IN THE SUPREME COURT OF MISSISSIPPI
2011-CA-00760

IN RE: THE LOLETA B. WING TRUST

TODD WING AND TAMMY KINNEY **APPELLANTS**

v.

JIMMY WING **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT OF LAFAYETTE COUNTY

BRIEF OF THE APPELLEE, JIMMY WING

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this litigation. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

- Todd Wing, Appellant;
- Tammy Kinney, Appellant;
- Jimmy Wing; Appellee;
- Bradley Walsh, Walsh Law Firm, and Scot Spragins, Hickman, Goza & Spragins, PLLC, counsel for Appellee;
- J. Hale Freeland and M. Reed Martz, Freeland Shull, PLLC, counsel for Appellants;
- James E. Justice, former counsel for Trust and for Jimmy Wing

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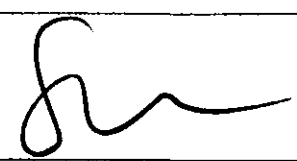
Attorney of Record for Appellee, Jimmy Wing



H. Scot Spragins

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STATEMENT ON ORAL ARGUMENT

Pursuant TO MISS. R. APP. P. 34(b), the Appellee requests oral argument in this matter. Appellee believes that the facts of this case and the applicable law are sufficiently clear. However, oral argument may be advantageous to show how the trial court did not abuse its discretion when it exercised its inherent right to dismiss the Plaintiffs' case.

STATEMENT OF THE ISSUE

Whether the trial court erred when it granted Jimmy Wing's (hereinafter "Defendant") Motion to Dismiss for Want of Prosecution, where the trial court applied the correct legal analysis and properly weighed the relevant factors in determining whether the Rule 41(b) motion should have been granted. The case presented a clear record of delay, lesser sanctions were considered but ultimately rejected, because they would not better serve the interests of justice due to the prejudice the delay caused the Defendant, and the presence of aggravating factors bolstered the case for dismissal.

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings, and its Disposition

This appeal comes from the trial court's order dismissing Todd Wing and Tammy Kinney's (hereinafter "Plaintiffs") case with prejudice because the Plaintiffs failed to prosecute their claim. In 2005, Plaintiffs – among others – filed a similar suit with the same trial court, which alleged the same accusations as the present case. Both cases accuse the Defendant of exerting undue influence over his mother, Loleta B. Wing, prompting her to convey real property and money to him from her living trust. In both cases, Plaintiffs were given full access to the financial and medical records of Mrs. Wing, Defendant and the Trust. Plaintiffs had the opportunity and did conduct full discovery. To this day, Plaintiffs have been unable to produce any evidence of wrongdoing.

Plaintiffs' first suit was filed in Lafayette County Chancery Court and was assigned to Chancellor Edwin H. Roberts, Jr. However, after Plaintiffs were presented with substantial evidence, some from Mrs. Wing herself, proving no wrongdoing or misconduct by her son, Defendant, they dismissed their suit, as it would obviously fail. Following dismissal, a system was established whereby these Plaintiffs could monitor Mrs. Wing and her activities, personally and medically. All was well until the key witness, Mrs. Wing, passed away, and Plaintiffs filed suit again, on February 21, 2008, alleging the same damning accusations.

On December 21, 2010, the Defendant filed a Motion to Dismiss for Want of Prosecution after Plaintiffs failed to take any action of record for practically the entire year of 2010. Notwithstanding this dilatoriness, Plaintiffs failed to take any substantive action to prosecute their claim for an even longer period of time. Once Defendant filed his Motion to Dismiss, however, Plaintiffs quickly responded by filing various motions, notices and subpoenas in an effort to appear diligent. On March 23, 2011, counsel for both Plaintiffs and Defendant

presented arguments to Judge Roberts on Defendant's Motion. At the hearing, Plaintiffs offered absolutely no excuse or explanation for the delay. On May 5, 2011, Judge Roberts issued his Opinion, dismissing the Plaintiffs' case for failure to prosecute.

B. Statement of Facts Relevant to the Issues Presented for Review

The Plaintiffs raise numerous issues and assignments of error regarding the chancellor, his findings of fact and the application of law to this case. The only issue on appeal is whether the trial court abused its discretion when it granted Defendant's Motion to Dismiss under Rule 41(b). On appeal, courts should "pass at once to the heart of the case."[1]

This case involves a trust. It also involves two individuals who overtly felt entitled to the lion's share of their grandmother's, Mrs. Wing, estate once she passed away. The trust involved in this case was a revocable, discretionary trust, also known as a living trust, which gave the Settlor and Trustees absolute, unfettered discretion over the Trust and its assets. Mrs. Wing made the decision to use her assets to benefit her only living son, Defendant, and also to name him a Co-Trustee. Mrs. Wing also decided that, on her death, she wanted the Trust to distribute a lump sum payment to her son and the remaining residual, if any, could be divided between her grandchildren, Plaintiffs. Plaintiffs, though, apparently felt slighted by their grandmother's wishes and now ask the courts to give them money Mrs. Wing never wanted them to have.

The Trust[2] was established in 1996 by Mrs. Wing and is governed by Tennessee law.[3] Originally, Mrs. Wing was the Settlor, Primary Beneficiary and Co-Trustee with her husband, W. R. Wing.[4] As mentioned, the Trust was revocable and discretionary, meaning that absolute discretion over Trust Assets lay with the Co-Trustees. In 2003, after the death of Mrs. Wing's husband, the Trust Agreement was amended to add Defendant, Mrs. Wing's only living son, as a

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[1] *See* Boyd v. Entrekin, 209 Miss. 51, 45 So. 2d 848, 849 (Miss. 1950).
[2] Record at 35-59.
[3] Record at 101-09.
[4] Record at 35-59.

Co-Trustee.[5] During this same time, also as a result of her husband's death, Mrs. Wing appointed Defendant her Agent through a Power of Attorney agreement.[6] It is undisputed that, throughout her lifetime, Mrs. Wing made considerable gifts to Defendant and his brother.[7] However, Defendant's brother predeceased him and Mrs. Wing, thereby leaving Defendant to assume the role of primary caregiver for his mother. It also cannot be disputed that Defendant took meticulous care of his mother till the day she passed away.

In January 2005, the Plaintiffs – among others[8] – filed a conservatorship action in Lafayette County Chancery Court, alleging improper conduct by Defendant over his mother and demanded that Defendant "account for all expenditures using assets of Loleta Bard Wing whether held in trust, as a trustee or held individually from Jul 17, 2003 to present."[9] These plaintiffs also petitioned the court to issue a restraining order, preventing Defendant from moving his mother from an assisted-living facility, Azalea Gardens, to a private home Defendant personally built for her on his property.[10] Defendant decided to move his mother to a private residence after it was discovered that Azalea Gardens, a medical facility charged with promoting health and vitality among elders, failed to give his mother her proper medications on a daily basis.[11] As a result of the facility's nonfeasance, Mrs. Wing's health deteriorated and, justly, Defendant was forced to confront the facility and its staff.[12] Subsequently, a licensure investigation was initiated against Azalea Gardens stemming, in part, from suspicion of failing to

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[5] Record at 187-90.
[6] Record at 195-200. Mrs. Wing's deceased husband formerly had power of attorney for her. After his death, Mrs. Wing had to make sure this special obligation was given to her only living son, the Defendant.
[7] Record at 31. Mrs. Wing's other son, Terry Wing, predeceased her. During his lifetime, Mrs. Wing contributed substantial capital and resources to fund Terry's business ventures. *Id.* at n.2; Transcript at 5.
[8] Record at 625. The plaintiffs in the 2005 conservatorship suit were Sue Broussard, Jack Bard, Barbara Cohen, Gene Bard, Gladys Brown, Mary Gabler, Bernita Hopkins, Frankie Pulhamus, *Todd Wing*, Judy Wing, Jan Gibson Miller, and *Tammy Wing Kinney*. *Id.* (emphasis added).
[9] Record at 667-680.
[10] Record at 629-30.
[11] *Id.*
[12] Record at 105.

properly administer prescribed medications to patients.[13] Defendant eventually moved his mother into the private residence and hired a full-time medical staff, which ensured she received her proper medications and first-rate medical attention. Under the improved circumstances, Mrs. Wing's health and wellness improved substantially.[14]

As part of the 2005 suit, Plaintiffs were given the opportunity and did conduct full and extensive discovery.[15] This included subpoenas for numerous financial and medical records, full and unconditional access to Mrs. Wing, her medical providers and records, and access Trust-related records.[16] On February 21, 2005, Mrs. Wing executed a sworn affidavit where she made it unquestionably clear that she was competent, was receiving the proper level of medical care and that she was fully informed of all financial information concerning the Trust and Trust assets.[17] In the very same document, Mrs. Wing ratified each and every transaction, expenditure, or otherwise made by the Trust on her behalf or that the behest of Defendant.[18] Mrs. Wing was all too aware of the litigious nature of certain family members and sought to protect her decisions regarding the Trust. As further part of these measures, counsel for Defendant prepared detailed correspondence to Plaintiffs and their attorneys, addressing the parties' concerns over visitation, phone calls and other related matters.[19] Also in the letter, defense counsel related Defendant's desire that communications between the two sides remain open, and that the family members try to work together in order to foster amicability.[20] A system was established, whereby Plaintiffs could monitor Mrs. Wing and her activities, both personally and medically.[21] This effort,

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[13] Record at 105; Transcript at 140.
[14] Record at 106.
[15] Record at 640-41.
[16] Record at 634, 685, 687-91.
[17] Record at 637-38.
[18] *Id.*
[19] Record at 635.
[20] *Id.*
[21] *Id.*

although later proved to be unsuccessful, was made in hopes of avoiding any future litigation with the quarrelsome bunch.

Plaintiffs allegations in the suit were unsupported by evidence, based on misinformation, and motivated by self-gain and personal motivation to gain control of Mrs. Wing's assets – this according to Mrs. Wing herself.[22] After extensive discovery, complete access to Mrs. Wing, her medical providers and their records, and the financial records related to the Trust, Plaintiffs ultimately dismissed their claims, as it became obvious they would be unsuccessful.[23] As mentioned, counsel for all parties decided to keep full access to all the information in place, in hopes of avoiding any further disputes between family members.[24]

After Plaintiffs dismissed their case, no issues arose between the parties until Mrs. Wing's death on November 17, 2007.[25] Following her death, Trust residual was distributed according to the terms of the Trust to the beneficiaries named in the Trust Agreement. Specifically, the Agreement provided that Defendant would receive payment of $100,000, after all debts and taxes were paid from the assets, and the remaining residual, if any, would be split between the Plaintiffs.[26] On December 10, 2007, Defendant, by and through counsel, prepared and submitted an accounting, which included explanations of the applicable trust provisions, and detailed the corpus of the Trust and the resulting distributions, to Plaintiffs.[27] Shortly after, on February 21, 2008, Plaintiffs again filed suit against Defendant, alleging undue influence and imprudent conduct towards Mrs. Wing and Trust finances.[28] The case was filed in Lafayette

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[22] *Id.*; Record at 638.
[23] Record at 733.
[24] Record at page 634-35, 638-39.
[25] Record at 638-39.
[26] Record at 12-14, 35-59.
[27] Record at 9, 12-14. During Mrs. Wing's lifetime as the primary beneficiary, the Respondent owed no duty to the Petitioners to provide an accounting of the trust. In fact, the Defendant owed a fiduciary duty to Mrs. Wing *not* to disclose trust information to other parties.
[28] Record at 1-5.

County Chancery Court and assigned to Chancellor Edwin Roberts, the same chancellor who presided over Plaintiffs' previous case. Defendant filed his Answer on March 5, 2008.[29]

In all, the Complaint alleged that Defendant had improperly kept Plaintiffs in the dark concerning the Trust and its assets prior to Mrs. Wing's death.[30] Defendant, however, owed absolutely no duty to Plaintiffs to provide a trust accounting or disclose Trust information prior to Mrs. Wing's death. In fact, Defendant had a fiduciary duty to Mrs. Wing specifically not to disclose such information without her consent – which was never given.[31] Mrs. Wing was aware of the litigious nature of these family members and, as a result, desired to keep any information related to the Trust confidential between herself and Defendant.

As in 2005, Plaintiffs issued subpoenas for financial and medical institutions associated with Mrs. Wing, Defendant and the Trust, many being for the same entities summoned in the 2005 suit.[32] On May 5, 2008, the parties entered an agreed order in which Defendant agreed – despite no affirmative duty to do so – to provide Plaintiffs with a detailed accounting prepared in accordance with all the records and information as to which Defendant had reasonable access, dating back as far as 1999.[33] Defendant agreed to provide this confidential information in hopes that he would be free from the persecution by these damning allegations (for the second time) at the hands of his own family. Understanding the immense breadth of Plaintiffs' request, the trial court provided instruction as to how the accounting should be completed.[34]

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[29] Record at 29-34.
[30] Record at 130.
[31] Record at page 142-152.
[32] *See* Docket; *Compare* Record at 687-91 *to* Docket.
[33] Record at 71-73, 587. Judge Roberts, in his Opinion, correctly noted that Defendant had certain legal arguments available to preclude providing the requested information, due to Tennessee statutory laws governing trusts. Record at 587. Nonetheless, Defendant agreed to provide all the information to which he had reasonable access to affirmatively prove his innocence of any wrongdoing.
[34] *Id.* The Order stated, in part, that the Defendant "shall make such requests as necessary to gather as much information about such period as reasonably necessary to produce such an account." Record at 72.

Under the court's direction, the Defendant submitted his accounting to the Plaintiffs' before June 2008.[35] On July 1, 2008, Petitioners filed a Motion to Compel, claiming inadequacies with the submitted accounting.[36] On August 26, 2008, an order was entered on Plaintiffs' Motion to Compel, but Plaintiffs took no further action regarding the order or discovery.[37] Then, on November 12, 2008, Defendant filed a Motion for Summary Judgment, stating, in part, that Plaintiffs' suit was brought under an inapplicable statute and, additionally, that Plaintiffs claims were barred under different provisions of law.[38] In response to that motion, Plaintiffs filed a second Motion to Compel eight days later, alleging that more information regarding the trust accounting was needed in order to respond to Defendant's motion, even though they had not raised this with the trial court or Defendant since the August 26, 2008 order after Defendant provided the accounting.[39]

On June 11, 2009, the parties presented arguments to Judge Roberts on their respective motions.[40] Arguing their Motion to Compel, Plaintiffs attempted to offer Mr. Eddie Aune, an accountant, as an expert witness, despite the fact they never once disclosed the witness or identified him in a discovery response to Defendant.[41] Plaintiffs then went on to elaborate how their expert had examined the provided accounting and, in his opinion, further information may be required. However, Plaintiffs failed to identify the expert or even contact Defendant to put him on notice of any alleged insufficiencies with the accounting. Frustrated by the additional delay this caused, Judge Roberts directed Plaintiffs' expert to cooperate with defense counsel to

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[35] Record at 588.
[36] Record at 77.
[37] Record at 97.
[38] Record at 101. In fact, the Plaintiffs ultimately admitted that their suit was brought under an incorrect statute, but contended that their claims were still viable.
[39] Record at 129.
[40] Transcript at 50.
[41] Transcript at 96.

resolve these alleged deficiencies.[42] Four days later, on June 16, 2009, Mr. Aune agreed and sent defense counsel an email with various attached documents, but absent of any instructions or requests.[43] That was the last time Defendant heard from Plaintiffs regarding this matter until December 2010 – almost eighteen months later.[44] Over two years after the accounting was submitted and eighteen months since the parties' last hearing, an attorney for Plaintiffs finally emailed Mr. Walsh, counsel for Defendant, indicating that he thought Mr. Aune had requested some information but "lost track" of a response.[45] Plaintiffs' counsel was partially correct: Mr. Aune had emailed Mr. Walsh – almost 18 months prior!

On December 21, 2010, over two and a half years since the submission of the accounting, over fifteen months since the Plaintiffs' last substantive action in the case, and almost the complete year of 2010 without any action of record, Defendant filed a Motion to Dismiss for Failure to Prosecute.[46] In reaction, Plaintiffs filed a Motion to Compel, again alleging incomplete information regarding the accounting, despite the fact they failed to mention a single word about the accounting for nearly eighteen months.[47] At the hearing on the motions, Plaintiffs' counsel failed to offer the trial court any explanation – reasonable or otherwise – for the delay, or explain why no substantive action had been taken in over a year, or even why no action of record occurred during practically the entire year of 2010.[48] Plaintiffs simply could not offer a single reason, excuse or explanation for their dilatory conduct.

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[42] Transcript at 100-01.
[43] Record at 556. *See* Correspondence from Mr. Martz to Mr. Walsh stating what was allegedly missing from the accounting; Record at 555; *See also* Correspondence from Mr. Aune to Mr. Walsh. It is certainly not a responding party's obligation to ferret out what he thinks a propounding party wants or, said differently, to do his discovery for him.
[44] Record at 556.
[45] Record at 560.
[46] Record at 516.
[47] Record at 523.
[48] Record at 589.

On May 5, 2011, the trial court issued its Opinion, dismissing the case for failure to prosecute.[49] Judge Roberts found "as fact a clear record of delay" in the case produced by Plaintiffs' dilatory conduct.[50] Specifically, the trial court concluded that Plaintiffs provided no "excusable reason for the delay in filing the Renewed Motion to Compel (filed 142 days after the secondary accounting) or the latest such Motion (filed 903 days from the secondary accounting)."[51] Furthermore, the delay was exacerbated by "Plaintiffs appear[ing] at the hearing on defendant's Motion for Summary Judgment seeking to present expert testimony that had yet to be disclosed."[52] More importantly, as Judge Roberts found, "defendant responded to the request and there were no further complaint until plaintiffs' present Motion to Compel."[53]

Plaintiffs were not diligent in their prosecution. "Prior to the filing of the Motion to Dismiss, plaintiffs had only deposed defendant...[and] [n]o action, of substance, was taken by the plaintiffs in the months and years leading up to the Motion to Dismiss."[54] Beyond that, Judge Roberts noted, "[t]his was all but admitted by plaintiffs at the hearing."[55] In summation, the trial court found that plaintiffs offered "[n]o excuse for delay," that "the record substantially support[ed] a finding of dilatory conduct on the part of the plaintiffs," and the particular circumstances surrounding the case "clearly evidence inexcusable and, thus, unreasonable delay."[56] Aggrieved, Plaintiffs now seek refuge from this Court. However, the trial court's ruling is supported by substantial evidence from the record and did not abuse its discretion in granting the Defendant's motion.

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[49] Record at 583, 593.
[50] Record at 589.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

SUMMARY OF THE ARGUMENT

The trial court did not abuse its judicial discretion by dismissing Plaintiffs' case pursuant to Mississippi Rule of Civil Procedure 41(b) for failure of the Plaintiffs to prosecute their case. The responsibility of pursuing redress rests solely with a plaintiff, and trial courts have the inherent authority to dismiss such claims when the plaintiff fails to do so. That is what happened in this case.

Plaintiffs filed their case on February 21, 2008, alleging that Defendant exerted undue influence over his mother, Loleta Wing, inducing her to transfer real property and money to him from her living trust. In 2005, Plaintiffs filed a conspicuously similar suit, which put forward the very same allegations. However, that suit was dismissed because Ms. Wing was alive, competent and would testify against Plaintiffs. It was not until Ms. Wing's passing that Plaintiffs renewed their unfounded allegations.

A trial court's ruling on a Rule 41(b) motion to dismiss should be affirmed when there has been a clear record of delay by the plaintiff and the trial court considers whether lesser sanctions would better serve the interests of justice. *Am. Tel. & Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178 (Miss. 1998). Delay alone may be sufficient. Aggravating factors may be considered, but are certainly not required for dismissal. *Cox v. Cox*, 976 So. 2d 869 (Miss. 2008).

The trial court's conclusions here are supported by substantial evidence and are in line with applicable law. First, Plaintiffs dilatory conduct caused a clear record of delay. The docket, on its face, shows as much. No action of record took place for almost one (1) year. More importantly, no substantive action in this case took place for over a year.

Second, lesser sanctions were considered and rejected. The chancellor, who presided over both the 2005 and 2008 cases, conclusively determined that dismissal with prejudice was

appropriate given the nature of the claims and allegations, the length of time in both suits and the prejudicial effect on Defendant. Defendant has faced identical allegations since 2005, and, given the lack of action by Plaintiffs, would be severely prejudiced should this matter be allowed to proceed. *Holder v. Orange Grove Medical Specialties, P.A.*, 54 So. 3d 192 (Miss. 2010).

Last, the presence of aggravating factors bolsters the case for dismissal. Plaintiffs' issues for trial require circumstantial evidence, *i.e.* recollections of daily interactions dating back a decade. Thus, it was not an abuse of discretion to conclude that Defendant would be substantially harmed if the case was allowed to continue after the period of dormancy. *See Holder*, 54 So. 3d at 199 (¶ 28).

Because it is clear from the record that this case fulfills all of the requisite factors for dismissal under Rule 41(b), and the trial court did not abuse its discretion, dismissal was proper.

ARGUMENT

I. Standard of Review

A trial court's ruling on a dismissal for failure to prosecute is reviewed for abuse of discretion. *Hill v. Ramsey*, 3 So. 3d 120, 122 (¶ 6) (Miss. 2009). What constitutes a failure to prosecute is considered on a case-by-case basis. *Am. Tel. & Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (¶ 12) (Miss. 1998) (hereinafter "*AT&T*"). "[T]his Court may reverse only if it finds that the [trial] court abused its discretion." *AT&T*, 720 So. 2d at 180 (¶ 12).

This Court should accept a chancellor's factual findings unless – given the evidence in the record – this Court concludes that the chancellor abused his discretion, and that no reasonable chancellor could have come to the same factual conclusions. *Bluewater Logistics, LLC v. Williford*, 55 So. 3d 148, 155 (¶ 24) (Miss. 2011). Thus, this Court should "affirm the trial court's findings of fact, unless the findings are manifestly wrong." *Barry v. Reeves*, 47 So. 3d 689, 696 (¶ 9) (Miss. 2010) (citing *Watson v. Lillard*, 493 So. 2d 1277, 1279 (Miss. 1986)).

II. The Trial Court's Factual Findings Are Not Manifestly Wrong and Are Substantially Supported by the Evidence in the Record

Plaintiffs assert that the trial court's factual findings are in error. To prove this, a party must show that the trial court abused its discretion and, consequently, the court's findings of fact are manifestly wrong. *Barry*, 47 So. 3d at 696 (¶ 9). Plaintiffs cite *Barry v. Reeves*, *supra*, in support of their argument. In *Barry*, this Court held that the trial court abused its discretion when it dismissed a plaintiff's legal malpractice suit for failure to prosecute, partly because the trial court's findings of fact were not supported by the record and were manifestly wrong. *Barry*, 47 So. 3d at 692 (¶ 6).[57] This Court further found that the trial court in *Barry* made a number of

[57] In addition to this Court's findings on the trial court's factual conclusions, this Court also determined, "nothing in the record suggests that the trial court considered lesser sanctions prior to dismissing the case." *Barry*, 47 So. 3d at 695 (¶ 18).

erroneous findings and relevant omissions, such as concluding the plaintiff had failed to conduct any discovery, concluding that the plaintiff failed to prosecute his case after a stay had been lifted, and stating that the plaintiff failed to file a motion setting case for trial or other relief. *Id.* at 693 (¶ 11). This Court found that, in actuality, the plaintiff had conducted some discovery, had actively pursued getting the stay lifted, and, above all, had filed a motion to set trial in an effort to move the case forward. *Id.* at 691-92 (¶¶ 2-6). Thus, the trial court in *Barry* erred, rather substantially, when it completely omitted actions taken by the plaintiff throughout the case. Based on this, this Court concluded that "the trial court's failure to include these actions by Barry in its findings of fact was a very relevant omission amounting to manifest error." *Id.* at (¶ 12).

Barry is clearly distinguishable from the facts of this case. In the case at hand, the trial court did not omit any facts in his factual findings or conclusions of law. Furthermore, the trial court did not omit any actions of Plaintiffs in his ruling. *See discussion infra.*

Plaintiffs assign six (6) errors regarding the trial court's factual findings. However, Plaintiffs never properly raised some of these issues with the trial court. "A trial judge cannot be put in error on a matter not presented to him. This Court repeatedly has held that issues not raised at trial cannot be raised on appeal." *Southern v. Mississippi State Hosp.*, 853 So. 2d 1212, 1214-15 (¶ 5) (Miss. 2003) (citations omitted). The same chancellor presided over both cases involving the parties and, as a result, was fully informed of the facts and circumstances connected to this litigation. As such, Judge Roberts was in the best position to make the factual determinations.

a. Plaintiffs' Two Suits Are "Strikingly Similar"

The trial court may have had a case of *déjà vu*. In Judge Roberts's Opinion, he conclusively found that the allegations made in this case and those made in the 2005 suit – in

which Plaintiffs were also a party – were "strikingly similar."[58] Considering that Judge Roberts presided over both cases, his familiarity with the cases should be afforded some deference. Indeed, Judge Roberts (if anyone) would be able to see the correlation.

Appropriately, the trial court took this into consideration when ruling on Defendant's Rule 41(b) motion: the two cases involve the same parties (Defendant, Mrs. Wing and Plaintiffs), the same damning accusations (Defendant exercised undue influence over his mother, inducing her to make unauthorized transfers from her Trust), the same subject matter (Defendant, his mother, Plaintiffs, the Trust and Trust assets), the same witnesses (Defendant, his mother – now *deceased*, Plaintiffs, all medical providers from the past decade and all information regarding the Trust dating back to 1999 and so forth), the same substantive arguments (*res judicata*, preclusion and certain procedural bars), proof on the same circumstantial evidence (testimony from aforesaid witnesses and so forth), and other evidence (records from all financial and medical institutions). Still, since this saga began in 2005, Plaintiffs have failed to present any viable evidence of wrongdoing by Defendant.[59]

The Defendant is ready to be free from the burdens attendant to his persecution at the hands of disgruntled family members.[60] Nothing in the record supports a finding that the trial court made a clear error in judgment or abused its discretion when it reflected on this fact in its decision.

b. Defendant Complied With the Trial Court's Order to Provide Accounting

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[58] Record at 585.

[59] Defendant will note that the trial court did, at one point, note "credible evidence" that the Defendant may or may not have acted improperly regarding the trust. Record at 16. Noteworthy, this was an *ex parte* hearing, and, as such, Defendant could not rebut any accusations laid that day. Also extraordinary at that particular hearing, Plaintiffs accusations centered on a piece of real property, which the Defendant had allegedly left off of the trust accounting. Record at 12. However, it has been conclusively shown that the property in question was owned personally by the Defendant and was not trust property. *Id.* at 102; *see* Record at 585.

[60] Record at 590.

"A chancellor has considerable discretion over matters of discovery, and [this Court should] not disturb those decisions absent an abuse of discretion." *In re Dissolution of Marriage of Leverock & Hamby*, 23 So. 3d 424, 432 (¶ 26) (Miss. 2009). Stated differently, "[m]atters of discovery are left to the sound discretion of the trial court, and discovery orders will not be disturbed unless there has been an abuse of discretion." *Scoggins v. Baptist Mem'l Hosp.-Desoto*, 967 So. 2d 646, 648 (¶ 8) (Miss. 2007).

In an Agreed Order entered May 5, 2008, Defendant agreed to provide Plaintiffs with "an accounting of all trust transactions, activities, assets, income, debits, etc. of the Loleta B. Wing Trust from July 15, 2005, when he became a Co-Trustee, to the present.[61] In addition, he also agreed to "provide such an accounting for the period January 1, 1999 to July 16, 2005 and shall make such requests as necessary to gather as much information about such period as reasonably necessary to produce such an accounting."[62] However, prior to July 16, 2005, the Defendant was not a Co-Trustee for the Trust.[63] Thus, Defendant consented to make reasonable efforts to provide information related to the Trust from the past decade in hopes that Plaintiffs would, as they had done before, dismiss their case once presented with exonerating evidence. Despite the extreme breadth of Plaintiffs' requests, Defendant provided all discovery pursuant to the trial court's order.[64] Plaintiffs, though, were never satisfied.

Furthermore, affidavits executed in both 2005 and 2007 ratified all transactions taken on behalf of the Trust.[65] These were done, ironically, to prevent the exact situation we are in today. Thus, not only did Defendant agree to make reasonable requests and provide all information

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[61] Record at 72.
[62] Record at 72.
[63] *Id.*
[64] Record at 588-89. In his Opinion, the trial court found that Defendant had provided the requested information, to the extent reasonable and practical, pursuant to his order. *Id.* at 588. Judge Roberts noted that after Plaintiffs requested accounting information, "defendant responded to the request and there was no further complaint until plaintiffs' [last] Motion to Compel," filed 903 days after the accounting was provided. *Id.* at 589.
[65] Record at 636-37, 501-04.

judged reasonable and necessary under the circumstances, he agreed to do so for periods for which he was not legally required and for transactions for which were legally ratified.[66] All this equated to substantial spending by Defendant to gather this information and make the required requests, all without a single penny from the Plaintiffs in violation of *their* obligations under the Trust Agreement.[67]

For over seven years, Plaintiffs were provided with thousands of pages of accounting, subpoenaed voluminous financial records, and deposed the Defendant.[68] Through all of these efforts, they have been unable to produce any evidence of overreaching by Defendant. During this same time, when confronted with the inconvenient truth, Plaintiffs have consistently reverted back to the same argument, stating that their motions to compel show excusable delay. However, reactionary conduct does not cure an unreasonable delay. *See Hill*, 3 So. 3d at 122 (¶ 7).

The dates of Plaintiffs' motions alone show sufficient delay to warrant dismissal.[69] Plaintiffs' first motion to compel was filed on July 1, 2008, shortly after the filing of the lawsuit.[70] Their second motion to compel was filed on November 20, 2008, in response to Defendant's Motion for Summary Judgment, filed eight days earlier.[71] Their third and final motion to compel was not filed under December 21, 2010, over two years from the date of their previous motion, and almost three years from the date they filed suit.[72] This motion, like the others, was filed in direct response to action taken by Defendant, namely the filing of his Motion to Dismiss, to bring this matter to conclusion.[73]

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[66] Record at 106 (¶ 13).
[67] Record at 145-46 (emphasis added).
[68] Record at 587.
[69] *See* Docket.
[70] Record at 77.
[71] Record at 129.
[72] Record at 523.
[73] Record at 588.

Furthermore, as discussed *supra*, this issue is without merit. The March 23, 2011, hearing was for both the Motion to Dismiss and Plaintiffs' Motion to Compel.[74] In his Opinion, the trial court concluded that Defendant had provided an acceptable accounting based on a totality of the circumstances.[75] Thus, the sufficiency of the accounting is not the issue before this Court today.

One can discern from the record, taken in light of the history and nature of this almost seven-year controversy, that Plaintiffs have systematically relied on this argument to delay prosecuting their claim. Since 2005, Plaintiffs, time after time, have claimed they were not provided with enough information to proceed with trial.[76] But when it seemed convenient to do so – such as when facing dismissal, Plaintiffs' abandoned this stance, and argued that they had been ready to try the case the whole time and wanted to proceed forward.[77] *How convenient.* If Plaintiffs were, in fact, ready to go to trial, it was *their* responsibility – not Defendant's – to bring this to the court's attention, and file a motion to set the case for trial. *See Hanson v. Disotell*, 2010–CA–01169–COA, at *5 (¶ 20) (Miss. Ct. App. 2011).[78] Plaintiffs' dilatory conduct cannot be countenanced.

c. Facts Supporting Dismissal Are Undisputed

The record substantially supports the trial court's conclusions that the facts were undisputed at the hearing or thereafter.[79] "A trial judge cannot be put in error on a matter not presented to him. This Court repeatedly has held that issues not raised at trial cannot be raised on appeal." *Southern*, 853 So. 2d at 1214-15 (¶ 5) (citations omitted). While Plaintiffs' counsel may have disagreed with what had been presented, they failed to make specific objections or

[74] Transcript at 114.
[75] Record at 588.
[76] *See* Discussion *supra*.
[77] Transcript at 136; Record at 589-90.
[78] Record at 589-90.
[79] Record at 589.

direct the trial court to where, exactly, these alleged inaccuracies were.[80] Thus, because Plaintiffs' failed to object to the presentation of facts and evidence at trial or thereafter, they should be procedurally barred from raising this point on appeal. *Id.*

Following the hearing on Defendant's Motion to Dismiss and Plaintiffs' Motion to Compel, the trial court asked defense counsel to provide the court with a timeline chart of what had been discussed at the hearing.[81] Plaintiffs made no objection and did not request to submit a substitute timeline. Moreover, Plaintiffs received the chart at the exact same time as the trial court and failed to raise any errors with the court.[82] It is the movant party's responsibility to raise errors with the trial court or bring them to the court's attention, and a failure to do so will result in a waiver of the same. *See e.g. Albert v. Allie Glove Corp.*, 944 So. 2d 1, 7 (¶ 21) (Miss. 2006); *Purvis v. Barnes*, 791 So. 2d 198, 202 (¶ 8) (Miss. 2002). Instead, Plaintiffs in this case sat idly by and choose to raise the error to this Court only after their case was dismissed.

d. The Date of the Defendant's Deposition Is Irrelevant at This Posture

The date of Defendant's deposition was not the only consideration taken into account by the trial court, and its timing has little to do with the court's ruling. Even with action of record occurring in January, the trial court found a clear record of delay in this case.[83] Defendant's deposition did have to be postponed on separate occasions.[84] However, at these depositions – but before postponement, Plaintiffs failed to ask any questions related to the accounting or trust finances – the very information they continuously claimed they needed from Defendant.[85]

Regardless of this, the trial court did not abuse its discretion, moreover commit manifest error, when it stated, "almost the complete year of 2010" passed "between defendant's

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[80] *See* Transcript at 127 where Plaintiffs' counsel stated that he did not "think" the Defendant's timeline was completely accurate but did not – then or ever – designate the errors with the court.
[81] Record at 589.
[82] Record at 623. Copies of the letter and timeline were distributed to all counsel of record.
[83] Record at 589 ("The Court finds as fact a clear record of delay.").
[84] Transcript at 125.
[85] *Id.*

deposition and the filing of the Motion to Dismiss."[86] From January 8 to December 21 is 347 days (11 months and 13 days). Said another way, the interval period of inactivity was approximately 95% for the year 2010.[87] As such, the trial court did not commit manifest error when it concluded that "almost the complete year of 2010" passed "between the defendant's deposition and the filing of the Motion to Dismiss."[88] Certainly, 95% can be considered "almost."

e. Plaintiffs' Motion to Compel Was Filed in Response to the Defendant's Motion to Dismiss

It was not an abuse of discretion for the trial court to conclude that Plaintiffs' Motion to Compel was filed in response to Defendant's Motion to Dismiss.[89] As discussed, the trial court was in the best position to determine exactly what happened – or failed to happen. In support of their argument, Plaintiffs insist that their Motion to Compel could hardly have been in response to the Motion to Dismiss because they emailed defense counsel a week before the Motion to Dismiss was filed.[90] While cooperation among parties is certainly necessary in litigation, the failure to take action to prosecute a case rests on the plaintiff's shoulders. *See Hasty v. Namihira*, 986 So. 2d 1036, 1040 (¶ 17) (Miss. Ct. App. 2008). Any way you look at it, Plaintiffs failed to take any affirmative action for virtually the entire year of 2010, even considering emails or "renewed requests." When they finally did, though, it was not diligent conduct to bring resolve to the matter. *See Hensarling v. Holly*, 972 So. 2d 716, 721 (¶ 17) (Miss. Ct. App. 2007). Simple correspondence, on its own, after essentially a year of dormancy, is not sufficient prosecution to overrule a trial court's findings. If that were the case, Rule 41(b) would be, for all practical purposes, dead letter.

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[86] Record at 589.
[87] Three hundred and forty-two divided by three hundred and sixty-five equals 0.95068493.
[88] Record at 589.
[89] Record at 588.
[90] Appellants' Brief at 21.

Plaintiffs' argument that the trial court improperly faulted Plaintiffs for not setting the case for trial is misplaced. While they repeatedly argue that the delay in not setting the case for trial is attributable to Defendant, they fail to recognize their own responsibility (or duty) to prosecute their claim. *See Hanson*, 2010–CA–01169–COA, at *5 (¶ 20). As could be expected, this would require setting a case for trial.[91] It was their responsibility to prosecute the case, not the defendant's or anyone else's. *See* Miss. R. Civ. P. 41(b).

f. The Trial Court's Conclusion That the Case Had Been Delayed Is Wholly Supported by the Evidence

On appeal, Plaintiffs raise ire to the trial court's conclusion that "[n]o action, of substance, was taken by the plaintiffs in the months and years leading up to the Motion to Dismiss."[92] In this case, the trial court was in the best position to assess the factual issues involved and scrutinize the actions taken by the parties, as the same chancellor presided over both cases related to this appeal. Because of this, it was not an abuse of discretion for the court to conclude that the Plaintiffs failed to take any substantive action for over a year, even considering what was recorded on the docket.[93] Even so, no action of record transpired from January 7 to December 21 – 95% of an entire year – until the Defendant filed his Motion to Dismiss.[94] Understandably, the trial court was displeased with the dilatory conduct of Plaintiffs, and was completely within its discretion when it dismissed their case due to the delay.[95]

In their brief, Plaintiffs ask this Court to reverse the trial court's decision because the court incorrectly "put the burden of persuasion on the [Plaintiffs] even though it was [the Defendant's] obligation to prove all the facts necessary to establish that an involuntary dismissal

[91] Record at 589-90.
[92] Record at 589.
[93] *Id.*
[94] Appellants' Brief at 22.
[95] Record at 589.

was appropriate."[96] Again, Plaintiffs decline to accept responsibility for their inaction. Defendant presented substantial evidence to the trial court that a dismissal was warranted. However, in response, Plaintiffs failed to offer the court anything to establish an excuse for their dilatoriness. *See Holder*, 54 So. 3d at 196-200 (¶¶ 15-34) (affirming trial court's dismissal with prejudice). Dismissal for failure to prosecute is not an *ex parte* motion – Plaintiffs were given the opportunity to state their position.[97]

If Plaintiffs were, in fact, taking substantive action to prosecute their case, it was their responsibility to bring these matters to the trial court's attention, not Defendant's or anyone else's. Based on this, it was certainly not an abuse of discretion for the trial court to consider the substantive actions taken by Plaintiffs when establishing whether the case presented a clear record of delay and ultimately that Defendant's motion should be granted.

III. The Trial Court Applied the Correct Legal Analysis and Accurately Examined the Relevant Factors When Granting the Defendant's Motion to Dismiss

Mississippi Rule of Civil Procedure 41(b) permits defendants to move for dismissal of any action "[f]or failure of the plaintiff to prosecute...." MISS. R. CIV. P. 41(b). "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." *Hillman v. Weatherly*, 14 So. 3d 721, 726 (¶ 17) (Miss. 2009) (citing *Cucos Inc. v. McDaniel*, 938 So. 2d 238, 240 (Miss. 2006)). "The power to dismiss is granted not only by Rule 41(b), but is part of a trial court's inherent authority...." *Cox*, 976 So. 2d at 874 (¶ 13).

"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 the plaintiff has been guilty of dilatory or contumacious conduct." *Miss. Dep't of Human Servs. v. Guidry*, 830

[96] Appellants' Brief at 22.

[97] "A motion made to the court without notice to the adverse party; a motion that a court considers and rules on *without hearing from all sides*." BLACK'S LAW DICTIONARY (8th ed. 2005).

So. 2d 628, 632 (¶ 13) (Miss. 2002) (citing *Watson*, 493 So. 2d at 1278) (internal quotations omitted). "What constitutes a failure to prosecute is considered on a case-by-case basis." *Cox*, 976 So. 2d at 874 (¶ 14) (Miss. 2008). This Court has set forth factors to be weighed in determining whether a Rule 41(b) dismissal should be affirmed: (1) whether there was a clear record of delay or contumacious conduct by the plaintiff; (2) whether lesser sanctions may have better served the interests of justice; and (3) the existence of other aggravating factors. *Id.* (citing *AT&T*, 720 So. 2d at 181 (¶ 13) (citing *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir. 1982)). While these factors should be considered, "[f]actors other than delay are *not* required." *Holder*, 54 So. 2d at 192 (¶ 20) (emphasis added). "The standard is whether there is a clear record of delay or contumacious conduct by the plaintiff." *Id.* In sum:

> [T]his Court may uphold a Rule 41(b) dismissal when there is: (1) a clear 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.
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> *Holder*, 54 So. 3d at 197 (¶ 18).

Defendant acknowledges, "dismissals for want of prosecution are...employed reluctantly." *AT&T*, 720 So. 2d at 180 (¶ 12). But in situations as the one before this Court, where plaintiffs have been afforded ample opportunity to pursue their claim and for whatever reason do not, dismissal is justified. The trial court was fully apprised of the applicable law and weighed the relevant factors appropriately. The trial court's ruling is fully supported by the record and the transcript, and the court did not abuse its discretion when it granted Defendant's motion to dismiss Plaintiffs' case for failure to prosecute.

A. There was a Clear Record of Delay

This case presents a clear record of inexcusable delay, which is supported by substantial evidence from the record. Before Defendant filed his Motion to Dismiss, no action of record had

taken place for virtually an entire year.[98] Moreover, no substantive action had taken place for an even longer period of time – almost fifteen months. And this was Plaintiffs' second bite at the apple!

After practically a full year, Plaintiffs' first action of record came only after Defendant filed his Motion to Dismiss. This Court held that when determining whether plaintiffs' conduct is dilatory, consideration should be given to "whether the plaintiffs' activity was reactionary to the [defendant's] motion to dismiss, or whether the activity was an effort to proceed in litigation." *Holder*, 54 So. 3d at 198 (¶ 22) (citing *Hillman*, 14 So. 3d at 727 (¶ 21)). Plaintiffs' action in this case was clearly reactionary to Defendant's Motion to Dismiss. First, Plaintiffs failed to take any action – of record or substantive – until Defendant filed his Motion to Dismiss. Once Plaintiffs became aware of Defendant's intentions to file his motion, they immediately sought damage control by scheduling depositions and criticizing the conduct of defense counsel as the reason for the delay.[99] Defense counsel, though, did not fail to pursue his client's relief, Plaintiffs' counsel did. Furthermore, it is not, as Plaintiffs suggest, what occurs *after* a plaintiff is made aware that his or her case may be dismissed for failure to prosecute that is dispositive of such a motion; it is, instead, whether the case presents a clear record of delay due to a plaintiff's failure to prosecute *before* the case actually is subject to dismissal. *See* MISS. R. CIV. P. 41(b). Up to this point, Plaintiffs had only deposed one witness –Defendant – and had made no substantive efforts to take any others.[100] However, once faced with dismissal, Plaintiffs (then) took observable action to depose witnesses and set the case for trial.[101] The trial court, taking these considerations into account, felt that Plaintiffs' dilatory conduct before the motion was filed supported dismissal, and the record supports this conclusion. Additionally, it was not a

[98] *See* Docket, Table of Contents; Record at 589.
[99] *See* Docket; *See* Table of Contents for Record prepared for Appeal.
[100] Record at 589. Prior to the Defendant's Motion to Dismiss, Plaintiffs' had only deposed one witness – Jimmy Wing.
[101] *See supre* note 102.

clear error in judgment for the trial court to conclude that Plaintiffs' conduct was reactionary given the history of the litigation – all of which the chancellor had been a part of.

Moreover, it is "clear from the record that the delay was the result of the [Plaintiffs'] failure to prosecute the claim, rather than extrinsic factors beyond the control the [Plaintiffs']." *Barry*, 47 So. 3d at 694 (¶ 14). Throughout the seven-year history of this controversy, Defendant has provided all information in accordance with the trial court's order concerning the Trust accounting.[102] Nonetheless, Plaintiffs still try to blame this point of fact on the delay they actually caused. This has been the motif of the dispute.[103]

As the trial court noted, *Holder v. Orange Grove Medical Specialities. P.A.*, "lends strong support to the defendant's Motion [to Dismiss]."[104] In *Holder*, the trial court dismissed the plaintiffs' case for failure to prosecute after only one year and eight months on the docket. 54 So. 3d at 194 (¶ 1). The Court of Appeals reversed, finding delay, but held that the trial court erred when it did not impose lesser sanctions before dismissing the case. *Id.* This Court reversed the Court of Appeals and affirmed the trial court's ruling granting dismissal, finding a clear record of dilatory conduct by the plaintiffs. *Id.* at 197 (¶ 19). In *Holder*, the plaintiffs filed their medical-negligence claim on December 7, 2006. *Id.* at 195 (¶ 6). On February 12, 2007, Defendants answered and submitted discovery. *Id.* For the next few months, the parties exchanged correspondence regarding the outstanding discovery responses. *Id.* (¶ 6-9). On May 9, 2008, the Defendant filed his motion to dismiss, which was ultimately granted by the trial court. *Id.* at (¶ 10). The case in *Holder* was only on the docket one year and eight months, and the period of inactivity between the parties was less than a year. *Id.* at 196 (¶ 9-10).

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[102] Record at 585, 589-90.
[103] *See* Discussion at Section b.
[104] Record at 590.

In the present case, Plaintiffs failed to take any action to bring the case to resolution for over a year. Plaintiffs failed to depose *any witness*, other than Defendant, until after the Motion to Dismiss was filed.[105] Plaintiffs only attempted to prosecute their case when faced with having their case dismissed. This conduct, taking into account the nature and history of the claims and the prejudicial effect to Defendant, is far more egregious than plaintiffs' conduct in the *Holder* case. Considering the heavy financial burdens shouldered by Defendant to generate the accounting – all without any apportionment of costs between the parties[106], the substantial prejudice he will suffer without a necessary key witness, his mother, and the presumption of prejudice from years of persecution, the trial court appropriately concluded that dismissal was proper.

Plaintiffs assert that the almost one year delay is attributable, for the most part, to Defendant, in particular defense counsel's failure to set depositions or agree to a trial date.[107] A trial court can consider a defendant's own dilatory conduct in ruling on a Rule 41(b) motion. *Holder*, 54 So. 3d at 198 (¶ 23). In this case, the trial court, having presided over both cases between the parties, took this fact into consideration, but conclusively found that the delay in prosecution was caused by Plaintiffs' own conduct, not by any extrinsic factors.[108] Thus, Plaintiffs' contention that the "trial court erred in not considering whether Jimmy's own conduct contributed toward the delay..." is without merit.[109] This point was brought to the attention of the trial court during the March 23, 2011 hearing, and the court, accordingly, took this into consideration when ruling on the motion.[110]

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[105] Record at 589 (emphasis added) ("Prior to the filing of the Motion to Dismiss, plaintiffs had only deposed defendant.").
[106] Record at 141. Tennessee Code Annotated. § 35-15-813(a)(2) provides that "a qualified beneficiary shall reimburse the trustee for any reasonable expenses incurred in responding to requests for information." *Id.*
[107] Appellants' Brief at 21.
[108] Record at 589.
[109] Appellants' Brief at 25.
[110] Transcript at 130-31; Record at 583-92.

In *Hasty v. Namihira*, the Court of Appeals affirmed a trial court's dismissal under Rule 41(b) after the Hastys failed to prosecute their medical-malpractice suit. 986 So. 2d at 1041 (¶ 21). In finding clear dilatory conduct by the plaintiff, the Court of Appeals noted that the plaintiff failed to avail himself of the procedural devices available to advance the litigation. *Id.* at 1040 (¶ 17). The plaintiff in *Hasty* chose to correspond directly with defense counsel regarding potential deposition dates, instead of subpoenaing the witness. *Id.* The defendants in *Hasty* did not respond, and eventually filed a Motion to Dismiss. *Id.* at 1038 (¶ 5). In response, the plaintiffs argued against dismissal on the grounds that the delay in the case was attributable to defense counsel's failure to respond to the Hastys' inquiries. *Id.* at 1040 (¶ 17). Their argument was unpersuasive. According to the Court of Appeals, this "conduct can be classified as dilatory." *Id.* at 1041 (¶ 21). Inherent in a plaintiff's responsibility to prosecute his claim, is the obligation to do so in an expeditious manner. *See Holder*, 54 So. 3d at 196-97 (¶ 17). The Plaintiffs in this case have failed in this regard and now ask this Court to condemn the Defendant and his counsel for Plaintiffs' own inaction.

Plaintiffs try to overcome their failure to prosecute by confiding in their motions to compel and their argument that the Defendant not once had to file a motion to compel against them – this, according to the Plaintiffs, somehow precludes a finding of delay.[111] However, these motions, in and of themselves, demonstrate explicit delay. As mentioned, these motions were filed in direct response to positive action taken by Defendant after prolonged periods of inactivity.[112] Furthermore, each was imprudent, as they were nothing more than a baseless fishing expedition. Plaintiffs cannot be passively inert and, when faced with the prospect of dismissal, argue that – from inception – their dormancy was the Defendant's fault.

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[111] Appellants' Brief at 25.
[112] *See* Part *e*.

In addition, Defendant does not believe that the absence of a motion to compel is, in any way, indicative of zealous prosecution. Besides, additional discovery by Defendant – under the circumstances – was not warranted.[113] Simply because a defendant may choose not to file a motion to compel against a plaintiff is not a valid reason to reverse a trial court's granting of that defendant's motion to dismiss. The absence of these motions does not demonstrate diligent conduct by a plaintiff. As briefed above, the duty to prosecute lies with the plaintiff, not a defendant. *See* MISS. R. CIV. P. 41(b).

Plaintiffs direct this Court to *Jackson Public School Dist. v. Head ex rel. Russell*, 2009-IA-020220-SCT (Miss. 2011), reminding us that the delay must be the result of the plaintiff's failure to prosecute the case. *Id.; see also Barry*, 47 So. 3d at 693 (¶ 14). The *Head* case is an excellent example of the importance of Rule 41 with respect to the trial court's inherent authority to control its docket and manage its own cases. In *Head*, the trial court found a clear record of delay in the plaintiffs' prosecution of their case after almost three years of inactivity. *Id.* at 765 (¶ 14). However, Judge Green found such a delay excusable given the circumstances of the case. *Id.* In response to the motion to dismiss, the plaintiff adequately explained the reasons for the delay, noting illness and personal issues with counsel. *Id.* at (¶ 15). In this case, Plaintiffs' failed to explain the reason for their delay or offer a reasonable excuse, as counsel did in *Head*.[114] Rather than presenting reasons for the significant delay to the court, Plaintiffs, instead, criticized Defendant's conduct, overlooking their own nonfeasance in the process.[115] Again, it appears as if Plaintiffs misunderstand the design of Rule 41(b): what occurs after the motion is filed is irrelevant; it is, rather, the applicable delay *before* the motion is filed that is material to a Rule 41(b) ruling, and was ultimately fatal to Plaintiffs case. *See* Miss. R. Civ. R. 41(b)

[113] Record at 144.
[114] *See Head*, 67 So. 3d at 765-66 (finding counsel adequately explained by delay should be excused).
[115] Record at 567. Counsel for Plaintiffs argued that defense counsel was being uncooperative since he would not agree to a trial date before the hearing on his motion to dismiss.

(emphasis added). In response and at the hearing, Plaintiffs did not meet their burden in proving the delay was excusable, as the plaintiff did in *Head*. Thus, the two scenarios are distinguishable.

In *Barry v. Reeves*, this Court affirmed in part and reversed in part a trial court's ruling which dismissed a plaintiff's legal malpractice claim against his attorney. 47 So. 3d at 696 (¶ 21). In *Barry*, reversal was justified, as there was no clear record of delay or contumacious conduct on the part of the plaintiff, and the trial court failed to even consider lesser sanctions before granting the defendant's motion to dismiss. *Id.* This Court found a number of factual findings significant: the trial court erroneously stated that no discovery had been conducted when, in fact, both parties had participated in discovery; the trial court erroneously stated that the plaintiff failed to prosecute his claim after a pending stay was lifted when it was the plaintiff who had the stay lifted; and that the trial court was in error when it failed to even mention that the plaintiff filed a motion to set the case for trial and for additional relief. *Id.* at 693 (¶ 11). Furthermore, the trial court in *Barry* failed to note that each period of inactivity in litigation was actually interrupted by substantive action by the plaintiff, not the defendant, unlike the case in this action. *Id.* at 694 (¶ 15). The positive acts included the plaintiff's motion to set the case for trial, a motion for status conference and certain correspondence sent directly to the court, inquiring into his pending motions. *Id.* Plaintiffs in this case have done none of these. Moreover, the delays in *Barry* were caused by forces outside the control of the plaintiff – such as a receivership and the trial court's refusal to rule on pending motions. *Id.* at (¶ 16).

As evidenced by the record and the transcript, this case is clearly distinguishable from *Barry*. First, Judge Roberts's Opinion does not contain any relevant omissions as the trial court did in *Barry*. Second, it is undisputed in this case that the delay is attributable solely to the

Plaintiffs' dilatory conduct.[116] "This was all but admitted by plaintiffs at the hearing."[117] Furthermore, it was not, as the case was in *Barry*, extrinsic factors beyond Plaintiffs control which created or contributed to this delay, it was their own dilatory conduct. *See Barry*, 47 So. 3d at 694 (¶ 14).

In conjunction with the above, at the hearing on Defendant's Motion to Dismiss, Plaintiffs' counsel stated their case was ready to go to trial.[118] If that was the case, it was *their* responsibility to bring this to the trial court's attention, *i.e.* by filing a motion to set trial or other record. *See Hanson*, 2010-CA-01169-COA, at *5 (¶ 20) (emphasis added). In a recent Court of Appeals decision, *Hanson v. Disotell*, the Court of Appeals found meritless a plaintiff's argument that a delay in prosecution due to counsels' inability to agree to a trial date was excusable. *Id.* A plaintiff has the ability to file a motion to set the case for trial, and the undeniable responsibility for doing so to prosecute a case. *Id.* "It was [the plaintiff's] responsibility to prosecute his case," the Court continued, "not the defendants' or the circuit court's." *Id.* (citing *Cox*, 976 So. 2d at 880 (¶ 50)).

In *Cox v. Cox*, this Court affirmed a chancellor's granting of a motion to dismiss under Rule 41(b), as the case presented a clear record of delay, lesser sanctions were considered by the court and the defendant faced substantial prejudice due to her mother's inability to testify. 976 So. 2d 880 (¶ 56). *Cox* involved a lawsuit between siblings regarding an inter vivos transfer of property from a mother to her daughter. *Id.* at 872 (¶ 1). In *Cox*, the trial court dismissed the plaintiff's case, after almost ten full years of inactivity, in view of the extensive delay and the resulting prejudice to the defendant due to the unavailability of her mother – the party who made the challenged transfer – to testify. *Id.* at 873 (¶ 8). Although the delay in *Cox* was longer than

[116] Record at 589.
[117] *Id.*
[118] Transcript at 136.

the delay in this case, the standard that governs our trial courts is the same. One of the plaintiff's main arguments in *Cox* was that dismissal was improper because the plaintiff in *Cox* had taken affirmative steps to set the case for trial by contacting counsel opposite. *Id.* at 879-50 (¶50). Specifically, the *Cox* plaintiffs stated that it would be "incongruous for the plaintiff to have taken the first action toward having the matter set for trial and then reward the defendant for her failure to do so." *Id.* "Yet," this Court held, "the responsibility to prosecute a case rests with the plaintiff, not the defendant." *Id.* (citing MISS. R. CIV. P. 41(b)). Plaintiffs have this responsibility, not defendants, and it is because the Wing Plaintiffs failed to fulfill this duty that the trial court found a clear record of delay and dismissed their case. A dilatory party should be held accountable for its inaction.

Plaintiffs argue they "have found no case which would support the trial court's ruling that the delay alone in this case is sufficient to warrant dismissal with prejudice."[119] But "[w]hat constitutes a failure to prosecute is considered on a case-by-case basis." *Cox*, 976 So. 2d at 874 (¶ 14). And, in this case, the trial court found that Plaintiffs' delay in prosecution, together with the consideration of lesser sanctions and the presence of certain aggravating factors, warranted dismissal.[120] By all means, the absence of good case law (or a case precisely on point) does not, in turn, equate to negative case law. Defendant believes that every case cited by both parties lends support to dismissal.

Plaintiffs cite *Vosbein v. Bellias*, 866 So. 2d 489 (Miss. Ct. App. 2004), for the proposition that the trial court erred when it did not impose lesser sanctions before dismissal.[121] That is not the law: there is no requirement that a trial court actually impose lesser sanctions.

[119] Appellants' Brief at 24.
[120] Record at 589-91.
[121] Appellants' Brief at 28.

The only requirement is that they be considered. *AT&T*, 720 So. 2d at 181 (¶ 17). Plaintiffs' point is without merit.

B. Lesser Sanctions Were Considered

Dismissal is proper when lesser sanctions would not better serve the interests of justice. *AT&T*, 720 So. 2d at 181 (¶ 17). "Lesser sanctions include 'fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings.' " *Cox*, 976 So. 2d at 876 (citing *AT&T*, 720 So.2d at 181–82) (quoting *Wallace v. Jones*, 572 So. 2d 371, 377 (Miss. 1990)). Lesser sanctions must *only be considered*, as they are not prerequisites for a Rule 41(b) dismissal. *AT&T*, 720 So. 2d at 181 (¶ 17) (emphasis added). "Where there is no indication in the record that the lower court considered any alternative sanctions to expedite the proceedings, appellate courts *are less likely to uphold a Rule 41(b) dismissal. Id.* (emphasis added).

In the present case, the trial court considered but ultimately rejected lesser sanctions.[122] As previously mentioned, the chancellor – Judge Roberts – was in a unique position relative to these proceedings, whereas he presided over the Plaintiffs' 2005 suit, which involved the same parties, the same relative period of time, the same subject matter and most, if not all, of the same witnesses and evidence as the present case.[123] In his Opinion, Judge Roberts found it particularly suspect that Plaintiffs chose to dismiss their claims when Defendant's key material witness – Mrs. Loleta Wing – was still alive and would testify against Plaintiffs.[124] Based on all that had not occurred to this point, Judge Roberts concluded that "fines, costs, damages against plaintiffs

[122] Record at 591 ("Finally, the Court is of the opinion and belief that a lesser sanction would not better serve the interests of justice.").
[123] Record at 585.
[124] Record at 591.

or their counsel, or explicit warnings" were not suitable remedies, because they would not be able to cure the prejudice caused by the delay.[125]

Plaintiffs raise four (4) specific errors concerning the trial court's consideration of lesser sanctions.[126] First, Plaintiffs' complain it was error for the trial court to classify their two cases brought against the same Defendant, both alleging he acted improperly towards his mother, his family and the Trust, as similar.[127] This point has been addressed *supra* and is meritless. Second, Plaintiffs claim that the most significant transactions did not occur until March 2007.[128] However, Defendant produced substantial evidence – sworn affidavits from attorneys who interviewed Mrs. Wing – that ratified the transactions, negating any suggestion of wrongdoing.[129] Third, Plaintiffs allege the trial court erred when it concluded Plaintiffs had done "precious little" to prosecute their claim.[130] As stated, the chancellor in this matter was in the best position to make these factual determinations and such findings should not be disrupted because they are now unfavorable to Plaintiffs' case. Fourth and last, Plaintiffs state that, if trial court was so concerned about delay, it should have entertained Plaintiffs request for a trial setting.[131] It should go without saying that this argument would effectively turn Rule 41(b) into dead letter. Plaintiffs did not file a motion for a trial setting or take any other affirmative action to set the case for trial. Furthermore, this contention seeks a ruling that every trial court considering a 41(b) dismissal, faced with a clear record of delay, as here, simply deny the motion and set the case for trial to (in some way) cure the delay. This would be entirely improper under our case law and the guidance of our appellate courts.

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[125] Record at 591.
[126] Appellants' Brief at 29.
[127] *Id.*
[128] *Id.*
[129] Record at 122-27.
[130] Appellants' Brief at 29.
[131] *Id.*

Plaintiffs have failed to present any evidence showing that the chancellor abused his discretion when he considered imposing lesser sanctions but conclusively found that they would not better serve the interests of justice. Aside from that, Defendant has suffered actual prejudice as a result of Plaintiffs' dilatory conduct. Since 2005, Defendant has been forced to spend substantial amounts to produce the accounting and other matters associated with the case, all without as much as a penny from Plaintiffs – violating their statutory duty.[132] Additionally, it would be rash to assume that memories and recollections regarding specific transfers and transactions and daily interactions among the parties have not been lost or forgotten. *See Holder*, 54 So. 3d at 200 (¶ 30). Moreover, Defendant would be at a material disadvantage due to his inability to have certain key witnesses testify because of death or relocation.[133] The trial court did not abuse its discretion when considering lesser sanctions.

C. Additional Considerations of Prejudice and Aggravating Factors

Aggravating factors may bolster a case for dismissal, but they are not required. *Hasty*, 986 So. 2d at 1041 (¶ 20) (citing *Hine v. Anchor Lake Property Owners Ass'n, Inc.*, 911 So. 2d 1001, 1006 (¶ 22) (Miss. Ct. App. 2005)). Aggravating factors may include: (1) whether the delay was caused by the party as opposed to his counsel; (2) whether there was actual prejudice to the opposing party; and (3) whether the delay was an intentional attempt to abuse the judicial process. *AT&T.*, 720 So. 2d at 182 (¶ 19). "These considerations, however, are not a prerequisite to dismissal under Rule 41(b)." *Holder*, 54 So. 3d at 199 (¶ 27). Delay *alone* may suffice. *Cox*, 976 So. 2d at 875 (¶ 17) (emphasis added). Even cases that lack the presence of any aggravating factors, which are dismissed under Rule 41(b), can be upheld on appeal. *See Hasty*, 986 So. 2d at 1041 ¶ (21).

[132] Record at 145-46.
[133] Transcript at 126.

"Actual prejudice may arise when, because of the delay, witnesses become unavailable or the memories of witnesses fade." *Cox*, 976 So. 2d at 877-79 (¶¶ 29-44). Actual prejudice is a very important consideration, but, as this Court held in *Holder*, the precise issue of whether actual prejudice did or did not occur in a case such of this is of no consequence. *See Holder*, 54 So. 3d at 199-200 (¶ 29). Either way, the result would be the same: dismissal is warranted. *Id.*

In *Holder*, this Court held that "[a]ctual prejudice is not a requirement for dismissal under Rule 41(b), however prejudice may be presumed from unreasonable delay." 54 So. 3d at 199 (¶ 28) (citing *Cox*, 976 So. 2d at 876-79). "This presumed prejudice strengthens the defendants' case for dismissal under Rule 41(b)." *Id.* at 200 (¶ 30). "The issue of whether actual prejudice did exist in this case is of no moment," the *Holder* Court affirmed, "because the result would be the same." *Id.* In this case, Defendant suffered actual prejudice as a result of the delay, as several key witnesses will be unavailable to testify. *See id.* at 200 (¶ 29) (*See supra*). Certainly, Mrs. Wing's death is more prejudicial than mere speculation of memory loss or the inconvenience of locating witnesses. *See Head*, 67 So. 3d at 766 (¶ 19). Of course, Defendant's case will require detailed testimony from periods dating back to 1999, and it would be gullible to assume that memories have not faded over a decade. *Id.* In *Holder*, counsel intended to rely on evidence notably similar to what must be presented in this matter – independent recollections of patient interaction. *See id.* On appeal, the *Holder* Defendants failed to put forth specific evidence that key witnesses would, in fact, be unavailable to testify or that their memories had actually faded. *Id.* Notwithstanding, this Court upheld the trial court's dismissal: "Despite the defendant's failure to present evidence of witnesses' fading memories, we find that the *delay alone may result in prejudice to the defendant.* This presumed prejudice strengthens the defendants' case for dismissal under Rule 41(b)." *Id.* at (¶ 30) (emphasis added).

Defendant presented substantial evidence proving he would suffer actual prejudice due to the inability of certain witnesses to testify should this case be allowed to proceed. Furthermore, taking into account the relevant time periods applicable to the case, Defendant is certainly entitled to a presumption of prejudice as this Court found in *Holder*.[134]

Plaintiffs again cite *Head*, arguing that the *Head* Court found it significant that no proof was ever presented that the delay was due to intentional conduct by the plaintiffs.[135] While intentional conduct should be taken into consideration when ruling on a Rule 41(b) motion, intentional conduct is not the standard by which our trial courts must adhere; it is only an aggravating factor. *See Cox*, 976 So. 2d at 875 (¶ 17). Defendant introduced sufficient evidence that the presence of certain aggravating factors bolstered the case for dismissal. Lastly, it is difficult to see how attorney discipline, fines, or even a dismissal without prejudice would serve the best interests of justice in this case. There is absolutely no evidence to support an argument that the case would be prosecuted any differently if it were reinstated. Moreover, the delay is clearly prejudicial to Defendant and it would not serve the best interest of justice to remand this case and start anew. Thus, the trial court did not abuse its discretion when it granted Defendant's Motion to Dismiss for Want of Prosecution.

[134] Record at 590.
[135] Appellants' Brief at 31.

CONCLUSION

Trial courts have the inherent power to dismiss a plaintiff's case for failure to prosecute. This power is necessary for courts to control their own dockets and manage their own caseloads. These decisions should be afforded considerable deference and only be overturned upon a showing that the trial court abused its discretion.

In this case, the trial court was presented with evidence that Plaintiffs' conduct was dilatory, that lesser sanctions would not better serve the interests of justice due to the prejudicial effect on Defendant, and the existence of aggravating factors bolstered the case for dismissal. Based on this, the trial court granted Defendant's Motion to Dismiss.

The trial court applied to correct legal analysis and properly weighed the relevant factors in determining whether dismissal was warranted under Rule 41(b). Furthermore, the record substantially supports the trial court's conclusions. Thus, the trial court did not abuse its discretion when it granted Defendant's Motion to Dismiss.

Respectfully Submitted, this the 27th day of December, 2011

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