IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-IA-00421-SCT
CONSOLIDATED WITH
No. 2008-IA-00788-SCT

DON BARRETT, INDIVIDUALLY;
BARRETT LAW OFFICE, P.A.;
AND LOVELACE LAW FIRM, P.A.

DEFENDANTS-APPELLANTS

versus

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, LLC

PLAINTIFF-APPELLEE

REPLY BRIEF OF APPELLANTS

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT
OF LAFAYETTE COUNTY, MISSISSIPPI
CAUSE NO. L07-135

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ORAL ARGUMENT IS REQUESTED

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STATUTES & RULES

I. ARGUMENT

Appellants prefatorily highlight seven key flaws in plaintiff's reply brief. First, plaintiff makes the remarkable assertion that appellants "are not prejudiced" (Brief at 21) and that: "The defendants are not actually deprived of anything by the trial court's order. They are not being punished." (Brief at 6). The lower court made it very clear that it was severely punishing the Scruggs Defendants when it imposed, in the court's words, its "harsh" sanctions. (R. 760). The very same "harsh" sanctions that were imposed on the actual wrongdoers were also imposed on appellants. The lower court struck appellants' answer and defenses, entered a default against them, deprived them of their contractual rights to arbitration, and charged appellants with paying plaintiff's attorneys' fees and expenses. To accept plaintiff's suggestion that appellants have suffered no prejudice and are not being punished would mean that the Scruggs Defendants were not prejudiced or punished either, and that the trial court sanctions were hollow and meaningless. The order imposing sanctions severely punished and prejudiced the appellants, and plaintiff's argument to the contrary is patently absurd.

Second, plaintiff spends much of its brief arguing a point that is not in dispute: the conduct of the Scruggs Defendants was a fraud on the court and reprehensible conduct deserving of severe sanctions and punishment. The primary issue on this appeal, however, is whether the trial court could sanction innocent parties (the appellants). Plaintiff's assertion that the punishment of innocent parties is acceptable "collateral damage," is contrary to clear case authority which establishes and confirms that inherent powers

sanctions can be imposed against a party only if there is a finding of bad faith or willful intent by that party. Inherent powers sanctions cannot be imposed on innocent parties through vicarious liability. Further, while plaintiff engages in unfounded speculations and innuendo, it is undisputed that appellants engaged in no wrongful conduct -- they had no knowledge of, did not participate in, did not authorize, and did not ratify the subject wrongful conduct of the Scruggs Defendants -- and the lower court made no finding of bad faith or willful intent by appellants. The sanctioning of appellants is, therefore, foreclosed as a matter of law.

Third, plaintiff asserts that the sanctioning of innocent parties is acceptable and necessary to protect the integrity of the judicial system. Plaintiff's assertion is not only contrary to law, as mentioned above, it is illogical. As appellants observed in their original brief (at pp. 32-33), our system of justice should appropriately punish the guilty, but it should never suffer, condone, or allow the punishment of innocent parties -- and in its zeal to protect and preserve our system of justice, a court should not sacrifice justice, itself, through the punishment of innocent parties.

Fourth, plaintiff claims that "[s]ince the birth of the Republic, the Courts have had the inherent power to do whatever is 'necessary to the exercise of all others.'" (Brief at 6). Plaintiff implies that a court's powers are unlimited. Not true. A court has no authority to punish innocent parties -- a principle that is inherently logical, is fundamental to a fair and workable system of justice, and has been implemented through, *inter alia*, the recognition that inherent powers sanctions may be imposed only upon a showing of

bad faith personal to the offender. Further, even when punishing a guilty party, a court's inherent powers are not unlimited. As one of the primary cases cited by plaintiff (Brief at p. 12) recognizes: "Because of their potency, inherent powers must be exercised with restraint and discretion, and discretion in sanctioning litigants is not unfettered." *Dotson v. Bravo*, 202 F.R.D. 559, 574 (D. Ill. 2001) (emphasis added).

Fifth, plaintiff acknowledges that courts imposing sanctions through their inherent powers must exercise restraint and caution, yet argues that restrained sanctions are only appropriate for "minor infractions." (Brief at 10). Plaintiff's argument is inconsistent and incorrect. While the severity of infractions may have a correlation to the severity of sanctions imposed on the actual wrongdoer, there still must be a finding of bad faith committed by a party before sanctions may actually be imposed against that party. There are no exceptions to the United States Supreme Court's mandate that courts must use the least possible power adequate to the end proposed. Even if there were some conceivable basis upon which the lower court could have lawfully impose sanctions on appellants, there was absolutely no need or reason to sanction the appellants. The lower court should have conducted the mandatory "lesser sanctions" analysis, exercised judicial restraint, and punished the Scruggs Defendants alone.

Sixth, even if the doctrine of vicarious liability were potentially available (which it is not), vicarious liability cannot be imposed on appellants, because the criminal conduct of the Scruggs Defendants is extraordinary and well beyond the "ordinary course of business." Plaintiff fails to address the legal implications of such extraordinary conduct,

which forecloses any potential application of vicarious liability.

Finally, sanctions were imposed upon appellants solely through vicarious liability based upon the wrongful acts of the Scruggs Defendants. In appellants' original brief (at 30-32), appellants established that pursuant to *J & J Timber Co. v. Broome*, 932 So. 2d 1, 6 (Miss. 2006), when plaintiff settled with and released the Scruggs Defendants and dismissed the Scruggs Defendants from the lower court proceeding with prejudice, any vicarious liability (if any) appellants could possibly have for the wrongful conduct of the Scruggs Defendants was extinguished, and appellants have been released from the court's order imposing sanctions as a matter of law. Plaintiff's brief does not discuss, respond to, nor challenge appellants' argument. The reasons for plaintiff's silence are obvious: appellants' argument is correct and dispositive, and plaintiff has no legitimate response. The legal effect of the plaintiff's settlement with the Scruggs Defendants is undisputed, and the lower court's order is due to be reversed on those grounds alone.

A. The Jones Firm is not entitled to sanctions against appellants as a matter of law.

The Jones Firm devotes a large portion of its brief to discussing the enormity of the crime committed by the Scruggs Defendants. Appellants agree that the seriousness of the crimes committed by the Scruggs Defendants cannot be overstated, and appellants do not dispute that severe sanctions against the Scruggs Defendants were appropriate. However, these points are not at issue in this appeal. Instead, the primary question is whether a court, through the exercise of its inherent powers, may impose sanctions against innocent

parties, i.e., without first finding that the party against whom sanctions are sought committed an act of bad faith. This Court answered this question in *Hayes v. Entergy Miss., Inc.* when it held that if there is no finding of bad faith or willful intent by the party against whom sanctions are sought, then sanctions cannot be imposed upon that party. *Hayes v. Entergy Miss., Inc.*, 871 So. 2d 743, 747 (Miss. 2004). Indeed, it is well established that a court's inherent power to issue sanctions is confined to instances of bad faith, *Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990), and without bad faith there can be no sanctions. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980); *Alyeska Pipeline, Inc. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). Further, a finding of bad faith is personal to the offending party and cannot be attributed to another party through vicarious liability. *Wolters Kluwer Fin. Servs., Inc. v. Scivantage,* 525 F.Supp.2d 448, 539, n. 331 (S.D.N.Y. 2007). *See also* the other cases cited on pages 11-12 of appellants' original brief. One of the primary cases cited and discussed by plaintiff recognizes that "fraud on the court requires an intent to deceive or defraud the court." *Dotson v. Bravo*, 202 F.R.D. 559, 569 (D. Ill. 2001), quoted in the Brief of Appellee at p. 11. The requirement of an "intent to deceive or defraud" is entirely consistent with the dispositive premise that bad faith personal to the offender is required for the imposition of sanctions. In other words, innocent parties -- parties who had no intent to deceive or defraud -- cannot be said to have committed a fraud upon the court and, therefore, cannot be sanctioned.

Plaintiff fails to acknowledge the bad faith requirement and the cases cited by appellants, and instead resorts to reliance upon inapplicable and clearly distinguishable cases. For example, plaintiff argues that this Court has allowed the imposition of sanctions such as dismissal through the trial court's inherent powers (Brief at 9), but in both of the cases cited by plaintiff, the party who actually committed the bad faith act was the only party that was sanctioned. *Burrough v. Hawn*, No. 97-CA-00673-SCT,1998 Miss. LEXIS 545, at *10 (Miss. Oct. 22,1998) (court sanctioned party who committed perjury multiple times); *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385 (Miss. 1997) (court dismissed plaintiff's case as a sanction after the plaintiff committed repeated perjury). In *Burrough*, this Court even stated that the trial court was empowered "to impose a sanction which deprived the defendant of his right to a jury trial if the conduct of the defendant justified the imposition of a severe sanction." *Burrough*, 1998 Miss. LEXIS at *13 (emphasis added).

Plaintiff also cites *Eppes v. Snowden,* 656 F.Supp. 1267 (D. Ky. 1986), for the proposition that a court may enter default judgment against one partner based upon the actions of another partner (Brief at 17-18), but *Eppes* is distinguishable, legally and factually. First, *Eppes* did not address the question of whether inherent powers sanctions can be imposed on innocent parties; and to the extent *Eppes* could possibly be read to allow such an outcome, it is in the clear minority and due to be ignored. Second, *Eppes* is factually distinguishable and plaintiff's description of *Eppes* omits numerous key facts from the case. In *Eppes*, Snowden and Doherty were insureds who each owned an

undivided one-half interest in a thoroughbred stallion that was covered by mortality insurance and died at an early age. *Id.* at 1268. Snowden manufactured and then in discovery and at trial produced numerous letters dated before the horse's death relating to the value of the horse, but it was revealed that each of the letters had actually been written after the horse's death. *Id.* at 1269. In imposing sanctions, the Court found that Snowden was acting as Doherty's "attorney-in-fact"; that Snowden had Doherty's general power of attorney authorizing Snowden to act, "with full power and in my name," including "institut[ing] or defend[ing] suits concerning [Doherty's] property or rights"; that Snowden actually negotiated and signed the contracts for the purchase of the horse and the purchase of the insurance policy at the center of the litigation on behalf of both himself and Doherty; that Snowden signed discovery responses for both himself and Doherty; and that counsel advised the court that Doherty's interest would be represented at trial by Snowden. *Id.* at 1269-70. The court also attached special significance to the fact that there was nothing in the record to rebut an inference that Doherty had acquiesced in Snowden's wrongdoing with full knowledge. *Id.* at 1270.

The facts in *Eppes* are a far cry from the facts of this case. The record is undisputed that appellants had no knowledge of, did not participate in, did not authorize, and did not ratify the subject wrongful conduct of the Scruggs Defendants. (R.E. 6, 9, 10; T. 303-314, 332-336, 338-341; R. 755-757). Unlike Doherty in the *Eppes* case, appellants unequivocally rebutted any "inference" that they knew of or acquiesced in the Scruggs

Defendants' wrongdoing.[1]

Plaintiff seeks to confuse the undisputed facts by referring to the appellants as "active participant[s]" (Brief at 14, 22), but plaintiff's reference is a misleading reference to the allegations contained in the underlying complaint. The underlying complaint and its allegations do not have anything to do with the Motion for Sanctions or this appeal. The conduct of the Scruggs Defendants after suit was filed was the only basis relied upon to impose sanctions, and appellants were not "participants" in any form or fashion. Plaintiff's attempt to confuse the issue should be ignored.[2]

Plaintiff also contends that appellants "had either actual or constructive notice that something was awry" because the Scruggs Defendants submitted to SKG a (false) invoice for voir dire services by Timothy Balducci in the "*Lisanby*" case and thereby had SKG

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[1] Don Barrett did not personally appear and testify at the hearing in this matter due to a previously scheduled appearance in another court, but Mr. Barrett filed an affidavit with the court the day before the hearing pursuant to Rule 6(d) of the Mississippi Rules of Civil Procedure.(R. 755-57, T. 338-39). Prior to the hearing date, plaintiff had the opportunity to depose Mr. Barrett but chose not to do so. These defendants sought a continuance of the proceedings to have Mr. Barrett appear and testify. (T. 338-39). In response to this request, plaintiff stipulated that Mr. Barrett's testimony would be substantially the same as the testimony of David Nutt and Dewitt Lovelace who both denied any knowledge, participation, authorization or ratification of the wrongful conduct. (T. 340-41). The affidavit of Don Barrett is also substantially the same as the testimony of David Nutt and Dewitt Lovelace. (R. 755-57). Accordingly, plaintiff cannot complain about the affidavit that was filed and is part of the record. This Court should consider its contents because plaintiff has stipulated that Mr. Barrett would have testified to the same matters. And in any event, it was plaintiff's burden to establish bad faith -- which plaintiff failed to do.

[2] In its brief, plaintiff also refers to testimony of Honorable Judge Lackey that Tim Balducci stated that "they" had "changed tactics." (Brief of Appellee, p. 6). "They" were never identified. While Judge Lackey thought "they" could have been the four law firms that were defendants, he did not know and was speculating. (T. 247-248). This objection to this testimony was sustained by the lower court. (T. 247). Following the objection, the Honorable Judge Lackey clarified, "Mr. Balducci didn't say, this is on behalf of this and this and this." (T. 248).

(unknowingly) reimburse the Scruggs Defendants for the bribery money. (Brief at 13). There is certainly nothing about the invoice that would have put any reasonable person on notice of judicial bribery. Further, the invoice was submitted only to Nutt & McAlister, PLLC, SKG's treasurer, not to appellants (T. 309, 320-321), and the invoice was buried by the Scruggs Defendants in a manifest that included numerous other invoices and sought reimbursement for more than $700,000 in various expenses. (T. 309-310, 331). In addition, *Lisanby* was scheduled for trial in December 2007, during the same time period in which the invoice was submitted, and had previously been designated as a "special handling" case by Richard Scruggs which meant that the Scruggs Law Firm would handle *Lisanby* without involvement from the other SKG members. (T. 310, 331, 340-341). Appellants did not even see the *Lisanby* invoice until after they learned of the Scruggs Defendants' wrongful conduct through news accounts; and they then called the FBI and aided the investigation, and demanded that the money be returned. (T. 309, 325, 334-335, 340-341).

It is undisputed that appellants had no knowledge of, did not participate in, did not authorize, and did not ratify the wrongful conduct of the Scruggs Defendants. (R. E. 6, 9, 10, 11, T. 303-314, 332-336, 338-341; R. 755-757). The trial court made no finding that appellants acted in bad faith, holding, instead, "that there is little, if any, evidence that [appellants] participated in or were aware of the bribe or were part of the conspiracy." (R. 759-60). The Mississippi Court of Appeals has stated, "Whenever we are called upon to consider the findings of fact of a circuit judge sitting without a jury, that circuit judge is

entitled to the same deference concerning his/her findings of fact as is afforded to a chancellor, who almost always sits, without a jury." *Scott v. City of Goodman*, 997 So. 2d 270, 275 (Miss. Ct. App. 2008) (quoting *City of Greenville v. Jones*, 925 So. 2d 106, 109 (Miss. 2006)). In *Jones*, this Court noted that it will "afford deferential treatment" to the circuit judge as fact finder. *Jones*, 925 So. 2d at 109 (citing *City of Jackson v. Perry*, 764 So. 2d 373, 376 (Miss. 2000)). This Court has also stated that "findings are safe on appeal where they are supported by substantial, credible and reasonable evidence." *Perry*, 764 So. 2d at 376 (citing *Puckett v. Stuckey*, 633 So. 2d 978, 982 (Miss. 1993)). Judge Coleman's findings were supported by substantial, credible and reasonable evidence -- evidence that was not contradicted at the hearing (and has not even been properly challenged by plaintiff through cross appeal).

Plaintiff also cites *Duggins v. Guardianship of Washington*, 632 So. 2d 420 (Miss. 1993), a punitive damages case, for the proposition that one co-venturer may be vicariously liable for the acts of another co-venturer committed within the course and scope of the joint venture. (Brief at 15-16). *Duggins* is distinguishable on several grounds. First, and for the reasons stated in appellants' original brief (at pp. 15-17), the extraordinary acts of the Scruggs Defendants were not what is done in the "ordinary course of business" and cannot, therefore, be considered to be in the "course and scope" of SKG. *See Idom v. Weeks & Russell*, 99 So. 761 (Miss. 1929) (court held the act of a partner in concealing himself in partners' drug store and shooting two men who came to the door was an "extraordinary act" and not committed within the course of business of the partnership).

See also Perna v. Electronic Data Systems Corp., 916 F.Supp. 388 (D.N.J. 1995) (unethical conduct by one partner during litigation was "extraordinary behavior" outside the scope of business).

Second, *Duggins* did not deal with the imposition of inherent powers sanctions. Case authority directly addressing the issue, e.g., *Hayes*, clearly establishes that sanctions are not available absent a finding of bad faith by the party against whom sanctions are sought.

Third, Mississippi law now provides, contrary to *Duggins*, that punishment in the form of punitive damages cannot be imposed vicariously. In *Duggins*, the Supreme Court affirmed punitive damages against one attorney (Duggins) for the acts of another attorney (Barfield) performed within the ordinary course of the business of the partnership. *Duggins*, 632 So. 2d at 429-30. However, after *Duggins* was filed the legislature amended Mississippi's punitive damage statute found at MISS. CODE ANN. §11-1-65; and Justice Lee explained in his *Duggins* dissent (on the Petition for Rehearing four months after the initial decision) that the amendment of §11-1-65 would have changed the result in the case had the amendment been applicable. *Duggins*, 632 So. 2d at 433 (Lee, J. Dissenting). Referring to the amended statute that is in effect today, Justice Lee stated "this statute absolutely forecloses vicarious liability for punitive damages in actions arising after the effective date." *Id.* This is because the statute plainly states punitive damages are only proper when "*the defendant against whom punitive damages are sought*" has acted with

actual malice, etc. *Id.* (*quoting* MISS. CODE ANN. §11-1-65) (emphasis in original).[3]

Finally, *Duggins* is distinguishable factually because the court found that partner Duggins was not free of blame. The court explained that there were countless red flags raised that should have alerted Duggins that something was wrong, including the fact that Duggins was unable to verify with the clerk that the subject complaint had actually been filed, the settlement amount was $66,000 less than expected, Duggins knew Barfield set up a trust account without including Duggins, and the fee paid to Duggins was not what he expected. *Id.* at 423 - 24, 429. In the present case, there were no "red flags" that would reasonably cause appellants to suspect that their co-defendant was trying to bribe the judge. Indeed, Judge Coleman did not find that appellants were guilty of any wrongdoing, concluding, instead, that there was "little, if any," evidence that appellants had knowledge of or participated in the wrongful acts. (R.E. 7, 13; T. 390-92; R. 759-60).

Because appellants' innocence is undisputed, plaintiff resorts to essentially asking this Court to condone the dropping of a "sanctions bomb," hitting everything around with no concern for innocent parties. Plaintiff calls this acceptable "collateral damage." (Brief at 14). The justice system that plaintiff, a law firm, talks of being corrupted by the Scruggs Defendants is the very same system of justice that is designed to protect the

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[3] Justice Lee also explained that the Uniform Partnership Act is inapplicable because it requires only that the partnership "make good the loss" caused by certain acts of one partner in the course of the business of the partnership, but punitive damages (like the sanctions sought by the plaintiff in this case to "send a message" and "punish the wrongdoers," *see* T. 191) have nothing to do with "making good a loss." *Id.*

innocent. At the same time plaintiff talks about protecting the integrity of this justice system, plaintiff argues it is acceptable for the justice system to punish innocent parties. Fortunately, our justice system does not work that way. Instead, sanctions must be narrowly tailored "rifle shots" aimed only at the actual wrongdoers (i.e., those who have acted in bad faith and with an intent to deceive). *Hayes, supra*. In addition, sanctions against the actual wrongdoer must be imposed with restraint and discretion. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44-45, 50 (1991). *See also Spallone v. United States*, 493 U.S. 265, 280 (1990)), (court is required to consider lesser sanctions and impose only those lesser sanctions if they would have the desired effect); *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*,86 F.3d 464, 467 (5th Cir. 1996) (court must use least restrictive measures).

The sanctions that have been thrust upon these innocent appellants are also not even "collateral" damage as plaintiff asserts (Brief at 14); the sanctions upon appellants are a "direct hit." Thus, plaintiff's analogy to the effect on clients of SKG who had to retain new counsel following the disqualification of SKG in some of the Katrina cases (Brief at 15) is misplaced. Those clients were not sanctioned directly and their cases were not dismissed. Even after the disqualification of SKG, those clients retained their rights to pursue their causes of action and be represented by counsel. In this case, appellants were sanctioned directly, their answer and their defenses were stricken, a default was entered against them, and they were ordered to pay attorneys' fees to plaintiff. There is an obvious difference between sanctions being imposed directly upon a party (as in this case)

compared to a party simply suffering the collateral effects of sanctions imposed on another party. And regardless, one point is manifestly clear: sanctions imposed directly upon a party require a finding of bad faith by that party. The appellants have done nothing wrong, and the lower court's order must be reversed.

Finally, plaintiff argues that the lower court essentially deemed the subject arbitration agreement revoked under the Federal Arbitration Act ("FAA") (Brief at 14). However, once the lower court determined that the parties' dispute was subject to arbitration, it could not delve further into the dispute according to the FAA and Mississippi common law, and could not deprive appellants of their arbitration rights, nor effectively dispose of the merits of the dispute via the entry of a default judgment. *See* appellants' original brief at 26-30. Instead, in order to, *inter alia*, protect appellants' constitutionally-protected contractual rights of arbitration, the lower court should have separated the arbitration issue from the sanctions issue, granted the appellants' motion to compel arbitration, and imposed appropriately severe monetary or other sanctions against the Scruggs Defendants alone. There certainly was no legal or factual basis for treating the arbitration agreement "revoked" as to appellants. Therefore, at a minimum, the lower court should have entered its default on the merits as to the Scruggs Defendants alone and compelled arbitration as between plaintiff and appellants.

B. Sanctions against appellants are not necessary.

The Jones Firm admits that courts imposing sanctions through their inherent powers must exercise restraint and caution, and must also employ the least possible power

adequate to the end proposed (Brief at 10 (*citing Spallone v. United States*, 493 U.S. 265, 276, 280 (1990)), yet argues inconsistently that "the enormity of the situation" sets this case apart from every other case where sanctions were considered, and that sufficient but restrained sanctions are only appropriate for "minor infractions." (Brief at 10). Plaintiff's argument is incorrect. While the severity of infractions may have a correlation to the severity of sanctions imposed on the actual wrongdoer, it does not change the United States Supreme Court's mandate in *Spallone* that a court only use the least possible power adequate to the end proposed. *Spallone*, 493 U.S. at 276, 280. Therefore, even when the offense is a severe one, like the one committed by the Scruggs Defendants (and not by these defendants), the court is still required to exercise restraint and caution and to only use the least possible power adequate to this end. *Spallone*, 493 U.S. at 276, 280. More importantly, the severity of the infraction by the Scruggs Defendants does not affect the mandate that there must be a finding of bad faith committed by the appellants before sanctions may actually be imposed against appellants. *Hayes*, 71 So. 2d at 747.

The Jones Firm contends that the end proposed to be achieved by sanctions in this case is to restore public faith in the integrity and dignity of the courts and to assure that no person will profit from bribing a judge. (Brief at 8). Those goals can be accomplished without punishing these innocent appellants and have been achieved adequately through the punishments imposed on Richard Scruggs and others in their criminal proceedings and/or through the sanctions imposed in this case on the actual wrongdoers, the Scruggs Defendants. It is not necessary to go any further. Indeed, public faith in the integrity and

dignity of the courts will be damaged if this Court condones the punishment of innocent parties.

Plaintiff relies upon a district court case from Indiana where the court vacated an order of the bankruptcy court following collusion between the bidder and debtor for a sale of assets. *Boyer v. GT Acquisition, LLC,* No. 1:06-cv-90-TS, 2007 U.S. Dist. LEXIS 58450, *12-14 (N.D. Ind. Aug. 9, 2007). The trustee only wanted the order amended to remove the findings that no collusion occurred in the sale, but otherwise leave the order in effect. *Id.* at *4. Because the order was the result of a fraud upon the court, the entire order had to be set aside "and the guilty party denied all relief" to purge the court records of fraud. *Id.* at *12-13 (emphasis added).

Boyer is entirely different from this case. First, *Boyer* is an example of sanctions that indirectly affect another party in one way because it cannot be avoided, but *Boyer* did not involve sanctions directly imposed on an innocent party. Second, no order compelling arbitration was ever entered in this case as a result of the subject bribery, so no order needs to be entered to "purge" the court records of the fraud upon the court. Instead, any taint of fraud in this case was effectively removed when sanctions were imposed on the Scruggs Defendants, and the imposition of sanctions against appellants directly served no purpose and was not necessary.

C. Sanctions against appellants constituted a violation of their constitutional rights.

Appellants possess a constitutional right to defend the Jones Firm's claims on the

merits, possess constitutionally-protected contractual rights of arbitration, and possess other rights protected by the Mississippi and United States constitutions. They engaged in no wrongful conduct that would serve as a basis for depriving them of those rights, and the lower court's order violated appellants' constitutional rights as described in appellants' original brief (at pp. 21-26).

Plaintiff's response to the constitutional rights issue is very cryptic and manifestly incorrect. First, plaintiff argues that the lower court has the authority to impose sanctions, including financial sanctions, but plaintiff's argument ignores the fact that the lower court only has the authority to impose inherent powers sanctions against a party who has acted in bad faith, i.e., the court does not have the authority to impose sanctions against innocent parties. The lower court found that these defendants did not act in bad faith. Second, plaintiff cites only a Ninth Circuit opinion (Brief at 20-21), but the only party sanctioned in that case was the actual wrongdoer. *F. J. Hanshaw Enterprises v. Emerald River Dev., Inc.*, 244 F.3d 1128 (9th Cir. 2001). Third, plaintiff seems to argue that the rules of civil procedure are adequate due process in the case of a compensatory financial sanction, but the rules of civil procedure only provide procedural due process. In this case, there have been violations of, *inter alia*, appellants' rights of substantive due process. Regardless of the fairness of any procedures used to implement the sanctions, the punishment of innocent parties "shocks the conscience," is not narrowly tailored to fit the goal of punishment and deterrence, and violates the appellants' rights to substantive due process. *Hall v. Board of Trustees of State Institution of Higher Learning*, 712 So. 2d 312, 318-19 (Miss. 1998)

(*quoting Brennan v. Stewart*, 834 F.2d 1248, 1255-56 (5th Cir. 1988)). Finally, plaintiff does not mention nor attempt to rebut the fact that the monetary value of the sanctions imposed on appellants will be many multiples of the actual damages (none) caused by appellants and that the sanctions are, therefore, unconstitutionally excessive. *See* Appellants' original brief at 24-25.

D. Appellants have been released from the court-imposed sanctions as a matter of law due to the Jones Firm's settlement with the Scruggs Defendants.

As discussed in this brief's introduction (*supra*, p. 1), the legal effect of the plaintiff's settlement with the Scruggs Defendants is undisputed. As a matter of law, the settlement has extinguished any vicarious liability appellants may have (if any) for the wrongful acts of the Scruggs Defendants and released appellants from the sanctions. Plaintiff's brief does not discuss, refute or challenge this dispositive point. Just as the failure of an appellee to file a brief is tantamount to a confession or error, so too should be the failure of an appellee to address an issue in its brief. *Transcontinental Gas Pipeline Corp. v. Rogers*, 284 So. 2d 304 (Miss. 1973). The lower court's order is due to be reversed on these grounds alone.

II. CONCLUSION

The seriousness of the crime committed by the Scruggs Defendants cannot be overstated. The crime was a fraud upon the court that attempted to corrupt the judicial process. However, this crime was committed by defendants Richard F. Scruggs and members of the Scruggs Law Firm. The severity of the crime cannot be allowed to

overshadow the fact that the remaining defendants were not involved.

Sanctions cannot be imposed via vicarious liability, but that is exactly what happened to appellants in the lower court. This is a clear error and abuse of discretion that must be reversed.

Even if vicarious liability was applicable, a court can only use the least possible power necessary. It is not necessary to punish the appellants when all of the goals sought to be achieved can be achieved by only punishing those who committed the wrong. "Collateral damage" is not permitted, but even if it were, it is not necessary. While the punishment of the guilty may be necessary to preserve our system of justice, so, too, is the protection of the innocent.

For the reasons set forth herein and in appellants' original brief, this Court should reverse the lower court's February 26, 2008, and April 16, 2008, orders; remand this action; and direct the lower court to enter an order granting appellants' Motion to Compel Arbitration and compelling the Jones Firm to submit its dispute with appellants to arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shea S. Scott, of counsel for Don Barrett, individually; Barrett Law Office, P.A.; and Lovelace Law Firm, P.A., do hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

Honorable William F. Coleman
Senior Status Judge
1843 Springridge Drive
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THIS, the 30th day of March, 2009.

SHEA S. SCOTT

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*** STATE COURT ANNOTATIONS CURRENT THROUGH NOVEMBER 18, 2008 ***

TITLE 11. CIVIL PRACTICE AND PROCEDURE
CHAPTER 1. PRACTICE AND PROCEDURE PROVISIONS COMMON TO COURTS

Miss. Code Ann. § 11-1-65 (2008)

§ 11-1-65. Punitive damages; limitations

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(f) (i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

(2) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same.

(3) (a) In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:

(i) Twenty Million Dollars ($ 20,000,000.00) for a defendant with a net worth of more than One Billion Dollars ($ 1,000,000,000.00);

(ii) Fifteen Million Dollars ($ 15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars ($ 750,000,000.00) but not more than One Billion Dollars ($ 1,000,000,000.00);

(iii) Five Million Dollars ($ 5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars ($ 500,000,000.00) but not more than Seven Hundred Fifty Million Dollars ($ 750,000,000.00);

(iv) Three Million Seven Hundred Fifty Thousand Dollars ($ 3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars ($ 100,000,000.00) but not more than Five Hundred Million Dollars ($ 500,000,000.00);

(v) Two Million Five Hundred Thousand Dollars ($ 2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars ($ 50,000,000.00) but not more than One Hundred Million Dollars ($ 100,000,000.00); or

(vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars ($ 50,000,000.00) or less.

(b) For the purposes of determining the defendant's net worth in paragraph (a), the amount of the net worth shall be determined in accordance with Generally Accepted Accounting Principles.

(c) The limitation on the amount of punitive damages imposed by this subsection (3) shall not be disclosed to the trier of fact, but shall be applied by the court to any punitive damages verdict.

(d) The limitation on the amount of punitive damages imposed by this subsection (3) shall not apply to actions brought for damages or an injury resulting from an act or failure to act by the defendant:

(i) If the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury; or

(ii) While the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription.

(4) Nothing in this section shall be construed as creating a right to an award of punitive damages or to limit the duty of the court, or the appellate courts, to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary and constitutional requirements, and to order remittitur where appropriate.

HISTORY: SOURCES: Laws, 1993, ch. 302, § 2; Laws, 2002, 3rd Ex Sess, ch. 4, § 6; Laws, 2004, 1st Ex. Sess., ch. 1, § 4, eff from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

NOTES:

EDITOR'S NOTE. --Laws, 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:

"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

AMENDMENT NOTES. --The 2002 amendment, 3rd Ex Sess, ch. 4, redesignated (g) as (2); inserted (3) and (4); and redesignated former (2) as (5) and made stylistic changes in (5).

The 2004 amendment, 1st Ex Sess, ch. 1, made a stylistic change in (1)(c); deleted "or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought" at the end of (2); substituted "Five Million Dollars ($5,000,000.00)" for "Ten Million Dollars ($10,000,000.00)" in (3)(a)(iii); substituted "Three Million Seven Hundred Fifty Thousand Dollars ($3,750,000.00)" for "Seven Million Five Hundred Thousand Dollars ($7,500,000.00)" in (3)(a)(iv); substituted "Two Million Five Hundred Thousand Dollars ($2,500,000.00)" for "Five Million Dollars ($5,000,000.00)" in (3)(a)(v); substituted "Two percent (2%)" for "Four percent (4%)" in (3)(a)(vi); deleted (3)(d), which read "The exceptions provided in paragraph (d) shall not apply to an employer of a person acting outside the scope of such person's employment or responsibility as an agent or employee"; and deleted (5), which provided that subsections (1) and (2) did not apply to contracts, libel and slander, or asbestos actions.

CROSS REFERENCES. --Provisions of this section as effecting exception to what otherwise might constitute consequential damages, see § 75-2-715.

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Punitive Damages

JUDICIAL DECISIONS

1. In general

2. Breach of contract

3. Torts

4. Availability

5. Bifurcated trials.

6. Bifurcated claims.

1. IN GENERAL.

In an insurance dispute involving a bad faith claim, an insurer's motion to bifurcate the compensatory and punitive damages phases of trial was granted because it was consistent with the provisions of Miss. Code. Ann. § 11-1-65. Simpson v. Econ. Premier Assur. Co. -- F. Supp. 2d -- (N.D. Miss. Sept. 8, 2006).

In an insurance dispute involving a bad faith claim, an insurer's motion to prohibit the admission of evidence of its net worth was granted as to the compensatory damages phase of the bifurcated trial, but Miss. Code. Ann. § 11-1-65 required that the trier of fact consider such evidence at the punitive damages stage of trial. Simpson v. Econ. Premier Assur. Co. -- F. Supp. 2d -- (N.D. Miss. Sept. 8, 2006).

If the jury awards compensatory damages, then an evidentiary hearing is conducted in the presence of the jury; therefore, in a contract case, a circuit court erred when it failed to conduct an evidentiary hearing on the issue of punitive damages under *Miss. Code Ann. § 11-1-65. Bradfield v. Schwartz, 936 So. 2d 931 (Miss. 2006).*

Trial court erred when it failed to conduct an evidentiary hearing on the issue of punitive damages pursuant to the statutory mandates of *Miss. Code Ann. § 11-1-65(1)(c)*, which expressly provided that if a properly instructed jury returned a verdict for compensatory damages against a party, the trial court "shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered." Bradfield v. Schwartz, -- So. 2d -- (Miss. May 18, 2006).

When the jury returned a verdict which resulted in a compensatory damages award, a punitive damages phase of trial should have automatically proceeded, consistent with the applicable statutory provisions of *Miss. Code Ann. § 11-1-65(1)*. Bradfield v. Schwartz, -- So. 2d -- (Miss. May 18, 2006).

In order for punitive damages to be awarded, the plaintiff must demonstrate a willful or malicious wrong, or a gross, reckless disregard for the rights of others; punitive damages are only appropriate in the most egregious cases. A bank customer was not entitled to punitive damages for a bank teller's fraudulent withdrawal of money from the customer's account where: (1) the bank made prompt restitution; (2) the act complained of was committed solely by a single bank

teller; (3) the bank's investigation of the matter was complete, thorough, and proper; and (4) considering the totality of the circumstances, the bank's conduct indicated a thorough attempt to satisfactorily resolve the matter. *Wise v. Valley Bank, 861 So. 2d 1029 (Miss. 2003).*

A proposed settlement amount of $ 4.4 million (6.5% of defendant's net worth), in an action largely involving compliance with governmental guidelines and not involving terrible personal injuries, was well within any arguable zone of reasonableness. *Smith v. Tower Loan of Miss., Inc. 216 F.R.D. 338 (S.D. Miss. 2003).*

In borrowers' suit arising from allegedly fraudulent loan transactions, remand was not necessary, because agents were fraudulently joined and the $ 75,000 jurisdictional threshold was met based upon the unspecified claims for punitive damages. Ross v. First Family Fin. Servs., Inc. -- F. Supp. 2d -- (N.D. Miss. Aug. 26, 2002).

Punitive damages were properly awarded in a case where two armed bail bondsmen entered a mother's home without a search warrant or other authority looking for her son, who had jumped bail. *Milburn v. Vinson, 850 So. 2d 1219 (Miss. Ct. App. 2002).*

Trial court did not err in refusing to grant decedent's estate's request for a jury instruction covering punitive damages in a wrongful death suit against a corporation arising out of a car accident, when the evidence did not support a punitive damages instruction in light of the fact that, although the corporation's employee was negligent in the operation of the tractor-trailer, he was not grossly negligent. *Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911 (Miss. 2002).*

Punitive damages pursuant to *Miss. Code Ann. § 11-1-65* (1994) were undivided claims of right with a potentially separable award and collectively exceeded the diversity jurisdiction amount. Remand of action to State court was thus denied. Agnew v. Commercial Credit Corp. -- F. Supp. 2d -- (S.D. Miss. July 11, 2002).

It was error for the court to refuse to submit the issue of punitive damages to the jury in an action for invasion of privacy by disclosure of private facts and intentional infliction of emotional distress, notwithstanding the trial court's determination that the defendant son acted out of a vendetta toward what he perceived to be improper business activity by a timber company in its relations with the plaintiff father, rather than out of malice toward his father, because the vendetta did not give the son the right to recklessly disregard his father's right to privacy and did not justify the outrageous conduct demonstrated by the son in subjecting his father to commitment proceedings to further his own interests. *McCorkle v. McCorkle, 811 So. 2d 258 (Miss. Ct. App. 2001).*

In an action arising from a motor vehicle accident, the defendant corporation, which owned the truck that struck the plaintiff's vehicle, was entitled to summary judgment on the plaintiff's claim for punitive damages since (1) there was no evidence that the driver of the truck acted with the necessary extreme conduct which would allow a reasonable jury to return a verdict for punitive damages against him individually, (2) the corporation could not be held liable for punitive damages on the basis of vicarious liability, and (3) there was no evidence that the corporation acted with actual malice or gross negligence or committed fraud in its screening, training, or monitoring of its drivers or in failing to remove unsafe drivers from the road. Hasty v. George, -- F. Supp. 2d -- (N.D. Miss. Jan. 10, 2000).

An action for retaliatory discharge and tortious breach of contract was a contract action to which this section did not apply. *Paracelsus Health Care Corp. v. Sumner, 754 So. 2d 437 (Miss. 1999),* cert. denied, *530 U.S. 1215, 120 S. Ct. 2219, 147 L. Ed 2d 251 (2000).*

Chancellor did not abuse his discretion in determining that punitive damages were appropriate where the plaintiffs clearly and convincingly proved that the defendant acted fraudulently. *Holland v. Mayfield, 826 So. 2d 664 (Miss. 1999).*

Punitive damages are only appropriate in the most egregious cases so as to discourage similar conduct in the future and should only be awarded in cases where the actions are extreme. *Thomas v. Harrah's Vicksburg Corp. 734 So. 2d 312 (Miss. Ct. App. 1999).*

The trial court's decision to permit the jury to consider both compensatory and punitive damages at the same time at a point when, if the jury had been properly instructed, the issue of whether compensatory damages were to be awarded had not been resolved was in direct contravention of the statute, and, therefore, error. *Harbin v. Jennings, 734 So. 2d 269 (Miss. Ct. App. 1999).*

Under Mississippi law, customer could not receive punitive damages from casino for injuries sustained when cocktail waitress spilled hot coffee on his back, where customer admitted that someone bumped into waitress causing her to spill her tray of drinks and that waitress did not act with either malice or gross negligence. *Spann v. Robinson Property Group, L.P. 970 F. Supp. 564 (N.D. Miss. 1997).*

Question of whether punitive damages could be recovered from life insurer in suit alleging tortious breach of contract, breach of fiduciary duties, and fraud was governed by common law, not by punitive damages statute. *American Funeral Assurance Co. v. Hubbs, 700 So. 2d 283 (Miss. 1997),* reh'g denied, *700 So. 2d 331 (Miss. 1997).*

2. BREACH OF CONTRACT.

In an insured's bad faith breach of contract suit against an insurer, the insured's claim for punitive damages under *Miss. Code Ann. § 11-1-65(1)(a)* was not sent to the jury because the evidence showed that the insurer undertook a

proper investigation into the insured's alleged disability before denying extended benefits, and thus, the insurer had not acted with malice, fraud, or gross negligence. Tarver v. Colonial Life & Accident Ins. Co, -- F.3d -- (5th Cir. Sept. 30, 2008).

In an action against an attorney for legal malpractice and tortious breach of contract, it was error to allow the issue of punitive damages to go the jury on the cause of action for breach of contract. *Hurst v. Southwest Miss. Legal Servs. Corp. 708 So. 2d 1347 (Miss. 1998).*

3. TORTS.

In a medical malpractice and wrongful death case, where there was no evidence that the doctor demonstrated a wilful or malicious wrong or a gross and reckless disregard for the rights of others, an award of punitive damages was improper. Further, punitive damages should not have automatically been submitted to the jury by the trial court; rather, a jury should only be permitted to consider punitive damages if the trial judge determines, under the totality of the circumstances and in light of the defendant's conduct, that a reasonable, hypothetical juror could have identified either malice or gross disregard for the rights of others. Causey v. Sanders, -- So. 2d -- (Miss. Oct. 23, 2008).

In an action in which a beneficiary filed suit against an insurance company alleging claims of tortious breach of contract, breach of fiduciary duty and duty of good faith and fair dealing, negligence, gross negligence, and intentional infliction of emotional distress, the insurance company was granted summary judgment where: (1) the insured executed a voluntary statement to police that her husband had stabbed her with a knife and a month after the knife wound, the insured died in her bed; (2) no reasonable juror could conclude that the insurance company acted with malice, gross negligence, or reckless disregard in wanting to review the autopsy report; and (3) the delay in receiving the autopsy report was due in part to the beneficiary's failure to inform them of his address change. *Washington v. Am. Heritage Life Ins. Co. 500 F. Supp. 2d 610 (N.D. Miss. 2007).*

In a debtor's conversion action against a bank, the trial court erred in denying the bank's motion for JNOV as to punitive damages as the only evidence that remotely approached one of the statutory requirements was a bank employee's alleged out-of-court statement regarding his intention to put the debtor out of business. This self-serving hearsay statement was not clear and convincing evidence of actual malice, gross negligence, or the commission of actual fraud. *Cmty. Bank v. Courtney, 884 So. 2d 767 (Miss. 2004).*

In a property owner's trespass suit against a construction company which removed trees from his property, the trial court did not err in refusing to submit the issue of punitive damages to the jury as the evidence showed that the company thought the property in question belonged to the neighbor (who hired the company) and did not reenter the property once it was aware of the trespass. *Teasley v. Buford, 876 So. 2d 1070 (Miss. Ct. App. 2004).*

Award of punitive damages in favor of the borrower in the borrower's action for conversion was improper under *Miss. Code Ann. § 11-1-65* because there was insufficient evidence to support a jury charge on that issue. A self-serving hearsay statement by a bank employee that he was going to put the borrower out of business was in no way clear and convincing evidence of actual malice, gross negligence, or the commission of actual fraud. Cmty. Bank v. Courtney, -- So. 2d -- (Miss. June 10, 2004).

Once a jury returned a verdict in a customer's favor on a claim sounding in conversion, it was the appropriate time to consider the issue of an unresolved claim for punitive damages under *Miss. Code Ann. § 11-1-65(1)(c). Brown v. N. Jackson Nissan, Inc. 856 So. 2d 692 (Miss. Ct. App. 2003).*

Even assuming that a trial court erred when it failed to take up punitive damages without any further prompting from a customer after a jury awarded damages on a claim sounding in conversion, the customer waived his right to complain by not raising the issue while the jury was still empaneled. *Brown v. N. Jackson Nissan, Inc. 856 So. 2d 692 (Miss. Ct. App. 2003).*

Trial court did not commit plain error when it failed to proceed on punitive damages after a jury returned a verdict of actual damages on a customer's claim sounding in conversion; the customer had no fundamental right to a possible assessment of punitive damages because he had already been made whole by the verdict for actual damages. *Brown v. N. Jackson Nissan, Inc. 856 So. 2d 692 (Miss. Ct. App. 2003).*

Employee admitted to not following the store policy regarding shoplifters, ignored the policy, followed the guest from the store on her own initiative, accused the guest of shoplifting, and committed the tort of assault by grabbing the guest by her underwear; because there was no proof that the store had any knowledge of prior incidents committed by the employee and the employee was acting on her own initiative, pursuant to *Miss. Code Ann. § 11-1-65(1)(a)*, punitive damages against the store should not have been allowed and the appellate court reversed and rendered the punitive damages assessed against the store. *Gamble v. Dollar Gen. Corp. 852 So. 2d 5 (Miss. 2003).*

In a products liability case, the trial court did not err in refusing to submit the punitive damages issue to the jury because there was no clear and convincing evidence of malice or gross negligence. *Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107 (Miss. 2003).*

Where there was no evidence that a new employer had the intent to harm a former employer by hiring a performer that was under contract, the issue of punitive damages should not have been submitted to the jury in a tortious interference with contractual relations case. *Neider v. Franklin, 844 So. 2d 433 (Miss. 2003).*

In a mother's suit against a camp counselor and his employer, based on the mother's claim that her child had been sexually assaulted by the counselor, the trial court properly refused to give a punitive damages instruction; the counselor was not acting within the scope of his employment at the time of the assault, the employer did not benefit from the assault, the jury did not find that the employer knew of the counselor's homosexual tendencies, and a reasonable jury could not find malice, gross neglect, or reckless disregard by the employer. *Doe v. Salvation Army, 835 So. 2d 76 (Miss. 2003).*

In the absence of any proof that commercial lenders regularly maintained a system of cross-referencing loans and the bank's prospective purchases, the failure to institute that system was not reckless or gross behavior warranting punitive damages; thus, the award of punitive damages was improper and the Supreme Court reversed and rendered the award. *AmSouth Bank v. Gupta, 838 So. 2d 205 (Miss. 2002).*

Remittitur was ordered in a case involving an employer's bad faith failure to pay worker's compensation benefits because the punitive damages awarded were excessive where the evidence did not show that the employer's conduct met the required degree of reprehensibility under *Miss. Code Ann. § 11-1-65(1)(a). Miss. Power & Light Co. v. Cook, 832 So. 2d 474 (Miss. 2002).*

In an automobile accident case, plaintiff was not entitled to punitive damages under *Miss. Code Ann. § 11-1-65* law where facts showed defendant did not run stop sign, did not fail to check vehicle's speed, tried to take evasive action to avoid accident, had not consumed alcohol, and did not leave the scene of the accident; defendants' conduct did not amount to gross negligence and accordingly, defendants were entitled to partial summary judgment on the issue of punitive damages. Terrell v. W.S. Thomas Trucking, Inc. -- F. Supp. 2d -- (N.D. Miss. Mar. 6, 2001).

Beneficiaries of decedent met their burden of proof against tire manufacturer in products liability suit through the testimony of employees of the tire manufacturer who stated that in the course of their many years of employment with the tire manufacturer, they had personal knowledge that bad stock had been used in the manufacture of tires. *Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002),* cert. denied, *537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27 (2002).*

A simple mathematical formula cannot be used to determine whether a punitive damage award is excessive or constitutional. *Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002),* cert. denied, *537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27 (2002).*

Operating a motor vehicle on a public street while under the influence of intoxicants to the extent that the driver's abilities were substantially impaired demonstrated the kind of gross negligence contemplated in *Miss. Code Ann. § 11-1-65(1)(a)* (Rev. 1991) and punitive damages were therefore proper. Savage v. Lagrange, -- So. 2d -- (Miss. Ct. App. Dec. 18, 2001).

Plaintiff in a wrongful death case was not entitled to a jury instruction on punitive damages, as there was no showing of a causal nexus between the defendant's alleged gross negligence and the fatal accident. Choctaw Maid Farms, Inc. v. Hailey, -- So. 2d -- (Miss. Oct. 31, 2001).

In an action arising from an accident in which a tractor-trailer rear-ended a tractor, the defendants were entitled to summary judgment on the issue of punitive damages where the plaintiff failed to bring forth any evidence of an action by the defendants that amounted to gross negligence or reckless disregard for others and the defendants brought forth evidence that the truck driver was not under the influence of drugs or alcohol while operating the tractor-trailer. Miller v. Hunt, -- F. Supp. 2d -- (N.D. Miss. July 6, 2000).

4. AVAILABILITY.

Casino patron's *Miss Code Ann. § 11-1-65* claim for punitive damages in connection with injuries she allegedly sustained when a cocktail waitress dropped a tray of drinks on or near the patron, while attempting to serve another customer, failed because there was no evidence that the waitress acted with gross negligence when she dropped the tray after the customer unexpectedly and excitedly threw up her hands after winning a poker game. Callender v. Imperial Palace of Miss., LLC, -- F. Supp. 2d -- (S.D. Miss. Sept. 19, 2008).

After a guardianship account was drained, the wards prevailed in their suit against the bank for breaching its duty by allowing the funds on deposit to be converted without a court order. Because the evidence established that the bank was not grossly negligent and did not engage in fraud or intentional misconduct, the chancery court erred in awarding punitive damages against the bank under *Miss. Code Ann. § 11-1-65. Williams v. Duckett (In re Duckett) 991 So. 2d 1165 (Miss. 2008).*

Under *Miss. Code Ann. § 11-1-65*, the issue of whether two insureds were entitled to punitive damages should not have been sent to the jury because the insureds did not show that their homeowner's insurer acted with actual malice in processing their claim, and the insurer had an arguable basis for denying the insureds' claim, as evidence showed that

the home was destroyed by flooding, a peril that was excluded from coverage; the insurer reasonably relied on a valid and enforceable anti-concurrent causation clause in denying coverage; and the insurer extensively investigated the insureds' claim to determine whether the destruction of the home was caused by flooding or by hurricane winds, which was a covered peril. *Broussard v. State Farm Fire & Cas. Co. 523 F.3d 618 (5th Cir. 2008).*

Under *Miss. Code Ann. § 11-1-65*, punitive damages should not have been awarded against a homeowner's insurer in two insureds' suit to recover policy proceeds and damages for bad faith; although the insurer advanced an unsuccessful legal position regarding the allocations of burdens of proof, it was not liable for punitive damages for advancing a legal argument over a disputed issue. *Broussard v. State Farm Fire & Cas. Co. 523 F.3d 618 (5th Cir. 2008).*

Under *Miss. Code Ann. § 11-1-65*, punitive damages should not have been awarded against a homeowner's insurer in two insureds' suit to recover policy proceeds and damages for bad faith; although the insurer withheld payment after its expert opined that some of the damage to the insureds' home was caused by wind, a peril that was covered under the policy, the insurer had advanced $ 2,000 to the insureds within 10 days after the destruction of the home, and the insureds had a two percent deductible, the combined sums of which may have been adeqaute to cover the damages caused by wind. *Broussard v. State Farm Fire & Cas. Co. 523 F.3d 618 (5th Cir. 2008).*

Employee was not entitled to punitive damages under *Miss. Code Ann. § 11-1-65* as to his claim that an insurer and its management company acted in bad faith in waiting four months to approve surgery for the employee's work-related injury because (1) the evidence showed that the employee caused the delay by refusing to release his medical records and by making misstatements about his prior related injuries; (2) the management company was entitled to investigate whether the prior injuries contributed to the current injury for purposes of determining coverage; and (3) the management company did not violate the 48-hour rule in § IV(A)(1) of the Utilization Management Guidelines of the Official Mississippi Uniform Worker's Compensation Fee Schedule because it approved the surgery within 2 days of receiving all of the information necessary to make the coverage decision. *McLendon v. Wal-Mart Stores, Inc. 521 F. Supp. 2d 561 (S.D. Miss. 2007).*

Lessees were properly awarded punitive damages where the landman stopped production of the well and after only a few months had passed, contrary to the interest of the lease and the lessees' interest, the landman contacted the landowner to negotiate and obtain a new lease for the well, and upon the execution of a new lease the landman resumed production from the well; the lessees claimed that they were never informed that the well was to be shut down by the landman. *Gill v. Gipson, 982 So. 2d 415 (Miss. Ct. App. 2007).*

Because an insured failed to prove that she suffered damages as a direct and proximate result of any reasonable reliance on any perceived negligent misrepresentation by an insurer and its agent, she could not prevail on her claim of negligent misrepresentation, nor was she entitled to a jury's award of punitive damages pursuant to *Miss. Code Ann. § 11-1-65(c). Horace Mann Life Ins. Co. v. Nunaley, 960 So. 2d 455 (Miss. 2007).*

It was not clear whether the court should have submitted the question of punitive damages to the jury before discovery was completed in a case involving the alleged forgery of a divorcee's signature by her former husband on vehicle lease and purchase agreements since the court could not determine from the summary judgment evidence whether the divorcee had established the elements for an award of punitive damages set forth in *Miss. Code Ann. § 11-1-65(1)(d)* against the dealership. Dowdy v. Palmer, -- F. Supp. 2d -- (S.D. Miss. Jan. 19, 2006).

Because the customer, in his action against the dealership for breach of contract, fraud, and infliction of emotional distress, failed to present evidence of compensatory damages, it was impossible to consider punitive damages under *Miss. Code Ann. § 11-1-65. Sumler v. East Ford, Inc. 915 So. 2d 1081 (Miss. Ct. App. 2005).*

5. BIFURCATED TRIALS.

In a suit in which two insureds alleged that they were owed proceeds under two property insurance policies and were also seeking punitive damages for the insurer's alleged bad faith and delays in payment, a bifurcated trial was ordered to be held in accordance with *Miss. Code Ann. § 11-1-65*. Letoha v. Nationwide Mut. Ins. Co. -- F. Supp. 2d -- (S.D. Miss. Feb. 28, 2008).

In a case involving a dispute over claimed insurance coverage, the court granted the insurer's request for a bifurcated trial, in accordance with *Miss. Code Ann. § 11-1-65*, ruling that the issue of punitive damages would be tried separately from other issues in the case, such as coverage, liability, and actual damages. Fowler v. State Farm Fire & Cas. Co. -- F. Supp. 2d -- (S.D. Miss. July 25, 2008).

6. BIFURCATED CLAIMS.

In insureds' suit asserting claims for breach of insurance policies and bad faith with regard to payment of the insureds' property damage claims related to Hurricane Katrina, bifurcation of the insureds' coverage and punitive damages claims was appropriate under *Miss. Code Ann. § 11-1-65*; however, because it was difficult to consider the issues of coverage and breach of contract without some information regarding the claims handling process, some evidence about that process would be allowed. Ross v. Metro. Prop. & Cas. Ins. Co. -- F. Supp. 2d -- (S.D. Miss. Aug. 25, 2008).

RESEARCH REFERENCES

ALR. Intoxication of automobile driver as basis for awarding punitive damages. *33 A.L.R.5th 303.*

Validity of state statutory cap on punitive damages. *103 A.L.R.5th 379.*

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. *50 A.L.R.5th 275.*

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive. *54 A.L.R.5th 1.*

Liability of vendor for food or beverage spilled on customer. *64 A.L.R.5th 205.*

Liability of cigarette manufacturers for punitive damages. *108 A.L.R.5th 343.*

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription -- Cases not under Consumer Product Safety Act *(15 U.S.C.A. § 2072). 109 A.L.R.5th 397.*

See A.L.R. Index to Annotations under Punitive Damages.

AM JUR. *22 Am. Jur. 2d, Damages §§ 731* et seq.; 842-849.

8 Am. Jur. Pl & Pr Forms (Rev), Damages, Forms 111-117, 311-322.

20A Am. Jur. Pl & Pr Forms (Rev), Products Liability, Form 291.1 (Complaint, petition, or declaration-Action against manufacturers of asbestos products and distributors of diatomaceous earth -- By employee).

23A Am. Jur. Pl & Pr Forms (Rev), Torts, Form 26.1 (Complaint, petition, or declaration -- Negligent and intentional disregard for safety causing asbestos poisoning-Individual plaintiff).

CJS. CJS, Damages §§ 117 et seq.; 133, 159, 162(3), 188.

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LEXSTAT M.R.C.P. 6

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

M.R.C.P. Rule 6
(2008)

Review Court Orders which may amend this Rule

Rule 6. Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), and 60(c) except to the extent and under the conditions therein stated.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in a civil action consistent with these rules.

(d) Motions. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is

served upon him by mail, three days shall be added to the prescribed period. This subdivision does not apply to responses to service of summons under Rule 4.

HISTORY: Amended effective March 1, 1989; amended effective June 24, 1992; amended effective July 1, 2008

NOTES:
ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 24, 1992, Rule 6(a) was amended to provide that the legal holidays which cause a period of time to be enlarged are those defined by statute. 598-602 So. 2d XXII-XXIII (West Miss. Cas. 1992).

Effective March 1, 1989, Rule 6(a) was amended to abrogate the inclusion of time periods established by local court rules. 536-538 So. 2d XXI (West Miss. Cas. 1989).

COMMENT

The purpose of Rule 6 is to provide reasonably flexible, general guidelines for the measurement of time periods under these rules. Rule 6(a) implements a new method for computing time by excluding Saturday or legal holidays from being the last day of a time period, and excluding intermediate Saturdays, Sundays, and legal holidays from the computation when the total time period is less than seven days.

It is not uncommon for clerks' offices and courthouses to be closed occasionally during what are normal working periods, whether by local custom or for a special purpose, such as attendance at a funeral. Rule 6(a) was drafted to obviate any harsh result that may otherwise ensue when an attorney, faced with an important filing deadline, discovers that the courthouse or the clerk's office is unexpectedly closed.

Under Rule 6(b), the court is given wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, certain enumerated cases being expected. Accord, e. g., *Rogers v. Rogers , 290 So.2d 631* (Miss.), cert. denied *419 U.S. 837 [95 S. Ct. 65, 42 L.Ed.2d 64]* (1974); *Grand Lodge Colored K.P. v. Yelvington, 111 Miss. 352, 71 So. 576 (1916).*

Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made ex parte; if it is made after the expiration of the period, notice of the motion must be given to other parties and the only cause for which extra time can be allowed is "excusable neglect." Excusable neglect is discussed and illustrated in 4 Wright & Miller, Federal Practice and Procedure, Civil § 1165 (1969).

Rule 6(c) does not abolish court terms. This rule merely provides greater flexibility to the courts in attending the myriad functions they must perform, many of which were heretofore possible only during term time. The rule is also consistent with the provisions elsewhere herein that prescribe a specific number of days for taking certain actions rather than linking time expirations to the opening day, or final day, or any other day of a term of court; e. g., M.R.C.P. 6(d) (motions and notices of hearings thereon to be served not less than five days before time fixed for hearing), and M.R.C.P. 12(a) (defendant to answer within thirty days after service of summons and complaint).

Rule 6(d) is self-explanatory in requiring a minimum of five days notice for hearing motions.

Rule 6(e) is patterned after Miss. Code Ann. § 13-3-83 (1972) and adds nothing new to Mississippi practice.

[Amended effective August 11, 2005.]

JUDICIAL DECISIONS

Construction.
Affidavits.
Computations.
Enlargement of time.
Excusable neglect.
Motions.
Notice.
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Construction.

Because the Mississippi Employment Security Commission (MESC) was not a circuit, chancery or county court, the Mississippi Rules of Civil Procedure, particularly Miss. R. Civ. P. 6(e), were not applicable to its administrative hearings or appeals. *Miss. Empl. Sec. Comm'n v. Parker ,903 So. 2d 42 ,2005 Miss. LEXIS 58 (Miss. 2005).*

M.R.C.P. 6(b) is a general rule and is therefore subject to specific provisions of M.R.C.P. 56(b), and therefore trial judge correctly granted defendant leave to file dispositive motion because, under M.R.C.P. 56(b), a motion for summary judgment is proper at any time. *Diogenes Editions, Inc. v. State ex rel. Board of Trustees of Insts. of Higher Learning ,700 So. 2d 316 (Miss. 1997).*

Ten day time limit set forth in M.R.C.P. Rule 59(b) is jurisdictional and mandatory, and Rule 6(b) gives trial judge no discretion to enlarge this time period. *Telford v. Aloway ,530 So. 2d 179 (Miss. 1988).*

Affidavits.

Affidavit submitted more than two months after summary judgment hearing was late and was not allowed under either M.R.C.P. Rule 6(d) or Rule 56(c); moreover, Rule 56(e) did not allow a supplemental affidavit to be submitted after time set out in Rule 56(c) or Rule 6(d). *Jones v. James Reeves Contractors ,701 So. 2d 774 (Miss. 1997).*

Computations.

Architect sought to appeal a decision from the Mississippi State Board of Architecture that found that the architect had unlawfully engaged in the practice of architecture in Mississippi; the chancery court improperly dismissed the appeal because the time for appeal expired on a Saturday, and therefore when the notice and bond were filed the following Monday, the appeal was timely. *Broady v. Miss. State Bd. of Architecture ,936 So. 2d 441 ,2006 Miss. App. LEXIS 593 (Miss. Ct. App. 2006).*

Where the statute of limitations applicable to plaintiff's personal injury claims would have expired on a Sunday, pursuant to Miss. R. Civ. P. 6(a), the limitations period expired the following *Monday. Riley v. Ga. Pac. Corp. ,-- F. Supp. 2d -- ,2006 U.S. Dist. LEXIS 1440* (N.D. Miss. Jan. 5, 2006).

Pursuant to Miss. R. Civ. P. 6(a) and 6(e), the claimant's time to appeal her case to the Mississippi Employment Security Commission Board of Review began on July 2, 2002, the day after the appeals referee mailed her decision to the claimant, and ended July 19, 2002, which reflected the addition of an additional three days for the claimant to respond, as required by Rule 6(e); therefore, the claimant's appeal was filed timely with the *Board of Review. Miss. Empl. Sec. Comm'n v. Parker ,905 So. 2d 613 ,2004 Miss. App. LEXIS 303 (Miss. Ct. App. 2004).*

Hearing on defendant's motion to compel discovery was not properly noticed, due to improper computation of time under this rule. *Cunningham v. Mitchell ,549 So. 2d 955 (Miss. 1989).*

Enlargement of time.

Once a party has received a first extension of time under Miss. R. Civ. P. 4(h) in which to serve process, a second or subsequent extension of time to effectuate service of process may be granted by a trial court only upon a showing of good cause; in other words, once the initial 120-day period after filing the complaint has elapsed, good cause is required to avoid dismissal. While Miss. R. Civ. P. 6(b)(1) provides for an enlargement of time for cause shown, when reading the two Rules together, it is apparent that Miss. R. Civ. P. 4(h) requires good cause after the expiration of 120 days. *Johnson v. Thomas ,982 So. 2d 405 ,2008 Miss. LEXIS 257 (Miss. 2008).*

It was arbitrary and capricious for a trial court to void an order granting plaintiff's motion under Miss. R. Civ. P. 6(b)(1) to extend the time to serve process after the court learned of defendant's previous motion to dismiss where the court said that the motion to extend had been granted without having "all the information" before the court, but there was nothing in the motion to dismiss that would have provided the court with any additional information, other than the fact that the motion existed. *Johnson v. Thomas ,982 So. 2d 423 ,2007 Miss. App. LEXIS 546 (Miss. Ct. App. 2007).*

In a son's negligence action against his father, the son failed to show good cause for why process was not served on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where: (1) the events pertaining to the father's attempts to evade service of process arose after the 120-day period for serving process; (2) the son only attempted to serve process one time during the 120-day period; and (3) the son failed to show that he exercised due diligence by moving for additional time to effect service prior to the expiration of the 120-day period. *Whitten v. Whitten ,956 So. 2d 1093 ,2007 Miss. App. LEXIS 356 (Miss. Ct. App. 2007).*

Motion for extension of time filed after expiration of initial time under Miss. R. Civ. P. 6(b)(2) was properly denied, even though the trial court did not at first address good cause, as required by Miss. R. Civ. P. 4(h); the trial court cured its own error by finding good cause had not been shown and the statute of limitations had expired. *Heard v. Remy ,937 So. 2d 939 ,2006 Miss. LEXIS 367 (Miss. 2006).*

Trial court did not abuse its discretion in denying a motorist's motion to dismiss another driver's complaint in a personal injury matter arising out of a four-car accident, because the other driver had made diligent attempts to complete service of process on the motorist, and she demonstrated good cause why extensions of time to complete service should be granted. *Bennett v. McCaffrey ,937 So. 2d 11 ,2006 Miss. LEXIS 351 (Miss. 2006).*

Application under Miss. R. Civ. P. 6(b)(1) to enlarge the time for service of process was granted in the absence of bad faith or prejudice to the adverse party. The plaintiff did not act in bad faith in failing to issue and serve summons; her excuse was that she was proceeding pro se. Ignorance of the court rules did not constitute bad faith and the defendant had shown absolutely no prejudice as a result of the delay. *Cross Creek Prods. v. Scafidi ,911 So. 2d 958 ,2005 Miss. LEXIS 834 (Miss. 2005).*

Plaintiff's filing of complaint by mail did not extend by three days the statute of limitations on actions for assault and battery and intentional infliction of emotional distress; dismissal of action on grounds of limitation was not error when the complaint was not received by the trial court clerk until after the statute of limitations had run. *Slaydon v. Hansford ,830 So. 2d 686 ,2002 Miss. App. LEXIS 477 (Miss. Ct. App. 2002).*

Subsection (b) of this rule does not authorize a trial court to enlarge the 30-day period provided by § 41-29-176 for the filing of a petition to contest the forfeiture of property. *Craigo v. North Mississippi Narcotics Unit ,762 So. 2d 349 ,2000 Miss. App. LEXIS 283 (Miss. Ct. App. 2000).*

Time limit for serving a M.R.C.P. Rule 59 motion for reconsideration is 10 days after judgment, and that period may not be enlarged except by request made within time period provided and such request being granted by the court. *Wright v. White ,693 So. 2d 898 (Miss. 1997).*

Excusable neglect.

Where affidavits opposing a summary judgment motion were untimely, a trial court did not abuse its discretion by failing to grant a continuance because the proponents had almost two years after their complaint was filed to obtain expert testimony, and their failure to do so was inexcusable neglect. *Maxwell v. Baptist Mem. Hospital-Desoto, Inc. ,-- So. 2d -- ,2008 Miss. App. LEXIS 331* (Miss. Ct. App. May 27, 2008).

Trial court did not abuse its discretion in denying a written motion for continuance of a hearing on a wife's petition to increase alimony and a proceeding to hear the petition on the wife's evidence alone where the husband's attorney had not filed the motion until three days before the trial date even though the attorney had been aware of a schedule conflict for two months, neither the attorney nor the husband appeared in the trial court on the date of the hearing, the conflicting trial had been continued by opposing counsel and the husband's attorney merely returned to his office without contacting the trial court. *Profilet v. Profilet ,826 So. 2d 91 ,2002 Miss. LEXIS 281 (Miss. 2002).*

Attorney's failure to monitor the status of the claimant's personal injury lawsuit against a casino was not good cause for the attorney's failure to effect service within 120 days; dismissal with prejudice was appropriate because the statute of limitations had run. *In re Holtzman ,823 So. 2d 1180 ,2002 Miss. LEXIS 253 (Miss. 2002).*

Chancery court did not err in failing to grant a continuance requested by a former husband of a hearing on the former wife's petition to increase alimony; the motion for a continuance was filed three working days prior to the hearing date, and the husband failed to show excusable neglect. *In re Profilet ,-- So. 2d -- ,2001 Miss. App. LEXIS 270* (Miss. Ct. App. July 17, 2001).

A motion for additional time to serve the defendant which cited "inadvertence and excusable neglect" as the basis for the failure to timely serve the defendant was sufficient to cover good cause under the notice pleading standard. *Crumpton v. Hegwood ,740 So. 2d 292 ,1999 Miss. LEXIS 251 (Miss. 1999).*

Motions.

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. *City of Jackson v. Presley ,942 So. 2d 777 ,2006 Miss. LEXIS 649 (Miss. 2006).*

The trial court committed no error in denying a motion for a continuance where the motion was not made until only three working days prior to trial, the movant showed no execusable neglect, and he had almost two months notice of the trial setting. *Profilet v. Profilet (In re Marriage of Profilet) ,-- So. 2d -- ,2001 Miss. App. LEXIS 48* (Miss. Ct. App. Feb. 6, 2001).

The movant failed to comply with the notice provisions as supplied by subsection (d) of this rule where the notice of motion and the motion to dismiss were served by mail on August 15, filed August 17, and delivered unannounced to the opposing party's attorney's office at 5:00 p.m. on August 17, when the hearing was scheduled for 9:00 a.m. on August 19. *L.W. v. C.W.B. ,762 So. 2d 323 ,2000 Miss. LEXIS 168 (Miss. 2000).*

Trial court erred in granting plaintiff's motion for voluntary dismissal, and dismissing her complaint without prejudice, without giving defendant reasonable advance notice and an opportunity to be heard on the motion. *Bolls v. Harris ,528 So. 2d 1128 (Miss. 1988).*

Notice.

Plaintiff's failure to serve defendant's attorney with a copy of a motion to extend the time to serve process under Miss. R. Civ. P. 6(b)(1) was not a dereliction sufficient to justify setting aside the extension because such a motion could be heard ex parte under Miss. R. Civ. P. 5(a). *Johnson v. Thomas ,982 So. 2d 423 ,2007 Miss. App. LEXIS 546 (Miss. Ct. App. 2007).*

Siblings did not submit their objections to the special commissioners' report in the form of a motion and did not notice a hearing, they simply objected to the special commissioners' recommendations and suggested alternative partition methods commensurate with their position; their document failed to include a written notice of a hearing and did not even include are quest for hearing; nothing in their document placed the chancellor on notice that the siblings desired a hearing on their objections. *Miles v. Miles ,949 So. 2d 774 ,2006 Miss. App. LEXIS 507 (Miss. Ct. App. 2006).*

Failure of plaintiff to serve motorist did not constitute receipt by the insurance company of "other paper" and did not trigger the 30-day removal period, but service of discovery requests was "other paper" from which the insurance company first learned that the case was removable; therefore, the insurance company timely filed the Notice of Removal, since it was within 30 days from when they could first ascertain the case was removable, and it was within one year from the filing of the complaint. *Jones v. Hartford Fire Ins. Co. ,347 F. Supp. 2d 328 ,2004 U.S. Dist. LEXIS 24627 (S.D. Miss. 2004).*

Plaintiff waived any objection he might have had to not being given timely notice of the hearing when he did not raise any objections during the proceedings or request a continuance when the chancellor announced that he would consider the motion for contempt and rule upon it. *Yancey v. Yancey ,752 So. 2d 1006 ,1999 Miss. LEXIS 388 (Miss. 1999).*

Service by mail.

Respondent attorney's motion for additional time to plead, filed twenty-three days after formal disciplinary complaint was filed and mailed to her, was filed on the last day permitted. *Terrell v. Mississippi Bar ,635 So. 2d 1377 (Miss. 1994).*