IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

KE'ASIA MAGEE (a minor), by and through Her Natural Father and Adult Next Friend, MAURICE MAGEE, **Plaintiff-Appellant**

v. **SC 2017-12**

MISSISSIPPI BAND OF CHOCTAW INDIANS, d/b/a Silver Star Resort and Casino, and JOHN DOES 1 through 10. **Defendant-Appellee**

OPINION AND ORDER

(Per Curium) This matter comes before the Court on direct appeal filed by the plaintiff below following the lower court's November 1, 2017 issuance of its 5-page Memorandum Opinion and Order dismissing her case that she had filed December 23, 2010. Her lawsuit named MBCI, d/b/a Silver Star Resort and Casino *et al.* as defendant. The claim filed under the Choctaw Tort Claims Act and was brought by the natural father on behalf of his then 13-year-old daughter. It alleged that on May 24, 2009 she was forcibly abducted and assaulted in defendant's Silver Star hotel. Her complaint alleges defendants "were in some manner negligently and proximately responsible for the events and happenings alleged" due to their inadequate security, maintenance, and operations.

PROCEEDINGS BELOW

Following Plaintiff's prerequisite exhaustion of her available administrative remedies under Title XXV of the Choctaw Tribal Code, Plaintiff on December 23, 2010 filed her complaint and First Set of Interrogatories and Requests for Production of Documents. Defendants' February 2, 2011 answer, together with Defendant's First Set of Interrogatories and First Request for Production of Documents Propounded to the Plaintiff were next duly filed of record with the court below. Notice of Service of Plaintiff's Responses to Defendant's Discovery were next filed by Plaintiffs August 16, 2011. Nothing material was filed of record over the next 6 years and 4+ months as the case lay dormant.[1]

[1] On 10/27/2015 Plaintiff's law firm did file a Notice of Appearance of new counsel for Plaintiff. It was actually a reassignment of new counsel from the law firm's Memphis office necessitated by a series of staff departures from the firm's Jackson, MS office. This, therefore, is not an instance where the court below needed to determine whether client-initiated actions to secure outside, substitute counsel may have constituted excusable delay such as is reviewed in *Cox v. Cox,* 976 So2d 869 (Miss. 2008).

On June 5, 2017 the lower court judge issued a Court's Motion to Dismiss for Want of Prosecution that notified counsel that the case had been recently acquired by him for resolution.[2] It also announced that the case would be dismissed by the court for want of prosecution 30 days from date of mailing the notice, unless, on or before the expiration of the 30 days, written application were to be made to the Court and good cause shown why it should be continued as a pending case; otherwise, if such application were not made or good cause not shown, the Court would dismiss the case with prejudice.

A flurry of filings were thereafter made. On June 30, 2017, Plaintiff's Application for Relief from the Court Motion to Dismiss for Want of Prosecution with attachments was file stamped. Plaintiff's Notice to Take Depositions and plaintiffs Motion to Compel responses to plaintiff's December 23, 2010 First Set of Interrogatories and Request for Production of Documents were likewise filed then. Defendant countered with an October 8, 2017 dated Defendant's Motion to Dismiss Pursuant to Rule 41(b) and Combined Supporting Memorandum. On October 24, 2017 Plaintiffs Response to Defendant's Motion to Dismiss and supporting affidavit were filed.

Arguments were then held on both the lower court's Motion to Dismiss for Want of Prosecution, Plaintiff's Application for Relief, and Defendant's Rule 41(b) Motion to Dismiss. The November 1, 2017 Memorandum Opinion and Order ultimately found that "Plaintiff's substantial delay warrants dismissal under Rule 41," and that "Plaintiff's claims herein are hereby dismissed with prejudice.

From this Memorandum and Order Plaintiff has taken her appeal. The case was duly briefed by both parties and oral arguments were held on March 28, 2019. This Court's opinion and order follows.

STANDARD OF REVIEW

This Court, like appellate courts of Mississippi, utilizes the abuse-of-discretion standard when reviewing a trial court dismissal for failure to prosecute. *Holder v. Orange Grove Med. Specialties, P. A.,* 54 So.3d 192, 196. (Miss. 2010). If a plaintiff files a civil lawsuit, then fails to pursue it, the trial court or defendant may move to dismiss for failure to prosecute. *Regan v. S. Cent. Med. Ctr,* 234 So3d 1242, 1243 (Miss. 2017). "The power to dismiss an action for want of

[2] Previously the Tribal Court civil division contracted for part-time services of two attorneys, but Judge Christopher Collins was appointed state District Court Judge by Gov. Bryant and Tribal Court Judge Jeffrey Webb assumed the additional duties of both.

prosecution is part of a trial court's inherent authority." *Wallace v. Jones,* 572 So.2d 371, 375 (Miss. 1990). That inherent authority is "a means necessary to the orderly expedition of justice and the court's control of its own docket." *AT&T v. Days Inn of Wynonna,* 720 So.2d 178, 180 (Miss. 1998) (citations omitted).

"A trial court's involuntary dismissal under Rule 41(b) is reviewed for abuse of discretion." *Cornelius v. Benefield,* 168 So.3d 1028, 1032 (Miss. Ct. App. 2013). 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 (Miss.2011) *Barry v. Reeves,* 47 So3d 689, 693 (Miss.2010)). Our Court's inquiry "is not whether the [tribal] judge ruled contrary to what [one of the justices of this Court] might have ruled, not whether he was "right" or "wrong" in [this Court's] view, but whether he abused its discretion." *Ashmore v. Miss. Auth. on Educ. Television,* 148 So.3d 977, 983 (Miss. 2014). As was stated in *Hanson v. Disotell,* 106 So.3d 345, 348 (Miss. 2013), even though another "reasonable trial judge very well might have denied the defendants' motion to dismiss," we find that "as an appellate court applying an abuse of discretion standard, we cannot reverse on that basis. Instead, we must affirm the trial judge unless we find he abused his discretion." *Id. at 348.*

PRELIMINARY STATEMENT

Although this claim arises from the May 24, 2009 forcible abduction and sexual assault of a then 13-year-old minor that was perpetrated within the hotel portion of the Silver Star hotel and casino complex, plaintiff's complaint alleges defendants "were in some manner negligently and proximately responsible for the events and happenings alleged" due to their inadequate security, maintenance, and operations. The dominant focus and, indeed, the threshold issue this plaintiff's lawsuit would necessarily have had to have proven if it had gone to trial, is therefore what plaintiff contends those specific hotel conditions and operations actually were that existed May 24, 2009. Next plaintiff would have to prove how defendants "were in some manner negligently and proximately responsible for the events and happenings alleged." It was against this backdrop that the trial judge presided over the Mississippi Band of Choctaw Indians Rules of Civil Procedure (CRCP) Rule 41[3] Motion to Dismiss proceedings, looking to the jurisprudence of Mississippi for guidance as directed by the Choctaw Tribal Code. He ruled that the clear record of delay between Plaintiff's August 16, 2011 filing of Notice of Service of Plaintiffs Response to Discovery and their June 30, 2017 Motion to Compel Defendants Responses constituted a clear record of delay sufficient to warrant Rule 41 dismissal with prejudice.

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[3] In regard to involutary dismissal under CRCP Rule 41(b) and Miss. R. Civ. P. 41(b), the language of the two rules are the same, therefore "Rule 41(b)" will generally be used without distinction.

APPELLANT'S ARGUMENTS[4]

I. The trial court did not abuse its discretion with dismissal of case despite the lack of any aggravating factors beyond the mere passage of time claim.

Appellant's first major point of argument is that the trial court dismissal of their case ***despite their claimed lack of any aggravating factors beyond mere passage of time*** was unduly harsh, exceeding the discretion allowed under Rule 41. However, Appellant does acknowledge, as she must, that Mississippi's Supreme Court has emphasized that the initial question under Rule 41(b) "is whether there is 'a clear record of delay *or* contumacious conduct by the plaintiff[.]'" *Holder,* 54 So.3d at 198 (quoting *Cox v. Cox*, 976 So.2d 869, 875 (Miss. 2008) (citations omitted)). The lower court opinion was correct in determining that dismissal due to plaintiff's delay was appropriate as it wrote that "[i]n the instant case, nearly 7 years have passed since the Complaint was filed, and six years without any activity since the Notice of Service of Plaintiff's Responses to discovery." [Opinion, at p. 2.] Furthermore, Mississippi courts regularly find that "'[d]elay *alone* may suffice' for a dismissal under Rule 41(b)." *Cox,* 976 So.2d at 875 (emphasis added). 'Factors other than delay are not required.'" *Id.* (citation omitted). "What constitutes failure to prosecute is considered on a case-by-case basis." *AT&T,* 720 So.2d at 181 (citing *Wallace,* 572 So.2d at 376).

This Court questions the accuracy of appellant's assertion that the court based its dismissal (and opinion) only on mere passage of time as an aggravating factor, given that the lower court judge stated in his opinion, "[f]urther, considering the actual prejudice to the defendant and the difficulty in obtaining witnesses and the reliability of these witnesses after such a period of time as noted in the *Cornelius* opinion contributes as an aggravating factor further warranting dismissal of the case." (Opinion, at p. 5.)

Appellant's arguments would seemingly ignore the controlling force of these dispositive Supreme Court rulings and instead press arguments that other courts have frequently dismissed when the delay warranting dismissal was accompanied by other aggravating factors beyond the mere passage of time. Additional "aggravating factors" or actual prejudice may bolster the case for dismissal, but are not requirements. *Holder,* 54 So.3d at 197. We shall nonetheless briefly address select contentions.

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[4] Appellant makes three enumerated assignments of error: specifically (1) Did the Tribal Court abuse its discretion in dismissing this case under Rule 41 for want of prosecution?; (2) The Tribal Court abused its discretion by dismissing this case despite the lack of any aggravating factors beyond mere passage of time; and (3) The Tribal Court abused its discretion by dismissing this case without first considering the feasibility of imposing lesser sanctions. We shall treat assignment of error (1) as virtually subsumed into numbers (2) & (3) as these latter are simply subsets of the overarching abuse of discretion contention. This opinion therefore addresses the latter as Issues I and II.

Appellant first claims that they were singularly penalized by Silver Star never responding to the discovery requests propounded. Consequently, they go on to argue, they were "powerless to identify" defendants' witnesses or their employment status and under the rules of ethics they could not unilaterally contact them since they did not know they were no longer employed there. Pressing the point, appellant claimed this constraint was not all her fault and therefore dismissal was unduly harsh, exceeding the discretion allowed under Rule 41. No authoritative case law is presented in support of this assertion and appellant's position is vacuous in actuality.

Neither was appellant as helpless as they characterize. Appellant must well know that once a lawsuit is filed, an immediate obligation is assumed by that party to move (and keep moving) the case forward. If the party opposite fails or declines to timely respond to discovery propounded unto them, CRCP Rule 37 titled "Failure to Make or Cooperate in Discovery: Sanctions" provides concise, comprehensive mechanisms for enforcement through court intercession. Appellant's counsel did not avail themselves of this avenue until their reactionary filing six and one-half years after their filing for discovery. To now argue they were "powerless to identify defendants witnesses or their employment status" and are now consequently being "singularly penalized" we find disappointing.[5] Appellant failed to both follow and exercise the above practice and discovery rules to create the very conundrum they now complain of.

Appellant's perhaps most brazen claim is that "efforts to substitute counsel may constitute excusable delay" and that "here the case was stalled in part due to an unexpected staffing turnover at the law firm representing Mr. Magee and the resulting transfer of his case to an out-of-state office."[6] Appellant's brief then rationalizes that "[t]his is akin to the kind of 'excusable delay' recognized in *Cox*. *See also, e.g. Camacho v. Chandeleur Homes, Inc.*, 862 So.2d 540, 544 (Miss. Ct. App. 2003) ("This Court has previously reversed dismissals when the cause for delay stemmed partially from the difficulty in retaining counsel")."[7] (Appellant's brief, at p. 11

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[5] Discovery was first propounded December 23, 2010 and the reactionary Motion to Compel was not filed until June 30, 2017. By contrast, Rule 4.04 of Mississippi's uniform circuit and County Court rules governing discovery deadlines and practice provide that "all discovery must be completed within 90 days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension."

[6] The reassignment and transfer of the case from the firm's offices in Jackson, MS to Memphis, TN further distanced Mr. Magee another approximate 225 miles from his new legal representative.

[7] If anything, both cited cases support the opposite contention of the appellant's claim that their securing of substitute counsel somehow contributed to their "excusable delay" in this case. *Cox v. Cox* saw appellant going through four different attorneys, yet insufficient cause to justify reversal of the lower court dismissal for inexcusable delay. *Camacho* saw the appellate court reversing a Chancellor's dismissal, saying: "We have thoroughly reviewed the record and find that, for at least two reasons, the trial judge erred and abused his discretion in dismissing Camacho's lawsuit. Firstly, there is no requirement that a party must be represented by an attorney. Therefore, dismissing a party's lawsuit simply because that party has not acquired an attorney is clearly an abuse of discretion. Secondly, the period of delay (five months) in acquiring counsel was

of 14). Three contradistinctions: (1) this was not a situation where a party litigant sought procurement of substitute counsel – rather, in-house staff reassignment within the same law firm took place here; (2) the case lie largely dormant from February 16, 2011 until October 27, 2015 under original counsel and thereafter under substitute counsel stagnated yet another nineteen months; and (3) it was the court, rather than either party litigant, whose Rule 41 Motion to Dismiss precipitated case movement after the combined six year three-plus month hiatus. On the point of eleventh-hour filings, the Mississippi Supreme Court has written: "We also may consider whether the plaintiffs' activity was reactionary to the defendants' motion to dismiss, or whether the activity was an effort to proceed in the litigation." *Hill v. Ramsey,* 3 So.3d 120, 122 (Miss.2009).

Given that it is firmly established in our state and reservation jurisprudence that delay ***alone*** may suffice for a dismissal under Rule 41(b) and that factors other than delay are not required, we find no merit whatsoever in appellant's suggestions to the contrary. Courts in the exercise of their inherent power to control their docket must not be impeded from their Rule 41 authority, and indeed duties, towards that end by a requirement that delay *ad infinitum, ad nauseum* must be tolerated unless concomitantly accompanied by professional or litigant misdeed, mismanagement, misconduct, or obdurate neglect or delay.

II. The Tribal Court did not abuse its discretion by dismissing this case without first considering the feasibility of lesser sanctions.

Appellant's second assignment of error alleges that the tribal court abused its discretion by dismissing this case without first considering the feasibility of lesser sanctions. Her brief on appeal begins by asserting,

> [b]efore dismissing the case with prejudice, the ***tribal courts*** "**must** consider whether lesser sanctions would better serve the interests of justice." C*ox* at 876, citing AT&T v. Days Inn of Wynonna, 720 So. 2d at 81. * * * * ***Reviewing courts*** are "**less likely** to uphold a Rule 41(b) dismissal 'where there is no indication in the record that the lower court considered any alternative sanctions....'"

[App. Br., at p. 11.] (Emphasis added.)

We do not share appellant's interpretation of the law, or, for that matter, does Judge Webb's opinion, even as appellant themselves have set it forth in their own chosen words and quoted excerpts. Note first of all appellant's contrast between ***"tribal courts"*** and ***"Reviewing courts"*** as they are not one and the same. This Choctaw Supreme Court is classified as a reviewing court in

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relatively short. This Court has previously reversed dismissals when the cause for delay stemmed partially from difficulty in retaining counsel was relatively short. (*Camacho,* at 1032.)

the same way as the Mississippi Court of Appeals and the Mississippi Supreme Court are in the state system. Secondly, we would point out that the mandatory nature of the word "must" as regards tribal courts is far stronger than the permissive "less likely" terminology appellant's brief uses in reference to the above-mentioned higher state courts of review.

Perhaps no better example of the application of the above than *Cox v. Cox* demonstrates the point in this excerpt:

> Rule 41(b) provides that "[i]f the court renders judgment on the merits against the plaintiff, the court *may* make findings as provided in Rule 52(a)." Miss. R. Civ. P. 41(b) (emphasis added) (with certain exceptions, a dismissal under Rule 41(b) operates as an adjudication on the merits). Thus, Rule 41(b) makes specific findings of fact and conclusions of law discretionary with the trial court.
>
> We find that the chancellor did not abuse his discretion in refusing to provide specific findings of fact and conclusions of law. The chancellor's bench opinion was sufficient to explain and support his adjudication of the matter.

(976 So.2d 869, 879.)

Appellant argues a claimed lower court **lack on the record of consideration of lesser sanctions**, including fines, costs, or damages against the client or his counsel, disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings should warrant overturning their dismissal with prejudice. No authoritative case law is provided to support that argument, and *Cox v. Cox* supports the contrary proposition. In *Cox,* the plaintiff Jennings [*Cox*] raised this issue in his motion for reconsideration, for a new trial, or for findings of fact and conclusions of law. The chancellor determined that his bench opinion had been made a part of the record and that such opinion articulated sufficient findings of fact and conclusions of law to support his decision. Thus, the chancellor declined to make any further findings of fact and conclusions of law. The Mississippi Supreme Court reasoning in Cox next follows:

> Rule 41(b) provides that "[i]f the court renders judgment on the merits against the plaintiff, the court *may* make findings as provided in Rule 52(a)." Miss. R. Civ. P. 41(b) (emphasis added) (with certain exceptions, a dismissal under Rule 41(b) operates as an adjudication on the merits). Thus, Rule 41(b) makes specific findings of fact and conclusions of law discretionary with the trial court.
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> We find that the chancellor did not abuse his discretion in refusing to provide specific findings of fact and conclusions of law.

> The chancellor's bench opinion was sufficient to explain and support his adjudication of the matter.

Cox, 976 So.2nd, at 880.

This Court agrees with the Mississippi Supreme Court and we find the lower court's opinion makes its rationale straightforward and clear in this present case.

As to appellant's suggestion that the lower court opinion nowhere indicates that the lower court considered other sanctions, page 5 of Judge Webb's opinion states: "Sanctions less than dismissal 'will not suffice if they do not cure the prejudice caused by the delay.' *Cornelius,* 168 So.3d at 1037." Nor does this Court agree with the suitability of any of appellant's proposed range of listed sanctions. Appellant's brief suggests other possible sanctions could include fines, costs, or damages against the client or his counsel, disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings.

Assuming simply for the sake of argument that it were necessary for the court to more expressly detail the insufficiencies of the lesser sanctions, the reasons should be self-evident. Regarding explicit warnings, the Mississippi Supreme Court in *Holder* wrote: "[T]he trial judge asked plaintiffs' counsel what sanctions would be appropriate. Counsel recognized that it is within the trial court's discretion to determine an appropriate sanction, but stated that he thought a warning would be appropriate. The trial judge responded by saying: 'What's the purpose of a warning? Everybody is supposed to know the rules.' Based on this exchange, the Court of Appeals found that the trial court considered lesser sanctions in his holding. *Holder,* 2010 WL 11267 at *5-6, ¶¶29-36. We agree." *Holder,* 54 So.3d at 200. This Court also agrees.[8]

Dismissal without prejudice is no longer even an available lesser sanction given the statute of limitations. *See, e.g., Regan v. S. Cent. Reg'l. Med. Ctr,* 234 So.3d 1242, 1247 (Miss 2017); *Thornhill v. Ingram,* 178 So.3d 38 (Miss. 2012); *Knight v. Knight,* 85 So.3d 832 (Miss. 2012). Appellant's counsel wrote that the "record does not suggest that [the plaintiff], as opposed to her counsel, was responsible for any of the delays...." (App. Br. at p. 11of 14.) Clearly, sanctions of any form against appellant would not be an available option for us. On the other hand, we would observe that the filing of a disciplinary action is a redress that is available and more appropriate for the client victim to avail herself of.[9] Lastly, we perceive no basis as to how imposition of fines, costs, or damages by our court on council advances or furthers justice for the victim.

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[8] Here, we also view conditional dismissal as tantamount to a warning.

[9] Possibly the same as regards damages.

Neither do any of the alternatives do anything to cure the crippling effect caused by the passage of so many years' delay.

Consequently, this Court finds that appellant's substantial delay warrants dismissal under Rule 41. Accordingly, we affirm the decision of the lower court.

CONCLUSION

Based on appellant's clear record of delay by failing to move the case forward between August 16, 2011 and June 30, 2017 – a period of 6 years and 4+ months -- during which nothing material was filed of record and the case lie dormant, we see no abuse of discretion by the trial court. Accordingly, we affirm the trial court's dismissal with prejudice.

AFFIRMED this the 18th day of September, 2020.

Chief Justice

Brenda Toineeta Pipestem
Associate Justice

Associate Justice

CHOCTAW SUPREME COURT
CHOCTAW, MS

CERTIFICATE OF SERVICE

I, do hereby certify that I have this, the 18th day of September, 2020 caused to be forwarded by electronic mail, United States mail and/or hand delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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