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 APPELLANT

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, Flynn & Rudstrom, Attorneys for the Defendant-Appellee.

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## III. STATEMENT OF THE ISSUES

ISSUE 1: The trial court erred in dismissing the Plaintiff's claims with prejudice as a sanction for a single discovery violation, when the Court had not previously attempted lesser sanctions.

ISSUE 2: The trial court erred in dismissing the Plaintiff's claims with prejudice as a sanction for failing to comply with a Court Order, where the time set for compliance with the Order had passed before the Order was entered by the Court.

## IV. STATEMENT OF THE CASE

This is an appeal from the Order Granting Defendant's Motion to Dismiss, entered by the Circuit Court of Coahoma County, Mississippi, on May 29, 2008.

### A. Course of Proceedings Below

On June 7, 2007, the Plaintiff-Appellant, Joseph Young (hereinafter "Plaintiff"), filed a Complaint against the Defendant-Appellee, James Merritt (hereinafter "Defendant"), in the Circuit Court of Coahoma County, Mississippi. The Complaint asserted claims of negligence against the Defendant, resulting from an automobile accident which occurred on March 30, 2006.

Following service of process, the Defendant filed a Motion for Additional Time in which to file responsive pleadings on July 24, 2007. On August 1, 2007, the Defendant filed his "Answer and Affirmative Defenses to Amended Complaint.[1]"

The Defendant propounded written discovery to the Plaintiff on August 1, 2007. On January 14, 2008, the Defendant filed a Motion to Compel the Plaintiff to respond to written discovery. On April 1, 2008, the Court entered an Agreed Order Granting Motion to

[1]The Defendant's reference to an "Amended Complaint" appears to be in error, as the Plaintiff filed only the original Complaint in this action.

Compel, and ordered the Plaintiff to respond to the Defendant's discovery requests not later than March 31, 2008.[2]

On April 1, 2008, the Defendant filed a Motion to Dismiss With Prejudice. The Plaintiff filed a response to the Motion to Dismiss on May 19, 2008. After hearing oral argument on the Motion to Dismiss With Prejudice, the Court entered an Order granting said motion, and dismissed the case with prejudice on May 29, 2008.

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

**B. Statement of the Facts**

On March 30, 2008, the Plaintiff was involved in an automobile accident with the Defendant. [R-2]. The accident occurred on Highway 49 in Forrest County, Mississippi. [R-2].

On June 7, 2007, the Plaintiff filed his Complaint against the Defendant in the Circuit Court of Coahoma County, Mississippi. [R-2]. The Complaint alleged that the Defendant was negligent, and that the Plaintiff had suffered damages as a result of the Defendant's negligence. [R-2]. The Complaint sought an unspecified amount of compensatory damages. [R-2].

The Defendant subsequently responded to the Complaint on August 1, 2007, and thereafter propounded his First Set of

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[2]The deadline for the Plaintiff to serve his discovery responses expired one day **prior** to the date the Order was entered by the Court.

## VI. ARGUMENT

### A. STANDARD OF REVIEW

The Mississippi Supreme Court applies an abuse of discretion standard of review 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); See also Robert v. Colson, 729 So.2d 1243, 1245 (Miss. 1999); Dawkins v. Redd Pest Control Co., 607 So.2d 1232, 1235 (Miss. 1992).

### B. THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S CLAIMS WITH PREJUDICE AS A SANCTION FOR A SINGLE DISCOVERY VIOLATION, WHEN THE COURT HAD NOT PREVIOUSLY ATTEMPTED LESSER SANCTIONS.

Trial courts are empowered with the discretion to impose sanctions against a party for discovery violations. Miss.R.Civ.P. 37(b)(2); Caracci v. International Paper Company, 699 So.2d 546, 557 (Miss. 1997). Rule 37 provides the trial court numerous options and "great latitude in deciding when and what sanctions will be imposed for a discovery violation." Ngo v. Centennial Insurance Company, 893 So.2d 1076, 1079 (Miss. 2005).

The sanctions available to the Court include dismissal of the action with prejudice. Salts v. Gulf Nat'l Life Ins. Co., 872 So.2d 667, 670 (Miss. 2004). Dismissal of an action is provided as an option to the trial court to ensure "the orderly expedition of justice and the court's regulation of its own docket." Ngo v. Centennial Insurance Company, 893 So.2d 1076, 1079 (Miss. 2005)

*citing* Palmer v. Biloxi Regional Medical Center, 564 So.2d 1346, 1367 (Miss. 1990). Dismissal with prejudice should be "used as a sanction only as a last resort," and "only under the most extreme circumstances." Beck v. Sapet, 937 So.2d 945, 949 (Miss. 2006) *quoting* Clark v. Mississippi Power Co., 372 So.2d 1077, 1080 (Miss. 1979); Pierce v. Heritage Properties, Inc., 688 So.2d 1385, 1388 (Miss. 1997).

A trial court should not employ the ultimate sanction of dismissal with prejudice, where a lesser, alternative sanction would be sufficient to remedy the discovery violation. Smith v. Tougaloo College, 805 So.2d 633, 641 (Miss.App. 2002); See also Batson v. Neal Spelce Associates, Inc., 765 F.2d 511, 516 (5th Cir. 1985); Griffin v. Aluminum Co. of America, 564 F.2d 1171, 1172 (5th Cir. 1977) *citing* Diaz v. Southern Drilling Co., 427 F.2d 1118, 1126 (5th Cir. 1970). Dismissal with prejudice should be imposed only where the deterrent value of Rule 37 could not be achieved by the imposition of less drastic sanctions. Salts, 872 So.2d at 673.

An example of the "extreme circumstances" which warrant dismissal with prejudice was discussed in Beck v. Sapet, 937 So.2d 945 (Miss. 2006). In Beck, the Plaintiffs failed to timely serve responses to written discovery propounded by the Defendant. Id. at 946. The Defendant filed a motion to compel, which was granted by the trial court. Id. The Plaintiffs failed to provide discovery responses before the date ordered by the court. Id.

court. Id.

*The Trial Court Failed to Consider or Impose Lesser Sanctions*

In the case at bar, the Plaintiff admittedly failed to comply with the Order granting the Defendant's motion to compel. However, the trial court failed to impose lesser sanctions upon the Plaintiff prior to dismissing his claims with prejudice. Further, the trial court failed to even *consider* whether lesser sanctions were appropriate.

Prior to dismissing the Plaintiff's claims, the Court had not imposed sanctions of any type upon the Plaintiff. The trial court had a myriad of options, other than dismissal with prejudice, at its disposal. The Court could have ordered monetary fines or sanctions, and/or ordered the Plaintiff to pay the Defendant's attorney's fees associated with the motion to compel. The Court could have even dismissed the claims *without* prejudice.

Dismissal without prejudice would have been an adequate and effective sanction for the trial court to impose for the Plaintiff's discovery violation. Dismissal without prejudice would have prevented any further alleged prejudice to the Defendant, and would have served the deterrent purposes of Rule 37. The Plaintiff would have been forced to re-file his lawsuit, and incur the costs of filing and service of process a second time.

Dismissal without prejudice would have served the purposes of Rule 37, prevented prejudice to the Defendant, and at the same time

avoided the Draconian result of dismissal with prejudice. This is but one lesser alternative sanction the Court had at its disposal. However, the Court failed to consider any of these alternatives prior to dismissing the case with prejudice.

Because the trial court ignored available alternative sanctions, and failed to impose adequate and effective alternative sanctions, the judgment of the trial court should be reversed and remanded.

*The Discovery Violation Was Not Sufficiently Egregious to Warrant Dismissal With Prejudice*

The Plaintiff was not guilty of a repeated pattern of defiance to the procedural orders of the Court. There was but one order entered by the Court relating to the Plaintiff's discovery responses. Violation of a single order of the Court does not rise to the level of repeated disregard of procedural orders.[6]

In addition, the Plaintiff did serve discovery responses upon the Defendant. The responses were admittedly unsigned, and a day late. Even though Plaintiff's counsel could not contact the Plaintiff to secure complete, signed and sworn discovery responses, Plaintiff's counsel served unsigned discovery responses, which were compiled using the information available in the case file. This action was taken on the Plaintiff's behalf in an effort to comply-to the greatest extent possible-with the Court's order.

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[6]Harvey, 862 So.2d at 549.

These facts do not support a finding that the Plaintiff "thumbed his nose" at the Order of the Court. Despite the fact that the Plaintiff did not strictly comply with the terms of the Order, efforts were made on the Plaintiff's behalf to comply with the Order. The conduct of the Plaintiff herein comes no where close to the level of wrongdoing as detailed in Beck and Gilbert, *supra*.

There was no repeated disregard of the trial court's directives, and efforts were made on the Plaintiff's behalf to comply with the single Order to the extent possible under the circumstances. Dismissal with prejudice was simply too harsh a sanction.[7] For these reasons, this case should be reversed and remanded.

**C. THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S CLAIMS WITH PREJUDICE AS A SANCTION FOR FAILING TO COMPLY WITH A COURT ORDER, WHERE THE TIME SET FOR COMPLIANCE WITH THE ORDER HAD PASSED BEFORE THE ORDER WAS ENTERED BY THE COURT.**

An order is not effective until the order is "entered" by the Clerk. Vaughn v. Monticello Insurance Company, 838 So.2d 983, 985 (Miss. 2001). The effective date of an order is not controlled by the date upon which it is signed by the judge, but the date upon which the Clerk performs the act of entering the order upon the

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[7]The fact that efforts were being made on the Plaintiff's behalf to serve at least partial discovery responses is further support for the proposition that the trial court erred in failing to impose lesser sanctions, as discussed in the preceding section.

minutes of the Court. Id.

In the instant case, the Circuit Judge signed the Order granting the Defendant's motion to compel on March 27, 2008. The Order directed the Plaintiff to serve his discovery responses not later than March 31, 2008. However, the Order was not actually entered until April 1, 2008. Accordingly, the Order was not effective until April 1, 2008. At the time the Order became effective, the date specified in the Order for the Plaintiff to serve his discovery responses had already passed. The Order commanded the Plaintiff to perform an act on a date which had passed before the Order was effective. Put another way, the trial court erred in dismissing the Plaintiff's claims for failing to perform an act prior to the Court ordering him to do so.

On the date the Plaintiff failed to serve his discovery responses, he had not yet been ordered to do so by the Court, because the Order had not been entered. While the Circuit Judge may have signed the Order prior to the deadline for the Plaintiff to serve his responses, the Order did not become effective until entered by the Clerk, one day after the deadline had passed. The trial court erred in finding that the Plaintiff violated an Order which was not entered and effective on the date of the alleged violation.

Because the Order was not entered and effective until April 1, 2008-the day after the Order directed the Plaintiff to serve his

discovery responses–it was literally impossible for the Plaintiff to comply with the Order. Because compliance was a literal impossibility, the Plaintiff's claims should not have been dismissed for failing to comply the Order. Accordingly, this case should be reversed and remanded to the trial court.

## VII. CONCLUSION

The Plaintiff's claims should not have been dismissed with prejudice. The Plaintiff did not engage in repeated contumacious conduct in the discovery process. Moreover, the trial court failed to consider or impose lesser sanctions upon the Plaintiff for his failure to comply with the Order granting the Defendant's motion to compel. The circumstances of this case do not warrant imposition of a remedy as harsh as dismissal with prejudice.

In addition, the Order the Defendant was found to have violated was not entered, and consequently not effective, until after the date the Order specified that the Plaintiff was to serve his discovery responses. The Plaintiff should not be punished for failing to comply with an Order which was not in effect at the time of the alleged violation.

For these reasons, the judgment below should be reversed, and this case remanded to the Circuit Court of Coahoma County, Mississippi, for trial.

## VIII. 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
Post Office Box 548
Cleveland, Mississippi 38732-0548

Mildred L. Sabbatini, Esquire
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This the 29th day of May, 2009.

CURT CROWLEY