Copy filed Dec 29, 2010

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-01267

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

APPELLANTS

VS.

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

APPELLEES

REPLY BRIEF OF APPELLANTS

ROBERT G. GERMANY, ESQ. (MSB N[redacted]
PITTMAN, GERMANY ROBERTS & WELSH, L.L.P.
410 South President Street (39201)
Post Office Box 22985
Jackson, Mississippi 39225-2985
Telephone: (601) 948-6200
Facsimile: (601) 948-6187

ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

I. INTRODUCTION.

One of the Appellee's briefs boldly states "THIS IS THE MOST EGREGIOUS CASE TO BE CONSIDERED BY THIS COURT." This hyperbole does not stand up to the true time-line of this case which is undisputed. It is as follows:

- In November, 2005 the trial court set the case for trial on November 27, 2006. The Appellees did not claim that Plaintiffs had been dilatory in pursuing the case or that any witnesses were unavailable or any other kind of prejudice.

- By letter dated October 11, 2006, counsel for Appellee Prairie requested that the trial court continue the case (R. 510-511). Another member of the firm representing Appellee Prairie could have tried the case at that time but that Prairie chose not to proceed in that manner. This in and of itself establishes that no prejudice took place after October 11, 2006 or if it did it was solely as a result of the actions of Appellee Prairie in requesting the continuance.

- On November 27, 2006, the Circuit Court entered the Agreed Order of Continuance (R. 658-661, RE. 37-40). Neither of the other defendants opposed the continuance. Again this in and of itself establishes that no prejudice took place after October 11, 2006 or if it did it was solely as a result of the actions of Appellees in requesting or agreeing to the continuance.

- By letter dated September 12, 2007, Plaintiffs requested that the Court Administrator provide a list of available trial dates during the year 2008 (R. 399, RE. 41). None of the Appellees objected to the proposed trial dates, including any objection that the case was stale or that they would somehow be prejudiced due to the passage of time. This in and of itself is an admission that the Appellees did not consider the case to be stale at that time nor did they feel their defense had been prejudiced.

- By letter dated September 13, 2007, Plaintiffs' counsel provided defense counsel with four (4) available trial dates during 2008. Counsel for Dr. Linton did not respond (R. 400, RE. 42).

- On March 28, 2008, the Circuit Clerk filed a motion to dismiss for failure to prosecute (R. 353).

- On April 29, 2008, Appellants filed their Motion MRCP 16 Conference and for Other Relief in which they asked the trial court to set the case for trial. (R. 355-357, RE. 43-45). Only in response to Appellants request for a Rule 16 conference and a trial setting did Appellees for the first time suggest that the case was stale and that they had somehow been prejudiced. This after they had either asked for or not opposed a continuance of the November 27, 2006 trial date.

This Court has declared that:

> There is no set time limit for the prosecution of an action; a dismissal with prejudice will be affirmed only if there is a showing of a clear record of delay or contumacious conduct by the plaintiff, and where lesser sanctions would not serve the best interests of justice.

American Tel. & Tel. Co. v. Days Inn, 720 So.2d 178, 180 (Miss. 1998).

The facts set forth above without any doubt show that Appellees have failed to meet this heavy burden and as a result the trial court erred in dismissing the case with prejudice.

II. THE AUTHORITIES RELIED UPON BY APPELLEES DO NOT SUPPORT A DISMISSAL OF THIS CASE WITH PREJUDICE.

As will be discussed below, the cases relied upon by the trial court and by Appellees here are factually different from those before the Court in this appeal and do not support a dismissal with prejudice in this case. Many actually support Appellants contention that the trial court erred when it dismissed this case.

- *American Tel. & Tel. Co. v. Days Inn*, 720 So.2d 178 (Miss. 1998):

In this case the defendants filed a motion to dismiss for failure to prosecute. Unlike the present case, at the time the motion to dismiss was filed there was no pending motion for a Rule 16 conference or a trial setting. Unlike here, the plaintiff did not respond to the motion to dismiss and failed to appear the hearing of the motion. Despite these failures by the plaintiff in that case this Court concluded that the trial court had abused its discretion in dismissing the case and reversed and remanded the case. In addition, this Court it its opinion pointed out the significance of the actions taken by the defendants. In particular this Court noted as here, that the defendants had asked that the case be continued to a later term because of a conflict. *Id.* at 181.

- *Barry v. Reeves*, 47 So.3d 689 (Miss. 2010):

The case was filed on April 17, 2001. Both sides conducted discovery until at least April 30, 2002. The defendant's insurance carrier went into receivership and the trial court stayed further proceedings until December 1, 2004. The plaintiff filed a motion to reopen discovery and to set the case for trial on September 30, 2005. After the trial court did not rule on the motion for more than a year, the plaintiff sent the court a letter on April 5, 2007 with a copy to defense counsel requesting a status conference. In response the defendant filed a motion to dismiss for failure to prosecute. A writ of mandamus was eventually issued by this Court directing the trial court to rule on the motion for trial setting and related relief. The trial court did not rule on that motion but instead dismissed the case with prejudice for failure to prosecute. On appeal this Court reversed the dismissal and noted that the defendant did not move to dismiss until after the plaintiff asked the trial court for a trial setting. *Id.* at 693. This Court also noted that the mere fact that delay occurs is not sufficient to warrant dismissal. Rather it must be clear from the record that the delay was caused by plaintiff's

failure to prosecute. *Id.* at 694.

This case is similar to *Barry* in many respects. There was a stay of the case due to factors beyond plaintiffs' control. The plaintiff had pending a motion for status conference and to set the case for trial at the time the defendants filed the motion to dismiss. Moreover, this case was set for trial on November 27, 2006 and was continued at the instance of one of the defendants and without objection by the other defendants. In addition, plaintiff thereafter sought to reset the case both by agreement and motion.

- *Camacho v. Chandeleur Homes, Inc.*, 862 So.2d 540 (Miss. App. 2003):

This case involved the withdrawal of plaintiff's counsel and plaintiff's failure to obtain new counsel within the time permitted by the trial court. As a result of plaintiff's failure to follow the trial court's order the case was dismissed with prejudice. The Court of Appeals reversed the trial court because there was no clear record of delay or contumacious conduct on the part of the plaintiff. This was true even though the plaintiff failed to obey a court order. In the present case, there was no finding by the trial court that Shepard failed to comply with any orders of the court. Of interest, the Court of Appeals also noted in its opinion that "... there is no set time limit on the prosecution of an action once a complaint has been filed." *Id.* at 542.

- *Cox v. Cox*, 976 So.2d 869 (Miss. 2008):

This case involved a son's complaint seeking to set aside his mother's *inter vivos* transfer of real property to his sister. The complaint was filed on November 5, 1992. The defendant filed a motion to dismiss for lack of prosecution on October 5, 2005. The trial court denied the motion on January 25, 2006 but reserved the right to dismiss the case later, depending on the proof. The case went to trial on July 24, 2006. At the conclusion of the proof the trial court dismissed the case with

prejudice finding that the defendant had been prejudiced because the defendant's mother was deceased at the time of trial and as such could not testify. This Court affirmed the dismissal of the case noting that the death of defendant's mother resulted in actual prejudice to the defendant. This Court also noted in its opinion that there had been no activity on the docket for over seven years and that the plaintiff took no action on the case for over nine years.

In the present case there has been no showing of actual prejudice. In fact as set forth in Appellants' opening brief there is no possibility of prejudice given the expert designations served by Appellees in this case. Moreover, the facts set forth in Appellants' Statement of the Case clearly demonstrate that there was no lack of activity in this case approaching the level of that in *Cox*.

- *Cucos, Inc. v. McDaniel*, 938 So.2d 238 (Miss. 2006):

In this case the complaint was filed on May 18, 2000. The defendant filed an answer on July 13, 2000. The last action on the court docket was July 6, 2001. The clerk filed a motion to dismiss on October 16, 2002. Plaintiffs sent a letter to the clerk on November 13, 2002 requesting that the case not be dismissed. The clerk did not place the letter in the file and on November 22, 2002, the trial court dismissed the case. Plaintiffs did not learn of the dismissal until August 24, 2004 following which they filed a motion to set aside the dismissal. The trial court set the dismissal aside and the defendant appealed. On appeal this Court affirmed noting "... the great social interest in provision of every litigant with his day in court and the attempt to not deprive the plaintiff of that opportunity for technical carelessness or unavoidable delay... ." *Id.* at 243.

In the present case Shepard has moved her case well beyond that in *Cucos*. She conducted discovery, designated experts and set the case for trial, only to have it continued at the request of Prairie.

- *Doll v. BSL, Inc.*, 41 So.3d 664 (Miss. 2010):

This case is not remotely similar to the present case. The case was set for trial on December 1, 2008. The trial court called the case for trial but neither plaintiffs nor their lawyer appeared. The trial court excused defense counsel until December 2, 2008 at which time the case was again called for trial. Again, neither the plaintiffs nor their lawyer appeared at which time the trial court dismissed the case.

Neither Ms. Shepard nor her lawyers have failed to appear for any hearing or deposition in this case. In addition, when the case was set for trial on November 27, 2006, it was one of the Appellees that requested a continuance not Shepard or her lawyers.

- *Guidry v. Pine Hills Country Club, Inc. of Calhoun County*, 858 So.2d 196 (Miss. App. 2003):

The plaintiff filed suit in this case on July 24, 1997. Pine Hills served discovery on September 22, 1997. Having received no responses, Pine Hills filed a motion to compel on March 30, 1998. The following day the trial court entered an order requiring the plaintiff to respond to the discovery. The plaintiff served responses but they were not signed or sworn. On April 17, 1998, Pine Hills filed a motion to strike. No further action was taken until the clerk filed a motion to dismiss on June 15, 2000. The clerk filed a second motion to dismiss on June 22, 2001 and the trial court dismissed the case **without prejudice** (emphasis added). On appeal the Court of Appeals affirmed the dismissal without prejudice noting that the only action of record by the plaintiff was to keep the case on the docket. *Id.* at 199.

The present case is very different. Shepard has conducted and participated in both written and oral discovery. She has designated expert witnesses to testify at trial. She obtained a trial setting

which was continued at the request of one of the Appellees. She then sought another trial setting by agreement without success. She then filed a motion for a status conference and a trial setting.

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

In this case the trial court issued a notice of a pending Rule 41 dismissal on July 1, 2003. The Hasty's took no action of record; however, on August 4, 2003, a lawyer sent a letter on their behalf to the trial court requesting that the matter remain on the docket. On August 18, 2004, Namihira filed a motion to dismiss for failure to prosecute. The Hasty's did not file a response. Accordingly, the trial court dismissed the case **without** prejudice due to the failure of the Hasty's to take any action of record since March 15, 2002. *Id.* at 1039.

In its opinion the Court of Appeals described the clerk's notice of dismissal as a "... warning to the plaintiffs that the case needed to proceed." *Id.* at 1041. Rather than take action of record, the Hasty's did nothing. The same is not true in the present case. In each instance in this case, Plaintiffs have taken action of record, culminating in the case being set for trial on November 27, 2006. Even after the trial date was continued at the request of counsel of Prairie, Plaintiffs continued their efforts to get the case set for trial in 2008. When the Clerk filed another motion to dismiss in 2008, Plaintiffs again filed a motion requesting that the case be set for trial.

The Court of Appeals also noted that the trial court in *Hasty* had applied a second lesser sanction - dismissal without prejudice - prior to refusing to reinstate the case. The Circuit Court in the present case never applied a second lesser sanction - rather it improperly invoked the "death penalty."

- *Hensarling v. Holly*, 972 So.2d 716 (Miss. App. 2007):

In this case Hensarling filed suit on September 11, 1998. Holly was not served with process

until January 13, 1999, after the 120-day service of process time had expired. No further action took place until October 4, 2002 when Hensarling filed a motion to substitute his attorney. The motion was heard on November 12, 2002 at which time the trial court denied the motion and *sua sponte* dismissed the case for failure to prosecute. The Court of Appeals affirmed and in its opinion noted that the time for discovery had lapsed, along with the time to serve process and the statute of limitations. *Id.* at 722.

None of these facts are present in this case. The case was filed within the statute of limitations, the defendants were timely served and discovery has been conducted. Moreover, the case was set for trial and continued at the request of one of the Appellees.

- *Hill v. Ramsey*, 3 So.3d 120 (Miss. 2009):

Suit was filed in this case on May 18, 2000. An Amended Complaint to add an additional party was filed on April 17, 2003. On April 27, 2005, one of the defendants filed a motion for judgment on the pleadings. The plaintiff filed a response on August 3, 2005. There was no further action in the case until March 1, 2007 when one of the defendants filed a motion for a status conference. Two other defendants then filed a motion to dismiss for failure to prosecute which the trial court granted **without prejudice** (emphasis added). On appeal this Court affirmed; however, it noted that if the dismissal had been with prejudice the outcome may have been different. *Id.* at 123.

The present case is very different. Discovery has been conducted, experts have been designated, Shepard moved for a status conference and a trial setting, and the case was set for trial and continued at the request of one of the Appellees. In *Hill* the plaintiff did none of these things.

- *Hillman v. Weatherly*, 14 So.3d 721 (Miss. 2009):

The complaint in this case was filed on September 4, 2002. The defendant moved to dismiss for want of prosecution on September 26, 2007. The plaintiff responded to the motion on December 17, 2007. The trial court dismissed the case with prejudice on February 29, 2008. On appeal this Court affirmed noting that the plaintiff had failed to respond to discovery or timely provide medical authorizations and that because of this failure many of the plaintiff's medical records were no longer available, that plaintiff obstructed discovery because she did not tell the truth about her medical history in her deposition, that witnesses to the accident were no longer available, and that plaintiff failed to comply with a court order to retain Mississippi counsel. *Id.* at 728.

Once again none of these facts are present in the case currently before the Court. Shepard has not failed to respond to discovery. To the contrary she has responded to more 100 interrogatories, requests for production and requests for admission. No one has argued that there are any missing medical records. There is no allegation that Ms. Shepard or any other witness listed by plaintiffs has been anything but truthful. Finally, there has been no finding that Shepard or her lawyers failed to comply with a court order.

- *Hine v. Anchor Lake Property Owners, Ass'n, Inc.*, 911 So.2d 1001 (Miss. App. 2005):

The initial complaint was filed on May 4, 1998. On July 7, 2000, the defendant served a second set of interrogatories. More than three years after the last activity of record, the defendant on January 8, 2004 filed a motion to dismiss for failure to prosecute. The trial court granted the motion noting that the plaintiffs' last action in prosecuting the case was four years earlier. The Court of Appeals affirmed noting that the plaintiffs had taken no affirmative action to prosecute the case since April 24, 1999. The Court further noted that plaintiffs had still not responded to the second

set of interrogatories though the responses were almost four years past due. *Id.* at 1004.

None of these facts are present in this case. Shepard took the affirmative act of getting her case set for trial on November 27, 2006, only to have it continued at the request of one of the defendants and without opposition from the remaining defendants. She then tried to get the case set by agreement without success. She then filed a motion for a status conference and a trial setting. Shepard had also not only responded to but supplemented her responses to all discovery served by the defendants.

- *Hoffman v. Paracelsus Health Care Corp.*, 752 So.2d 1030 (Miss. 1999):

The complaint was filed in 1991. The case was set for trial on August 2, 1993. The plaintiff filed a motion for continuance and the case was reset for May 16, 1994. Hoffman again requested a continuance of the trial date by motion filed on March 25, 1994. On October 12, 1994 the defendants filed a motion to dismiss for failure to prosecute or in the alternative for a trial setting. As a result of this motion the trial court reset the case for October 30, 1995. One of the defendants then filed bankruptcy which stayed the proceeding until March 19, 1996. Thereafter the plaintiff took no further action. The defendants filed a motion to dismiss for failure to prosecute which was granted by the trial court. The trial court later denied a motion to reconsider noting that the plaintiff had requested numerous continuances, there had been a lack of discovery and no activity since the bankruptcy stay was lifted. On appeal, this Court reversed noting in its opinion that one of the continuances was due, at least in part, to actions taken by the defendants. The Court further wrote:

> While the authority exists to dismiss a case with prejudice for failure to prosecute as a necessary means to control the docket, this power is reserved for egregious cases of delay. The record does not show a claim of prejudice or injury to the appellees by reason of the delay. Dismissal is drastic punishment and should not be invoked except

> where the conduct of the party has been so deliberately careless as to call for drastic action. In view of the course of conduct between the attorneys, the fact that there is no evidence of such deliberate carelessness as to require drastic action, and the fact there is no evidence of prejudice or harm done appellee compel this Court to hold that the circuit court erred in dismissing Hoffman's case with prejudice.

752 So.2d at 1035.

In the present case the Appellants never sought a continuance. The only continuance was at the instance of one of the Appellees and without objection by the other defendants. Moreover, after the continuance Shepard tried to get the case set by agreement and later by filing a motion.

- *Holder v. Orange Grove Medical Specialties*, 2008-CT-01442-SCT (Miss. 2010):

This case is readily distinguishable. The plaintiff never took any depositions, never designated any expert witnesses and never set the case for trial. In the present case Shepard conducted both written and oral discovery, designated expert witnesses and set the case for trial. In fact the case would have been tried commencing November 27, 2006 but for the fact that one of the Appellees requested a continuance to which the remaining defendants did not object. Thereafter Shepard attempted to get the case reset by agreement and later filed a motion to set the case for trial.

- *Illinois Central Railroad Company v. Moore*, 994 So.2d 723 (Miss. 2008):

The complaint was filed on December 28, 1998. There was no activity at all from that time until October 31, 2005 other than four letters from plaintiff's counsel in response to four motions to dismiss from the clerk. On March 24, 2006, the defendant filed a motion to dismiss for failure to prosecute. The trial court denied the motion and stated that it would enter a scheduling order. The defendant took an interlocutory appeal. On appeal this Court reversed and rendered dismissing the case **without prejudice** (emphasis added).

The present case is very different. Shepard has conducted and participated in discovery, she has designated experts to testify at trial, she has attended hearings, she obtained a trial setting which was continued at the request of one of the defendants and without objection from the remaining defendants and she tried to get the case reset by agreement and then filed a motion for a trial setting.

- *Jenkins v. Tucker*, 18 So.3d 265 (Miss. App. 2009):

The case was filed on February 20, 2001. The defendants filed a motion to dismiss for failure to prosecute on August 31, 2006. The trial court dismissed the case **without prejudice** (emphasis added) finding that the plaintiff had been dilatory in pursuing the case, including the failure to respond to discovery for five years. The Court of Appeals affirmed noting the plaintiff's failure to respond to discovery for five years.

The present case is different in several respects. First, Shepard has not only responded to all pending discovery, she has also supplemented those responses on more than one occasion. Shepard also designated expert witnessed for trial and obtained a trial setting. After that trial date was continued at the request of one of the defendants she sought to reset the case both by agreement and by motion.

- *Lone Star Casino v. Full House Resorts, Inc.*, 796 So.2d 1031 (Miss. App. 2001):

This case was remanded on appeal from the Court of Appeals and the mandate was issued on April 28, 1998. No further action was taken by either party until December 22, 1999 when the defendants filed a motion to dismiss for failure to prosecute. The trial court dismissed the case with prejudice on the basis that two witnesses were no longer able to testify, one due to illness and the other death. On appeal, the Court of Appeals reversed and remanded the case noting that the witnesses in question had been deposed and as such their testimony would be available at trial.

The present case is very similar in terms of the availability of witnesses. All relevant witnesses were deposed during discovery. In addition, the hospital and other medical records are available for use at trial. As set forth in detail in Appellants' opening brief, these are the very materials relied upon by the experts for both sides. As such, the trial court should not have dismissed this case with prejudice.

- *Stacy v. Johnson*, 25 So.3d 365 (Miss. App. 2009):

This case was filed on October 16, 1998. On March 4, 2005, the trial court entered an order dismissing the case with prejudice for failure to prosecute. The trial court reinstated the case on March 14, 2005. On July 1, 2006, the trial entered an order to expedite the case and ordering the parties to appear at a show cause hearing on November 2, 2006. Plaintiff failed to appear at the hearing and the case was again dismissed with prejudice. Plaintiff filed a motion to reinstate claiming she did not receive any notice of the November 2nd hearing. On August 6, 2007, the trial court ordered plaintiff to submit a proposed scheduling order within 30 days. Plaintiff failed to submit the proposed scheduling order. On October 2, 2007, the trial court denied the motion to reinstate. This Court affirmed the dismissal and in its opinion noted there was no record of meaningful action taken by the plaintiff to prosecute the case, that the plaintiff failed to attend the show cause hearing and that the plaintiff failed to submit the requested scheduling order. *Id.* at 368.

The facts of the present case are very different. Shepard never failed to attend any hearing or deposition in this case. Shepard never failed to submit any papers requested by the trial court. Shepard conducted extensive discovery and obtained a trial setting only to have the trial date continued at the request of one of the defendants. Thereafter, she sought to reset the case both by agreement and motion.

- *Tolliver v. Mladineo*, 987 So.2d 989 (Miss. App. 2007):

The case was filed on December 16, 2002. An amended complaint substituting a new plaintiff was filed on June 16, 2004. A new lawyer also entered an appearance for the plaintiff shortly thereafter. On March 23, 2005 the trial court issued an order for a mandatory special civil docket call to be held on April 21, 2005. The order provided that failure to attend would result in dismissal with prejudice and/or sanctions. No one appeared for plaintiff at the docket call and the case was dismissed with prejudice. On appeal the Court of Appeals affirmed the dismissal based on a statute of limitations issue but went on to discuss the dismissal for failure to prosecute. The Court noted that the plaintiff failed to appear at the special civil docket call and the plaintiff himself contributed to the delay by first filing the suit without standing. *Id.* at 998.

The instant case is very different. Neither Shepard or her lawyers failed to appear at a docket call or any other hearing set by the trial court. None of the Appellants have alleged that Ms. Shepard did anything to contribute to any delay in this case. Moreover, Shepard has conducted discovery, designated expert witnesses for trial, obtained a trial only to have it continued at the request of one of the Appellees and without objection from the others, and she attempted to reset the case both by agreement and by motion.

- *Vosbein v. Bellias*, 866 So.2d 489 (Miss. App. 2004):

The case was filed on June 28, 1993. The trial court dismissed the case with prejudice for failure to prosecute on November 21, 2001. The Court of Appeals affirmed the dismissal and in its opinion noted that the trial court dismissed the case three times and that even after the case was reinstated there was no activity for 15 months. The Court further noted that the plaintiff failed to submit to the trial court a chronology of events as instructed by the trial court on August 27, 1999.

The Court also found that the plaintiff contributed to the delay by failing to obtain a new attorney for a period of four years.

Again this case is very different. There were no previous dismissals of the present case. There was no failure to submit papers to the trial court. There is no allegation that Ms. Shepard in any way contributed to any delays in this case. Moreover, Ms. Shepard's counsel got the case ready for trial and set it for trial only to have it continued at the request of one of the defendants. Thereafter he attempted to get the case reset by both agreement and motion.

III. THE MOTION TO STRIKE SHOULD BE DENIED:

MRAP 10(f) provides as follows:

> Nothing in the rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

The papers added to the record by the trial court's order are relevant to the issue of whether this case should be dismissed for failure to prosecute. The papers are evidence of the work done on the case and the various positions taken by the parties during this litigation. One would think that all parties would want the sun to shine in on what was done or not done in this case.

The defendants have cited five cases in support of their motion to strike and all are readily distinguishable from the present case. The first case is *Craig v. State*, 44 So.2d 860 (Miss. 1950). An issue arose as to whether a certain person sat on the jury or not. It was not part of the motion for new trial. On appeal the defendant sought to include in the record affidavits obtained after the fact. In the present case all plaintiff has asked this Court to consider are papers that were in existence at the time the trial court issued its ruling.

Similarly, in *Loden v. State*, 971 So.2d 548 (Miss. 2007), the defendant sought to include in the record an affidavit obtained after the trial court had ruled on the pending issues. Again, this is not what plaintiff has asked this Court to consider.

The final Mississippi case, *KBL Properties, LLC v. Bellin*, 900 So.2d 1160 (Miss. 2005), relied upon by defendants is also very similar to the two already discussed. The appeal involved the granting of a summary judgment. On appeal the defendant sought to add to the record a transcript of a meeting that was not introduced in opposition to the summary motion. Such a transcript is quite different from the pleadings and other papers plaintiff is asking this Court to consider. In addition, a motion for summary judgment is quite different from a motion to dismiss for lack of prosecution.

The last two cases relied upon by the defendants are from federal courts other than from the State of Mississippi or the Fifth Circuit. In *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556 (8th Cir. 2008) the issue was the enforcement of a settlement agreement. One of the parties sought to add to the record an affidavit made after the trial court's ruling. This affidavit was properly stricken for the same reasons this Court struck the affidavits in *Craig* and *Logan*. This case is likewise distinguishable from the present case for the same reasons *Craig* and *Logan* are distinguishable. The final case is *Naser Jewelers, Inc. v. City of Concord, New Hampshire*, 538 F.3d 17 (1st Cir. 2008). That case involved a motion for summary judgment. First this is not an appeal from a summary judgment. MRCP 56 makes it very clear what a party must do in response to a motion for summary judgment. Second, the court in its opinion commented that the documents at issue contributed nothing to plaintiff's case. See Footnote 1 at page 20.

IV. CONCLUSION.

Appellants, Delia Shepard, Individually, and as Administratrix of the Estate of Rodney Stowers, Deceased, respectfully submit that the Court should deny the motion to strike and further that the Court should reverse the dismissal of this case and remand this case to the trial court for a trial on the merits. In the alternative, Appellants submit that dismissal with prejudice is too drastic a sanction and that rather than impose the "death penalty" or "nuclear option" this Court should dismiss the case without prejudice.

DATED this the 29th day of December, 2010.

Respectfully submitted,

PITTMAN, GERMANY, ROBERTS
& WELSH, L.L.P.

BY: _____
ROBERT G. GERMANY

OF COUNSEL:

ROBERT G. GERMANY, MSB NO [redacted]
PITTMAN, GERMANY, ROBERTS & WELSH, L.L.P.
410 South President Street (39201)
Post Office Box 22985
Jackson, Mississippi 39225-2985
Telephone: 601-948-6200
Facsimile: 601-948-6187

CERTIFICATE OF SERVICE

I, Robert G. Germany, attorney for Appellants, do hereby certify that I have served a true and correct copy of the above and foregoing document by United States mail, postage prepaid, to the following persons:

Aubrey E. Nichols, Esquire
M. Jay Nichols, Esquire
Nichols Crowell Gillis Cooper & Amos
P.O. Box 1827
Columbus, Mississippi 39703-1827

Tommie G. Williams, Esquire
J. L. Wilson, IV, Esquire
Upshaw, Williams
P.O. Drawer 8230
Greenwood, Mississippi 38930

Jeffrey J. Turnage, Esquire
Mitchell McNutt & Sams
P. O. Box 1366
Columbus, MS 39703

Honorable Lee J. Howard
Post Office Box 1344
Starkville, Mississippi 39760

This the 29th day of December, 2010.

ROBERT G. GERMANY