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

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

BRIEF OF APPELLANT SHIRLEY JEAN COLLINS

ORAL ARGUMENT REQUESTED

Hunter W. Lundy (MSB No[redacted]
Kristie M. Hightower (MSB No[redacted]
LUNDY, LUNDY, SOILEAU & SOUTH, LLP
501 Broad Street
Lake Charles, Louisiana 70601
(337) 439-0707

Wilbur O. Colom (MSB No[redacted]
THE COLOM LAW FIRM
P.O. Box 866
Columbus, MS 39703
(662) 328-0903

Attorneys for Shirley Jean Collins

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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 Appellant-Plaintiff
3. Lundy, Lundy, Soileau & South, LLP, Counsel for Appellant-Plaintiff
4. Jerry P. "Jay" Hughes, Jr., Counsel for Plaintiffs
5. Carter C. Hitt, Counsel for Plaintiffs
6. Franklin S. Thackston, Jr., Counsel for Plaintiffs
7. John H. Daniels, III, Counsel for Plaintiffs
8. William Eason Mitchell, Counsel for Plaintiffs
9. Bailey & Womble, Counsel for Plaintiffs
10. Patterson & Patterson, PLLC, Counsel for Plaintiffs
11. Peter T. Martin, Counsel for Plaintiffs
12. Koppers Inc., f/k/a Koppers Industries, Inc.

13. Beazer East, Inc., f/k/a Beazer Materials and Services

14 Three Rivers Management

15. Illinois Central Railroad Company, f/k/a Illinois Central Gulf Railroad Co.

16. Jay Gore III, Counsel for Koppers Inc., Three River Management, Beazer East, Inc.

17. Christopher A. Shapley, Counsel for Koppers Inc., Three Rivers Management, Beazer East, Inc.

18. William "Trey" Jones III, Counsel for Koppers Inc., Three Rivers Management, Beazer East, Inc.

19. Reuben V. Anderson, Counsel for Koppers Inc., Three Rivers Management, Beazer East, Inc.

20. Robert L. Gibbs, Counsel for Koppers Inc., Three Rivers Management, Beazer East, Inc.

21. Glenn F. Beckham, Counsel for Illinois Central Railroad Company

22. Harris Frederick Powers III, Counsel for Illinois Central Railroad Company

23. Christopher W. Winter, Counsel for Illinois Central Railroad Company

24. C. Cameran Auerswald, Counsel for Illinois Central Railroad Company

25. Hon. Joseph H. Loper Jr., Grenada County Circuit Court Judge

In addition to the above-listed persons having a specific interest in the matter at hand, this Court has on file before it appeals in other cases involving the same defendants. All of these cases are currently stayed, pending the outcome of the *Shirley Jean Collins* case. The attorneys for these cases are the same as those in the instant matter. The appellants in the stayed 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.

Respectfully submitted, this the 17th day of March 2010.

Hunter W. Lundy

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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 ISSUES

I. When a Plaintiff's Case Is Not Set for Trial, No Scheduling Order Is In Place, Volumes of Depositions Have Been Taken in the Ongoing Litigation, and the Plaintiff Has Presented Experts as to General Causation, Is It an Abuse of the Trial Court's Discretion to Dismiss her Cause of Action with Prejudice Pursuant to Mississippi Rule of Civil Procedure 41(b)?

II. When a Plaintiff Has Presented Evidence That She Has Been Diagnosed with Colon Cancer, Heart Disease, Diabetes and High Blood Pressure, That She Lived and Attended Elementary School Near a Wood Treatment Facility That Released Creosote and Pentachlorophenol, Known Carcinogens, and the Expert Report Provides that Her Ailments Are Causally Associated with the Toxic Exposure from the Defendant's Facility, Does the Trial Court Err in Granting Summary Judgment in Favor of the Defendants?

III. When a Defendant Makes No Mention of Any Argument, Other than One Regarding Personal Injury, In Their Original Motion for Summary Judgment, Does the Trial Court Err in Granting Summary Judgment as to the Plaintiff's Claims in their Entirety?

IV. When a Plaintiff, in Her Summary Judgment Response, Specifically Requests a Hearing As Contemplated by Rule 56(c) of the Mississippi Rules of Civil Procedure Where She May Put Forth Live Evidence and Appear to Testify Personally and She Receives No Denial of Her Request and/or Opportunity to Supplement Her Response, Does the Trial Court Err in Denying the Plaintiff a Hearing and Granting Summary Judgment "on Written Briefs" Alone?

V. When a Plaintiff Has Presented Evidence That She Has Been Diagnosed with Colon Cancer, Heart Disease, Diabetes and High Blood Pressure Which Are Opined by the Plaintiff's Expert to Be Causally Related to the Toxic Exposure of the Defendants' Wood Treatment Facility Near the Plaintiff's Home and Elementary School and the Plaintiff's Attorneys Have Been Successful at Trial in a Similar Matter, Is It An Abuse of the Trial Court's Discretion to Order Monetary Sanctions Against the Plaintiff and Her Attorneys Because, According to the Court, Her Complaint is Frivolous?

VI Alternatively, When a Defendant Submits a Statement of Attorney's Fees and Costs, Basing Their Fees on a Proration Formula with Nothing Other than Affidavits to Support Their Claim and Requesting Reimbursement for Nominal and/or Duplicative Work, and the Trial Court Orders the Plaintiff and Her Attorneys to Pay Those Fees and Costs, Is It an Abuse of

the Trial Court's Discretion?

VII. When Attorneys Who Were Not of Record and Were Not Active in the Proceedings Are Sanctioned, Is It an Abuse of the Trial Court's Discretion?

STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings.

This matter is one of a group of cases filed in Grenada, Mississippi, regarding environmental contamination by a wood treatment facility which pressure treats railroad ties, poles and lumber with creosote and pentachlorophenol. The Court cannot look at this case in isolation. Plaintiff's counsel have tried one case before the United States Court for the Northern District of Mississippi, specifically, *Beck (Barnes) v. Koppers, Inc., et al.*, C.A. No. 3:03CV-60-P-D, where the jury found liability and returned an $850,000 verdict in favor of the plaintiff on behalf of her mother, who died of breast cancer at the age of thirty-four (34). While that case was appealed and overturned, the Fifth Circuit overturned the verdict based upon the issue of statute of limitations, not the liability of Defendants. In the same context, the statute of limitations issue was recently brought before the Mississippi Supreme Court. Arguments were heard March 8, 2010, in a companion case to *Collins*, that of *Rebekah Angle v. Koppers Inc., et al.*, Circuit Court of Grenada County, Mississippi, No. 2006-194-CV-L, Supreme Court Cause Number 2008-CA-02045, and the parties are awaiting a decision on that matter.

Plaintiff respectfully asks the Court to take notice of the time-consuming, expensive and diligent actions Plaintiff's counsel have taken on behalf of all of the plaintiffs which is crucial to understanding the posture of these cases. Additionally, all cases must be tried with only two courts involved, and all must be filed or the statutes of limitations would run on them.

Shirley Jean Collins brought suit against Koppers Inc., Beazer East, Inc., Three Rivers Management (sometimes hereinafter referred to as the "Koppers Defendants") and Illinois Central

Railroad Company (hereinafter referred to as "Illinois Central") on March 17, 2006,[1] alleging exposure to toxic chemicals and various other harmful constituents generated by the Defendants' wood treatment processes and/or contribution thereto. [R. 3-40.] Counsel reached an agreement regarding acceptance of process, also agreeing answers would be filed by May 19, 2006. See R. at 41. On May 19, 2006, two (2) motions to dismiss were filed – one by Illinois Central and the other by Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc. [R. 43-45, 46-61.] Defendants' motions were denied June 29, 2006, and Plaintiff was ordered to provide a more definite statement in accordance with Rule 12(e).[2] [R. 99.] Plaintiff filed her more definite statement August 14, 2006. [R. 100-05.] Defendants, Illinois Central, Koppers Inc., and Beazer East, Inc. and Three Rivers Management, filed their answers thereafter in August 2006. [R. 106-26, 127-59, 160-92.]

The parties began exchanging discovery August 31, 2006, exchanging the majority of discovery from that date to December 28, 2006, and throughout 2007. [R.E. 1.] Koppers Inc., Beazer East, Inc. and Three Rivers Management filed on September 17, 2008, a Motion for Expert Disclosure. [R. 234-62.] On December 3, 2008, the trial court entered an order granting Defendants'

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[1]Suit was also brought against Hanson PLC, Hanson Building Materials Limited, Hanson Holdings, Limited, Hanson Holdings Basalt, Inc., Hanson Holdings Aragonite, Inc., HBMA Holdings, Inc. (sometimes hereinafter referred to as the "Hanson Defendants"). The Hanson Defendants were later dismissed for lack of *in personam* jurisdiction.

[2]The trial court set out in it's order:

> The [Defendants'] basis for these motions is that the complaint has failed to provide "core information" as required by the Court's order of December 15, 2005, [in *Rebekah C. Angle v. Koppers Inc., et al.*]. The Defendants only refer to the order of this Court and do not cite any rule of law that would justify dismissal at this time. The Court can only conclude that these motions are akin to a 12(b)(6) motion.

[R. 99.] The trial court found that "while it is true that certain information is lacking...the complaint does at least set out a claim upon which relief can be sought," making dismissal inappropriate. *Id.* However, while not relief specifically plead, with its inherent authority, the trial court ordered Plaintiff to provide a more definite statement to Defendants. *Id.*

motion. [R. 326-27.] Plaintiff filed a Motion for Relief from Order on December 12, 2008, seeking additional time to respond in light of conflicts with Plaintiff's expert witnesses and Plaintiff's counsel [R. 329-32]; however, her motion was denied with the trial court finding "that the information that was ordered to be provided to the defendants is information that should have been in the possession of the plaintiff's attorney prior to the filing of a complaint, and at the very latest, when the plaintiff filed a more definite statement . . . "[3] [R. 341-42.] In the meantime, on or about December 19, 2008, Plaintiffs' counsel determined The Colom Law Firm would respond to all Grenada County motions and discovery. Plaintiff served her Supplemental Responses to Beazer East, Inc.'s First Set of Combined Interrogatories, Requests for Production of Documents and Request to Admit and Second Supplemental Response to Defendant, Three Rivers Management, Inc.'s First Request to Admit, Interrogatories and Document Production on January 5, 2009. [R. 360-72; R. 373-81.] On January 14, 2009, Defendants, Koppers Inc., Beazer East, Inc. and Three Rivers Management, filed their Motion to Dismiss or, in the Alternative, for Summary Judgement and for Sanctions [R. 349-81], in which Illinois Central joined on or about January 19, 2009. [R. 382-84.] The trial court issued an order requiring Plaintiff to respond to Defendants' motion within ten (10) days of its January 22, 2009 order [R. 385], but that order was not received by counsel and the trial court granted summary judgment February 12, 2009. See affidavits of Andre F. Ducote [R. 395-96],

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[3]Plaintiff was ordered to, within thirty (30) days of the entry of the order:

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 complaints.
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 plaintiff's specific medical conditions.
4. Respond fully and completely to Interrogatory 21 seeking expert disclosures and supplement all discovery requests seeking expert information.

[R. 326-27.] (emphasis added).

Hunter W. Lundy [R. 397] and J.P. Hughes, Jr. [R. 398.] Wilbur O. Colom filed his Entry of Appearance on February 6, 2009. [R. 387-88.] Plaintiff filed a Motion to Set Aside Summary Judgment on February 20, 2009 [R. 391-98], which the trial court granted March 10, 2009.[4] [R. 446-49.] With eighteen (18) pending cases, Plaintiff's counsel filed a Motion to Enter Scheduling Order on March 18, 2009, again, not to create delay, but "to give appropriate priority" since all of the cases could not be tried at the same time. [R. 450-53.] Plaintiff filed her Response to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and for Sanctions on March 23, 2009. [R. 459-76.] The Koppers Defendants followed with a reply in support of their motion on March 30, 2009 [R.545-58], in which Illinois Central joined [R. 559-60], to which Plaintiff responded with her Motion to Strike the Reply of Defendants' in Their Motion to Dismiss or for Summary Judgment filed April 6, 2009. [R. 561-63.] Plaintiff contended Defendants set forth arguments including theories of law and fact not advanced in the initial motion; thus, Plaintiff had inadequate opportunity to respond, resulting in a denial of due process. *Id.* On September 1, 2009, the trial court's opinion was entered into the record [R.E. 4; R. 570-90], and on September 15, 2009, the trial court entered its Amended Judgment of Dismissal and Summary Judgment, ordering that Plaintiff and her counsel pay sanctions [R.E. 3; R. 603-04]. Aggrieved by this decision, Collins timely filed her Notice of Appeal. [R. 615.]

II. Statement of the Facts.

The Koppers wood treatment facility near the town of Grenada, Mississippi, has been in almost continuous operation since the year 1904, with Koppers and its predecessors producing

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[4]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, and set aside the Summary Judgement entered on February 12, 2009, giving Plaintiff five (5) days to file a written response. [R. 447-48.]

primarily pressure treated railroad cross ties and telephone poles using creosote and pentachlorophenol. Dioxin is a constituent of pentachlorophenol and polycyclic aromatic hydrocarbons (PAHs) are a constituent of creosote. The plant is situated on 171 acres and is located five (5) miles southeast of Grenada, Mississippi, between State Highway 51 and the Batupan Bogue Creek. Just west and northeast of the Plant is a residential community known as Tie Plant.

The physical pathways in which plaintiff contends she was exposed include the offsite migrations of dioxins, furans, benzene, benzo[a]pyrene, naphthalene, and other chemicals from the process waste liquids and the waste preservative liquids that were emitted from the Plant. Also, vapors and gases of these same chemicals of concern were emitted as a result of elevated process temperatures, which then migrated offsite and came to rest at local schools in the community, and other locations where the plaintiff either lived, worked, played or visited. In addition to the above-described offsite migration of toxic chemicals, there were offsite soot products and by products of combustion resulting from: 1) fires at the Plant; 2) boiler burning operations; 3) the opening of cylinder doors; 4) emitting volatile vapors from treatment process operations; 5) emitting volatile vapors from treated ties and poles; 6) emitting volatile vapors from aerosol droplets from operations, including fog mist containing dissolved concentrations of these toxic chemicals coming from the Koppers' waste disposal spray field across from the Carver Circle community; and 7) from other contaminated soils and conditions on the property.

Shirley Jean Collins was born in 1949, in Grenada, Mississippi, and lived at Route 1, Box 98 for a large portion of her life. [R. 100.] Additionally, as a child, she attended Tie Plant Elementary School which is located on what was previously Koppers' own plant property. [R. 100; R. 22-23.] She lived at the Route 1 address from approximately 1951 until 1967, and from approximately 1957 until 1961, attended the Tie Plant Elementary School. [R. 100.] While growing up, she played in the ditches near the Koppers facility and drank water from a creek in the vicinity

of the Koppers plant as well. [R. 100.] Throughout this time, Collins received chronic exposure, inhaling, ingesting and being exposed through the skin to the toxic contaminants. Collins began suffering from dizziness beginning in 1981. [R. 100.] She was then diagnosed with high blood pressure in 1992, heart disease in 1993, diabetes in 2004, and colon cancer in 2005. [R. 100-05.]

Litigation has been ongoing for some years regarding the Koppers Grenada wood treatment facility in both state and federal courts with one trial having occurred in the Northern District of Mississippi before Judge W. Allen Pepper, Jr. The jury in that action, *Beck (Barnes) v. Koppers, Inc., et al.*, United States District Court for the Northern District of Mississippi, C.A. No. 3:03CV-60-P-D, returned a compensatory verdict in the amount of $850,000 in favor of the plaintiff against Beazer and Koppers, finding that they operated the Grenada wood treatment facility in a negligent manner causing the mother of the plaintiff to be exposed to toxic chemicals which resulted in her development of breast cancer and eventually her death. While the Fifth Circuit eventually overturned that verdict, it did so based on statute of limitations, an issue which is now on appeal in the Mississippi Supreme Court in the case of *Angle v. Koppers Inc., et al.*, Circuit Court of Grenada County, Mississippi, No. 2006-194-CV-L, Supreme Court Cause Number 2008-CA-02045.

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. While these experts had not yet rendered reports specific to Collins' exposure and ailments, their previous reports and deposition testimony were applicable and had been produced to Defendants.

Shirley Jean Collins was originally a plaintiff in *Rebekah C. Angle, et al. vs. Koppers Inc., et al.*, Circuit Court of Grenada County, Mississippi, No. 2005-299-CV-L (hereinafter referred to as "*Angle*"); however, the trial court found that the claims of the plaintiffs were improperly joined and ordered them severed, looking to Judge Pepper's opinion in the related *Beck* case. [R. 51-56.] In its order, the trial court required that each of the *Angle* plaintiffs refile an individual complaint within thirty (30) days of the entry of its February 16, 2006 judgment. Collins, as noted above, refiled her complaint March 15, 2006, and is one of eighteen (18) remaining *Angle* plaintiffs.

SUMMARY OF THE ARGUMENT

I. Dismissal

Collins contends the trial court abused its discretion in dismissing her action pursuant to Mississippi Rule of Procedure Rule 41(b), when it found "given the length of time this litigation has been ongoing and the fact that the plaintiff has failed to provide the information concerning expert witnesses, and has done very little to advance this litigation, this court finds that dismissal of this action pursuant to M.R.C.P. 41(b) is appropriate." [R.E. 3; R. 575-76.] Plaintiff submits to this

Court that: (1) no clear record of delay or pattern of contumacious conduct exists, (2) lesser sanctions were not considered and (3) no aggravating facts were present. *Am. Tel. & Te. Co. v. Days Inn of Winona*, 720 So. 2d 178, 180-81 (¶¶ 12-13) (Miss. 1998). Because the required elements are lacking for dismissal pursuant to Rule 41(b), the dismissal was inappropriate and an abuse of the trial court's discretion.

II. Summary Judgment

Collins further argues that the trial court erred in granting summary judgment in favor of defendants. On motion for summary judgment, "the moving party has the burden of demonstrating that no genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Howard v. City of Biloxi*, 943 So. 2d 751, 754 ¶4 (Miss App. 2006) (quoting *City of Jackson v. Sutton*, 797 So. 2d 977, 979 ¶7 (Miss. 2001). Collins was denied a summary judgment hearing despite her request for same. The trial court found that "*oral arguments* would not be beneficial" and considered Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and for Sanctions, completely disregarding Collins' request for a *hearing*. [R.E. 3; R. 570.] (Emphasis added.) In *Adams v. Cinemark USA, Inc.*, the Supreme Court found that, due to the finality of summary judgments, the trial court erred in not granting a hearing on the motion. *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1163 (¶ 26) (Miss. 2002). In the case *sub judice*, Plaintiff specifically requested a hearing so that she would have an opportunity to put on evidence, stating in her response to Defendants' motion as follows: "As contemplated by M.R.C.P. 56(c), Plaintiff requests a hearing on this matter where she may put forth live evidence and appear to testify personally." [R. 467.] Mississippi law in general requires adherence to the notice and hearing requirements of Rule 56 of the Mississippi Rules of Civil Procedure, yet Collins' request was not only denied, but ignored. Rule 56(c) clearly states that the adverse party may serve opposing affidavits "prior to the day of the hearing." Miss. R. Civ. P. 56(c).

As such, Plaintiff, if not afforded a hearing as requested, should have been given a date certain to supplement her response with affidavits. To dispose of Plaintiff's case upon the merits without a hearing and without informing her she would not be provided a hearing is a denial of due process.

III. Sanctions

Finally, Collins argues the trial court abused its discretion in ordering monetary sanctions against Plaintiff and her attorneys pursuant to Mississippi Rule of Civil Procedure 11 and/or the Litigation Accountability Act of 1988, finding her complaint frivolous. While Rule 11 looks to the time of filing, the Litigation Accountability Act imposes a duty of continuing inquiring, "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." *Leaf River Forest Products, Inc. v. Deakle*, 661 So. 2d 188, 197 (Miss. 1995). A pleading is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *City of Madison v. Bryan*, 763 So. 2d 162, 168 (Miss. 2000) (quoting *Tricon Metals & Servs., Inc. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989)). Plaintiff 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. Plaintiff had much more that a mere "hope of success" from the point of initiating the complaint and forward.

In the alternative, Plaintiff contends the trial court abused its discretion in failing to order a reduced amount of attorney's fees and costs. Mississippi Code Annotated § 11-55-5 requires that an assessment of attorney's fees must be an amount deemed to be reasonable. The United States Supreme Court adopted the "lodestar" method of calculating reasonable attorney's fees in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983), setting out twelve (12) factors considered in determining a reasonable fee. The Mississippi Supreme Court has outlined similar factors in *McKee v. McKee* and further held that "the reasonableness of attorney's fees [is]

controlled by the applicable Mississippi Rule of Professional Conduct 1.5 factors . . . " *BellSouth Pers. Commun., LLC v. Bd. of Supervisors*, 912 So. 2d 436, 446 (Miss. 2005) (quoting *Mabus v. Mabus*, 910 2d 486, 489 (Miss. 2005)). The *BellSouth* Court stated "In calculating the 'lodestar' fee, the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate." *Bellsouth*, 912 So. 2d at 446-47 (quoting *In re Estate of Gillies*, 830 So. 2d 640, 645 (Miss. 2002)). The controlling factor is "what is reasonable." *BellSouth*, 912 So. 2d at 446 (quoting *Mauck v. Columbus Hotel*, 741 So. 2d 259, 271 (Miss. 1999)). Plaintiff submits that the fees and costs assessed in this instance are not reasonable in that (1) the Koppers Defendants submitted a statement of attorney's fees and costs based on a pro-rata share and provided affidavits alone with no detail regarding the hours expended on the *Collins* matter and (2) the fees submitted by Illinois Central were excessive.

STANDARD OF REVIEW

I. Dismissal

Mississippi Rule of Civil Procedure 41(b) involves court orders that are "necessary for preparation of trial litigation as well as the trial itself and its procedure insofar as it relates to the rules of civil procedure." *Wallace v. Jones*, 572 So. 2d 371, 377 (Miss. 1990). This Court reviews Rule 41(b) dismissals for an abuse of discretion. See, e.g., *Miss. Dept. Human Serv. v. Guidry*, 830 So. 2d 628, 632 (Miss. 2002) (citations omitted); *Wallace*, 572 So. 2d at 375 (citations omitted).

II. Summary Judgment

This Court applies a *de novo* standard of review to a trial court's grant of summary judgment. *Moss v. Batesville Casket Co.,* 935 So.2d 393, 398 (¶ 15) (Miss. 2006). The court must determine that no genuine issue of material fact exists and that the moving party must be entitled to a judgment as a matter of law for summary judgment to be properly granted. Miss. R. Civ. P. 56(c). "The moving party has the burden of demonstrating that no genuine issue of material fact exists, and the

non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Howard v. City of Biloxi*, 943 So.2d 751, 754 (¶ 4) (Miss. Ct. App. 2006). "The evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Northern Elec. Co. v. Phillips*, 660 So.2d 1278, 1281 (Miss.1995).

III. Sanctions

This Court reviews a sanctions order brought under Mississippi Rule of Civil Procedure 11(b) and/or the Litigation Accountability Act of 1988 for abuse of discretion. Rule 11 states, and the Act has been interpreted to state, that the decision to award sanctions is within the trial court's discretion. Miss.Code Ann. § 11-55-5 (Rev.2002); M.R.C.P. 11(b); *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So.2d 1041, 1045 n. 6 (Miss.2007).

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).

A. Defendants' Motion for Expert Disclosure Was Granted Despite Conflicts of Plaintiff's Experts and Counsel and Her Request for Additional Time.

Koppers Inc., Beazer East, Inc. and Three Rivers Management jointly filed on September 17, 2008, pursuant to Mississippi Rules of Civil Procedure 16, 26, and 37, a Motion for Expert Disclosure, requesting that the trial court enter a discovery order, "requiring plaintiffs to provide the basis for expert opinions relating to general causation, specific causation and exposure." [R. 234-62.] Taking each rule in turn, first Mississippi Rule of Civil Procedure 16 (f) provides in part that the court may direct the attorneys for the parties to appear before it at least twenty (20) days before the case is set for trial for a conference to consider and determine the exchange of reports of expert witnesses expected to be called by each party. Miss. R. Civ. P. 16(f). No attempt to schedule a conference to consider deadlines for providing reports in this or the other seventeen (17) *Angle* cases was made. Second, Rule 26 as to experts provides:

(b)(4)(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Miss. R. Civ. P. 26(b)(4)(A)(i). Beazer East Inc.'s First Set of Combined Interrogatories, Requests for Production of Documents and Request to Admit propounded to Plaintiff, included the following interrogatory:

> **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.

(Emphasis added.) Plaintiff initially responded to Defendant's discovery request on November 3, 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 responded as follows in her Supplemental Responses served on January 5, 2009:

> **RESPONSE:** Plaintiff has not determined which experts will testify at the trial or at a hearing in this matter. Without waiving any objections:
>
> 1. Nicholas Cheremisinoff, Ph.D., may be called to give testimony 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. Dr. Cheremisinoff has already presented opinions specific to the Koppers wood treatment plant in Grenada in *Barnes v. Koppers, Inc.* and those opinions will be substantially the same. The substances of the opinions, grounds and factual basis thereof are contained in Dr. Cheremisinoff's reports provided in *Barnes*, his deposition and trial testimony, all of which is or should already be in the possession of the Defendants and are incorporated herein. The expert reserves the right to supplement this designation should the need arise.
>
> 2. Randy Horsak may be called to provide testimony regarding soil and attic dust sampling he conducted in the Tie Plant community. Mr. Horsak has already presented opinions specific to the Koppers wood treatment plant in Grenada in *Barnes v. Koppers, Inc.* and those opinions will be substantially the same. The substances of the opinions, grounds and factual basis thereof are contained in Mr.

Horsak's reports provided in *Barnes*, his deposition and trial testimony, all of which is or should already be in the possession of the Defendants and are incorporated herein. The expert reserves the right to supplement this designation should the need arise.

3. Devraj Sharma, Ph.D., may be called to give testimony regarding the mathematical quantification of the historical emissions of pentachlorophenol and creosote, and the constituent and derivative substances thereof, offsite from the facility in question through the air, surface water and groundwater. Dr. Sharma has already presented opinions specific to the Koppers wood treatment plant in Grenada in *Barnes v. Koppers, Inc.* and those opinions will be substantially the same. The substances of the opinions, grounds and factual basis thereof are contained in Dr. Sharma's reports provided in *Barnes*, his deposition and trial testimony, all of which is or should already be in the possession of the Defendants and are incorporated herein. The expert reserves the right to supplement this designation should the need arise.

4. Glen Johnson, Ph.D., may be called to give testimony regarding the chemical analysis of polyclyclic aromatic hydrocarbons (PAHs), which are a constituent of creosote, found in soil and attic dust samples in the Tie Plant community and the fingerprinting of those PAHs to the subject Koppers facility. Dr. Johnson has already presented opinions specific to the Koppers wood treatment plant in Grenada in *Barnes v. Koppers, Inc.* and those opinions will be substantially the same. The substances of the opinions, grounds and factual basis thereof are contained in Dr. Johnson's reports provided in *Barnes*, his deposition and trial testimony, all of which is or should already be in the possession of the Defendants and are incorporated herein. The expert reserves the right to supplement this designation should the need arise.

5. James Bruya, Ph.D. may be called to give testimony regarding the chemical analysis of dioxins, a derivative substances of pentachlorophenol, found in soil and attic dust samples in the Tie Plant community and the fingerprinting of those dioxins to the subject Koppers facility. Dr. Bruya has already presented opinions specific to the Koppers wood treatment plant in Grenada in *Barnes v. Koppers, Inc.* and those opinions will be substantially the same. The substances of the opinions, grounds and factual basis thereof are contained in Dr. Bruya's reports provided in *Barnes*, his deposition and trial testimony, all of which is or should already be in the possession of the Defendants and are incorporated herein. The expert reserves the right to supplement this designation should the need arise.

6. Dr. William Sawyer, a toxicologist, may be called to testify as to the toxicity of the dioxins and PAHs which have emanated offsite of the subject Koppers facility as well as detrimental effects of those substances upon human health, including the ailments suffered by the Plaintiff, as well as the dose to which the Plaintiff was exposed. Dr. Sawyer has already presented toxicological and methodology opinions regarding the substances utilized at the subject Koppers facility and dosage quantification in *Barnes v. Koppers, Inc.* and portions of those opinions will be

substantially the same. The substances of the opinions, grounds and factual basis thereof will be similar to that already provided by Dr. Sawyer in his reports, his deposition and trial testimony given in *Barnes*, all of which is or should already be in the possession of the Defendants and are incorporated herein. In addition, the specific facts of the Plaintiff's exposure and history, the chemical analysis and fingerprinting of the dioxins and PAH's found in the soil and attic dust samples taken from the Tie Plant Community and the mathematical quantification of the dioxins and are relative to the quantification of dose. The expert reserves the right to supplement this designation should the need arise.

7. Dr. James Dahlgren, a medical doctor with toxicological training, may be called to provide opinions that the illnesses and symptoms complained of by the Plaintiff are generally and specifically caused by the dioxins and PAHs which have emanated, and are emanating, offsite of the subject Koppers facility. Dr. Dahlgren has already presented opinions regarding specific and general causation in *Barnes v. Koppers, Inc.* and portions of those opinions are relevant to his opinions in this case. The substances of the relevant portions of those opinions, grounds and factual basis thereof will be similar to that already provided by Dr. Dahlgren in his reports, his deposition and trial testimony given in *Barnes*, all of which is or should already be in the possession of the Defendants and are incorporated herein. In addition, the specific facts of the Plaintiff's exposure and history and the dose calculations generated by Dr. Sawyer are relative to Dr. Dahlgren's opinions. Dr. Dalhgren is also expected to provide opinions regarding the peer reviewed health study he conducted regarding the community around the Columbus, Mississippi, Kerr-McGee wood treatment facility. The expert reserves the right to supplement this designation should the need arise.

8. Paul Rosenfeld, Ph.D., may be called to provide testimony regarding a study he conducted of the blood of various residents of Tie Plant, Mississippi. Dr. Rosenfeld is expected to testify that the study reveals that the dioxin levels found in the blood samples greatly exceeds the background and safe levels. A copy of the study, which contains the factual basis, methodology and results, will be provided to the Defendants. Dr. Rosenfeld may also be called upon to provide opinions regarding dose and dose quantification. A copy of Dr. Rosenfeld's curriculum vitae is attached hereto. The expert reserves the right to supplement this designation should the need arise.

9. S. Vishwanath, M.D., an internist in private practice, may be called to provide testimony regarding community health issues and the general and specific causation of the illnesses and symptoms of which the Plaintiff complains. A copy of Dr. Vishwanath's short form curriculum vitae is attached hereto.

10. Dr. Thomas M. Nolen, a practicing physician, may be called to provide testimony regarding community health issues and the general and specific causation of the illnesses and symptoms of which the Plaintiff complains. A copy of Dr. Nolen's curriculum vitae is attached hereto.

[R. 360-65.]

Third, Mississippi Rule of Civil Procedure 37 allows a party to apply for an order compelling discovery. Miss. R. Civ. P. 37. Further, if a party fails to comply with such an order, Rule 37(b)(2) provides:

> [i]f 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, 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 of 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.

B. The Mississippi Supreme Court Established Guidelines for Review of a Rule 41(b) Dismissal.

Mississippi Rule of Civil Procedure 41(b) provides that a court may dismiss an action involuntarily for three different causes: dismissal at the close of the plaintiff's evidence for failure to show a right to relief, dismissal for want of prosecution, and dismissal for failure to comply with the rules of civil procedure or any order of the court. See Miss. R. Civ. P. 41(b); Miss. R. Civ. P. 41(b) cmt. According to its September 1, 2009 opinion, the trial court dismissed Plaintiff's suit with prejudice "for non-compliance with an order of" the court [R.E. 3; R. 589], stating that "[g]iven the

length of time this litigation has been ongoing and the fact that the plaintiff has failed to provide the information concerning expert witnesses, and has done very little to advance this litigation, this court finds that dismissal of this action pursuant to M.R.C.P. 41(b) is appropriate." [R.E. 3; R. 575-76.]

The Mississippi Supreme Court has held that "[t]he power to dismiss for failure to prosecute is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket." *Watson v. Lilliard*, 493 So. 2d 1277, 1278 (Miss. 1986). However, the Court also held that:

> The law favors trial of issues on the merits, and dismissals for want of prosecution are therefore employed reluctantly. There is no set time limit for the prosecution of an action once it has been filed, but where the record shows that a plaintiff has been guilty of dilatory or contumacious conduct, or has repeatedly disregarded the procedural directives of the court, such a dismissal is likely to be upheld.

Watson, 493 So. 2d at 1279. Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and is reserved for the most egregious cases, generally where clear delay and inadequate lesser sanctions are present. *Am. Tel. & Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 180-81(¶ 12) (Miss. 1998).

The Supreme Court has held that "dismissal for failure to comply with an order of the [trial] court is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice." *Wallace v. Jones*, 572 So. 2d 371, 376 (Miss. 1990) (citations omitted). In addition to a plaintiff's record of delay and perhaps ineffective sanctions, several other considerations have been identified as "aggravating factors." *Am. Tel. & Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 181(¶ 13) (Miss. 1998) (citing *Rogers v. Kroger Co.*, 669 F.2d 317, 320 n. 3 (5th Cir. 1982)). Particularly, these include "the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct." *Id.* (citing *Rogers*, 669 F.2d at 320). Cases "in which dismissals with prejudice have been affirmed on

appeal illustrate that such a sanction is reserved for the most egregious of cases, usually cases where the requisite factors of clear delay and ineffective lesser sanctions are bolstered by the presence of at least one of the aggravating factors." *Id.*

C. The Required Elements are Lacking for Dismissal Pursuant to Rule 41(b).

(1) No clear record of delay or pattern of contumacious conduct exists.

Applying these standards, Collins' case lacks the required elements to justify dismissal with prejudice. First this matter does not involve a clear record of delay by Collins or her counsel either overall so as to dismiss for want of prosecution[5] or more specifically regarding the trial court's December 3, 2008 order. [R.E. 2; R. 603-04.] Despite the fact that no trial date has yet been set, activity, as the court docket indicates, has continued in this matter since the date of filing. See R.E. 1.

Additionally, the record fails to establish a pattern of "contumacious conduct." One order compelling discovery is ultimately at issue.[6] The trial court entered its order granting Defendants' Motion for Expert Disclosure on December 3, 2008. [R. 326-27.] That same order was lodged in all eighteen (18) *Angle* cases. Plaintiff was ordered to, within thirty (30) days of the entry of the order:

> 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 complaints.

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[5]As stated above, the September 1, 2009 opinion provided that "[g]iven the length of time this litigation has been ongoing and the fact that the plaintiff has failed to provide the information concerning expert witnesses, and has done very little to advance this litigation, this court finds that dismissal of this action pursuant to M.R.C.P. 41(b) is appropriate." [R.E. 3; R. 575-76.]

[6]The record also shows Illinois Central filed a Motion to Compel October 29, 2008 [R. 266.], compelling responses to its First Set of Interrogatories to Plaintiffs and Defendant's First Set of Requests for Production of Documents and Things Propounded to Plaintiff [R. 285-91.] While Plaintiff served responses, they were deemed incomplete. The trial court granted Illinois Central's motion on December 5, 2008. Plaintiff served her responses to the requests for production of documents on December 15, 2008, and responses, although unverified, on December 29, 2009.

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 plaintiff's specific medical conditions.

4. Respond fully and completely to Interrogatory 21 seeking expert disclosures and supplement all discovery requests seeking expert information.

[R. 326-27] (emphasis added). Not for purposes of delay, but in the best interest of Plaintiff, counsel filed a Motion for Relief from Order on December 12, 2008, seeking additional time to respond. [R. 329-32]. Particularly, 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 date set and no scheduling order in place to violate, no party would have suffered any prejudice by an extension. Plaintiff's motion, however, was denied with the trial court finding "that the information that was ordered to be provided to the defendants is information that should have been in the possession of the plaintiff's attorney prior to the filing of a complaint, and at the very latest, when the plaintiff filed a more definite statement . . ." [R. 341-42.]

Plaintiff submits she was not required to obtain expert reports prior to the filing of her complaint. While a heightened requirement is provided in Mississippi Code Annotated § 11-1-58, requiring attorneys to consult with a qualified medical expert before filing a medical malpractice action and to attach a certificate of consultation to the complaint confirming the same, that statute is not relevant here. Nevertheless, Plaintiff and/or her counsel have provided to Defendants expert reports regarding the ongoing Koppers litigation which is relevant to this Plaintiff. Additionally, counsel have consulted with experts prior to and throughout this litigation.

Furthermore, the trial court adopted text similar to that from Defendants' Motion for Expert Disclosure,[7] but in their motion, Defendants were directing the trial court to *Acuna v. Brown & Roote Inc.*, 335, 340 (5th Cir. 2000), for that proposition. In *Acuna*, there were approximately one thousand six hundred plaintiffs suing over one hundred defendants for a range of injuries having occurred over a forty-year span. 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. It was within the court's discretion to take steps to manage the complex and potentially very burdensome discovery especially considering the large number of plaintiffs and defendants involved in the litigation. *Id.* The district court did so in *Acuna* 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)." 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.* Although *Acuna* is distinguishable from the case *sub judice*, Collins' Complaint [R. 3-40] and Submissions of Additional Information [R. 100-05] meet the criteria set out by *Acuna*.

Further in response to any allegations regarding delay and/or contumacious conduct, in mid-December, 2008, following the trial court's ruling, Wilbur Colom met with Plaintiff's counsel and agreed to handle Collins' case, as well as the other seventeen (17) *Angle* cases.[8] These activities, again, were not tactics of delay, but were, instead, efforts to ultimately move the cases forward more efficiently. See R. at 391-98. Also, the opinion states that "plaintiff has never provided any

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

[8]Lundy, Lundy, Soileau and South, LLP (f/k/a Lundy & Davis, LLP) would remain involved as far as completing the ongoing discovery responses, etc.

information concerning the names or expected testimony of expert witnesses"; however, as stated hereinabove, on January 5, 2009, Plaintiff served supplemental responses which included information regarding experts. [R. 346-48; R. 360-81.] Ultimately, Defendants did not complain that Plaintiff did not respond, but that Plaintiff's response was insufficient and/or lacked detail or specificity. While Plaintiff's response may be grounds upon which to attack her case on its merits, it is not grounds for a dismissal based upon Rule 41(b). Rule 41(b), by its nature, requires willful indifference on the part of the plaintiff and/or counsel, not that the plaintiff's case may be weak.

(2) Lesser sanctions were not considered.

This Mississippi Supreme Court has held that a cause of action should be dismissed pursuant to Rule 41(b) only if lesser sanctions are inadequate. *Wallace*, 572 So. 2d at 377 (citations omitted). Lesser sanctions available to the lower court include "fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings." *Wallace*, 572 So. 2d at 377 (quoting *Rogers*, 669 F.2d at 321). The Court has also noted that it is less likely to uphold a Rule 41(b) dismissal when the trial court does not consider alternative sanctions. *Hoffman v. Paracelsus Health Care Corp.*, 752 So. 2d 1030, 1035 (¶ 16) (Miss. 1990). The record reflects no consideration of an alternate sanction.

Plaintiff respectfully submits that the trial court's statement within its September 1, 2009 opinion, "[i]f sanctions are not appropriate and justified in this case, then this court can conceive of no circumstances under which sanctions would ever be warranted," is not equivalent to consideration of "alternative sanctions." [R.E. 3; R. 588.] Instead, dismissal seemed the only consideration. Looking to the trial court's first entry of Summary Judgment, although later set aside based on Plaintiff's lack of notice, the case was dismissed with prejudice for failure to respond to Defendants's Motion to Dismiss, or, in the Alternative, for Summary Judgment and for Sanctions. [R.E. 3; R. 389-90.] Turning next to the dismissal sanction which is the subject of this appeal, the

trial court dismissed Collins' case with prejudice finding, as stated previously, "[g]iven the length of time this litigation has been ongoing and the fact that the plaintiff has failed to provide the information concerning expert witnesses, and has done very little to advance this litigation, this court finds this dismissal of this action pursuant to M.R.C.P. 41(b) appropriate." [R.E. 3; R. 575-76.] The record provides nothing regarding consideration of *alternate* sanctions here other than those sanctions (attorneys' fees and costs) issued simultaneously.

(3) No aggravating factors were present.

Rule 41(b) dismissals, as noted above, generally involve an aggravating factor, such as the plaintiff's responsibility for the delay, the actual prejudice to the defendant, or the fact that intentional conduct caused the delay. *Hoffman*, 752 So. 2d at 1034. None of the three aggravating elements were present. First, the record provides no evidence that Collins was personally responsible for any delay, thus plaintiff culpability is not present. Second, Defendants have suffered no actual prejudice. Finally, any delay in providing information to Defendants and/or the trial court has not been intentional.

Because the required elements are lacking for dismissal pursuant to Rule 41(b), the trial court abused its discretion in dismissing Collins' action. Accordingly, Plaintiff respectfully requests that this Court vacate the trial court's dismissal with prejudice and remand this matter for further proceedings.

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

The trial court erred in finding Plaintiff "failed to offer any proof of injury or causation," and thus granting summary judgment as to both her negligence and intentional tort claims. [R.E. 3; R. 581-82.] Summary judgment is appropriate only "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." Miss. R. Civ. P. 56(c). This Court conducts a *de novo* review of a lower court's decision on a motion for summary judgment. *Mabus v. St. James Episcopal Church,* 13 So.3d 260, 263 (Miss. 2009) (citing *Smith v. Gilmore Meml. Hosp., Inc.,* 952 So.2d 177, 180 (Miss.2007)).

On motion for summary judgment, "the moving party has the burden of demonstrating that no genuine issue of material facts exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Howard v. City of Biloxi*, 943 So. 2d 751, 754 (Miss. App. 2006), (quoting *City of Jackson v. Sutton,* 797 So. 2d 977, 979 (Miss. 2001)). The evidence must be viewed in the light most favorable to the non-moving party. *Russell v. Orr,* 700 So.2d 619, 622 (¶ 8) (Miss.1997). Precedent requires that, like the circuit court, this Court must be skeptical when considering motions for summary judgment, because it is better to err on the side of denying such a motion. *Ratliff v. Ratliff,* 500 So.2d 981 (Miss.1986).

The trial court provides in its opinion "[a]s for the issue of whether summary judgment should be granted, the defendants assert that the plaintiff has failed to provide *any* evidence that would link the alleged injuries and damages to exposure to chemicals, thus failing to prove the requisite element of causation." (Emphasis added.) As listed in her Submissions of Additional Information, Plaintiff began suffering from dizziness in 1981, and was diagnosed with high blood pressure in 1992, heart disease in 1993, diabetes in 2004, and colon cancer in 2005. [R. 100-05.] While neither the record nor the Court benefit from the transcript, Collins provided deposition testimony to Defendants on October 24, 2007, wherein she discussed under oath each of these medical conditions and the physicians who have treated her for each of the same.[9] Collins was born in 1949 and lived at Route 1, Box 98, from approximately 1951 until 1967. [R. 100.] From approximately 1957 until 1961, she attended Tie Plant Elementary School which is located on a

[9]See Defendants Notice of Deposition [R. 228-30]; itemized time of Illinois Central attorneys [R.E. 5; R. 419].

thirty-acre tract of land that was originally plant property. [R. 100; R. 22-23.] Also while still a child, Collins played in ditches near the Koppers facility and drank water from a creek/spring in the vicinity of the Koppers plant as well. [R. 100.]

While living and going to school near the Koppers wood treatment facility, Collins received chronic exposure to toxic substances from the Grenada wood treatment facility through multiple pathways. Particularly Collins was exposed via air emissions from the facility. See Koppers' Interoffice Correspondence [R. 85], which provides: "The incidence of airborne emissions are becoming more prevalent and costly."[10] Additionally, Collins received dermal exposure while playing in the ditches that carried contaminated surface water runoff and received further exposure by ingesting water from the nearby creek. Koppers's own document provides evidence of the extensive contamination. 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.[11] 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 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.

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[10]While the memo is dated April 1978, after Collins' move from the Route 1 address, it simply confirms Koppers' air emissions and indicates their costs were increasing as a result of those emissions.

[11]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.

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.

* * *

In a paper published in 2003 in *Environmental Research* titled "Health Effects on Nearby Residents of a Wood Treatment Plant,"[12] by James Dahlgren, Raphael Warshaw, John Thornton, Pamela Anderson-Mahoney and Harpseet Takhar, the effects of the Kerr-McGee wood treatment plant in Columbus, Mississippi are assessed. More recently, Dr. Dahlgren performed a study of the health effects on nearby residents from the Koppers Grenada plant operations. 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, and are provided for the Court herein below as well.

Summary - Health Effects:

Pancreatic Cancer

A risk factor for pancreatic cancer is the PAHs in cigarette smoke. This risk factor is associated with 25 - 27% of pancreatic cancer cases. Ojajarvi et al., report their findings of a meta-analysis of pancreas cancer and occupational exposures. The authors were careful to include only those studies that met high epidemiologic standards for study design and analysis. They found an increased risk from occupational PAH exposure. Every study included in the meta-analysis that reported on PAH, found increased rates of pancreatic cancer in PAH exposed populations. The "meta-" etiological fraction among the PAH exposed is 33%. In other words, among those who were exposed to PAHs and have pancreatic cancer, the PAH exposure accounts for 33% of the cases.

Nevertheless, there is certainly enough published epidemiologic data to confirm that PAH exposure causes or contributes to pancreatic cancer. However, it must be noted that some of the same authors who report positive associations discount their own findings because of the lack of statistical significance, others do not. However, when the number of positive studies adds up to four, five and six as reported by in Ojajarvi's meta-analysis.

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[12]Included as Attachment "B" 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.

Stomach Cancer

Cigarette smoking is associated with stomach cancer. It has long been suspected that PAH is a cause of stomach cancer. Dusich reported significantly increased rates of gastrointestinal tract cancer in creosote exposed women suggesting a possible association. In LaDou's most recent edition Harrison points out the occurrence of stomach cancer in PAH exposed populations. Randem et al. Found increased rates of stomach cancer in asphalt workers. Dioxin has also been implicated in the etiology of stomach cancer. A Japanese study showed an increase in stomach cancer with creosote ingestion used to treat stomach upset.

Breast Cancer

Coal tar creosote, PAHs and dioxins have all be implicated in the etiology of breast cancer. Although there have been studies published with negative findings, the majority of published studies have indicated a causal relationship between beast cancer and the chemicals of interest here and several authors have determined that there is suggestive or conclusive evidence indicating causality and/or cancer promotion for PAHs and dioxins; yet we have more work to do in order to clearly understand the mechanisms of action. In addition, the research suggests that some known risk factors for breast cancer may in fact modify the effect of these chemicals. For instance, Rundle et al. suggest that the effect of PAHs on breast cancer is mediated by the alcohol consumption for those who are genetically predisposed, current drinkers who were genetically predisposed and higher levels of PAH adducts compared to nondrinkers with the same genetic profile. It is also worth noting that TCDD is a cancer initiator and promoter, a notion supported by Steenland et al. in their large cohort mortality study.

Diabetes

Dioxin is known to cause diabetes. The soldiers exposed to Agent Orange in Vietnam have an increase in diabetes. This is suggestive of a threshold effect, in other words, after minimal exposure, those who were susceptible developed the disease and the others never did. In fact, most studies that report on blood glucose concentrations and rates of diabetes in dioxin-exposed cohorts find increases in the occurrence of diabetes.

Liver Condition

Ladou's *Occupational and Environmental Medicine*, "elevated liver enzymes have been found in a group of coke oven workers heavily exposed to PAHs, and excess mortality from cirrhosis of the liver has been observed in a cohort of workers heavily exposed to chlorinated naphthalenes." Kogevinas, in his recent review of the health effects of dioxin, asserts that temporary increase in liver enzymes is a proven effect of dioxin.

Cardiovascular Disease

Steenland et al. Found a modest but significant trend of increasing SMR with increasing exposure to TCDD. Additionally, an internal analysis comparing non-exposed plant workers to those with varying degrees of exposure reveals a robust exposure-response trend with the highest exposure group showing a rate ratio of 1.75

(95% CI = 1.07 - 2.87). The most disturbing finding was the lack of latency. It appeared that the heart disease occurred simultaneously with exposure. The authors note that the persistence of TCDD in tissue could result in long-term cardiovascular health effects. High blood pressure, congestive heart disease and heart murmur are all complications of ischemic heart. Increased systolic blood pressure and heart rate has been demonstrated in PCP-exposed workers.

Asthma

The increased risk of asthma has been documented in workers in the asphalt industry and associated with coal tar creosote exposure in both children and adults. Outdoor air pollution is associated with upper and lower respiratory symptoms. Polycyclic organic matter, pentachlorophenol and naphthalene have all been identified in the clean air act as hazardous air pollutants. Both children and adults have been shown to experience increased frequency and severity of asthmatic symptoms with increased measures of air pollutants.

The evidence that environmental tobacco smoke (ETS) has a causal role in asthma-related morbidity is sufficiently strong. To our knowledge, the possible synergistic effects of PAH, PCP, naphthalene or other exposures concurrent with environmental tobacco smoke have not been addressed. However, because they share some of the same constituents it is likely that these exposures would be even more damaging when coupled with ETS.

Conclusion:

My studies of the residents living near the Koppers Plant indicate that these residents have been exposed to harmful chemicals and that this exposure has adversely affected their health. The above review reveals that the plaintiffs have been exposed to chemicals known to cause the types of health problems that they have. To a reasonable medical and scientific certainty, the plaintiffs have been exposed to a significant amount of toxic chemicals for many years. The health effects from their exposures are serious and require extensive treatment both in the past and in the future.

James G. Dahlgren, M.D., "Health Effects on Nearby Residents from the Koppers Grenada Plant Operations" (Jan. 31, 2005).[13] [R. 463-67.]

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[13]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.

Both the trial court and Defendants cite to *Herrington v. Leaf River Forest Prod., Inc.*, 733 So. 2d 774 (Miss. 1999), wherein the plaintiff sought relief for injuries associated with Hodgkin's disease which she claimed was caused by her exposure to dioxin in water and fish from the Leaf River. *Id.* at 776. The trial court granted summary judgment with the Mississippi Supreme Court affirming on appeal, holding that Herrington failed to carry her burden of proof, leaving no questions of material fact to be decided by a jury. *Id.* at 779. Plaintiff contends the *Herrington* matter is distinguishable from her own.

Based on her theory of recovery in negligence, Herrington argued on appeal that circumstantial evidence was sufficient to establish causation. Circumstantial evidence consists of "evidence of a fact, or a set of facts, from which the existence of another fact may reasonably be inferred." *Hardy v. K Mart Corp.*, 669 So. 2d 34, 38 (Miss. 1996) (quoting *Mississippi Winn-Dixie Supermarkets v. Hughes*, 247 Miss. 575, 585, 156 So. 2d 734, 736 (1963)). However, "circumstantial evidence must be such that it creates a legitimate inference that places it beyond conjecture." *Hardy*, 669 So. 2d at 38. The Court referred to a much earlier case, *Masonite Corp. v. Hill*, where it addressed circumstantial evidence and toxic contamination and stated the following:

> ...as to inferences deduced from the facts, it is not the unqualified rule that an inference may not be based upon another inference. Numerous cases of circumstantial evidence found in our books, and many trials in the everyday experience of our bench and bar, disclose that inference upon inference is availed and is enforced.

Masonite Corp. v. Hill, 170 Miss. 158, 166, 154 So. 295, 298 (1934) (citations omitted). However, the *Herrington* Court also noted from their 1934 opinion:

> [W]here a party, who has the burden of proof, has the power to produce evidence of a more explicit, direct, and satisfactory character than that which he does introduce and relies on, he must introduce that mor explicit, direct, and satisfactory proof, or else suffer the presumption that, if the more satisfactory evidence had been given, it would have been detrimental to him and would have laid open deficiencies in, and objections to, his case, which the more obscure and uncertain evidence did not disclose.

Masonite Corp., 170 Miss. at 167, 154 So. at 298 (citations omitted).

Plaintiff submits to the Court that her case and Herrington's were at two entirely different stages in litigation. The *Herrington* opinion revealed that her proof included the testimony of Dr. Hayes, her pediatric oncologist, and the deposition testimony of Dr. James Pinson. 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.] Thus, only Collins' deposition had been taken in this matter, leaving her unable to attach similar physicians' transcripts to her response. Further, as discussed above, Collins requested additional time in which to provide the information required by the trial court's order granting Defendants' Motion for Expert Disclosure which required submission of expert reports as well, only to be denied. [R. 329-32; R. 341-42.]

Herrington also addresses the "frequency-regularity-proximity" test, the causation test adopted by most jurisdictions in asbestos cases. *Herrington,* 733 So. 2d at 778 (citing *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 171 (5th Cir. 1991)). The "frequency-regularity-proximity" test was announced in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), which held that a motion for summary judgment cannot be defeated merely be alleging work at a shipyard in which defendants' asbestos products had somewhere been present. Rather, the plaintiff must provide evidence of frequent and regular work in an area of the shipyard in proximity to some specific item of the defendants' asbestos-containing product. *Id.* at 171. For instance, exposure to an asbestos-filled pipe cover on ten to fifteen occasions did not satisfy the test. *Id.* In *Slaughter v. Southern Talc Co.*, the defendants argued that the plaintiffs could not meet the proximity prong of the test, because they had provided no evidence placing defendants' products at a specific location near plaintiffs' regular and frequent worksites in the 49-acre General Tire plant. *Id.* Relying on circumstantial evidence, the plaintiffs responded that (1) defendants' products were actually delivered to the General Tire plant; (2) defendants' products were actually installed randomly and

evenly "all over the plant; and (3) all plaintiffs worked near places where defendants' products would have been installed. *Id.* The plaintiffs argued from these facts that it was reasonable for a jury to infer sufficient proximity for producing causation. *Id.*

The Court was unable to use the "frequency-regularity-proximity" standard in connection with Herrington because there was no evidence of abnormally high levels of dioxin in the Leaf River near her cabin. However, as to Collins: (1) Collins lived at Route 1, Box 98 from 1951 to 1967; (2) Even closer in proximity in that it is located on what was previously plant property, Collins attended Tie Plant Elementary School every week day from approximately 1957 to 1961; and (3) The wood treatment plant has been in operation almost continuously since 1904 using creosote and/or pentachlorophenol to treat crossties and telephone poles. Koppers' own documents establish exposure pathways based on the concern over airborne emissions becoming "*more* prevalent and costly" and the evidence of contamination. [R. 85; R. 79-84] (emphasis added.)

Plaintiff asserts there are genuine issues of material fact which exist, requiring reversal of the trial court's order.

III. The Trial Court Erred in Granting Summary Judgment as to Plaintiff's Claims in their Entirety.

Common law trespass has been defined as "an intrusion upon the land of another without a license or other right for one's own purpose." *Thomas v. Harrah's Vicksburg Corp.*, 734 So.2d 312, 316 (¶ 10) (Miss. 1999). Counsel included, on behalf of Plaintiff, a count for trespass in her complaint upon review of the documents on file for Collins and out of an abundance of caution at the time of commencing this action. Upon receipt of propounded discovery regarding same, Plaintiff responded, informing Defendants that she was not the owner of property in Grenada, Mississippi. Despite the fact that Plaintiff is not a property owner, some Mississippi courts have interpreted the tort of trespass more broadly than that relating to ownership, recognizing it to be an offense to

another's persons, health, reputation or property. *Great Northern Nekoosa Corp. v. Aetna Cas. and Sur. Co.*, 921 F. Supp. 410, 415 (N.D. Miss. 1996) (citing *Keppner v. Gulf Shores, Inc.*, 462 So. 2d 719, 725 (Miss. 1985)). As such, "[i]t is obvious that a claim of trespass is a means to recover for more than just property damage, and that proof of intent to dispossess is not required to maintain a trespass cause of action in Mississippi." *Great Northern Nekoosa Corp. v. Aetna Cas. and Sur. Co.*, 921 F. Supp. at 415. Applying the broader reading to Plaintiff, Collins would contend her person has been trespassed upon by Defendants. Regardless, counsel for Plaintiff maintain 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 (17) *Angle* cases.

More critical is the point that Defendants made no mention of this property argument in their motion; therefore, Plaintiff had no opportunity to respond. Only in their response brief was the issue raised. Again, given the opportunity as requested, Plaintiff would have testified.

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

Collins was denied a summary judgment hearing despite her request for same. Mississippi Rule of Civil Procedure 56 provides in part as follows:

> (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.
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> (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 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.

Miss. R. Civ. P. 56(c); Miss. R. Civ. P. 56(d) (emphasis added). The trial court found that "oral arguments would not be beneficial" and considered Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and for Sanctions, disregarding Plaintiff's request for a hearing. [R.E. 3; R. 570.] "[T]he Mississippi Supreme Court has held that there is no explicit or implicit right to a hearing under Rule 56(c)." *Strange ex rel. Strange v. Itawamba County Sch. Dist.*, 9 So. 3d 1187, 1193 (¶ 23) (Miss. Ct. App. 2009) (citing *Croke v. Southgate Sewer Dist.*, 857 So. 2d 774, 777-78 (¶ 10) (Miss. 2003)). Additionally, Rule 78 of the Mississippi Rules of Civil Procedure with its 2003 amendment permits courts to establish local rules allowing for certain motions to be decided on written briefs without a hearing, "but M.R.C.P. 78 does not, by its terms, fundamentally change the requirements of M.R.C.P. 56 regarding summary judgment." *Partin v. N. Miss. Medical Ctr.*, 929 So. 2d. 924, 934 (¶ 37) (Miss. App. 2005). In *Adams v. Cinemark USA, Inc.*, the Supreme Court found that, due to the finality of summary judgments, the trial court erred in not granting a hearing on the motion. *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1163 (¶ 26) (Miss. 2002). The cases of *Croke v. Southgate Sewer Dist.* and *Adams v. Cinemark USA, Inc.* hold, however, that the error in granting a summary judgment motion without a hearing may be harmless error if there are,

indeed, no triable issues of fact.[14,15] *Croke v. Southgate Sewer Dist.*, 857 So. 2d at 778 (¶ 10); *Adams v. Cinemark USA, Inc.*, 831 So. 2d at 1163 (¶ 26).

In the case *sub judice*, Plaintiff specifically requested a hearing so that she would have an opportunity to put on evidence, stating in her response to Defendants' motion as follows: "As contemplated by M.R.C.P. 56(c), Plaintiff requests a hearing on this matter where she may put forth live evidence and appear to testify personally." [R. 467.] Mississippi law in general requires adherence to the notice and hearing requirements of Rule 56 of the Mississippi Rules of Civil Procedure, yet Collins' request was ignored. The trial court included the following statement in its March 10, 2009 Order:

> . . . that after the rebuttal memorandum has been filed, or after the time for filing one has expired, this court will consider and rule on the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and for Sanctions, based on the pleadings that have been filed, unless, upon review, this court finds that oral arguments would be helpful to the court.

[R. 449] (emphasis added.) Its statement provided insufficient notice to Plaintiff, who requested, in a subsequent pleading, a hearing to put on evidence, yet was never informed that the request was denied, and never provided an opportunity to supplement her response otherwise. [R. 467.] Rule 56(c) clearly states that the adverse party may serve opposing affidavits "prior to the day of the hearing." Miss. R. Civ. P. 56(c). As such, Plaintiff, if not afforded a hearing as requested, should have been given a date certain to supplement her response with affidavits. To dispose of Plaintiff's

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[14]In *Adams*, no reversible error was found in granting summary judgment without a hearing because it would have centered exclusively around legal arguments, since the factual arguments were undisputed. *Adams v. Cinemark USA, Inc.*, 831 So.2d at 1163 (¶¶ 30-31).

[15]While the Fifth Circuit agrees that the court has the authority to grant summary judgment without a hearing if it determines sufficient information is available in the pleadings and the papers in support of and opposition to the motion so that *a hearing would be of no utility*, courts generally recognize the advisability of allowing oral argument on summary-judgment motions. *Adams v. Cinemark USA, Inc.*, 831 So.2d at 1165 (¶ 30) (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2720.1, at 357 (3d ed.1998) (footnotes omitted & emphasis added).

case upon the merits without a hearing and without informing her she would not be provided a hearing is a denial of due process.

Should summary judgment in this matter not be reversed as Plaintiff contends it should, Plaintiff, in the alternative, respectfully requests that this Court vacate the trial court's ruling and remand this matter for hearing.

V. 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 sought monetary sanctions pursuant to Rules 11(b) and 37 of the Mississippi Rules of Civil Procedure. The trial court, on its own motion, considered the imposition of sanctions under the Litigation Accountability Act of 1988, found in Mississippi Code Annotated Section 11-55-1, et seq. Plaintiff and her counsel were ordered to pay $10,763,93 in the *Collins* matter, $3,677.50 in attorney fees and expenses to Illinois Central, and $7,086.43 to the Koppers Defendants.[16] [R.E. 2; R. 603-04.] Plaintiff contends the trial court abused its discretion in assessing monetary sanctions against Plaintiff and her attorneys pursuant to Mississippi Rule of Civil Procedure 11 and/or the Litigation Accountability Act of 1988 (sometimes hereinafter referred to as "the Act") based on an erroneous finding that her complaint was frivolous.

Pursuant to Mississippi Code Annotated § 11-55-5 (Rev. 2002):

> [A]ny court of record in this state . . . shall award, as part of its judgment . . . reasonable attorney's fees and costs against any party or attorney if the court . . . finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification.

"Miss. Code Ann. § 11-55-3(a) provides that a claim is without substantial justification when it is 'frivolous, groundless in fact or in law, or vexatious, as determined by the court,'" *Scruggs v.*

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[16]In total, Plaintiff and her attorneys were ordered to pay $182,986.81 based on the Amended Judgment of Dismissal and Summary Judgment filed in September 2009, in the eighteen (18) *Angle* cases.

Saterfiel, 693 So. 2d 924, 927 (Miss. 1997). The Act is considered to augment, rather than conflict with, Mississippi Rule of Civil Procedure 11(b) which provides:

> ...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 attorney's fees.

Mis. R. Civ. P. 11(b). The Act, however, imposes a duty of continuing inquiry where Rule 11 imposes none, "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." *Leaf River Forest Products, Inc. v. Deakle*, 661 So. 2d 188, 197 (Miss. 1995). Therefore, a plaintiff has a duty to abandon a complaint that is later learned to be frivolous.

The trial court found nothing before it suggesting Plaintiff's complaint was filed for the purposes of harassment or delay, nor did it find it vexatious. [R.E. 3; R. 582.] The trial court did, however, err in finding her complaint frivolous and groundless in fact and ordering sanctions as a result thereof. The Mississippi Supreme Court has stated that a pleading is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *City of Madison v. Bryan,* 763 So. 2d 162, 168 (Miss.2000) (quoting *Tricon Metals & Servs., Inc. v. Topp,* 537 So. 2d 1331, 1335 (Miss.1989)). "Though a case may be weak or 'light-headed,' that is not sufficient to label it frivolous." *Deakle*, 661 So. 2d at 195; *Nichols v. Munn*, 565 So. 2d 1132, 1137 (Miss. 1990).

Mississippi Code Annotated § 11-5-7 requires the court to set forth reasons for the award of costs and fees and requires consideration of the following factors 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 of 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 owning 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.

On March 17, 2006, Plaintiff filed this action.[17] She had lived a significant portion of her life near Tie Plant (approximately 16 years) and also attended Tie Plant Elementary School (4

[17]Plaintiff respectfully submits that any consideration of her claims having been originally joined with the claims of ninety-four (94) other plaintiffs in a complaint filed on May 27, 2005, is inappropriate as to sanctions in this matter. [R.E. 3; R. 585; R. 587.] Plaintiff's counsel filed the 2005 complaint in good faith at a time when Mississippi's joinder was still being fleshed out and case law established as a result of the amendment to Rule 20 of the Mississippi Rules of Civil Procedure. Nevertheless, Plaintiffs were sanctioned for the filing of that complaint, *Rebekah C. Angle v. Koppers Inc., et al.* Thereafter, Collins' claims were severed and she was ordered to file a separate complaint within thirty (30) days of the date of the entry of the February 16, 2007 Judgment Severing Claims and Assessing Attorney Fees, as she did resulting in this action. [R. 57-60.]

years). [R. 3-40; R. 100-05.] At the time of filing, she suffered from dizziness and had been diagnosed with high blood pressure, heart disease, diabetes and colon cancer. [R. 100-05.] As discussed above, litigation regarding the Koppers Grenada facility has been ongoing for sometime with volumes of expert depositions, as well as dozens of plaintiff and fact witness depositions, having been taken and thousands of documents produced. The complaint was filed based on counsel's experience and discussions with its experts, considering Plaintiff's exposure history combined with her diagnoses. Dr. James Dahlgren's study regarding the Grenada, Mississippi residents surrounding the Koppers plant particularly discusses diabetes, cardiovascular disease, high blood pressure and various cancers. [R. 465.] Plaintiff had a good-faith belief when she initiated the complaint with more than a mere "hope of success." See *Bean v. Broussard*, 587 So. 2d 908, 912 (Miss. 1991); *Tricon Metals & Servs., Inc. v. Topp*, 537 So. 2d 1331, 1336 (Miss. 1989). Additionally, Plaintiff's counsel had tried a similar case wherein they proved contamination from the Defendants' wood treatment processes contaminated the community and exposed the plaintiff to harmful constituents which led to her developing cancer. At no time since filing the complaint has Plaintiff learned and/or considered that her action is frivolous. Moreover, Plaintiff requested a hearing regarding the motion for summary judgment and the opportunity to present live testimony in response to Defendants' motion.

In the levying of sanctions, in addition to finding Plaintiff's complaint frivolous, the trial court also addressed Plaintiff's need for a more definite statement. Following the March 17, 2006 filing of Collins' complaint, counsel reached an agreement regarding acceptance of process, also agreeing answers would be filed by May 19, 2006. See R. at 41. On May 19, 2006, motions to dismiss were filed by Illinois and the Koppers Defendants. [R. 43-45, 46-61.] Defendants' motions were denied June 29, 2006, and Plaintiff was ordered to provide a more definite statement in

accordance with Rule 12(e).[18] [R. 99.] Plaintiff filed her more definite statement August 14, 2006, providing the information as required. [R. 100.]

In addition to the Koppers Defendants and Illinois Central, Plaintiff also brought suit against "Hanson PLC, Hansen Building Materials, Ltd., and Hanson Holdings, Ltd." which the trial court also considered in ordering sanctions and noted in its opinion. [R.E. 3; R. 586-87.] While briefing regarding the Hanson Defendants is included in the *Angle* record, Plaintiff set forth substantial information in her complaint providing evidence that she was, in fact, diligent in her efforts to determine which companies were relevant to the suit prior to filing. Below is "Background" information taken from Plaintiff's complaint [R. 3-40], while specific claims against the Hanson Companies are provided in paragraphs 121-124 [R. 36-37] and a claim for joint venture in paragraphs 125-129 [R. 37-38.]

> 19. At all times pertinent hereto, Defendants, Koppers, Inc. and Beazer East, Inc. and their predecessors were the owners and operators of a wood treatment facility in Grenada, Mississippi. The Plant is situated on approximately 171 acres and is located approximately five miles southeast of Grenada, Mississippi, between State highway 51 and Bogue Creek. West and northeast of the plant is a residential community known as Tie Plant.
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> 20. The facility pressure treats railroad ties, poles and lumber with creosote and pentachlorophenol. The facility operates five retorts. Two are used to treat wood with pentachlorophenol and two with creosote. The other retort is used to steam condition the wood.

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[18]The trial court set out in it's order:

> The [Defendants'] basis for these motions is that the complaint has failed to provide "core information" as required by the Court's order of December 15, 2005, [in *Rebekah C. Angle v. Koppers Inc., et al.*] The Defendants only refer to the order of this Court and do not cite any rule of law that would justify dismissal at this time. The Court can only conclude that these motions are akin to a 12(b)(6) motion.

[R. 99.] The trial court found that "while it is true that certain information is lacking...the complaint does at least set out a claim upon which relief can be sought," making dismissal inappropriate. *Id.* However, while not relief specifically plead, with its inherent authority, the trial court ordered Plaintiff to provide a more definite statement to Defendants. *Id.*

21. The facility was built in 1904 by Ayer and Lord Tie Company for the treatment of railroad crossties for Illinois Central Gulf Railroad Company. Koppers Company, Inc. acquired the facility on November 9, 1944. Koppers Company, Inc. was acquired by Beazer Materials and Services, Inc. on December 28, 1988. Beazer Materials and Services, Inc. sold the division, of which the Grenada Mississippi facility was a part, to a separate management group to form Koppers Industries, Inc. Beazer Materials and Services, Inc. retained responsibility for the closed surface impoundment on site, which operated as part of the facility's wastewater treatment system and managed K0001 listed hazardous waste. In April 1990, Beazer Materials and Services, Inc. changed its name to Beazer East, Inc. On March 21, 2003 Koppers Industries, Inc. changed its name to Koppers, Inc.

22. With each successive merger in the history of the Plant, the liability of the successor corporation was purchased and/or assumed, with the exception of Beazer East, Inc., f/k/a Beazer Materials and Services, Inc. maintaining liability for the closed surface impoundment on site. Furthermore, Beazer East, Inc., f/k/a Beazer Materials and Services, Inc. continued to provide financial assurance for post closure care. As such, Koppers, Inc. has purchased and/or assumed all liabilities of the Grenada wood preserving plant from the date of its inception, with the exception of those liabilities retained by Beazer East, Inc.

23. Hanson PLC acquired Beazer PLC in 1991, making Beazer East, Inc. a wholly-owned subsidiary. Several years later all Beazer East, Inc. employees were transferred to the payroll of another Hanson PLC subsidiary, three Rivers Management, Inc. Beazer East continues solely as a shell corporation which possesses certain real property and stock assets, and extensive environmental liabilities. Three Rivers Management exists solely to manage the environmental liabilities of Beazer East, Inc.

24. Beazer East is, and was at all relevant times, a wholly owned subsidiary of Hanson Holdings Basalt, Inc. Hanson Holdings Basalt, Inc., is, and was at all relevant times, a wholly owned subsidiary of Hanson Aragonite, Inc. Hanson Aragonite, Inc., is, and was at all relevant times, a wholly owned subsidiary of HBMA Holdings, Inc. HBMA Holdings, Inc., is, and was at all relevant times, a wholly owned subsidiary of Hanson Building Materials, Limited. Hanson Building Materials, Limited, in, and was at all relevant times, a wholly owned subsidiary of Hanson Holdings, Limited. Hanson Holdings, Limited, is, and was at all relevant times, a wholly owned subsidiary of Hanson PLC. Beazer East, by virtue of the corporate chain of ownership set out above is a wholly owned subsidiary of Hanson PLC. Three Rivers Management, Inc., is a wholly owned subsidiary of Beazer East, Inc., and (by virtue of that ownership) a wholly owned subsidiary of Hanson, PLC.

25. Three Rivers Management and Beazer East, and the other Hanson companies (Hanson Holdings, Limited, Hanson Building Materials, Limited, Hanson Holdings Basalt, Inc., Hanson Aragonite, Inc., HBMA Holdings, Inc.) and their predecessors were a shell and/or an alter ego of Hanson PLC and in all instances herein acting as agents of Hanson PLC. Three Rivers Management and Beazer East and its

predecessors have never maintain sufficient control over its own entity. Hanson PLC and/or the Hanson Companies have maintained sufficient control over Beazer East and its predecessors to warrant liability on their parts. All actions taken in respect to the wood treatment facility in Grenada County were taken by Three Rivers Management and/or Beazer East and their predecessors in conjunction with Hanson PLC and/or the Hanson Companies as a single economic entity. Hanson PLC and/or the Hanson Companies have engaged in deliberate and personal misuse of the corporate form of Three Rivers Management and Beazer East and their predecessors that will result in unfairness, injustice and injury to plaintiffs herein if the corporate veils of Three Rivers Management and Beazer East and their predecessors are not pierced.

26. Alternatively, Three Rivers Management and Beazer East and their predecessors have acted as agents or servants of Hanson PLC and/or the Hanson Companies; therefore, Hanson PLC as/or the Hanson Companies are vicariously liable for the actions of Three Rivers Management and Beazer East and their predecessors who are liable under the doctrine of responding to its superior. Hanson PLC has cloaked both Beazer East and Three Rivers Management with actual and apparent authority to act on its behalf with regard to the management of the Grenada facility's environmental liabilities.

27. Hanson PLC and/or Three Rivers Management and Beazer East and/or the other Hanson companies are engaged in a joint venture. As set out above, the co-adventurers are engaged in a common business enterprise for profit in which each contributes money, skill, efforts and/or knowledge. A common link among all of the aforementioned legal entities is that they are subject to the common ownership, management and control of Hanson PLC. The Beazer East/Three Rivers Management venture exists solely to manage the environmental liabilities associated with the Koppers Company wood-treatment operations at several sites, including the Grenada plant. Since its 1991 purchase of Beazer PLC, Hanson PLC has exercised substantial authority overt the affairs of this environmental management venture.

28. Hanson PLC and/or the Hanson Companies are independently liable, as Hanson PLC and/or Hanson Companies have provided environmental policies and technical services to the Grenada wood treatment facility. Furthermore, Hanson PLC, and/or the Hanson Companies have approved and controlled environmental budgets and expenditures.

[R. 8-11.] The trial court entered a final judgment, dismissing the Hanson Defendants January 4, 2007, finding that it lacked "*in personam* jurisdiction over the UK Defendants." [R. 209-11.] Plaintiff filed her Notice of Appeal on February 2, 2007, but withdrew her notice on February 12, 2007. [R. 212-13; R. 214-15.] Plaintiff's having filed suit against these corporate entities is not cause for assessing sanctions and/or additional sanctions.

Plaintiff asserts that her complaint was not frivolous at the time of filing, nor did her cause of action become frivolous at any point in the litigation. Thus the trial court abused its discretion when it awarded attorney's fees and costs to Defendants.

VI. Alternatively, the Trial Court Abused its Discretion by Not Ordering a Reduced Amount of Attorney's Fees and Costs.

While the trial court was quite vigorous in its requirement that Plaintiff reduce to detail all of her facts in a proceeding that requires only notice pleading, the trial court, on the other hand, was lenient as to Defendants' vague and overly broad claim for attorney's fees where specificity is always required. The trial court ordered Plaintiff and her counsel to pay $10,763,93, $3,677.50 in attorney fees and expenses to Illinois Central, and $7,086.43 to the Koppers Defendants.[19] [R.E.2; R. 603-04.] Mississippi Code Annotated § 11-55-5 requires that an assessment of attorney's fees must be in an amount deemed to be reasonable. The United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), adopted the "lodestar" method of calculating reasonable attorney's fees, wherein the Court stated the amount of attorney's fees understandably had to be determined based on the facts of each case. In *Hensley*, the United States Supreme Court set out twelve (12) factors to be considered in determining a reasonable fee,[20] while the Court, in *McKee v. McKee*, stated that factors to be considered in an award of attorney's fees included:

> the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue,

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[19]Plaintiff and her attorneys were ordered to pay $182,986.81, in total, based on the Amended Judgment of Dismissal and Summary Judgment filed in September 2009, in the eighteen (18) *Angle* cases.

[20]The twelve (12) factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

> as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case

McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982). The Mississippi Supreme Court has further held that "the reasonableness of attorney's fees [is] controlled by the applicable Mississippi Rule of Professional Conduct 1.5 factors and the McKee factors." *BellSouth Pers. Commun., LLC v. Bd. of Supervisors*, 912 So. 2d 436, 446 (Miss. 2005) (quoting *Mabus v. Mabus*, 910 So. 2d 486, 489 (Miss. 2005)). Rule 1.5 provides:

> 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. Prof. Conduct 1.5(a). The Rule 1.5 factors are nearly identical to the "lodestar" factors set forth by the United States Supreme Court. *Mauck v. Columbus Hotel*, 741 So. 2d 259, 272 (Miss. 1999). The Supreme Court stated in *BellSouth Pers. Commun., LLC v. Bd. of Supervisors*:

> In calculating the "lodestar" fee, **the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate.** This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services . . .

BellSouth, 912 So. 2d at 446-47 (quoting *In re Estate of Gillies*, 830 So. 2d 640, 645 (Miss. 2002)). Thus, the determination of a reasonable attorney's fee commences with the determination of a "lodestar" fee, after which the Court is to apply the Rule 1.5 and *McKee* factors. *Gillies*, 830 So. 2d at 645.

A. The Koppers Defendants Submitted A Statement of Attorneys' Fees and Costs Based on a Pro-Rata Share and Affidavits Alone.

In this action, the Koppers Defendants submitted their Statement of Attorneys' Fees and Costs [R.E. 4; R. 399-412], as did Illinois Central [R.E. 5; R. 412-21]. Rather than submitting the number of hours expended on the *Collins* matter particularly, the Koppers Defendants provide:

> During the relevant time period, plaintiffs originally filed 104 separate actions. These matters had originally been filed under one caption, Angle, and were ordered severed by this Court, requiring plaintiffs to refile 104 separate cases. Since then, legal fees and costs incurred defending these 104 cases have been submitted to defendant clients under a single "Angle" designation. For that reason, defendants seek recovery of only the pro rata share of fees and costs for these 18 plaintiffs. Defendants have divided total fees and costs by 18/104 (17%), and then divided that number again by 18 to ascertain fees and costs on a per case basis.

[R.E. 4; R. 399-400.] From its inception, the determination of the Koppers Defendants' fees is flawed in that Defendants failed to provide the number of hours expended on Collins' case. Defendants' contention that they should receive compensation upon a pro rata share of cases has no precedence in the law.

Defendants, Koppers Inc., Beazer East, Inc., and Three Rivers Management, Inc., submitted their Bill of Attorneys' Fees and Costs totaling $7,086.43 in the *Collins* matter based on Defendants' pro rata formula as shown above. These Defendants are jointly represented by Cal R. Burnton of the Chicago, Illinois law firm of Wildman, Harrold, Allen & Dixon, LLP, Christopher A. Shapley and William E. Jones, III of the Jackson, Mississippi law firm of Brunini, Grantham, Grower and Hewes, PLLC, and Jay Gore, III of the Grenada, Mississippi law firm of Gore, Kilpatrick, Purdie, Metz & Adcock. The Bill of Attorneys' Fees and Costs submitted by these Defendants is inadequately supported by self-serving affidavits executed by the aforementioned defense counsel with Mr. Burnton, Mr. Jones and Mr. Gore having elected not to submit the itemized billing statements upon which their sworn testimony is based. Recent decisions of the Court regarding the assessment of attorney's fees reference evidence *in the record* which includes detailed itemized billing statements

of the counsel for the party seeking attorney's fees. See *Mabus v. Mabus*, 910 So. 2d 486, 489 (¶ 9) (Miss. 2005) ("Attached to the affidavit . . . was a detailed itemized billing statement outlining how he arrived at his fee"); *City of Madison v. Bryan*, 763 So. 2d 162, 176 (¶ 53) (Miss. 2000) ("This letter details the roadblocks Bryan encountered throughout this case and contains a thorough itemization of all fees and costs expended"); *Roebuck v. City of Aberdeen*, 671 So. 2d 49 (Miss. 1996) ("The proof was in the form of time sheets, billing statements and affidavits of the attorney's involved."). Additionally, the Court, in *Carter v. Clegg*, in considering the proof that a party must put on to show reasonableness of an attorney's fee award provided:

> Although the courts have outlined different standards, it seems clear that they insist that defendants prove the expenses incurred because of the litigation. *See, e.g., McNulty v. Borough of Norristown*, Civ. A. No. 88-3354, 1988 WL 156166, 7 (trial judge allowed defendant opportunity to submit the customary itemization showing attorney hours and rate, and plaintiff had opportunity to oppose the reasonableness of the amount claimed), (citing *Schulley v. Mileur*, 115 F.R.D. 50 (M.D. Pa.1987); *Alexander, supra*, 1989 WL 87617 (Defendant submitted his billings and contemporaneous time records), (citing *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir.1974); *Taragon v. Eli Lilly and Co., Inc.*, 838 F.2d 1337, 1340 (D.C. Cir.1988) (the amount must be supported by evidence in the record); *Cauley v. Wilson*, 754 F.2d 769, 772 (7th Cir.1985) (Although defendant provided a two-page affidavit and a one-page itemization of attorney's fees which stated that the attorney spent twenty-five hours on researching, drafting, and filing pleadings, eighty hours on discovery, and forty hours on trial preparation, the court found these to be too sketchy to determine reasonable fees; billing statements and time sheets are better documentary evidence).

Carter v. Clegg, 557 So. 2d 1197, 1193 (Miss. 1990).

The evidence submitted by Defendants' counsel in support of their request for attorney's fees was inadequate for Plaintiff's counsel to properly consider the reasonableness of the proposed attorney's fee and assert specific objections. More importantly, the evidence submitted by Defendants' counsel in support of their request for attorney's fees was inadequate for the trial court to determine reasonableness. Plaintiff, in her response to Defendants' Statement of Attorneys' Fees and Costs, requested that the trial court direct Defendants to provide itemized billing records and

that it conduct a hearing as to attorney's fees thereafter. [R. 439-45.] Plaintiff's requests were denied, leaving the same deficient evidence in the record upon which Defendants' fees and costs were awarded. Allowing a fee on such spurious evidence – the proration of fees on a formula where the universe of cases is unknown and the time devoted to each inscrutable – is an abuse of discretion. As such, Plaintiff respectfully submits the award should be reversed.

B. Illinois Central's Requested Attorney's Fees Were Excessive.

Defendant's counsel filed on behalf of Illinois Central, an Affidavit of Attorney in Support of Motion for Attorney Fees and Expenses on February 24, 2009, attaching itemized time for Harris F. Powers, III, Glenn F. Beckham, Christopher W. Winter and C. Cameran Auerswald, including "fees incurred in the preparation and review of pleadings and preparation for an attendance at discovery depositions." [R.E. 5; R. 413-21.] Although noting significant cost, Illinois Central acknowledged in its Affidavit "that the litigation has been terminated at a relatively early stage of litigation . . . " [RE. 5; R. 414.] Additionally, as pointed out in her March 9, 2009 response to Illinois Central's Affidavit, of the fifty-two (52) time entries, few regarded activities other than "receive and review," or the filing of joinders in the pleadings of counsel for the Koppers Defendants, activities not warranting an award. [R. 436-38.] See R.E. 5; R. 417-21.[21] Further, for each of the eighteen (18) matters, the cost of "receive and review" was charged, allotting the same amount of time each time, although the documents were identical in each filing. Imposing sanctions for fees associated with re-reviewing the identical document eighteen (18) times is not a reasonable

[21] 5/17/06 Prepare IC Motion to Dismiss...; 8/13/06 Revise... Separate Answer...; 8/29/06 Prepare and Propound ... Request for Admissions; 8/29/06 Prepare Notice of Service; 8/10/07 Prepare and Finalize Response to Interrogatories and Requests for Production of Documents; 10/23/07 "Prepare for deposition of Shirley J. Collins: review Complaint, Definite Statement as Illnesses, Toxicology Questionnaire, and discovery responses; prepare detailed notes and deposition outline"; 10/24/07 Attend telephonic deposition fo Shirley J. Collins and prepare report of deposition; 3/30/08 Propound First Set of Interrogatories...Requests for Production...; 10/26/08 Draft ...Motion to Compel.

fee. For that matter imposing sanctions for the preparation of the same document eighteen (18) times is not reasonable either when essentially only the style is being changed, i.e., notices of service, interrogatories, requests for production.

The controlling factor is "what is reasonable." *BellSouth*, 912 So. 2d at 446 (quoting *Mauck v. Columbus Hotel*, 741 So. 2d 259, 271 (Miss. 1999)). The fees and costs assessed to Plaintiff and her attorneys are excessive and/or unreasonable. Plaintiff, therefore, respectfully requests that this Court vacate the trial court's current fee and cost award and remand this matter. Interestingly, in the earlier Judgment Severing Claims and Assessing Attorney Fees, included in the *Collins* record as an exhibit, the trial court, when ordering sanctions in *Angle v. Koppers Inc., et al.* found: "[T]he amount of time spent by the defense counsel is excessive considering the fact that they should have a great knowledge of the law and the legal issues involved in this case, since they have defended other cases and offered defenses in those cases, that are almost identical tho those offered in this action." [R. 59-60.]

VII. The Trial Court Abused Its Discretion When It Awarded Attorneys' Fees and Costs, and Sanctions Against Lawyers Who Were Not of Record and Were Not Active in the Proceedings.

There was simply no objective basis, pursuant to Rule 11 of Miss. Code Ann. § 11-55-5, for ordering Wilbur Colom, J.P. Hughes, and Frank Thackston, jointly and severally liable for the payment of attorneys' fees and costs to Defendants. Colom did not appear in the case until February 6, 2009, after the motion for summary judgment and sanctions had been filed by Defendants. He had no involvement with the actions the Court found sanctionable. Similarly, while Hughes and Thackston were of record, they did not sign any of the pleadings a subject of sanction and were merely of record, to be kept abreast of the proceeding because of their role in other cases against these Defendants. All pleadings criticized by the Court were signed by other attorneys. Rule 11 states that "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." The trial court, however, ordered sanctions in connection with the Litigation Accountability Act which states that the court "shall assess the payment against the offending attorneys or parties, or both." Miss. Code Ann. § 11-55-5(3) (emphasis added). The sanction order at issue here falls well short of this mandate.

Indeed, there is no evidence in the record that would support any such findings. Colom, Hughes and Thackston were not active attorneys of record before the trial court in this case at the time the events in question occurred. Given the foregoing, then, they should not have been sanctioned by the trial court in this matter.

CONCLUSION

For all of the foregoing reasons, 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 17th day of March, 2010.

SHIRLEY JEAN COLLINS

BY: _____

Hunter W. Lundy (MSB No. [redacted]
Kristie M. Hightower (MSB No. [redacted]
LUNDY, LUNDY, SOILEAU & SOUTH, LLP
501 Broad Street
Lake Charles, Louisiana 70601
(337) 439-0707

Wilbur O. Colom (MSB No. [redacted]
THE COLOM LAW FIRM
P.O. Box 866
Columbus, MS 39703
(662) 328-0903

CERTIFICATE OF SERVICE

I, Hunter W. Lundy, do hereby certify that a true and correct copy of the above and foregoing document was forwarded via United States Mail, first class postage prepaid, to the following:

Hon. Joseph H. Loper
Circuit Judge
Post Office Box 616
Ackerman, MS 39735

Jay Gore, III, Esq.
Gore, Kilpatrick, Purdie, Metz & Adcock
Post Office Box 901
Grenada, Mississippi 38902

Christopher A. Shapley, Esq.
Robert G. Gibbs, Esq.
William Trey Jones, III, Esq.
Brunini, Grantham, Grower & Hewes, PLLC
Post Office Box 119
Jackson, Mississippi 39205-0119

Cal R. Burnton, Esq.
William M. Barnes, Jr., Esq.
Jeffrey K. McGinness, Esq.
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive, Suite 2800
Chicago, Illinois 60606-1229

Reuben V. Anderson, Esq.
Phelps Dunbar
Post Office Box 23066
Jackson, Mississippi 39225-3066

Glenn F. Beckham, Esq.
Harris Powers, Esq.
Upshaw, Williams, Biggers, Beckham & Riddick, LLP
Post Office Drawer 8230
Greenwood, MS 38935-8230

This the 17th day of March 2010.

Hunter W. Lundy

Miss Code Ann. § 11-55-1. Litigation Accountability Act of 1988.

This chapter may be cited as the "Litigation Accountability Act of 1988."

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.

Rule 41. Dismissal of Actions.

(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.

Miss. R. Civ. P. 41(b).

Rule 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. R. Civ. P. 56.