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**

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 may evaluate possible disqualification or recusal.

1. Hon. Tomie T. Green, Hinds County Circuit Court Judge
2. Michelle King, Appellant;
3. Marilyn Minter, Appellant;
4. Betty A. Mallett, Attorney for Appellants, Jackson Public School District, Marilyn Minter and Michelle King
5. JoAnne Nelson Shepherd, Attorney for Appellants Jackson Public School District, Marilyn Minter and Michelle King;
6. Clayton Johnson, Appellant;
7. Pieter Teeuwissen, City Attorney, City of Jackson, MS

8. Claire Barker Hawkins, Deputy City Attorney, Jackson, MS;

9. LaTisha Head, Appellee;

10. Ashley McCoy, Appellee;

11. Shirley Russell, Appellee;

12. Shirley McCoy, Appellee;

13. Lydia Roberta Blackmon, Attorney for Appellees

14. Deborah McDonald, Attorney for Appellees.

This the 7th day of September, 2010.

Betty A. Mallett

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STATEMENT OF THE ISSUES

I. Whether the Trial Court abused its discretion in denying Jackson Public School District's Motion to Dismiss pursuant to Rule 41 (b) of the Mississippi Rules of Civil Procedure.

STATEMENT OF THE CASE-PROCEDURAL HISTORY

The Plaintiffs, LaTisha Head, by and through her mother, Shirley Russell, and Ashley McCoy, by and through her mother, Shirley McCoy, and Shirley Russell, individually, (the "Plaintiffs") commenced a lawsuit in Hinds County Circuit Court on December 13, 2004, against the Jackson Public School District, ("JPS"), teacher Marilyn Minter ("Minter") and former school principal Michelle King ("King"). (R. 5). The lawsuit alleged that JPS, Minter and King engaged in negligent conduct stemming from a confrontation between LaTisha Head and City of Jackson Police Officer, Clayton Johnson at Watkins Elementary School on May 16, 2003. Other defendants named in the lawsuit are the City of Jackson, Mississippi (the "City"), the Jackson Police Department and the police officer, Clayton Johnson ("Johnson").

The Plaintiffs filed an Amended Complaint (the "Complaint") on March 31, 2005. (R. 28). All of the Defendants filed answer to the Complaint. Both the City of Jackson and Jackson Public School District propounded discovery requests. The Plaintiffs filed a response to the City's requests for admissions on August 15, 2005, which was their last action of record. (Supplemental R. 6; RE 7). The Plaintiffs did not file a response to any other discovery requests and took no further action after August 15, 2005 to prosecute their claims against the Defendants.

After three years of inactivity by the Plaintiffs, JPS filed a Motion to Dismiss for Failure to Prosecute on December 10, 2008. (R. 148; RE 9). Thereafter, the Plaintiffs suddenly expressed an interest in taking the JPS defendants' depositions some five years after the underlying incident occurred. Plaintiffs also expressed a sudden interest in responding to JPS

discovery two years after the discovery was propounded, but the Plaintiffs admitted that they had lost the JPS discovery requests during the years of inactivity. (R. 175-178; RE 18-21).

JPS made attempts to schedule a hearing on its Motion to Dismiss, (Supplemental R. 10-13; RE 22-23, 26-27), only to have the Plaintiffs seek further delays in the proceedings. (R. 170-171; RE 24-25) (R. 173; RE 28).

The trial judge, Hon. Tomie T. Green, continued the hearing on the Motion to Dismiss until docket call on November 19, 2009. (R. 174; RE 29). At docket call, the judge did not conduct a hearing on the Motion to Dismiss but advised counsel for the parties that she would render a decision in short order.

On December 8, 2009, Judge Green denied JPS' Motion to Dismiss, citing the Plaintiffs' "excusable neglect" for the slow movement of the case. (R. 201; RE 5). The Court ordered JPS to re-serve the discovery requests that the Plaintiffs had lost and ordered the Plaintiffs to pay the cost of JPS's reproduction of discovery requests. The Court ordered the parties to submit a scheduling order and complete depositions within 90 days.

JPS, Minter, and King timely sought an interlocutory appeal of the trial court judge's decision on December 22, 2009, while proceedings in the trial court continued. This Court granted the interlocutory appeal on February 10, 2010.

STATEMENT OF THE CASE-FACTUAL BACKGROUND

This case stems from a confrontation on May 16, 2003 between LaTisha Head, then a 12-year-old fourth grader at Watkins Elementary School in Jackson, Mississippi, and Clayton Johnson, a City of Jackson police officer. The confrontation occurred when the police officer attempted to correct Head's bad behavior during Field Day at the school. The police officer

reportedly restrained Head to prevent her from hitting him. Head alleges that she incurred emotional and physical injuries during the incident.

Ashley McCoy, also a 12-year-old fourth grader at the time of the incident, witnessed the exchange and alleges trauma from having seen the confrontation.

Head and McCoy, by and through their mothers, Shirley Russell and Shirley McCoy, respectively, sued the Jackson Public School District ("JPS"); a school teacher, Marilyn Minter ("Minter"); Michelle King ("King"), a former principal of Watkins Elementary School; the City of Jackson ("the City") and police officer Clayton Johnson ("Johnson") in Hinds County Circuit Court on December 13, 2004 (R.5).The Plaintiffs filed an Amended Complaint on March 31, 2005. (R.28). The lawsuit alleged claims of negligence, negligent hiring of police officers, negligent hiring of teachers, negligent supervision of police officers, negligent supervision of teachers, negligent training of police officers, negligent training of teachers, negligent retention of police officers, negligent retention of teachers, negligent discipline of police officers, negligent discipline of teachers and principal, negligent/intentional confliction of emotional distress, assault, battery, false arrest/false imprisonment, defamation and negligence per se.

After the Defendants filed their answers to the Complaint, both the City and JPS propounded discovery on the Plaintiffs, including interrogatories, requests for production of documents and requests for admissions filed by the City (Supplemental R. 4) and interrogatories and requests for production of documents filed by JPS (Supplemental R. 8). The Plaintiffs filed responses only to the City's request for admissions on August 15, 2005 (Supplemental R. 6; RE 7) but failed to respond to any other discovery propounded by JPS or the City. Without explanation, the Plaintiffs did not pursue their case after the last record of action on August 15, 2005.

The Jackson Public School District filed its Motion to Dismiss For Failure to Prosecute pursuant to Miss.R.Civ.P 41(b) on December 10, 2008. (R. 143; RE 9). The Plaintiffs did not respond to the Motion until some two months later. (R. 157; RE 13). It was only after JPS filed its Motion to Dismiss that the Plaintiffs took a sudden interest in deposing the defendant former school principal, Michelle King, the defendant teacher, Marilyn Minter and former JPS Superintendent Dr. Earl Watkins.(R. 169; RE 17).

Five years had passed since the 2003 incident between Head, McCoy and the police officer and three years had passed since the 2003 filing of the lawsuit without the Plaintiffs taking one step to respond to the City's or JPS' outstanding discovery requests. The Plaintiffs did not propound discovery or take any other action in the case. It was only after JPS filed its Motion to Dismiss in 2008 that the Plaintiffs expressed an interest in responding to JPS discovery request. By then, the Plaintiffs had lost the discovery requests and didn't bother to request replacement copies until after the Motion to Dismiss had been filed. (R. 175; RE 18).

Thereafter, the Plaintiffs made themselves unavailable for months and continued a pattern of dilatoriness, which led to the scheduling and rescheduling of the hearing on the Motion to Dismiss.

After several attempts, JPS was able to obtain a hearing date on its Motion to Dismiss. On May 11, 2009, JPS filed a Notice of Hearing, which set the hearing date on the Motion to Dismiss for June 16, 2009. (Supplemental R. 10; RE 22). Counsel for the Plaintiffs advised that they could not appear at the June 16, 2009 hearing, but they wanted deposition dates for Minter, Head and Watkins. (R 169; RE 17). In fact the Plaintiffs said that they would be unavailable for a hearing on the Motion for most of June, July and August 2009 but expressed a belated interest in taking depositions.

JPS obtained a second hearing date for its Motion to Dismiss, (Supplemental R. 10; RE 22), and even notified the Plaintiffs of the date three months in advance of the hearing. (R. 170; RE 24). The Plaintiffs did not even respond as to whether they were available on the new hearing date (R. 171; RE 25), so the school district moved forward on July 28, 2009 and filed notice of the hearing scheduled for October 20, 2009 (Supplemental R. 12; RE 26).

Despite the three months' advance notice, the Plaintiffs waited until October 8, 2009 to advise they wouldn't be available a second time for the October 20, 2009 hearing. (R. 173; RE 28) and wanted to again postpone.

The Plaintiffs sought a Motion to Continue the hearing (R. 161). JPS objected, citing the Plaintiff's continues dilatory conduct (R. 164), but the trial judge, Hon. Tomie Green, allowed the continuance until docket call on November 19, 2009. (R. 174; RE 29).

At docket call, Judge Green did not conduct a hearing on the Motion to Dismiss, but announced that she would render an opinion at a later date. She instructed the parties to submit any additional supporting authorities. The Plaintiffs filed their supplemental brief on November 24, 2009 (R. 179; RE 30) and JPS filed its supplemental authorities on November 25, 2009 (R. 185; RE 36), and its rebuttal (R. 197), reiterating the prejudice that JPS faced because of Plaintiffs' delays, particularly the fading memories of witnesses, including school children, and the potential difficulties in locating witnesses after the long period of inactivity.

On December 9, 2009, Hinds County Circuit Court Judge Tomie Green issued an order denying the Defendants' Motion to Dismiss for Failure to Prosecute, citing the Plaintiffs' "excusable neglect for the slow movement of the herein case," (R. 201; RE 5). The judge ordered JPS to re-produce the discovery that the Plaintiffs had lost; ordered the parties to submit an agreed scheduling order; and ordered the Plaintiffs to pay JPS' reasonable costs of reproducing the discovery.

JPS timely filed its Petition for Interlocutory Appeal of the trial court's order to this Court Order on December 22, 2009.

After Judge Green denied the Motion to Dismiss, she ordered the parties to continue the case by establishing an agreed scheduling order. (R. 201; R.E.5). But, the Plaintiffs continued the pattern of dilatoriness and delay.

JPS re-served the discovery that it originally propounded in 2006 on December 21, 2009. (Supplemental R. 14) .

The Plaintiffs filed a Notice of Service of the belated discovery on February 3, 2010 (Supplemental R. 16). In filing responses to interrogatories, and requests for production of documents, the Plaintiffs failed to execute medical authorizations that would allow JPS to obtain relevant records from medical providers. (R. 254, Response to Interrogatory 14 (g); RE 44). With their responses to discovery, the Plaintiffs revealed that LaTisha Head and Ashley McCoy first visited a psychiatrist regarding their alleged injuries seven months before they filed their initial lawsuit in 2004. (R. 244-271, p. 254; RE 44-45). The discovery also revealed that the Plaintiffs had consulted with an expert, Dr. Wood Hiatt, a psychiatrist, who had information regarding the Plaintiffs' alleged emotional injuries. (R. 244-271). The Plaintiffs failed to produce any records from Dr. Hiatt or execute medical authorizations for the records, and Dr. Hiatt subsequently died on March 25, 2010. (Supplemental R. 40; RE 71).

After the trial court ordered the case to continue with commencement of discovery, Jackson Public School District arranged to depose Plaintiffs LaTisha Head, Ashley McCoy, Shirley Russell and Shirley McCoy. (R. 238; RE 46).

By that time, the Plaintiffs revealed that Ashley McCoy and Shirley McCoy had moved to St. Louis, Missouri. (R. 238; RE 46). JPS worked with the Plaintiffs to schedule their

depositions (R. 240), and filed deposition notices accordingly. (Supplemental R. 20-31; RE 48-59).

The school district even went as far as arranging for a location and a court reporter in St. Louis, Missouri to accommodate the telephonic depositions of Shirley and Ashley McCoy. (R. 241; RE 61). The Plaintiffs indicated that they would be ready to appear for depositions on February 23, 2010.(R. 241; RE 61).

This Court granted JPS' interlocutory appeal on February 10, 2010. This Court did not stay the trial court proceedings. However, after stating that they would appear for depositions, on February 23, 2010 the Plaintiffs waited until 24 hours before the scheduled depositions to change their minds and suddenly decide that the depositions should not go forward. The Plaintiffs moved for an order to stay the depositions on February 22, 2010, some ten (10) days after this Court granted the interlocutory appeal. (R. 206; RE 62). JPS sought a motion to compel the Plaintiffs' attendance at the deposition, (R. 211-234; RE 65) but to no avail, as the trial court halted the depositions. (R. 340), and a similar motion for emergency relief was dismissed by a panel of this Court. (R. 341).

The Plaintiffs initially advised JPS that they would not appear at depositions because of this Court granting the interlocutory appeal and because they had hired additional counsel and needed more time to prepare. (R. 213; RE 67). Then in their motion to stay proceedings, the Plaintiffs cited their inability to take time off from work and school to attend the depositions. (R. 206; RE 62).

Since JPS was the party that would incur the expense of taking the Plaintiffs' depositions in accordance with the trial court's instructions to commence discovery, the Plaintiffs' work to halt the depositions is just another example of dilatory conduct and delay.

The Jackson Public School District submits the following timeline to demonstrate the dilatory conduct of the Plaintiffs:

May 16, 2003	Date of incident between Head, McCoy and Officer Johnson
December 13, 2004	Original Complaint filed (no service on defendants)
March 31, 2005	Amended Complaint filed
August 15, 2005	Date of last action taken by Plaintiffs (Response to Requests for Admissions)
2005-	No action of record by Plaintiffs to advance case
December 10, 2008	Motion to Dismiss for Failure to Prosecute filed by Jackson Public School District
February 6, 2009	Motion to Schedule Hearing on Motion to Dismiss filed by Jackson Public School District
February 25, 2009	Response to Motion to Dismiss filed by Plaintiffs
May 8, 2009	Notice of June 16, 2009 Hearing on Motion to Dismiss filed by Jackson Public School District
June 10, 2009	Letter of Plaintiffs' counsel to JPS counsel requesting delay of June 16, 2009 hearing on Motion to Dismiss and requesting dates to depose defendants; advises of Plaintiffs' unavailability during most of June, July and August, 2009
July, 28, 2009	Notice of October 20, 2009 hearing on Motion to Dismiss
October 8, 2009	Motion for Continuance of October 20, 2009 hearing filed by Plaintiffs
December 9, 2009	Order of Judge Green Denying Defendants' Motion to Dismiss

SUMMARY OF THE ARGUMENT

Rule 41(b) of the Mississippi Rules of Civil Procedure authorizes the dismissal of an action as an adjudication on its merits when the Plaintiff fails to prosecute his case with resulting prejudice to the Defendant. When a trial court denies a defendant's motion to dismiss due to the plaintiff's failure to prosecute his case, the denial is reviewed for abuse of discretion. *Illinois Central Railroad Company v. Moore*, 994 So.2d 723 (Miss. 2008). Where there is evidence that the plaintiff engaged in a clear pattern of delay resulting in prejudice to the defendant that cannot be rectified with a sanction lesser than outright dismissal, then outright dismissal is appropriate. *Hillman v. Weatherly*, 14 So.3d 721 (Miss. 2009); *Jenkins v. Tucker*, 18 So.3d 265, (Miss. Ct. App. 2009), *citing*, *AT&T. v. Days Inn of Winona*, 720 So.2d 178 (Miss. 1998).

The fading memories of potential witnesses and the potential unavailability of witnesses for trial are the consequence of the Plaintiff's pattern of delay and dilatoriness. Seven years have now passed since the date of the incident at issue in this case. Students who witnessed the confrontation between Head and Johnson were fourth graders at the time of the incident and are now 11th-grade high school students. Former administrators who could provide testimony on behalf of the school district regarding claims of negligent hiring, negligent supervision, negligent training, negligent retention, and negligent discipline of the named teacher and principal – including the superintendent of education, human resources director and executive director of elementary schools – are no longer employed by the school district.

Due to the unexplained dilatory conduct of the Plaintiffs, JPS is faced with the prospect of defending a lawsuit against it more than seven years after the incident giving rise to the lawsuit occurred. The school district now must rely on the fading eye witness accounts of school children. In addition, the school district faces the task of trying to discover the whereabouts of and press the memories of retired and relocated school personnel.

The Plaintiffs were well aware that Head and McCoy were examined by a psychiatrist as early as seven months prior to filing their initial lawsuit in 2004 but failed to timely reveal this information regarding medical treatment. Furthermore, the Plaintiffs failed to timely reveal the identity of their potential expert, who has since died. (Supplemental R. 40; RE 71).

The school district faces the implausible task of obtaining an expert witness's opinions regarding the damages to Ashley McCoy and LaTisha Head, if any. Not only did the Plaintiffs' potential expert take the basis of his impressions to his grave, there is no indication in the record that he or any other doctor was made aware of LaTisha Head's very troubled background that may have been the actual cause of her alleged emotional problems. Any JPS-retained expert will also have to filter through the Plaintiffs' troubled histories prior to the incident that gave rise to the lawsuit, as well as their subsequent and unrelated troubles that occurred during the seven years since the incident occurred. It is apparent from the Plaintiffs' own admissions in discovery that both Head and McCoy, who were three grades behind in school in 2003, continued to have trouble with fighting at school after the incident with Officer Johnson, (R. 244-271; RE 70), with McCoy even facing charges in juvenile court and spending a stint in an alternative school.

The trial court did not properly consider all of the well-settled factors stated in case law when she determined that the delay in this case was caused by unspecified excusable neglect. The sanction imposed by the trial court requiring the Plaintiffs to pay the cost of the school district's reproduction of discovery (which they have yet to do) cannot overcome the strong presumption of prejudice to JPS caused by the Plaintiffs' dilatoriness. *Cox v. Cox*, 976 So. 2d 869 (Miss. 2008) (delay gives rise to strong presumption of prejudice to defendants).

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE JACKSON PUBLIC SCHOOL DISTRICT'S MOTION TO DISMISS PURSUANT TO MRCP 41(B) DESPITE EVIDENCE OF A CLEAR RECORD OF DELAY AND PREJUDICE TO SCHOOL DISTRICT, MINTER AND KING

1. The Trial Court Did Not Properly Weigh Relevant Factors In Determining Rule 41(b) Motion

Mississippi Rules of Civil Procedure 41(b) authorizes a defendant to move for the dismissal of an action for failure to prosecute. What constitutes failure to prosecute is considered on a case-by-case basis. *AT& T v. Days Inn of Winona*, 720 So.2d 178 (Miss. 1998). This Court has set forth considerations to be weighed in determining whether to affirm dismissal with prejudice under Rule 41(b): 1) whether there was a clear record of delay or contumacious conduct by the plaintiff; (2) whether lesser sanctions may have better served the interests of justice; and (3) the existence of other "aggravating factors." *Cox v. Cox*, 976 So.2d 869 (Miss. 2008).

In her Order denying JPS' Motion to Dismiss for Failure to Prosecute, Judge Green found that the inactivity in the case was due to unspecified "excusable neglect." (R. 201; RE 5). The sanction that the trial court imposed requiring the Plaintiffs to pay JPS the cost of re-producing discovery request some two years after the discovery was initially propounded by JPS did not take into account the prejudice occasioned by the Plaintiffs' failure to take any action of record in the case for over three years and the passage of five years between the underlying incident and the filing of the motion to dismiss; the presumptive prejudice caused by the delay due to the fading memories of witnesses, particularly school children; the unavailability of witnesses; the Plaintiffs' loss of discovery requests; and the Plaintiffs' obvious knowledge that their case was not progressing and their failure to do anything to move the case along.

2. There is a Clear Record of Delay

The record of delay in this case is unmistakable. The Plaintiffs filed their Amended Complaint on March 31, 2005. After the City of Jackson propounded interrogatories, requests for production of documents and requests for admissions, the Plaintiffs chose only to answer the requests for admissions on August 15, 2005. (Supplemental R. 6, RE 7) The Plaintiffs chose not to file responses to any of the school district's interrogatories and requests for production of documents nor the requests for production of documents or interrogatories propounded by the City of Jackson.

To date, the Plaintiffs have failed to complete the medical authorizations enclosed with the discovery propounded by JPS, thereby thwarting the school district's ability to obtain relevant medical information. When the Plaintiffs filed the belated discovery responses years later, they provided only selected medical documents that were generated some six years before. (R. 244-271; RE 44-45).

By the time the school district filed its Motion to Dismiss, the Plaintiffs had filed only one pleading other than the original and amended complaints and had just walked away from the case. They did not propound one discovery request, nor did they file any motions. For three years, the Plaintiffs did not attempt to schedule any depositions of witnesses. They did not issue any subpoenaes for documents. The loss of discovery requests and the failure to request a replacement copy until after the Motion to Dismiss was filed is a clear indication that the Plaintiffs were not interested in pursuing their case. The Plaintiffs knew that nothing was going on in their case and did not present any evidence that they were concerned about the inactivity.

Even after the motion to dismiss was filed, the Plaintiffs remained dilatory by making themselves unavailable for the hearing on the Motion to Dismiss for several months while, at the same time, expressing a sudden interest to depose JPS witnesses.

Still, after the trial court denied the motion to dismiss and ordered the parties to proceed with the case, the Plaintiffs initially indicated that they were willing to appear for depositions but, as the date for depositions approached they sought and obtained an order from the trial court halting the depositions 24 hours before the depositions were scheduled to begin. By then, the school district had spent money to hire a court reporter in St. Louis, Missouri to facilitate the deposition of Shirley and Ashley McCoy, who are now residents of St. Louis.

There is a clear and consistent pattern of delay by the Plaintiffs in this case. The Plaintiffs' reactionary conduct after the Motion to Dismiss was filed has not saved dilatory litigants from dismissal of their actions.

In *Hill v. Ramsey*, 3 So.3d 120 (Miss. 2009), this Court, in dismissing the plaintiff's case, considered that the Plaintiff, over a course of 2 years, never noticed a deposition (until a motion to dismiss was filed); never served discovery; never issued a subpoena or otherwise initiated discovery. The court held that the two- year span of inactivity, *alone*, was sufficient to sustain a dismissal.

In *Hillman v. Weatherly*, 15 So. 3d 721 (Miss. 2009), this Court found that even 19 months of inactivity, *standing alone*, were enough to warrant a dismissal. In *Hillman*, the court found most aggravating the Plaintiffs' reactionary conduct characterized by a sudden interest in taking depositions once a motion to dismiss was filed. *Id.*

The Plaintiffs have been inexplicably dilatory in all instances of dealing with this case. The Plaintiffs did not respond to the Motion to Dismiss until two months after it was filed, and the Plaintiffs delayed the hearing on the Motion to Dismiss for several months. Such conduct

cannot be rewarded with a sudden re-emergence of the case to the detriment of JPS. Clearly, dismissal is warranted. The Plaintiffs even argue that it was JPS' duty to prod them into action, (R. 181-182; RE 32-33), but this Court has held that the test for dismissal under Rule 41 (b) focuses on the plaintiff's conduct, not on the defendant's efforts to prod a dilatory plaintiff into action. *Hillman v. Weatherly*, 14 So. 3d 721, 727 (R. 197-198).

3. Aggravating Factors Resulting in Prejudice to the JPS, Minter and King Are Present

While factors other than delay are typically present when a dismissal with prejudice under Rule 41(b) is pursued, this Court has stated that, nevertheless, factors other than delay are not required. *Cox v. Cox*, 976 So.2d 869, 875 (Miss. 2008). The standard is whether there is "a clear record of delay or contumacious conduct by the plaintiff . . . " *citing AT&T v. Days Inn of Winona*, 720 So.2d at 181; *Hine v. Anchor Lake Prop. Owners Ass'n*, 911 So.2d 1001 (Miss. Ct. App. 2003)(where a clear record of delay has been shown, there is no need for a showing of contumacious conduct). Aggravating factors serve to bolster the case for dismissal, but are not required. *Cox*, 976 So.2d at 875, even when dismissal is with prejudice, *Jenkins v. Tucker*, 18 So. 3d 265 (Miss. Ct. App. 2009), *citing Hasty v. Namihira*, 986 So.2d 1036 (Miss. Ct. App. 2008).

Aggravating factors and resulting prejudice to JPS in this case are clearly present. The Plaintiffs don't have to be sophisticated litigants to realize that their case was not moving forward. *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415 (5th Cir. 2006)(dismissal under Rule 41(b) appropriate after two years of case inactivity where plaintiff knew that attorney was not diligently prosecuting case). There is no evidence in this case that the Plaintiffs prodded their attorney into action at any time. Two of the Plaintiffs moved to another state without having undertaken one single action in connection with their lawsuit for over three years. The Plaintiffs have not demonstrated that any of them bothered to communicate with their lawyer to advance

their case or to question why their case was not being diligently prosecuted during the years of case inactivity. Neither the Plaintiffs nor their counsel offered a good reason for the delays in prosecuting their case. It can only be assumed that the delays were an indication that the Plaintiffs were no longer interested in pursuing their case. *Illinois Central v. Moore*, 994 So.2d 723 at 729-730 (case dismissed where plaintiff failed to give good cause for delay). The Plaintiffs lost the discovery that the school district propounded and didn't seek a replacement copy until after the school district filed its dismissal motion, thus providing further evidence that the Plaintiffs had no intention to diligently pursue the case.

Even if the delay is in some way attributable to the attorney, it is well settled law that a party is bound by the acts of his attorney. *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 419 (5th Cir. 2006), *citing, Link v. Wabash R.R.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed. 2d 734, (1962).

The provisions of Fed.R.Civ.P. 41(b), and MRCP 41(b) are identical, as are the legal analysis of the factors supporting dismissal. In *Sealed Appellant v. Sealed Appellee, cited supra,* the Fifth Circuit Court of Appeals stated that:

> We believe that there comes a point at which the deficiency in counsel's performance puts the plaintiff on notice that, unless a new lawyer is obtained, the very continuation of the lawsuit is threatened." *Sealed Appellant v. Sealed Appellee*, 452 F.3d at 419 (5th Cir. 2006), *citing Callip v. Harris County Child Welfare Dep't*, 757 F.2d 1513, 1522 (5th Cir. 1985)(affirming dismissal with prejudice).

Furthermore, the Plaintiffs admitted in discovery that both Ashley McCoy and LaTisha Head, who were three grades behind in school, continued to engage in a pattern of bad behavior similar to their conduct on May 16, 2003 when they confronted Officer Johnson, including fighting at school. (R. 244-271; RE 70). Obviously, the Plaintiffs' interest in the instant

litigation waned when they were faced with the prospect that evidence of their poor behavior before and after the incident with Officer Clayton may diminish their claims.

Three years of inactivity in the case created a strong presumption of prejudice to the Jackson Public School District, given the fading memories of witnesses, particularly school children, and potential problems with locating witnesses for trial. The school children were fourth graders in 2003 when the underlying incident occurred. They are now in the 11th grade. With the passage of seven years, their account of events are inherently faulty and unreliable. Even adult witnesses to the incident will be hard-pressed to recall relevant facts after seven years.

In recent cases, this Court has found that, where the plaintiffs have been dilatory in prosecuting their case, the resulting unavailability of witnesses who could provide valuable testimony prejudices the defendant; therefore, dismissal with prejudice is appropriate. *Cox. v. Cox*, 976 So. 2d 869, 877 (Miss. 2008). In addition, this Court has indicated that long-term inactivity in a case establishes a *strong* presumption of prejudice to the Defendant because of fading memories and potential problems with locating witnesses for trial. *Illinois Central v. Moore*, 944 So. 2d 723 (Miss. 2008).

This case should be dismissed because its continuance would be prejudicial to the interests of the Defendants. Memories of the incident that gave rise to the underlying lawsuit are no longer reliable and the availability of witnesses for trial is not guaranteed. School personnel who would provide valuable testimony on behalf of the school district concerning the training, hiring and retention of the named defendants are no longer employed by the school district. The superintendent of schools at that time, Dr. Earl Watkins; Dr. Cheryl Sheppherd, the immediate supervisor of Appellant Michelle King; and Shae Robinson, the human resources director in 2003 are no longer employees of the school district. Witnesses who were in charge of hiring and

training and retaining King and Minter throughout their careers with the school district will be hard to locate and hard-pressed to recall relevant facts regarding training of these veteran educators. The availability of witnesses clearly cannot be guaranteed if this case goes to trial.

According to the Plaintiffs' belated discovery responses, the Plaintiffs sought psychiatric examinations shortly before they filed their initial lawsuit in 2004, which was a year after the underlying incident. The Plaintiffs, however, failed to respond to any discovery propounded by the City of Jackson or Jackson Public School District to reveal this information, thus depriving the Defendants with the full opportunity to discover and preserve relevant information while the evidence is still relatively fresh, intact and available.

The Plaintiffs even consulted a potential expert and still did not provide any information about his knowledge of the case, nor did the Plaintiffs ever execute medical authorizations to allow JPS to discover such information. Now, the expert, Dr. Wood Hiatt, is dead and unavailable. (Supplemental R. 40; RE 71).

If the case were to proceed to trial, any expert testimony presented by the Plaintiffs would be based on speculative medical information garnered by someone who examined the Plaintiffs seven years after the incident that gave rise to the claim for damages. The Plaintiffs' failure to provide timely medical information to the Defendants will make it difficult for any expert for the Defendants to piece together a reliable counter-analysis of the Plaintiffs' alleged emotional damages. The unavailability of reliable witnesses to render opinions and counter-opinions relating to damages claimed by the Plaintiffs makes a trial in this matter untenable. That the futility of a trial is occasioned by the Plaintiffs' own dilatory conduct underscores the appropriate sanction of an outright dismissal.

4. Lesser Sanctions than Dismissal Will Not Serve the Interest of Justice

The trial court considered lesser sanctions than dismissal of the case by ordering the Plaintiffs to pay the cost of JPS' reproduction of discovery that the Plaintiffs lost. The Plaintiffs have not even attempted to pay such costs, a strong indication that the trial court's sanction was not an effective sanction at all and did not serve the interest of justice.

The prejudice that JPS has suffered cannot be cured by the imposition of fines, costs, disciplinary measures, or explicit warnings. Fading memories of witnesses cannot be regained. The prejudice suffered by the Defendants is based on the relocation of the litigants, and the retirement and relocation of other witnesses. Such unavailability cannot be rectified. Due to the Plaintiffs delays, expert witness testimony is now reduced to mere speculation.

Therefore, outright dismissal is the appropriate sanction due to the Plaintiffs' own conduct.

VIII. CONCLUSION

Jackson Public School District, Marilyn Minter and Michelle King seek dismissal of the Plaintiffs' lawsuit against them pursuant to Miss. R. Civ. 41(b). The trial court Judge abused her discretion when she denied the school district's Motion to Dimiss for Failure to Prosecute in light of the clear and unmistakable conclusion that any further proceedings in the trial court will result in irreversible prejudice to all defendants. This Court has established well-settled factors that must be considered when deciding a Rule 41(b) motion. This Court has consistently held that, in cases where the plaintiff engages in a clear record of delay that results in prejudice to the defendant that cannot be rectified by lesser sanctions, then outright dismissal is appropriate.

Applying this Court's well-settled factors to the totality of the facts in this case renders the Plaintiffs' case appropriate for dismissal.

The undisputed evidence in this case reflects that the underlying confrontation between LaTisha Head and Officer Clayton Johnson occurred on May 16, 2003. The Plantiffs filed their Amended Complaint on March 31, 2005, and filed a response to the City's request for admissions on August 15, 2005. Then, without good explanation, the Plaintiffs ceased to prosecute their case. They did not respond to any of JPS' discovery requests. For three years, they did not initiate discovery, file any pleadings, take depositions or issue subpoenaes. They even lost the discovery requests that JPS propounded. There is no indication that any of the Plaintiffs sought out counsel to determine the state of their case. Two of the Plaintiffs moved away to St. Louis at some point without taking any action. The Plaintiffs knew that their case was not moving toward judgment, and appeared to have abandoned their claims.

When Jackson Public School District filed its Motion to Dismiss for Failure to Prosecute, suddenly the Plaintiffs, by and through counsel, expressed an interest in pursuing the case, but the Plaintiffs continued to make themselves unavailable for hearings and depositions. In recent cases, this Court has reiterated that the Plaintiff's reactionary conduct to the filing of a motion to dismiss will not save his case from dismissal, particularly in cases with extended periods of inactivity. This Court has held that long periods of inactivity in a case creates a strong presumption of prejudice to the defendant.

The prejudice to the Defendants in this case is clear. When JPS filed its motion to dismiss, five years had passed since the underlying incident at the school, and three years had passed since the Plaintiffs had taken any action in their case. If the Plaintiffs were to proceed to trial in this case, JPS, Minter and King would be faced with finding retired and relocated witnesses. They would be faced with witnesses whose memories have faded, particularly school children who witnessed the incident seven years ago.

The trial judge did not conduct a hearing on the Motion to Dismiss for Failure to Prosecute but found that the slow movement in this case was due to unspecified excusable neglect. This Court, however, has found that the level of neglect offered by the Plaintiffs in this case is not excusable. Such neglect as long periods of inactivity that can lead to the unavailability of witnesses and faulty memory of relevant facts is presumptively prejudicial. To hold the Plaintiffs responsible for their dilatory conduct by merely charging them the cost of re-producing a pleading in no way addresses the irreversible prejudice caused by the Plaintiffs' own voluntary action. Miss. R. Civ. P. 41(b) provides the appropriate remedy for neglectful and prejudicial conduct through dismissal.

WHEREFORE, based on the foregoing, Jackson Public School District, Marilyn Minter, and Michelle King, requests 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 17th day of September, 2010.

Respectfully submitted,

Jackson Public School District, Marilyn Minter, and Michelle King

BY: _____

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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 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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