

I. CERTIFICATE OF INTERESTED PERSONS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2007-TS-00148

RICHARD MARSHALL

APPELLANT

VS.

**BURGER KING, SYDRAN and
THE WORLEY COMPANIES**

APPELLEES

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

1. Hon. Frank G. Vollar, Trial Judge
2. Richard Marshall, Plaintiff/Appellant
3. Joy R. Jackson, Counsel for Plaintiff/Appellant
4. J. Brian Hyneman, Counsel for Defendant/Appellee Burger King
5. H. Scot Spragins, Counsel for Defendant/Appellee Burger King
6. Dion J. Shanley, Counsel for Defendant/Appellee Burger King

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Counsel of Record

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IV. STATEMENT OF THE ISSUES

ISSUE I

Whether dismissal without prejudice as sanction for violation of Court's scheduling order and order compelling discovery was an abuse of discretion.

ISSUE II

Whether the trial court's denial of plaintiff's motion to reinstate the case was manifest error.

V. STATEMENT OF THE CASE

Plaintiff's cause of action arises out of a slip and fall which allegedly occurred on April 2, 2002 at a Burger King in Vicksburg, Mississippi. Plaintiff filed his cause of action on April 1, 2005 – two days shy of the expiration of the statute of limitations. (R.5-7).

A. PROCEDURAL HISTORY

The proper defendant "Burger King Corporation"¹ issued a timely answer to the complaint and propounded discovery upon the plaintiff on or about June 10, 2005. (R.21-26). It is unknown whether plaintiff served process upon the remaining defendants, Sydran and/or the Worley Companies, however neither defendant had counsel enter an appearance or otherwise defend the allegations. On October 3, 2005, the Circuit Court of Warren County, Mississippi entered a scheduling order which provided deadlines for the completion of discovery and other matters pertaining to the case. (R.28). Defendant Burger King subsequently filed a Motion to Dismiss for Failure to Prosecute on October 7, 2005 as plaintiff had in no way prosecuted the cause of action since its origination on April 1, 2005. (R.29-33). This motion was heard by the Court on February 3, 2006. Instead of dismissing the action, the Court converted the motion from one seeking dismissal to a motion to compel and provided the plaintiff with fourteen (14) days in which to properly respond to discovery. An order commensurate with this ruling was entered on February 8, 2006. (R.44).

The case was set for trial to begin on November 13, 2006 by order of the Court dated May 25, 2006. (R.71). This setting was deemed a third setting, yet became a primary trial setting as of October 13, 2006 when the parties were notified of such by correspondence from the Court. (R.89).

¹Plaintiff's complaint mis-identifies Burger King Corporation as "Burger King".

Subsequently, Defendant Burger King Corporation filed its motion to dismiss upon the premise that the plaintiff had violated the Court's previous order and scheduling order in failing to provide proper responses to discovery. (R.72-89). The trial court granted defendant's motion pursuant to an order issued on November 14, 2006. (R.98).

Plaintiff filed a Motion to Reinstate Case on or about December 12, 2006. (R.99). Plaintiff's motion was heard, and the Court denied the request to reinstate finding that "lesser sanctions" were allowed by the Court on previous occasions. (R.112). Upon this order, plaintiff appealed.

B. STATEMENT OF FACTS

Plaintiff filed his cause of action on April 1, 2005 for damages allegedly caused by a slip and fall. The suit was filed two days prior to the expiration of the statute of limitations, and was the first notice Burger King Corporation had of such an occurrence. Upon answering the allegations, the defendant propounded interrogatories and request for production to plaintiff on or about June 10, 2005. (R.26). Subsequent to the propounding of discovery, plaintiff failed to respond to the requests within the time allowed, request additional time or prosecute his cause of action in any manner. This despite two letters sent to plaintiff's counsel seeking some action on the case. (R.32-33).

Having no response to the continued efforts to move the case along, defendant filed its Motion to Dismiss for Failure to Prosecute on October 7, 2005. (R.29-33). Said motion was set for hearing on December 8, 2005, but subsequently continued at the request of plaintiff's counsel. (R.36-36-39). After the continuance of the hearing, plaintiff filed a document termed "Plaintiff's List of Experts" which simply listed the names of two physicians and a physical therapist. (R.40). This document was submitted without information in compliance with Rule 26(b)(4) of the

Mississippi Rules of Civil Procedure, nor was the information accompanied by any responses to discovery.

The hearing on defendant's motion was set and heard on February 3, 2006. At the hearing, plaintiff provided documents which purported to be responses to discovery, however said responses were deficient in numerous aspects. This led to the following exchange with the Court:

THE COURT: Okay. What I'll do, I'm not going to dismiss it, but I am going to take it under a Rule 37 motion and order that the discovery - - the discovery propounded, not all discovery, but the discovery propounded be responded to within two weeks.

THE COURT: Now, in that regard, you'll also need - - although I know you've tendered documents, you'll need to formally respond to the - - are there specific interrogatories asked?

MS. JACKSON: Right.

THE COURT: Answer them.

THE COURT: Okay. That will be the order of the Court. Get me an order to that effect, discovery responded to within two weeks.

(T.4-5). An order to that effect was entered by the Court on February 8, 2006. (R.44).

After the hearing, defendant did request and received, through subpoena, various records from out-of-state physicians. (R.47-70). However, some subpoenas went unanswered with no recourse given the lack of subpoena power held over the out-of-state physicians. The case then went stale again until the case was set for trial by the Court as a third setting to begin on November 13, 2006 and a first setting on April 16, 2007. (R.71).

The parties were notified by the Court on October 13, 2006 that the case had been moved to

a first setting and would be tried beginning on November 14, 2006. (R.89). Upon receipt of this letter, plaintiff's counsel contacted counsel for the defendant requesting a continuance. This was never agreed upon as the defendant's client rejected the proposed continuance. Defendant Burger King Corporation then filed its Motion to Dismiss for violation of the scheduling order and order compelling discovery which was issued on February 8, 2006. (R.72-86). Defendant's motion was heard on November 8, 2006, and the Court granted said motion. (R.98). Plaintiff then moved to have the matter reinstated, and said motion was denied. (R.112).

Plaintiff's appeal followed.

VI. SUMMARY OF ARGUMENT

The primary issue in this matter is whether the trial court erred in dismissing the case for failing to comply with an order compelling discovery. The standard of review this Court applies to a trial court's dismissal of an action as a result of a discovery violation is abuse of discretion. *Salts v. Gulf Nat'l Life Ins. Co.*, 872 So.2d 667, 670 (Miss.2004). "The trial court has wide and considerable discretion in matters relating to discovery; its order will not be disturbed unless there has been an abuse of discretion." *Busick v. St. John*, 856 So.2d 304, 319 (Miss.2003).

In the present matter, plaintiff failed to comply with both the Court's scheduling order and an order compelling discovery. The Court when presented with a Motion to Dismiss for Failure to Prosecute considered and applied the lesser sanction of ordering complete responses to discovery within fourteen (14) days. Plaintiff failed to comply with the order, and the case was dismissed.

Defendant's motion was heard on November 8, 2006 – just one (1) week prior to the scheduled trial of the case – and plaintiff had yet to comply with the Court's February 8, 2006 order compelling discovery responses to the defense. A defendant is entitled to learn the extent of the claims made against him, and the breadth of information which supports each particular claim. Otherwise, our tort system would revert back to trial by ambush. The only way such can be achieved is through complete and proper discovery. The trial court's dismissal of the action was appropriate given the prejudice to the defendant in failing to comply with both Court orders with merely one (1) week remaining prior to trial; the clear record of delay on the part of the plaintiff; and the fact that lesser sanctions were levied in response to a prior motion to dismiss.

An involuntary dismissal pursuant to Rule 41(b) is a harsh sanction, and only appropriate when there exists a "clear record of delay or contumacious conduct and lesser sanctions would not

serve the interests of justice.” *Wallace v. Jones*, 572 So.2d 371, 376 (Miss.1990) (citations omitted).

In the present matter, there exists a clear record of delay with the plaintiff failing to provide any responses to discovery for seven (7) months. Plaintiff finally delivered the purported responses when faced with a motion to dismiss. The purported responses were wholly deficient, and the trial court provided plaintiff a lesser sanction of fourteen (14) days to rectify the deficient responses. Nine (9) more months passed without compliance, and the case was dismissed.

Given the record of delay and the fact that lesser sanctions were levied in response to a prior motion to dismiss, it was not manifest error to deny plaintiff’s motion to reinstate the case.

VII. ARGUMENT AND AUTHORITY

ISSUE: Whether dismissal without prejudice as sanction for violation of Court's scheduling order and order compelling discovery was an abuse of discretion.

Defendant's motion to dismiss was based upon the plaintiff's failure to comply with two separate orders issued by the trial court – the scheduling order and the order compelling discovery. (R.72-90). The Court chose to grant defendant's motion on the basis that plaintiff failed to comply with the February 9, 2006 order which compelled plaintiff to provide responses to discovery. (R.98).

It is the plaintiff's claim that his only failure was failing to provide sworn responses. However, an examination of the record reveals that plaintiff never noticed any responses whatsoever. Plaintiff did provide a document which purported to be responses to discovery on February 6, 2006 at the hearing on defendant's first motion. (T.3) Plaintiff hinges his argument on the fact that this document was provided. However, the record does not contain these purported responses or any notice that these responses were served upon the defendant. "This Court is limited to consideration of the facts in the record, while reliance on facts only disclosed in the briefs is prohibited." *Greater Canton Ford Mercury, Inc. v. Clark*, 948 So.2d 417, 423 (Miss.2007). What is clear is that the Court found the responses incomplete given the trial court's order. (T.4 & 28). Finding these responses incomplete, the trial court provided the plaintiff with fourteen (14) additional days to provide complete responses. (R.44). Plaintiff never provided another document or supplement to these documents even when faced with a defendant's motion to dismiss.

Rule 37 of the Mississippi Rules of Civil Procedure addresses the imposition of sanctions for failure of a party to cooperate in discovery, and Rule 37(b) addresses a party's failure to comply with the court's order. Rule 37(b) states as follows, in pertinent part:

(b) Failure to Comply with Court Order.

(1) *Sanctions by the Court.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) *Sanctions by Court in Which Action is Pending.* If a party....fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

M.R.C.P. 37(b) (2006). In determining whether the trial court abused its discretion, there are several considerations which must be addressed. First, dismissal is authorized only when the failure to comply with the court's order is a product of willfulness or bad faith, and not from the inability to comply. *Hapgood v. Biloxi Regional Medical Center*, 540 So.2d 630, 634 (Miss.1989) (citations omitted). Next, the dismissal of a cause of action is proper only in situations where the deterrent value of the rule cannot be substantially achieved through the use of lesser sanctions. *Id.* Also, the court must consider whether the opposing party's preparation for trial was substantially prejudiced by the failure to comply. *Id.* A final consideration is whether the neglect was "plainly attributable" to the attorney rather than the client, or when a party's failure is a product of "confusion or sincere misunderstanding" of the order. *Id.*

A. Inability to comply.

Plaintiff's counsel avers that failing to properly respond to discovery as ordered by the trial court was "oversight" on her part and no fault of the plaintiff. In responding to the motion to

dismiss, counsel stated otherwise. At one point, counsel states that the failure to abide by the order was “due to [Marshall] being hard to catch up with.” (T.10). Within that same argument, plaintiff’s counsel indicates that “[m]y client could sign the interrogatories.” (T.12). These statements lead to only two conclusions – either plaintiff is to blame due to his unavailability or plaintiff’s counsel failed to provide them in bad faith. Neither scenario provides this Court with reasoning to rule that plaintiff was unable to comply. If plaintiff was truly unable to comply, a motion for extension of time would have been the course of action, yet the record is replete of any attempts on the part of the plaintiff to gain such an extension of time to comply.

However, such is only half of the story.

Plaintiff contends that he provided the defendant with an unlimited medical release which was used to “obtain numerous medical records including, but not limited to, all of the medical records from each of the experts listed by Marshall in its list of experts.” Further, plaintiff admits that she received medical information which was not in her possession from defense counsel. (T.11). What plaintiff fails to realize, and the defendant clearly argued, that defendant is entitled to know exactly which medical records were being claimed as a part of the cause of action. (T.28-29). Plaintiff’s counsel avers that the defendant was fully informed, yet nothing could be farther from the truth unless she expects the defendant to blindly guess what medicals were being claimed and what medicals were not.

Plaintiff, in his brief, admits this in stating, “A medical release which gave access to all of Burger King’s [sic]² medical records in the case and even medical information that was not related

²Defendant assumes that plaintiff is referencing his medical records rather than “Burger King’s medical records”.

to the case....” This is the crux of the argument. Plaintiff simply relied upon a medical release which garnered some medicals pursuant to subpoena, yet others went unanswered. At some point the onus falls upon the plaintiff to fully comply with the trial court’s order and provide the defendant with medicals and/or sufficient discovery responses detailing what would be claimed. That was the purpose of the order compelling discovery, and plaintiff failed to comply.

It is the plaintiff’s duty to sufficiently respond to discovery. A plaintiff cannot rely on the defendant to collect the necessary information through alternate means. A party is under the duty pursuant to the rules governing discovery to “seasonably” amend any and all prior response if information is obtained which renders the initial response inadequate. *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714 (Miss. 1995); *See also*, Miss. R. Civ. Pro. 26(f)(2). The term “seasonably” does not mean several months later, but rather immediately. *Id.* Complete responses to properly made discovery requests are required; it is not enough to state that the requesting party has other available avenues in gathering the necessary information. *Smith v. Tougaloo College*, 805 So.2d 633 (Miss.Ct.App. 2002); *See also*, Miss. R. Civ. P. 34.

Without proper supplementation, the defense would be completely blind as to the claims to be made at trial. Plaintiff offers no explanation as to why proper supplementation was not submitted. Based upon the foregoing proof contained within the record, dismissal was proper.

B. Lesser sanctions.

The trial court considered lesser sanctions in this matter when faced with the first motion to dismiss. Instead of dismissing the case for failure to prosecute, the trial court converted the motion into a motion to compel and provided the plaintiff with an additional fourteen (14) days to respond. (R.44). These sanctions were imposed on February 8, 2006. Between that date and November 14,

2006 (a total of nine months), the plaintiff failed in any manner to comply with the court's order.

Plaintiff received his lesser sanction, yet failed to take advantage of the trial court's decision. Plaintiff avers that "Burger King knew that dismissal was not proper..." This unsupported statement is simply untrue. Given the leniency of the court on prior occasions, and plaintiff's continued failure to adhere to the order of the court, defendant sought a dismissal of the case. (T.16). Dismissal was a proper consideration pursuant to Rule 37(b), and a proper sanction given plaintiff's conduct or lack thereof.

C. Prejudice to opposing party.

It is important to note that defendant's motion to dismiss was heard one (1) week prior to trial, and at that time, plaintiff remained noncompliant with the trial court's order. "[L]itigants have an obligation to timely comply with the orders of the trial courts. *Salts*, 872 So.2d at 674. "Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril." *Bowie v. Monfort Jones Memorial Hospital*, 861 So.2d 1037, 1042 (Miss.2003) (citations omitted). While the end result may seem harsh, litigants and their attorneys must understand that they have an obligation and duty to timely comply with the orders of trial courts. *Id.*

Plaintiff contends on numerous occasions that the defendant was not prejudiced by his failure to comply with a court order. Such a statement is completely unsupported given the fact that trial was one week away, and plaintiff had failed to respond to discovery as ordered by the trial court. Plaintiff spews unsupported facts regarding conversations with defense counsel, yet nothing in the record supports his contentions.

Counsel for the parties were exchanging phone messages, and at one point, discussed

deposition dates for the plaintiff and witnesses under the belief that the trial was not going to be heard as a third setting. No depositions were noticed. Once the third setting became primary (one month prior to the trial date), it became painfully obvious that the defense was completely unable to prepare for trial given plaintiff's failure to comply with the court order. There was never a verbal agreement to continue the case, yet it was offered by the plaintiff. Defense counsel conferred with his client who rejected the proposal, and plaintiff's counsel was notified of the same.

If plaintiff believed that a continuance should be considered as an alternative, then plaintiff's counsel should have offered it to the court. By refraining from the request, plaintiff waived such a right, and this Court has often enforced waivers when a party fails to request a continuance. *Holladay v. Holladay*, 776 So.2d 662, 671 (Miss.2000). Certainly the court is not obliged to make the request for the plaintiff, and the failure to request such waives consideration of the same.

One could not expect a defendant to try a matter within one week when even the basic allegations of injuries and medical expenses claimed as a result of the injuries are unknown. Plaintiff never provided a proper response informing the defendant as to what injuries were claimed as a result of the alleged fall, and what medical treatment was undertaken to care for those injuries. Should the case have been tried, it would be tantamount to trial by ambush. The avoidance of trial by ambush is the sole purpose for discovery.

This Court has developed strict discovery rules in order to avoid trial by ambush and to insure each party has a reasonable time to prepare for trial. It is committed to the discovery rules because they promote fair trials. Once an opponent requests discoverable material, an attorney has a duty to comply with the request regardless of the advantage a surprise may bring.

Haggerty v. Foster, 838 So.2d 948, 959 (Miss.2002) (citing *Harris v. General Host Corp.*, 503 So.2d 795, 797 (Miss.1986)); *Tolbert v. State*, 441 So.2d 1374, 1375 (Miss.1983). It is disingenuous for

plaintiff to claim that the defendant would not suffer prejudice when he had failed to comply with the court's order the week prior to trial.

The incident which forms the basis of plaintiff's complaint is alleged to have occurred on April 2, 2002. Plaintiff delayed filing of the complaint until April 1, 2005. Defendant answered and propounded discovery requests to the plaintiff on or about June 7, 2005. The defendant issued correspondence on two separate occasions – August 9, 2005 and August 26, 2005 – seeking responses to discovery. (R.32-33). There was no response. It was not until February 3, 2006 (seven months later) when faced with a motion to dismiss for failure to prosecute that plaintiff provided purported responses which the trial court found to be insufficient. Given these incomplete responses, plaintiff's counsel was provided the lesser sanction of fourteen (14) days to rectify the deficiencies. Nine (9) months passed without compliance even when faced with dismissal one (1) week prior to trial.

The defendant realizes that the sanction of dismissal for noncompliance of a court order is "appropriate only where there is a clear record of delay or contumacious conduct" on the part of a party. *Wallace*, 572 So.2d.at 376. At the time of the dismissal, the alleged occurrence was over four (4) years old, and suit was pending for over one (1) year without proper responses being propounded. Based upon the capsule of facts, a clear record of delay exists. Combine this with the lesser sanctions provided by the court, it is clear that dismissal was a proper sanction pursuant to Rule 37(b) of the Mississippi Rules of Civil Procedure.

ISSUE II: Whether the trial court's denial of plaintiff's motion to reinstate was manifest error.

Plaintiff seems to discuss this aspect of appeal throughout the body of arguing the first issue by citing *Taylor v. General Motors Corp.*, 717 So.2d 747 (Miss.1998), for the proposition that the court's sanction of dismissal was too harsh. *Taylor* involved a cause of action against an automobile manufacturer and other defendants arising out of a motor vehicle accident. *Id.* The plaintiff was represented by out-of-state counsel who failed to comply with Rule 46 of the Mississippi Rules of Appellate Procedure in providing an affidavit as required. *Id.* In considering the dismissal, this Court reviewed the facts of the case and applicable law and affirmed the dismissal. *Id.*

Rule 41(b) of the Mississippi Rules of Civil Procedure provides, in pertinent part:

(b) Involuntary Dismissal: Effect Thereof. 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....Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

M.R.C.P. 41(b) (2006). When reviewing a trial court's involuntary dismissal pursuant to Rule 41(b), this Court may not reverse unless it finds that the trial court was manifestly wrong. *Walters v. Patterson*, 531 So.2d 581, 583 (Miss.1988).

Plaintiff complains that the court's dismissal was too harsh as the plaintiff did not "willfully or consistently violate a court order." Such a statement is difficult too swallow given the past statements of plaintiff's counsel, and nine (9) months of contempt to a court order. Plaintiff's counsel clearly stated to the court that her client "could sign the interrogatories" which were outstanding. This statement denotes that plaintiff had the ability to execute the sworn responses, yet

chose not to comply. However, as stated earlier, this is only one piece of the puzzle. Plaintiff completely failed to correct deficiencies in the purported responses as directed by the trial court. Defendant assumes that plaintiff and/or plaintiff's counsel had the ability to rectify the purported responses, yet simply chose not to comply.

Dismissal for failure to comply with an order of the court is an extreme and harsh sanction, and is appropriate where a clear record of delay or contumacious conduct and lesser sanctions would not serve the interests of justice. *Wallace*, 572 So.2d at 376 (citations omitted). As previously shown, there exists a clear record of delay in this case, and the trial court granted lesser sanctions in response to defendant's first motion to dismiss. Given that trial was one (1) week away at the time of hearing and plaintiff had wholly failed to comply with any part of the court's order, dismissal was a proper sanction.

VIII. CONCLUSION

Plaintiff filed his cause of action on April 1, 2005 – two days prior to the running of the statute of limitations. Defendant answered and propounded discovery requests to the plaintiff on or about June 7, 2005. The defendant issued correspondence on two separate occasions – August 9, 2005 and August 26, 2005 – seeking responses to discovery. (R.32-33). There was no response. It was not until February 3, 2006 (seven months later) when faced with a motion to dismiss for failure to prosecute that plaintiff provided purported responses. However, these purported responses were sorely incomplete. The trial court, recognizing this, provided the plaintiff fourteen (14) additional days to rectify the deficiencies. Nine (9) months passed without compliance even when faced with dismissal one (1) week prior to trial.

The dismissal by the trial court was not an abuse of discretion. Plaintiff has failed to show an inability to comply with the order. The record is clear that the court considered and levied lesser sanctions in response to a prior motion to dismiss filed by the defendant. Further, the plaintiff's failure to supplement the deficient responses up to one (1) week prior to trial substantially prejudiced the defense, and such action is tantamount to trial by ambush. Weighing these factors, the dismissal was proper pursuant to Rule 37 of the Mississippi Rules of Civil Procedure.

The facts of this case also paint a clear picture of delay on the part of the plaintiff. This delay, coupled with the consideration of lesser sanctions, provide support for the denial of plaintiff's motion to reinstate. The trial court's denial was not manifest error.

Trial judges are afforded considerable discretion in issuing orders to assure the timely disposition of cases, and they have the right to compliance with their orders, and when parties or their attorneys fail to adhere to the provisions of these orders, they do so at their own peril. *Bowie*,

861 So.2d 1037, 1042. The Mississippi Rules of Civil Procedure clearly provide for sanctions in the form of dismissal for failure to abide by its orders. M.R.C.P. 37(b)(2) (2006). This Court stated it best in affirming a trial court's refusal to set aside a default judgment:

It may be that people will miss fewer trains if they know the engineer will leave without them rather than delay even a few seconds. Although we are not about to inaugurate a policy of entering irrevocable defaults where no answer has been filed by the thirty-first day, we are equally resolved that people know that the duty to answer must be taken seriously. At some point the train must leave.

Guaranty Nat'l Ins. Co. v. Pittman, 501 So.2d 377, 388-389 (Miss.1987). The train in this case waited at the station for a total of sixteen (16) months for plaintiff to provide the defendant with proper responses to discovery. At some point, the train had to leave – with or without the plaintiff.

RESPECTFULLY SUBMITTED, this the 9th day of January, 2008.



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CERTIFICATE OF SERVICE

I, J. BRIAN HYNEMAN, of Hickman, Goza & Spragins, Attorneys at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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Ninth Circuit Court District
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An electronic version of the brief is hereby provided to the Court on Compact Disk.

THIS, the 9th day of January, 2008.



J. BRIAN HYNEMAN