IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HERBERT C. HANSON, JR. APPELLANT

VERSUS CAUSE NUMBER: 2010-CA-01169

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

SCT

SUPPLEMENTAL 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 pursuant to MRAP 17(h) files this, their Supplemental Brief, and in support thereof would respectfully show unto this Honorable Court as follows, to wit:

I. HANSON DID NOTHING FOR OVER FOUR YEARS

Fourteen (14) years have now elapsed since Plaintiff initially filed this action back in 1998. Thirteen (13) 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 Trial Court, exercising its discretion, dismissed Plaintiff's Complaint for failure to prosecute and in doing so did not abuse such discretion, a decision which was affirmed by the Mississippi Court of Appeals. 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.

In 2005, this cause was in front of this Court on Interlocutory Appeal.[1] On June 30, 2012, this Court remanded this action back to the Harrison County Circuit Court, allowing Hanson to pursue his claims against Appellees. Since that time, Hanson did nothing for over four (4) years, as the chronology shown by Circuit Court Docket in this matter demonstrates:

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.

6/30/09 Motion by Karen Young to Substitute Counsel, Tim Holleman, attorney for Harrison County
7/2/09 Order Allowing Substitution of Counsel
7/14/09 Entry of Appearance by Tim Holleman

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

9/30/09 Motion to Set Case for Trial by Floyd Logan, attorney for Plaintiff

(See R. 2-5).

Once this cause was remanded to the Harrison County Circuit Court, **Hanson did nothing for over four (4) years.** As shown above, he only filed his Motion to Set Case

[1] Cause No. 2005-IA-00857-SCT.

for Trial as a "reaction"[2] to the Substitution of Counsel by Harrison County. As such, the trial court stated in its Order of Dismissal that a "record of dilatoriness and delay exists" in this case after "four years of inactivity" and dismissed this cause pursuant to Miss. R. Civ. P. 41(b). (R. 99-103). The Mississippi Court of Appeals subsequently held that the "circuit court's dismissal for failure to prosecute under Rule 41(b) was not an abuse of discretion." (See Opinion at ¶ 18, cited as *Hanson v. Disotell*, 2011 WL 5373663, ¶ 18, (Miss. Ct. App.)).

II. RECENT CASE LAW CONTINUES TO SUPPORT THE TRIAL COURT'S DECISION TO DISMISS

The trial court's decision to dismiss Hanson's claims pursuant to Rule 41(b) mirrors the recent decisions in *Holder v. Orange Grove Med. Specialties, P.A.*, 54 So.3d 192 (Miss. 2010) *reh'g denied* (March 3, 2011) and *Loleta B. Wing Trust v. Wing*, 2012 WL 9895983 (Miss. App.).[3] In *Holder,* Plaintiff did not respond to interrogatories until 435 days past the deadline imposed by the Mississippi Rules of Civil Procedure. *Holder* at ¶ 22. Further, these discovery responses were only made after defendants had already filed their motion to dismiss for want of prosecution, which was deemed a reactionary act by this Court. *Id.*

When reviewing dismissal for failure to prosecute, consideration may be given as to "whether the plaintiff['s] activity was reactionary... or whether the activity was an effort to proceed in the litigation.'" *Id.* Hanson's motion to set the case for trial was a similar reactionary act, as stated by the trial court. (R. 102). Had it not been for Harrison

[2] The trial Court specifically stated that this was a "reaction" by Hanson. (R. 102)
[3] These two cases serve as a supplementation to the case law previously cited in the Brief of Appellees, submitted to the Mississippi Court of Appeals.

County's pleadings for substitution of counsel, there is no telling how long Hanson would have taken to pursue prosecution of this action, if ever.

In the recent *Wing* decision, the Court of Appeals concluded that the lower court "did not abuse its discretion in finding that a clear record of delay existed" when it dismissed an action pursuant to Rule 41(b) after "no action of record had taken place for almost an entire year." *Wing* at ¶ 14. Similar to Hanson and the Plaintiff in *Holder,* the first action of record by the Plaintiffs in *Wing* came only after the Defendants had filed a motion to dismiss.[4] Of course, Hanson waited over four (4) years before he took any action of record, much longer than the approximate 12-15 month delay found in both *Holder* and *Wing.* The Court in *Wing* further stated that "we recognize that it was (Plaintiff's) responsibility... to prosecute their case, not the defendant's nor the (trial) court's." *Id.* (citing *Cox v. Cox*, 976 So.2d 869, 880 (¶50)(Miss 2008)).

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). Four (4) years is just too long to have to wait for Plaintiff to prosecute his claim. In its Order of Dismissal, the trial court considered all aspects that could have attributed to the delay, including Hurricane Katrina.[5] In its Order of Dismissal, the court stated "(a)lthough this Court is well aware of the fact that Hurricane Katrina made landfall on August 29, 2005, shortly after this cause was remanded by the Mississippi Supreme Court, **such fact does not mitigate over four years of inactivity."**

[4] Of course, Hanson waited over four years before he took any action of record, much more time than the approximate 12-18 month delay found in *Holder* and *Wing.*

[5] The Court of Appeals, in its dissent, stated that Katrina was a factor that could not be attributed to the delay of Hanson. *Hanson* at ¶ 23. However, this factor was clearly taken into account by the trial court.

(emphasis added). In accordance with *Holder* and *Wing*, the trial court's dismissal does not constitute an abuse of discretion.

Further, Plaintiff's attorney clearly had the ability to prosecute other actions in the aftermath of Katrina, as he stated that one of the reasons Hanson's case was not pursued diligently for more than four (4) years is because "Plaintiffs counsel's law office handled an estimated 50 to 60 Hurricane Katrina claims". See Brief of Appellant at p. 3. In other words, these "Katrina cases" became more important than the present case, which was filed back in 1998. This Court in *Holder* addressed this exact argument when it stated "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***." *Holder* at ¶ 19 (citing *Holder v Orange Grove Medical Specialties,* 54 So.3d 244, 249, ¶21 (Miss. Ct. App. 2010)). If anything, Plaintiff's attorney's statement serves as an admission that this case was in fact neglected for several years after Katrina, and should not be excused as it is a "clear record of delay" as stated in *Holder. Id.* at ¶¶ 19, 25.

Further, neither the opinions of the Trial Court nor the Court of Appeals conflict with this Court's opinions in *Jackson Public School District vs. Head*, 67 So.3d 761 (Miss. 2011) or *Barry v. Reeves*, 47 So. 3d. 689 (Miss. 2010).[6] In fact, both decisions support the Trial Court and the Court of Appeals findings and opinions. In *Barry*, this Court found that each period of inactivity was interrupted by a positive action by the Plaintiff to expedite the litigation. *Id. at* ¶ 15. Here, for more than 4 years, there was no "positive action" taken by the Appellant or his counsel to "expedite" the litigation in this

[6] Cases cited by Appellant in his Petition for Writ of Certiorari, and expected to be cited in his Supplemental Brief.

case. In *Jackson Public School District,* this Court applied the "abuse of discretion" standard to the Trial Court's denial of a Motion to Dismiss for want of prosecution and found there was no "abuse of discretion" in exercising her "discretion" to not dismiss the case. *Id.* at ¶ 13. Here, the same standard applies, and there likewise was no abuse of discretion in the Trial Court exercising its discretion to dismiss the case. See *Holder, supra.*

In this case, 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[7]; (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 counsel. (R. 98-103). Based on such findings, the trial court held that a clear record of delay and dilatoriness exists. (R. 102). Such was not an "abuse of discretion."

III. PLAINTIFF DID NOT SUFFER A CONSTITUTIONAL DEPRIVATION

Plaintiff essentially argues that he was denied procedural due process because the Second Circuit Court District[8] does not have local rules governing the trial docket setting procedure. See Brief of Appellant, p. 9-11. However, as stated by the Court of Appeals, Plaintiff "had the ability to file a motion to set trial prior to October 2009."[9] He simply did not do so, and Appellees submit he probably would not have done so had a Motion to Substitute Counsel not been filed. In fact, when he finally filed a Motion to Set Trial in

[7] Eleven (11) years had passed at the time of dismissal from the trial court. It now has been over fourteen (14) years.
[8] The Second Circuit Court District is comprised of Harrison, Hancock, and Stone Counties.
[9] Opinion, ¶ 20, *Hanson* at ¶ 20.

"reaction" to the Motion to Substitute, the matter was set for hearing. The problem was such was four (4) years, two (2) months and nine (9) days late.

There is no statute, rule, or regulation that requires the Mississippi Circuit Court Districts to adopt local rules. Miss. R. Civ. P. 83(a) simply states that the districts "may hereafter make uniform rules and amendments in their respective courts not inconsistent with these rules." As such, it is up the individual districts as to whether or not they feel that such rules are necessary. More importantly, "it was (Plaintiff's) responsibility to prosecute his case, not the defendant's or the (trial) court's." *Wing* at ¶ 14 (citing *Cox v. Cox*, 976 So.2d 869, 880 (¶50)(Miss 2008)). He should not now blame the Second Circuit Court District for not adopting local rules, which it has no obligation to adopt, just because he did not file his Motion to Set Trial years in advance. Such is not a constitutional deprivation.

IV. 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. P. 41(b). In addition to the case law cited throughout the Brief of Appellees, the decisions in *Holder* and *Wing, supra*, demonstrate that even a delay of just over one year is subject to dismissal under Rule 41(b). 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 agree with the Court of Appeals, and exercise its power to affirm the dismissal of the trial court as it did not abuse its discretion in dismissing this cause for want of prosecution. Further, any assertion that the lack of local rules in the

Harrison County Circuit Court led to a constitutional deprivation is unfounded, as Hanson could have simply filed his Motion to Set Trial years in advance.

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 when this Court remanded this action in June, 2005 until September, 2009; Hanson essentially neglected the case completely. The dormancy of this case exceeds all others cited herein and in the Brief of Appellees, 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 20th day of August, 2012.

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

BOYCE HOLLEMAN & ASSOCIATES

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
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This the 20th day of August, 2012.

Tim C. Holleman

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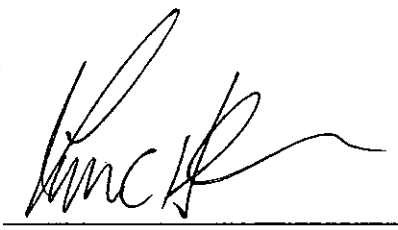
CERTIFICATE OF COMPLIANCE

I, Tim C. Holleman, do hereby certify that I have this day forwarded one (1) original and (10) paper copies and one (1) electronic copy of the foregoing Supplemental Brief of Appellee, via Federal Express to the Clerk of the Supreme Court of Mississippi.

This the 20th day of August, 2012.



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