

**IN THE SUPREME COURT OF MISSISSIPPI**  
**Cause No. 2010-CA-00337**

**HELEN POWELS, ADMINISTRATRIX OF THE  
ESTATE OF KATHRYN M. RICH**

**APPELLANT**

**vs.**

**JERRY W. ILES, M.D.**

**APPELLEE**

**APPEAL FROM THE  
CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI**

---

**BRIEF OF APPELLEE**

**ORAL ARGUMENT NOT REQUESTED BY APPELLEE**

---

**PREPARED AND SUBMITTED BY:**

**Joseph Leray McNamara, MSB # [REDACTED]  
Stephanie C. Edgar, MSB # [REDACTED]  
COPELAND, COOK, TAYLOR & BUSH  
Post Office Box 6020  
Ridgeland, Mississippi 39158-6020  
Telephone: (601) 856-7200  
Facsimile: (601) 856-7626**

**IN THE SUPREME COURT OF MISSISSIPPI**

**HELEN POWELS, ADMINISTRATRIX OF THE  
ESTATE OF KATHRYN M. RICH**

**APPELLANT**

**vs.**

**CAUSE NO. 2010-CA-00337**

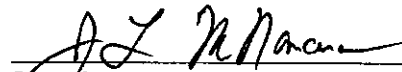
**JERRY W. ILES, M.D.**

**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for the Appellee certify 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. Helen Powels
2. Joseph E. Roberts, Jr.
3. The Estate of Jerry W. Iles, M.D.
4. Joseph Leray McNamara
5. Stephanie C. Edgar
6. The Honorable Forrest A. Johnson

  
\_\_\_\_\_  
Joseph Leray McNamara  
Stephanie C. Edgar  
Attorneys for Jerry W. Iles, M.D.

## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUE .....	1
STATEMENT OF THE CASE .....	2
A.    FACTS .....	2
B.    COURSE OF PROCEEDINGS AND DISPOSITION BELOW .....	2
STANDARD OF REVIEW .....	4
SUMMARY OF THE ARGUMENT .....	5
ARGUMENT .....	6
DISMISSAL WAS PROPER .....	6
1.    There is a clear record of delay .....	6
2.    Lesser sanctions would have no effect .....	7
3.    Aggravating factors are present .....	7
4.    Correspondence and telephone calls do not constitute actions of record .....	8
CONCLUSION .....	9
CERTIFICATE OF SERVICE .....	11

## **TABLE OF AUTHORITIES**

### **CASES**

<i>AT&amp;T v. Days Inn of Winona</i> , 720 So.2d 178 (Miss. 1998) .....	6, 7, 8
<i>Cox v. Cox</i> , 976 So.2d 869 (Miss. 2008) .....	8
<i>Cucos, Inc. v. McDaniel</i> , 938 So.2d 238 (Miss. 2006) .....	4
<i>Hasty v. Namihira</i> , 986 So.2d 1036 (Miss. App. 2008) .....	6, 7
<i>Hine v. Anchor Lake Property Owners Ass'n, Inc.</i> , 911 So.2d 1001 (Miss. App. 2005) .....	6
<i>Hensarling v. Holly</i> , 972 So.2d 716 (Miss. App. 2007) .....	6, 7
<i>Illinois Central Railroad Co. v. Moore</i> , 994 So.2d 723 (Miss. 2008). ....	4, 8, 9
<i>Rogers v. Kroger Co.</i> , 669 F.2d 317 (5 <sup>th</sup> Cir. 1982) .....	7, 8
<i>Tolliver v. Mladineo</i> , 987 So.2d 989 (Miss. App. 2007) .....	6
<i>Watson v. Lillard</i> , 493 So.2d 1277 (Miss. 1986) .....	4, 6

### **RULES**

Miss. R. Civ. Pro. 41 .....	6, 9
-----------------------------	------

## **I. STATEMENT OF THE ISSUE**

- A. Whether the trial court abused its discretion in dismissing Appellant's case, which was filed in 1989 and has been stale since 1997?

## **II. STATEMENT OF THE CASE**

### **A. FACTS**

This medical malpractice action was filed on January 17, 1989, for events occurring in 1986. R. at 63. The substance of Plaintiff's allegations was that Dr. Iles, along with others, failed to properly and timely diagnose a compression fracture of Kathryn Rich's T-8 vertebra, which resulted in a spinal cord injury that caused paraplegia. *Id.*

### **B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

This case was tried on February 1, 1994. R. at 57. After the jury returned a verdict in favor of Dr. Iles, the Appellant appealed. R. at 1. On June 3, 1997, the Mississippi Court of Appeals reversed the jury's verdict on the basis of the "bona fide medical judgment" jury instruction. R. at 20-32.

The case was subsequently remanded to Adams County for a new trial on September 16, 1997. R. at 39. From the date of remand to February 19, 2009, when Dr. Iles filed his Motion to Dismiss for Lack of Prosecution, no action of record was taken. R. at 70-71.

On August 17, 2009, the Adams County Circuit Court granted Dr. Iles' Motion, finding that the "passage of time has been such that it is of prejudice to the Defendant. . ." R. at 117. Thereafter, Appellant moved for re-hearing based on what she considered "newly discovered evidence." R. at 96. This alleged newly discovered evidence was limited to an argument that one of Dr. Iles' original experts, Dr. William Bowlus, recently served as an expert witness in a lawsuit wholly unrelated to this case. *Id.*

On November 23, 2009, the Circuit Court of Adams County held a hearing on Appellant's Motion to Reconsider which it denied. R. at 119-127. The trial court did not abuse his discretion in denying relief to Appellant.

### III. STANDARD OF REVIEW

This Court's standard of review for the grant of dismissals under Miss. R. Civ. Pro. 41 is abuse of discretion. *Illinois Central Railroad Co. v. Moore*, 994 So.2d 723, 726 (¶ 8) (Miss. 2008) (quoting *Cucos, Inc. v. McDaniel*, 938 So.2d 238, 240 (¶ 5) (Miss. 2006) (citing *Watson v. Lillard*, 493 So.2d 1277, 1279 (Miss. 1986))).



#### **IV. SUMMARY OF THE ARGUMENT**

Since this case was remanded to the Circuit Court of Adams County in 1997, Plaintiff has taken no action of record to prosecute this case. This Honorable Court can practically take judicial notice of the fact that a twelve year period of delay constitutes a clear record of delay under Mississippi jurisprudence.

Moreover, lesser sanctions would have no effect because aggravating factors are abundant in this case. Dr. Iles, who was approximately sixty years old, when this case was tried, was seventy-seven years old when the case was dismissed. In addition, during the pendency of this appeal, counsel for Dr. Iles learned of his September 1, 2010 death. Dr. Iles' experts, Dr. Joe Herrington and Dr. William Bowlus, are likewise, in their seventies. Dr. Bowlus has completely retired from practicing medicine, and Dr. Herrington recently sustained a grievous brain injury.

Applying these facts to Mississippi law regarding dismissal of stale cases, the trial court's dismissal was entirely proper.

## V. ARGUMENT

### **Dismissal was Proper**

Rule 41(b) of the Mississippi Rules of Civil Procedure provides in part, “[F]or failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action or of any claim against him.” Dismissal for failure to prosecute has been regarded “as a means necessary to the orderly expedition of justice and the court’s control of its own docket.” *Hensarling v. Holly*, 972 So.2d 716, 719 (¶ 5) (Miss. App. 2007) (citing *Lillard*, 493 So.2d at 1278). Thus, the Circuit Court of Adams County was vested with the inherent power to dismiss Appellant’s case against Dr. Iles due to Appellant’s failure to prosecute.

In determining whether to dismiss a case for failure to prosecute, the following three (3) factors should be considered: “(1) whether the conduct of the plaintiff can be considered contumacious or dilatory; (2) whether lesser sanctions could be applied; and (3) other aggravating factors.” *Hasty v. Namihira*, 986 So.2d 1036, 1040 (¶ 16) (Miss. App. 2008) (citing *AT&T v. Days Inn of Winona*, 720 So.2d 178, 181-82 (¶¶ 14, 17, 19) (Miss. 1998).

#### **1. There Is A Clear Record of Delay.**

Ordinarily, the first factor that should be considered is whether a plaintiff’s conduct was contumacious or dilatory. *Id.* However, under this factor, a showing of contumacious conduct is not necessarily required. *Hine v. Anchor Lake Property Owners Ass’n, Inc.*, 911 So.2d 1001, 1005 (¶ 14) (Miss. App. 2005). Rather, where a clear record of delay has been shown . . . there is no need for a showing of contumacious conduct. *Id.* “While ‘there is no set time limit on the prosecution of an action once it has been filed,’ an action must at some point in time, be prosecuted after its filing or dismissed. *Tolliver v. Mladineo*, 987 So.2d 989, 998 (¶ 23) (Miss. App. 2007) (quoting *Days Inn of Winona*, 720 So.2d at 180 (¶ 12)).

This matter was filed in 1989, twenty (20) years ago. R. at 63. This case has lain dormant for nearly twelve (12) of the past twenty (20) years. R.E. at 1-3. Prior to Dr. Iles' Motion to Dismiss, the last activity recorded on the Adams County Circuit Clerk's docket was in 1997 when the case was remanded to Adams County for a new trial. *Id.* Based upon the foregoing, a clear record of delay has been shown to exist and consequently, whether there was contumacious conduct on the part of Appellant is a moot point.

**2. Lesser Sanctions Would Have No Effect.**

The second factor which must be considered is whether a lesser sanction than dismissal would remedy this matter. *Hasty*, 986 So.2d at 1040 (¶ 18). Lesser sanctions have been held to include, "fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings." *Days Inn of Winona*, 720 So.2d at 181-82 (¶ 17).

In the case at bar, lesser sanctions would have no effect because as is fully discussed below, the prejudice to Dr. Iles or his estate has already resulted and cannot be cured. Appellant has allowed this matter to become stale by failing to take any action of record for a period of nearly twelve (12) years.

**3. Aggravating Factors Are Present.**

The Court should also consider whether any aggravating factors are present. *Hasty*, 986 So.2d at 1040 (¶ 16). Aggravating factors have been found to 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." *Hensarling*, 972 So.2d at 720 (¶ 9) (quoting *Days Inn of Winona*, 720 So.2d at 181 (¶ 13)) (citing *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5<sup>th</sup> Cir. 1982)). "Aggravating factors' serve to 'bolster'

the case for dismissal, but are not required.” *Cox v. Cox*, 976 So.2d 869, 875 (¶ 17) (Miss. 2008) (quoting *Days Inn of Winona*, 720 So.2d at 181 (¶ 13) (Miss. 1998) and *Rogers*, 669 F.2d at 320). “Given the inherent concerns regarding locating witnesses, fading memories, and increased costs to both litigants and burdening the court system, such a lengthy delay creates a strong presumption of prejudice which can be overcome only by a good cause finding.” *Moore*, 994 So.2d at 729 (¶ 14).

Dr. Iles was a party to this litigation for over twenty (20) years. Counsel was only recently informed that Dr. Iles died on September 1, 2010. See *Natchez Democrat Obituary* attached hereto as Exhibit “A.” Now, Dr. Iles’ defense is limited solely to the 1994 trial transcript. Had Dr. Iles been required to re-try this case at any point over the intervening twelve (12) years, he could have at the very least, testified at the trial albeit with a faulty memory about the events giving rise to this lawsuit. Now, however, Dr. Iles does not have even that option.

Further, Dr. William Bowlus, one of Dr. Iles’ trial experts, is seventy-seven (77) years old and has retired from the practice of medicine. R.E. at 4-5. Dr. Iles’ other trial expert, Dr. Joe Herrington, is seventy-three (73) years old and was involved in a very serious automobile accident, which according to his wife, caused a brain injury that has led to significant memory impairment. R.E. at 6-7.

Suffice it to say that the information and memory of the events surrounding this litigation have grown stale. It is always a plaintiff’s burden to prosecute a case to its conclusion. In *Cox*, cited above, the case had been pending for nearly fourteen (14) years, and the *Cox* Court held that the passage of time along with the effect that time had on the memory of witnesses was presumed to be prejudicial to the defendant. *Cox*, 976 So.2d at 879 (¶¶ 44-45).

Clearly, prejudice to Dr. Iles should be presumed as the case has been pending for twenty (20) years and has been dormant for the last twelve (12) years. Because Appellant’s failure to

prosecute this matter has prejudiced Dr. Iles, this factor weighs heavily in affirming the trial court's dismissal of Appellant's case.

**4. Correspondence and Telephone Calls Do Not Constitute Actions of Record.**

This Court recently explained that cases can only be hastened to judgment by actions of record. *Moore*, 994 So.2d at 729 (§ 14). The record in *Moore* revealed that the Amite County Chancery Clerk had, pursuant to Miss. R. Civ. Pro. 41(d), mailed four (4) notices to counsel of record over a period of seven (7) years. *Id.* at 724 (§ 3). In response to each, Moore merely transmitted letters back to the clerk asking that the case not be dismissed. *Id.*

The *Moore* Court, in denouncing Moore's flagrant disregard of the Mississippi Rules of Civil Procedure, explained that *ex parte* letters to the clerk, regardless of local practice, do not constitute actions of record. *Id.* at 728 (§ 13). The Court held that "unwritten and unapproved local customs or procedures which conflict with the Mississippi Rules of Civil Procedure must suffer the same demise as formal ancient writs . . ." *Id.*

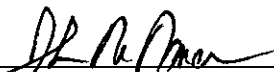
In the case at bar, Appellant has taken no action of record or otherwise. The only activity that has occurred in the past twelve years were two (2) letters sent to Dr. Iles' counsel and a telephone call also made to Dr. Iles' counsel. Appellant now argues that she also called the court administrator to obtain trial dates. However, if correspondence to the circuit clerk is no longer sufficient to prevent dismissal of a stale case, then certainly, mere correspondence and telephone calls to opposing counsel and court administrator are likewise insufficient.

**VI. CONCLUSION**

Appellant has caused an extremely lengthy delay in this action. She has taken no action of record in this case for a period of nearly twelve (12) years. A lesser sanction than dismissal with prejudice would not remedy this prejudicial circumstance because the damage has already been done

to Dr. Iles' defense due to the death of Dr. Iles and fading memories and advanced ages of expert witnesses. Appellant's counsel's correspondence and telephone call to Dr. Iles' counsel and to the court administrator are clearly not actions of record as defined by this Court. As such, dismissal was proper, and in order to be consistent with the holding in *Moore*, this Honorable Court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED, this the 6<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
JOSEPH LERAY MCNAMARA, MSB # [REDACTED]  
STEPHANIE C. EDGAR, MSB # [REDACTED]  
ATTORNEYS FOR JERRY W. ILES, M.D.

OF COUNSEL:

**COPELAND, COOK, TAYLOR & BUSH**

Post Office Box 6020  
Ridgeland, Mississippi 39158-6020  
Telephone: (601) 856-7200  
Facsimile: (601) 856-7626

**CERTIFICATE OF SERVICE**

I, Joseph Leray McNamara, do hereby certify that I have this day caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Mr. Joseph E. Roberts, Jr.  
Pittman, Germany, Roberts & Welsh  
Post Office Box 22985  
Jackson, MS 39225-2985

The Honorable Forrest A. Johnson  
Adams County Circuit Court Judge  
P.O. Box 1372  
Natchez, MS 39121

This the 6<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
JOSEPH LERAY MCNAMARA

Dr. Iles was preceded in death by his parents and one brother, Claude Stanley Iles of Columbia, Mo.

Survivors include his wife Betty; two sons, Greg Iles and Geoff Iles and his wife, Betsy; mother-in-law, Codie Thornhill; four grandchildren, Mary Catherine, Madeline, Michael and Mark Iles, all of Natchez; four brothers, Larry Iles and wife, Lois Christian Iles, of Long Beach, Calif., Douglas Merwin Iles Sr. and wife, Angela Contino Iles, of Virginia Beach, Va., and Percy Joseph Iles Jr. and wife, Cheryl, of Temecula, Calif.; one sister, Christie Iles Cassell and husband, Randy, of Shreveport, La.; one sister-in-law, Irma McGraw and husband, J.D., of Weston, Fla.; one brother-in-law, John Thornhill and wife, Ann, of West Monroe, La.; and a number of well-loved nieces and nephews.

Dr. Iles' family extends thanks to Dr. Vikram Dulam, the fine nurses of Natchez Community Hospital Intensive Care Unit and the hospital administrators. Heartfelt gratitude to Dr. Carrie Iles, Simmons Huber, Colin, Martin and Linda Kemp, Sharon Holley, patients and friends.

Pallbearers will be Greg Iles, Geoff Iles, Larry Iles, Joe Iles, Douglas Iles, Christie Iles, Scott Iles, Colin Kemp, Michael Iles and Mark Iles.

Honorary pallbearers will be doctors and nurses of Natchez.

Online condolences may be sent to [www.lairdfh.com](http://www.lairdfh.com).