IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-IA-02022-SCT

JACKSON PUBLIC SCHOOL DISTRICT, THE CITY OF JACKSON, THE JACKSON POLICE DEPARTMENT, CLAYTON JOHNSON, MARILYN MINTER, MICHELLE KING — APPELLANTS

VS.

LATISHA HEAD, a minor, by and through SHIRLEY RUSSELL, her mother and next friend; ASHLEY McCOY, a minor, by and through SHIRLEY McCOY, her mother and next friend; and SHIRLEY RUSSELL, individually — APPELLEES

ON INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS JACKSON PUBLIC SCHOOL DISTRICT, MARILYN MINTER AND MICHELLE KING

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF THE CASE: FACTUAL BACKGROUND

The facts in this case are disputed and were never fully developed given the delays occasioned by the dilatoriness of the Plaintiffs. The confrontation in this case occurred between LaTisha Head, the student, and Clayton Johnson, a police officer with the Jackson , MS Police Department, who restrained LaTisha Head after she attempted to strike him while he attempted to speak to her and Ashley McCoy about their behavior at school. It is apparent, however, that between the original filing of the Complaint on December 13, 2004 and the filing of their brief, the Plaintiffs have alleged different facts that include initial allegations that the police officer accused Head of jumping on him during the melee (R. 9) to now, for the first time, alleging that the officer accused Head of making a pass at him. (Appellee's Brief in Opposition to Appellants' Motion to Dismiss, p. 2). It was the Plaintiffs, however, who initially claimed that the police officer's chastising of the students somehow constituted a gratification of lust. (R. 22). The Plaintiffs never alleged that the officer accused Head of making a pass at him until they filed their appellate brief.

Such stark contrasts in the allegations underscore the inherent prejudice that results from the Plaintiffs' unreasonable delays in the prosecution of this case. After more than seven years since the May 16, 2003 incident that forms the basis of the Plaintiffs' complaint, memories are bound to have faded, including the memories of the Plaintiffs; facts are likely to be stretched under the weight of attempting to re-create a case that the Plaintiffs did not diligently pursue for a number of years; school children who witnessed the incident in the fourth grade are now in high school and cannot be relied upon to remember the events surrounding the case; former school administrators will have to be located and the named defendants themselves will be hard-

pressed to recall facts about this particular case, given the intervening school years and ensuing school events.

This Court and the Mississippi Court of Appeals have recognized the inherent prejudice to defendants when Plaintiffs allow a case to lay dormant and have determined that such cases should be dismissed. Therefore, given the strong presumptive prejudice to the Defendants caused by the Plaintiffs, this case, too, should be dismissed.

I. Conduct of Plaintiffs' Attorney Does Not Preclude Dismissal Under Rule 41(b).

The Plaintiffs have not provided any reason for failing to take any action in this case for over three years except to offer up their attorney's summary recitations of challenges associated with the practice of law. The trial court failed to conduct a hearing to determine the factual basis for the absence of case activity for some three years. Rather, the Plaintiffs were allowed to point an arbitrary finger at their attorney without undertaking any responsibility for continuing to retain an attorney whom the Plaintiffs presumably knew was plagued by problems and was not moving their case forward.

The Plaintiffs did not present any evidence to the trial court that the Plaintiffs' counsel had been ill; or that she actually faced the administrative challenges cited; or that the Plaintiffs could not retain other counsel to continue their case. There is no evidence of whether the myriad problems attributed to Plaintiffs' counsel lasted for a span of three months or three years. However, the Plaintiffs maintained in their brief that they kept in contact with their lawyer throughout the pendency of the case. Surely, if Plaintiffs counsel's unspecified illness, unspecified personal problems and administrative challenges stretched over a three-year period, the Plaintiffs were keenly aware that absolutely nothing was going on in their case, and they were aware that their attorney had not provided them with any evidence that the case was moving forward. If the Plaintiffs were genuinely interested in pursuing their case against the

Defendants, it was not beyond their control to find other counsel. *See, Sealed Appellant v. Sealed* Appellee 452 F.3d 415 (5th Cir. 2006).

The Plaintiffs summarily charge that they are unsophisticated litigants. However, as litigants, the Plaintiffs knew how to hire a lawyer when they believed they had been wronged and, therefore, are sophisticated enough to understand that, when their case is not moving forward, they can retain the services of another lawyer. If the Plaintiffs were somehow misled to believe that their case was progressing when it actually was not, then the Plaintiffs should look to their attorney for a remedy. The Defendants should not have to endure the prejudicial effect of long-term inactivity.

The Plaintiffs rely on *Rogers v. Kroger*, 669 F.2d 317 (5th Cir. 1982) to assert that the many cited challenges of their attorney – illness, personal problems, misplacement of documents, numerous staff turnovers, changes in offices, and backlog in work production - preclude the dismissal of the instant case. But such is not the holding in recent federal and Mississippi cases, where the courts have consistently held that dormant cases are subject to dismissal where there is a clear record of delay due to attorney conduct. In fact, the courts have held that the Plaintiffs, despite their attorneys' conduct contributing to the delay, are ultimately responsible for the prosecution of their case. *Cox v. Cox*, 976 So.2d 869 (Miss. 2008); *Jenkins v. Tucker*, 18 So. 3d 265 (Miss. Ct. App. 2009); *Sealed Appellant v. Sealed Appellee*, 452 F. 3d 415 (5th Cir. 2006). Furthermore, contrary to assertions by the Plaintiffs, this case is subject to dismissal even with minor plaintiffs when there is a failure to prosecute. *Stacy v. Johnson*, 25 So.3d 365 (Miss. App. 2009)(medical malpractice claim filed on behalf of minor dismissed for failure to prosecute).

In *Jenkins*, the Defendant filed a motion to dismiss under Rule 41(b) after the Plaintiff failed to prosecute her case. The lower court, in dismissing the case, cited Jenkins' failure to respond to discovery and failure to take action for an extended period of time over 14 months.

The Plaintiff asserted, among other things, that she was not personally responsible for the delays. In upholding the dismissal of the case, however, the Mississippi Court of Appeals held that :

> There is no evidence in the record that Jenkins, as opposed to her attorney, was personally responsible for the delay. Nonetheless, the Supreme Court has stated that a party must bear some responsibility for a long delay in which no substantive action is taken . . . Jenkins must herself bear some modicum of responsibility for the delay in this case *Jenkins v. Tucker*, 18 So.3d 265, *citing Cox v. Cox*, 976 So.2d 869 (Miss. 2008).

Even where the Defendants demonstrated no evidence of actual prejudice by the Plaintiffs' failure to prosecute, the Mississippi Court of Appeals still upheld the dismissal of the action. The Court reasoned that:

> The defendants argued that memories would have faded in the seven years since the incident, but they did not put on any proof to that effect in support of their motion to dismiss. Nonetheless, we have held that similar delays entitle defendants to some presumption of prejudice even where most of the fact witnesses had been timely deposed." *Jenkins v. Tucker*, 18 So. 3d at 272, *citing*, *Hasty v. Namihira*, 986 So. 2d 1036 (Miss. Ct. App. 2008).

In the instant case, the trial court did not conduct a hearing to weigh the prejudicial impact of the Plaintiffs' delay; however, the prejudice is evident and sufficient to sustain a dismissal. In addition to the passage of time and the consequential fading memories, the school district specifically cited that the school administrators who were in charge of the district and in charge of supervising the Defendants were no longer employed by the district and their locations cannot be guaranteed, particularly that of Dr. Cheryl Shepherd, who was the Assistant Superintendent of Elementary Schools at the time of the relevant incident and has now relocated from the Jackson area. Furthermore, the Defendants have cited the prejudicial impact that the Plaintiffs' delays will have on potential medical testimony. All of these factors – the unavailability of witnesses, fading memories, potential problems with testimony- have served as the basis for dismissal of cases where Plaintiffs failed to diligently pursue their case. *Holder v. Orange Grove Medical Specialties, 2010WL5016508 (Miss. 2010); Cox v. Cox, 976 So. 2d 869 (Miss. 2008); Hill V.*

Ramsey 3 So. 3d 120 (Miss. 2009); Hillman v. Weatherly, 14 So. 3d 721 (Miss. 2009) Jenkins v. Tucker, 18 So. 3d 365 (Miss. Ct. App. 2009); Hasty v. Namihira, 986 So. 2d 1036.

In *Hasty*, the Mississippi Court of Appeals found that, although the delay in the case was caused by the attorney rather than the Plaintiff and although there was no indication that the Plaintiffs delayed the case to intentionally abuse the judicial process, the presumption of fading memories due to delay was an aggravating factor sufficient to dismiss the case. Specifically, the Court found:

> Dr. Namihira argues that he would be prejudiced because several medical personnel will not be able to remember independent facts about a small outpatient procedure performed upon Mr. Hasty. Further, the memories of Mr. Hasty's treating physicians will have faded further hindering Dr. Namihira's defense. The Hastys argue that all of the fact witnesses had been deposed with the exception of one treating physician, and the medical nurses and doctors would be able to testify from their notes. Therefore, the Hastys maintain that there was little or no prejudice to Dr. Namihira. While each side has compelling arguments, ***it would not seem inappropriate to weigh, even if slightly, the prejudice factor in favor of Dr. Namihira*** since he was not responsible for the delay. This Court has noted that while aggravating factors may bolster the reasoning for a dismissal they are not required even in a harsher case of dismissal with prejudice. *Hine v. Anchor Lake Prop. Owners Ass'n,* 911 So.2d 1001, 1006 (Miss.Ct.App.2005).

As in *Hasty*, the Defendants have shown that the Plaintiffs' delay will hinder the memories of potential witnesses, including medical personnel. After the Defendants propounded discovery, the Plaintiffs failed to respond to discovery to reveal the names of treating physicians or potential expert witnesses. To date, the Plaintiffs still have not executed medical authorizations so that the Defendants can obtain medical records. It was not until the Defendants commenced the dismissal of this action that the Plaintiffs revealed in 2009 that the Plaintiffs had been seen by doctors as early as 2004 and had consulted with an expert psychiatrist, who subsequently died. As in *Hasty*, it is evident in this case that treating physicians will have no independent knowledge of this case after more than seven years have passed. The Mississippi

courts have found that the presumptive fading memories that are cited in this case are sufficient to render a dismissal of this case.

Contrary to assertions of the Plaintiff, the Jackson Public School District did not engage in contemptible conduct in this case. As discussed in the brief in chief, Judge Green summoned the parties to docket call on November 19, 2009, but she did not have a hearing on the Motion to Dismiss and she did not hear any arguments of counsel. There is no transcript of the proceedings because there was no hearing, and there is nothing in the record that would suggest that the Court found the school district responsible for the delays that are the subject of the Motion to Dismiss. The Court advised the parties during docket call that a scheduling order would be needed if she decided that the case would continue. (R. 199; R. 204). When the Court issued her opinion on the Motion to Dismiss, she noted that the parties had not entered a scheduling order since appearing for docket call, and ordered the parties to submit one within 30 days of her denial of the Motion to Dismiss. The parties did, subsequently, at the initiation of the school district, submit an agreed scheduling order, but the Court did not execute the order.

Notably, the lower court cited "excusable neglect" as the reason for the delays in this case, which points solely to the conduct of the Plaintiffs and not the school district, the City of Jackson or Clayton Johnson. Judge Green sanctioned the Plaintiffs – not the Defendants – because of this conduct and ordered the Plaintiffs to pay the cost of the Defendants' reproduction of the discovery. It is the Plaintiffs who have engaged in contemptible conduct by failing to reimburse the Defendants' reproduction cost even after the Defendants submitted supporting documentation.

In the instant case, the Plaintiffs failed to provide any evidentiary proof that would constitute good cause for the delays in this case. Plaintiffs have done nothing but make arbitrary

assertions about their attorney's problems. The prevailing legal authorities as cited herein, however, find that the Plaintiffs are ultimately responsible for prosecuting their case. In the absence of evidentiary support for the delays, the lower court abused her discretion by forcing the continuation of the case with inherent and presumptive prejudice to the Defendants.

II. The Reactionary Conduct of the Plaintiffs Reflect a Clear Record of Delay

In their brief, the Plaintiffs admit that there has been a delay in this case, but they cite two cases that do not support their positions to avoid a dismissal. The Plaintiffs first cite *Watson v. Lillard*, 493 So.2d 1277 wherein the Court dismissed the plaintiff's case for failure to prosecute. The plaintiff attempted to argue that her disabilities caused the delays in the case; however, the Court found that the plaintiffs inability to cooperate with her many attorneys caused the delays, not any illness. In the instant case, the Plaintiffs do not claim any personal illness that prevented the prosecution of their case, and the court in *Watson* did not find the assertion of personal illness sufficient to prevent a dismissal after unreasonable delays.

Similarly, *Barry v. Reeves*, 2010 WL 3785542 (Miss. September 30, 2010), cited by the Plaintiffs, also fails to help their case. In *Barry*, the Plaintiff clearly took affirmative steps to keep his case active and even filed a mandamus to require a trial court decision pursuant to the Mississippi Rules of Appellate Procedure.

Contary to the facts in *Barry*, nothing in this case caused a procedural delay that prevented the Plaintiffs from prosecuting their claims. The Plaintiffs in this case could have pursued their case at any time following the filing of the original complaint, but they did nothing for three years and showed no interest in pursuing the case until the school district filed its Motion to Dismiss for Failure to Prosecute.

Contrary to their assertions, nothing stopped the Plaintiffs from responding to the Defendants' discovery within 30 days of service. The Plaintiffs had ample opportunity prior to the filing of the Motion to Dismiss to object to the execution of medical authorizations sought by Defendants. It wasn't until the Defendants moved to dismiss the action that the Plaintiffs even expressed an interest in responding to discovery and only now assert an objection to the release of medical records.

The record reflects that, after the school district filed the Motion to Dismiss, the Plaintiffs started requesting dates for deposition but would not make themselves available for a hearing on the Motion to Dismiss. The record reflects that, whenever the Defendants attempted to schedule a hearing on the Motion to Dismiss, the Plaintiffs would not cooperate with scheduling the hearing or would seek further delay once a hearing date was suggested.

The Plaintiffs' reactionary response to the Defendants' Motion to Dismiss, however, is the very course of action that this Court previously found to constitute a clear record of delay that supports dismissal. *Hill v. Ramsey*, 3 So.3d 120 (Miss. 2009); *Hillman v. Weatherly*, 14 So.3d 721 (Miss. 2009). Once the Jackson Public School District filed the Motion to Dismiss, the Plaintiffs started requesting deposition dates for defense witnesses and began pledging to file responses to discovery. Despite the ongoing saga of the attorney's administrative problems, those problems did not prevent them from suddenly taking an interest in the case once the Motion to Dismiss was filed.

In their response to the Motion to Dismiss, the Plaintiffs stated that:

> Plaintiffs admit that there has been no formal action taken in this case since August 25, 2005 however, Plaintiffs' attempts to move this case forward has been replete with obstacles and setbacks, namely, problems caused by illness and personal problems of Plaintiffs' counsel, resulting in a backlog in work

> production . . . Plaintiffs seek to move forward in this case and have taken affirmative action to do so by scheduling depositions and by diligently working on the responses to all of the defendants' discovery. Plaintiffs anticipate that they will complete the responses to defendants' discovery within the week, and that the case will be solidly back on track within a few weeks. (R. 158).

When the Plaintiffs later amended their response in opposition to the Motion to Dismiss, the Plaintiffs still had not responded to discovery but reiterated that their attorney was plagued with problems and expanded the problems to include numerous changes in staff and offices as well as misplacement of documents. In fact, the Plaintiffs admitted that they had lost discovery that was previously propounded by the school district, but did not realize the loss until after the school district filed its Motion to Dismiss and after the trial judge had called the parties to docket call. The Plaintiffs contend:

> ...As mentioned, Plaintiffs' attorney began working on the discovery responses, but somehow lost the computer entries. (Prior to entering the information in the computer, Plaintiffs attorney, due to administrative changes in her office, had already misplaced the hard copies of the discovery). These losses were discovered after the fact that Plaintiffs, by and through their attorney, had represented to this Court in their original response to the Motion to dismiss that Plaintiffs anticipated that they would complete the responses to defendants' discovery within the week, and that the case would be solidly back on track within a few weeks. (R. 180).

Clearly, the Plaintiffs had not made an effort to do anything in this case until the Motion to Dismiss was filed. The case law is clear that such conduct will not save a case from dismissal.

III. Aggravating Factors Are Present In This Case

Although aggravating factors are not required to be shown in cases where the Defendants seek dismissal due to the Plaintiffs' failure to prosecute the case, the aggravating factors serve to bolster the case for dismissal. *Cox v. Cox*, 976 So. 2d 869 (Miss. 2008). Nevertheless, the demonstrated prejudice to Defendants occasioned by the Plaintiffs' delay is evident in this case. As the Court found in *Hasty*, one aggravating factor is sufficient to sustain dismissal. In *Hasty*, the Defendant urged that the inherent prejudice caused by fading memories of witnesses is

sufficient to cause the dismissal, and this Court agreed. The Defendants in the instant case also have shown that inactivity in this case will affect the memories of witnesses, including school children and other witnesses whose memories are not reliable after seven years have passed. In addition, the Defendants have urged that the delay in this case was aggravated by the Plaintiffs failure to diligently pursue the case. The Plaintiffs were aware that nothing was going on this case for three years. They were in contact with their lawyer and knew that the lawyer was doing absolutely nothing to advance the case. However, the Plaintiffs did nothing to retain a new attorney and did not otherwise show any interest in the case. Their conduct reflects a lack of desire to diligently pursue the case and should be dismissed.

IV. Lesser Sanctions Than Dismissal Are Futile

Although the case law clearly holds that the Plaintiffs are responsible for prosecuting their case, they still erroneously maintain that the Defendants had a duty to save their case by filing a motion to compel and remind them of their dilatory response to discovery propounded by the Defendants. However, this Court has made it clear that, in considering motions to dismiss under Rule 41(b), the major focus is the plaintiff's conduct, and not the defendants' efforts to prod a dilatory plaintiff into action. *Hillman v. Weatherly*, 14 So.3d 721. (Miss.2009). The Plaintiffs further acknowledge that the Court imposed a sanction due to the Plaintiffs' delay, but they fail to explain why they did not pay the costs of the Defendants' reproduction of discovery as required by the Court. Instead, the Plaintiffs maintain that they were not at fault because the delay, they contend, was beyond their control. Without sufficient support to explain the prejudicial delays, even the cases cited by the Plaintiffs find that the appropriate remedy is dismissal where the Plaintiffs fail to demonstrate good cause for allowing a case to languish.

CONCLUSION

The Defendants adopt and incorporate the authorities and arguments set forth in their initial brief filed in this case, and based on the forgoing additional arguments, Jackson Public School District, Marilyn Minter, and Michelle King, request that this Court reverse the order of the trial court and dismiss the Plaintiffs' lawsuit pursuant to Miss. R. Civ. P. 41(b).

This the 27th day of January, 2011.

Respectfully submitted,

Jackson Public School District, Marilyn Minter, and Michelle King

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CERTIFICATE OF FILING AND SERVICE

Pursuant to Rule 25 of the Mississippi Rules of Appellate Procedures, I, Betty A. Mallett, do hereby certify that I have this date addressed and directed via hand delivery to the Clerk of this Court, an original and three (3) copies and one (1) CD-ROM of the REPLY BRIEF OF APPELLANTS JACKSON PUBLIC SCHOOL DISTRICT, MARILYN MINTER AND MICHELLE KING, and further certify that I have forwarded via U. S. Mail, postage pre-paid, a true and correct copy of same to all interested parties listed below:

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