

**IN THE MISSISSIPPI SUPREME COURT**

**JOSEPH YOUNG,**

**APPELLANT**

**VS**

**NO.: 2008-CA-01146**

**JAMES MERRITT**

**APPELLEE**


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**ON APPEAL FROM THE CIRCUIT COURT  
OF COAHOMA COUNTY, MISSISSIPPI**

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**BRIEF OF APPELLEE**

**ORAL ARGUMENT NOT REQUESTED**

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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible bases for disqualification or recusal.

1. Joseph Young, Plaintiff – Appellant.
2. James Merritt, Defendant – Appellee.
3. Curt Crowley, The Crowley Law Firm, PLLC, Attorney for Plaintiff – Appellant.
4. Mildred L. Sabbatini, Esquire, Spicer Rudstrom, PLLC, Attorney for the Defendant – Appellee.

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## **I. TABLE OF AUTHORITIES**

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## **II. STATEMENT OF THE CASE**

This is an appeal from the Order Granting Defendant's Motion to Dismiss, signed by the Circuit Court Judge, Kenneth L. Thomas, on or about May 26, 2008 and entered by the Circuit Court Clerk into the record on or about May 29, 2008.

### **A. Course of Proceedings Below**

On or about June 7, 2007, the Plaintiff-Appellant, Joseph Young (hereinafter referred to as "Plaintiff," or "Young") filed a Complaint against the Defendant – Appellee, James Merritt (hereinafter referred to as "Defendant" or "Merritt"), in the Circuit Court of Coahoma County, Mississippi, based upon a claim of negligence arising from an automobile accident on or about March 30, 2006.

Following service of process, the Defendant filed a Motion for Additional Time in which to file a responsive pleading. Thereafter, on or about July 31, 2007, the Defendant filed an Answer and Affirmative Defenses to the Amended Complaint, as well as propounded written discovery upon the Plaintiff. Plaintiff failed to timely respond to the written discovery request. After the Defendant made several inquiries and efforts to obtain said discovery, the Defendant, on or about January 14, 2008, filed a Motion to Compel Plaintiff to respond to written discovery. In lieu of appearing at the hearing of said Motion, the parties entered into an Agreed Order whereby the Plaintiff was ordered to respond to any outstanding interrogatories and requests for productions no later than March 31, 2008, and if the Plaintiff failed to so respond to said discovery requests by such date, then the suit/cause would be dismissed with prejudice. The Order was signed by Circuit Court Judge, Kenneth L. Thomas, on or about the 27<sup>th</sup> day of March, 2008 and entered into the Court records by the Circuit Court Clerk, on or about April 1, 2008.

On or about April 1, 2008, the Defendant filed a Motion to Dismiss with Prejudice in reliance upon the Agreed Order on discovery issued by consent of the parties. The Plaintiff filed a response to the Motion to Dismiss on or about May 19, 2008. After hearing oral argument on the Motion to Dismiss with Prejudice, the Court executed an Order granting the motion and dismissing the case with prejudice on or about May 26, 2008. The Order was entered by the clerk, on or about May 29, 2008.

On June 27, 2008, the Plaintiff perfected his appeal to this Court.

**B. Statement of Facts**

On or about June 7, 2007, the Plaintiff filed a Complaint against the Defendant in the Circuit Court of Coahoma County, Mississippi, for injuries arising from a motor vehicle accident. [R-2]. The Defendant subsequently responded to the Complaint on or about June 31, 2007, and at that time propounded his First Set of Interrogatories and Requests for Production of Documents to the Plaintiff. [R-1,6].

On or about September 27, 2007, counsel for the Defendant sent a letter to Plaintiff's counsel to inquire about the status of written discovery which was propounded and served on or about July 31, 2007, and to request that same be responded to as soon as possible. [R-34]. After still obtaining no response from the Plaintiff, counsel for the Defendant, on or about November 7, 2007, sent a letter to Plaintiff's counsel again inquiring as to the status of written discovery and requesting that same be responded to as soon as possible or a Motion to Compel would be required. [R-35]. Again after receiving no response from Plaintiff's counsel, Defendant's counsel again wrote on December 4, 2007, requested that responses to written discovery be filed within fourteen (14) days or a Motion to Compel would be prepared and filed with the Court. [R-36].

On or about December 19, 2007, counsel for the Defendant spoke with Plaintiff's counsel via the telephone regarding the delinquent discovery responses and was told that the Plaintiff would respond to discovery within ten (10) to fourteen (14) days. However, responses were not forthcoming within the ten (10) to fourteen (14) days as indicated by Plaintiff's counsel. Consequently, on or about January 14, 2008, the Defendant filed a Motion to Compel, requesting the Honorable Court to compel the Plaintiff to answer discovery propounded upon him within five (5) days of the Order. [R-39]. A hearing on said Motion to Compel was noticed for March 19, 2008, at the Bolivar County Courthouse for the second Judicial District in Cleveland. [R-43].

The afternoon prior to the hearing, on March 18, 2008, Plaintiff's counsel telephoned the Defendant's counsel and suggested that if the Defendant's counsel would give the Plaintiff an extension of ten (10) days in which to answer the outstanding discovery, that the Plaintiff would enter an Order agreeing to have the matter dismissed with prejudice if the discovery was not answered within the additional ten (10) day period. Based upon this conversation, the Defendant's attorney drafted an Order and emailed it to the Plaintiff's counsel, who consented to the content and gave permission for the signature of his name to the Order and entry of same with the Court.[R-45,46]. The Order was forwarded to the Honorable Kenneth L. Thomas, who duly executed the Order on or about March 27, 2008, and returned it to the Defendant's counsel, who received it on the afternoon of March 31, 2008. [R-48]. The Agreed Order was filed with the Court the next day on April 1, 2008. [R-50].

As of the morning of April 1, 2008, the Defendant had not received a telephone call, facsimile, an email, a letter, or any other means of communication from the

Plaintiff's attorney regarding the above referenced interrogatories and requests for production of documents pursuant to the Agreed Court Order. Furthermore, the Defendant had not received any communication from Plaintiff's counsel regarding same. Consequently, on or about March 27, 2008, a Motion to Dismiss with Prejudice was prepared and filed on or about April 1, 2008 based upon the terms of the previous Order. [R-1, 15]. A hearing on the Motion to Dismiss was held before the Honorable Kenneth L. Thomas, on or about May 20, 2008. <sup>1</sup> [R-1, transcript]. Following the hearing of the motion, the Court entered an Order granting Defendant's Motion to Dismiss with Prejudice. The Order on the motion granting the dismissal of the suit with prejudice was executed by the Court on May 26, 2008, and entered by the court clerk on May 29, 2008. [R-56].

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<sup>1</sup> The transcript of the hearing is included in the Appellate record.



### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW**

The Appellant sites the appropriate Standard of Review as an abuse of discretion standard when considering a dismissal with prejudice for discovery violations pursuant to Miss.R.Civ.P. 37; Beck v. Sapet, 937 So.2d 945, 948 (Miss. 2006), citing Salts v. Gulf Nat'l Life Ins. Co., 872 So.2d 667,670 (Miss. 2004). The Appellee agrees with the above stated Standard of Review.

#### **B. THE TRIAL COURT ACTED PROPERLY IN COMPLIANCE WITH ITS PREVIOUS ORDER BY DISMISSING THE PLAINTIFF'S COMPLAINT WITH PREJUDICE.**

Under Miss.R.Civ.P. 37, Mississippi trial courts are giving great latitude and discretion to impose sanctions against a party for discovery violations. Miss.R.Civ.P. 37. Sanctions available to the court include the dismissal of an action with prejudice. Salts v. Gulf Nat'l Life Ins. Co., 872 So.2d 667,670 (Miss. 2004). The Appellant in his Brief lists numerous cases under Mississippi law where in he describes the dismissal of an action with prejudice to be the ultimate sanction and argues that the Court should have used a lesser alternative sanction that would have been sufficient to remedy the discovery violation. However, the Defendant-Appellee submits that none of the cases cited in support of the Plaintiff's argument are analogous to the situation at hand. In the matter at hand, there is an agreed Order in which it is specifically stated as follows:

"Came On for hearing this date in the above styled and numbered cause, the Defendant's Motion to Compel, and finding the same meritorious and well taking, and finding the parties have reached an agreement, it is hereby

ORDERED, DECREED AND ADJUDGED, that the Defendant's Motion to Compel is hereby granted, and that the Plaintiff is hereby compelled to respond to outstanding interrogatories and requests for production of documents propounded onto it by the Defendant no later than March 31, 2008, and that **if the Plaintiff**

**fails to respond to said discover by such date, that this suit/cause shall be dismissed with prejudice.” [Emphasis added]<sup>2</sup>**

Based upon the inclusion of this condition in the Order, the Plaintiff is now bound to said condition. The Defendant submits that the Plaintiff cannot agree to certain conditions in an Agreed Order and; thereafter, when in violation of that condition, then move it should not be bound by its own agreed terms and conditions due to the harshness or severity of same. To allow such relief and/or argument available to the Plaintiff would in essence nullify the Order in its entirety.

This is fully recognized in the Court’s own ruling from the hearing on the Motion to Dismiss. The Court stated as follows:

“...when rules of discovery are violated, dismissing a cause of action with prejudice is the most harsh course of action a court can take. And Judges are cautioned not to leap that great distance without first considering less severe options. But this is not an instance where a less severe option should be used. Here we have the by-passing of deadlines and the by-passing of deadlines and the by-passing of deadlines. We have a consent, a mutual agreement between the attorneys and we have a Court Order. If I were to set this matter aside, I would be laughing in the face of my own Order. A Court Order in this instance would lose its own various essence.

The Court does hereby grant the Motion to Dismiss with Prejudice.”

The Defendant-Appellee submits that the mutually agreed upon Order entered with the Court should be given its full deference and that the dismissal with prejudice should remain in tact.

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<sup>2</sup> Please note that it was at Plaintiff’s counsel’s own suggestion and submission that this provision as to the dismissal of this case with prejudice was included in the Agreed Order.

**C. THE TRIAL COURT DID NOT ERR IN DISMISSING THE PLAINTIFF'S COMPLAINT WITH PREJUDICE WHERE THE ORDER WAS NOT ENTERED BY THE CLERK UNTIL APRIL 1, 2008.**

The Plaintiff attempts to rely upon Vaughn v. Monticello Insurance Company, 838 So.2d 983, 985 (Miss. 2001), in an effort to argue that the Agreed Order on the Motion to Compel was not effective until its entry by the clerk on April 1, 2008. First, the Defendant maintains that the Vaughn matter is not analogous to the case at hand. In the Vaughn matter, a judge issued and signed an Order granting summary judgment on or about June 8, 2000, for some unknown reason, this Order was not filed with the clerk until August 8, 2000 after the expiration of the trial judge's term. In the Vaughn matter, it was held that the succeeding judge has the authority to adopt the findings of the prior judge and did so. Based upon the action of the succeeding judge, it was determined that the Order granting summary judgment was valid. This matter is not analogous in that we are not dealing with a judge who was no longer serving at the time of the entry of the Order. Furthermore, the case itself says for **purposes of argument only**, the Court was accepting the argument raised that the Order was not filed until after the term expired was not effective, based upon the finding that it was a moot issue since the succeeding judge adopted the findings. Thus this case does not stand for the principles as indicated and/or argued within the Plaintiff's Brief.

Plaintiff attempts to argue that since the court clerk did not docket the entry of the Agreed Order on the Motion to Compel until April 1, that the Order in its entirety was null and void.

The Defendant simply asserts that the Plaintiff's position is without merit. Furthermore, the Defendant would note by Plaintiff's counsel's own admission that it did

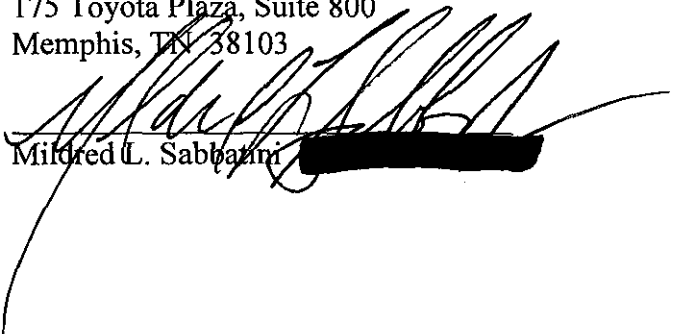

not send the responses to any discovery until April 2, 2008, the day after the filing of the Order to Compel and the Motion to Dismiss.

#### **IV. CONCLUSION**

For the reason contained herein, the Defendant-Appellee states that the dismissal of the matter with prejudice was proper and well within the discretion of the trial court and respectfully moves this court to affirm said dismissal with prejudice.

RESPECTFULLY SUBMITTED this the 7<sup>th</sup> day of July, 2009.

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Mildred L. Sabbatini 

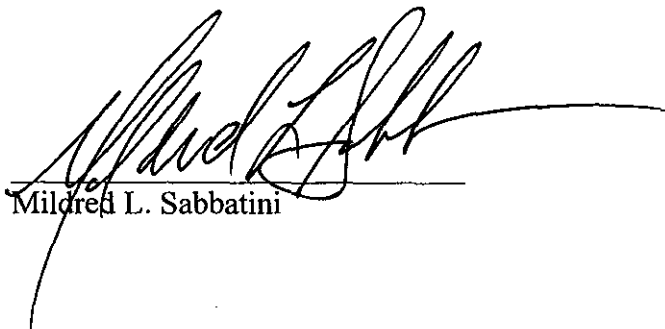
**V. CERTIFICATE OF SERVICE**

I, the undersigned counsel of record, do hereby certify that I have this day served,  
by first-class U.S. Mail, postage-prepaid, a true and correct copy of the attached and  
foregoing document to the following persons:

Judge Kenneth L. Thomas  
Circuit Court of Coahoma County  
P.O. Box 548  
Cleveland, MS 38732-0548

Curt Crowley  
The Crowley Law Firm, PLLC  
P.O. Box 4673  
Jackson, MS 39296-4673

This the 7<sup>th</sup> day of July, 2009.

  
Mildred L. Sabbatini