

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**HERBERT C. HANSON, JR.**

**APPELLANT**

**VERSUS**

**CAUSE NUMBER: 2010-CA-01169**

**JOHN GREGORY DISOTELL, J & J  
INVESTMENTS, LLC, THE ESTATE OF  
BEN G. CLARK, WEST HARRISON FARMS, LLC AND  
HARRISON COUNTY, MISSISSIPPI**

**APPELLEES**

**From the Circuit Court  
of Harrison County, Mississippi  
First Judicial District  
Cause No. A-2401-98-00302**

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**BRIEF OF APPELLEES,  
HARRISON COUNTY, MISSISSIPPI,  
AND THE ESTATE OF BEN G. CLARK**

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***Of Counsel for Harrison County, Mississippi,  
and The Estate of Ben G. Clark, Appellees***

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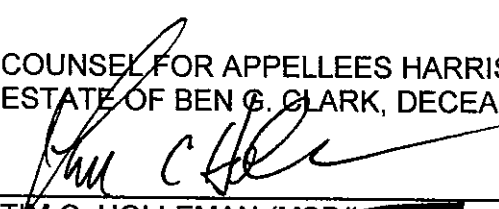
CERTIFICATE OF INTERESTED PARTIES

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The undersigned counsel of record certifies that the following persons have an interest in the outcome of this appeal. These representations are made in order that the Justices of this Court may evaluate for possible disqualification or recusal:

1. Herbert C. Hanson, Jr., Plaintiff-Appellant;
2. Floyd J. Logan, Attorney for Plaintiff-Appellant;
3. John Gregory Disotell, Defendant-Appellee;
4. J & J Investments, LLC, Defendant-Appellee;
5. The Estate of Ben G. Clark, Defendant-Appellee;
6. West Harrison Farms, LLC, Defendant-Appellee;
7. Harrison County, Mississippi, Defendant-Appellee;
9. F. Henry Laird, Jr., attorney for West Harrison Farms, LLC;
10. Tim C. Holleman, attorney for Harrison County, Mississippi, and Estate of Ben G. Clark, Deceased.

COUNSEL FOR APPELLEES HARRISON COUNTY and  
ESTATE OF BEN G. CLARK, DECEASED

  
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**APPELLEES**

**BRIEF OF APPELLEES,  
HARRISON COUNTY, MISSISSIPPI, AND ESTATE OF BEN G. CLARK**

COMES NOW, the Appellees, Estate of Ben G. Clark and Harrison County, Mississippi, by and through its Board of Supervisors, by and through its counsel of record, Tim C. Holleman, Boyce Holleman & Associates, and files this, their Brief, and in support thereof would respectfully show unto this Honorable Court as follows, to wit:

**STATEMENT OF THE FACTS**

Twelve (12) years (1998) have elapsed since Plaintiff initially filed this action. Eleven (11) years have elapsed since Harrison County and its Code Administrator, Ben Clark, were added as parties. One party, Defendant, Ben Clark, has died. More importantly, four (4) years, two (2) months and nine (9) days elapsed with Hanson taking no action of record at all to prosecute his claims. The Court, exercising its discretion, dismissed Plaintiff's Complaint for failure to prosecute and in doing so did not abuse such discretion. There is a clear record of delay that constitutes the dismissal of this cause for failure to prosecute and the trial court did not abuse its discretion in dismissing the same.

On July 8, 1998, (**over 12 years ago**) Herbert Hanson filed his original Complaint against Defendants, OPM-USA, Inc., and West Harrison Farms, LLC, for Breach of Contract and Intentional Interference with Contract. The suit arose from a Lease Agreement between OPM and Hanson, whereby OPM gave Hanson a lease for a cell tower to be built on Hanson's property.

OPM, pursuant to its lease, sought a building permit from Code Administrator, Ben Clark, deceased. Plaintiff claims the request for a "permit" for a 380 feet tall tower was wrongfully denied to OPM by Code Administrator, Ben Clark, deceased. **No appeal of the alleged denial of the permit was ever taken to the Board of Supervisors of Harrison County by either OPM or Hanson and the Board of Supervisors of Harrison County never had an opportunity to adjudicate the merits of the grant or even denial of such permit.**

After the Hanson site permit was not granted to OPM, the tower was built on property across the interstate owned by West Harrison Farms. Hanson's lawsuit alleged that OPM breached its lease and that West Harrison Farms somehow interfered with his OPM lease contract. The OPM lease called for lease payments of approximately \$120,000.00 over 20 years, and after litigation, Hanson settled his dispute over breach of his lease with OPM for \$22,500.00 cash and OPM claims were dismissed.

After Hanson settled with OPM, Plaintiff, Hanson, filed an Amended Complaint on July 28, 1999 (over 10 years ago) naming Ben Clark, Individually, and the Harrison County Code Administration as Defendants and alleging Fifth and Fourteenth Amendment violations. The suit alleges that Clark and Disotell, acting as agent for West Harrison Farms, conspired to keep OPM from getting a permit on Hanson's property, therefore interfering with Hanson's Lease with OPM.

The Trial Court considered the chronology as shown by Circuit Court Docket in this matter:

|          |   |
|----------|---|
| 7/8/98   | <b>Complaint</b> against OPM-USA, Inc., and West Harrison Farms   |
| 9/2/98   | Deposition of Ben Clark   |
| 3/3/99   | Deposition of Herbert Hanson  |
| 4/26/99  | <b>RELEASE</b> of OPM-USA, Inc., by Hanson - \$22,500.00  |
| 4/29/99  | Agreed Judgment of Dismissal of OPM-USA   |
| 7/28/99  | <b>First Amended Complaint</b> against John Gregory Disotell, J & J Investments, LLC, West Harrison Farms, LLC, Ben G. Clark, and Harrison County Code Administration   |
| 8/24/99  | Answer of Harrison County and Ben Clark to First Amended Complaint  |
| 8/25/99  | Harco Notice of Service of Interrogatories and Request for Production   |
| 8/25/99  | Harco Interrogatories to Plaintiff  |
| 8/25/99  | Harco Request for Production to Plaintiff, Herbert C. Hanson, Jr. v. John Gregory Disotell, J & J Investments, LLC; West Harrison Farms, LLC; Ben G. Clark, and Harrison County, Mississippi Hanson v. Harrison County, et al |
| 10/29/99 | Answer of West Harrison Farms to First Amended Complaint  |

|          |  |
|----------|--|
| 11/18/99 | Plaintiff's Application for Commission to take Deposition out of state   |
| 12/20/99 | Plaintiff's Application for Issuance of Subpoena to take Deposition in Foreign Court   |
| 12/22/99 | West Harrison Co. Farms Motion for Protective Order and Objection  |
| 12/29/99 | Harrison County and Clark Joinder in Motion for Protective Order   |
| 2/28/00  | Plaintiff's Answers to Harrison County and Clark Interrogatories   |
| 06/06/00 | Order Appointing Special examiner to Take Deposition out of state  |
| 06/06/00 | Notice of Tampa Deposition   |
| 06/16/00 | Harrison County's Motion to Dismiss Plaintiff's Complaint or Summary Judgment  |
| 06/16/00 | Memorandum in Support of Motion to Dismiss or for Summary Judgment   |
| 06/16/00 | Subpoena for Deposition of Dan Ausley  |
| 06/16/00 | Subpoena for Deposition of Bradley Harvell   |
| 06/26/00 | Plaintiff's Response to Harrison County and Clark's Motion to Dismiss or Summary Judgment  |
| 06/26/00 | HEARING on Harrison County's Motion for Summary Judgment. Court took Motion under advisement and allowed discovery to proceed  |
| 10/06/00 | Harrison County's Notice of Video Deposition of Ben Clark  |
| 12/04/00 | Harrison County's Notice of Deposition of Greg Disotell  |
| 12/04/00 | Harrison County's Re-Notice of Deposition of Ben Clark   |
| 11/08/01 | Plaintiff's Notice of Deposition of Greg Disotell  |
| 11/27/01 | Plaintiff's Re-Notice of Deposition of Greg Disotell   |
| 01/10/02 | Plaintiff's Re-Notice of Deposition of Greg Disotell   |
| 04/18/02 | Notice of Trial Setting for November 18, 2002  |
| 07/19/02 | Plaintiff's Petition for Letters Rogatory  |
| 07/19/02 | Plaintiff's Notice of Deposition of Mike Cowan   |
| 08/01/02 | Plaintiff's Request to Issue Out of State Subpoena   |
| 08/07/02 | Plaintiff's Re-Notice of Deposition of Mike Cowan  |
| 08/20/02 | Plaintiff's Notice of Video Deposition of James Hilton   |
| 09/09/02 | Plaintiff's Notice of Video Deposition of James Hilton   |
| 10/17/02 | Harrison County's Motion for Continuance of Trial  |
| 10/17/02 | Harrison County's Notice of Motion for Continuance of Trial  |
| 10/24/02 | Disotell & J & J Notice of Motion for Leave to Amend Pro Se Answer   |
| 10/24/02 | Disotell & J & J Motion for Leave to Amend Pro Se Answer   |
| 10/29/02 | West Harrison Co. Farms Answer to First Amended Complaint  |
| 10/31/02 | Clark's Supplement to Motion for Continuance of Trial  |
| 10/31/02 | Plaintiff's Notice of Service of Answers to Request for Production   |
| 10/31/02 | Plaintiff's Answers to Defendant's Request for Production  |
| 11/07/02 | Plaintiff's Subpoena Duces Tecum   |
| 11/12/02 | Clark's Supplement to Motion for Summary Judgment  |
| 11/15/02 | Order Denying Clark and Disotell's Motion for Continuance of Trial   |
| 11/18/02 | <b>TRIAL.</b> Court asked to rule on Motion to Dismiss; heard in chambers during break after jury seated; Logan made ore tenus Motion to Amend Complaint and Substitute County instead of Code Administration. Court granted. Plaintiff given 30 days to file Brief in Response to Motion to Dismiss and County same to respond. |
| 11/19/02 | Clark's Motion in Limine   |
| 11/20/02 | Order Allowing Amended Complaint   |
| 11/21/02 | <b>SECOND AMENDED COMPLAINT</b> against John Gregory Disotell, J & J Investments, LLC, West Harrison Farms, LLC, Ben G. Clark, and Harrison County, Mississippi.   |

12/2/02 Plaintiff's Memorandum in Response to Clark & Harrison County's Motion for Summary  
 12/09/02 Harrison County and Clark's Reply Brief  
 12/19/02 Plaintiff's Memorandum in Response to Clark & Harrison County's Reply Brief  
 12/19/02 Plaintiff's Supplemental Answers to Interrogatories by Clark and Harrison County

**ONE YEAR, 5 MONTHS, 7 DAYS PASSED WITH NO ACTION TAKEN**

05/26/04 Plaintiff's Motion to Set Case for Trial Pursuant to MRCP Rule 40  
 08/26/04 Harrison County's Motion to Continue Trial  
 09/27/04 Notice of Hearing on Harrison County's Motion (10/11/04)  
 12/08/04 Agreed Order of Trial Setting  
 12/17/04 **ESTATE OF BEN CLARK** - Order Authorizing Appointment of Administrator and Issuance of Letters of Administration  
 01/10/05 Plaintiff's Motion to Substitute Estate of Ben Clark for Ben Clark, deceased  
 02/01/05 Harrison County's Answer to Second Amended Complaint  
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 03/17/05 Memorandum and Order Granting Summary Judgment  
 03/21/05 West Harrison Farms Motion for Continuance  
 03/21/05 West Harrison Farms Motion for Summary Judgment  
 03/21/05 West Harrison Farms Memorandum in Support of Motion for Summary Judgment  
 03/23/05 Plaintiff's Response to West Harrison Farms Motion for Summary Judgment  
 03/23/05 Plaintiff's Motion for Reconsideration  
 03/29/05 Disotell & JJ's Joinder in West Harrison Farms Motion for Summary Judgment  
 03/29/05 Disotell & JJ's Motion for Continuance  
 03/29/05 Disotell and JJ's Memorandum in Support of Motion for Summary Judgment  
 04/11/05 Order Denying Plaintiff's Motion for Reconsideration  
 04/12/05 Judgment of Dismissal  
 04/29/05 Petition of Plaintiff for Interlocutory Appeal  
 04/29/05 Plaintiff's Brief in Support of Petition for Interlocutory Appeal  
 06/30/05 **SUPREME COURT ORDER** on Petition for Interlocutory Appeal and Remand  
 07/21/05 **SUPREME COURT MANDATE to Circuit Court**

**7/21/05 to 7/21/06 no action taken by Plaintiff – One Year.**

**7/21/06 to 7/21/07 no action taken by Plaintiff – Two Years.**

**7/21/07 to 7/21/08 no action taken by Plaintiff – Three Years.**

**7/21/08 to 7/21/09 no action taken by Plaintiff – Four Years.**

**7/21/09 to 9/30/09 no action taken by Plaintiff – Four Years 2 mos. 9 days.**

**4 YEARS 2 MONTHS AND 9 DAYS WITH NO ACTION TAKEN BY PLAINTIFF**



6/30/09 Motion by Karen Young to Substitute Counsel, Tim Holleman, attorney for  
County  
7/2/09 Order Allowing Substitution of Counsel  
7/14/09 Entry of Appearance by Tim Holleman  
9/30/09 Motion to Set Case for Trial by Floyd Logan

## **ARGUMENT**

### **I. DISMISSAL FOR WANT OF PROSECUTION**

Under Rule 41(b) of the Mississippi Rules of Civil Procedure, “trial courts possess the **inherent authority** to dismiss cases for failure to prosecute as a means of controlling the court’s docket and ensuring the orderly expedition of justice.” *Jenkins v. Tucker*, 18 So. 3d 265, 269 (Miss.App. 2009)(quoting *Watson v. Lillard*, 493 So.2d 1277, 1278 (Miss. 1986)). Rule 41(b) provides for the dismissal of an action upon the defendant’s motion for failure to prosecute, and on appeal, the trial court’s decision to dismiss is reviewed for an abuse of discretion. *Cox v. Cox*, 976 So.2d 869, 874 (Miss.2008).

This Court has propounded three factors to consider in determining whether to dismiss a cause under Rule 41(b). These factors include: (1) whether the conduct of the plaintiff can be considered contumacious or dilatory; (2) whether lesser sanctions can be applied; and (3) other aggravating factors. *Hatsy v. Namihira*, 986 So.2d 1036, 1040 (Miss. Ct. App. 2008). While all three of these factors are usually considered in making the determination of dismissal, “factors other than delay are not required.” *Cox*, 976 So.2d at 875 (Miss.2008).

### **II. HANSON’S AND HIS COUNSEL’S INACTION OR CONDUCT WAS DILATORY**

While there is no time limit for the prosecution of an action, Mississippi law provides that a case may be dismissed with prejudice for failure to prosecute when there has been a “clear record of delay.” *Hine v. Anchor Lake Prop. Owners Ass’n*, 911 So.2d 1001, 1005 (Miss. Ct. App. 2005). Upon the defendant’s showing of such delay, there is no additional requirement to show “contumacious conduct.” *Id.* at 1005. Four (4) years (2) months and nine (9) days is a “clear record of delay” under any circumstances.

As the record in this case illustrates, the Complaint filed at the commencement of the action is twelve (12) years old. More importantly, Hanson has done nothing to prosecute this civil action for the last four (4) years (2) months and nine (9) days from June 30, 2005, until September 30, 2009. There can be no valid excuse for such a "clear record of delay". Hanson cannot excuse his failure to prosecute his case, since this Court's Order remanding on June 30, 2005, and subsequent Mandate on July 21, 2005.

More than four (4) years (2) months and nine (9) days passed before Plaintiff took any action and only after new counsel was substituted on behalf of the Defendants Harrison County and the Estate of Ben Clark. Hanson's attempt to excuse his dilatoriness by Hurricane Katrina explains only approximately one (1) year, however the remaining three (3) years (2) months and nine (9) days is completely unacceptable.

While dismissal under Rule 41(b) does not require a specific time limit for the prosecution of an action once it has been filed, it does stipulate that an action must at some point in time be prosecuted after its filing, or be dismissed. *Tolliver Ex Rel. Green v. Mladineo*, 987 So.2d 989 (Miss. 2007). OVER FOUR (4) YEARS WITH NO ACTIVITY IS CLEARLY TOO LONG, even considering Hurricane Katrina causing delay of one (1) year. Mississippi case law clearly establishes that a four (4) year period of dormancy in a case whereby Plaintiff, who has the responsibility to prosecute, takes no action at all, subjects a Plaintiff to the potential of a dismissal with prejudice for failure to prosecute. *Cox v. Cox*, 976 So.2d 869, 879 (Miss.2008). The Mississippi Court of Appeals has held that a Plaintiff's inaction for over three years could clearly be seen as "dilatory conduct." See *Jenkins v. Tucker*, 18 So. 3d 265, 269 (Miss.App. 2009). **Here Plaintiff has been dilatory for over three (3) years.** In *Jenkins*, Plaintiff took no action of record from approximately June 2001, until the first Motion to Dismiss filed on March 24, 2005. While the Plaintiff argued that Defendant's failure to compel discovery should excuse her failure to respond, the **Court reiterated that the responsibility to prosecute a case "rests with the plaintiff, not**

**the defendant.”** *Id.* (rejecting plaintiff’s argument that defendant’s failure to compel discovery excused plaintiff’s failure to answer).

In *Hill v. Ramsey*, 3 So.3d 120 (Miss. 2009), this Court found that nineteen (19) months of inactivity was “sufficient delay, standing alone, to warrant dismissal.” *Id.* at 122. The only actions taken by the Plaintiff in *Hill* were said to be “reactionary” and the Court held that even if such reactionary action could somehow be viewed as sufficient prosecution, it was undisputed that no action of record took place for one (1) year seven (7) months. *Id.* As was held by the Court, “the trial judge must control his own docket.” *Id.* Thus, the delay itself was sufficient for the judge’s dismissal. *Id.* Here, Hanson’s only action after more than four (4) years was in “reaction” to Defendants’ substitution of new counsel, thus, the delay itself was sufficient for the Trial Court to exercise its discretion and dismiss the action. Certainly, such dismissal is not an abuse of discretion.

In *Hillman v. Weatherly*, 14 So.3d 721 (Miss.2009), the Supreme Court affirmed the circuit court’s dismissal for failure to prosecute a legal malpractice claim after only a little over two (2) years. *Id.* at 727. The Court found the record suggestive of conduct rising to the level of dilatoriness, as there was no action of record for more than two years, from December 16, 2002, when the Defendant filed discovery, until March 4, 2005, when Plaintiff filed discovery. *Id.* While the Court noted the initial diligent actions by the Plaintiff in instituting her suit, the three-year span following such action showed dilatory conduct and delay. *Id.*

Hanson has shown this same disregard. There is no doubt that an over four (4)-year period of absolutely no activity by Hanson is a clear record of dilatory conduct and delay. That alone is sufficient for dismissal. *Cox*, 976 So.2d at 875 (Miss.2008). Amazingly, Hanson’s counsel admits that one of the reasons Hanson’s case was not pursued diligently for more than four (4) years is “Plaintiffs counsel’s law office handled an estimated 50 to 60 Hurricane Katrina claims”. See Brief of Appellant at p. 3. In other words, new cases became more important than the present case. No evidence has been presented by Hanson, himself, of anything he did to pursue his action

for the more than four (4) years which elapsed in this case. Such alone should be considered an aggravating factor for the delay. As the Mississippi Court of Appeals stated in *Holder v. Orange Grove Med. Specialties, P. A.*, — So. 3d —, 2010 WL 11267 (Miss. Ct. App. Jan. 5, 2010) reh'g denied (May 18, 2010).at \*3, ¶ 21<sup>1</sup>: “we can say unequivocally that the asserted reason for the delay as stated by counsel for the plaintiffs, which he attributed to staffing difficulties at his law office and **his having other trials to contend with, warrants no such consideration.**” (emphasis added).

This case is over 12 years old, one Defendant has died (6 years after the original Complaint was filed). It is completely reasonable that witnesses will relocate and their memories fade of an incident occurring 12 years ago and with more four (4) years passing with no activity of any kind. Plaintiff did nothing for more than four (4) years, or at the very least over three (3) years<sup>2</sup> except to react to the filing of Motion to Substitute Counsel by filing a Motion for Trial Setting. While the Court bears the responsibility of considering lesser sanctions prior to dismissal for failure to prosecute, imposing lesser sanctions is not required. *Hine*, 911 So.2d at 1005 (holding trial court need not make a showing that lesser sanctions would not suffice); *Hillman v. Weatherly*, 14 So.3d 721, 727 (Miss.2009) (citing *Miss. Dep't of Human Servs. v. Guidry*, 830 So.2d 628, 633 (Miss.2002)). “Lesser sanctions will not suffice where they cannot cure prejudice suffered by a defendant from the delay.” *Jenkins v. Tucker*, 18 So. 3d 265, 269 (Miss.App. 2009)(citing *Cox*, 976 So.2d at 869). In *Hensarling v. Holly*, 972 So.2d 716, 720(¶ 8) (Miss.Ct.App.2007) the Court of Appeals found the record sufficient to show that lesser sanctions would not have served the best interests of justice in light of the delays. *Id.* at 721. Very similar to the present situation, *Hensarling* failed to diligently prosecute the case for four years, and nearly nine years had passed since the

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<sup>1</sup> The Appellant cited the Court of Appeals decision in *Holder* at p. 9 of his Brief, however the Mississippi Supreme Court reversed the Court of Appeals and reinstated the Trial Court's dismissal in *Holder v. Orange Grove Med. Specialties, P. A.*, --- So. 3d ---, 2010 WL 5016508 (Miss. Sup. Ct. Dec. 9, 2010) and a Motion for Rehearing is pending.

<sup>2</sup> Giving Hanson the benefit of the doubt for one (1) year after Hurricane Katrina bringing into 2006, however Hanson explanations for the remaining time in excess of three (3) years are specious at best.

initial complaint was filed. *Id.* The Court considered such a lengthy passage of time prejudicial to the Defendant, reasoning that the availability of the evidence had been altered substantially. *Id.* at 722. In this case, twelve (12) years have passed, a Defendant has died, his Estate has been substituted as a Defendant, and without doubt after more than four (4) years the "availability of the evidence" has been altered substantially, witness memories have faded without doubt. The fact that depositions were taken are of no consequences as witnesses credibility cannot be judged adequately by "refreshing recollection" because of Hanson's dilatoriness for more than four (4) years. In light of such prejudice, as the Court found in *Hensarling*, the imposition of any lesser sanctions would not serve the best interests of justice in this case either. *Id.*

The delay involved in this case at least equals that of *Hensarling*, and there is no doubt that such a delay is prejudicial to the Defendants. Not only has a witness died, but just trying to locate witnesses, original documents, files, or other evidence etc. after such length of time which elapsed in this case alone is prejudicial. It is difficult to perceive how attorney discipline, fines, or even a dismissal without prejudice would serve the best interests of justice in this case. The underlying dispute occurred in 1998. These examples are only a mere representation of the evidentiary deficiencies which will be caused by Hanson's delay.

Hanson has disregarded procedural rules certainly for the last four (4) years, two (2) months and nine (9) days. Hanson has been given every opportunity to prosecute, and the Defendants have done nothing for the last four (4) years to hinder such prosecution. Hanson's claims or assertions of the difficulties in obtaining a trial setting from June 2005 until the dismissal a period of four (4) years are also specious at best. The docket of this matter shows there were a number of trial settings from 1998 until June 30, 2005. In fact, Hanson filed a Motion to Set Case for Trial Pursuant to MRCP Rule 40 on May 26, 2004 and obtained a trial setting before the Trial Court granted summary judgment on March 17, 2005. This Court reversed and remanded the grant of summary judgment on June 30, 2005, thereafter Hanson did nothing for four (4) years (2) months and nine (9) days. If Hanson intended to prosecute his action why did he not file another

Motion for Trial Setting in 2006<sup>3</sup>, or 2007, or 2008 and/or up to September 30, 2009, when he finally took action<sup>4</sup>.

Even if there was no evidence of actual prejudice to the Defendant, however, "actual prejudice may be presumed for unreasonable delay." *Jenkins v. Tucker*, surpa.

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION**

On appeal, this Court must employ an abuse-of-discretion standard when reviewing a trial court's dismissal for failure to prosecute pursuant to Rule 41(b). *Holder v. Orange Grove Medical Specialties*, 2010 WL 5016508, ¶16 (Miss. 2010)<sup>5</sup> (quoting *Am. Tel. & Tel v. Days Inn of Winona.*, 720 So.2d 178, 180 (Miss. 1998)). Any court of law or equity may exercise the power to dismiss for want of prosecution. This power, inherent to the courts, is necessary as a means to the orderly expedition of justice and the court's control of its own docket. *Id.*, ¶17 (quoting *Hillman*, 14 So.3d at 726). Motions for failure to prosecute are considered on a case-by-case basis. *Id.* This Court may uphold a Rule 41(b) dismissal when there is: (1) a record of dilatory or contumacious conduct by the plaintiff; and (2) a finding by this Court that lesser sanctions would not serve the interests of justice. Additional "aggravating factors" or actual prejudice may bolster the case for dismissal, **but are not requirements.** *Id.*

In the case sub judice, the trial court correctly found a clear record of delay and therefore did not abuse its discretion in dismissing this case. The trial court made the following findings with regard to delay in the instant case: (1) the Complaint in this cause was filed over eleven (11) years ago; (2) Plaintiff has failed to prosecute this action for over four (4) years; and (3) Plaintiff's only action after over four (4) years of inactivity was in "reaction" to Defendant's substitution of new

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<sup>3</sup> Giving Hanson the benefit of the doubt for one (1) year after Hurricane Katrina.

<sup>4</sup> There cannot be much question that Hanson was reacting to the substitution of counsel when he filed this Motion.

<sup>5</sup> The Appellant cited the Court of Appeals decision in *Holder* at p. 9 of his Brief, however the Mississippi Supreme Court reversed the Court of Appeals and reinstated the Trial Court's dismissal in *Holder v. Orange Grove Med. Specialties, P. A.*, --- So. 3d ---, 2010 WL 5016508 (Miss. Sup. Ct. Dec. 9, 2010) and a Motion for Rehearing is pending

counsel. Based on such findings, the trial court held that a clear record of delay and dilatoriness exists. Such was not an "abuse of discretion."

### CONCLUSION

Under Rule 41(b), a Mississippi Court, either on its own motion or that of a party, is given the power to dismiss a case for failure to prosecute. Miss. R. Civ. Pro. 41(b). This power stems from the court's interest in controlling its docket and in ensuring the orderly expedition of justice." *Jenkins v. Tucker*, surpa. (quoting *Watson v. Lillard*, 493 So.2d 1277, 1278 (Miss. 1986)). The Court in this matter was presented with evidence by way of the record that Hanson's conduct was dilatory, lesser sanctions will not serve the best interests of justice, and aggravating factors were present as a result of Hanson's failure to prosecute. As a result, this court should exercise its power to affirm the dismissal of the trial court as such trial court did not abuse its discretion in dismissing this cause for want of prosecution.

Hanson filed his complaint in 1998, and since that time, has shown no diligence in pursuing prosecution of the matter. Hanson took no action from June 2005 until June 2009, Hanson essentially neglected the case completely.

The record sufficiently shows a clear record of delay consistent with Mississippi precedent whereby much shorter periods of delay have been regarded as reflective of dilatory conduct. See e.g., *Hill*, 3 So.3d 120 at 122; *Jenkins v. Tucker*, surpa. The dormancy of this case exceeds all others cited herein whereby dismissal under Rule 41(b) was affirmed. Not only is the lengthy delay itself sufficient for dismissal, the prejudice that such delay imposes upon the Defendants cannot be cured by any measure other than dismissal. As such, there was not only a clear record of delay but there was also contumacious conduct on the part of Hanson. The trial court properly dismissed this cause for failure to prosecute and certainly did not abuse its discretion, therefore, this Court should affirm such dismissal.


RESPECTFULLY SUBMITTED this the 31<sup>st</sup> day of January, 2011.

HARRISON COUNTY, MISSISSIPPI, and  
ESTATE OF BEN G. CLARK,  
APPELLEES

BOYCE HOLLEMAN & ASSOCIATES

BY: 

TIM C. HOLLEMAN

PREPARED BY:  
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**CERTIFICATE OF SERVICE**

I, Tim C. Holleman, do hereby certify that I have this day mailed, via U.S. mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Hon. John C. Gargiulo  
Circuit Judge  
P.O. Box 1461  
Gulfport, MS 39502

Floyd J. Logan, Esq.  
P.O. Drawer 4207  
Gulfport, MS 39502

Henry Laird, Esq.  
Watkins, Ludlam  
P.O. Drawer 160  
Gulfport, MS 39502

This the 31<sup>st</sup> day of January, 2011.



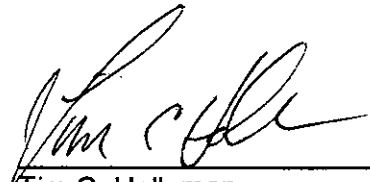
Tim C. Holleman



**CERTIFICATE OF COMPLIANCE**

I, Tim C. Holleman, do hereby certify that I have this day forwarded one (1) original and (3) copies of the foregoing Brief for Appellee, via Federal Express to the Clerk of the Supreme Court of Mississippi.

This the 31<sup>st</sup> day of January, 2011.

  
\_\_\_\_\_  
Tim C. Holleman

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

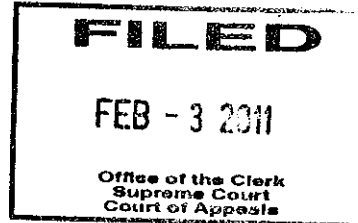
HERBERT C. HANSON, JR.

APPELLANT

VERSUS

CAUSE NO: 2010-CA-01169

JOHN GREGORY DISOTELL, J&J  
INVESTMENTS, LLC, THE ESTATE OF  
BEN G. CLARK, WEST HARRISON  
FARMS, LLC, AND HARRISON COUNTY,  
MISSISSIPPI



APPELLEES

From the Circuit Court of Harrison County, Mississippi  
First Judicial District  
Cause No: A2401-98-00302

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M.R.A.P. 28(i) JOINDER BY APPELLEE WEST HARRISON  
FARMS, LLC IN BRIEF OF APPELLEES HARRISON COUNTY,  
MISSISSIPPI AND THE ESTATE OF BEN G. CLARK

---

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Counsel for West Harrison Farms, LLC

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**HERBERT C. HANSON, JR.**

**APPELLANT**

**VERSUS**

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FARMS, LLC, AND HARRISON COUNTY,  
MISSISSIPPI**

**APPELLEES**

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**CERTIFICATE OF INTERESTED PARTIES**

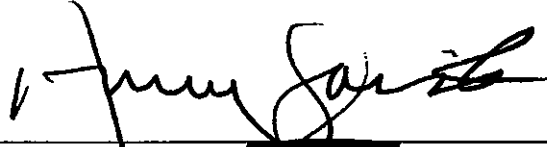
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The undersigned counsel of record certifies that the following persons have an interest in the outcome of this appeal. These representations are made in order that the Justices of this Court may evaluate for possible disqualification or recusal:

1. Herbert C. Hanson, Jr., Plaintiff-Appellant;
2. Floyd J. Logan, Attorney for Plaintiff-Appellant;
3. John Gregory Disotell; Defendant-Appellee;
4. J&J Investments, LLC, Defendant-Appellee;
5. The Estate of Ben G. Clark, Defendant-Appellee;
6. West Harrison Farms, LLC, Defendant-Appellee;
  - a. Doug Holden, West Harrison Farms, LLC member;
  - b. Joe West, West Harrison Farms, LLC member;

7. Harrison County, Mississippi, Defendant-Appellee;
8. Tim C. Holleman, Attorney for Harrison County, Mississippi, and Estate of Ben G. Clark, Deceased;

This the 2 day of February, 2011.



---

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