IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-00021-COA

NELL CORNELIUS **APPELLANT**

v.

DR. DONALD W. BENEFIELD, INDIVIDUALLY AND AS SHAREHOLDER OF BENEFIELD EYECARE, PC **APPELLEE**

DATE OF JUDGMENT:	12/21/2011
TRIAL JUDGE:	HON. JOHN C. GARGIULO
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	W. THOMAS MCCRANEY III WILLIAM BONNEY BARDWELL WILLIAM MONROE QUIN II RICKY O. AMOS
ATTORNEYS FOR APPELLEE:	STEPHEN GILES PERESICH LAUREN REEDER MCCRORY JOHANNA MALBROUGH MCMULLAN
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	DISMISSED APPELLANT'S CASE FOR FAILURE TO PROSECUTE
DISPOSITION:	AFFIRMED - 09/03/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

CARLTON, J., FOR THE COURT:

¶1. The issue presented in this case is whether the trial court abused its discretion in dismissing Nell Cornelius's medical-malpractice claim with prejudice, pursuant to Mississippi Rule of Civil Procedure 41(b), for failure to prosecute. The trial court found dismissal was warranted because of a clear record of delay by Cornelius; prejudice to the defendant, Dr. Donald Benefield; and aggravating circumstances. The record shows that

Cornelius repeatedly failed to cooperate with discovery requests; failed to timely disclose known witnesses, including an expert witness relevant to the factual basis of her claim; delayed in moving the case forward for fifteen months; and failed to schedule a deposition for nearly five years. Finding no abuse of discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. In early 2007, Dr. Benefield recommended that Cornelius undergo cataract surgery in both eyes. According to Cornelius's complaint, Dr. Benefield successfully performed the first surgery on her left eye. However, on February 6, 2007, a complication occurred during surgery on her right eye, resulting in a choroidal hemorrhage and detached retina. She underwent surgery with a vitreo-retinal specialist, who was able to partially correct the damage. Cornelius asserts her vision was 20/30 in her right eye prior to the cataract surgery, but she is now effectively blind in that eye.

¶3. On February 6, 2009, two years after the cataract surgery on her right eye, Cornelius filed a medical-malpractice action against Dr. Benefield, individually and as shareholder of Benefield Eye Care PC, in the Circuit Court of Harrison County. The following timeline, based on the chronology listed in the trial court's judgment, sets forth the actions of record leading to the dismissal of this case:

February 6, 2007	Dr. Benefield performed cataract surgery on Cornelius's right eye.
February 6, 2009	Cornelius filed her complaint against Dr. Benefield, alleging medical negligence for injuries sustained to her right eye.
May 28, 2009	Cornelius served Dr. Benefield with process.

June 22, 2009	Dr. Benefield filed an answer to Cornelius's complaint.
July 24, 2009	Cornelius filed a certificate of expert consultation.
September 25, 2009	Dr. Benefield filed a "Motion to Dismiss for Failure to Comply with [Mississippi] Code [Annotated section] 15-1-36(15)[1] and Motion to Dismiss for Failure to State a Claim pursuant to Miss. R. Civ. P. 12(b)(6)."
September 30, 2009	Dr. Benefield propounded his first set of discovery.
October 15, 2009	Dr. Benefield filed a "Motion to Compel Waiver of Medical Privilege."
December 7, 2009	Dr. Benefield filed an "Amended Motion to Dismiss for Failure to Comply with [section] 15-1-36(15)."
December 21, 2009	Dr. Benefield moved to compel discovery.
January 28, 2010	The trial court entered an order requiring Cornelius to respond to Dr. Benefield's first set of discovery by February 9, 2010.
February 11, 2010	Cornelius responded to Dr. Benefield's first set of discovery requests.
February 22, 2010	Dr. Benefield filed a "Motion to Dismiss for Violation of Court Order Requiring Discovery with Combined Memorandum Brief," alleging

[1] Mississippi Code Annotated section 15-1-36(15) (Rev. 2012) requires a plaintiff to give sixty days' notice prior to suing a health-care provider for medical negligence. The plaintiff must "notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered." *Id.* Cornelius sent notices on March 24, 2008, and December 5, 2008. However, the notices only state that Cornelius suffered "loss of her eyesight in her right eye" as a result Dr. Benefield's negligence during the February 6, 2007 cataract surgery. Dr. Benefield's motion argued this was insufficient.

	"the Plaintiff failed to disclose a scintilla of proof supporting [her] claims."
March 16, 2010	Cornelius filed a combined response to Dr. Benefield's motions to dismiss.
March 25, 2010	The trial court entered an order requiring Cornelius to "fully and completely respond to [Dr. Benefield's] first set of discovery requests within fourteen days."
March 29, 2010	Dr. Benefield filed a "Rebuttal [Motion] in Support of Motion to Dismiss for Failure to Comply with [section] 15-1-36(15) and Motion to Dismiss for Violation of Court Order Requiring Discovery."
April 8, 2010	Cornelius supplemented her discovery responses.
April 21, 2010	Cornelius propounded her first set of discovery.
June 7, 2010	Dr. Benefield responded to Cornelius's first set of discovery requests.
July 26, 2011	Co-counsel entered an appearance for Cornelius.
November 9, 2011	Dr. Benefield filed a motion to dismiss for failure to prosecute.
November 9, 2011	Dr. Benefield filed a notice of hearing on the motion to dismiss for failure to prosecute, setting the hearing for December 8, 2011.
November 30, 2011	Cornelius filed a motion for extension of time to respond to Dr. Benefield's motion to dismiss.
November 30, 2011	The trial court entered an order granting Cornelius an extension of time through December 1, 2011, to file a response to Dr. Benefield's motion to dismiss.
December 1, 2011	Cornelius filed her response to Dr. Benefield's motion to dismiss and moved to set a trial date.

December 1, 2011	Cornelius submitted her second supplemental responses to Dr. Benefield's first set of discovery.
December 6, 2011	Dr. Benefield filed a reply in support of his motion to dismiss for failure to prosecute, objected to Cornelius's counter-motion to set a trial date, and moved to strike Cornelius's expert report.
December 7, 2011	Dr. Benefield filed a supplemental motion to dismiss for failure to prosecute and moved, in the alternative, to strike Cornelius's newly filed expert report and affidavits.
December 8, 2011	The trial court held a hearing on Dr. Benefield's motion to dismiss for failure to prosecute.

¶4. Following the December 8, 2011 hearing on Dr. Benefield's Rule 41(b) motion, the trial court dismissed the case with prejudice, finding a clear record of delay, prejudice to Dr. Benefield, and aggravating circumstances. Cornelius appeals, asserting the trial court abused its discretion in dismissing her action when lesser sanctions would have sufficed.

STANDARD OF REVIEW

¶5. A trial court's involuntary dismissal under Rule 41(b) is reviewed for abuse of discretion. *Hanson v. Disotell*, 106 So. 3d 345, 347 (¶9) (Miss. 2013); *Am. Tel. & Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 180 (¶12) (Miss. 1998). A dismissal under Rule 41(b) is for failure of the plaintiff to prosecute or failure of the plaintiff to comply with the rules of civil procedure or any order of the court. *See* M.R.C.P. 41(b). The trial court's findings of fact will be affirmed "unless the findings are manifestly wrong." *Jackson Pub. Sch. Dist. v. Head ex rel. Russell*, 67 So. 3d 761, 765 (¶10) (Miss. 2011) (quoting *Barry v. Reeves*, 47 So. 3d 689, 693 (¶9) (Miss. 2010)).

¶6. Regarding the grant of dismissals for want of prosecution, the Mississippi Supreme Court has held:

> The law favors trial of issues on the merits, and dismissals for want of prosecution are therefore employed reluctantly. There is no set time limit for the prosecution of an action once it has been filed, but where the record shows that a plaintiff has been guilty of dilatory or contumacious conduct, or has repeatedly disregarded the procedural directives of the court, such a dismissal is likely to be upheld.

Vosbein v. Bellias, 866 So. 2d 489, 493 (¶6) (Miss. Ct. App. 2004) (quoting *Watson v. Lillard*, 493 So. 2d 1277, 1278 (Miss. 1986)).

DISCUSSION

¶7. Rule 41(b) states in relevant part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." The purpose of this rule is to provide trial judges the "inherent authority to dismiss cases . . . as a means of controlling the court's docket and ensuring expeditious justice." *Hanson*, 106 So. 3d at 347 (¶8). The following factors are considered when reviewing a Rule 41(b) dismissal: "(1) a record of dilatory or contumacious conduct by the plaintiff; and (2) a finding . . . 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." *Holder v. Orange Grove Med. Specialties, P.A.*, 54 So. 3d 192, 197 (¶18) (Miss. 2010). We will consider each factor separately.

1. Record of Delay or Contumacious Conduct

¶8. "Rule 41(b) dismissals with prejudice will be affirmed only upon a showing of 'a clear record of delay or contumacious conduct by the plaintiff[.]'" *Am. Tel.*, 720 So. 2d at 181

(¶13) (quoting *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982)). "What constitutes failure to prosecute depends on the facts of the particular case." *Id.* at (¶12). Although other factors are typically present when a dismissal with prejudice is upheld, "delay alone may be sufficient[.]" *Holder*, 54 So. 3d at 201 (¶34).

¶9. Cornelius's complaint was filed on February 6, 2009, exactly two years after the alleged malpractice, and Cornelius served Dr. Benefield with process on May 28, 2009, near the end of the allotted 120 days. *See* M.R.C.P. 4(h). Dr. Benefield timely answered and later filed for discovery on September 30, 2009. After Cornelius failed to respond to discovery within thirty days, Dr. Benefield sent a good-faith letter on November 30, 2009, requesting the responses. When no responses were sent, on December 21, 2009, Dr. Benefield filed a motion to compel, and the trial court ordered Cornelius to respond to the discovery propounded by Dr. Benefield by February 9, 2010. On February 11, 2010, two days after the deadline, Cornelius filed her responses. Of the twenty-one interrogatories propounded, Cornelius answered four, only providing her name, age, date of birth, address, and social security number; her deceased spouse's name and the date of his death; her work history (she had not worked in ten years); and some of the names of her medical providers. Cornelius produced no documents in response to the request for production of documents, which sought the production of twenty-four documents.

¶10. Dr. Benefield filed a motion to dismiss based on Cornelius's untimely responses and also argued Cornelius's delinquent responses were insufficient. The trial court denied the motion to dismiss, but the trial court agreed that the responses provided by Cornelius were insufficient. On March 25, 2010, the trial court demanded that Cornelius "fully and

completely respond" within fourteen days.[2] On April 8, 2010, nearly six months after the discovery was initially requested, Cornelius supplemented her responses, but, again, provided insufficient and incomplete responses. No substantive information was given regarding the factual basis of her claim against Dr. Benefield. The supplemental responses included an expert report prepared by Dr. Noel Elgut. However, the report was a short, one-paragraph statement that failed to give a medical opinion supporting causation or Cornelius's allegation that Dr. Benefield had breached the standard of care.

¶11. The next action of record was Cornelius's untimely request for discovery. Uniform Rule of Circuit and County Court 4.04 states that "[a]ll discovery must be completed within ninety days from service of an answer by the applicable defendant." Dr. Benefield filed his answer on June 22, 2009, and Cornelius propounded discovery approximately ten months later on April 21, 2010. While Rule 4.04 allows additional time for discovery "upon written motion setting forth good cause," no such motion was filed by Cornelius to allow her to propound discovery late. No other action of record was taken by Cornelius, with the exception of co-counsel entering an appearance fifteen months later on July 26, 2011.

¶12. The record then reflects that Cornelius delayed in responding to the motion to dismiss for failure to prosecute. On November 9, 2011, after receiving no communication from Cornelius since April 21, 2010, Dr. Benefield moved to dismiss the action. *See* M.R.C.P. 41. Uniform Rule of Circuit and County Court 4.03 allows ten days to respond to a motion to dismiss. On November 30, 2011, twenty-one days after Dr. Benefield's motion to dismiss

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[2] Again, the underlying discovery requests were submitted by Dr. Benefield on September 30, 2009.

was filed, instead of filing a response, Cornelius submitted an untimely request for additional time to file a response. The trial court granted the motion for additional time, despite the motion's untimeliness, giving Cornelius until December 1, 2011, to respond. On December 1, 2011, Cornelius filed her response. On this same day, three weeks after the motion to dismiss was filed, Cornelius, for the first time, provided supplemental discovery responses with detailed allegations of negligence forming the basis of her cause of action. The supplemental responses included disclosure of an expert report from a newly designated expert, Dr. Phillip C. Smith, and disclosure of affidavits of two new fact witnesses, Cornelius and her daughter. Cornelius failed to disclose this information previously in her discovery responses, despite the information being requested, and despite both her and her daughter's knowledge of this relevant factual information about the claim since before the inception of the case.

¶13. Our supreme court has held "that repeated failures to comply with discovery requests warrant dismissal with prejudice." *Holder*, 54 So. 3d at 198 (¶21); *see also Beck v. Sapet*, 937 So. 2d 945, 949-51 (¶¶8-15) (Miss. 2006) (case dismissed with prejudice after plaintiff violated multiple orders compelling discovery); *Hillman v. Weatherly*, 14 So. 3d 721, 726 (¶19) (Miss. 2009) (case dismissed after plaintiff failed to respond to "numerous requests" for discovery by defendant). Likewise, a dismissal with prejudice "is likely to be upheld" where the plaintiff is "guilty of dilatory or contumacious conduct, or has repeatedly disregarded the procedural directives of the court . . . ." *Watson*, 493 So. 2d at 1279 (internal citation omitted). Cornelius eventually responded to discovery, but only after a good-faith letter, two court orders, and a motion to dismiss. Even when given two deadlines to respond

to discovery, Cornelius still responded late once and both times gave incomplete responses. Cornelius also took no action of record from April 21, 2010, to July 26, 2011—a delay of fifteen months. The action taken on July 26, 2011, was not a substantive action to move the case forward but, rather, the entry of appearance by co-counsel.[3] The next action was taken on November 30, 2011, in response to Dr. Benefield's motion to dismiss—approximately nineteen months after Cornelius filed for discovery on April 21, 2010. Cornelius argues these calculations fail to account for the time Dr. Benefield utilized in responding to discovery. She argues that after subtracting Dr. Benefield's response time, the actual delay was twelve months. However, this argument lacks merit, as even a twelve-month delay could have subjected Cornelius to dismissal, given the court's finding of reactionary and dilatory conduct by Cornelius. *See* M.R.C.P. 41(d)(1).

¶14. A review of precedent reflects that in *Holder*, the plaintiffs failed to respond to discovery despite repeated requests, and "allowed the case to languish on the docket without any activity for more than a year." *Holder*, 54 So. 3d at 199 (¶24). In upholding the dismissal for failure to prosecute, our supreme court noted that the "plaintiffs' counsel made no attempt to move for a continuance to allow for more time to answer the defendants' discovery requests." *Id.* The supreme court further noted that "[t]here is nothing contemptuous or contumacious about requesting continuances." *Id.* (quoting *Miss. Dep't of Human Servs. v. Helton*, 741 So. 2d 240, 243 (¶13) (Miss. 1999)). Like in *Holder*, Cornelius

[3] It is significant to note that this was an addition of counsel rather than a substitution of counsel. Cornelius has been represented by the same attorney since the inception of this case. Thus, the trial court correctly found that the entry of appearance was irrelevant in the untimely prosecution of this case.

allowed the case to languish on the docket for over a year; she made no request for additional time to respond to discovery; and she repeatedly failed to submit timely responses. Cornelius delayed in responding to discovery from September 30, 2009, until February 11, 2010, when she provided the incomplete responses. Further, Cornelius failed to provide the supplemental responses that disclosed the basis for her medical-negligence claim until December 1, 2011—over two years after the responses were requested.

¶15. Precedent reflects that when looking at the plaintiff's activity in prosecuting a case, this Court "also may consider whether the plaintiff['s] activity was reactionary to the defendant['s] motion to dismiss, or whether the activity was an effort to proceed in the litigation."*Holder*, 54 So. 3d at 198 (¶22). With respect to the reactionary conduct in this case, Cornelius failed to disclose the factual basis for her suit until December 1, 2011, approximately three weeks *after* the motion to dismiss was filed. Also, on this day, for the first time, she moved to set a trial date. The reactionary disclosures provided in the December 1, 2011 supplemental responses included two affidavits, which were both signed on November 22, 2011—approximately two weeks after Dr. Benefield filed the November 9, 2011 motion to dismiss. Further, while Dr. Smith's expert report was undated, Cornelius's counsel admitted at the December 8, 2011 hearing on the motion to dismiss that the report was prepared "two weeks ago"—that is, two weeks prior to the hearing and approximately two weeks after the motion to dismiss was filed.

¶16. The record shows that the trial court determined that Cornelius disclosed the factual basis of her claims and that she and her daughter were the fact witnesses only in reaction to Dr. Benefield's motion to dismiss, instead of providing timely discovery or timely

supplemental discovery. Cornelius's November 22, 2011 affidavit states that as she awoke from anaesthesia on the day of her surgery, she "heard Dr. Benefield say that he had to call someone to assist him with the procedure he performed on [her] eye." According to Cornelius's daughter's affidavit, while her mother was in surgery, Dr. Benefield came to the waiting room and explained that there were "complications with the surgery"; her "mother's eye [had] started to bleed"; "he had trouble getting the bleeding to stop"; and "he called one of his colleagues after the bleeding started[,] and the colleague was able to walk him through the procedure to get the bleeding under control." Also, Cornelius's daughter recalled that while Cornelius's first cataract surgery on her left eye took "approximately 15 minutes," the surgery on her right eye took four hours. Dr. Smith's report, which referenced the two affidavits, opined that Dr. Benefield "lacked the skill, training and expertise to competently assess and perform" the procedures to correct the damage done to Cornelius's eye during surgery. In his opinion, "had Dr. Benefield conformed to the standard of care, Mrs. Cornelius would not have suffered this harm [to her eye,] and . . . under the care of a vitreo-retinal specialist, she would have more likely than not experienced a better outcome."

¶17. As stated, the trial court found that the affidavits and expert report were "reactionary" to the motion to dismiss since these documents were not prepared until after the motion was filed, and that the affidavits were prepared only in an attempt to defeat Dr. Benefield's motion to dismiss. The information provided in the affidavits by the fact witnesses and in the expert report had been available to Cornelius since the inception of the case, and Dr. Benefield had requested the relevant information since he first propounded discovery on September 30, 2009. Even if the information was not available on September 30, 2009, when

it was first requested, Cornelius possessed a duty to timely supplement her responses. *See* URCCC 4.04. The trial court determined Cornelius intentionally delayed disclosing this relevant information until December 1, 2011—one week before the hearing on the motion to dismiss.

¶18. Cornelius gives no explanation for the multiple delays in this case or the dilatory disclosure of relevant factual information in her possession about the basis of her claim. Rather, Cornelius urges this Court to consider Dr. Benefield's lack of effort "to move this case forward since serving his discovery responses in June[] 2010." Specifically, she states that Dr. Benefield could have propounded new discovery, requested discovery supplementation, noticed a deposition, requested a deposition date from her, or provided a scheduling order. Cornelius is correct that "a defendant's own dilatory conduct may be considered when dismissing an action." *Holder*, 54 So. 3d at 198 (¶23) (citing *Salts v. Gulf Nat'l Life Ins. Co.*, 872 So. 2d 667, 670 (¶4) (Miss. 2004)). However, the test provided in *American Telephone & Telegraph Co.* "focuses on the plaintiff's conduct, not on the defendant's efforts to prod a dilatory plaintiff into action." *Hillman*, 14 So. 3d at 727 (¶22) (citing *Am. Tel.*, 720 So. 2d at 181 (¶13)). The record shows no dilatory conduct on behalf of Dr. Benefield, and Dr. Benefield possessed no duty to prosecute Cornelius's case for her or prod her into action. Thus, there is no merit to this assertion.

¶19. Rule 41(b) dismissals are determined on a case-by-case basis, as "[t]here is no set time limit on the prosecution of an action once it has been filed[.]" *Am. Tel.*, 720 So. 2d at 180 (¶12). However, we acknowledge the discretion given to the trial court in making the appropriate factual findings regarding the delay. *Id.* The record clearly shows that there

were multiple instances of inexcusable delay in the prosecution of this case. Cornelius took over six months to respond to discovery, responding only after a good-faith request and two court orders. When she finally responded, she submitted incomplete discovery responses, and she violated multiple court orders by filing untimely responses. Cornelius failed to begin her own discovery until ten months after Dr. Benefield filed his answer, well beyond the ninety-day deadline set by Uniform Rule of Circuit and County Court 4.04(a). She took no action in the prosecution of her case for fifteen months after filing for discovery, and she took only the nominal action of an entry of appearance by a co-counsel. She failed to timely reply to Dr. Benefield's motion to dismiss within ten days as required by Rule 4.03(2), and she did not move to set a trial date or disclose the basis for her medical-negligence claim until three weeks after the motion to dismiss for failure to prosecute was filed. On this basis, we find substantial evidence existed to support the trial court's finding of a clear record of delay and contumacious conduct.

2. Lesser Sanctions

¶20. Next, we must consider whether a sanction lesser than dismissal would have sufficed. *Hanson*, 106 So. 3d at 347 (¶9). While "delay or contumacious conduct provides a sufficient basis for a trial judge to dismiss pursuant to Rule 41(b)," the trial judge should also consider whether "a lesser sanction would . . . serve the best interests of justice." *Hanson*, 106 So. 3d at 347 (¶9) (citing *Holder*, 54 So. 3d at 198 (¶20)). "Lesser sanctions may include 'fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings.'" *Id.* at 347-48 (¶9). These sanctions will not suffice if they do not cure the prejudice caused by the delay. *Cox v. Cox*,

976 So. 2d 869, 876 (¶26) (Miss. 2008).

¶21. The trial court considered lesser sanctions and determined such measures insufficient due to Cornelius's blatant "failure to adhere to the deadlines set by the Mississippi Rules of Civil Procedure and the Uniform Circuit and County Court Rules, her failure to timely respond to discovery, her failure to timely propound discovery, [and] her failure to prosecute her case for at least fifteen months . . . ." Cornelius acknowledged these failures before the trial court, but argued a warning or assessment of attorney's fees and costs would suffice for Dr. Benefield's "inconvenience." However, the trial court found lesser sanctions would not cure the prejudice suffered by Dr. Benefield due to the delayed and dilatory disclosure of the basis of her claim and witnesses related to her claim. The trial court found that Dr. Benefield attempted on multiple occasions to compel discovery before filing and pursuing the Rule 41(b) motion to dismiss. Due to the passage of time, the trial court reasoned that "[t]he information and memory of events surrounding this litigation have grown stale, . . . especially in light of the fact that no depositions have been taken," and this prejudice could not be cured by lesser sanctions. Cornelius delayed in disclosing this relevant information and the relevant witnesses despite her prior knowledge of such and despite prior discovery requests and court orders to respond to discovery requests. We cannot find the trial judge erred in finding lesser sanctions were not appropriate.

¶22. Despite the claims of Cornelius that the trial court failed to give lesser sanctions, the trial court gave multiple extensions of time and provided an "explicit warning," which is a form of a lesser sanction. *See Hanson*, 106 So. 3d at 348 (¶9). As previously discussed, after Cornelius failed to respond to initial discovery requests within thirty days, the trial court

issued an order on January 28, 2010, giving Cornelius until February 9, 2010, to respond. Cornelius responded two days late on February 11, 2010, giving only partial responses. Dr. Benefield moved to dismiss the action, but the trial court overruled the motion in a March 25, 2010 order, allowing Cornelius an additional fourteen days to respond. But the trial court warned:

> Failure to do so will result in the Plaintiff facing further sanctions. It is further ORDERED AND ADJUDGED that should the Plaintiff fail to make full and complete disclosures as ordered . . . , this matter may be called up by the Defendants for further hearing before this Court for consideration of dismissal.

Even after Dr. Benefield filed his motion to dismiss for failure to prosecute, Cornelius continued to engage in dilatory conduct by requesting an extension of time eleven days late. However, despite Cornelius's failure to timely move for an extension of time, the trial court allowed Cornelius additional time to respond.

¶23. The trial court gave Cornelius multiple opportunities to correct her deficiencies, but she failed to do so and instead continually submitted incomplete and untimely responses. These failures prejudiced Dr. Benefield, as he was left filing multiple motions to dismiss for discovery violations and eventually filing and defending his motion to dismiss for failure to prosecute. Also, as the trial court found, no lesser sanction could be imposed for the prejudice caused by the delay in disclosing this relevant information since memories undoubtedly had faded over the nearly five-year delay. We find the record supports the finding that lesser sanctions would not have served the best interest of justice in this case, and the record reflects no abuse of discretion by the trial court in the dismissal of this case pursuant to Rule 41(b).

3. Aggravating Factors

¶24. Although not required, aggravating factors "may help to bolster or strengthen a defendant's case in support of dismissal." *Holder*, 54 So. 3d at 199 (¶27). Aggravating factors may "include 'the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct.'" *Am. Tel.*, 720 So. 2d at 181 (¶13) (quoting *Rogers*, 669 F.2d at 320). "[P]rejudice may be presumed from unreasonable delay." *Holder*, 54 So. 3d at 199 (¶28) (citing *Cox*, 976 So. 2d at 876-79 (¶¶23-44)).

¶25. The medical procedure at the basis of this suit was performed on February 6, 2007. As of November 9, 2011, when the motion to dismiss was filed, Cornelius had provided no substantive discovery answers or information as to the factual basis of her medical-negligence claim. As of December 8, 2011, when the motion to dismiss was heard, no depositions had been taken. The trial court reasoned as follows in finding the nearly five-year delay from the time of the alleged negligence was prejudicial to Dr. Benefield:

> [T]here is a natural tendency for memories to fade. Lengthy litigation creates unique issues regarding evidence and witnesses' memories. The information and memory of events surrounding this litigation have grown stale, which has resulted in prejudice to the Defendants, especially in light of the fact that no depositions have been taken.

¶26. The record shows that the trial court concluded Cornelius had acted delinquently and dilatorily in the disclosure of the factual basis of her claim and relevant witnesses. The trial court concluded that the delay prejudiced Dr. Benefield in the defense of this case, with faded memories and lack of ability to discover the identity of relevant witnesses. Also, the record reflect Cornelius's conduct has shown that additional warnings or lesser sanctions

than dismissal would not have been effective. Not only were there lengthy periods of inactivity, but the trial court found that Cornelius was uncooperative and dilatory in adhering to deadlines, complying with court orders, responding to discovery, and propounding discovery. We, therefore, find no abuse of discretion by the trial court in dismissing this case in accordance with Rule 41(b).

¶27. **THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

BARNES, ISHEE, ROBERTS AND FAIR, JJ., CONCUR. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY ROBERTS AND FAIR, JJ. JAMES, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY LEE, C.J., AND GRIFFIS, P.J.; JAMES, J., JOINS IN PART.

MAXWELL, J., SPECIALLY CONCURRING:

¶28. While I am not swayed by all parts of the majority's analysis, after reviewing our supreme court's decisions in *Holder v. Orange Grove Medical Specialties, P.A.*,[4] and *Hanson v. Disotell*,[5] I do agree that the judgment of dismissal must be affirmed. But much like Justice Pierce, who wrote separately in *Holder*, I too "have some discomfort with the decision of the trial court," particularly since the cited delays here are relatively slight and Cornelius's new counsel was working to move the case forward when it was dismissed. *Holder*, 54 So. 3d at 201 (¶38) (Pierce, J., specially concurring).

¶29. However, this court's ultimate agreement or disagreement with the trial judge's

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[4] *Holder v. Orange Grove Med. Specialties, P.A.*, 54 So. 3d 192 (Miss. 2010).

[5] *Hanson v. Driscoll*, 106 So. 3d 345 (Miss. 2013).

dismissal is not a factor in our deferential review of Rule 41(b) dismissals. Nor does the possibility that another "reasonable trial judge very well might have denied the defendant's motion to dismiss" provide a basis for reversal. *Hanson*, 106 So. 3d at 348 (¶13).[6] Instead, we review for abuse of discretion. *Id.* And after adhering to this review, I find *Holder* and the supreme court's more recent decision in *Hanson* support the Rule 41(b) dismissal.

¶30. I do find it worth noting, however, that *Holder* marks a shift in how appellate courts must apply the test for deciding whether a trial judge abused his or her discretion in granting a motion to dismiss for failure to prosecute. Before *Holder*, because of the severity of denying a litigant his or her day in court, appellate courts typically only affirmed dismissals for failure to prosecute in "the most egregious of cases, . . . where the requisite factors of clear delay and ineffective lesser sanctions are bolstered by the presence of at least one of the aggravating factors," such as actual prejudice to the defendant. *Am. Tel. & Tel Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (¶¶12-13) (Miss. 1998) (citations omitted).

¶31. But in *Holder*, the supreme court relaxed the necessity of finding "[a]dditional 'aggravating factors' or actual prejudice." *Holder*, 54 So. 3d at 197 (¶18). The court emphasized "'[d]elay *alone* may suffice' for a dismissal under Rule 41(b)." *Holder*, 54 So. 3d at 198 (¶20) (quoting *Cox v. Cox*, 976 So. 2d 869, 875 (¶18) (Miss. 2008)). It also applied the two remaining requirements—(1) a clear record of delay and (2) a consideration of whether lesser sanctions would better serve the interest of justice—in a manner highly

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[6] *See also Holder*, 54 So. 3d at 201-02 (¶¶36-38) (Pierce, J., specially concurring) (separate opinion—joined at least in part by a majority of the supreme court—emphasizing whether appellate judge is in "agreement or disagreement" with trial judge's decision to dismiss does not factor into "deferential review" of Rule 41(b) dismissals).

deferential to the trial judge, determining a dismissal based solely on delays in responding to discovery was within the trial judge's discretion. *Id.* at 197-98 (¶¶18, 20), 200-01 (¶¶32-33).

¶32. I certainly understand, however, why Cornelius and the dissent cite as support *Jackson Public School District v. Head ex rel. Russell*—a unanimous supreme court opinion handed down just eight months after *Holder* that affirmed the denial of a motion to dismiss for failure to prosecute, which did not reference *Holder* but instead applied the former aggravating-factors test. *Jackson Pub. Sch. Dist. v. Head ex rel. Russell*, 67 So. 3d 761 (Miss. 2011). But upon review, I find that rather than signaling a retreat from *Holder*, it appears *Russell* was merely a flash in the pan—as a majority of the supreme court, in its most recent review of a dismissal for failure to prosecute, *Hanson*, 106 So. 3d 345, did not even mention *Russell*'s application of the aggravating-factors test. Instead, the *Hanson* majority returned to *Holder* to affirm a trial judge's Rule 41(b) dismissal. *Hanson*, 106 So. 3d at 347-48 (¶¶8-14). And the view from *Russell* that Cornelius argues here—that the aggravating-factors test should have been applied to prevent the "extreme and harsh sanction" of dismissal with prejudice—was relegated to the *Hanson* dissent. *Id.* at 349 (¶18) (Kitchens, J., dissenting).

¶33. If anything, the *Hanson* majority appears to have broadened the trial court's discretion to dismiss with prejudice for failure to prosecute. Gone is the language from *Holder* that affirming a dismissal requires a "clear record of delay" and a determination by the *appellate court* that a lesser sanction would not have served the interest of justice. *Compare Hanson*, 106 So. 3d at 347-48 (¶¶9-14), *with Holder*, 54 So. 3d at 197-99 (¶¶18-25), 200-01 (¶¶32-33). Instead, *Hanson* characterizes *Holder* as saying "that either *delay* or contumacious

conduct *provides a sufficient basis for a trial judge to dismiss* pursuant to Rule 41(b), provided that the trial judge finds that a lesser sanction would not serve the best interests of justice." *Hanson*, 106 So. 3d at 347 (¶9) (emphasis added) (citing *Holder*, 54 So. 3d at 198 (¶20)). It is also worth mentioning that the *Hanson* majority deferred to the trial court's determination that the plaintiff failed to prosecute the case, but did not even deem it necessary to discuss the trial court's finding that lesser sanctions would not suffice. *See id.* at 348 (¶¶12-13).

¶34. But these varying precedents aside, the bottom line in our case-by-case discretionary review of Rule 41(b) dismissals is that it is not for the judges of this court to decide whether we agree or disagree with a trial judge's determination of whether the circumstances of delay warrant the "extreme and harsh sanction" of dismissal with prejudice. Rather, a consistent thread in *Hanson* and *Holder* is that the decision of when a plaintiff's actions or inactions reach this "most egregious of cases" category falls *exclusively* within the purview of the trial judge. And "we must affirm the trial judge unless we find he abused his discretion." *Hanson*, 106 So. 3d at 348 (¶13). Since here, like *Holder*, there was evidence of delay in responding to discovery and pursuing the medical-malpractice case, it appears the trial judge had discretion to dismiss. Thus, I agree with the majority's holding that the trial judge did not abuse his discretion in dismissing the case.

ROBERTS AND FAIR, JJ., JOIN THIS OPINION.

IRVING, P.J., DISSENTING:

¶35. The majority finds that the circuit court did not abuse its discretion in dismissing with prejudice Cornelius's medical-malpractice complaint against Dr. Benefield. In my opinion,

the record does not support a Rule 41(b) dismissal. Therefore, I dissent. I would reverse the circuit court's judgment and remand this case for a trial on the merits.

¶36. Let me be clear, I am well aware that the plaintiff shoulders the primary responsibility for moving the case forward once the complaint is filed. However, as the majority notes and then disregards, "[t]here is no set time limit on the prosecution of an action once it has been filed," and "the law favors a trial of the issues on the merits[.]" *Holder v. Orange Grove Med. Specialities, P.A.*, 54 So. 3d 192, 196-97 (¶¶16-17) (Miss. 2010) (citations omitted). Additionally, our supreme court has reiterated that "dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases." *Id.* at 197 (¶17) (quoting *Hoffman v. Paracelsus Health Care Corp.*, 752 So. 2d 1030, 1034 (¶11) (Miss. 1999)). I do not think that the conduct or the delay in this case is sufficient to justify a dismissal with prejudice.

¶37. Our supreme court has stated that to affirm on appeal a circuit court's dismissal pursuant to Rule 41(b), "[i]t must be clear from the record that the delay was the result of the plaintiff's failure to prosecute the claim, rather than extrinsic factors beyond the control of the plaintiff." *Barry v. Reeves*, 47 So. 3d 689, 694 (¶14) (Miss. 2010). Furthermore, "[d]ismissals for want of prosecution typically are affirmed only when there is a clear record of delay or contumacious conduct *enhanced by at least one* aggravating factor, and lesser sanctions would be ineffective." *Jackson Pub. Sch. Dist. v. Head ex rel. Russell*, 67 So. 3d 761, 765 (¶11) (Miss. 2011) (emphasis added) (citing *Am. Tel. & Tel. Co. v. Days Inn of Winona*, 720 So. 2d 178, 181 (¶13) (Miss. 1998)).

¶38. While it cannot be denied that this case could have progressed through the system faster than it has, there is no indication that the delay was Cornelius's fault, rather than that of her counsel. For example, counsel, not the plaintiff, is responsible for responding to discovery and scheduling depositions. Based on the record before this Court, it cannot be said that Cornelius's failure to prosecute the case against Dr. Benefield is not attributable to "extrinsic factors" beyond her control.

¶39. Also, there is no evidence of any aggravating factor strengthening Dr. Benefield's case for dismissal. The majority seemingly recognizes that the delay was not the result of any intentional conduct by Cornelius but cites prejudice to Dr. Benefield to support the dismissal of Cornelius's complaint. Specifically, the circuit court and the majority point to fading memories surrounding the incident to justify a finding of prejudice. The record is devoid, in my opinion, of any evidence of prejudice to Dr. Benefield. There is no evidence that any identified witness or potential witness in this case would be unable to recall the events surrounding this incident. Interestingly enough, the fact witnesses in this case would be few—Dr. Benefield, his operating-room staff, and Cornelius's daughter, Barbara Trotter. Surely, Dr. Benefield would remember if he adhered to the applicable standard of care while performing surgery on Cornelius's eye.

¶40. The majority also mentions the fact that no depositions had been taken prior to Dr. Benefield's motion to dismiss and assumes that the absence of timely depositions supports a finding that Dr. Benefield has been prejudiced. This reasoning assumes (1) that there are critical witnesses supporting Dr. Benefield's defense, (2) that he would have received a benefit had those witnesses been timely deposed, and (3) that now he will be denied that

benefit because the memories of those witnesses have failed. Again, I note that Dr. Benefield is the only witness who would have been qualified to testify as to what occurred during Cornelius's eye surgery. Cornelius's attorneys had already received a copy of Dr. Benefield's records and notes and did not expect his testimony to conflict with his records, as a deviation from what is written in the records could have meant disaster for Dr. Benefield's defense against this claim.

¶41. Nevertheless, the majority concludes that because the surgery occurred five years ago, Dr. Benefield has suffered prejudice as a result of fading memories. "Although prejudice can be presumed [from] unreasonable delay, the preference for a decision on the merits must be weighed against any presumed prejudice to the defendant[,] and the court may . . . excuse [the] plaintiff's lack of diligence in the absence of any actual prejudice to the defendant." *Russell*, 67 So. 3d at 767 (¶23) (quoting *Cox v. Cox*, 976 So. 2d 869, 876 (¶44) (Miss. 2008)) (internal quotation marks omitted). In my opinion, the delay in bringing this case to trial is not unreasonable or inexcusable; there is no prejudice to Dr. Benefield; and any "presumed prejudice" does not outweigh the preference for a decision on the merits.

¶42. Inasmuch as I would find an absence of prejudice to Dr. Benefield as a result of the passage of time since the surgery, I would likewise find that lesser sanctions against Cornelius would "better serve the interests of justice." *Id.* at 766 (¶17) (citation omitted). At the hearing on the motion to dismiss, Dr. Benefield argued that the "intentional withholding of critical relevant evidence that is set forth in Cornelius's and Trotter's affidavit[s]" supported his contention that no sanction other than dismissal with prejudice would remedy the prejudice that he suffered. Dr. Benefield has never specifically identified

how these affidavits prejudice his ability to prepare for a trial on the merits. It does not require much imagination to conclude that Cornelius would give testimony adverse to Dr. Benefield, and if he wanted pretrial notice of Cornelius's testimony so he could be prepared to rebut it, he could have taken her deposition. Further, based on the contents of Cornelius's and Trotter's affidavits, only Dr. Benefield could rebut what they said in them. Regardless, it is difficult to understand why the statements in either affidavit would be detrimental to Dr. Benefield's defense, as neither affidavit impacts the ultimate issue in the case—whether or not he adhered to the standard of care in performing Cornelius's surgery. Furthermore, there is no evidence that Cornelius's failure to submit her affidavit or to disclose Trotter as a witness was an intentional act, as Dr. Benefield's attorney claimed. In the absence of any prejudice to Dr. Benefield, I find no justification for the imposition of the extreme sanction of dismissal of the complaint with prejudice.

¶43. I understand that some members of the majority may view our supreme court's rulings in *Holder* and *Hanson v. Disotell*, 106 So. 3d 345 (Miss. 2013), as restrictions on this Court's ability to determine whether a circuit court has abused its discretion in granting a Rule 41(b) motion. However, because "[m]otions for failure to prosecute are considered on a case-by-case basis[,]" we are not confined by the *Holder* ruling. *Holder*, 54 So. 3d at 197 (¶17) (citations omitted). The facts in *Holder* were more egregious than the facts before us. In *Holder*, after a one-year-and-eight-month delay, repeated failures to comply with discovery requests, repeated avoidance of numerous good-faith letters, and repeated failures to meet deadlines set by the rules of court, the circuit court dismissed the plaintiff's complaint with prejudice. *Id.* at 194-96 (¶¶1-12). Our supreme court affirmed the dismissal, stating that

"[d]elay alone *may* suffice for a dismissal under Rule 41(b)." *Id.* at 198 (¶20) (emphasis added) (quoting *Cox*, 976 So. 2d at 875 (¶18)) (internal quotation marks omitted). The court found no actual prejudice, but presumed prejudice from the length of the delay, and found that lesser sanctions "in the present case would not serve the interests of justice." *Id.* at 200-01 (¶¶30-33).

¶44. Almost one year later, our supreme court revisited dismissals with prejudice. In *Russell*, the circuit court determined that the record clearly demonstrated delay, as the incident that served as the basis for the plaintiff's complaint had occurred seven years earlier. *Russell*, 67 So. 3d at 765 (¶14). However, it was clear from the record that the delay was due to factors beyond the plaintiff's control. *Id.* at 766 (¶16). Additionally, the court determined that the defendant had suffered no actual prejudice from the delay and that paying the costs of the reproduction of discovery documents would be a sufficient sanction against the plaintiff for the seven-year delay. *Id.* at 767 (¶25). Therefore, even though the delay was much longer than the delay in *Holder*, the court concluded that "the case need not be dismissed[.]" *Id.*

¶45. The only explanation, in my opinion, for the discrepancy between the *Holder* and *Russell* rulings is the presence of egregious conduct by the plaintiff. If not, then the *Russell* plaintiff would have suffered the same fate as the *Holder* plaintiff. That same distinction then—the absence of egregious conduct on the plaintiff's behalf—would keep this case from falling into the "delay alone may be sufficient" trap. While there has been a delay here, there is no evidence in the record that the delay is attributable to any intentional conduct by Cornelius. Dr. Benefield has not demonstrated that he has suffered any prejudice, and the

presumption of prejudice, if any, does not outweigh the preference for a decision on the merits. Lastly, though a warning may have been an ineffective sanction, other sanctions, such as fines, costs, or even striking Cornelius's and Trotter's affidavits, would have served the interests of justice and would have cured any prejudice to Dr. Benefield, if found.

¶46. Likewise, *Hanson*'s facts are noticeably more egregious than the essential facts in Cornelius's case. Thus, neither the *Hanson* ruling nor "our case-by-case discretionary review of Rule 41(b) dismissals," Spec. Conc. Op. at (¶34), alters my opinion that the circuit court abused its discretion in dismissing Cornelius's case with prejudice. In *Hanson*, the circuit court dismissed the plaintiff's complaint with prejudice after an eleven-year delay, the death of one of the defendants, and the relocation of certain witnesses. *Hanson*, 106 So. 3d at 348 (¶10). Additionally, our supreme court had issued a previous mandate in *Hanson*, remanding the case for trial, after which four years passed without the plaintiff taking any action of record. *Id.*

¶47. It is understandable why a delay of this magnitude alone—eleven years—might justify dismissing a case with prejudice. But, in my opinion, the delay in Cornelius's case—fifteen months—pales in comparison to the delay in *Hanson*. And even though our supreme court did not discuss "aggravating factors" in its analysis, they were clearly present, and would further justify a dismissal with prejudice. Unlike *Hanson*, however, all of this case's essential parties are still alive, and there is no evidence that other critical witnesses, if any, cannot be found. Despite what might appear to be inconsistencies between our supreme court's rulings regarding Rule 41(b) dismissals, the fact remains that dismissals with prejudice are reserved for the most egregious cases; and what is missing here is evidence of

egregiousness sufficient to justify denying Cornelius her day in court.

¶48. For the reasons stated, I dissent.

LEE, C.J., AND GRIFFIS, P.J., JOIN THIS OPINION. JAMES, J., JOINS THIS OPINION IN PART.