motions to Dismiss for Want of Prosecution were utilized in the case *sub judice* without success.

C. Availability of Lesser Sanctions

The Plaintiff argues that the trial court abused its discretion in not considering or applying lesser sanctions in this case. Again, contrary to the Plaintiff's argument, the trial court specifically considered the issue of lesser sanctions, and addressed that in its Memorandum Opinion. (R. 404).

The Court's discussion regarding the dilatory nature of the Plaintiff's conduct necessarily flowed into the trial court's consideration of the second factor, the availability of lesser sanctions. Citing Hasty v. Namihira, 986 So. 2d 1036 (Miss. Ct. App. 2008), the trial court considered the Clerk's Motions to Dismiss as explicit warnings to the Plaintiff to be used as a lesser sanction. (R. 404). Finding that these Motions to Dismiss were explicit warnings to the Plaintiff to move forward with the case, the trial court correctly concluded that lesser sanctions had already been applied and thus were not available at the time of dismissal. (R. 404).

The trial court stated, "The Court finds that lesser sanctions have already been applied by way of the four Clerk's Motions to Dismiss and thus are not available in the case *sub judice*." (R. 404). The Hasty Court defined "lesser sanctions" to include conditional dismissals and explicit warnings. Hasty, 986 So. 2d at 1040. Regarding the application of lesser sanctions in the case *sub judice*, the trial court specifically explained,

> There have been four Clerk's Motions to Dismiss for Lack of Prosecution occurring in 2000, 2001, 2004, and finally in 2008. According to Hasty, these Clerk's Motions was considered as explicit warnings to be used when lesser sanctions are available. Hasty at 1041. The Court agrees and finds that these were explicit warnings to the Plaintiff to move forward with the case. The Court finds that lesser sanctions have already been applied by way of the four Clerk's Motions to Dismiss and thus are not available in the case *sub judice*.

(R. 404).

The trial court correctly found that the Clerk's multiple Motions to Dismiss for Want of Prosecution were lesser sanctions in the form of explicit warnings. In response, the Plaintiff did nothing but file one sentence pleadings asking for a status conference and/or trial date. After filing these brief pleadings, the Plaintiff did not request any hearings on, or bring these Motions to the Court's attention. Therefore, it is clear from the record that the Court did not abuse its discretion in finding that lesser sanctions had already been applied to the Plaintiff and were therefore unavailable at the time of dismissal. Moreover, on an 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). In addition to the presumption that the trial court made the requisite findings to

support a ruling that lesser sanctions would have been insufficient, the Appellate Court will "assume that the trial Judge made all the findings of fact that were necessary to support his verdict." Hine v. Anchor Lake Prop. Owners Ass'n, Inc., 911 So. 2d 1001, 1005 (Miss. Ct. App. 2005).

D. Aggravating Circumstances - Prejudice to the Defendants

Regarding the third consideration under Rule 41(b), aggravating circumstances, the trial court, again relying on Hasty, identified the three factors to consider in determining whether there were aggravating circumstances:

1. whether the delay was caused by the party as opposed to his counsel;

2. whether there was an actual prejudice to the opposing party; and

3. whether the delay was an intentional attempt to abuse the judicial process.

(R. 404).

The trial court found the first and third factors to be irrelevant. However, after hearing argument from the Defendants regarding the prejudice cause by virtue of the unavailability of witnesses (via memory loss or otherwise), and even the inability to locate witnesses, the trial court properly found that the lengthy delay in this matter created prejudice toward the Defendants. The Plaintiff argues that there was no specific proof offered of the prejudice; however, there is no requirement that actual prejudice be proven in order to sustain a dismissal for failure to prosecute. The trial court specifically addressed the issue of prejudice in its Memorandum Opinion and stated as follows:

> Regarding the second factor, the Defendant argues that the long delay has caused prejudice to the defense in that the witnesses for the defense have already started

losing their memories. Additionally, the defense avers that it will be difficult to even locate witnesses after such a large length of time.

If the Court only considers the latter date of 1997, when the stay was lifted, it still was over 10 years ago. There is a large span of time that has elapsed since 1997 and even more since 1991 when the alleged medical negligence occurred. Thus, the Court finds that the Defendant has been prejudiced due to the lengthy amount of time that has accrued.

(R. 404-405).

Accordingly, to be overturned on this issue, this Court must find that the trial court abused its discretion in finding that a delay of approximately 17 years could either actually prejudice the Defendants or create the presumption of prejudice. Regarding this notion, the Mississippi Supreme Court has found the presumption of prejudice from a much shorter delay than that in the case *sub judice*. See Illinois Central RR Co. v. Moore, 994 So. 2d 723 (Miss. 2008) (holding seven year delay inherently prejudicial).

E. Motion to Strike Portion of the Record

After the Plaintiff perfected her appeal, she sought to supplement the record on appeal with documents which were not filed of record and which were never attached to any Motion filed in the trial court until after the case had been dismissed for failure to prosecute. Pages 686 through 779 of the record were never presented to the trial court even when the trial court ruled on the Plaintiff's Motion to Alter or Amend the Judgment of Dismissal. (R. 495-497).

Over objection of all Defendants, and after hearing argument on the Plaintiff's Motion to Supplement the Record with these additional papers, the trial court decided the better route would

be to make the requested supplementation available to this Court for determination as to whether it should be included in the record and/or what impact, if any, they may have on the merits of the case.

The requested supplementation should not be included in the record on appeal and should not be considered by this Court. Rule 10(f) of the Mississippi Rules of Appellate Procedure does not allow the addition to the record of documents which were not considered by the trial court in the course of the underlying trial court proceedings. Loden v. State, 971 So. 2d 548, 564 (Miss. 2007); KBL Properties, LLC v. Bellin, 900 So. 2d 1160, 1163 (Miss. 2005). Accordingly, because pages 686 through 779 were not originally part of the record in the trial court proceedings below, were never presented to the trial court for consideration, and were never considered by the trial court in reaching its decision to dismiss this case for failure to prosecute, the rules of court and legal precedent now prohibit the inclusion of these documents on appeal and consideration of same by t his Court.

V. ADOPTION OF CO-DEFENDANTS' ARGUMENTS ON APPEAL

In addition to the content hereof, pursuant to Rule 28(i) of the Mississippi rules of appellate procedure, GTRMC hereby adopts by reference the content of Linton and Prairie's briefs in their entirety.

VI. CONCLUSION

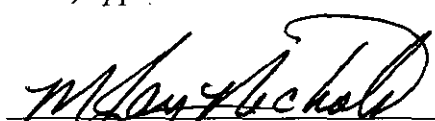
The gist of the Plaintiff's argument in her brief is simply that the dismissal with prejudice was not warranted and was too harsh a sanction based on the other circumstances of this case other than the length of the delay. However, this argument ignores Cox v. Cox and its proposition that

while factors other than delay are typically found in dismissals with prejudice, factors other than delay "are not required." Cox, 976 So. 2d at 875-76. Though not required, the trial court considered and found that lesser sanctions had been unsuccessful, and that the defense was prejudiced by the length of the delay insofar as the availability of witnesses.

As the trial court has clearly applied the correct legal standard, this Court should affirm the trial court's dismissal absent reaching a definite and firm conviction that the trial court committed clear error in judgment in consideration of the relevant factors. Plaxico v. Michael, 735 So. 2d 1036, 1039 (Miss. 1999). No such error in judgment has occurred.

Respectfully submitted this 14th day of October, 2010.

GOLDEN TRIANGLE REGIONAL MEDICAL CENTER, *Appellee*

BY: 

M. Jay Nichols, MB [redacted]
Its Attorney

OF COUNSEL:

NICHOLS, CROWELL, GILLIS, COOPER & AMOS, PLLC
POST OFFICE BOX 1827
COLUMBUS, MS 39703-1827
(662) 243-7330; (662) 328-6890 FAX
jnichols@nicholscrowell.com

CERTIFICATE OF SERVICE

I, the undersigned, M. JAY NICHOLS, attorney of record for the Appellee, Golden Triangle Regional Medical Center, herein, do hereby certify that I have this date mailed, postage pre-paid, a true and correct copy of the foregoing ***BRIEF OF APPELLEE*** to the following:

Robert G. Germany, Esq.
Pittman, Germany, Roberts & Welsh, L.L.P.
Post Office Box 22985
Jackson, MS 39225-2985
Attorney for Plaintiff

J. L. Wilson, IV, Esq.
Upshaw, Williams, Biggers, Beckham & Riddick
Post Office Box 8230
Greenwood, MS 38935-8230
Attorney for Prairie Anesthesia Associates

Jeffrey J. Turnage, Esq.
Mitchell, McNutt & Sams
Post Office Box 1366
Columbus, MS 39703-1366
Attorney for Russell C. Linton, M.D.

Lee J. Howard, Esq.
Circuit Court Judge
P. O. Box 1344
Starkville, MS 39760

SO CERTIFIED on this the 14th day of October, 2010.

M. JAY NICHOLS

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