IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01678

SHIRLEY JEAN COLLINS — **APPELLANT-PLAINTIFF**

VS.

KOPPERS INC., ET AL — **APPELLEES-DEFENDANTS**

APPEAL FROM THE CIRCUIT COURT OF GRENADA COUNTY
HONORABLE JOSEPH H. LOPER, JR., CIRCUIT JUDGE

BRIEF OF APPELLEES KOPPERS INC., BEAZER EAST, INC. AND THREE RIVERS MANAGEMENT, INC.

ORAL ARGUMENT NOT REQUESTED

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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. Shirley Jean Collins, Appellant-Plaintiff
2. The Colom Law Firm, Counsel for Shirley Jean Collins
3. Lundy, Lundy, Soileau & South, LLP, Counsel for Shirley Jean Collins
4. Jerry P. Hughes, Jr., Counsel for Shirley Jean Collins
5. Carter C. Hitt, Counsel for Shirley Jean Collins
6. Franklin S. Thackston, Jr., Counsel for Shirley Jean Collins
7. John H. Daniels, III, Counsel for Shirley Jean Collins
8. William Eason Mitchell, Counsel for Shirley Jean Collins
9. Bailey & Womble, Counsel for Shirley Jean Collins
10. Patterson & Patterson, PLLC, Counsel for Shirley Jean Collins
11. Peter T. Martin, Counsel for Shirley Jean Collins
12. Koppers Inc., f/k/a Koppers Industries, Inc., Appellee-Defendant. Koppers Inc. is owned by Koppers Holdings Inc., a publicly traded company.

13. Beazer East, Inc., Appellee-Defendant. Beazer East, Inc., through various privately-held subsidiaries, is ultimately owned by HeidelbergCement AG, a German publicly traded company.

14. Three Rivers Management, Inc., Appellee-Defendant. Three Rivers Management, Inc., through various privately-held subsidiaries, is ultimately owned by HeidelbergCement AG, a German publicly traded company.

15. Illinois Central Railroad Company, Appellee-Defendant.

16. Christopher A. Shapley, Esq., BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

17. Robert L. Gibbs, Esq., BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

18. William Trey Jones, III, Esq. , BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

19. Joseph Anthony Sclafani, Esq., BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

20. Reuben V. Anderson, Esq., PHELPS DUNBAR, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

21. Jay Gore, III, Esq., GORE KILPATRICK & DAMBRINO, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

22. Cal R. Burnton, Esq., WILDMAN, HARROLD, ALLEN & DIXON LLP, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

23. Glenn F. Beckham, Esq., UPSHAW, WILLIAMS, BIGGERS, BECKHAM & RIDDICK, LLP, Counsel for Illinois Central Railroad.

In addition to the above-listed persons having a specific interest in this case, the Court has on file before it appeals in other cases involving the same issues and the same defendants. All of these cases are stayed pending the outcome of this case. The attorneys for these cases are the same as for this case, and are listed above. The appellants in these cases are: John F. Bailey, Paul Alexander Beck, Erica Lashay Booker, Annie Mae Collins, Harry Collins Jr., Frank L. Davis Sr., Priscilla Ann Parker Harris, Elnora Hubbard on behalf of the estate of Everette

Hubbard, Gloria Johnson as next friend and guardian of the minor child Jakayle D. Johnson-Daniels, Christy A. Jourdan as next friend and guardian of the minor child Hallee Jourdan, Joseph Marascalco, Yvonne Marascalco, Jessica McCree on behalf of the estate of Sandra McRee, Ceola Moore, Beverly Ann Robinson, Zella R. Stanford, and Martha Townsend.

Christopher A. Shapley

Attorney of record for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Mississippi Rule of Appellate Procedure 34, Defendants do not seek oral argument. The issues presented in this appeal are clear and have been previously authoritatively decided. Furthermore, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court abused its discretion when it dismissed Plaintiff's claims pursuant to Mississippi Rule of Civil Procedure 41(b) because Plaintiff repeatedly failed to comply with the Circuit Court's December 3, 2008 Order to disclose information from expert witnesses that could establish a causal connection linking Plaintiff's alleged injuries to exposure to chemicals from the Grenada Plant.

2. Whether the Circuit Court correctly found that Defendants were entitled to summary judgment in their favor on Plaintiff's complaint because Plaintiff failed to make any showing sufficient to establish the requisite elements of her claims.

3. Whether the Circuit Court abused its discretion when it assessed sanctions against Plaintiff and her attorneys pursuant to the Litigation Accountability Act of 1988 and Rule 11(b) of the Mississippi Rules of Civil Procedure because Plaintiff's complaint was frivolous and groundless in fact.

STATEMENT OF THE CASE

This case is one of several mass tort actions filed by the same plaintiffs' counsel on behalf of more than one thousand plaintiffs in various Mississippi State and Federal Courts.[1] The plaintiffs allege that various chemicals, primarily creosote and pentachlorophenol, were released from a wood-treating plant in Grenada, Mississippi (the "Grenada Plant") and affected their property and caused or exacerbated certain illnesses. To fully understand the facts of the instant appeal and the appropriate reasoning behind the Circuit Court's rulings, it is helpful to look at the full procedural history of the cases in their entirety.

The Grenada wood-treating plant was built by the Ayer and Lord Tie Company in 1904. The facility to this day continues to treat railroad ties and utility poles with either creosote or pentachlorophenol. One of its primary customers is Defendant-Appellee Illinois Central Railroad. Defendant-Appellee Koppers Inc. has owned the plant since 1988. Prior to Koppers Inc.'s acquisition, the Grenada Plant was owned by an unrelated company then known as Koppers Company, Inc. That company is today known as Beazer East, Inc. ("Beazer"), also a Defendant-Appellee in this lawsuit. Beazer sold the name "Koppers" to what is now Koppers Inc. when the plant was sold in 1988. Since the sale, Beazer has been involved in environmental remediation at the Grenada Facility. These environmental cleanup activities have been

[1] Four actions were commenced in Mississippi State courts on December 27, 2002, each filed in a different county: (1) *Walter Crowder, et al. v. Koppers Industries, Inc., et al.*, No. 2002-0225 on the Docket of the Circuit Court of Leflore County (23 plaintiffs); (2) *Likisha Booker, et al. v. Koppers Industries, Inc., et al.*, No. 2002-0549 on the Docket of the Circuit Court of Holmes County (25 plaintiffs); (3) *Lynette Brown, et al. v. Koppers Industries, Inc., et al.*, No. 2002-0479 on the Docket of the Circuit Court of Washington County (25 plaintiffs); and (4) *Benobe Beck, et al. v. Koppers Industries, Inc., et al.*, No. 251-03-30 CIV on the Docket of the Circuit Court of Hinds County (35 plaintiffs). Plaintiffs' counsel commenced the instant action (*Rebekah C. Angle, et al. v. Koppers Inc., et al.*, No. 2005-299CVL) on May 27, 2005, in the Circuit Court of Grenada County, Mississippi. Appellant Shirley Jean Collins was one of the 95 original plaintiffs in that action. Plaintiffs' counsel also brought two Federal Court actions: *Fred Beck, et al. v. Koppers Industries Inc., et al.*, No. 3:03CV-60-P-D (N.D. Miss. Filed March 18, 2003) (110 plaintiffs); and *Hope Adams Ellis, et al. v. Koppers Inc., et al.*, No. 3:04CV-160-P-D (N.D. Miss. filed August 24, 2004) (1,130 plaintiffs).

performed by a sister company to Beazer East, Inc., Defendant-Appellee Three Rivers Management, Inc. (Koppers Inc., Beazer East, Inc., and Three Rivers Management, Inc., will hereinafter be referred to collectively as "Defendants.")

On April 18, 2005, in one of the pending federal cases, United States District Court Judge Allen Pepper issued a ruling which severed and dismissed the claims of 98 plaintiffs.[2] Weeks later, in the state court cases brought by the same plaintiffs' counsel, the Mississippi Supreme Court issued an order which severed the combined claims in the cases filed in Holmes and Leflore Counties. *See Koppers Inc., et al. v. Crowder, et al.,* 2003-IA-2327-SCT (Miss. 2005). The Supreme Court ordered that these cases be severed and transferred to the appropriate venue – Grenada County.[3] Plaintiffs' counsel commenced the instant mass joinder action, *Rebekah C. Angle, et al. v. Koppers Inc., et al.*, in the Circuit Court of Grenada County, Mississippi on May 27, 2005.[4]

The initial *Angle* case was brought on behalf of 95 plaintiffs, including the Appellant here, Shirley Jean Collins, alleging that the plaintiffs suffered various ailments such as runny noses, hair loss, coughing, stomach aches, headaches, fatigue, and more serious injuries like

[2] This left twelve "unsevered" plaintiffs in the *Beck* federal litigation, whose claims are in the process of being tried individually. The 98 dismissed *Beck* federal plaintiffs have since re-filed their actions separately.

[3] That appeal involved the *Booker* (Holmes County) and *Crowder* (Leflore County) cases. Plaintiffs' counsel has yet to take steps to comply with the Court's 2005 Order. Of the 48 plaintiffs in the Holmes and Leflore County lawsuits, only ten plaintiffs' cases have been dismissed, and only one has been re-filed. The remainder are still pending in Holmes and Leflore County. Moreover, plaintiffs have taken no steps to dismiss the still pending cases in Hinds or Washington County, both of which were stayed pending the *Booker/Crowder* appeal.

[4] In addition to Defendants and Illinois Central, Plaintiff's complaint included baseless claims against Hanson PLC, Hanson Building Materials, Ltd., and Hanson Holdings, Ltd. (the "Hanson Entities"). (*See* R. 3-40.) The Hanson Entities are all organized under the laws of England and Wales. A Hanson PLC subsidiary acquired Beazer PLC, the parent of what is now Defendant Beazer East, Inc., in 1991 – after the Grenada Plant had been sold to Koppers Inc. None of the Hanson Entities ever played any role in the operation of the Grenada Plant, and the claims against them were ultimately dismissed for lack of personal jurisdiction. (R. 209-11.) Plaintiffs' original complaint also named Jill Blundon, Vice President and General Counsel of Beazer East, Inc., as a defendant. Ms. Blundon played no role in the operation of the Grenada Plant. The meritless claims against Ms. Blundon were also dismissed.

Alzheimer's disease, heart disease, diabetes, terminated pregnancies, pneumonia and many types of cancer. The complaint also alleged property damage. However, the complaint failed to allege which plaintiff suffered from which physical injury, or which plaintiffs suffered property damage. Nor was there any allegation as to the date that any individual plaintiff was injured or damaged.

Relying on the previous rulings of both the U.S. District Court and this Court, Defendants moved to sever the combined 95 plaintiffs and to dismiss the claims for failure to provide the "core information" required under *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004). On December 15, 2005, the Circuit Court granted Defendants' motion. (R. 51-56.) The court noted that plaintiffs' complaint contained no allegation as to how any of the 95 plaintiffs were actually damaged. (R. 53.) At the hearing on Defendants' motion to dismiss, the Circuit Court randomly selected the names of several of the individual plaintiffs and questioned the plaintiffs' counsel as to how these individuals were damaged. Plaintiffs' counsel Mr. Thackston could not advise the court as to how any of these randomly selected plaintiffs were damaged by Defendants. (R. 53-4.) The Circuit Court also found that severance was appropriate because "[t]he only thing that is identical [about plaintiffs] is that they each claim that the creosote plant and the railroad company are responsible for actual or speculative damages that they may have suffered." (R. 53.) Moreover, the Circuit Court found that "the law on the issue of joinder of claims is so well settled that the plaintiff's counsel could not have believed in good faith that the joinder of claims was appropriate." (R. 54.) The claims of the individual plaintiffs were dismissed with leave to re-file individual complaints which complied with the specificity requirements of *Mangialardi.*

The 95 severed plaintiffs then re-filed their cases as individual plaintiffs in March 2006, including plaintiff here, Shirley Jean Collins ("Plaintiff").[5] (R. 3-40.) All of the complaints were identical to each other and again failed to include the detailed information required by *Harold's Auto Parts, Inc. v. Mangialardi* and its progeny, and as had been ordered by the Circuit Court in its prior order. Consequently, although denying Defendants' motion to dismiss for failing to comply with the court's December 15, 2005 order, the Circuit Court ordered each plaintiff to provide a more definite statement, specifically "detailing the dates of alleged exposure and manifestation of injuries, the manner of any such exposure, and which chemicals caused the alleged injuries...." (Appellees' R.E. 1; R. 99.)

On August 14, 2006, Plaintiff Shirley Jean Collins issued a Submission of Additional Information which disclosed that she claims recovery for a variety of ailments diagnosed between 1981 and 2005. Her more definite statement reads:

> As a result of exposure to harmful chemicals from the Grenada wood treatment facility, Plaintiff has suffered:
>
> | Illness | Date of diagnosis |
> |---|---|
> | High blood pressure | 1992 |
> | Dizziness | 1981 |
> | Diabetes | 2004 |
> | Heart disease | 1993 |
> | Colon cancer | 2005 |

(Appellees' R.E. 2; R. 100-105.)

[5] In the initial *Angle* complaint, some plaintiffs filed actions individually and on behalf of others (such as estates or minors). When these claims were re-filed separately, there were 104 individual complaints. In addition, ten plaintiffs filed complaints under the *Angle* caption after being transferred from other counties. These ten were later dismissed pursuant to *Canadian Nat'l/Illinois Cent. R.R. Co. v. Smith*, 926 So. 2d 839 (Miss. 2006). Thus, 114 individual complaints were ultimately filed under the *Angle* umbrella.

On September 7, 2006, Defendants propounded discovery requests on Plaintiff. Defendants sought, *inter alia*, information relating to the experts upon whom Plaintiff relied in making her claims. In particular, Defendants' Interrogatory No. 21 read as follows:

> INTERROGATORY NO. 21: Identify any expert witness(es) whom Plaintiff may have testify at a trial or hearing in this matter and state with respect to each such expert:
>
> a. The subject matter on which the expert is expected to testify;
>
> b. The facts and opinions to which the expert is expected to testify; and
>
> c. The grounds for each opinion.

(R. 236.) Plaintiff responded that she had "not determined which experts will testify at the trial or at a hearing in this matter" and that she would "supplement responses to Interrogatory No. 21 when a determination has been made and in accordance with the Mississippi Rules of Civil Procedure." (*Id.*) Similar interrogatories were submitted to the other 113 plaintiffs.

On June 25, 2007, Defendants sought again to ascertain the basis for the contention that Plaintiff's specific medical conditions were attributable to chemicals from the Grenada Plant by propounding additional requests to admit, interrogatories and document requests seeking expert disclosures. Plaintiff responded to Defendants' interrogatory requests by objecting to the requests and stating that "no determination has been made as to what expert witness will be called to testify." (R. 249.)

Koppers, Beazer and Three Rivers were not the only defendants to submit discovery to plaintiffs. On April 2, 2008, Illinois Central propounded interrogatories and requests for production. (R. 231.) These requests went and remain unanswered. On June 11, 2008, counsel for Illinois Central corresponded with plaintiffs' counsel regarding plaintiffs' outstanding responses to those discovery requests. (R. 266, 294.) Plaintiffs' counsel agreed that plaintiffs would respond to the requests on or before July 11, 2008. (R. 266, 295-8.) On July 19, 2008,

plaintiffs provided unsigned, unverified responses to a set of unrelated interrogatories propounded by Illinois Central in a different lawsuit. (R. 300-316.) These answers were not responsive to the actual interrogatories propounded by Illinois Central in this action. (R. 266-7; R. 319-21.) On July 30, 2008, counsel for Illinois Central sent a deficiency letter to plaintiffs' counsel advising of the deficiencies in plaintiffs' unsigned, unverified, non-responsive answers. (R. 319-21.) Counsel for Illinois Central and plaintiffs' counsel again conferred regarding outstanding discovery, and plaintiffs' counsel indicated that plaintiffs were "working on" responses. (R. 322-24) To this day, however, plaintiffs have never supplemented their responses to Illinois Central's discovery. On October 28, 2008, Illinois Central moved to compel plaintiffs to respond to its discovery requests. (R. 266-325.) On December 5, 2008, the Circuit Court granted the motion and ordered plaintiffs to provide sworn, verified responses to Illinois Central's discovery requests within fifteen days. (R. 328.) That date came and went and, as noted, plaintiffs have still not complied with that order.

Meanwhile, in many of the other pending "*Angle*" cases, Defendants moved for dismissal and/or summary judgment based upon, among other things, statutes of limitations, improper transfer from other venues, failure to prosecute, and failure to provide more definite statements as ordered by the Circuit Court. Ultimately, 56 of the 114 cases were dismissed for want of prosecution, largely because plaintiffs refused or were unable to answer discovery, and 40 more were dismissed on statute of limitations grounds.[6]

In the remaining 18 cases which are the subject of this appeal, plaintiffs asserted ailments dating back to the early 1950s, including:

> Allergies, Anemia, Arthritis, Asthma, Bleeding ulcers, Blood clots in lungs and legs, Blood in urine, Breast Cancer, Bronchitis,

[6] On May 27, 2010, this Court affirmed the dismissals based on the statute of limitations. *Angle v. Koppers Inc.*, 2008-CA-02045-SCT, 2010 WL 2106043 (Miss. May 27, 2010).

> Bursitis, Cancer in lymph nodes, Child born with club foot, Crohns Disease, Colon cancer, Congestive heart failure, Constant cold/infections, Coronary artery disease, Coronary failure, Diabetes, Dizziness, Ear problems, Ectopic pregnancy, Enlarged prostate, Esophical problems, Frequent dizziness, Frequent nose bleeds, Gastroenteritis, Gastrointestinal problems, Goiter, Hair loss, Heart condition, Heart disease, Heart problems, Hearing loss, High blood pressure, Hurtle cell metaplasia of Hashimoto Thyroiditis, Hypertension, IBS, Irregular heart beat, Kidney problems, Learning disorders, Low while cells, Loss of pigmentation of skin, Migraine headaches, Mild retardation, Miscarriage, Multiple kidney infections, Multiple kidney stones, Multinodular goiter on thyroid and ovaries resulting in hysterectomy, and thyroidectomy, Muscle damage, Nerve damage, Nerve disorders, Neurofibromatosis, Persistent fatigue and weakness, Pneumonia, Poorly differentiated carcinoma, Premature birth, Prostate cancer, Respiratory problems, Schizophrenia, Severe headaches, Severe migraines, Shortness of breath, Sinusitis, Skin rashes, Spots on lungs, Stillborn child, Stroke, Throat problems, Tumors in head, Unstable angina.

(R. 235.)

On September 17, 2008, over three years after the original *Angle* complaint was filed, Defendants filed a Motion for Expert Disclosure in the remaining 18 cases, seeking an order requiring plaintiffs to answer expert interrogatories and disclose information from expert witnesses that could establish a causal connection linking each plaintiff's alleged injuries to an exposure to chemicals from the Grenada Plant. (R. 234-53.) On September 26, 2008, Plaintiff requested additional time to respond to the motion, up to and including November 14, 2008. (R. 263.) That date came and went and Plaintiff never responded to Defendants' motion, nor did she respond to the outstanding interrogatories.

On December 3, 2008, the Circuit Court granted Defendants' Motion for Expert Disclosure and entered an order (hereinafter, the "December 3, 2008 Order") which required Plaintiff to:

> (1) Identify the basis, including all expert opinions, for the contention that a particular chemical can cause the specific medical conditions for which the plaintiff complains.

(2) Identify the basis, including all expert opinions, for the contention that the particular chemical has actually in fact caused the specific medical conditions for which the plaintiff complains.

(3) Identify the basis, including all expert opinions, for establishing how the plaintiff's exposure to a specific chemical, both in manner and amount, was sufficient in fact to cause the particular plaintiff's specific medical conditions.

(4) Respond fully and completely to Interrogatory No. 21 seeking expert disclosures and supplement all discovery requests seeking expert information.

(Appellees' R.E. 3; R. 326-7.) The court ordered Plaintiff to produce this information within thirty days. (*Id.*) Rather than comply, on December 12, 2008, Plaintiff filed a Motion for Relief From Order requesting additional time to comply with the December 3 Order, which request the Circuit Court denied. (R. 329-32; 341-2.)

On January 5, 2009 – the Court-ordered deadline to produce the requested information – Plaintiff served supplemental "answers" to Defendants' discovery requests. (R. 360-81.) Plaintiff's responses referenced expert opinions and testimony given in other lawsuits, but made no reference at all to Plaintiff's specific injuries, Plaintiff's exposure to wood treating chemicals, or individual issues of general and specific causation. (*Id.*) Plaintiff did not submit any expert reports discussing her specific injuries or alleged exposures. This was true in all of the 18 cases remaining on the Circuit Court's docket.

On January 14, 2009, Defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment and Sanctions (the "Motion to Dismiss or for Summary Judgment"). (R. 349-381.) Defendants requested that Plaintiff's claims be dismissed with prejudice pursuant to Mississippi Rule of Civil Procedure 41(b) for failure to comply with the Circuit Court's orders. (R. 349-52.) Alternatively, Defendants requested that the court grant Defendants summary judgment on Plaintiff's claims, because Plaintiff lacked any evidence to establish that her

specific injuries were caused by exposure to chemicals from the Grenada Plant. (R 352.) Defendants further requested that the court impose sanctions on Plaintiff and her counsel for filing a frivolous lawsuit. (R 352-3.)

On January 22, 2009, the Circuit Court entered an order setting a briefing schedule on Defendants' Motion to Dismiss or for Summary Judgment. (R. 385-6.) In that order, the Circuit Court stated: "[A]fter the rebuttal memorandum has been filed, or after the time for filing one has expired, this court will consider the motion based on the pleadings that have been filed, unless upon review, this court finds that oral arguments would be helpful to the court." (R. 386.)

Plaintiff failed to file a response to Defendants' Motion to Dismiss or for Summary Judgment as required by the Circuit Court's January 22, 2009 order or by applicable rules. On February 12, 2009, the Circuit Court granted Defendants' Motion to Dismiss or for Summary Judgment, and dismissed Plaintiff's complaint with prejudice. (R. 389-90.) However, on February 20, 2009, Plaintiff filed a Motion to Set Aside Summary Judgment and Allow Plaintiff Five Days to File Out of Time Response. (R. 391-8.) Plaintiff's attorneys claimed that they never received the Circuit Court's January 22, 2009 order setting a briefing schedule on Defendants' Motion to Dismiss or for Summary Judgment. (*Id.*) On March 10, 2009, the Circuit Court granted Plaintiff's Motion to Set Aside Summary Judgment, and granted Plaintiff's request for five days in which to respond to Defendants' Motion to Dismiss or for Summary Judgment. (R. 446-9.) However, Plaintiff again failed to comply with the deadline set by the Circuit Court's March 10 order. Instead, on March 18, 2009 – three days after the court-ordered and agreed upon deadline to respond – Plaintiff filed a Motion to Enter Scheduling Order, requesting that the Circuit Court enter a scheduling order with respect to the remaining 18 plaintiffs. (R. 450-51.)

On March 23, 2009 – more than a week after the court-ordered deadline to respond – Plaintiff finally responded to Defendants' Motion to Dismiss or for Summary Judgment. (Appellees' R.E. 4; R. 459-76.) With respect to Defendants' request for dismissal, Plaintiff merely responded that "[d]iscovery is an ongoing process that requires a party to timely supplement" and that her claims should not be dismissed because "discovery is not complete and none of these cases are set for trial." (Appellees' R.E. 4; R. 460.) With respect to Defendants' request for summary judgment, Plaintiff pointed to a report involving plaintiffs from a different lawsuit, and a six-year-old paper concerning plaintiffs from a different lawsuit, a different wood treatment facility, and an unrelated wood treating company. (Appellees' R.E. 4; R. 463-9.) These materials once again made no reference to Plaintiff or any of the other individual plaintiffs in the *Angle* litigation. Plaintiff again failed to submit any expert reports discussing her alleged injuries in this case. Plaintiff also asserted, with no explanation, that summary judgment was inappropriate for her "non-health claims." (Appellees' R.E. 4; R. 467.)

Defendants argued in their March 30, 2009 Reply in Support of their Motion to Dismiss or for Summary Judgment that Plaintiff's complaint should be dismissed pursuant to Mississippi Rules of Civil Procedure 37 and 41 because Plaintiff: (1) did not respond to Defendants' discovery requests seeking expert information; and (2) did not comply with the Circuit Court's December 3, 2008 Order to disclose information from expert witnesses that could establish a causal connection linking her alleged injuries to an exposure to chemicals from the Grenada Plant. (R. 545-8.) In the alternative, Defendants requested that the Circuit Court enter summary judgment in Defendants' favor because Plaintiff had failed to make any showing sufficient to establish the essential elements of her claims. (R. 548-9.) Specifically, Defendants argued that Plaintiff had not provided any evidence that her particular injuries and damages were caused by exposure to any emissions from the Grenada facility. (*Id.*)

Defendants also argued that dismissal or summary judgment was appropriate for Plaintiff's trespass, private nuisance, and failure to warn claims. (R. 549-51.) With respect to Plaintiff's failure to warn claim, Defendants contended that allegations surrounding Defendants' alleged failure to warn concerning alleged dangers stemming from the wood treating process were, in essence, part of Plaintiff's negligence claims, and did not constitute a separate cause of action. (R. 549.) Because Plaintiff's negligence claims failed for lack of any expert evidence that Plaintiff's particular injuries and damages were caused by exposure to any emissions from the Grenada facility, Defendants argued that Plaintiff's failure to warn claim also failed. (*Id.*) With respect to Plaintiff's property damage claims, Defendants argued that there was no evidence in the record to support such claims, and indeed, Plaintiff conceded in her interrogatory responses and deposition that she was not seeking to recover for any property damage. (R. 549-51.)[7] Moreover, any such claims were barred by the Mississippi "Right to Farm" statute, Miss. Code Ann. § 95-3-29(1), which provides an "absolute defense" to claims against an agricultural operation (including forestry activity) that has existed for more than one year. (R. 551.)[8]

On September 1, 2009, the Circuit Court granted Defendants' Motion to Dismiss or for Summary Judgment (hereinafter, the "September 1, 2009 Order"). (Appellant's R.E. 3; R. 570-92.) The Circuit Court considered the motion without hearing oral argument because it determined that "[e]ach side has submitted memorandum of authorities thoroughly outlining their legal positions...[and therefore] oral arguments would not be beneficial." (Appellant's R.E.

[7] Notwithstanding the allegations in her complaint, Plaintiff has lived in Chicago, Illinois since 1975 and owns no property in Mississippi. (R. 31.)

[8] On April 3, 2009, Plaintiff moved to strike Defendants' reply brief for unspecified and nebulous reasons. (R. 561.) While Plaintiff claimed that Defendants' brief advanced theories of law and fact not advanced in Defendants' original motion, Plaintiff's three-sentence Motion to Strike did not specifically identify a single "new" theory of law or fact to which Plaintiff objected. (*See id.*) Defendants responded that their reply brief properly advanced rebuttal argument to assertions raised by Plaintiff in her response, and reiterated the initial bases for dismissal that were discussed in Defendants' original motion. (R. 564-5.) The Court agreed with Defendants, finding that Defendants' reply brief "was proper rebuttal and should not have been stricken." (R. 611.)

3; R. 570.) The Circuit Court found that dismissal of Plaintiff's claims was warranted pursuant to Mississippi Rule of Civil Procedure 41(b) for Plaintiff's failure to comply with the Circuit Court's December 3, 2009 Order to provide information concerning expert witnesses who would testify about a causal connection between her alleged injuries and alleged exposure to chemicals from the Grenada Plant. (Appellant's R.E. 3; R. 574-6.) The Circuit Court noted that, "[i]n defiance of [its orders], and now three years after acknowledging that expert testimony is necessary, the plaintiff has never provided any information concerning the names or expected testimony of expert witnesses." (Appellant's R.E. 3; R. 575.)

The Circuit Court also found that summary judgment in Defendants' favor on Plaintiff's medical and failure to warn claims was warranted because Plaintiff "failed to provide any testimony or expert opinion that would show that the physical injuries from which she claims to suffer were caused by the conduct of the defendant." (Appellant's R.E. 3; R. 579.) Likewise, the Circuit Court ruled that summary judgment in Defendants' favor on Plaintiff's trespass and nuisance claims was warranted because Plaintiff "failed to provide any type of scientific evidence, or for that matter, any sworn testimony from anyone that there was any actual property damage or the presence of any chemicals on the surface, in the ground, in the water, or in the air, on the plaintiffs' property, much less that it can be directly linked to the defendant." (Appellant's R.E. 3; R. 580.) The court also pointed out that Plaintiff never offered any evidence whatsoever that she owned any real property, and that she had in fact expressly disclaimed having suffered any damage to real property. (Appellant's R.E. 3; R. 580-1.)

Finally, the Circuit Court imposed sanctions upon Plaintiff and her attorneys pursuant to Mississippi Rule of Civil Procedure 11(b) and the Litigation Accountability Act of 1988. The court found that Plaintiff's complaint was frivolous and groundless in fact. (Appellant's R.E. 3; R. 582-92.) The Circuit Court imposed sanctions in the amount of $7,086.43 for Defendants'

attorneys fees and expenses. (Appellant's R.E. 3; R. 589.) In so ordering, the Circuit Court considered Defendants' Statement of Attorneys' Fees and Costs, which evidenced the hours worked and the rates claimed, and the requisite factors laid out in Mississippi Rule of Professional Conduct 1.5. (Appellant's R.E. 3; R. 588-90.)

In all, the Circuit Court granted motions to dismiss and for summary judgment in 18 cases, including the present appeal. Plaintiffs moved to "reconsider and/or clarify" these orders, which request the Circuit Court denied. (Appellees' R.E. 5; R. 605-14.) These eighteen appeals followed. All of the other seventeen appeals have been stayed for briefing purposes pending the outcome of this one.

SUMMARY OF THE ARGUMENT

Trial courts have the authority to control their dockets and the discretion to enter orders to ensure that cases proceed fairly and expeditiously. The Circuit Court below was confronted with a mass tort case with over 100 plaintiffs who claimed that virtually every illness they ever suffered in their lifetime was caused by the Grenada Plant. The cases had been pending on the Circuit Court's docket for over three years. During that time, none of the plaintiffs were able to provide any expert reports to support their claims, nor had plaintiffs responded to Defendants' discovery requests seeking expert information. Given this situation, the Circuit Court certainly did not abuse its discretion in entering an order after three years requiring plaintiffs to respond to Defendants' repeated discovery requests and to disclose information from expert witnesses that could establish a causal connection linking plaintiffs' alleged injuries and exposure to chemicals from the Grenada Plant. Plaintiffs repeatedly delayed and defied the Circuit Court's order, and to this day have been unable to submit any expert information in support of their individual claims. In the nine months that followed the Circuit Court's December 3, 2008 Order, plaintiff requested a scheduling conference, twice asked for additional time, filed responses out of time,

and provided discovery responses applicable to other plaintiffs in other cases involving other plants. Plaintiff did everything but comply with the order of the Circuit Court or address the long-standing discovery requests. In short, after four years, Plaintiff still had no facts or experts to support her claims.

The Circuit Court thus did not abuse its discretion when it dismissed Plaintiff's claims pursuant to Mississippi Rule of Civil Procedure 41(b). That rule provides that a claim may be dismissed for "failure of the plaintiff...to comply with [the Mississippi Rules of Civil Procedure] or any order of court." Miss. R. Civ. Pro. 41(b). It is undisputed that Plaintiff never complied with the Circuit Court's December 3, 2008 Order to disclose information from expert witnesses that could establish a causal connection linking her alleged injuries to an exposure to chemicals from the Grenada Plant. Plaintiff submitted no evidence to suggest that she would ever be able to do so. The Circuit Court did not abuse its discretion when it found that Plaintiff's repeated and intentional failure after nine months to comply with the Court's December 3, 2008 Order warranted dismissal of Plaintiff's claims pursuant to Mississippi Rule of Civil Procedure 41(b).

The Circuit Court also correctly entered summary judgment in Defendants' favor on Plaintiff's complaint because Plaintiff failed to make any showing to establish the requisite elements of her claims. It is the plaintiff's burden in a toxic tort case to provide evidence establishing a causal connection between the specific injuries alleged and the alleged chemical exposures. Plaintiff failed to put forth any evidence about anything, including evidence that could link her alleged injuries and damages to exposure to chemicals from the Grenada Plant. Plaintiff thus failed to meet her evidentiary burden and summary judgment was properly entered in Defendants' favor.

Moreover, the Circuit Court did not abuse its discretion when it entered summary judgment in Defendants' favor without an oral hearing. Mississippi Rule of Civil Procedure 78

was amended in 2003 to explicitly permit a court to enter summary judgment without a prior hearing. *See* Miss. R. Civ. Pro. 78 cmt. (rule was amended effective April 17, 2003 "to provide for determination of motions seeking final judgment without oral argument."). Plaintiff relies on cases and holdings from before the amendment of Rule 78. In any event, oral argument would have added nothing to the Circuit Court's deliberative process. No Rule 56 affidavits were submitted, and not a shred of evidence was ever put before the court. Plaintiff had ample time for discovery prior to Defendants' Motion to Dismiss or for Summary Judgment. Because she failed to present any evidence that could link her alleged injuries and damages to exposure to chemicals from the Grenada Plant, the Circuit Court properly entered summary judgment in Defendants' favor.

The Circuit Court also did not abuse its discretion when it assessed sanctions against Plaintiff and Plaintiff's attorneys pursuant to the Litigation Accountability Act of 1988, Miss. Code Ann. § 11-55-1, *et seq.* ("Litigation Accountability Act"), and Rule 11(b) of the Mississippi Rules of Civil Procedure ("Rule 11 (b)"). The Circuit Court correctly found that Plaintiff's complaint was frivolous and groundless in fact, because – four years into the litigation – it was clear that Plaintiff did not, nor did she ever, have any evidence to support her claims. The Circuit Court properly considered the factors listed in the Litigation Accountability Act and pointed to a number of additional reasons why sanctions were warranted in this case. Given the record in this case, the Circuit Court did not abuse its discretion when it imposed sanctions against Plaintiff and her counsel. Moreover, the attorneys' fee and cost award was reasonable and supported by the evidence. In determining the amount of the award, the Circuit Court properly relied upon and accepted Defendants' Statement of Attorneys' Fees and Costs, which evidenced the hours worked and the rates claimed, and the requisite factors laid out in Mississippi Rule of Professional Conduct 1.5.

ARGUMENT

I. Standards of Review.

a. Rule 37 and 41 Dismissals

The Court reviews Rule 37 and 41 dismissals for abuse of discretion. *Beck v. Sapet*, 937 So. 2d 945, 948 (Miss. 2006); *Wilson v. Nance,* 4 So. 3d 336, 341 (Miss. 2009). The Court "only reverses if it has a definite and firm conviction that the court below committed a clear error of judgment...." *Beck*, 937 So. 2d at 949.

b. Summary Judgment

The standard of review the Court applies to a trial court's entry of summary judgment is de novo. *Bullard v. Guardian Life Ins. Co. of Am.*, 941 So. 2d 812, 814 (Miss. 2006).

c. Sanctions

The Court reviews sanctions orders entered pursuant to Mississippi Rule of Civil Procedure 11 and the Litigation Accountability Act of 1988 for abuse of discretion. *In re Spencer*, 985 So. 2d 330, 336-7 (Miss. 2008). "In the absence of a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon the weighing of the relevant factors, the judgment of the court's imposition of sanctions will be affirmed." *Id.* at 337 (*citing Wyssbrod v. Wittjen*, 798 So. 2d 352, 357 (Miss. 2001)).

d. Attorneys' Fees and Costs

This Court has held that "[t]he trial court is the appropriate entity to award attorney's fees and costs" and that the Court "will not reverse the trial court on the question of attorney's fees unless there is a *manifest abuse of discretion* in making the allowance." *Mabus v. Mabus,* 910 So. 2d 486, 488 (Miss. 2005) (citations omitted).

II. The Circuit Court Did Not Abuse Its Discretion When It Dismissed Plaintiff's Claims Pursuant to Mississippi Rule of Civil Procedure 41(b).

Forty-five months after suit was first filed, and twenty-seven months after Defendants first sought expert discovery, the Circuit Court on December 3, 2008 ordered Plaintiff to disclose information relating to a causal connection linking Plaintiff's alleged injuries to exposure to chemicals from the Grenada plant. (Appellees' R.E. 3; R. 326-7.) It is undisputed that Plaintiff has never complied with that order. (*See* Appellant's Brief, p. 8 (admitting that no expert has "rendered reports specific to Collins' exposure and ailments.").) It is also undisputed that Plaintiff has made no showing that she ever will or could comply with that order. Therefore, the Circuit Court correctly dismissed Plaintiff's complaint pursuant to Mississippi Rule of Civil Procedure 41(b).

a. The Circuit Court Did Not Abuse Its Discretion When It Entered the December 3, 2008 Order

To the extent Plaintiff suggests that the Circuit Court erred in entering the December 3, 2008 Order, Plaintiff is incorrect. (*See* Appellant's Brief, pp. 12-13.) As the Circuit Court noted, the December 3, 2008 Order "was entered for the purpose of advancing this litigation and moving this case on the docket, where at that time, it had been languishing since March 17, 2006." (Appellant's R.E. 3; R. 575.) Mississippi law is clear that the trial court has "the authority and indeed a duty to maintain control of the docket and ensure the efficient disposal of court business." *Venton v. Beckham*, 845 So. 2d 676, 684 (Miss. 2003). Moreover, the trial court has "considerable discretion" in matters pertaining to discovery. *Id.*; *see also Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 972-3 (Miss. 2007) ("Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases.").

The *Angle* case involved 114 plaintiffs suing for virtually every illness they had ever experienced in their lifetime. Plaintiffs claimed their exposure caused everything from nosebleeds and hair loss, to more serious conditions such as various types of cancer, Alzheimer's disease, heart disease, and diabetes. Defendants propounded discovery requests on Plaintiff on September 7, 2006, seeking to ascertain the basis for the contention that Plaintiff's specific injuries were attributable to chemicals from the Grenada Plant. (*See* R. 236.) Several years later, Plaintiff was unable to provide the information Defendants requested. The Circuit Court did not abuse its discretion when it granted Defendants' Motion for Expert Disclosure and entered the December 3, 2008 Order requiring Plaintiff to disclose information from expert witnesses that could establish a causal connection linking Plaintiff's alleged injuries to an exposure to chemicals from the Grenada Plant. *See Buchanan,* 957 So. 2d at 972-3; *Acuna v. Brown & Root, Inc.,* 200 F.3d 335, 340-41 (5th Cir. 2000) (finding that the trial court was within its discretion "to take steps to manage the complex and potentially very burdensome discovery that the cases would require" by entering orders requiring plaintiffs to provide expert disclosures in support of certain of their claims).

b. The Circuit Court Did Not Abuse Its Discretion When It Dismissed Plaintiff's Claims Pursuant to Mississippi Rule of Civil Procedure 41(b)

A trial court has the authority, pursuant to Mississippi Rule of Civil Procedure 41(b), to dismiss a plaintiff's cause of action for failure to comply with the court's orders or the rules of civil procedure. *See* Miss. R. Civ. Pro. 41(b) ("[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."); *Wilson,* 4 So. 3d 336 (affirming trial court's dismissal of plaintiff's complaint pursuant to Miss. R. Civ. Pro. 41(b) for plaintiff's failure to comply with the court's orders); *Taylor v. General Motors Corp.*, 717 So. 2d 747 (Miss. 1998) (affirming trial

court's dismissal of plaintiff's complaint pursuant to Miss. R. Civ. Pro. 41(b) for plaintiff's failure to comply with the rules of civil procedure). Indeed, as this Court has stated:

> Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of cases. Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their peril.

Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037, 1042 (Miss. 2003).

In this case, the Circuit Court did not abuse its discretion when it dismissed Plaintiff's complaint pursuant to Rule 41(b) for Plaintiff's failure to comply with its December 3, 2008 Order. The Circuit Court ordered Plaintiff to produce the required information within thirty days, or by January 5, 2009. (Appellees' R.E. 3; R. 326-7.) Rather than comply, Plaintiff filed a "Motion for Relief From Order" requesting additional time. (R. 329-32.) The Circuit Court denied Plaintiff's motion, and again ordered Plaintiff to produce the required information by January 5, 2009. (R. 341-2.) On January 5, 2009 – the court-ordered deadline to produce the requested information – Plaintiff served non-responsive supplemental answers to Defendants' written discovery requests. (R. 360-91.) These vague, generic responses referenced expert opinions and testimony given in other lawsuits with no attempt to explain how those opinions in any way related to Plaintiff's alleged injuries. They did not reference Plaintiff's specific injuries, Plaintiff's exposure to wood treating chemicals, or issues of general and specific causation. Quite simply, in defiance of the Circuit Court's December 3, 2008 Order, Plaintiff failed to submit **any** expert reports discussing her alleged injuries and exposures.

After Plaintiff failed to comply with the December 3, 2008 Order, Defendants filed their Motion to Dismiss or for Summary Judgment. (R. 349-81.) The Circuit Court entered a briefing schedule on the motion on January 22, 2009, ordering Plaintiff to respond to the motion within

ten days. (R. 385-6.) Plaintiff failed to file a response to Defendants' Motion to Dismiss or for Summary Judgment as required by the Circuit Court's January 22, 2009 order. On February 12, 2009, the Circuit Court granted Defendants' Motion to Dismiss or for Summary Judgment, and dismissed Plaintiff's complaint with prejudice. (R. 389-90.) However, on February 20, 2009, Plaintiff filed a Motion to Set Aside Summary Judgment and Allow Plaintiff Five Days to File Out of Time Response. (R. 391-8.) Plaintiff's attorneys claimed that they never received the Circuit Court's January 22, 2009 order setting a briefing schedule on Defendants' Motion to Dismiss or for Summary Judgment. (*Id.*)

On March 10, 2009, the Circuit Court granted Plaintiff's Motion to Set Aside Summary Judgment, and gave Plaintiff the five days she requested in which to respond to Defendants' Motion to Dismiss or for Summary Judgment. (R. 446-9.) Even then, Plaintiff did not comply with the Circuit Court's March 10 order. Instead, on March 18, 2009, Plaintiff filed a Motion to Enter Scheduling Order, requesting that the Circuit Court enter a scheduling order with respect to the remaining 18 plaintiffs. (R. 450-51.) Not only was this submission unresponsive to the Motion to Dismiss or for Summary Judgment, it was untimely.

On March 23, 2009 – eight days after a court deadline Plaintiff had requested – Plaintiff finally responded to Defendants' Motion to Dismiss or for Summary Judgment. (Appellees' R.E. 4; R. 459-76.) This response, however, did not point to any expert disclosures referencing Plaintiff's specific injuries, Plaintiff's exposure to wood treating chemicals, or the issues of general and specific causation for Plaintiff's injuries. Plaintiff's submission of expert reports from unrelated lawsuits involving different plaintiffs and an article about a different wood treating plant in Columbus, Mississippi, was not responsive to Defendants' discovery requests and did not comply with the Circuit Court's December 3, 2008 Order. On this record, the Circuit Court did not abuse its discretion when it dismissed Plaintiff's complaint pursuant to Rule 41(b)

for failure to comply with the December 3, 2008 Order. *See* Miss. R. Civ. Pro. 41(b); *Wilson*, 4 So. 3d 336; *Taylor*, 717 So. 2d 747 (Miss. 1998).

Plaintiff argues that the dismissal was improper because the record does not reflect delay or contumacious conduct, the Circuit Court did not consider lesser sanctions, and no aggravating factors are present. (Appellant's Brief, pp. 18-22.) As an initial matter, because Plaintiff never raised these arguments below, they are waived. (Appellees' R.E. 4; R. 459-69; Appellees' R.E. 5; R. 605-6.) *See Southern v. Miss. State Hosp.*, 853 So. 2d 1212, 1214-15 (Miss. 2003) (where a party fails to raise a matter before the trial court, the Supreme Court is procedurally barred from considering that matter on appeal).

Regardless, Plaintiff is wrong. The record reflects a clear pattern of delay or contumacious conduct. As discussed in detail above, Plaintiff twice refused to comply with the Circuit Court's December 3, 2008 Order, first by submitting non-responsive supplemental answers to Defendants' written discovery requests, and second by failing to timely respond to Defendants' Motion to Dismiss or for Summary Judgment. The Circuit Court granted Plaintiff's request for five more days to respond, but Plaintiff defied even that order by filing an untimely and non-responsive Motion to Enter Scheduling Order. Finally, over a week after being ordered to do so, Plaintiff responded to the Motion to Dismiss or for Summary Judgment. However, this response did not provide any of the information required by the Circuit Court's December 3, 2008 Order. Under these egregious circumstances, lesser sanctions would not have been reasonable or appropriate, and the Circuit Court was correct in dismissing Plaintiff's complaint pursuant to Mississippi Rule of Civil Procedure 41(b).

Finally, aggravating factors are present in the record. Here, as in *Wilson*, "the Plaintiff's failure to comply with [the Circuit Court's] Order resulted in prejudice to the Defendant[s], including the requirement that the Defendant[s] incur needless litigation cost and expense."

Wilson, 4 So. 3d at 346. Setting aside the needless litigation costs and expenses Defendants incurred in moving to sever the initial complaint, moving to dismiss the Hanson Entities, moving for a more definite statement of Plaintiff's claims, and moving for expert disclosures – all of which could have been avoided had Plaintiff's counsel followed the Rules of Civil Procedure and well-settled Mississippi law – Defendants subsequently incurred litigation costs and expenses as a result of Plaintiff's repeated failure to comply with the Circuit Court's December 3, 2008 Order.

Moreover, the record supports the conclusion that Plaintiff's counsel intentionally engaged in dilatory tactics throughout this case. Defendants' discovery requests have been pending since 2006. As Plaintiff repeatedly emphasizes in her brief, her counsel has a team of "experts" in the related *Beck* federal litigation, and these experts have previously rendered opinions regarding other plaintiffs.[9] (*See* Appellant's Brief, pp. 7-8, 13-15, 19, 26-28.) Plaintiff does not explain why – in the five years her case has been pending – not a single one of these experts rendered an opinion specific to Plaintiff's claims in this lawsuit. The Circuit Court did not abuse its discretion when it dismissed Plaintiff's complaint.[10] Trial courts have the authority to control their dockets and the discretion to enter orders to ensure that cases proceed fairly and

[9] These experts have been the subject of numerous *Daubert* challenges, and most recently were barred by the District Court in *Hill v. Koppers Inc.*, No. 03CV60-P-D, 2009 WL 4908836 (N.D. Miss. Dec. 11, 2009).

[10] For these same reasons, the Circuit Court would have been correct in dismissing Plaintiff's complaint pursuant to Mississippi Rule of Civil Procedure 37(b)(2)(C). *See* Miss. R. Civ. Pro 37(b)(2)(C) ("If a party...fails to obey an order to provide or permit discovery...the court in which the action is pending may make such orders in regard to the failure as are just, [including]...an order...dismissing the action or proceeding or any part thereof..."); *Beck v. Sapet*, 937 So. 2d 945, 946 (Miss. 2006) (affirming trial court's dismissal of plaintiffs' complaint with prejudice pursuant to Rule 37(b)(2)(C) for plaintiffs' "repeated failure to timely provide full and complete supplemental responses to written discovery requests"); *Williams v. Puryear*, 515 So. 2d 1231, 1234 (Miss. 1987) (affirming trial court's dismissal of plaintiff's complaint with prejudice pursuant to Rule 37(b)(2)(C) for plaintiff's failure to respond to discovery); *Kilpatrick v. Mississippi Baptist Med. Ctr.*, 461 So. 2d 765 (Miss. 1984) (affirming trial court's dismissal of plaintiffs' complaint with prejudice pursuant to Miss. Code Ann. §13-1-237(b)(2)(C), former version of Rule 37(b)(2)(C), for plaintiffs' failure to respond to expert interrogatories).

expeditiously. To reverse the dismissal below would be to severely curtail that discretion. In the event, however, that this Court finds that the Circuit Court abused its discretion in dismissing Plaintiff's complaint, the judgment should still be affirmed because Defendants were entitled to summary judgment because Plaintiff failed to make a showing sufficient to establish the requisite elements of her claims.

III. The Circuit Court Correctly Entered Summary Judgment in Defendants' Favor on Plaintiff's Complaint Because Plaintiff Failed to Make a Showing Sufficient to Establish the Requisite Elements of Her Claims.

Plaintiff admits that no expert has "rendered reports specific to Collins' exposure and ailments." (Appellant's Brief, p. 8.) It is undisputed that the record contains no evidence that Plaintiff's alleged injuries and illnesses were caused by exposure to emissions from the Grenada Plant. In other words, the record contains no evidence to support any of her claims, particularly as to causation, a requisite element of each of Plaintiff's claims. There is thus no genuine issue of material fact and the Circuit Court correctly entered summary judgment in Defendants' favor on Plaintiff's complaint.

a. Causation is a Requisite Element of Each of Plaintiff's Claims

Causation is a requisite element of each of Plaintiff's claims. *See Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990) (negligence)[11]; *Thomas v. Harrah's Vicksburg Corp.*, 734 So. 2d 312, 315 (Miss. App. 1999) (trespass); *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d 648, 662 (Miss. 1995) (nuisance).

Moreover, this Court has held that a plaintiff in a toxic tort case has the burden to provide expert evidence establishing a causal connection between the specific injuries alleged and the alleged chemical exposure. *See Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 151

[11] Plaintiff's failure to warn claim sought damages stemming from Defendants' alleged failure to warn Plaintiff about dangers stemming from the wood treatment process. Allegations surrounding Defendants' alleged failure to warn concerning these dangers are, in essence, part of Plaintiff's negligence claims, and do not constitute a separate cause of action.

(Miss. 2008) (affirming trial court's grant of defendants' motion for JNOV because Plaintiff had no evidence of either general or specific causation); *Herrington v. Leaf River Forest Prod., Inc.*, 733 So. 2d 774, 779-80 (Miss. 1999) (affirming trial court's grant of summary judgment to defendants because plaintiff had "no medical or scientific evidence that [her] diseases were caused by [defendants' pulp mill]"); *Prescott v. Leaf River Forest Prod., Inc.*, 740 So. 2d 301, 309-10 (Miss. 1999) (affirming trial court's grant of summary judgment to defendants because plaintiffs had no evidence that they were exposed to dioxins from defendants' mill). This rule applies equally to property damage claims. *See Anglado v. Leaf River Forest Products, Inc.*, 716 So. 2d 543, 548-9 (Miss. 1998) (affirming trial court's award of summary judgment to defendants on plaintiffs' trespass and nuisance claims because plaintiffs failed to present sufficient evidence to establish that their properties were exposed to chemicals and that those chemicals came from defendants' pulp mill).

b. Plaintiff's Burden on Defendants' Motion for Summary Judgment

Summary judgment should be granted "where there is no genuine issue as to any material fact and...the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c)(2). Once the movant has established the absence of any genuine issue of material fact, "the burden of rebuttal falls upon the non-moving party." *Wilbourn v. Stennett, Wilkinson & Ward,* 687 So. 2d 1205, 1213 (Miss. 1996) (internal citations omitted). To survive summary judgment, the non-moving party must produce evidence establishing that there is a genuine material issue for trial. *See id.*

In a negligence action, the nonmovant can only defeat summary judgment "by producing supportive evidence of *significant* and *probative* value; this evidence must show that the defendant breached the established standard of care and that such breach was a proximate cause of her injury." *Palmer,* 564 So. 2d at 1355. "Mere allegation or denial of material fact is

insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment. More specifically, the plaintiff may not rely solely upon the unsworn allegations in the pleadings, or 'arguments and assertions in briefs or legal memoranda.'" *Id.* at 1356 (internal citations omitted). Instead, "[t]he party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial." *Id.*

Moreover, the non-movant's claim "must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Wilbourn,* 687 So. 2d at 1214 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Summary judgment is "mandated where the respondent has failed 'to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* (internal citations omitted, emphasis added).

c. The Circuit Court Correctly Entered Summary Judgment in Defendants' Favor Because Plaintiff Failed to Make a Showing Sufficient to Establish the Requisite Elements of Her Claims

Plaintiff admits that no expert has "rendered reports specific to Collins' exposure and ailments." (Appellant's Brief, p. 8.) Nevertheless, Plaintiff contends that the Circuit Court erred in granting summary judgment in Defendants' favor on Plaintiff's complaint. Ostensibly in an effort to establish that a genuine issue of material fact exists, Plaintiff points this Court to her deposition testimony and documents produced by Defendants in discovery, but the testimony and documents were never submitted to the Circuit Court. In fact, all Plaintiff submitted to the Circuit Court was a paper involving a different wood treating plant in Columbus Mississippi, and an expert report in an unrelated lawsuit involving different plaintiffs. (Appellees' R.E. 4; R. 463-7.) These documents are not sufficient to establish any of the requisite elements of

Plaintiff's claims, and Plaintiff does not provide any meaningful explanation of how they would do so.

Plaintiff submitted no evidence to the Circuit Court to substantiate any claim of her injuries; no evidence of her exposure; no evidence of her dose; and no evidence of general or specific causation. There was no showing of damages. There was no showing of property loss; and, as noted, Ms. Collins owns no Mississippi property and has lived in Illinois continually since 1975. Plaintiff was required to retain an expert to link her diabetes and colon cancer to emissions from the Grenada Plant. She was unable to do so. Plaintiff's failure to make any showing to establish causation, a requisite element of each of her claims, justifies the Circuit Court's entry of summary judgment in Defendants' favor. *See Wilbourn,* 687 So. 2d at 1214 (summary judgment is "mandated where the respondent has failed 'to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'") (internal citations omitted, emphasis added); *see also Watts v. Radiator Specialty Co.*, 990 So. 2d at 151; *Herrington,* 733 So. 2d at 779-80; *Prescott*, 740 So. 2d at 309-10; *Anglado,* 716 So. 2d at 548-9.[12]

Plaintiff's suggestion that the Circuit Court's denial of her Motion for Relief From Order was an abuse of discretion should be rejected. (Appellant's Brief, p. 30.) Mississippi Rule of Civil Procedure 56(f) provides that when a party is unable to produce affidavits to oppose a motion for summary judgment, that party may instead file a motion or affidavit with the court explaining his inability to oppose the motion for summary judgment. In such cases, the trial court has the discretion to postpone consideration of the motion for summary judgment and order

[12] Likewise, Plaintiff's suggestion that there was sufficient evidence in the record to satisfy the "frequency-regularity-proximity" test should be rejected. (Appellant's Brief, pp. 30-31.) This test is used only in asbestos cases, and is inapplicable here. *See E.I. DuPont de Nemours and Co. v. Strong,* 968 So. 2d 410, 417-19 (Miss. 2007).

among other things that further discovery be conducted. *See Prescott*, 740 So. 2d at 308 (citations omitted). However, this Court has cautioned:

> [T]he party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." The party opposing the motion for summary judgment may not rely on vague assertions that discovery will produce needed, but unspecified, facts particularly where there was ample time and opportunity for discovery. This is so because Rule 56(f) is not designed to protect the litigants who are lazy or dilatory and normally the party invoking Rule 56(f) must show what steps have been taken to obtain access to the information allegedly within the exclusive possession of the other party. Finally, the determination as to the adequacies of the non-movant's Rule 56(f) affidavits and the decision to grant a continuance or order further discovery rests within the sound discretion of the trial judge and will not be reversed unless his decision can be characterized as an abuse of discretion.

Id. at 308 (internal citations omitted).

Here, Plaintiff did not submit a Rule 56(f) affidavit. Instead, she filed a "Motion for Relief From Order" that requested additional time because "conflicts with their experts" and "conflicts of Plaintiff's counsel" prevented Plaintiff from complying with the December 3, 2008 Order on time. (R. 329-30.) Plaintiff's Motion for Relief From Order did not claim that the requisite information was in Defendants' sole possession and did not demonstrate how additional time would enable Plaintiff to rebut Defendants' showing of the absence of a genuine issue of fact. As such, the Circuit Court did not abuse its discretion when it denied Plaintiff's request for additional time. *See Prescott*, 740 So. 2d at 308 (finding that the trial court did not abuse its discretion in denying plaintiff's motion to continue, where plaintiff did not claim the requisite information was in defendant's sole possession, plaintiff had "ample opportunity to obtain expert affidavits of their own," and the facts involved in the action were not new to

plaintiff and indeed "nearly identical facts had been litigated [in previous cases] against the [same] defendants by the same attorneys.").

This Court should also reject Plaintiff's contention that the Circuit Court erred in granting summary judgment as to her trespass and nuisance claims, because, had Plaintiff been given the opportunity, she "would have testified" that she suffered a trespass. (Appellant's Brief, p. 32.) To the contrary, Plaintiff has lived in Illinois since 1975 and in her deposition expressly disclaimed having suffered any property damage. Plaintiff's interrogatory responses likewise disclaim any property damage. (Appellant's Brief, p. 31 (Plaintiff's interrogatory responses concede "that she was not the owner of property in Grenada, Mississippi").)[13]

Plaintiff's contention that "trespass and nuisance claims remain viable for those Plaintiffs with real property whose cases are currently stayed pending this appeal in the remaining seventeen *Angle* cases," is equally unavailing. In fact, the vast majority of Plaintiffs in these consolidated cases have admitted that they have no property damage claims. (R. 549-50.) Moreover, there is absolutely no evidence in the record that any individual plaintiff's property was exposed to chemicals, harmed by chemicals, impacted by chemicals, or that any chemicals came from the Grenada plant. The Circuit Court's entry of summary judgment in Defendants' favor was correct and should be affirmed.

d. The Circuit Court Did Not Abuse Its Discretion When It Entered Summary Judgment in Defendants' Favor Without an Oral Hearing

[13] In any event, Plaintiff's property damage claims are barred by Mississippi's "Right to Farm" statute, which provides an "absolute defense" to "any nuisance action" against an "agricultural operation" that has existed for more than one year. Miss. Code Ann. § 95-3-29(1). The Grenada plant was built in 1904 and has operated continuously from that date to the present, and the Right to Farm statute was enacted in 1980. Plaintiff did not file suit until 2005 – nearly 100 years after the plant began operating and 25 years after the Right to Farm statute was enacted. Therefore, Plaintiff's property damage claims are untimely, and Defendants should be granted summary judgment on those claims. *See, e.g., Bowen v. Flaherty,* 601 So. 2d 860 (Miss. 1992); *Hill v. Koppers Inc.*, No. 03CV60-P-D, 2010 WL 323380, *4 (N.D. Miss. Jan. 20, 2010).

Finally, Plaintiff contends that the Circuit Court erred in entering summary judgment in Defendants' favor without first conducting a hearing. (*See* Appellant's Brief, pp. 32-5.) Plaintiff is incorrect. Rule 78 was amended in 2003 to explicitly permit courts to enter summary judgment without a prior hearing. *See* Miss. R. Civ. Pro. 78 cmt. (rule was amended effective April 17, 2003 "to provide for determination of motions seeking final judgment without oral argument."); *see also Hosey v. Mediamolle*, 963 So. 2d 1267, 1270 (Miss.App. 2007) ("A court has the discretion to dispense entirely with oral argument on a motion, and can rule based only upon the brief written statements of reasons in support of and in opposition to the motion."). This comports with the Fifth Circuit's definition of "hearing," which "within the meaning of Rule 56 has been held to refer to the final submission of summary judgment motion papers, rather than implying a requirement that a full-fledged hearing with receipt of oral evidence take place with every motion." *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1164 (Miss. 2002) (citations omitted). Plaintiff relies on cases and holdings from before the amendment of Rule 78, which are inapposite.

Moreover, there was no need for a hearing. Plaintiff submitted no evidence, never said what evidence was forthcoming, and failed in any way to put forth a single shred of evidence in support of her claims. There was nothing to debate before the Circuit Court. Plaintiff's best approach was to beg for more time, which after so many years was no longer a viable option.

In any event, under this Court's decision in *Adams*, the Circuit Court's entry of summary judgment without an oral hearing is at most a harmless error, and the Circuit Court's judgment should be affirmed. *Adams*, 831 So. 2d at 1163-4. Here, as in *Adams*, Plaintiff "had ample time for discovery prior to the entry of summary judgment." *Id.* at 1164. Moreover, although Plaintiff claims that she would have "put on evidence" at a hearing, she does not specify what this mystery evidence would have been. (Appellant's Brief, p. 34.) As the *Adams* Court noted,

"[i]t is highly unlikely that any material or pertinent facts would have been disclosed at a summary judgment hearing had it been held. [Plaintiff] would be ill-served by responding to [Defendants'] motion and...then waiting until an oral hearing to disclose material facts which would deliver a *coup de grâce* to [Defendants'] motion." *Adams,* 831 So. 2d at 1164. The same logic applies here, and the Circuit Court's decision should be affirmed.

IV. The Circuit Court Did Not Abuse Its Discretion When It Assessed Sanctions Against Plaintiff and Her Attorneys Pursuant to the Litigation Accountability Act and Rule 11(b) of the Mississippi Rules of Civil Procedure.

Pursuant to the Litigation Accountability Act and Rule 11(b) of the Mississippi Rules of Civil Procedure, the Circuit Court imposed sanctions against Plaintiff and her attorneys by holding them jointly and severally liable for the payment of $7,086.43 for Defendants' attorneys' fees. (Appellant's R.E. 3; R. 589.) In awarding these sanctions, the Circuit Court found that Plaintiff's complaint was "frivolous and groundless in fact." (Appellant's R.E. 3; R. 584.) The Circuit Court also relied on the history of the cases and plaintiffs' deliberate violations of several court orders, decisions of the Mississippi Supreme Court and the Mississippi Rules of Civil Procedure. The Circuit Court did not abuse its discretion when it awarded sanctions, and the award should be affirmed. *See In re Spencer*, 985 So. 2d 330 (affirming trial court's imposition of sanctions under Rule 11(b) and Litigation Accountability Act); *Wyssbrod*, 798 So. 2d 352 (affirming trial court's imposition of sanctions under Litigation Accountability Act).

a. Legal Standards

Mississippi Rule of Civil Procedure 11(b) provides that "[i]f any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees." Miss. R. Civ. Pro. 11(b).

Likewise, the Litigation Accountability Act provides that in any civil action commenced in Mississippi, "the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any part or attorney if the court...finds that an attorney or party brought an action...that is without substantial justification...." Miss. Code Ann. § 11-55-5(1). "'Without substantial justification,' when used with reference to any action, claim, defense or appeal, including without limitation any motion, means that it is frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss. Code Ann. § 11-55-3(a). Pursuant to the Litigation Accountability Act, "[w]hen a court determines reasonable attorney's fees or costs should be assessed, it shall assess the payment against the offending attorneys or parties, or both, and in its discretion may allocate the payment among them, as it determines most just, and may assess the full amount or any portion to any offending attorney or party." Miss. Code Ann. § 11-55-5(3).

Section 11-55-7 of the Litigation Accountability Act provides that "[w]hen granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award." Miss. Code Ann. § 11-55-7. That Section further provides a list of factors to be considered by the trial court when granting an award of costs and attorneys' fees. *See id.*

b. The Circuit Court Correctly Found That Sanctions Were Warranted Against Plaintiff and Her Attorneys Pursuant to the Litigation Accountability Act and Rule 11(b) of the Mississippi Rules of Civil Procedure

i. The Circuit Court did not abuse its discretion when it found Plaintiff's complaint to be frivolous and groundless in fact

The Circuit Court did not abuse its discretion in determining that Plaintiff's complaint was "frivolous and unsupported by any facts" and thus that "sanctions under both Rule 11 and the Litigation Accountability Act are appropriate and, in fact, well justified." (Appellant's R.E. 3; R. 588.) A claim is considered frivolous under both Rule 11 and the Litigation Accountability Act when "objectively speaking, the pleader or movant has no hope of success." *See Tricon*

Metals Servs. v. Topp, 537 So. 2d 1331, 1335 (Miss. 1989) (affirming trial court's imposition of sanctions against plaintiff under Rule 11 for the filing of a frivolous complaint); *In re Spencer*, 985 So. 2d 330, 338 (Miss. 2008) ("The term 'frivolous' as used in [the Litigation Accountability Act] takes the same definition as it does under Rule 11: a claim or defense made 'without hope of success.'") (internal citations omitted). This Court has stated that "[a] plaintiff's belief alone will not garner 'a hope of success' where a claim has no basis in fact." *Foster v. Ross*, 804 So. 2d 1018, 1024 (Miss. 2002).

In *Foster*, plaintiff brought suit against defendant seeking an injunction requiring defendant to return to the estate of Nannie Mae Ross the proceeds of three certificates of deposit. *See Foster*, 804 So. 2d at 1019. In order to prevail in the action, plaintiff had to demonstrate by clear and convincing evidence that a confidential relationship existed between defendant and Nannie Mae Ross. *See id.* at 1022. At the close of plaintiff's case, the trial court granted defendant's motion for dismissal pursuant to Mississippi Rule of Civil Procedure 41(b). *Id.* at 1021. The trial court also found that "because there was a total lack of evidence to support the claim of a confidential relationship between Nannie Mae and [defendant], [plaintiff] had no hope of success in pursuing the action." *Id.* at 1021-2. Thus, pursuant to the Litigation Accountability Act, the trial court found plaintiff and his attorney jointly and severally liable for defendant's attorneys' fees and expenses. *Id.* at 1022. This Court affirmed, holding that in light of the complete lack of evidence in support of plaintiff's allegation of a confidential relationship, "[plaintiff's] action was groundless in fact and that the chancellor did not abuse his discretion in holding that it was brought without substantial justification." *Id.* at 1025.

Here, as in *Foster*, because there is "a total lack of evidence" to support Plaintiff's claims, Plaintiff had no hope of success in this action. She had no experts and could not establish dose, exposure or causation. She put forth no facts to support her claims.

Consequently, the Circuit Court was correct in finding Plaintiff's complaint to be frivolous and groundless in fact. (Appellant's R.E. 3; R. 584) ("[Plaintiff] has presented not one scintilla of proof in support of the allegations contained in her complaint. Because there are no facts to support her claims, Collins had absolutely no chance of success in this action. Consequently, this court finds her complaint to be frivolous and groundless in fact.") *See also Wyssbrod*, 798 So. 2d at 362-5, 369 (affirming trial court's award of attorneys' fees and expenses pursuant to the Litigation Accountability Act for the filing of a frivolous complaint because there was no evidence in the record at the time summary judgment was granted that could have supported plaintiff's claims); *Tricon Metals & Servs.*, 537 So. 2d at 1335-7 (affirming trial court's award of attorneys' fees and expenses pursuant to Mississippi Rule of Civil Procedure 11 for the filing of a frivolous complaint because there was no evidence in the record that could have supported plaintiff's claims).

In addition to the "total lack of evidence" to support Plaintiff's claims, the Circuit Court considered the factors enumerated in Section 11-55-7 of the Litigation Accountability Act and pointed to a number of additional reasons why the imposition of sanctions in this case was warranted. (*See* Appellant's R.E. 3; R. 584-88.) In particular, the Circuit Court considered the overall history of the case and Plaintiff's history of delay and not following orders or recognized case law. The Circuit Court noted that: (1) Plaintiff's claims were originally joined with the claims of 94 other plaintiffs, despite the fact that "it was clear at the time the complaint was filed that joinder was improper," and Plaintiff forced Defendants to seek relief from the Circuit Court rather than voluntarily severing her claims (Appellant's R.E. 3; R. 585); (2) when Plaintiff filed her separate complaint (which was identical to all the other plaintiffs' complaints), she did not provide the court-ordered "core information" necessary for Defendants to respond, forcing Defendants again to seek relief from the Circuit Court (*id.*); (3) Plaintiff sued the Hanson

Entities, none of which played any role in the operation of the Grenada Plant, and there was "no indication that the plaintiff prior to commencing her lawsuit, ever attempted to determine whether those companies should have been named as defendants in this action" (Appellant's R.E. 3; R. 586); (4) Plaintiff claimed property loss in her complaint even though she owned no property in Mississippi and has been living in Illinois since 1975; (5) Plaintiff repeatedly refused to respond to Illinois Central's discovery requests, and defied the Circuit Court's order to do so; and (6) despite knowledge that proof of her claims would require an expert opinion as to causation, and discovery requests from defendants requesting and an order from the Circuit Court ordering the disclosure of expert testimony, Plaintiff never offered any evidence that her alleged injuries and damages were caused by exposure to chemicals from the Grenada Plant (Appellant's R.E. 3; R. 587-8). The Circuit Court did not abuse its discretion, in light of this record, when it imposed sanctions under both Mississippi Rule of Civil Procedure 11 and the Litigation Accountability Act.

Plaintiff does not dispute any of these facts. Instead, she contends that she "filed her complaint and continued this action based on a number of factors including, counsel's experience in this and previous litigation, discussions with experts, as well as Plaintiff's exposure history and diagnoses." (*See* Appellant's Brief, p. 10.) None of these "factors" justify Plaintiff's filing and pursuit of claims without any evidence whatsoever to support them. First, plaintiffs' counsel have yet to recover from the Defendants in any of these cases. On June 30, 2008, the verdict of the first plaintiff in the *Beck* federal litigation, Kenesha Barnes on behalf of the estate of her mother, Sherrie Barnes, was reversed by United States Court of Appeals for the Fifth Circuit and judgment was rendered in favor of Defendants. *See Barnes v. Koppers Inc., et al.,* 534 F.3d 357 (5th Cir. 2008). In so ruling, the Fifth Circuit specifically referred to "troubling questions" about how the lower court addressed various issues, which led to the ultimately reversed verdict. *See*

id. at 359. In the case of the second *Beck* plaintiff, the District Court on January 20, 2010 entered summary judgment in Defendants' favor on all claims. *See Hill v. Koppers Inc.*, No. 03CV60-P-D, 2010 WL 323380, *4 (N.D. Miss. Jan. 20, 2010). Plaintiffs have not appealed that order. In the *Angle* litigation, 56 cases have been dismissed for want of prosecution, 40 were dismissed on statute of limitations grounds, and the remaining 18 were found to be unsupported and frivolous, with summary judgment entered and sanctions awarded to Defendants (which order is the subject of this appeal). This Court recently affirmed the dismissals based on the statute of limitations. *Angle v. Koppers Inc.*, 2008-CA-02045-SCT, 2010 WL 2106043 (Miss. May 27, 2010). If anything, Plaintiff's "counsel's experience in this and previous litigation" demonstrates the frivolity of each plaintiff's claims.

Second, despite any "discussions with experts," it is undisputed that Plaintiff never presented a single expert report regarding her specific claims. As Plaintiff acknowledges, the Litigation Accountability Act imposes a duty of continuing inquiry, allowing sanctions "where an action, claim, or defense is not voluntarily dismissed within a 'reasonable time' after the attorney or party reasonably should have known that he could not prevail on the claim." (Appellant's Brief, p. 26) (citing *Leaf River Forest Products, Inc. v. Deakle*, 661 So. 2d 188, 197 (Miss. 1995)). At the time of the Circuit Court's September 1, 2009 Order, over four years had passed since Plaintiff joined herself in the original complaint; nearly two years had passed since Defendants requested the disclosure of expert testimony; and more than nine months had passed since the Circuit Court required Plaintiff to disclose expert testimony.

As the Circuit Court noted, the "inescapable conclusion" is that Plaintiff could "find no expert that is willing to offer an opinion that her purported injuries, illnesses, or property damage were caused by the defendants." (Appellant's R.E. 3; R. 587.) Assuming, *arguendo*, that Plaintiff and her counsel believed they could prevail on the complaint at the time it was filed,

they reasonably should have known that they could not prevail when they were unable to find a single expert to offer an opinion linking Plaintiff's injuries to emissions from the Grenada Plant, and they should have voluntarily dismissed the complaint. Because they did not, the Circuit Court did not abuse its discretion when it imposed sanctions. As this Court has stated:

> Complaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action. Absent exigent circumstances, plaintiffs' counsel should not file a complaint until sufficient information is obtained, and plaintiffs' counsel believes in good faith that *each plaintiff* has an appropriate cause of action...To do otherwise is an abuse of the system, and is sanctionable.

Harold's Auto Parts, 889 So. 2d at 494.

Finally, "Plaintiff's exposure history and diagnoses" alone does not support "a hope of success" in the absence of any evidence that Plaintiff's alleged injuries were caused by Defendants. As this Court has held, "[a] plaintiff's belief alone will not garner 'a hope of success' where a claim has no basis in fact." *Foster,* 804 So. 2d at 1024. In short, given the record in this case, the Circuit Court did not abuse its discretion in finding Plaintiff's complaint to be frivolous and groundless in fact, and in imposing sanctions pursuant to Rule 11(b) and the Litigation Accountability Act.

ii. The Circuit Court's attorneys' fee and cost award was reasonable and supported by the evidence

The Circuit Court ordered Plaintiff and her counsel to pay Defendants' attorneys' fees and costs in the amount of $7,086.43. (Appellant's R.E. 3; R. 589.) Plaintiff contends that the Circuit Court abused its discretion in "not ordering a reduced amount of attorney's fees and costs." (Appellant's Brief, p. 42.) Plaintiff is incorrect. This Court has held that the reasonableness of an attorney's fee award is determined by reference to the factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct. *Mauck v. Columbus Hotel Co.,* 741 So. 2d 259, 269 (Miss. 1999). That Rule provides in pertinent part:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Miss. R. Professional Conduct 1.5. In addition to these factors, "the Legislature gives additional guidance to courts in determining the reasonableness of attorney's fees by instructing the court to 'make the award based on the information already before it and the court's own opinion based on experience and observation....'" *Mauck*, 741 So. 2d at 270 (citing Miss. Code Ann. § 9-1-41).

In this case, Defendants submitted a Statement of Attorneys' Fees and Costs that evidenced the hours worked and rates claimed. (Appellant's R.E. 4; R. 399-412.) The Statement was supported by affidavits from Defendants' counsel attesting to the hours worked, fees and costs claimed, and work performed. (*Id.*) The affidavits were based on counsels' review of the billing records maintained in the litigation. (*Id.*) Because "the legal fees and costs incurred defending these 104 cases have been submitted to defendant clients under a single '*Angle*' designation," Defendants sought the pro rata share of fees and costs for the 18 plaintiffs whose

claims were dismissed by the September 1, 2009 Order. (Appellant's R.E. 4; R. 399-400.) In making its fee and cost award, the Circuit Court considered Defendants' Statement of Attorneys' Fees and Costs and supporting affidavits, the requisite factors under Rule 1.5 of the Mississippi Rule of Professional Conduct, the length and complexity of the case, and its own knowledge of what is charged for legal services in the area, and determined that the $7,086.43 in fees and costs sought was reasonable. (Appellant's R.E. 3; R. 588-9.) The Circuit Court followed the procedure established by this Court for determining reasonable attorneys fees, and the award should be affirmed. *See Estate of Gillies*, 830 So. 2d 640, 646 (Miss. 2002) ("In the case sub judice, the chancellor determined a reasonable fee, based on the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. He also considered the eight factors enumerated in Rule 1.5, as is required by *Mauck*. In doing so, he followed the proper procedure that this Court has established for determining reasonable attorney's fees. Thus, he did not abuse his discretion....").

Citing no authority on point, Plaintiff contends that Defendants should have provided the number of hours expended on each individual plaintiffs' case, rather than seeking recovery of the pro rata share of fees and costs for the 18 plaintiffs whose claims were dismissed by the September 1, 2009 Order. (Appellant's Brief, p. 44.) On the contrary, Defendants provided the Circuit Court with evidence of the hours worked, fees and costs claimed, and work performed, and the Circuit Court determined the fee sought was reasonable. As Plaintiff herself admits, this case required "time-consuming" and "expensive" legal work. (*See* Appellant's Brief, p. 2.) Given that the litigation had been pending below for over four years and involved voluminous pleadings, lengthy briefing on several complex legal issues that required extensive legal research, several hearings, written discovery and depositions, Plaintiff cannot seriously contend that the

$7,086.43 in fees and costs sought by Defendants was unreasonable. The Circuit Court did not abuse its discretion when it found that amount reasonable, and the award should be affirmed.

iii. The Circuit Court did not abuse its discretion in holding Plaintiff and each of her attorneys jointly and severally liable for Defendants' attorneys fees and costs

Finally, Plaintiff contends that the Circuit Court erred in ordering attorneys Wilbur Colom, J.P. Hughes and Frank Thackston jointly and severally liable for Defendants' attorneys fees and costs, because "[a]ll pleadings criticized by the Court were signed by other attorneys." (*See* Appellant's Brief, pp. 47-8.) Plaintiff is incorrect. As an initial matter, Plaintiff misstates the involvement of these attorneys in the proceedings below. Mr. Hughes has been counsel of record for plaintiffs since the filing of the original complaint in 2005. He and attorneys from his law firm have been actively involved in this case from its inception, even presenting Ms. Collins for her deposition in 2007. Members of the Hughes firm appeared in numerous depositions in the 18 cases which are the subject of this appeal. Likewise, Mr. Thackston first appeared for plaintiffs when they filed their initial complaint in 2005, and has been involved in the case ever since. His name appears on every pleading and discovery response. Mr. Colom appeared in early 2009 and has signed most of the subsequent pleadings, including the untimely and non-responsive Motion to Enter Scheduling Order and Response to Defendants' Motion to Dismiss or for Summary Judgment. (R. 387-8; 450-51; Appellees' R.E. 4; R. 459-69.)

Both Rule 11(b) and the Litigation Accountability Act specifically give the trial court discretion to impose sanctions against parties, attorneys, or both. *See* Miss. R. Civ. Pro. 11(b) ("If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.") (emphasis added); Miss. Code Ann. §

11-55-5(3) ("When a court determines reasonable attorney's fees or costs should be assessed, it shall assess the payment against the offending attorneys or parties, or both, and in its discretion may allocate the payment among them, as it determines most just, and may assess the full amount or any portion to any offending attorney or party.") (emphasis added).

As this Court has noted, "[f]rivolous filings impose substantial and unnecessary costs upon both litigants and courts, and ultimately upon the public. Rule 11 must be read and interpreted in light of the purpose implicit in it: one of general deterrence of frivolous filings. Common sense informs us that we may not eliminate frivolous filing nor its costs. The goal of Rule 11 enforcement is to holding the social cost of frivolous filings to an optimally efficient level." *Tricon Metals & Servs.*, 537 So. 2d at 1335. The Circuit Court explicitly laid out its rationale for holding each of Plaintiff's attorneys jointly and severally liable for the fee and cost sanction:

> This court sees no distinction between a plaintiff who pursues a frivolous cause of action, an attorney who continues to pursue the cause of action well after it is apparent that the cause of action has no merit, and the attorneys who originally filed the complaint. They all caused the defendant to spend time and money defending the action. They all should be liable for the payment of sanctions. Additionally, there is nothing in the Mississippi Rules of Civil Procedure that provides for an attorney playing a "passive" role in litigation. M.R.C.P. 11 and the Litigation Accountability Act apply to all attorneys who make an appearance in a cause of action.

(R. 613.) In light of the deterrent purpose of Rule 11, it cannot be said that the Circuit Court abused its discretion in holding all of Plaintiff's attorneys jointly and severally liable for the fee and cost sanction. *See, e.g., Foster,* 804 So. 2d 1018 (affirming trial court's decision holding attorney and client jointly and severally liable for attorneys fees and costs pursuant to Litigation Accountability Act); *Wyssbrod,* 798 So. 2d 352 (same).

CONCLUSION

Filing a lawsuit brings with it certain responsibilities. Plaintiffs should be prepared to follow orders of the court and prosecute their cases. The Circuit Court has the authority to oversee its docket and the discretion to set such orders to ensure that cases proceed fairly and expeditiously. Plaintiff and her counsel have failed in these cases to meet their responsibilities as litigants. They had no basis to make the claims they did. They clogged the Circuit Court's docket with frivolous and unsubstantiated lawsuits, defied court orders, and ignored the rules of discovery which govern Mississippi lawsuits. They had no evidence to support their claims.

The Circuit Court did not abuse its discretion when, after the case had been pending for three years, it ordered plaintiffs to come forward with expert evidence. Plaintiff has since repeatedly failed to comply with the Circuit Court's December 3, 2008 Order, and she defied the court's order to file a response to the summary judgment motion within five days. The Circuit Court did not abuse its discretion when it dismissed her complaint pursuant to Mississippi Rule of Civil Procedure 41(b). The Circuit Court also correctly entered summary judgment in Defendants' favor on Plaintiff's complaint after Plaintiff failed to make any showing sufficient to establish causation, a requisite element of each of her claims. Finally, the Circuit Court did not abuse its discretion in assessing sanctions against Plaintiff and Plaintiff's attorneys pursuant to the Litigation Accountability Act of 1988 and Rule 11(b) of the Mississippi Rules of Civil Procedure. Moreover, the Circuit Court's award of attorneys fees and costs was reasonable and supported by the evidence.

Accordingly, Koppers Inc., Beazer East, Inc., and Three Rivers Management, Inc. respectfully request that this Court affirm the judgment of the Circuit Court dismissing Plaintiff's claims, entering summary judgment in Defendants' favor and against Plaintiff on all of Plaintiff's claims, and awarding sanctions.

Respectfully submitted,

Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

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CERTIFICATE OF SERVICE

I, Christopher A. Shapley, hereby certify that a true and correct copy of the foregoing was sent via United States mail, first class postage prepaid, to the following:

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Hon. Joseph H. Loper, Jr. Circuit Judge P.O. Box 616 Ackerman, Mississippi 39735	

This is the 18th day of June, 2010.

Christopher A. Shapley

Miss. R. Civ. Pro. 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 66, or of any statute of the State of Mississippi, and upon the payment of all costs, an action may be dismissed by the plaintiff without order of court:

(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or

(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(2) *By Order of Court.* Except as provided in paragraph (a)(1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action may be dismissed but the counter-claim shall remain pending for adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court

may make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counter-claim, Cross-Claim or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Dismissal on Clerk's Motion.

(1) *Notice.* In all civil actions wherein there has been no action of record during the preceding twelve months, the clerk of the court shall mail notice to the attorneys of record that such case will be dismissed by the court for want of prosecution unless within thirty days following said mailing, action of record is taken or an application in writing is made to the court and good cause shown why it should be continued as a pending case. If action of record is not taken or good cause is not shown, the court shall dismiss each such case without prejudice. The cost of filing such order of dismissal with the clerk shall not be assessed against either party.

(2) *Mailing Notice.* The notice shall be mailed in every eligible case not later than thirty days before June 15 and December 15 of each year, and all such cases shall be presented to the court by the clerk for action therein on or before June 30 and December 31 of each year. These deadlines shall not be interpreted as a prohibition against mailing of notice and dismissal thereon as cases may become eligible for dismissal under this rule. This rule is not a limitation upon any other power that the court may have to dismiss any action upon motion or otherwise.

(e) Cost of Previously Dismissed Action. If a plaintiff whose action has once been dismissed in any court commences an action based upon or including the same claim against the same defendant, the

court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Miss. R. Civ. Pro. 37. Failure to Make or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order may be made to the court in which the action is pending.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).

(3) *Evasive or Incomplete Answer.* For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party of the attorney advising the motion or both

of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

(e) Additional Sanctions. In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

Miss. R. Civ. Pro. 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Miss. Code Ann. § 11-55-3. Definitions

The following words and phrases as used in this chapter have the meaning ascribed to them in this section, unless the context clearly requires otherwise:

(a) "Without substantial justification," when used with reference to any action, claim, defense or appeal, including without limitation any motion, means that it is frivolous, groundless in fact or in law, or vexatious, as determined by the court.

(b) "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company or any other entity, including any governmental entity or unincorporated association of persons.

(c) "Action" means a civil action that contains one or more claims for relief, defense or an appeal of such civil action. For the purposes of this chapter only, an "action" also means any separate count, claim, defense or request for relief contained in any such civil action.

Miss. Code Ann. § 11-55-5. Costs awarded for meritless action

(1) Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

(2) No attorney's fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim or defense within a reasonable time after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense.

(3) When a court determines reasonable attorney's fees or costs should be assessed, it shall assess the payment against the offending attorneys or parties, or both, and in its discretion may allocate the payment among them, as it determines most just, and may assess the full amount or any portion to any offending attorney or party.

(4) No party, except an attorney licensed to practice law in this state, who is appearing without an attorney shall be assessed attorney's fees unless the court finds that the party clearly knew or reasonably should have known that such party's action, claim or defense or any part of it was without substantial justification.

Miss. Code Ann. § 11-55-7. Discretion regarding amount awarded

In determining the amount of an award of costs or attorney's fees, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall consider the following factors, among others, in determining whether to assess attorney's fees and costs and the amount to be assessed:

(a) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed;

(b) The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;

(c) The availability of facts to assist in determining the validity of an action, claim or defense;

(d) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;

(e) Whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;

(f) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;

(g) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;

(h) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court;

(i) The extent to which a reasonable effort was made to determine

prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;

(j) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and

(k) The period of time available to the attorney for the party asserting any defense before such defense was interposed.

Miss. R. Civ. Pro. 11. Signing of Pleadings and Motions

(a) Signature Required. Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in that attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign that party's pleading or motion and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. The signature of an attorney who is not regularly admitted to practice in Mississippi, except on a verified application for admission pro hac vice, shall further constitute a certificate by the attorney that the foreign attorney has been admitted in the case in accordance with the requirements and limitations of Rule 46(b) of the Mississippi Rules of Appellate Procedure.

(b) Sanctions. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.