IN THE SUPREME COURT OF THE STATE 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

APPEAL FROM THE CIRCUIT COURT
OF ADAMS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF APPELLANT

Helen Powell, Administratrix of the Estate of Katherine M. Rich, files this her Reply Brief of Appellant as follows:

MOTION TO STRIKE

Contemporaneous with the filing of the Reply Brief of Appellant, the Appellant has filed a Motion to Strike. Portions of Appellee's Brief refer to the September 2010 death of Appellee, Jerry W. Iles, M.D. As stated in the Motion to Strike, this Court's review of the issues in this case is limited to a review of whether the trial court abused its discretion in dismissing this case for lack of prosecution. As such, the Court's review is limited to information contained in the record which the trial court considered in making its ruling which occurred on November 23, 2009. The submission of information outside of the record is an improper attempt by Appellee to bring before the Court matters outside of the record in order to improperly prejudice Appellant. "Mississippi Appellate Courts may not consider information that is outside the record. *Dew v. Langford*, 666 So. 2d 739, 746 (Miss. 1995)" *Hardy v. Brock*, 826 So. 2d 71(Miss. 2002). For these reasons and for the reasons set out in Appellant's Motion to Strike, the portions of Appellee's Brief which make reference to matters outside of the record should be stricken.

ARGUMENT

In his Brief Appellee extracts language from five cases which Appellee claims supports the trial court's dismissal of this action for want of prosecution. In doing so, Appellee neither references the facts of the cited cases nor attempts to analogize the cited cases to the facts of the present case. Instead, Appellee cites to language taken out of the cases in the abstract and out of context. The language cited by Appellee, while accurately quoted verbatim from the cases, originates from cases which do not have facts consistent with the facts in this case. As this Court has previously recognized, "what constitutes failure to prosecute depends on the facts of the particular case." *AT&T v. Days Inn*, 720 So. 2d 178, 181 ¶12 (Miss. 1998) For that reason an analysis of the facts from the cases utilized by Appellee in support of his position is crucial in determining the relevance of the quotations to the facts of the present case. With that context, Appellant will address the four issues made in Appellee's Brief.

1. There is not a clear record of delay.

Appellee cites to the cases of *Hine v. Anchor Lake Property Owners Association, Inc.*, 911 So. 2d 1001 (Miss. 2005) and *Tolliver v. Mladineo*, 987 So. 2d 989 (Miss. App. 2007) for the proposition that contumacious conduct is not necessarily required to affirm a dismissal for want of prosecution. *Tolliver* defines contumacious conduct as "willfully stubborn and disobedient conduct, commonly punishable as contempt of court." *Black's Law Dictionary* 330 (6th Ed. 1990) *Tolliver* at 989 (F.N.4) As Appellee recognizes in his brief, the Appellate is not guilty of contumacious conduct in the present case. However, Appellee claims that there is a "clear record of delay" by the Appellant in the prosecution of this case, and that such "clear record of delay" is sufficient, even without contumacious conduct on behalf of Appellant, to

substantiate a dismissal for want of prosecution. While the Appellee accurately quotes the language from *Hine* and *Tolliver* in this section, the facts of both of those cases, which give context to the quotes, are not consistent with those in the case pending before the Court.

In *Hine*, the Court found that since the filing of the initial Complaint, the Plaintiffs had been affirmative dilatory in their prosecution of the case. The Court stated:

> The record below shows that the Hines required an extension of time to make proper service on ALPOA. This delay was immediately followed by a delay in answering ALPOA's first set of interrogatories and request for production of documents. The Hines did not answer the interrogatories until May 2, 1999, which was 146 days after the date due, and they did not respond to the production of documents until April 24, 1999, which was 138 days after the date due. On April 24 the Hines made their last affirmative action in the prosecution of their case by propounding interrogatories and requests for production of documents to ALPOA. After this action, the Hines were late in responding to ALPOA's request for Admissions, and they have yet to respond to ALPOA's second set of interrogatories, which were due three years and nine months prior to the court's dismissal of the action.

Hine at 1004, ¶12

There is no such record of delay in the present case. In *Hine* there is a clear record that the Plaintiff delayed their discovery responses on more than one occasion and had made little, if any, effort during the entire course of the litigation to prosecute the litigation. In the present case, there is no record whatsoever of the Plaintiff delaying the prosecution of the case. As is explained in Appellant's brief, in order to substantiate a dismissal for want of prosecution the record must clearly reflect, as it did in *Hine,* that there is a clear record of delay by the Plaintiff.

As is explained in *Mississippi Department of Human Services v. Guidry*, 830 So. 2d 628 (Miss. 2002) where there is no clear record as to exactly what had transpired during the delays in the case, the mere passage of time was found insufficient to support the trial court's dismissal in an action for want of prosecution based upon a "clear record of delay".

As with the quote that Appellee extracts from *Hine*, although the Appellee accurately quotes from *Tolliver*, similar to Hine, the facts in *Tolliver* reflect affirmative dilatory actions on behalf of the Plaintiff's counsel which evidences a clear record of delay on behalf of the Plaintiff. Notably, "Tolliver's counsel failed to appear at the mandatory docket call despite being sent a notice of the call warning that failure to attend will result in the dismissal with prejudice of cases and/or sanctions." *Tolliver* at 998 (¶23) Additionally, in *Tolliver* the Court found that the "delay in this case was caused by the plaintiff(s) personally." *Tolliver* at 998 (¶24) Based upon the foregoing clear record of delay, the Appellate Court in *Tolliver* affirmed the trial court's dismissal of the action for want of prosecution. The facts that existed in *Tolliver* are not congruent to the facts in this case.

The common fact which differentiates the facts in *Hine* and *Tolliver* from those in the present case is the affirmative derelict nature of Plaintiff's attorney's conduct in both of those cases. In both *Hine* and *Tolliver* the Plaintiff's counsel was not responsive to affirmative efforts on behalf of either the Court or defense counsel to prosecute the action. In *Hine*, the delay was caused by Plaintiff's counsel's failure to timely respond to discovery. In *Tolliver*, the delay was caused by Plaintiff's counsel's failure to attend docket calls after being warned that the failure to attend would result in dismissal with prejudice of the case. Additionally, in *Tolliver* the Court weighed the Plaintiff's personal involvement versus that of his counsel, in delaying prosecution of the case, as a factor in affirming the dismissal. Neither of the factors which supported the trial court's granting of the Motion to Dismiss for Want of Prosecution in *Hine* or *Tolliver* are present in this case.

2. Lesser sanctions should have been explored.

As Appellee states in his Brief, "The second factor which must be considered is whether a lesser sanction than dismissal would remedy this matter. *Appellee Brief* at page 7. In the present case, the trial court failed to even consider whether lesser sanctions would expedite the resolution of this case. The lesser sanctions which the Court should have explored prior to dismissal of this action are discussed in the Appellant's original Brief. An additional sanction which could have been explored by the trial court which would ameliorate any negative affects claimed by Appellee would be to limit the Appellant's evidence to the testimony that was presented at the previous trial. Since all the testimony has been preserved in the transcript of the previous trial, this sanction would obviate any concerns which Appellee has expressed with regard to the fading memories or unavailable testimony of witnesses.

The cases cited by Appellee in support of this proposition are *Hasty v. Namihira,* 986 So.2d 1036 (Miss. C.A. 2008) and *AT&T v. Days Inn of Winona,* 720 So. 2d 178 (Miss. 1998). The facts in *Hasty* are not consistent with those in the present case. In *Hasty*, prior to dismissal of the action, the trial court had attempted to employ two lesser sanctions prior to dismissal of the action. "The first such application of lesser sanction was the August 2003 clerk's Notice of Dismissal. It essentially served as a warning to the Plaintiff that the case needed to proceed. *Hasty* 1041 at ¶18 "The second lesser sanction the trial court applied was dismissal without prejudice instead of the much harsher penalty of dismissal with prejudice. Clearly the trial court's attempt to impose lesser sanctions failed to produce the desired results." *Id.* Unlike in *Hasty*, the trial court in this case neither consider nor attempted to employ lesser sanctions prior to dismissal of this action as is required by this Court in *Hasty.*

In *AT&T v. Days Inn of Winona*, AT&T had filed a Complaint against Days Inn alleging damages caused by the Days Inn's negligence in cutting an underground telephone cable. After counsel for Plaintiff did not appear at a docket setting, the Defendant filed a Motion to Dismiss the case for failure to prosecute. The Motion was noticed for hearing; however, instead of responding to the motion, the Plaintiff filed a Motion for Trial Setting. Counsel for Plaintiff failed to appear at the hearing for the Motion to Dismiss. The Court, therefore, dismissed the case for want of prosecution. Plaintiff appealed that ruling to this Court. In reversing the Circuit Court's dismissal of the case, this Court determined that while the conduct of counsel of Plaintiff was less than diligent. "It does not constitute a contemptuous resistance to the authority of the trial court or clear record of unilateral delay." *AT&T* at 181, ¶16. Further the Court determined, "in the present case there is no indication that lesser sanctions were considered by the Court, and it is not at all certain that such sanctions would have been futile in expediting the proceedings." *Id.* at ¶17.

Finally, the Court in *AT&T* noted that there was, "the lack of any clear indication that the delays were due to so- called "aggravating factor" identified by the *Roger's* Court.[1] First, there is nothing in the record to suggest that *AT&T*, as opposed to its counsel, was responsible for any of the delays. This circumstance sets the present case apart from other cases in which Rule 41(b) dismissals have been affirmed. *Id.* at 182, ¶19. Based upon the foregoing, this Court reversed the dismissal of the case for want of prosecution. In that lesser sanctions were not considered by the trial court in the present case, the Court abused its discretion in dismissing this action.

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[1]*Rogers v. Kroger Co.*, 669 Fd. 2d 317 (5th Cir. 1982)

3. Aggravating factors are not present.

As is pointed out by Appellee in his Brief, prior to dismissing an action for want of prosecution, the Court should consider any aggravating factors which are present. Although the cases indicate that aggravating factors are not necessarily mandatory to support dismissal, the presence of aggravating factors can serve to bolster the trial court's decision to dismiss the action for want of prosecution. Aggravating factors in past cases have been found to include, the extent to which the Plaintiff, has distinguished from his counsel, which is personally responsible for the delay, the degree of actual prejudice to the Defendant, and whether the delay was the result of intentional conduct. *AT&T v. Days Inn of Winona* at 181 (¶13).

The Appellee does not claim in its brief that Plaintiff, as distinguished from Plaintiff's counsel, was responsible for any delay or that the delay was the result of intentional conduct. Appellee instead advances the notion that he has been prejudiced by fading memories and unavailability of witnesses testimony. The Appellee attempts to bolster this argument by improperly submitting information to this court outside of the records which is the subject of Plaintiff's Motion to Strike filed in this action.

Speaking to Appellee's claims of prejudice which are contained in the record, all of the witnesses' testimony has been preserved in this action through the previous trial. The Appellee cannot legitimately complain that he will be prejudiced by the lack of having the witnesses testimony preserved or by failing memories. With regard to Appellee's claim that the testimony of Dr. William Bowlus, one of Dr. Iles' trial experts, is somehow compromised by his age, as is demonstrated in Plaintiff's Motion to Reconsider, Dr. Bowlus is of the belief that despite his age, he is competent to give expert testimony. This fact is substantiated by the fact that he has been

listed as an expert witness is an unrelated case as recently as May 29, 2009. (R100-101)

With regard to Appellee's claim of prejudice which has resulted from Dr. Iles' death on September 1, 2010, which is the subject of Appellant's Motion to Strike, Appellee ignores the fact that the retrial of this case was necessitated by Appellee submitting an improper jury instruction during the first trial of the case. (R-44) Appellee also ignores the fact that if he had simply responded to Appellant's attempts to set this case for trial without filing the Motion to Dismiss, the case would have been tried prior to Dr. Iles' passing. The clean hands doctrine should serve to address any prejudice which Appellee claims in this regard. *Anders v. Anders*, 22 So. 3d 314 (Miss. C.A. 2009)

4. Action of record is not necessary to reverse the dismissal of this action.

Finally, Appellee contends in his brief that cases can only be hastened to judgment by actions of record and that Appellant's attempts to either settle the case or have it set for trial, were not "actions of record." In support of this proposition, Appellee cites to the Court the case of *Illinois Central Railroad Company v. Moore*, 994 So. 2d 723 (Miss. 2006) A reading of the facts in *Moore* reveal that the dismissal of the case for want of prosecution only occurred after the Circuit Clerk had sent the Plaintiff four separate clerk's Motions to Dismiss for Want of Prosecution, pursuant to 41(d) M.R.C.P. Although 41(d) M.R.C.P. does require action of record to be taken or good cause shown to avoid the Court dismissing a case without prejudice within thirty days following the mailing of the clerk's Notice of Dismissal, the present case was not dismissed pursuant to 41(d) M.R.C.P., but instead pursuant to Rule 41(b) M.R.C.P. which does not require action of record to preclude the dismissal of an action.

Secondly, unlike in *Moore*, the Circuit Clerk in the present case did not send any Rule 41(d) Clerk's Notices of Dismissal for Want of Prosecution to the parties. Therefore, the facts in *Moore* and the argument contained in paragraph 4 of the Appellee's Brief are inapplicable to the facts of the present case.

CONCLUSION

The common thread which runs through the cases which address a dismissal pursuant to 41(b) M.R.C.P. is that in the cases where dismissal has been affirmed, there was a clear record of an affirmation dereliction by either Plaintiff's counsel or the Plaintiff which delayed the case. That either the Court or the Defendant had made some attempt to move the case forward, that Plaintiff had ignored the efforts of the Court or defense counsel, and that lesser sanctions or warnings attempted were simply ineffective. Such affirmation dereliction and consideration, or implementation of lesser sanctions are not present in the case before the Court. While it is not evident from an examination of the record in this case why this case has been dormant for some period of time, it is evident that the expiration of time is not in any way related to any affirmative dereliction on behalf of Appellant or her counsel. As a result, the facts of this case are not consistent with those cases in which this Court has affirmed dismissal of a case for want of prosecution. As is stated in *Wallace v. Jones*, 572 So. 2d 371, 376 (Miss. 1990), "dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim. . . dismissals with prejudice are reserved for the most egregious cases." According to the facts of the cases where this Court has addressed this issue, the case pending before the Court is not a case which should be dismissed for want of prosecution.

BASED UPON THE FOREGOING, the trial court abused its discretion in granting the dismissal of this action for want of prosecution. Appellant request the Court to reverse the dismissal of this action and remand the case to the Circuit Court of Adams County for trial.

DATED, this the 24TH day of November, 2010.

Respectfully submitted,

PITTMAN, GERMANY, ROBERTS
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CERTIFICATE OF SERVICE

I, Joseph E. Roberts, Jr., do hereby certify that I have this day forwarded, by United States mail, postage prepaid a true and correct copy and an electronic copy of the above and foregoing *Reply Brief of Appellant* to the following:

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DATED, this the 24th day of November, 2010.

JOSEPH E. ROBERTS, JR.