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

REPLY BRIEF OF APPELLANT SHIRLEY JEAN COLLINS

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Plaintiff requests that the Court hear oral argument from the parties on this case pursuant to Mississippi Rule of Appellate Procedure 34(a). Plaintiff believes that the issues will be presented to the Court more clearly on oral argument and that oral argument will significantly assist the Court in rendering its decision.

STATEMENT OF THE CASE

Collins provided in her original brief a statement of the case; however, she replies to particular points made in the Brief of Appellees as follows:

Studies indicate creosote and pentachlorophenol and/or their constituents cause or exacerbate a number of health conditions, including, but not limited to cancer, birth defects, neurological disorders, asthma, chronic obstructive pulmonary disease, sarcoidosis, lupus, renal disease, liver disorders and cardiovascular disease. Plaintiff, having lived at Route 1, Box 98 (Tie Plant Road), from age two (2) to age eighteen (18), is one of thousands of neighbors, past and present, to the Koppers Grenada wood treating facility who was exposed to its emissions. Defendants point out for the Court that more than 1,000 of those who live or lived near the plant filed suit. Once put on notice of the cause of their injuries, Plaintiffs believed it was imperative that they initiate their suits in a timely manner based on that knowledge.

Defendants are inaccurate in stating "[t]o this day, however, plaintiffs have never supplemented their responses to Illinois Central's discovery.[1] [Appellees' Brief at p. 7.] On December 5, 2008, the Circuit Court granted Illinois Central's motion to compel as stated in Appellees' brief [R. 328]; however, on December 17, 2008, the trial court ordered that Plaintiff was "granted ... until January 5, 2009, to respond to discovery requests from Defendant, Illinois Central Railroad." [R. 343.] Plaintiff served Responses to Defendant's, Illinois Central Railroad Company's, Requests for Production on December 12, 2008, and Plaintiff served Responses to Illinois Central Railroad Company's First Set of Interrogatories on December 24, 2008. [R. 339-40; R. 344-46.]

Appellees' Brief at page 7 discusses the remaining 18 cases which are the subject of this

[1]Plaintiff respectfully submits to the Court that Defendants' including terminology such as "to this day" and "still have not" is inappropriate inasmuch as once the trial court entered its judgment of dismissal, Plaintiff was prevented from further activity other than that related to appeal which dictates use of the standing trial record.

appeal, stating that Plaintiffs assert ailments dating back to the 1950s. Because the Koppers wood treating facility has been in almost continuous operation since the year 1904, with Koppers and its predecessors producing primarily pressure treated railroad cross ties and telephone poles using creosote and pentachlorophenol, such dates are not surprising. These remaining cases as brought to the Court's attention include: (1) John F. Bailey, (2) Paul Alexander Beck, (3) Erica Lashay Booker, (4) Annie Marie Collins, (5) Harry Collins, Jr., (6) Frank L. Davis, Sr., (7) Priscilla Ann Parker Harris, (8) Elnora Hubbard on behalf of the estate of Everette Hubbard, (9) Gloria Johnson as next friend and guardian of the minor child Jakayle D. Johnson-Daniels, (10) Christy A. Jourdan as next friend and guardian of the minor child Hallee Jourdan, (11) Joseph Marascalco, (12) Yvonne Marascalco, (13) Jessica McCree on behalf of the estate of Sandra McRee, (14) Ceola Moore, (15) Beverly Ann Robinson, (16) Zella R. Stanford, and (17) Martha Townsend.

Collins would also assert that the fact that Plaintiff's attorneys did not receive the Circuit Court's January 22, 2009 order setting a briefing schedule on Defendants' Motion to Dismiss or for Summary Judgment is well documented in the record,[2] despite Appellees' notation that her attorneys "claimed" they never received the order. [*See* Appellee's Brief at p. 10.]

ARGUMENT

I. The Trial Court Abused its Discretion in Dismissing Shirley Jean Collins' Cause of Action with Prejudice Pursuant to Mississippi Rule of Civil Procedure 41(b).

Defendants are incorrect in stating that Plaintiff has made no showing that she ever will or could comply with the December 3, 2008 order requiring expert details. [*See* Appellee's Brief at p.

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[2]Plaintiff filed a Motion to Set Aside Summary Judgment on February 20, 2009, attaching the affidavits of Andre F. Ducote, Hunter W. Lundy and J.P. Hughes, Jr. [R. 391-98], which the trial court granted March 10, 2009. In light of Plaintiff's motion, the trial court contacted the clerk of court and was advised that a copy of the order was mailed to Plaintiff's attorneys, postage due. [R. 447.] Based on counsel's affidavits and the clerk's method of mailing, the trial court found Plaintiff's attorneys had no notice of the order entered on January 22, 2009. [R. 447-48.]

18.] Plaintiff provided to Defendants information regarding experts who may testify on her behalf. [R. 360-65.] Plaintiff, in her December 12, 2008 Motion for Relief from Order, asked for additional time to obtain reports from her experts. [R. 329-32.] Further, Plaintiff's Response to Defendants Motion to Dismiss or, In the Alternative, for Summary Judgment and for Sanctions included portions of Dr. James Dahlgren's study of the health effects on nearby residents of the Grenada Koppers Plant which points to the fact that exposure to creosote, pentachlorophenol and/or their constituents cause and/or exacerbate cancer, diabetes and cardiovascular disease. [R. 459-76.][3]

"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." *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 972-3 (Miss. 2007). In the case *sub judice*, however, no scheduling order had been entered and no trial date set. While Plaintiff respectfully disagrees with the trial court's stating that the case had been *languishing* since March 17, 2006,[4] with eighteen (18) cases pending, Plaintiff requested the trial court enter a scheduling order to assist in advancing the litigation as a whole. [R. 450-53.]

Collins submits that the Circuit Court, in its December 3, 2008 Order Granting Motion for Expert Disclosure, adopted language similar to that from Defendants' Motion for Expert Disclosure,[5] however, that language was provided in a misleading manner:

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[3]The entire report was included as Attachment "C" to Response to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and for Sanctions filed in *Priscilla Ann Parker Harris v. Koppers, Inc., et al.*, Circuit Court of Grenada County, Mississippi, No. 2006-159-CV-L (Supreme Court Cause Number 2009-TS-01687), and incorporated by reference as to the *Collins* matter. Both the *Collins* and *Harris* matters are of a group of similar cases before the Supreme Court of the State of Mississippi. The matter at hand was selected to move forward on appeal, while *Harris* is stayed, pending a decision in the instant cause of action.

[4] [R. 575 (emphasis added). *See also* R.E. 1.]

[5]"[P]laintiff should have had this information before filing their claims." [R. 237.]

> The rationale behind these decisions for requiring expert disclosures in multi-plaintiff toxic tort litigation is that "plaintiffs should have had this information before filing their claims" pursuant to Rule 11. See Acuna v. Brown & Roote Inc., 200 F.3d 335, 340 (5th Cir. 2000).

Acuna v. Brown & Roote, Inc. does not stand for the proposition that obtaining an expert report is a prerequisite to filing a complaint. *Acuna v. Brown & Roote Inc.*, 200 F.3d 335, 340 (5th Cir. 2000).

Approximately one thousand six hundred plaintiffs in *Acuna* were suing over one hundred defendants for a range of injuries having occurred over a forty-year span. The plaintiffs' pleadings provided no notice as to how many instances of which diseases were being claimed as injuries or which facilities were alleged to have caused those injuries. Particularly considering the large number of parties involved in the litigation, it was within the district court's discretion to take steps to manage the complex and potentially burdensome discovery. *Id.* As such, the court did so by issuing scheduling orders requiring "that information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3)." *Id.* The Fifth Circuit agreed that "[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injures." *Id.* Collins' Complaint [R. 3-40], combined with her Submissions of Additional Information [R. 100-05] meet the criteria set out by *Acuna*.

Further, as discussed more fully in Plaintiff's principle brief, unlike with a medical malpractice claim, expert reports were not required prior to Plaintiff's filing her complaint. Plaintiff's counsel have consulted with experts prior to and throughout this litigation regarding causation; however, Plaintiff was unable to provide written expert reports and thus filed a Motion for Relief from Order on December 12, 2008, seeking additional time to respond. [R. 329-32.] Specifically, conflicts existed with Plaintiff's experts and her counsel were preparing for trial in an

environmental action scheduled to begin in January 2009, in federal court in Cincinnati, Ohio. *Id.* With no trial setting and no scheduling order in place, Defendants would not have been prejudiced. Plaintiff's motion, however, was denied. [R. 341-42.]

In response to the court's order, Plaintiff provided expert information in her supplemental discovery responses to Defendants, served January 5, 2009, including information regarding Nicholas Cheremisinoff, Ph.D.; Randy Horsak; Devraj Sharma, Ph.D.; Glen Johnson, Ph.D.; James Bruya, Ph.D.; Dr. William Sawyer; Dr. James Dahlgren; Paul Rosenfeld, Ph.D.; Dr. S. Vishwanath; and Dr. Thomas M. Nolen. [R. 360-65.] Plaintiff contends her responses as provided to defense counsel who are intimately familiar with this litigation were neither "vague," nor "generic." [Appellees' Brief at p. 20.] The same counsel were involved in the lengthy discovery process and trial of *Barnes v. Koppers Inc.*, a case on which the Circuit Court has based rulings, thus Plaintiff submits it was not inappropriate for her to reference same in her responses. Of the ten (10) experts listed in Plaintiff's responses, Defendants had deposed eight (8) of them with the depositions lasting for hours, some days. For the other two (2) experts, Drs. Vishwanath and Nolen, Plaintiff provided the information available at the time – each of their curriculum vitaes. [*See* R. 365.]

Plaintiff submitted further information regarding Dr. James Dahlgren to the Circuit Court in her Response to Defendants' Motion to Dismiss or, In the Alternative, for Summary Judgment and for Sanctions. [R.E. 4; R. 459-76.] In her response, Plaintiff included portions of Dr. Dahlgren's study specific to the Koppers Grenada facility, showing that cancers, diabetes and cardiovascular disease are related to exposure to creosote, pentachlorophenol and/or their constituents involved in the wood treating process (PAHs, dioxins, TCDD). [R.E. 4; R. 459-76.] Collins, who lived on Tie Plant Road from age two (2) to age eighteen (18), played in the ditches near the plant as a child, attended Tie Plant Elementary from 1958 - 1961, and drank water from a creek near the Koppers

facility, was diagnosed with each of these conditions – cancer, diabetes and cardiovascular disease. [R.E. 4; R. 459-76.]

This Court will affirm a dismissal with prejudice only if there is a showing of a clear record of delay or contumacious conduct by the plaintiff, and where lesser sanctions would not serve the best interests of justice. *Am. Tel. & Tel. Co. v. Days Inn of Winona,* 720 So.2d 178, 181 (Miss.1998) (citing *Rogers v. Kroger Co.,* 669 F.2d 317 (5th Cir.1982)). Defendants contend Plaintiff waived these arguments by failing to raise them below; however, Plaintiff submits to the Court that while not using the precise words, she did include such arguments by stating as follows:

> Defendants do not assert that plaintiff did not attempt to respond or wilfully ignored the order of the court. Their charge (which we will later show to has no merit) is that Plaintiff's answers were not good enough or not complete and did not provide all the evidence necessary to prove her case at trial.
>
> Discovery is an ongoing process that requires a party to timely supplement. Parties are required to give the best evidence they have, as soon as they have it. Evidence not disclosed may not be presented at trial. Here, discovery is not complete and none of the cases are set for trial.

[R. 459-60.]

None of the aggravating factors were present. The record provides no evidence that Collins was personally responsible for any delay. Furthermore, although Defendants include the *Wilson v. Nance* insert regarding prejudice, the aggravating factor requires *actual prejudice* and expenses alone do not reach that level. *Wilson v. Nance*, 4 So. 3d 336, 345 (¶ 36) (Miss. 2009). Wilson asserted on appeal that Nance suffered no prejudice beyond incurring costs and fees from the prolonged litigation with the trial court finding as follows:

> [T]he Plaintiff's failure to comply with this Court's Order resulted in prejudice to the Defendant, including the requirement that the Defendant incur needless litigation cost and expense, as well as a loss of income. Further, allowing this case to proceed would subject the Defendant to the potential of confronting new and different proof from a psychologist or psychiatrist despite the fact that no such proof has been identified by Plaintiff in Plaintiff's discovery responses.

Id. Nance argued that in addition to incurring costs from the litigation and losses from missing work, he would be prejudiced by the passage of time since the date of the accident and the loss of potential witnesses' testimony. *Id.* This Court found that the trial court properly found that Nance had suffered actual prejudice based on the combination of circumstances, not based strictly on an expenditure of litigation costs. *Id.*

Further, the filing of the initial *Angle* complaint is not at issue here; thus, Plaintiff should not be penalized for same. Collins' immediate action commenced upon the filing of her individual complaint on March 15, 2006. At that time, the Hanson Entities were included as defendants in Collins', as well as the other seventeen (17) actions, based on the due diligence of counsel. Notwithstanding the ultimate ruling of the trial court, the decision to include these parties, as seen in Plaintiff's complaint, was not an arbitrary one considering the involvement of these companies in the Grenada wood treating facility. [R. 3-5; R. 6-9; Appellate's Brief, pp. 39-41.]

Defendants are incorrect in stating that Plaintiff's counsel intentionally engaged in dilatory tactics throughout this case. Defendants note that requests have been pending since 2006; however, Plaintiff first served Defendant's Plaintiff's Responses to Defendant's, Beazer, Inc., Interrogatories, Requests for Production and Request for Admissions on November 1, 2006. [*See* R. at 200-02.] Thereafter, no motion to compel was ever filed by Defendant Beazer, Inc. as to Interrogatory No. 21 or any other of Plaintiff's responses. Plaintiff supplemented her responses to Beazer, Inc.'s discovery requests in her Supplemental Responses served on January 5, 2009.[6]

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[6]Plaintiff's counsel do, in fact, have a group of experts in the related *Beck* federal litigation, as is necessary in toxic tort litigation, and Defendants' counsel certainly have a experts of their own including: (1) Philip Cole, M.D., DR Ph.; (2) James Tate Thigpen, M.D.; (3) Dr. Philip S. Guzelian; (4) Dr. Jay Gandy; (5) Dr. Paul Anderson; (6) Michael Corn; (7) Dr. Walter J. Shields; (8) Gale Hoffnagle; (9) Leland Speakes, Jr.; (10) Jeffrey H. Bull; (11) Donald L. Corwin, PE; (12) Gary Kleinsrichert, CPA, CVA; (13) Ronald Frehner; (14) Wayne M. Grip; (15) Gary D. McGinnis, Ph.D.; (16) Otto Wong, SC.D; (17) Ray Ferrara; and (18) William H. Desvousges, Ph.D. Defendants imply that all of Plaintiff's experts have been the subject of numerous *Daubert* challenges and were barred by the District Court – that is incorrect. [*See* Appellee's Brief at p. 23.]

While the Court in *Kilpatrick v. Mississippi Baptist Med. Ctr.* affirmed the trial court's dismissal of plaintiffs' complaint with prejudice, the circumstances there are distinguishable from those in the matter *sub judice*. *Kilpatrick v. Miss. Baptist Med. Ctr.*, 461 So. 2d 765. (Miss. 1984). In *Kilpatrick*, when asked to identify expert witnesses plaintiff expected to call at trial, the plaintiff responded, "At this time, neither I nor my attorney have any crystal clear plans for calling any expert witnesses for my case. If and when these plans are changed including the expert witnesses, I will supplement my answers required by law to do so." *Id.* at 766. Ultimately, the plaintiff failed to provide the names of *any experts* other than stating that the plaintiff had been unable to schedule an appointment with a particular doctor for consideration as an expert and the lower court dismissed the plaintiffs' complaint with prejudice pursuant to Miss. Code Ann. § 13-1-237(b)(2)(C), former version of Rule 37(b)(2)(C). *Id.* Collins provided the names of potential experts as well as the information she had available about each of them. Further, expert reports had previously been provided to Defendants that were applicable to Collins' action as well.

Williams v. Puryear is also distinguishable. *Williams v. Puryear*, 515 So. 2d 1231 (Miss. 1987). There, this Court affirmed the trial court's dismissal with prejudice pursuant to Rule 37(b)(2)(C). *Id.* Additionally, the trial court finally dismissed the plaintiff's complaint because she failed to submit a pretrial order and to pay a $500.00 penalty as previously ordered by the court. *Id.* at 1232. The defendants propounded discovery to which the plaintiff supplied no responses, leading the defendants to file a motion to compel and later a second motion to compel. *Id.* Additionally, the plaintiff failed to respond to a request for admissions for four (4) months. *Id.* The lower court, "attempted to bring the case together by means of a pretrial conference," at which time it imposed a third deadline, requiring the plaintiff to supplement her answers to interrogatories and requests for admissions and to produce documents requested at an earlier deposition. *Id.* The court also granted

Williams leave to amend her admissions. *Id.* The plaintiff failed to respond and the defendants moved to dismiss her complaint. *Id.* The trial court heard the defendants' motion and entered the following requirement:

> [U]nless the plaintiff fully answers the interrogatories, furnishes the documents requested, and fully answers the request for admissions, prefiles the requested instructions and submits an executed pretrial order and reduces to writing and files a written record of any stipulation on or before the 15th day of January, 1986, and pays to the Defense $500.00 costs for having had to make motions and attend hearings on these four occasions, the case will be dismissed at the cost of the plaintiff.

Id. The plaintiff, as stated above, failed to submit a pretrial order and failed to pay the $500.00 to the defendants; thus, the court dismissed her cause of action with prejudice. *Id.*

Not only is *Williams v. Puryear* specific to a dismissal pursuant to Rule 37(b)(2)(C), but also litigation in the *Puryear* matter was much further along with a pre-trial conference held and a pre-trial order required by the lower court.[7, 8] Further, unlike Collins, Williams provided no responses at all prior to a hearing on a motion for sanctions held in connection to her failure to respond to discovery.

As outlined in Plaintiff's supplemental responses, Defendants possessed copies of reports, depositions and/or trial testimony for the majority of Plaintiff's listed experts. [*See* R. 360-65; *See also* Appellant's Brief, pp. 13-15.] Nicholas Cheremisinoff, Ph.D., as an example, presented opinions specific to the Grenada Koppers wood treatment plant regarding the acceptable standards, practices and procedures for waste management and disposal, as well as compliance with state and federal environmental rules, regulations and laws. *Id.* His report and/or testimony would not be

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[7]As noted by Illinois Central's counsel, the *Collins* "litigation has been terminated at a relatively early stage of litigation . . . " [R.E. 5; R. 414.]

[8]Collins filed a Motion to Enter Scheduling Order in an effort to move the litigation forward, but to do so by giving "appropriate priority" since all of the cases could not be tried at the same time. [R. 450-53.]

specific to Collins, but to the Koppers facility.

II. The Trial Court Erred in Granting Summary Judgment in Favor of Defendants.

The record contains evidence that Collins' injuries and health conditions were caused by exposure to emissions from the Koppers wood treatment facility. Portions of Dr. Dahlgren's Koppers Grenada study were set forth in Plaintiff's Response to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and for Sanctions, establishing causation evidence related to cancers, diabetes and cardiovascular disease for those exposed to creosote, pentachlorophenol and/or their constituents, relevant to Collins who lived on Tie Plant Road from age two (2) to age eighteen (18), played in the ditches near the plant as a child, attended Tie Plant Elementary from 1958 - 1961, and drank water from a creek near the Koppers facility. [R.E. 4; R. 459-76.]

The nonmovant, in a negligence action, can defeat summary judgment only "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 v. Biloxi Regl. Med. Ctr., Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990). Koppers's own document provides evidence of a breach of the standard of care and, as a result, the extensive contamination in the community. [*See* R. at 79-84.] A letter between Koppers and Beazer, produced in the litigation, revealed knowledge of contamination, as well as the fear that they would be sued by people claiming illness from exposure.[9] As pointed out in Plaintiff's principle brief, the letter provides, in part, the following:

* * *

> 6) Prior to KII's acquisition of the plant, BEI in its status as the owner/operator conducted open burning of materials containing pentachlorophenol in open

[9]Further, Koppers and Beazer brought suit against their insurers seeking coverage of environmental claims for several wood preserving sites around the country, including the Grenada, Mississippi facility. To do so, Koppers and Beazer had to admit contamination existed requiring remediation.

lagoons. [Illegible] the product that result from burning pentachlorophenol is dioxin. The responsibility for remediating the consequences of the open burning of pentachlorophenol, including dioxin contamination, remains with BEI, Further the full extent of dioxin contamination of the plant has not been characterized by BEI. The responsibility for doing so remains with BEI.

* * *

8) As a result of the extended period of time BEI has taken to implement corrective actions at the plant various contaminants associated with and arising from activities that occurred before December 18, 1988 have contaminated storm water that originates on the plant property. In order to continue operations at the plant, KII has been forced to obtain an NPDES permit for the discharge of storm water and had been required to implement various storm water control strategies and structures whose presence are required in whole are in part because of the pre-closing contamination for which BEI has responsibility. While BEI has enjoyed the benefit of the storm water control measures, it has not contributed to their costs despite the fact that they would have been required to implement such measures had KII not done so. The responsibility for an appropriate share of the costs of these storm water control measures and for any exceedances of discharge standards arising from pre-closing contamination remains with BEI.

9) Because BEI has failed to account properly for workplace exposures to hazardous constituents, there exists the possibility that at some point in the future KII will be sued by either an employee, plant visitor, or a plant neighbor for exposure to toxic substances. To the extent such exposures result from BEI's approach to risk assessment and remediation, responsibility therefor will be BEI's.

10) Because contaminated groundwater has been documented to have migrated off-site, there exists the possibility that private groundwater wells located on neighboring properties may have been impacted. The responsibility for locating and, if necessary, remediating the wells remains with BEI.

* * *

13) Sanborn maps indicate the existence of a "creosote hole" prior to the APA in the area approximately 20 feet south of the treating cylinders. Any contamination associated with the "creosote hole" remains the responsibility of BEI.

* * *

[R. 79-84.]

Defendants correctly state that Collins did not in her Motion for Relief From Order claim that the requisite information was in Defendants' sole possession. [R. 329-30.] However, by requesting additional time based on conflicts with experts and Plaintiff's counsel, preventing Plaintiff from complying with the December 3, 2008, Plaintiff's motion demonstrated that additional time would allow her to provide to both the Court and Defendants the requisite expert report(s), thus enabling Plaintiff to rebut Defendants' motion. *Id.*

In the overall litigation, extensive discovery has been conducted, including expert depositions, plaintiffs' depositions and voluminous document production. Further, a number of experts have rendered opinions regarding the Koppers facility. These experts include: (1) Nicholas Cheremisinoff, who provided opinions and testimony regarding the acceptable standard of care, environmental regulatory compliance and state of the art practices for wood treatment facilities; (2) Devraj Sharma, who provided opinions and testimony on air and surface water modeling to show the pathways of exposure; (3) Randy Horsak, who provided opinions and testimony regarding soil and attic dust samples taken in the Carver Circle neighborhood in which chemicals associated with the Grenada wood preserving facility were found; (4) Glen Johnson, who provided opinions and testimony fingerprinting chemicals found in soil and attic dust samples taken from the yards and homes in Carver Circle to the Grenada wood treatment facility; (5) James Bruya, who also provided opinions and testimony fingerprinting the chemicals found in soil and attic dust samples taken from the yards and homes in Carver Circle to the Grenada wood treatment facility; (6) William Sawyer, a toxicologist who provided opinions and testimony regarding general medical causation; and (7) James Dahlgren, a medical doctor with toxicological training who provided opinions and testimony regarding specific medical causation. The Defendants deposed almost all of these experts for several days each. Evidence exists in this action. The parties were not providing entirely new sets of the

same voluminous reports for each and every plaintiff. Additionally, the parties in the federal litigation had agreed to only supplement the depositions of the experts, rather than re-deposing experts for days (ultimately weeks) in each cause of action.

In light of her inability to provide an expert report within the time frame set by the District Court, a hearing would have allowed Collins an opportunity to present evidence including her own testimony, as well as that of Drs. Dahlgren and Sawyer.

III. The Trial Court Erred in Denying Shirley Jean Collins a Hearing and Granting Summary Judgment "on Written Briefs" Alone.

Plaintiff cited in her brief the 2009 *Strange ex rel. Strange v. Itawamba County Sch. Dist.*, 9 So. 3d 1187 (Miss. Ct. App. 2009), and 2005 *Partin v. N. Miss. Medical Ctr.*, 929 So. 2d 924 (Miss. App. 2005), both of which post-date the 2003 amendment to Rule 78 of the Mississippi Rules of Civil Procedure. While the Court has made some allowance for harmless error in matters in which there are clearly no genuine issues of material fact, "our case law declares that granting a summary judgment motion without a hearing is error." *Partin*, 929 So. 2d at 935 (¶ 38). Despite the fact that the amended Rule 78 of the Mississippi Rules of Civil Procedure permits courts to establish local rules allowing for certain motions to be decided on written briefs without a hearing, "M.R.C.P. 78 does not, by its terms, fundamentally change the requirements of M.R.C.P. 56 regarding summary judgment." *Partin*, 929 So. 2d at 934 (¶ 37). Furthermore, while Rule 78 allows courts the flexibility to establish procedures to "expedite court business," particularly where motion practice is concerned, no such local rule has been ratified by the Supreme Court for the Fifth Circuit Court District. *See* Miss. Rules of Court (West July, 2010) (Rule 4 as submitted to the Supreme Court was disapproved by order entered September 4, 2003). (*But see Strange*, 9 So. 3d at 1192 (¶ 22) ("the First Circuit Court District of Mississippi has established Rule 4(f), ratified by the [S]upreme [C]ourt in May 2006, which states that '[a]ll motions shall be decided by the Court without a hearing or oral

argument unless otherwise ordered by the Court on its own motion, or, in its discretion, upon written motion made by either counsel.'"))

IV. The Trial Court Abused its Discretion in Ordering Monetary Sanctions Against Plaintiff and Her Attorneys Because, According to the Court, Her Complaint Was Frivolous.

Defendants' reliance upon *In re Spencer*, 985 So. 2d 330 (Miss. 2008), is misplaced. The District Court specifically stated that there was nothing before the court that would suggest that Collins' complaint was filed for the purpose of harassment, or delay; nor did the lower court find it vexatious. [R.E. 2; R. 583.] In *Spencer*, however, a key issue was the *harassing* nature of Spencer's filings, with the Supreme Court noting:

> [W]e cannot say the chancellor abused her discretion in finding the several pleadings filed by Spencer constituted "harassment" under the Rule. Therefore, we affirm the chancellor's judgment finding Spencer liable for attorneys' fees and costs under Rule 11 of the Mississippi Rules of Civil Procedure.

In re Spencer, 985 So. 2d at 339 (¶ 30). The Court also affirmed Spencer's liability for fees and costs under the Litigation Accountability Act and Rule 11, but found plain error in the amount of those fees and costs. *Id.* at 339 (¶ 31). As such, the Court vacated the judgement and remanded for a factual finding as to the amount of reasonable attorneys' fees and costs. *Id.* at 339 (¶ 31).[10]

Collins respectfully disagrees with the District Court regarding the merits of her cause of action; however, should this Court agree, Plaintiff would point to its *Tricon Metals & Services, Inc. v. Topp*:

> We must be clear that mere denial of a claim on the merits in and of itself does not subject a party to Rule 11 sanctions. The claim must not only be without merit, it must be frivolous.

Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1331, 1335 (Miss. 1989) (citing *Dethlefs v. Beau*

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[10]As noted by Defendants, the Court in *Wyssbrod v. Wittjen*, 798 So. 2d 352 (Miss. 2001), also affirmed the trial court's imposition of sanctions under the Litigation Accountability Act; however, the trial court imposed those sanctions following an evidentiary hearing which was not afforded the parties in the instant matter.

Maison Development Corp., 511 So. 2d 112, 118 (Miss. 1987)). Defendants also cite *Tricon Metals & Services, Inc. v. Topp* wherein this Court affirmed the trial court's imposition of sanctions against the plaintiff under Rule 11 for the filing of a frivolous complaint. [Appellee's Brief at pp. 32-33.] *Tricon*, however, is not analogous to the instant cause. In its complaint Tricon sought (1) injunctive relief against a former employee based upon a non-compete clause contained in an alleged contract, and (2) monetary damages in connection with repayment of a bank note and for repayment of commission advances. *Tricon*, 537 So. 2d at 1335. First, Tricon had nothing on which to establish its claim for injunctive relief since Topp had not signed a written contract containing a non-competition clause. *Id.* As for its damages claim, the lower court found that Topp had earned all of the commissions advanced to him, including that in the form of the bank loan. *Id.* Thus, Topp had a complete defense to the plaintiff's claims, leaving the plaintiff with no hope of success. *Id.* at 1336.

The *Collins* record contains information regarding Plaintiff's exposure history, as well as her health conditions. Further, the record includes portions of Dr. Dahlgren's study of the health effects on nearby residents of the Grenada Koppers Plant which states cancer, diabetes and cardiovascular disease, conditions from which Collins suffers, are related to exposures to creosote, pentachlorophenol and/or their constituents. [R. 459-76.] Further still, the record includes copies of Defendants' own documents which discuss the contamination of the community surrounding the Koppers facility. [R. 79-84.] Unlike Topp, Defendants do not have a complete defense.

In *Foster*, despite the fact that in order to prevail, plaintiff had to demonstrate by clear and convincing evidence that a confidential relationship existed between the defendant and Nannie Mae Ross, the only evidence the plaintiff put forth was that Nannie Mae Ross and her son, Tony Ross, were related. *Foster v. Ross*, 804 So. 2d 1018, 1022-23 (¶¶ 14-16) (Miss. 2002). Foster's position

was that he "continued to believe [Nannie Mae] would never knowingly contradict the terms of her will and that she had been under the dominance of Mr. Ross." *Id.* at 1024 (¶ 17). However, "[a] plaintiff's belief alone will not garner a 'hope of success' where a claim has no basis in fact." *Id.* Foster's scenario is not that of Collins as is evident by the record in combination with Plaintiff's briefs.

CONCLUSION

Based upon the reasons set forth in her principal brief and this reply brief, Plaintiff respectfully requests that this Court REVERSE and VACATE the September 15, 2009 Amended Judgment of Dismissal and Summary Judgment. Alternatively, Plaintiff respectfully requests that this Court remand this matter to the trial court for hearing.

Respectfully submitted, this the 5th day of August, 2010.

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CERTIFICATE OF SERVICE

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