

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

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. 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
8. Jeffrey L. Hall, Johnson, Hall and Ratliff, PLLC, attorneys for John Gregory

Disotell.

9. F. Henry Laird, Jr., attorney for West Harrison Farms, LLC.
10. Woodrow W. Pringle, III, attorney for The Estate of Ben G. Clark, Deceased.
11. Tim C. Holleman, attorney for Harrison County, Mississippi.

OF COUNSEL FOR PLAINTIFF-APPELLANT

A handwritten signature in cursive script, appearing to read "Floyd J. Logan", is written over a horizontal line.

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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.

construction of a cellular phone tower on his property by conspiring with Harrison County building officials to deny Hanson a construction permit.

Over the course of this case, discovery has been completed and the cases has been set for trial and continued several times. After numerous unsuccessful efforts to get Defendant Harrison County to agree to a trial date, on October 2, 2009 Plaintiff, Herbert C. Hanson, Jr., filed Motion to Set Case for Trial pursuant to Rule 40 of the Mississippi Rules of Civil Procedure. On October 20, 2009, Defendants, Harrison County and Ben G. Clark, filed no response to Plaintiff's Motion to Set Case for Trial but in response on October 20, 2009, filed a Motion to Dismiss for Lack of Prosecution. Defendants, John Gregory Disotell and J&J Investments later joined in the Motion. Neither of the Defendants' Motions to Dismiss had any affidavits or exhibits attached. Although Plaintiff's Motion to set the case for trial was set prior to Defendants' Motion to Dismiss, the Court ruled only on the latter motion at the hearing. The hearing was held before the Court on November 19, 2009. At the hearing Defendants Harrison County, Ben G. Clark, John Gregory Disotell and J&J Investments offered no evidence, testimony or exhibits, in support of their Motions. Following arguments, the Court took the Motions to Dismiss under advisement and sustained the Defendants' Motion to Dismiss.

2. The Facts Relevant to this Appeal.

Harrison County and Clark filed their Answer to the Amended Complaint on August 25, 1999. Written discovery was conducted and completed by all parties. The deposition of Herbert C. Hanson, Jr. was taken by defendants on March 3, 1999. The deposition of Ben Clark was taken by Harrison County December 19, 2000 to preserve his testimony. The depositions of Ben Clark, Sept. 2, 1998, Douglas Holden, April 8, 1999, Joseph West, April 8, 1999, Greg Disotell, March 22, 2002, Hattiesburg, Ms., Dan Ausley, Bradley Harvill, August 2, 2000 Tallahassee, FL, James Hilton,

Oct 24, 2002, Orlando, FL, Michael Cowan, August 15, 2002, Birmingham, AL were taken by Plaintiff.

The first trial setting in this case was November 18, 2002. Harrison County moved for a continuance on October 18, 2002. On November 20, 2002 an Order to Continue was entered and trial was reset to March 10, 2003. On March 10, 2003 the case was reset for a priority setting in Biloxi by agreement of the parties. Harrison County filed a Motion for a continuance on August 27, 2004 and an agreed Order was entered resetting the trial to April 4, 2005. On January 10, 2005 the Estate of Ben Clark was substituted as a party for Ben Clark who had deceased. On February 28, 2005 the law firm of Riley and Meadows moved to withdraw as counsel of record for Harrison County. On March 29, 2005, Defendant Greg Disotell moved for a continuance. On the trial date of April 4, 2005, the Court moved the trial date to April 11, 2005 in order to rule on a Motion for Reconsideration and Reply to a Motion for Summary Judgment. On April 11, 2005 the Court denied the Motion for Reconsideration and Plaintiff filed an Interlocutory Appeal to the Supreme Court. The Interlocutory Appeal was granted by the Supreme Court and the case was remanded to the Circuit Court for trial on July 25, 2005.

Hurricane Katrina occurred on August 29, 2005. No Circuit Court jury trials were held until 2006. Plaintiff's counsel's law office handled an estimated 50 to 60 Hurricane Katrina claims.

In July and August 2007, Plaintiff's co-counsel, Jason Purvis, contacted defense attorneys about agreeing to a trial setting. Purvis attempted to set the case on dates during November and December 2007. Karen Young, attorney for Harrison County, refused the requested trial dates due to alleged schedule conflicts. The Court Administrator gave trial dates in January 2008. On August 16, 2007, Purvis wrote to defense counsel and gave dates of January 22 and 28, 2008. Karen Young refused to agree to trial dates. (Ex.P-1) Plaintiff's staff requested dates from Karen Young to set

a Motion to set the trial date. Young refused to give dates due to alleged schedule conflicts.

On May 19, 2009 Judge Jerry O. Terry officially announces his retirement from the bench effective June 30, 2009.

On July 1, 2009, Tim Holleman took over as attorney for Harrison County Board of supervisors. On July 21, 2009, case was assigned to Judge Lisa Dodson. On July 21, 2009 an entry of appearance was filed by Tim Holleman. On Sept 1, 2009 Plaintiff sent a letter to all defense counsel giving proposed trial dates. (R. 71-72) Tim Holleman responded on Sept. 11, 2009 and refused to set the case for trial until Oct.- Nov 2010. (R.73) On September 15, 2009, the case was reassigned to Judge John Gargiulo. On September 18, 2009 Holleman checked out the court file. On Oct 14, 2009 Plaintiff filed a Motion to set a trial date. (R69-72) .On October 20, 2009, Defendant Harrison County filed a Motion to Dismiss under Miss Rule of Civil Procedure 40(b) for lack of prosecution. At the hearing on November 19, 2009, defendant Harrison County made oral argument but produced no evidence in support of its Rule 40(b) Motion. The only evidence offered at the hearing was letters offered by the Plaintiff to demonstrate efforts to set the case for trial and Harrison County counsel's resistance to those efforts.

ARGUMENT OF THE LAW

1. Summary of the Argument

In support of its decision, the trial court made a finding that although the mere passage of time does not justify a dismissal with prejudice, a consideration of lesser sanctions was not necessary where the lesser sanctions would not cure prejudice suffered by the defendant. The trial court found that one witnesses was dead and that certain unnamed witnesses had relocated and other witnesses' memories had faded. This finding was manifest error. The deceased witness had been deposed twice, once by plaintiff for discovery and again by the defendant Harrison County to preserve his trial

testimony. There was no proof of any witnesses relocating and all known witnesses were deposed.

The trial court further concluded that Plaintiff's Motion to Set the Case for Trial. was reactionary because it was filed subsequent to Tim Holleman's entry of appearance as attorney for Harrison County. The evidence shows that when Plaintiff's counsel wrote to Holleman and requested a trial setting, Holleman gave dates over a year later. Plaintiff then filed his Motion to Set the Case for Trial and Holleman responded with a Rule 40(b) Motion to Dismiss for Failure to Prosecute. The trial court's finding contradicts the record and is manifestly erroneous.

Sec. 9-7-173 of the Miss. Code setting out a trial docket setting procedure was repealed in 1991. There is no Uniform Circuit Court rule or a Local Rule in the Circuit Court district governing civil docket settings. In practice, the lawyers contact the court administrator for trial dates for the assigned judge and request that opposing counsel to agree to one of those dates for a trial setting. If opposing counsel refuses to agree to a trial date, the only redress is to file a motion to set the case for trial. Again counsel must get opposing counsels' agreement for dates to hear the motion. If he refuses to agree to a motion hearing date, the case is stalemated. With no remedy, Plaintiff is denied procedural due process.

2. Standard of Review

A trial court's ruling on a motion to dismiss under Rule 41(b) involves the exercise of discretion by the trial court. Each case must be decided on its own facts. The appellate court will reverse if it finds an abuse of discretion by the trial court. Wallace v. Jones 572 So.2d at 371 (Miss1990)

3. Argument of the Issues

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.

The law favors trial of issues on the merits, and dismissals for want of prosecution are therefore employed reluctantly. Watson v. Lillard, 493 So.2d. 1277 (Miss.1986) There is no set time limit on the prosecution of an action once it has been filed, and dismissal for failure to prosecute will be upheld only "where the record shows that a plaintiff has been guilty of dilatory or contumacious conduct". Dept of Human Svcs. v. Guidry, 830 So.2d. 628 (Miss.2002). Watson, supra, 493 So.2d at 1279. Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases." Wallace, supra, 572 So.2d at 376. What constitutes failure to prosecute depends on the facts of the particular case. Id.

The Mississippi Supreme Court has adopted the Fifth Circuit rule that "Rule 41(b) dismissals with prejudice will be affirmed only upon a showing of a clear record of delay or contumacious conduct by the plaintiff,...and where lesser sanctions would not serve the best interests of justice." American Telephone and Telegraph Company v. Days Inn of Winona, 720 So.2d 178(Miss.1998) Pond v. Braniff Airways, Inc., 453 F.2d 347, 349 (5th Cir.1972)). While the requirements of a clear record of delay by the plaintiff and futile lesser sanctions have been articulated the most consistently, several other factors have been identified as "aggravating factors." American Telephone and Telegraph Company, supra; Specifically, these 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." American Telephone and Telegraph Company, supra; In the American Telephone and Telegraph Company, case the court noted that federal cases "in which dismissals with prejudice have been affirmed on appeal

illustrate that such a sanction is reserved for the most egregious of cases, usually cases where the requisite factors of clear delay and ineffective lesser sanctions are bolstered by the presence of at least one of the aggravating factors." American Telephone and Telegraph Company, supra; at 181.

Although a significant period of time has elapsed over the history of this case since filing, there is no set time limit on the prosecution of an action once it has been filed. Dept of Human Services v. Guidry, supra. Simply the passage to time will not justify a dismissal with prejudice in the absence of other aggravating factors. See: Dept of Human Services v. Guidry, supra, (10 years), Tims v. Jackson, 823 So.2d 602 (Miss. 2002) (3 years); Cucos, Inc. v. McDaniel 938 So.2d. 238 (Miss. 2006) (4 years); Barry v. Reeves, No. 2009CA-01124-SCT, (Miss. 2010) (7.5 years) . "The theme running through the cases involving Rule 41(b) is that negligence or inexcusable conduct on the part of plaintiff's counsel does not in itself justify dismissal with prejudice".American Telephone and Telegraph Company, supra; at 182; Hoffman v. Paracellus Health Care, 752 So.2d 1030 (Miss. 1999).

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

In support of its dismissal with prejudice, the trial court cited the elapse of 11 years from initial filing of the case and the four years that elapsed after the Supreme Court reversed and remanded this action. (Order of Dismissal 12/03/09, p. 3) While the trial court recognized that there was a responsibility to consider lesser sanctions prior to dismissal with prejudice, it held that this was not necessary where the lesser sanctions would not cure prejudice suffered by the defendant. (Order of Dismissal at p. 4) The trial court concluded:

Such a lengthy passage of time is prejudicial to Defendants. Defendant, Ben G. Clark

died in 2004. Moreover, witnesses have relocated and witnesses' memories regarding the cause of action have faded. Since the availability of evidence has been altered, this Court finds the imposition of any lesser sanctions would not serve the best interests of justice. (Order of Dismissal at p. 4)

There was no evidence offered at the hearing that any witnesses have relocated or that witnesses' memories regarding the cause of action have failed or that the availability of evidence has been altered. To the contrary, Ben G. Clark was deposed by the Plaintiff on Sept. 2, 1998 and Defendant took his trial deposition to preserve his testimony on Dec. 19, 2000. All other material witnesses have been deposed and their testimony under oath preserved in writing. No less than ten depositions have been taken and preserved in this matter. Defendant totally failed to present any evidence of prejudice at the hearing.

Where the trial court's findings in support of a Rule 41 dismissal with prejudice are manifestly erroneous, the dismissal should be reversed and the case remanded for trial. Barry v. Reeves, supra.

The trial court further concluded that Plaintiff's Motion filed on October 14, 2009 was reactionary because it was filed subsequent to Tim Holleman's entry of appearance as attorney for Harrison County. Again, this finding contradicts the record and is manifestly erroneous. On Sept 1, 2009 Plaintiff sent a letter to all defense counsel giving proposed trial dates. Tim Holleman responded on Sept. 11, 2009 and refused to set the case for trial until Oct.- Nov 2010, over a year later. On Oct 14, 2009 Plaintiff's counsel filed a Motion to set a trial date. In response to this, on October 20, 2009, Defendant Harrison County filed a Motion to Dismiss under Rule 40 (b) of the Miss Rules of Civil Procedure for lack of prosecution. Although, Plaintiff's Motion to set trial was filed before Defendants' Rule 40 Motions, it was never ruled on by the trial court before it dismissed the action with prejudice.

Indeed, the record strongly suggests that it was the plaintiffs themselves who were responsible for the last action(s) taken in this matter before the defendants filed their Rule 41 (B) Motion. At the hearing, counsel for the plaintiffs indicated that he had sought to schedule the deposition of Dr. Benefield after the plaintiffs came into his office and inquired about the status of their case.

When this fact is taken into consideration together with the fact that there is no clear record of actual prejudice caused to the defendants, or even that of presumptive prejudice, we find that the trial court erred in its decision to dismiss the plaintiffs' case with prejudice. Holder v. Orange Grove Medical Specialties, et al, No.2008 CA-01442-COA (Miss. 2010).

The years of delay in this case are more attributable to the continuances granted the Defendant, the occurrence of Hurricane Katrina, 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. The trial court's dismissal of this case with prejudice was manifest error.

C. 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.

Prior to 1991, Sec. 9-7-173 of the Mississippi Code provided in pertinent parts that:

Before each term of court the clerk shall make out a docket, in which he shall enter all cases triable at the approaching term in the order in which they are filed and numbered; and under the control of the court or judge, he shall set the causes for the several days of the term, commencing with the first day, and proceeding so far in the term as the number of suits may require....The court shall call the cases in order in which they stand on the docket, and each case shall be tried or continued, or set for trial on a future day, before proceeding to the trial of any other, except by consent.

Sec. 9-7-173 was repealed in 1991 and no corresponding rule is found in the Mississippi Rules

of Civil Procedure, the Uniform Circuit Court Rules or the Local Rules.¹ Many of the Circuit Court Districts have addressed this by enacting a local rule governing the trial or motion docket setting procedure. For instance, the Local Rule 2 , Trial Settings, of the Fourth Circuit Court District provides:

(f) In the event the Court Administrator is unable to resolve any conflict between attorneys in civil matters...the respective judge shall resolve the conflict and set the case for trial.

A written rule governing the case trial setting procedure has not been adopted by the Second Circuit Court District comprising Harrison, Hancock and Stone Counties nor authorized by this Court under Rule 83 of the MRCP . When cases are filed they are assigned to the docket of one of the four Circuit Court Judges. There are 12 monthly terms and the four Circuit Judges preside in the First Judicial District three months per year. This significantly limits the availability of the trial judge to whom the case is assigned. Civil cases are set through the Court Administrator's office. The Plaintiff's and Defendant's attorney set a case by requesting available trial dates on the assigned judge's docket from the Court Administrator's office. This is a fault in the procedure because if one of the attorneys does not agree, the case is not set. The only available redress to the attorney wishing to set the case is to file a Motion with the court to set the case. Again this procedure is flawed because the attorney wishing to set the Motion to Set the case cannot set a date for the Motion to Set trial for hearing without the agreement of counsel opposite. The attorney opposing the trial setting may effectively stalemate efforts to set the case for trial. There is no calling of the entire civil docket by the trial judge on the first day of the Term and only the cases set by agreement of plaintiff and defense counsel through the Court Administrator's office are called the first day of each week

¹Rule 9.02 of the Uniform Rules of the Circuit Court has a provision addressing the trial docket, but Rule 6.01 makes it applicable only to criminal cases.

of the term.

The failure of the failure of the Rules of Civil procedure, Uniform Circuit Court Rules and Local Rules to address this procedural issue has been a significant causative factor in the inability of the Plaintiff's counsel to set this case for trial and the dismissal with prejudice based on an alleged failure to prosecute is a denial of procedural due process.

A local rule promulgated properly pursuant to MRCP Rules 40 and 83 would have given this court a 'paper trail' of orders, clerical entries, letters of confirmation, agreements reduced to writing or *something* to indicate that the local rules of procedure had been followed in the setting of trials, notice and other matters. Johnson v. Weston Lumber & Bldg. Supply, 566 So.2d 466(Miss 1990), at p. 469.

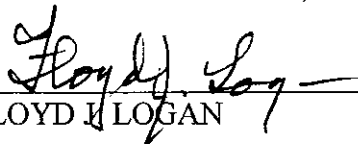
CONCLUSION


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 3rd day of December, 2010.

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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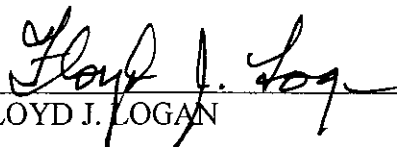
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CERTIFICATE OF COMPLIANCE

I, Danielle Bordes, do hereby certify that I have this day, the 3rd day of December, 2010,
forwarded one (1) original and three (3) copies of the foregoing Brief for Appellant , via United
States First Class Mail, postage prepaid, to the Clerk of the Court of Appeals.

SO CERTIFIED this the 3rd day of December, 2010.


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