

IN THE SUPREME COURT/COURT OF APPEALS
FOR THE STATE OF MISSISSIPPI

HERBERT C. HANSON, JR.

**PLAINTIFF-
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**

**DEFENDANTS-
APPELLEES**

**Appeal from the Circuit Court for the First Judicial District
of Harrison County, Mississippi**

REPLY BRIEF FOR PLAINTIFF-APPELLANT

**OF COUNSEL FOR PLAINTIFF-
APPELLANT
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ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

Appellant raises three issues on this appeal which were decided adversely to him:

A.. Whether the facts of this case support a dismissal with prejudice for failure to prosecute under Rule 40 (b) of the Ms Rules of Civil Procedure.

B. Whether the trial judge's finding of facts are manifest error due to not being supported by the record.

C. Whether dismissal of this case with prejudice for failure to prosecute is a denial of procedural due process to the plaintiff due to the lack of a written statute or rule governing trial and motion setting procedure in the Second Circuit Court District.

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REPLY BRIEF FOR APPELLANT, HERBERT C. HANSON, JR.

COMES NOW, the Plaintiff/Appellant, Herbert C. Hanson, Jr., by and through his attorney of record, Floyd J. Logan, PLLC, and files this, his Reply Brief and in support thereof, and would respectfully show unto the Court, the following, to-wit:

Appellant's Brief identified three issues where the trial court committed reversible error. These issues are repeated at page iii above. Issue C was stated as "Whether dismissal of this case with prejudice for failure to prosecute is a denial of procedural due process to the Plaintiff due to the lack of a written statute or rule governing trial and motion setting procedure in the Second Circuit Court District." The gist of the argument under this issue is that the inadequate and undocumented trial docket procedures practiced in the Circuit Court District allowed Defendants to frustrate trial and motion settings by refusing to agree to them. Appellee did not respond to the argument under this issue and it is submitted that is tantamount to a confession of error. United American Ins. Co. v. Merrill, 978 So.2d 613 (Miss. 2007); McGriggs v. State, 987 So.2d 455 (Miss. C.A. 2008). Appellant produced evidence at the hearing of repeated correspondence with Appellee's counsel wherein Appellant's counsel attempted to set the case for trial. Appellees provided no rebuttal evidence at the hearing. The only Motions for a continuance evidenced by the trial court's docket sheet

are motions filed by the Appellees. This was a continuing problem over the history of this case and Appellees should not be allowed to benefit from their own dilatory actions.

The trial judge found on page 4 of its Order of Dismissal that based solely on the passage of time in this case that “a record of dilatoriness and delay exists.” It is respectfully submitted, that the passage to time alone is not sufficient to justify a dismissal with prejudice. The comments under Rule 41(b) provide that

(dismissal is a drastic punishment which should not be invoked except where conduct of parties has been so deliberately careless as to call for such action.) Citing Peoples Bank v. D’Lo Royalties, Inc., 206 So.2d 836 (Miss. 1968)

This Court has held that dismissal without prejudice under Rule 41(d) “is a means of docket regulation.”

In considering which cases should be pruned from the docket pursuant to Rule 41(d), the trial court in using its discretion should employ a balancing concept.(cites omitted) There are typically two competing policy considerations. The Court must weigh the great social interest in provision of every litigant with his day in court and the opportunity for technical carelessness or unavoidable delay against the purpose of the Rule as found by the Court in *Walker* to be achievement of the orderly expedition of justice and control by the trial court of its own docket. Cucos, Inc. v. McDaniel, 938 So.2d 238 (Miss 2006), at p. 243.

This Court further stated in the Cucos case that “...dismissal should be considered as a last resort, and any dispute about satisfaction of the rule that can be resolved in favor of the Plaintiff should be resolved in favor of the Plaintiff”. 938 So.2d, at p.243.

In its brief, Appellee, Harrison County, repeatedly asserts that there is a “clear record of delay” by the Appellant in this case. Prior to Hurricane Katrina in August of 2005, Appellant diligently pursued this action by completing discovery and taking over ten depositions in three states. Appellant has not disobeyed any court orders or failed to respond to any discovery. There were a number of trial setting obtained and the motions for continuances were filed by the Appellees. Following Katrina, factors beyond the control of Appellants further delayed trial of the case. The difficulty of agreeing

on trial dates with multiple defendants, the retirement and reassignment of judges, changes of counsel representing Defendant, Harrison County, and Defendant, Harrison County's counsel's refusal to agree to a trial date are all factors beyond the control of Appellant or his counsel.

The trial court found and Appellees argue that there is prejudice as a result of the delay in this case due to the death of one party and the loss of memory of other witnesses. However, all known witnesses have been deposed in video depositions with a court reporter transcribing the testimony. No witnesses have been identified who have allegedly relocated. Any presumption of loss of evidence from the passage of time has been rebutted.

One of the purposes of Rule 41 of the MRCP is achievement of the orderly expedition of justice and control by the trial court of its own docket. Appellee's Motion to Dismiss under Rule 41(b) was filed as a result of Appellant's Motion to set the case for trial. Counsel for Harrison County initially agreed to set the case for trial but refused to agree to a trial date less than a year in the future. It is submitted that this conduct waived his Rule 40(b) Motion. The simple solution to the dispute for trial court was to set the case for trial as requested by Appellant and take punitive action if Appellant refused to go forward. The trial court's dismissal of this case with prejudice was an abuse of discretion.

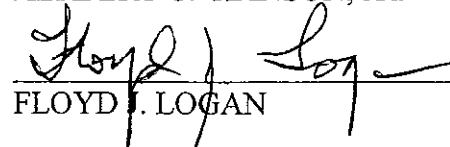
CONCLUSION

For the foregoing reasons, the decision of the trial court dismissing this action with prejudice should be reversed and this matter should be remanded to the trial court for trial.

RESPECTFULLY SUBMITTED this the 16th day of February, 2011.

HERBERT C. HANSON, JR.

BY:


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CERTIFICATE OF SERVICE

I, Floyd J. Logan, 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:

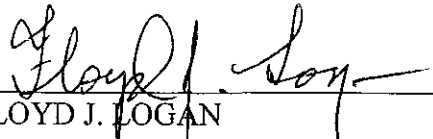
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SO CERTIFIED this the 16th day of February, 2011.


FLOYD J. LOGAN

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CERTIFICATE OF COMPLIANCE

I, Danielle Bordes, do hereby certify that I have this day, the 16th day of February, 2011,
forwarded one (1) original and three (3) copies of the foregoing Reply Brief for Plaintiff-Appellant,
via United States First Class Mail, postage prepaid, to the Clerk of the Court of Appeals.

SO CERTIFIED this the 16th day of February, 2011.


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