FILED

#### IN THE

## INDIANA COURT OF APPEALS

CLERK JEFFERSON CIRCUIT COUR

## APPELLATE CASE NO. 39A01-0908-CV-408

SHERRY CHAPO and

JESSIE A. CHAPO-STITSWORTH,
Defendants/Appellants

VS.

TRIAL COURT NO. 39C01-0706-PL-304

JEFFERSON COUNTY PLAN,
COMMISSION
Plaintiff/Appellee.

Trial Court Judge
Plaintiff/Appellee.

#### NOTICE OF FILING OF TRANSCRIPT

Angelia M. Rogers, the Court Reporter for the Jefferson Circuit Court, hereby notifies the parties, pursuant to Appellate Rule 11(A), that the Transcript in this cause has been prepared and certified and is complete. This 15th day of September, 2009, the transcript was filed with the Clerk of the Trial Court in accordance with Appellate Rule 28.

Angelia M. Rogers Court Reporter

Jefferson Circuit Court

## NOTICE TO THE PARTIES

I certified that on September 15, 2009, I sent by United States Mail, postage pre-paid a copy of this notice to all parties of record.

Angelia M. Rogers

# IN THE INDIANA COURT OF APPEALS

## APPELLATE NO. 39A01-0908-CV-408

SHERRY J. CHAPO and, JESSIE A. CHAPO-STITSWORTH, APPELLANTS/DEFENDANTS,	1	APPEAL FROM THE JEFFERSON CIRCUIT COURT - CIVIL DIVISION
vs.	)	TRIAL COURT NO. 39C01-0706-PL-304
JEFFERSON COUNTY PLAN COMMISSION, APPELLEE/PLAINTIFF.	}	HONORABLE TED R. TODD TRIAL COURT JUDGE

## TRANSCRIPT OF THE PROCEEDINGS

VOLUME I OF I (PAGES 1 - 22)

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ANGELIA M. ROGERS
OFFICIAL COURT REPORTER
JEFFERSON CIRCUIT COURT

1	STATE OF INDIANA		
2	SS:		
3	COUNTY OF JEFFERSON		
4	IN THE JEFFERSON CIRCUIT COURT		
5	IN MADISON, INDIANA		
6	JEFFERSON COUNTY PLAN )		
7	COMMISSION, )		
8	)		
9	Plaintiff, )		
10	)		
11	VS. ) CAUSE NO. 39C01-0706-PL-304		
12	)		
13	SHERRY J. CHAPO and )		
14	JESSIE A. CHAPO-STITSWORTH, )		
15	$\Sigma$		
16	Defendants. )		
17			
18	TRANSCRIPT OF THE PROCEEDINGS held in the above-		
19	captioned cause on April 9, 2009 before the Honorable Ted R.		
20	Todd, Judge of the Jefferson Circuit Court, Fifth Judicial		
21	Circuit in the Jefferson County Courtroom in Madison,		
22	Jefferson County, Indiana.		
23			
24	ANGELIA M. ROGERS		
25	OFFICIAL COURT REPORTER		

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## COURT DISCUSSION This is Cause Number 39C01-0706-PL-304 in 2 JUDGE TODD: which the Jefferson County Plan Commission is 3 4 the Plaintiff and Sherry L. Chapo and Jessie Chapo are the Defendants. We're here... 5 Kristen Vandewater is present and 6 7 representing the Plaintiff, and...you are Mr. Blaiklock? 8 9 MR. BLAIKLOCK: Yes, Your Honor. 10 JUDGE TODD: Okay...representing the uh...defendants on a 41E Motion, and uh...is the...do you wish 11 12 to...are you opposing the Motion? K. VANDEWATER: Yes, Your Honor. 13 Okay. Then you may proceed. 14 JUDGE TODD: MR. BLAIKLOCK: Thank you, Judge. Your Honor, I have with 15 16 me, Sherry Chapo, one of my clients. Judge, 17 on June 12th, 2007, the Jefferson County Plan Commission filed suit against Sherry and 18 19 Jessie Chapo, and it related to allegations 20 of failing to get certain permits. 21 JUDGE TODD: I'm familiar with the file. I read it over 22 this morning. MR. BLAIKLOCK: The reason I say that, Judge, is the house is 23 24 now five years old, and at the time the suit

was filed, it was three years old. The suit

was verified by somebody from the County Plan Commission, and we answered the Complaint without admitting that uh...the building at issue was on the address listed in the Complaint. And then a few months after the Complaint had been filed, one of our clients, Miss Chapo, who actually lives across...or at this address listed in the Complaint which isn't apparently the address at issue, was trying to refinance her house and couldn't do so because this law suit showed up at the title company. So I brought this to uh...the Plaintiff's counsel's attention about this error and received a letter a few days later in which the error was acknowledged, and in the letter said that the Complaint would be amended in the coming week. That was September 7', 2007. Prior to that we had served some discovery. Since that time and until today, absolutely no action has been taken by county's plan commission to prosecute this case. No discovery, no depositions, and most importantly no amended complaint. Yes, so 22 months have passed

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## COURT DISCUSSION

since September 7th without any action...I'm sorry...20 months...22 months since the law suit was filed without any action to prosecute it. Finally, in December of 2008 we filed this case, and I would just point out to the Court that this is not an insignificant case. The county is asking that the residence of the address be prohibited from residing in the address and that they be charged 2,500 dollars per day that the address is violation of certain ordinances. So this has been hanging over our client's head...excuse me...for almost two years without any action whatsoever by the Plaintiffs. Yesterday, four months after I filed this motion before the Court in December, I received an e-mail from the county's attorney, the Plan Commissions's attorney, advising that they would be filing a Motion to Amend and a uh...request for jury trial. I don't have it. I don't have any opposition to this motion, and we would object to any such pleadings. But my point is that for 22 months this...Miss Chapo and

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#### COURT DISCUSSION

Sherry Chapo or Jessie Chapo had a complaint hanging over their heads with absolutely no action being taken, and I start with the proposition that the government has a special trust that it has not to file law suits against people that they shouldn't be doing and, secondly, that when they do file the cases then they should prosecute them or move them forward. They have not done that here. Your Honor, I would refer the Court to a few trial rules. First of all, it's 41E which says, "When no action has been taken in a civil case for a period of 60 days, the Court or a party shall order a hearing for the purpose of dismissing the case. The Court shall enter an order of dismissal at Plaintiff's cost if the Plaintiff shall not show sufficient cause at or before such hearing." I am unaware of any such cause as to why this case hasn't been prosecuted for 22 months, and obviously the county will have an opportunity to speak, and it will be the first time I've heard that. But I will say that assuming that the argument is, well,

we're about to prosecute this case, which is what I learned about yesterday, this Motion to Amend and the Request for Jury Trial, I found a case, Your Honor. May I approach the Court with the case?

JUDGE TODD: You may.

Mr. BLAIKLOCK: And the crux of this case, Your Honor, is that it's too late once a Motion to Dismiss has been filed to begin prosecuting the case and use the resurrection of the activity as justification for not dismissing the case, and I'll just briefly go over a few things from this case. It says, first of all, the purpose of Rule 41E is to ensure the Plaintiffs will diligently pursue their claims. The burden of moving the litigation rests on the Plaintiffs. And particularly here it says the courts cannot be asked to carry cases on their dockets and definitely ...indefinitely and the rights of the adverse party, the Chapos, should also be considered. He should not be left with a lawsuit hanging over his head indefinitely. That's after 22 months now. The Court goes into several

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different factors that can be considered and says, "A lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the Plaintiff has no excuse for the delay." And in this case that I've just provided to you, the Belcaster case. It was ten months. We're at 22 months. And the Court dismissed the case with prejudice. The case went up on appeal, and the Court of Appeals affirmed it, and the Court in doing so made the point of saying, "The Court has held...the Court need not impose a sanction less severe than a dismissal where the record of dilatory conduct is clear." Your Honor, it's clear in this case. It is not a pleasant experience for our clients to have this hanging over their heads for 2,500 dollars a day...a day allegation. They've had to refinance their house and had an issue with the title. They...they refinanced it again here within the last several months, had the same issue. Unfortunately, the prior letter worked, but there is a cloud on the

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## COURT DISCUSSION

title. There's a lawsuit pending against our client, and the time has come and the time has passed for the county to prosecute it. The county, I assume, will say this is a drastic measure dismissing the case with prejudice. Well, Your Honor, it's a drastic measure to sue somebody. This isn't somebody who's got insurance coverage. This isn't, you know, some allegations regarding, you know, the one similar to what we just heard. This is allegations of you violated some ordinances, and it's been 22 months since the case was filed and five years since they built the house, and there's been absolutely no action taken. So I would say, yes, this might be a severe remedy, but the government's had it's time, and the time has passed. It is a severe inconvenience for our client to be sued, first of all, to have the suit hanging over their head for 22 months, and that severity, Your Honor, outweighs any drastic remedy that the county might argue equal to dismissal. Your Honor, I would request that the Court not (inaudible) in

this delay, not require out client to continue to expend her funds defending this case when five years, memories have faded, the events are stale, and that the Court dismiss the case with prejudice. And I finally will refer the Court to Trial Rule 1 which I... I think is quite telling here. It says uh...the trial rules shall be construed to secure the just speedy and inexpensive determination of every action. Your Honor, Trial Rule 14 is there for a reason. Our client should not have to spend anymore time, money and effort worrying about this case and defending this case, and we would respectfully request that it be dismissed with prejudice.

JUDGE TODD: Thank you.

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K. VANDEWATER: Thank you, Your Honor. I also have the Belcaster case for you, but...I will submit it, and in the Belcaster case it does not stand for a basic proposition that there is some length...some certain length of time where after which you need to dismiss a case. So obviously...

JUDGE TODD:

I understand that.

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K. VANDEWATER: The fact that it was ten months there and 22 months here is...really is relevant as you find it I suppose. As it relates to the Belcaster case though, that case sets forth the balancing test to determine whether or not this remedy is proper. This case does in fact date back to 2004. I believe at the time that Mike Walro was the Plan Commission attorney. There have been several attorneys since then representing the Plan Commission, and uh...what had occurred during the period that they were representing the commission was various letters back and forth to the Chapos saying that this is what our ordinance says, this is how you have not complied with it, and this is what we want you to do. The Chapos continued to ignore any of the...the notices that they received from the government, and so it isn't that we just sprung to sue them immediately. We did so as a last result...resort. As it relates to the uh...allegation that we're saying we're requesting them not to live in the house, we

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## COURT DISCUSSION

have not requested that injunction. We have Not gone forward with a hearing on that to kick them out of the house, and really our goal is just enforcement. We just ... we just want for the Court to figure out and listen to the facts of the case, tell us whether or not they've complied, whether they haven't complied. We think they haven't complied. They thing that they don't need to comply, and that's basically what we're looking for. I think that one of the uh...key factors of the balancing test is whether or not they have been prejudiced by the delay, and uh... they've been able to refinance their house. That was not an issue. They have not contacted me since then. And the reason that the Amended Complaint was not filed, by the way, was simply because I had actually drafted it, and it's been in my file since I even wrote that, but I didn't realize that it had not been filed. The only change to the complaint, it's not a substantive amendment. It is...we were off by a digit in the address essentially. And that's the only...

JUDGE TODD:

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Well, I'm not so concerned about that as I am about the fact...has there been any discovery ongoing? Has there been any action taken to try to proceed to move the case along?

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K. VANDEWATER: Right. And as it relates to that, I mean I ... I have found at least kind of 41E motions historically in this county to be kind of ... to spur it along and to get it set, and I have communicated with Mr. Blaiklock and told him, "Let's go ahead and set this," and I've have no problem with doing that, and we can do that soon. There has, in fact, been discovery since that. They have requested discovery, which we provided to them in November. In November there was an issue of whether or not we actually were required to give them the documents they requested because they requested a number of documents that were matters of public record. I told them, "That's fine. I don't think...I don't think that we have to do this. I will produce those things for you," and then I proceeded to spend 255 dollars getting copies of public documents to help them in their

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case and then requested reimbursement for that, and they refused to pay that. So uh... then after that Miss Chapo filed a ... a separate action concerning the propriety of the Plan Commission charging a certain amount of documents...or a certain amount per page for copying a request, and so we went through that proceeding and ... JUDGE TODD: Well, how does that... I mean I understand 

JUDGE TODD: Well, how does that...I mean I understand that that was because of this case perhaps, but it really isn't relevant to the...

K. VANDEWATER: And it really wasn't. I just kind of was letting that play out, and...and I mean at this point we're ready to go forward, and I've just asked that it be set for a trial date. Nothing has changed substantively. They know what we're asking them to do and what we've been asking them to do for several years. They've made no actions to do that. So another issue on the balancing test if the desirability of deciding the case on the merits.

JUDGE TODD: I understand that.

K. VANDEWATER: The simple fact is we're not going to reach

an agreement on this.

JUDGE TODD:

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But the...you...you refer to historically the way that these matters have been handled culturally here, and usually those are because there is a motion by the Court itself, and usually the motion is...the case is dismissed unless both parties say, "No, keep it on because we were...we were trying to negotiate," and yadda-yadda-yadda or something like that. But I can't recall...I... the Court usually takes seriously if...if one of the parties actually does want it dismissed and it's by the party. I think our standard has not been that. It's been more, "What's happening here," or "Is it being processed," or, "Is it being treated...," I mean, "Is it benign neglect or is it being treated with...is it just being ignored," and I...I'm having trouble understanding here... In other words, what contacts have there been between you and the defense between the time of the filing and the time...?

K. VANDEWATER: Arguments over discovery.

JUDGE TODD: Huh?

2	K. VANDEWATER:	And related to the second case that she
3		filed. I mean I don't think that there's
4		ever been any question that we weren't
5	ď.	willing to resolve this by an agreement. We
6		we need to pursue it. I mean we need to
7		try it. I'm asking for a trial date.
8	JUDGE TODD:	I mean nobody's asked for mediation, or
9	N.	nobody'sI guess the Court could have
10		sua sponte.
11	K. VANDEWATER:	And I really don't believe based on our
12		communication so far that a mediation would
13		even be successful so
14	JUDGE TODD:	Uhokay. I understand your argument.
15		Reply?
16	MR. BLAIKLOCK:	Thank you, Your Honor. First of all, I would
17		just point out toto maybe emphasize what
18	d.	the Court said, uhwhat happened in some
19		other proceeding in which I'm minimally
20		well, first of all, not involved. There were
21		some copying expenses. I don't know anything
22		about that other than what I've just heard
23		here and some minimal information from my
24		client. That's not this case. It's got

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history prior to the lawsuit being filed is irrelevant. I'm asking that the Court strike it. It's not testimony in any event.

There's been no showing here.

JUDGE TODD: Well, I've let you both flash out the facts a little.

MR. BLAIKLOCK: The uh...the discovery issue, just to be clear, counsel said that happened in December...December 2007, and it was our discovery. So we are now being argued against that because we were actually trying to do something to defend the case, that's going to prevent us from prevailing on a motion based on their failure to prosecute the case, and this happened in December of 2007 in any event. I have had no discussions with counsel that I can recall. There's nothing in the file since that time. I've had nothing since an e-mail yesterday at 2:30 even after I filed this motion in December. So nothing has been done by the Plaintiff to prosecute this case. Absolutely nothing. Secondly, the rule requires that dismissal occur. The Court shall enter an order of

dismissal at Plaintiff's costs if the
Plaintiff shall not show sufficient cause at
or before such hearing. Plaintiff's counsel
has given the only reason that this case
hasn't been prosecuted as I've drafted an
Amended Complaint and it's stuck in my file.
First of all, that's not our obligation to
make sure that gets done. Secondly, that
doesn't answer the question why depositions
weren't noticed, why discovery wasn't
pursued, why a trial wasn't requested, why
any other type of dispositive motions weren't
filed. So there has been absolutely no cause
to the court as to why there has been no
action for 22 months in this case. I would
also say to the Court II made before the
argument that they're going to get up and say
this is a severe remedy. I'm reading from
the case that I provided you, the Belcaster
case. We also recognize there are factors
that favor a lot on the Belcasters to
prosecute their complaint. First, there is a
preference for deciding a case on the merits.
Second, there appears to be no degree of

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## COURT DISCUSSION

personal responsibility on the part of Belcasters which is the Plaintiffs themselves. Third, less drastic sanctions and dismissal were available. However, on this point we note that the Court is held that the Court need not impose a sanction less severe than a dismissal. I don't know what the county's innocence or not is in this situation. My concern is with our client in defending this case, and I would look at those factors, Your Honor, and just walk through them from the Belcaster case. length of the delay, 22 months. The reason for the delay? We haven't heard it. degree of personal responsibility on the part of the actual Plaintiff? We don't know. That Court's got no evidence before it on that. The degree to which the Plaintiff will be charged for the acts of his attorney? Well, you know, again we don't know if there will be a dismissal in this case, and that would be that. The amount of prejudice to the Defendant caused by the delay? Memories have faded. This was five years ago when

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## COURT DISCUSSION

this all started, two years since the case happened. This isn't the simple you've breach the ordinance case. There's a lot ... There's facts involved that the Court will need to hear if it gets to that point. We certainly hope it does. The presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion? Well, we don't know, but it hasn't been proceeded in, so that doesn't weigh against us or in favor of them. The existence and effectiveness of sanctions less drastic than a dismissal? There are none, Your Honor. Our clients...by the time I drive back up to Indianapolis and pursue this motion and spend a significant amount of money defending this case to this point, pursuing this motion at her cost, and dismissal is the only appropriate remedy in this case, Judge. desirability of deciding the case on the merits? That does not control (inaudible). And the extent to which the Plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the

Plaintiff's part? Well, I don't think we can argue that the Plaintiff was going to do anything but for my motion when it took four months after my motion and less than 24 hours before today for me to get any response whatsoever. So the...the Plaintiff is not showing this Court that this is an important case that should not be dismissed, and in the meantime our client here has this shadow hanging over her head, 2,500 dollars a day. The Plaintiffs said that they weren't asking for injunction. Let me read you the Complaint.

JUDGE TODD: I understand it. It does say that.

MR. BLAIKLOCK: They are asking for it. So we would ask that the Court dismiss this case with prejudice, and that would be it. Thank you, Judge.

Thank you. I will take the matter under JUDGE TODD: advisement and let you all know.

CONCLUSION OF THE HEARING

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STATE (	OF :	INDIANA	)	
			)	ss:
COUNTY	OF	JEFFERSON	)	

IN THE JEFFERSON CIRCUIT COURT

MADISON, INDIANA

JEFFERSON	COUNTY	PLAN	)
COMMISSION	٧,		)
			)
	P	aintiff,	)

Plaintill,

VS. )
SHERRY J. CHAPO and )

JESSIE A. CHAPO-STITSWORTH,

Defendants.

CAUSE NO. 39C01-0706-PL-304

FILLED

SEP 15 2009

CLERK JEFFERSON CIRCUIT COURT

## CERTIFICATION

## OFFICIAL COURT REPORTER

I, Angelia M. Rogers, Official Court Reporter for the Jefferson Circuit Court, State of Indiana, do hereby certify that I am the Court Reporter of said Court, duly appointed and sworn to report the evidence of cause tried therein.

That upon the hearing held on April 9, 2009, in the above captioned cause, I took down by machine recording all of the statements by counsel, the evidence given during the hearing of this cause, and the Court's rulings thereon.

I further certify that the foregoing transcript, as prepared is a true, correct and complete transcript of the hearing held in this cause.

In witness thereof, I have hereunto set my hand and affixed my seal this 15th day of September, 2009.

Angelia M. Rogers

Official Court Reporter Jefferson Circuit Court

## Form 10-2 Notice Of Completion Of Transcript

# IN THE INDIANA [SUPREME COURT OF APPEALS]

Case No.: 39A01-0908-CV-00408

	)	Appeal from the Jefferson Circuit
Sherry Chapo &	)	Court - Civil Division
Jessie A. Chapo-Stitsworth	)	
Appellant(s),	)	
	)	Trial Court Case No:
vs.	)	39C01-0706-PL-304
	)	
Jefferson Co. Planning Commission	)	
	)	The Honorable Ted R. Todd
Appellee (s).	)	Judge
0.75 0.75	)	

## NOTICE OF COMPLETION OF TRANSCRIPT

Kim Smith, the Clerk of Jefferson Circuit Court, hereby notifies the parties, pursuant to Appellate Rule 10(D), that the Transcript in this case has been completed.

Clerk

Date issued

09/29/2009

## CERTIFICATE OF SERVICE

I certify that on 09/29/2009 I sent copies of this document to all parties of record and to the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court by United States Mail, postage pre-paid.

Clerk