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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-01267

Filed Aug 16-2010

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**

APPEAL FROM THE CIRCUIT COURT OF LOWNDES COUNTY
HONORABLE LEE J. HOWARD, CIRCUIT JUDGE

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

ORAL ARGUMENT REQUESTED

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

Attorneys for Appellants Delia Shepard, Individually and as Administratrix of the Estate of Rodney Stowers, Deceased

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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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Delia Shepard, Individually and as the Administratrix of the Estate of Rodney Stowers, Deceased, Appellants-Plaintiff;
2. Robert G. Germany, Esq., Counsel for Appellants-Plaintiff;
3. PITTMAN, GERMANY, ROBERTS & WELSH, LLP, Counsel for Appellants-Plaintiff;
4. Prairie Anesthesia Associates, Appellee-Defendant;
5. James Lawrence Wilson, IV, Esq., Counsel for Prairie Anesthesia Associates;
6. Tommie G. Williams, Esq., Counsel for Prairie Anesthesia Associates;
7. UPSHAW, WILLIAMS, BIGGEERS, BECKHAM & RIDDICK, LLP, Counsel for Prairie Anesthesia Associates;
8. Russell Linton, M.D., Appellee-Defendant;
9. Jeffrey Johnson Turnage, Esq., Counsel for Russell Linton, M.D.;

10. MITCHELL, MCNUTT & SAMS, P.A., Counsel for Russell Linton, M.D.;

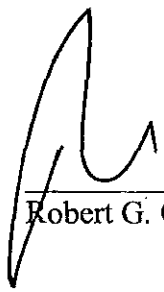
11. Golden Triangle Regional Medical Center, Appellee-Defendant;

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 16th day of August, 2010.



Robert G. Germany, Esq.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Mississippi Rule of Appellate Procedure 34, Plaintiffs respectfully request oral argument. The procedural history of this case is quite complex and is at the crux of the issue before the Court. Oral argument would provide the parties with the opportunity to expound upon this history and to answer any questions the Court may have regarding the same. For these reasons, Plaintiffs believe that oral argument would be beneficial.

STATEMENT OF THE ISSUE

1. 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?

STATEMENT OF THE CASE

This case arises out of the death of Mississippi State football player Rodney Stowers. On September 28, 1991, Stowers suffered a fracture of the right tibia during the first half of Mississippi State's football game against the Florida Gators at "The Swamp" in Gainesville, Florida. Stowers was permitted by team physician and Defendant Russell Linton, M.D. to return to the sidelines for the second half of the game, participate in post-game activities with his teammates, and return to Starkville, Mississippi with the teammates on the next day.

On September 29, 1991, Stowers was admitted to Golden Triangle Regional Medical Center where he was examined and treated by Dr. Linton. During the night and early morning hours of September 30th, Stowers' temperature became elevated and his Hemoglobin and Hematocrit levels dropped. By 3:30 p.m. on September 30th, Stowers' temperature had reached 103 degrees despite the fact that he had received medication to lower his temperature, his pulse was 101, and his respiratory rate was 24. Despite these abnormal vital signs, Dr. Linton went forward with a surgical procedure to stabilize Stowers' broken tibia. In connection with this

surgical procedure, general anesthesia was administered to Stowers. Following surgery, at 11:00 p.m. on September 30th, Stowers pulse had reached 152 and his temperature was 104 degrees. By midnight, Stowers was not responsive to verbal or painful stimuli and his temperature had reached 104.5 degrees. At this point, Dr. Linton ordered a battery of tests that revealed Stowers was suffering from Adult Respiratory Distress Syndrome related to fat emboli. Stowers was transferred to intensive care and received extensive treatment. Despite this treatment, in the early morning hours of October 3, 1991, Stowers stopped breathing and was ultimately pronounced dead at 7:03 a.m..

On October 1, 1993, the instant wrongful death action was filed in the Circuit Court of Scott County, Mississippi. (R.14-18)[1] By Order dated April 26, 1994, the Circuit Court of Scott County, Mississippi transferred this action to the Circuit Court to Lowndes County Mississippi, where a prior-filed wrongful death action[2] related to the death of Stowers was already pending ("the Jones action"). (R. 143-144) On May 23, 1994, the court file was received by the Clerk of the Lowndes County Circuit Court, and the action was re-filed. (R. 14) By Order dated November 2, 1994, the Circuit Court of Lowndes County stayed this action pending resolution of dispositive motions filed in the Jones action. (R. 147-148; RE. 21-22)

On May 30, 1996, the Mississippi Supreme Court reversed the rulings of the Hinds County Chancery Court denying multiple requests for DNA testing in connection with the Jones action and ordered that blood genetic marker testing on Kierra Brachell Jones be conducted. (R.

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[1] "R" refers to the Record on Appeal. "RE" refers to the Appellants' Record Excerpts.

[2] On May 23, 1994, Telesia L. Jones, on behalf of Kierra Brachell Jones, the alleged daughter of Stowers, commenced a wrongful-death action in the Circuit Court of Lowndes County, Mississippi (Civil Action No. 93-068-CV1) asserting medical malpractice claims against Defendants. (R. 36-46)

177-180) As a result of this DNA testing, it was conclusively established that Stowers was not the father of Kierra Brachell Jones, (R. 181-189), and the Jones action was ultimately dismissed.

On July 22, 1997, after a delay of nearly three years, the Circuit Court of Lowndes County entered an order lifting the stay of this action and setting expert disclosure and motion deadlines. (R. 199-200; RE. 23-24). On August 27, 1997, Prairie filed its Answer and propounded written discovery to Plaintiff. (R. 201-206) On August 29, 1997, Dr. Linton filed his Answer (R. 207-213), and on September 10, 1997, Dr. Linton propounded written discovery to Plaintiff. (R. 218-219) On September 2, 1997, Defendant Golden Triangle filed its Answer. (R. 214).

Due to a heavy trial calendar in the second half of 1997, Plaintiffs' Counsel was unable to timely respond to Defendants' written discovery, (R. 271), resulting in Defendants Prairie and Dr. Linton filing Motions to Compel. (R. 220 & 255) On February 9, 1998, the Circuit Court conducted a hearing on Defendants' Motion to Compel. (R. 313) The Circuit Court granted Defendants' Motions to Compel and ordered Plaintiffs to provided to Defendants complete interrogatory responses and the requested documents on or before February 27, 1998. (R. 316-318) The Circuit Court further ordered that discovery depositions of Defendants and/or its employees shall not be conducted until Plaintiffs designate their experts on or before April 15, 1998. (Id.) Additionally, the Circuit Court entered an Amended Scheduling Order extending the expert, discovery and motions deadlines. (R. 314-315; RE. 25-26).

Through the course of discovery in this action, Plaintiffs have provided to Defendants responses and supplemental responses to the following one hundred and eleven (111) interrogatories, requests for production and requests for admissions:

- Plaintiffs' Responses to First Set of Requests for Admissions Propounded by Defendant Linton, dated September 11, 1997 (R. 303-306);
- Plaintiffs' Responses to First Set of Interrogatories Propounded by Defendant Linton, dated February 2, 1998 (R. 280-293);
- Plaintiffs' Responses to First Requests for Production of Documents and Things Propounded by Defendant Linton, dated February 2, 1998 (R. 294-302);
- Responses to Requests for Discovery, dated February 2, 1998 (R. 687-697);
- Plaintiffs' First Supplemental Responses to First Set of Interrogatories Propounded by Dr. Linton, dated February 27, 1998 (R. 699-711);
- Plaintiffs' Second Supplemental Response to First Set of Interrogatories Propounded by Dr. Linton, dated April 21, 1998;
- First Supplemental Response to Requests for Discovery, dated April 21, 1998 (R. 713-720);
- Plaintiffs' Response to Requests for Production of Documents by Golden Triangle contained in the Notice of Deposition of Plaintiff, dated April 28, 1998 (R. 529-533);
- Plaintiffs' Responses to Defendant Golden Triangle's First Request for Admissions,[3] dated April 28, 1998 (R. 535-537);
- Plaintiffs' Responses to Defendant Golden Triangle's First Request for Production of Documents and Things, dated May 19, 1998 (R. 727-731); and
- Plaintiffs' Response to Defendant Golden Triangle's First Set of Interrogatories, dated May 28, 1998 (R. 733-746).

[3] On April 22, 1998, Golden Triangle propounded its first set of written discovery to Plaintiff. (R. 524-527)

Additionally, in accordance with the Circuit Court's February 23, 1998 Order Compelling Discovery, on April 15, 1998, Plaintiffs served their Designation of Experts. (R. 521-523) Further, on April 21, 1998, as part of Plaintiffs' first supplementation of its interrogatory responses to Prairie, Plaintiffs provided a complete response to Prairie's expert interrogatory, including a two page outline of the opinions to be offered by Dr. Barry W. Levine regarding the malpractice committed by Defendants, and the basis for these opinions. (R. 713-720)

Acknowledging the completeness of Plaintiffs' expert designation and the medical opinions offered by Dr. Levine, on June 11, 1998 Defendants permitted Plaintiffs to conduct the depositions of Dr. Linton and Dr. Michael White.[4]

On June 19, 1998, Prairie served its Designation of Experts identifying five physicians who may be called as experts at trial (R. 539-541); supplemented its expert disclosures, including identifying two additional physicians who may be called as experts at trial, on July 14, 1998 (R. 611-653); and further supplemented its expert disclosures by identifying yet another physician who may called as an expert at trial, on September 3, 2002. (R. 748-751) On July 14, 1998, Dr. Linton served his Designation of Experts identifying two physicians he expected to call to testify at trial (R. 543-595), including a thirteen page outline of "Expected Testimony of Expert Witnesses." (R. 597-610) On July 14, 1998, Golden Triangle served its Designation of Experts. (R. 655-656) The discovery deadline set by the Circuit Court in its February 23, 1998 Amended Scheduling Order expired on September 15, 1998. (R. 314)

On February 11, 2000, with discovery complete and in response to a clerk's motion to dismiss, Plaintiffs filed a Motion for Trial Setting requesting that "the Court set this case down

[4] Transcripts of these depositions are contained in the appeal record as exhibits to the May 29, 2009 hearing conducted by the Circuit Court.

for trial at the earliest possible date." (R. 321) Defendants failed to file a response to this Motion for Trial Setting or seek leave of court to conduct any additional discovery. On February 13, 2001, again in response to a clerk's motion to dismiss, Plaintiffs filed a second Motion for Trial Setting, this time also requesting a status conference with the Circuit Court. (R. 325) By Agreed Order dated September 28, 2001, the Circuit Court set a pre-trial conference for November 19, 2001. (R. 329) Due to a prior trial setting that conflicted with the November 19, 2001 pre-trial conference, on November 14, 2001, Plaintiffs' Counsel requested a continuance of the pre-trial conference. (R. 337) The clerk did not reset the pre-trial conference, and, instead, filed a third clerk's motion to dismiss. (R. 338)

On April 15, 2004, Plaintiffs' Counsel again moved for a trial setting and status conference with the Circuit Court. (R. 340) On April 12, 2005, Plaintiffs' Counsel renewed this request for a trial setting and status conference. (R. 346) By Order dated August 23, 2005, the Circuit Court set a hearing on Plaintiffs' motion for trial setting and status conference for November 14, 2005. (R. 349) A hearing was conducted on November 14, 2005, and, although not memorialized in a written order, the Circuit Court and the parties agreed to a November 27, 2006 trial date. (R. 396-397) Plaintiffs' counsel prepared and circulated an Amended Scheduling Order that apparently was never entered by the Court. (R. 777-779; RE. 27-29)

During the November 14, 2005 hearing, which was attended by Counsel for each of the Defendants, no argument was raised that the case was too old to go to trial or that any Defendant had suffered any prejudice as a result of the passage of time. Additionally, during the hearing, Prairie's Counsel informed the parties and the Circuit Court that he had a potential conflict with the November 27, 2006 trial setting.

Prairie's Counsel subsequently advised the parties and the Circuit Court that the conflict could not be cleared, and Plaintiffs' Counsel took Prairie's Counsel at his word and extended to him a professional courtesy by not opposing Prairie's Counsel's request to continue the November 27, 2006 trial setting. (R. 396-397; RE. 37-40) Accordingly, by Agreed Order dated November 27, 2006, the Circuit Court "continued" the trial "to a date in the future." (Id.)

On September 12, 2007, Plaintiffs' Counsel contacted the Circuit Court's administrator to obtain available first setting dates to reset this case for trial. (R. 399; RE. 41) On September 13, 2007, the Circuit Court's administrator provided to Plaintiffs' Counsel the next four available first setting for trial--May 19, 2008, May 27, 2008, November 17, 2008 and December 1, 2008--and Plaintiffs' Counsel provided these available trial settings to Defendants' Counsel. (R. 362; RE. 42) Plaintiffs' Counsel received no response from Linton's Counsel to the September 13, 2007 letter, thus, Plaintiffs' Counsel was unable to reset this matter for trial. (R. 358)

On March 28, 2008, the clerk filed another motion to dismiss. (R. 353) In response to this motion, Plaintiffs' Counsel advised the clerk and the Circuit Court of the steps he had taken to attempt to reset this matter for trial. (R. 358-366) Additionally, on April 29, 2008, Plaintiffs' Counsel filed another motion for a trial setting and conference with the Court. (R. 355-357; RE. 43-45) Rather than responding to Plaintiffs' motion for trial setting and conference with the Court, on May 21, 2008, Prairie's Counsel filed a Motion to Dismiss for Want of Prosecution. (R. 367-375) Incredibly, the only reason the case did not proceed to trial a year and one-half earlier as scheduled on November 27, 2006, was due to a conflict raised by Prairie's Counsel with this prior trial setting. Further, for the first time in this case, Prairies' Counsel baldly asserted that Defendants have been prejudiced by the passage of time because they cannot find former employees (though there is no attempt to identify what steps have been taken to locate

these former employees or to identify the specific information that they may have that now has been lost) and memories of witnesses have been "obliterated". (R. 371) Prairies' Counsel failed to raise any argument regarding alleged prejudice during the November 14, 2005 status conference with the Circuit Court or in its letter raising a conflict with the November 27, 2006 trial setting and request for a continuance. Defendants Dr. Linton and Golden Triangle filed one page joinders in Prairie's Motion to Dismiss, wholly failing to make any attempt to demonstrate any prejudice that they have suffered to their ability to defend Plaintiffs' claims. (R. 374 & 376)

On November 20, 2008, Plaintiffs' Counsel filed a response to Prairie's Motion to Dismiss for Want of Prosecution outlining his attempts to reset this case for trial following the continuance of the November 27, 2006 trial setting necessitated by an alleged conflict by Prairie's Counsel. (R. 379-400) Further, in this response, Plaintiffs' Counsel argued that Defendants had failed to offer any evidence to establish how they have been prejudiced in their defense of this case by the passage of time, or what attempts they had made to located former employees who are alleged by Defendants to be lost witnesses. (Id.)

On November 21, 2008, the Circuit Court conducted a hearing on Defendants' Motion to Dismiss for Want of Prosecution. (R. Vol. 5 of 5—pages not numbered) During the hearing, Defendants' Counsel offered little more than conclusory assertions that "this case demonstrates dilatoriness," the "lesser sanctions" of clerk's motions to dismiss "have not achieved the desired effect," and "[m]y client will be deprived of the ability to present crucial items of defense from a three-day period when Mr. Stowers was alive and was being treated by many of these medical providers [and w]e won't be able to offer those recollections, and our defense will be hampered, and we will be prejudiced."

In response to these arguments, Plaintiffs' Counsel pointed out that the "Court set the case for trial in November 2006. Nobody was claiming that the case was too old. Nobody was claiming they couldn't find witnesses. The case didn't get tried in November 2006 because of Mr. Williams's [(Prairie's Counsel's)] conflict." In response to the alleged unavailability of witnesses, Plaintiffs' Counsel argued that "there's no suggestion as to what they have done to find those people other than talking to the hospital. I don't think that satisfies or meets their burden of prejudice." Further, Plaintiffs' Counsel argued that one available lesser sanction than dismissal would be to require Plaintiffs' Counsel, at their expense, to locate the missing witnesses and provide to Defendants' Counsel current contact information. Finally, Plaintiffs' Counsel argued that Defendants' Counsel "hasn't told any of us what these [missing] people supposedly know or don't know" and it is common in medical malpractice cases for witnesses to review medical records and "refresh their memory and reconstruct events."

On December 18, 2008, the Circuit Court entered an Order granting Defendants' Motion to Dismiss for Want of Prosecution. (R. 402-405; RE. 15-18) In its Order, the Circuit Court correctly acknowledged the three factors to be considered when ruling on a Motion to Dismiss under Rule 61. (Id.) Addressing the first factor, dilatory conduct, the Circuit Court concluded that because Plaintiffs' Counsel's failed "to bring [its Motions for Status Conference and Trial Setting] to the Court's attention or to request a hearing thereon. . . Plaintiffs' conduct was dilatory in nature." (R. 403-404). Turning to the second factor, availability of a lesser sanction, the Circuit Court concluded 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) Finally, addressing the third factor, aggravating circumstances, the Circuit Court concluded that the first and third aggravating factors "are not applicable." (R. 404). However, without requiring

Defendants to proffer any evidence to establish prejudice, the Circuit Court concluded "that the Defendant has been prejudiced due to the lengthy amount of time that has accrued." (R. 405) In this Order, the Circuit Court failed to address Plaintiffs' April 29, 2008 Motion for Status Conference and Trial Setting that was filed prior to Defendants' Motion to Dismiss for Want of Prosecution. (R. 355-357)

On December 29, 2008, Plaintiffs filed a Motion to Alter or Amend Order Granting Defendants' Motion to Dismiss for Lack of Prosecution. (R. 406-408) Plaintiffs argued that the Circuit Court erred in concluding there was dilatory conducted on the part of Plaintiffs because the November 27, 2006 trial setting was continued at the request of Defendants' Counsel, and Defendants' Counsel failed to respond to Plaintiffs' Counsel's attempts to get the case re-set for trial. (R. 406) Further, Plaintiffs' Counsel argued that the Circuit Court erred in concluding that a lesser sanction than dismissal was not available, as the Circuit Court failed to address Plaintiffs' Counsel's offer to locate, at Plaintiffs' Counsel's expense, any alleged witnesses that Defendants' Counsel represented they cannot locate. (Id.) Finally, Plaintiffs' Counsel argued that Defendants had failed to offer any evidence to support their bald assertion that loss of memory by witnesses would prejudice their defense of Plaintiffs' claims, thus the Circuit Court erred in concluding that Defendants had suffered prejudice as a result of the passage of time. (R. 407).

On May 29, 2009, the Circuit Court conducted a hearing on Plaintiffs' Motion to Alter or Amend Order Granting Defendants' Motion to Dismiss for Lack of Prosecution. During this hearing, the issue of the case being set for trial in November 2006 and subsequently being continued due to an alleged conflict of Prairie's Counsel was discussed, and on two occasions, the Circuit Court stated that this continuance at the request of Prairie's Counsel gives me some

pause. Nevertheless, on June 29, 2009, the Circuit Court, while expressly acknowledging that "the recent continuance was done on the behalf of Defendant Prairie Anesthesia on October 16, 2006," denied Plaintiffs' Motion to Alter or Amend Order Granting Defendants' Motion to Dismiss for Lack of Prosecution. (R. 462-463; RE. 19-20) In this Order, the Court largely failed to address the merits of the arguments raised by Plaintiffs' Counsel, specifically Plaintiffs' Counsel's arguments regarding the availability of a lesser sanction than dismissal, and Defendants' failure to offer any evidence to support their bald assertion that loss of memory by witnesses would prejudice their defense of Plaintiffs' claim.

On July 29, 2009, Plaintiffs timely filed a Notice of Appeal. (R. 464)

SUMMARY OF THE ARGUMENT

The Circuit Court plainly abused its discretion by improperly applying the "Three Factors" and dismissing with prejudice Plaintiffs' wrongful death suit for failure to prosecute absent a finding of egregious or contumacious conduct by Plaintiffs or their Counsel.

Plaintiffs' conduct was not dilatory. This case was set for trial on November 27, 2006. It was continued at the request of Counsel for Prairie. Plaintiffs' Counsel contacted the Court Administrator on September 12, 2007 to obtain dates for a trial setting in 2008. Plaintiffs' Counsel provided those dates to defense counsel on September 13, 2007. Counsel for Dr. Linton did not respond. On March 28, 2008, The Clerk filed a motion to dismiss for failure to prosecute despite Plaintiffs' Counsel's attempt to get the case set for trial. On April 29, 2008, Plaintiffs filed a Motion for MRCP Conference and Other Relief in which they again asked the Circuit Court to set the case for trial.

The Circuit Court erred in not considering or applying "lesser sanctions" in this case. In the case relied upon by the Circuit Court in dismissing this case, the Plaintiffs did not take any action of record in response to the Clerk's motion to dismiss. In the present case, Plaintiffs not

only took such action at every turn but actually got the case set for trial. Subsequently the case was continued at the request of Counsel for Prairie. In addition, the Plaintiffs in the case relied upon by the Circuit Court did not file a response to the motion to dismiss. Plaintiffs in the present case not only filed a lengthy response but appeared at a hearing on the motion and presented argument. Finally, in the case relied upon by the Circuit Court the dismissal was without prejudice. Here the dismissal is with prejudice.

The Circuit Court erred in finding actual prejudice to the Defendants. The sole basis for this finding was the passage of time and Prairie's unsubstantiated claims of unnamed witnesses losing their memories and being difficult to locate. This is a medical malpractice case and as such it is a battle of the experts. The issue is whether the surgery should have been delayed. The doctors who participated in that surgery were deposed on June 11, 1998 and explained at length why they decided to proceed with the surgery. The pleadings in this case clearly demonstrate that the experts for all parties are relying on the medical records and the depositions taken in this case. Not a single expert is relying on the testimony of some unnamed witness who is losing their memory or who may be difficult to locate.

The Court should reverse the dismissal of this case and remand it to the Circuit Court of Lowndes County, Mississippi for a trial on the merits.

ARGUMENT

I. Standard of Review.

The Court applies an abuse of discretion standard in reviewing the trial court's dismissal of a case under Rule 41(b) for failure to prosecute. *See, e.g., Cox v. Cox*, 976 So.2d 869, (Miss. 2008)(citing *AT&T v. Days Inn of Winona*, 720 So.2d 178, 180 (Miss. 1998)(citations omitted); *Camacho v. Chandeleur Homes, Inc.*, 862 So.2d 540, 542 (Miss. Ct. App. 2003).

II. The "Three Factors" to be Applied in Ruling on a Motion to Dismiss for Want of Prosecution

As the Court previously has recognized, "the law favors trial of issues on the merits, and dismissals for want of prosecution are therefore employed reluctantly." *AT&T*, 729 So.2d at 180 (citations omitted); *see also Hoffman v. Paracelsus Health Care Corp.*, 752 So.2d 1030, 1034 (Miss. 1999)(same). Under Mississippi law, "[t]here is no set time limit on the prosecution of an action once it has been filed, and dismissal for failure to prosecute will be upheld only 'when the record shows that a plaintiff has been guilty of dilatory or contumacious conduct.'" *AT&T*, 729 So.2d 180; *see also Hoffman*, 752 So.2d 1034. Further, the Court previously has recognized that dismissal with prejudice for failure to prosecute "is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissal with prejudice are reserved for the most egregious cases." Id.[5]

Mississippi Rule of Civil Procedure 41(b) permits a defendant to move for the dismissal of an action "[f]or failure of the plaintiff to prosecute. . . ." *Cox*, 976 So.2d at 874 (quoting Miss. R. Civ. Pro. 41(b)). In *AT&T*, the Court, adopting the test established by the Fifth Circuit in *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir. 1982), set forth three factors to be weighed in determining whether a dismissal under Rule 41(b) is proper: (1) whether there was a clear record of delay or contumacious conduct by the plaintiff; (2) whether lesser sanctions would serve the

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[5] *See also, Lone Star Casino Corp. v. Full House Resorts, Inc.*, 796 So.2d 1031, 1032 (Miss. Ct. App. 2001) (In Mississippi there is no set time limit on the prosecution of an action once it has been filed, and dismissal for failure to prosecute will be upheld only where the record shows that a plaintiff has been guilty of dilatory or contumacious conduct. Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and is reserved for the most egregious cases, usually where the requisite factors of clear delay and ineffective lesser sanctions are bolstered by the presence of at least one of the aggravating factors as set forth in *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir. 1982). These aggregating factors have been held to specifically include the extent to which the plaintiff, as distinguished from his counsel have been held responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct. Id.")

interests of justice; and (3) whether any "aggravating factors" exist. Id. (citing *AT&T*, 720 So.2d at 181). The Court went on to define "aggravating factors" to include: (1) the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, (2) the degree of actual prejudice to the defendant, and (3) whether the delay was the result of intentional conduct. Id. (citing *AT&T*, 720 So.2d at 181).

III. The Circuit Court Failed to Properly Apply the "Three Factors" and Abused Its Discretion in Dismissing the Case with Prejudice.

a. Plaintiffs' conduct was not dilatory.

The Circuit Court found that Plaintiffs' conduct was dilatory because they did not bring their Motion(s) for Status Conference and Trial Setting to the Court's attention or request a hearing thereon. (R. 403-404, RE. 16-17). There are a number of problems with this finding. First and foremost it ignores the fact that this case was set for trial on November 27, 2006 and was continued at the request of counsel for Prairie. (R. 778, RE. 28; R. 510-511) Second, it ignores Plaintiffs' efforts to get the case on the trial calendar in September, 2007. (R. 399, RE. 41; R. 400, RE. 42). Third, the Circuit Court cited no authority for the proposition that the alleged failure to bring these motions on for hearing constituted "dilatory conduct" in the setting of a motion to dismiss.

The true time-line of events is as follows:

- In November, 2005 the Circuit Court set the case for trial on November 27, 2006. No one claimed that Plaintiffs had been dilatory in pursuing the case nor that any witnesses were unavailable;
- By letter dated October 11, 2006, counsel for Prairie requests the Circuit Court to continue the case (R. 510-511);

- On November 27, 2006, the Circuit Court entered the Agreed Order of Continuance (R. 658-661, RE. 37-40);
- By letter dated September 12, 2007, Plaintiffs request that the Court Administrator provide a list of available trial dates during the year 2008 (R. 399, RE. 41);
- 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); and
- On April 29, 2008, Plaintiffs filed their Motion MRCP 16 Conference and for Other Relief in which they asked the Circuit Court to set the case for trial. (R. 355-357, RE. 43-45)

Plaintiffs got the case set for trial on November 27, 2006. The trial date was continued at the request of Prairie. During September, 2007, Plaintiffs attempted to get the case reset for trial in 2008. Six months later the Clerk moved to dismiss the case and Plaintiffs again asked the Circuit Court to set the case for trial. These facts clearly do not support a finding of "dilatory conduct."

b. The Circuit Court Erroneously Found The Clerk's Motions to Dismiss to be "Lesser Sanctions" Under the Facts of This Case.

Relying on *Hasty v. Namihira*, 986 So.2d 1036 (Miss.App. 2008), the Circuit Court found that the Clerk's motions to dismiss constituted lesser sanctions and thus lesser sanctions were no longer available in this case. This finding by the Circuit Court ignores the time line in this case and misapplies the holding in *Hasty*.

The Clerk's motions to dismiss were filed in 2000, 2001, 2004 and 2008. (R. 319-320, R. 323-324, R. 338-339 and R. 353-354). In each instance Plaintiffs filed a response to the motion to dismiss requesting a status conference and a trial setting. (R. 321-322, R. 325-326, R. 340-341 and R. 355-357)

The facts in *Hasty* were much different. There 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. 986 So.2d 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 Prairie, Plaintiffs continued their efforts to get the case set for trial in 2008. (R. 399-400; RE. 41-42). When the Clerk filed another motion to dismiss in 2008, Plaintiffs again filed a motion requesting that the case be set for trial. (R. 355-357; RE. 43-45).

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."

c. The Circuit Court Erred in Finding Actual Prejudice to the Defendants.

The Circuit Court found actual prejudice "... due to the lengthy amount of time that has accrued." (R. 404-405; RE. 17-18). Apparently this finding was based upon Prairie's claims that witnesses **(unidentified)** had already started losing their memories and **(without evidentiary basis in the record)** that it will be difficult to locate these witnesses. This finding by the Circuit Court is also not supported by the record. It ignores a number of undisputed facts which are set forth below:

- There is a medical record which memorializes the events giving rise to this case;
- The deposition of Dr. Linton was taken on June 11, 1998;
- The deposition of Dr. White (Prairie) was taken on June 11, 1998;
- Designation of Expert Witnesses Prairie Anesthesia Associates (R. 539-541);
- Designation of Expert Witnesses by Defendant, Russell C. Linton, M.D. (R. 543-595);
- Expected Testimony of Expert Witnesses Expected to Be Called on Behalf of Dr. Linton (R. 597-610);
- Supplemental Designation of Expert Witnesses by Prairie Anesthesia Associates (R. 612-653);
- Golden Triangle Regional Medical Center's Designation of Expert Witnesses (R. 655-656); and
- Second Supplemental Designation of Expert Witnesses by Prairie Anesthesia Associates (R. 748-750).
- First Supplemental Response to Requests for Discovery (R. 713-720).

This is a medical malpractice case. As is the case in most medical malpractice actions, it comes down to a battle of the experts. When Plaintiffs got the case set for trial on November 27, 2006 and then tried in September, 2007 to get a setting in 2008, no one claimed that any witness was losing his or her memory or that any witness would be difficult to locate.

The Defendants' designations describe in detail the expected testimony of the defense expert witnesses and more importantly, **the basis of the expert testimony**, none of which includes the testimony of the witnesses that "have started losing their memories" or which will be "difficult to locate." For example, the following appears in the Expected Testimony of Expert Witnesses Expected to Be Called on Behalf of Dr. Linton:

> Dr. Russell's and Dr. Fabian's opinions will be based upon their review of the following documents and things: (1) the x-rays and medical records compiled on Rodney Stowers including but not limited to the x-rays made to Stowers' right lower extremity in Florida on September 28, 1991, Columbus Orthopaedic Clinic records, x-rays made at and hospital records compiled by the Golden Triangle Regional Medical Center, and the Columbus Pathology Autopsy Report; and (2) the deposition testimony taken in this case and the prior litigation styled, *Jones v. Prairie Anesthesia Associates, et al.*, Lowndes County Circuit Court Number 93-068-CV1 including but not limited to the deposition testimony of Mrs. Delie Shepard, Mr. Percy Shepard, Ms. Telesia Jones, Dr. Russell C. Linton, and Dr. Michael White.

(R. 598)

Similarly, the Supplemental Designation of Expert Witnesses by Prairie Anesthesia Associates does not state that any of its expert witnesses is relying on the testimony of some witness, missing or otherwise. (R. 611-653). The Second Supplemental Designation of Expert Witnesses by Prairie Anesthesia Associates is even more informative. In that designation, Prairie identifies Dr. Donald Ganier as a potential expert. The following appears in the designation:

> Dr. Donald Ganier has reviewed the medical records pertaining to Mr. Rodney Stowers' admission at Golden Triangle Regional Medical Center on 9/29/91. Dr. Gainer has also reviewed the report of the autopsy performed upon Mr. Stowers' remains, and he has read the depositions of Doctors White, Voller and Linton. Dr. Gainer has also reviewed a letter written by Dr. Barry Levine on November 1, 1993 stating Dr. Levine's opinions in this matter.

(R. 748)

The same arguments apply to Golden Triangle as it simply designated the experts identified by Prairie and Linton. (R. 654-565).

The First Supplemental Response to Requests for Discovery clearly sets forth Plaintiffs' theory of the case. (R. 713-720). The following is taken from the Supplemental Response to Interrogatory No. 1:

> Dr. Levine is expected to testify that the medical records revealed there was significant deviation from accepted medical standards and that this deviation caused or contributed to Rodney's untimely death. Dr. Levine is expected to testify that Rodney was noted to have an excessively high temperature several hours prior to surgery and this elevation persisted prior, during and following surgery. Dr. Levine is expected to testify that there was an associated increase in respiratory rate and blood pressure. Dr. Levine is expected to testify that in the face of an undiagnosed temperature elevation of this magnitude, surgery should have been delayed and the patient completely evaluated.

This case is clearly about the timing of the surgery. The two doctors (Linton and White) who participated in that surgery were deposed on June 11, 1998 and explained their reasons for going forward with the surgery. Neither of them contended that there was anything that had been omitted from the hospital chart or that any of the information in the chart was incorrect. In fact, all of the medical experts, Plaintiffs' and Defendants', are relying on the medical records in support of their opinions.

There simply are no witnesses that have already started losing their memories or that would be difficult to locate. The Circuit Court erred in finding that the Defendants had sustained actual prejudice.

CONCLUSION

The Circuit Court abused its discretion in granting the motion to dismiss and in denying the motion to reconsider. The dismissal should be reversed and the case should be remanded to the Circuit Court of Lowndes County, Mississippi for trial.

This the 16th day of August, 2010.

Respectfully submitted,

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

By: _____
ROBERT G. GERMANY

OF COUNSEL:

Robert G. Germany, Esq. (MSB No. [redacted])
PITTMAN, GERMANY ROBERTS & WELSH, L.L.P.
410 South State 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, do hereby certify that I have this day caused to be served by United States Mail, postage prepaid, a correct copy of the foregoing instrument to the following persons:

James Lawrence Wilson, IV, Esq.
Tommie G. Williams, Esq.
Upshaw, Williams, Biggers, Beckham & Riddick, LLP
Post Office Drawer 8230
Greenwood, MS 38935-8230
Counsel for Prairie Anesthesia Associates

Jeffery Johnson Turnage, Esq.
Mitchell, McNutt & Sams
Post Office Box 1366
Columbus, MS 39703-1366
Counsel for Russell Linton, M.D.

M. Jay Nichols, Esq.
Aubrey E. Nichols, Esq.
Nichols, Crowell, Gillis, Cooper & Amos
Post Office Box 1827
Columbus, MS 39703-1827
Counsel for Golden Triangle Regional Medical Center

Honorable Lee J. Howard
Circuit Judge
Post Office Box 1344
Starkville, MS 39760

This the 16th day of August, 2010.

ROBERT G. GERMANY