

**IN THE COURT OF APPEALS OF MISSISSIPPI**

**CITY OF JACKSON, MISSISSIPPI**

**APPELLANT**

**VS.**

**CASE NO. 2009-TS-00350**

**MYRT NAYLOR RHALY, et al.**

**APPELLEES**

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**BRIEF OF APPELLEES**

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DATED: June 9, 2010

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**V.**

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**HENRY CRAWFORD RHALY, et al.**

**APPELLEES**

**I. 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 and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

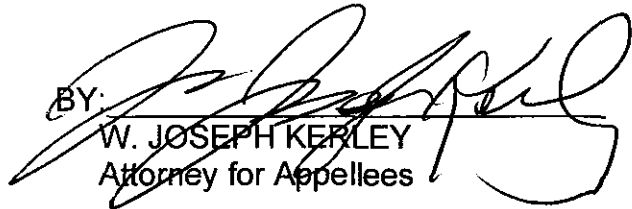
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7. William Joseph Kerley and John G. Clark, Esq, Kerley & Clark, 1855 Lakeland Drive, Suite B-20, Jackson, MS, 39211; Attorneys for Appellants; and
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9. Hon. W. Swan Yerger, Hinds County Circuit Judge, Hinds County Courthouse, P.O. box 327, Jackson, MS 39205;
10. City of Jackson, Mississippi, P.O. Box 17, Jackson, MS 39205, Appellant/Defendant; and
11. Hiawatha Northington, II, Esq., Pieter Teeuwissen, Esq., and Clare Barker Hawkins, Esq., Office of the City Attorney, P.O. Box 17, Jackson, MS 39205, Attorney for Appellant/Defendant.

Respectfully submitted,

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## **STATEMENT OF ISSUES**

The sole issue for consideration by this Court is whether the Trial Judge abused his discretion in striking the Answer of the Defendant City of Jackson (also referred to herein as "City"), and entering judgment against it after said Trial Judge found that the Defendant City of Jackson's conduct in failing to produce a requested document constituted "a gross indifference to discovery obligations".

## **STATEMENT OF THE CASE**

In July 2003 the Plaintiffs' residences and other property were flooded and damaged as a result of a heavy rain that fell and which, Plaintiffs contend, resulted in two garbage dumpsters being washed into Eubanks Creek which ran immediately behind Plaintiffs' respective properties. These dumpsters, Plaintiffs alleged, became lodged against pipelines traversing the waterway of Eubanks Creek adjacent to and just East of the North State Street bridge across Eubanks Creek. Said dumpsters trapped significant amounts of debris and garbage at the entrance of the passage under said bridge, effectively creating a dam and blocking a significant amount of water in its course under said bridge. The backed-up water spilled out of the banks of Eubanks Creek, traveled in a Westerly direction along with the flow of the water in said creek, and down the adjacent Choctaw Road where the Plaintiffs' properties were located. As a result of the blocked waterway, waters entered the properties of said Plaintiffs resulting in the damages alleged.

Plaintiffs further allege that after making significant recovery from the July 2002 flood, the same thing occurred in April 2003 when another heavy rain resulted in a garbage dumpster washing into Eubanks Creek and becoming lodged against the North State Street bridge at the same location. Again, significant debris and garbage accumulated in that location and, along with a reduced capacity of the waterway at that location due to heavy sediment and vegetation in the concrete lined waterway, another flood occurred resulting in new and additional damage to the same Plaintiffs. (Supp. R. 106; Supp. R. E. 19)

As a result of those two flooding incidents, two separate suits were filed which were ultimately consolidated by the Trial Court for discovery purposes. (R. p.36) Discovery did ensue, and as part of that, in the Plaintiffs' Request for Production of Documents, the following was asked: "REQUEST NO.2: Any standard operating procedure (SOPs) which govern the site of the subject incident." (R.171; R.E.23) The Defendant City of Jackson's first response was, "none. Will supplement upon receipt of any information." (R. 172; R.E.24) This Response was supplemented subsequent to an informal discovery conference between Plaintiffs' counsel and Defendant City of Jackson's new counsel, Paul M. Neville, Esq. (R.179; R. E. 31) (The City of Jackson has been represented throughout this litigation by at least eight (8) attorneys.) Said supplementation was provided to the Plaintiffs, through their above mentioned counsel, at another meeting between Plaintiffs' counsel and said counsel for the City of Jackson,



which occurred on or about February 5, 2005, the date of said supplementation (R. 179, 180; R.E. 31,32):

**SUPPLEMENTATION TO RESPONSE NO.2: There was no standard operating procedure which governed water quantity control in the City of Jackson at the time of the incident.** Matter were handled by exterior or interior complaint with routine inspections made before and after rain events on problem areas. **Beginning November 26, 2004,** the City adapted from the Operations and Maintenance Manual prepared for water quality requirements of the EPA a Storm Water Drainage Maintenance Plan for water quantity purposes. A copy is produced. (R. 172; R.E. 24) (Emphasis ours.)

At the discovery meeting where counsel for the Defendant City Neville provided the supplementations, the only document provided to Plaintiffs through counsel as responsive was the aforesaid "STATE OF MISSISSIPPI WATER POLLUTION CONTROL INDIVIDUAL STORM WATER PERMIT". (R.85-110; R.E. 33-77; see responses to Request No. 2 and 4, R. 172; R.E. 24) (Aforesaid counsel for the Defendant City advised counsel for Plaintiffs at this meeting that the Public Works Department officials had advised him that this document was the only document which would in any manner be responsive to these Requests for Production, and that there were no other documents which governed the site of the subject incident.)

Subsequent to this, and on the representation by the Defendant City that "There was no standard operating procedure which governed water quantity control in the City of Jackson at the time of the incident. Matters were handled by exterior or interior complaint with routine inspections made before and after rain events on problem areas," (R. 172; R.E. 24; Supplementation to Response No. 2), Plaintiffs embarked on an extensive course of discovery. This included

the taking of numerous depositions to follow up on records of complaints received by the Mayor's action line and others. (R. 158; Supp. R. E. 5; at ¶4) (Also see Plaintiffs' Motion to Compel Discovery of Defendant, City of Jackson, R. 58-62; Plaintiffs' Re-Notice of 30(b)(6) Depositions, [R. 63-68], and correspondence with Assistant City Attorney Mark McLeod, Esq., who succeeded Paul Neville, Esq., in the handling of this matter for the City, referencing another meeting with the City Attorney's office, and regarding attempts to have City officials and employees designated for depositions. A designee to address the "Permit", the only document provided in response to Request for Production No. 2, is discussed in item #7. [R. 69-71])

The trial of this matter was set for April 7, 2008. On March 31, 2008, only seven (7) days before the commencement of the trial, the Defendant City's operating procedures manual was discovered in another case file in the First Judicial District of Hinds County, Mississippi, in a similar flood case that had been previously heard by the same Court and Trial Judge. Said Manual was addressed to in a motion for post judgment relief by the City of Jackson, also the Defendant in that action, *Internal Engine Parts*. After reviewing this document, the Plaintiffs immediately filed a motion for sanctions for abuse of discovery, a telephone hearing was held almost immediately by the Trial Judge (which had previously been scheduled as a pre-trial conference), and an evidentiary hearing subsequently held. From those hearings the Trial Court entered its Findings of Fact and Conclusions of Law, (Supp. R. 117-123; R. E. 16-32), and its Order Granting Plaintiffs' Motion for Sanctions. (R. 249-251; R. E. 13-15)

It is from this Order and subsequent Judgment that the Defendant City takes this appeal.

### **SUMMARY OF THE ARGUMENT**

This Defendant's abuses in failing to produce the subject Manual was calculated to, and has achieved the result that it significantly damaged the Plaintiffs'/Appellees' ability to properly, expeditiously, and economically prove their case to a significant extent, while strengthening the Defendant's own defenses by concealing material evidence that would have supported the Plaintiffs'/Appellees' claims. This was basically the finding by the Trial Court below. (Supp.R. 117-123; R.E. 16-22) Quite simply, the degree of misconduct employed by this Defendant made it impossible for the Plaintiffs to take their claims before the Court in the same state of preparedness, or with the same degree of knowledge and access to evidence that would have existed but for this Defendant's successful effort to impede and corrupt the discovery process.

The Trial Court, through the Trial Judge, was completely within its discretion to grant the sanctions it did by its Order Granting Plaintiffs' Motion for Sanctions. (R. 249-251; R. E. 13-15) Said Order was granted after an extensive evidentiary hearing on the matter as seen from the transcript of that hearing (Transcript Supp., Vol 1-57 and accompanying Exhibits 1-21) and the Trial Court's accompanying Findings of Fact and Conclusions of Law. (Supp R. 117-123; R.E. 16-22) Plaintiffs/Appellees would show that there is simply no abuse of discretion by the Trial Court in this matter, that the actions of the Trial Court in assessing the subject sanctions was fully within its discretion as supported by the

relevant case law, and that there is, accordingly, no basis to set aside or reverse the Order of the Trial Court from which the Defendant City appeals.

### ARGUMENT

1. This Appeal by the Defendant City of Jackson is the result of sanctions entered by the Circuit Court of Hinds County, Mississippi, for what it found, after a full evidentiary hearing on the issues, to be a significant and egregious abuse of discovery by said Appellant/Defendant. Plaintiffs sought this relief from the Court for what appeared to be an intentional concealment of material evidence, to make false discovery responses to the Plaintiffs, and to seek to avoid liability in the Trial Court by withholding and denying the existence of a significant document, thereby making false representations to said Court. It was and is the position of the Plaintiffs/Appellees that the conduct of this Appellant/Defendant in failing to produce the document requested, under these specific circumstances, amounts to a total disregard for the authority and integrity of the rules of discovery, for the Trial Court, and indeed our very system of Civil Justice. The Trial Judge found that the Plaintiffs suffered “**enormous and substantial**” prejudice as a result of the Defendant’s/Appellant’s concealment of material evidence and outright misrepresentations of fact over a period of several years. (Supp R. 117-123, p. 120 at ¶11; R.E. 16-22 at p.20. Note: this page, page 4 of the document, in the Appellant’s Record Excerpts is out of order and follows page 5 of the document.) (Emphasis ours.)

2. In a nutshell, the Appellant/Defendant City of Jackson falsely represented to the Plaintiffs, through discovery and, accordingly to the Trial Court, that the City

of Jackson itself did not have any type of compiled "standard operating procedures" through a manual, written policies, procedures, or other writings or publications that it had generated or caused to be generated pertaining to the inspection and maintenance of Eubanks Creek specifically, and its water drainage system generally. This misrepresentation was done through the City's **failure to produce** a document it had entitled, Streets, Bridges, and Drainage Division of the Public Works Department City of Jackson, Mississippi Operations and Maintenance Policy Manual (hereinafter referred to as the Manual). (A copy of the Defendant City of Jackson's Supplementation of Responses to Plaintiffs' First Request for Production of Documents and Things is found at R. 172; R.E.23) This Manual was prepared for the City of Jackson's Public Works Department by Neel-Schaffer, Inc. (Interestingly, this is the same engineering firm that the City of Jackson retained as its expert in these actions, and its report was also silent regarding the Manual it drafted for the Public Works Department of the City of Jackson.) (R. 181; R.E 33) Defendant's Supplemental Response to Request No. 2 were constituted significant misrepresentations of fact in discovery served on the Plaintiffs/Appellees. (R.172; R.E. 24) Plaintiffs/Appellees contended that said Manual was withheld by the City of Jackson in deliberate concealment of material evidence. The aforestated Manual proves that the City of Jackson failed in its duties to properly inspect and maintain the subject Creek prior to the subject flooding. It was reviewed by the Trial Court, and that Court so found.

3. The Manual was fortuitously discovered by Plaintiffs' counsel's staff from the records of the Hinds County Circuit Clerk's office when it obtained THE VERDICT AND JUDGMENT BY THE COURT IN A BENCH TRIAL in a case previously before this Court and styled, *The Internal Engine Parts Group, Inc. a/k/a Engine Parts Warehouse Jackson, and Clearbrook Holdings, LLC v. The City of Jackson, Mississippi*, Civil Action 251-02-91CIV, hereinafter referred to as "Internal Engine Parts". Plaintiffs' counsel's staff again fortuitously obtained copies also of the Defendant City's MOTION FOR AMENDMENT OR RECONSIDERATION OF FINDINGS AND JUDGMENT AND/OR ALTERNATIVE MOTION FOR NEW TRIAL and the RESPONSE OF PLAINTIFFS TO MOTION FOR AMENDMENT OR RECONSIDERATION OF FINDINGS AND JUDGMENT AND/OR ALTERNATIVE MOTION FOR NEW TRIAL in the "Internal Engine Parts" case. (R.234 at p. 237) The Plaintiff Engine Parts' Response stated that the City had not produced the Manual until seven (7) days before the trial. The Defendant's Post Trial Motions in "Internal Engine Parts" were denied by the Trial Court.

4. In the instant case, Plaintiffs'/Appellees' counsel's staff obtained the Manual from the "Evidence Cabinet" of the Hinds County Circuit Clerk's office by sheer luck on March 31, 2008, seven (7) days before the trial of this case was to commence (R. 158; Supp.R.E. 5) Plaintiffs'/Appellees' counsel did not see the Manual until the next day, April 1, 2008, six (6) days before trial.

5. For the sake of clarity in what has transpired throughout the pendency of this case in regard to Plaintiffs'/Appellee's attempt at discovery as pertains to the

City of Jackson, a timeline was offered (as was provided to the Trial Court in the *Supplement to Plaintiffs' Combined Motion for Sanctions...*) at Supp. R.105-116; Supp.R.E. 18-29).

Plaintiffs/Appellees will not re-state the timeline here for the sake of brevity, but it is crucial to the understanding of what the Trial Judge considered in making his Findings of Facts and Conclusions of Law, and the Order Granting the Sanctions that this appeal is questioning.

6. Plaintiffs/Appellees would show that numerous depositions of City officials and employees were taken and the Plaintiffs/Appellees were denied use of the Manual in discovery which took place over several years. (This was delayed in part due to Hurricane Katrina and the significant damage to Plaintiffs' counsel's Pascagoula, MS office operated by his law partner, and the same type of damage to his home.) This discovery included, but was not limited to, Plaintiffs' Rule 30(b)(6) deposition notices discussed above, where the Manual was not addressed because the City had not properly identified or produced it.

7. The Mississippi Rules of Civil Procedure expressly grants the Trial Court authority to address the conduct and failures of the Defendant City herein. As shown, the repeated conduct of this Defendant/Appellant regarding the Manual is such that the most severe sanctions afforded that Court were in order. The Plaintiffs/Appellees respectfully request that that this Honorable Court consider the evidence and argument set forth in the Motions and at the hearing, which the Trial Judge did, and affirm the actions of the Trial Court.

8. It must be considered that after a telephonic hearing, and an evidentiary hearing, the Trial Judge affirmatively found that any Order to produce the previously concealed evidence by reopening discovery could not possibly be responded to with credibility – it is simply impossible for the Plaintiffs, or the Court, to feel secure in the authenticity or credibility of future discovery responses by this Defendant. The Court specifically found, “The Plaintiffs have spent a large amount of time and expense on this case and here on the eve of trial the manual is discovered not through the efforts of the City of Jackson, but through the efforts of the Plaintiffs. It would not be a proper deterrent to give the Plaintiffs an opportunity to reopen discovery and delay the trial. ” (Supp.R. 119 at No.10; R. E. 18)

## **LAW**

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION**

1. Mississippi law supports entry of the sanctions requested by the Rhaly, *et al.* “The decision to impose sanctions for discovery abuse is vested in the trial court's discretion.” *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942, 948, ¶24 (Miss. 2000) (*rehearing denied*, Oct. 11, 2001) (citations omitted). “The power to dismiss is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket.” *Id.* Where a Trial Court applies the proper standard in choosing to enter sanctions of dismissal or default for discovery violations, the Mississippi Supreme Court “will uphold the decision unless we have a ‘definite and firm conviction that the court



below committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors'." *Smith v. Tougaloo College*, 805 So.2d 633, 640, ¶23 (Miss. Ct. App. 2002) (quoting *Wood v. Biloxi Pub. Sch. Dist.*, 757 So.2d 190, 192 (Miss. 2000)).

2. The seminal case in Mississippi on the issue of appropriate sanctions for abusive discovery practices is *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997). *Pierce* involved a Plaintiff in a personal injury case whose case was dismissed (with prejudice) by the Hinds County Circuit Court as a sanction for discovery violations because the Plaintiff concealed the identity of a material witness. Specifically, the Court discovered the Plaintiff, Tyner Pierce, gave false testimony (through responses to various interrogatories, deposition testimony, and trial testimony) that she was alone at the time of her injury.<sup>1</sup> The Plaintiff's cause of action arose from injuries allegedly received when a ceiling fan above a bed became dislodged from the ceiling and fell onto the Plaintiff. Between the time the jury's verdict was overturned and the second trial, Defendants' counsel received an anonymous tip that the Plaintiff was *not* alone in bed at the time of the incident. Counsel for the Plaintiff, after being informed the Defendants knew the Plaintiff gave false testimony, identified the individual who was in bed with Ms. Pierce at the time of her injury, and the Defendants took his deposition. Ms. Pierce admitted she gave false testimony, and maintained her purpose was not to deceive the Court, but to protect her parents from the fact

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<sup>1</sup> Ms. Pierce's case originally went to trial, at which time she was awarded a \$500,000 jury verdict. The trial Court overturned the verdict on a finding of improper closing argument by Ms. Pierce's counsel, and ordered a new trial. The discovery violations that resulted in dismissal of Ms. Pierce's claims, with prejudice, were uncovered during the period preceding the second trial.

she was accompanied by a male companion in bed at the time of her injury. *Pierce*, 688 So.2d at 1387-1388.

The deposition of the previously concealed witness was taken, and there was no indication in the Court's opinion that his testimony about the circumstances surrounding the injury was any different than the Plaintiff's. As stated, the Plaintiff explained her concealment was for the sole purpose of protecting her parents from unpleasant facts. Notwithstanding the fact, the Plaintiff's concealment of the identity of a material witness had no effect on facts concerning the causation of injury, and would thus not materially prejudice the Defendants' defenses (in fact, one would have to assume the male companion's testimony would support the Plaintiff's claims), the Supreme Court affirmed absolute dismissal of the Plaintiff's claims because of the intentional nature of her misconduct, and because of the fact lesser sanctions would effectively let the Plaintiff get away with lying with no meaningful consequence, and would not provide the necessary deterrent to prevent future litigants from engaging in similar misconduct – results that would erode the integrity of the Judicial process.

The Defendants filed motions asking the Court to dismiss the Plaintiff's claims, with prejudice, for her failure to identify a material witness, and corresponding false testimony. The Court concluded the nature of Pierce's misconduct merited dismissal of her claims, with prejudice, with costs assessed against the Plaintiff, and ordered sanctions of that magnitude. *Id.* at 1388. In formulating its holding, the Court focused on the intentional nature of the

Plaintiff's misconduct, and on the effect intentional discovery misconduct has on the litigation process as a whole.

In reaching its conclusions, the Mississippi Supreme Court carefully considered holdings of the Fifth Circuit, and other jurisdictions, concerning similar discovery abuses. The Court examined several such cases in detail, including *Batson v. Neal Spelce Associates*, 765 F.2d 511, 514 (5<sup>th</sup> Cir. 1985) (holding dismissal is appropriate where discovery violations result from willfulness or bad faith, and where the deterrent purpose of Rule 37 can not be achieved by lesser sanctions); and *Medina v. Foundation Reserve Insurance Co.*, 870 P.2d 125, 126 (New Mexico Supreme Court, 1994) (holding dismissal appropriate for willful violation of discovery rules, and that the requisite degree of willfulness may be found upon a showing of "conscious or intentional failure to comply with the rule's requirements" or a finding of "either a willful, intentional, or bad faith attempt to conceal evidence or a gross indifference to discovery obligations." See *Pierce*, 688 So.2d at 1390.

The Mississippi Supreme Court emphasized the holding by the New Mexico Supreme Court that *it is not necessary to make a finding that concealed information is critical to trial preparation* in order to dismiss a party's claims. *Pierce*, 688 So.2d at 1390 (citing *Medina*, 870 P.2d at 128). In so doing, the Mississippi Supreme Court adopted a no frills policy that willful or bad faith discovery violations *will not be tolerated in this State*, whatever the circumstances, and endorsed the use of the severest possible sanctions to provide necessary deterrents under Rule 37, and to preserve our judicial

process. Notwithstanding the fact, Ms. Pierce's concealment of the identity of a witness to her injury was not critical to the prosecution/defense of the case, the high Court held

[T]he instant case provides the paradigm situation [for granting the "death penalty" sanction of dismissal] in which the [deceitful party] knowingly refused to be forthcoming and actively withheld the truth from the Court . . .

**. . . The same reasoning [as the reasoning applied by the Court in *The Mississippi Bar v. Land*, 653 So.2d 899 (Miss. 1994)] applies to a client who knowingly gives false testimony under oath and conceals significant facts from the court. Such action by *any party* should not and *will not be tolerated*. If a Defendant had done the same in this case, the trial court would have been affirmed if it struck the answer and allowed a default judgment to occur.**

*Pierce*, 688 So.2d at 1391-92 (emphasis added).<sup>2</sup>

Emphasizing the need for "death penalty" sanctions as punishment for a party who intentionally and/or in bad faith conceals evidence, the Court noted that the trial court considered lesser sanctions, including the right to cross-examine the Plaintiff on her previous concealment of the identity of a material witness, and monetary sanctions in the amount of ***all costs incurred by the Defendants in the litigation***. *Id.* at 1390. After discussing the availability of these lesser sanctions, the Mississippi Supreme Court concluded

The other sanctions considered by the court **would not achieve the deterrent value of dismissal**. Since **any other sanction besides dismissal would virtually allow the Plaintiff to get away with lying under oath without a meaningful penalty**, the trial court's decision regarding this factor was correct.

*Pierce*, 688 So.2d at 1391 (emphasis added).

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<sup>2</sup> Note that the Supreme Court's very strongly stated holding that intentional concealment of evidence by *any party* will not be tolerated, and that "death penalty" sanctions are just in such a situation, is without dissent.

3. Appellate Courts reviewing “death penalty” sanctions subsequent to *Pierce* interpret *Pierce* as setting forth four (4) “considerations” a trial court should examine when evaluating the appropriateness of entering such sanctions. See, e.g. *Smith v. Tougaloo College*, 805 So.2d 633 (Miss. Ct. App. 2002). Those considerations are: (1) whether the discovery violation is the result of willfulness or bad faith; (2) whether the deterrent value of Rule 37 may be achieved by lesser sanctions; (3) whether the wronged party has suffered prejudice as a result of the discovery violation; and (4) whether the discovery abuse is attributable solely to trial counsel instead of a blameless client. *Id.* at 640, ¶24. **Both the *Pierce* and *Smith* courts held that the requisite finding of willfulness “may be based upon either a willful, intentional, and bad faith attempt to conceal evidence, OR a gross indifference to discovery obligations.”** *Pierce*, 688 So.2d at 1390; *Smith*, 805 So.2d at 641, ¶25 (citations omitted). Our appellate courts specifically hold, where willfulness or bad faith is clearly demonstrated, “consideration of the other *Pierce* factors is unnecessary.” *Smith*, 805 So.2d at 642, ¶36.

4. In the case at hand, the City of Jackson provided false and materially misleading responses to requests for production. It made representations that the requested Manual did not exist at a time close to the same time when it was arguing that this exact Manual should not have been allowed into evidence in another flood case brought against this same City Defendant/Appellant. (Supp. R. 106-109; Supp.R.E. 19-22) The City made no effort to inform the Court, or the Plaintiffs, that the Manual existed at least one year before the 2002 flood, or that

the existence of the Manual was withheld from evidence in another case during the pendency of the instant two cases. Plaintiffs/Appellees assert that the Defendant City has engaged in “willful” and “bad faith” discovery misconduct and, as the Trial Court found, as set forth in its *Findings of Fact and Conclusion of Law*, “...that, under Mississippi law, the City of Jackson is guilty of gross indifference to its discovery obligations in its failure to produce the Manual in this case, and that the proper sanction for the City’s conduct is the entry of a judgment in favor of the Plaintiffs.” (Supp.R.122; R.E. 20) This is a matter which the Court obviously carefully investigated and addressed under our Rules.

5. Plaintiffs/Appellees would show that the deterrent value of other sanctions, such as solely heavy monetary fines, would be insufficient, as they would allow this Defendant to get away with again ignoring its discovery obligations, and with apparently hiding material evidence from this Court, with no meaningful penalty. See Pierce, 688 So.2d at 1391. The prejudice suffered by the Plaintiffs is clear – they were significantly delayed and impeded in prosecuting their claims for a substantial period of time because of this Defendant’s apparent willful misrepresentations and discovery misconduct.

6. The Trial Court conducted an evidentiary hearing to determine the degree wrongdoing by the City of Jackson through its officers and employees and its counsel. (Supplemental Transcript Volume with Exhibits filed supplementally.) It appears clear that the City directly attempted through its discovery omission to mislead this Court; and improperly avoid liability for the damages suffered by the Plaintiffs in not one but two flood events. The Plaintiffs/Appellees, through

counsel, are not asserting that the specific counsel for the City who supplied the supplemental Responses to Plaintiffs' Request for Production had any knowledge of the proceedings in the *Internal Engine Parts* case, *supra*, and assume, as he stated, that he was strictly providing a supplemental Response based on what he was told and provided by his client, the City of Jackson, through its Streets, Bridges and Drainage Division of the Public Works Department. However, that assumption cannot be made as to those with the City Attorney's office whose names appeared on the *Internal Engine Parts* case and on the initial Response to Request for Production in this matter where the City/Appellant denied the existence of any documents whatsoever (R. 172; R.E. 24). The Trial Court affirmatively found that this City Attorney did not intentionally conceal or knowingly conceal the subject Manual, "...as the Court is aware that some turnover of personnel exists in the City Attorney's Office. Nevertheless, the City did have knowledge that this document was part of the *Internal Engine Parts* case concerning maintenance of drainage ditches and creeks in Jackson. This manual was within the knowledge of the City, **its legal department, and its Drainage Division of the Public Works Department.**" (Supp.R. 119 at #8; R.E. 18) (Emphasis added) It is simply impossible to conclude that the City's department which had, and supposedly utilized this Manual did not know it existed. It is therefore illogical that it would have accidentally failed to provide this crucial Manual to its counsel in response to the subject Request. Although the sanctions requested by Plaintiffs and granted by the Trial Court are severe, they are justified in this instance, and have a necessary place in the jurisprudence of

this, and many jurisdictions. For the Court's convenience, Plaintiffs summarize the findings and holdings of some of the Courts faced with these issues, as follows:

a. *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942 (Miss. 2000) (rehearing denied, Oct. 11, 2001): In a case where the Mississippi Supreme Court was faced only with the issue of whether a successor Judge could reverse the original Judge's order entering default judgment against a Defendant who committed willful discovery violations, and concluded the original Judge's order could not be countermanded by the successor judge. The Court observed, in a concurring opinion, that, "[where the actions of the Plaintiff whose \$500,000 verdict we took away in *Pierce* were not as severe as the actions of the Defendant in this case, the default judgment entered by the original Judge was appropriate, and] What is sauce for the goose is sauce for the gander."<sup>3</sup> 796 So.2d at 949, ¶ 30;

b. *Henry v. Sneiders*, 490 F.2d 315 (9<sup>th</sup> Cir. 1974) (cited in *Amiker*): Held default judgment against a Defendant, and evidentiary hearing by the trial Court to determine amount of damages wherein evidence pertaining to liability was excluded, were proper where Defendant refused to produce certain documents; and finding that it was not necessary for a Court's Order to produce documents to be reduced to writing in order for default judgment to be an appropriate sanction;

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<sup>3</sup> Although the Court was only faced with the issue of whether the successor Judge could enter a different sanction than his predecessor, the Supreme Court made a point to emphasize that the "death penalty" is not reserved for naughty plaintiffs, but that, in cases where there is evidence of intentional and/or bad faith discovery violations by the Defendant, entry of default judgment is an appropriate sanction.



c. *Billman v. State of Maryland Deposit Ins. Fund Corp.*, 585 A.2d 238 (Md. App. 1991) (cited in *Amiker*): Held trial Court's entry of default judgment under Maryland Rule of Civil Procedure 2-433(a) [worded nearly identically to M.R.C.P. 37(b)] was proper, even without clear finding on the Record that plaintiff's trial preparation was prejudiced;

d. *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990 (Miss. 1999): Upheld dismissal of plaintiff's claim based on trial Court's findings that plaintiff gave untruthful discovery responses, and that the plaintiff's explanation that her failure to identify previous medical treatment was not intentional lacked credibility;

e. *Cunningham v. Mitchell, M.D.*, 549 So.2d 955 (Miss. 1989): Affirmed decision of the Jackson County Circuit Court to dismiss a plaintiff's claims for discovery violations, and emphasizing a Court's ability to impose discovery sanctions under M.R.C.P. 37(e) notwithstanding the absence of an Order from the Court directing that certain discovery responses be made;

f. *Salts vs. Gulf National Life Insurance Company*, 872 So.2d 667 (Miss. May 6, 2004): Affirmed the Trial Court's dismissal of a Plaintiff's claim for the Plaintiff's failure to appear for a deposition after being ordered by the Court to do so. The Court noted that M.R.C.P. 37 expressly authorizes the Trial Judge to enter an order dismissing an action or rendering a default judgment, and held "To hold otherwise would render this provision of the rule meaningless and one which we should simply judicially abrogate if it is not going to be enforced. A rule which is not enforced is not rule at all." *Salts*, 872 So.2d at ¶18;

g. *Bowie vs. Montfort Jones Memorial Hospital*, 861 So.2d 1073 (Miss. 2003): Affirmed the Trial Court's grant of summary judgment in a medical malpractice case, based on a previous sanction striking the plaintiffs' expert designation because the designation was made outside of the time set in the Scheduling Order entered by the Court (since the Plaintiff had no chance of succeeding in a medical malpractice case without an expert witness). As emphasized in *Salts*, the Court's ruling was based on recognition that the express authority for "death penalty" sanctions in Rule 37 must be exercised, or rendered meaningless. at ¶¶14-16.)

h. *Hood vs. Mordecai*, 900 So.2d 370 (Miss. App. 2004) (rehearing denied February 1, 2005) cert. denied April 28, 2005): Affirmed Trial Court's Order striking Defendant's answers to the Complaint, and ordered that the Plaintiff could obtain judgment by default. The matter came before the Court of Appeals on the issue of whether the Circuit Court erred in refusing to set aside the Default Judgment (which was entered as a sanction for violation of a discovery order). In support of his Motion to Set Aside Default, Hood argued that he had a colorable defense to the Plaintiff's claims, and good cause for setting aside the default. The Court of Appeals noted that the Default Judgment had been entered by the Court as a sanction for discovery abuse (at ¶14); and concluded that the Trial Court had the authority to strike the Defendant's Answer and enter Default Judgment in favor of the Plaintiff pursuant to Rule 37<sup>4</sup>; and

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<sup>4</sup> The Court in this case was focused on the issue of whether there was a procedural error in the Court entering a Default Judgment prior to the Plaintiff obtaining a Clerk's entry of Default, and concluded that Rule 37(b)(2)(C) was a separate and distinct avenue for entering Default Judgment from Rule 55. Although the Court did not give detailed discussion to the appropriateness of the

- i. *Mississippi Farm Bureau Mutual Insurance Company v. Parker*, 921

So.2d 260 (Miss. 2005 (rehearing denied March 2, 2006)): The Mississippi Supreme Court observed, and encouraged:

Our rules of discovery as judicially codified in Mississippi Rules of Civil Procedure 26 through 37 have been in effect for over 23 years. Though quite often not followed, they are hardly unfamiliar to practitioners. In addition to their inherent power and authority, Trial Courts have the unequivocal authority to impose sanctions via inter alia, MRCP 26(c), 26(d), 30(g), and most importantly, 37(b)(c)(d)(e). **Our learned Trial Judges should act promptly to sanction those who would abuse our rules.** At ¶23.

7. The evidence in this case clearly establishes two instances of intentional and/or bad faith discovery misconduct by the Defendant City, in not just one, but two civil actions arising from the subject of flooding due to the City's negligence. This appears to be an attempt to deprive the Plaintiffs, and at least one other similarly situated Plaintiff, from gaining any compensation for their damages arising for the flooding caused by negligence of the City of Jackson in failing to follow the procedures set out in the Manual. As in *Pierce*, any lesser sanction than the "death penalty" specifically authorized by M.R.C.P. 37 [in this case default judgments] would not serve the deterrent purpose of Rule 37, but would allow this Defendant to get away with what appears to be equal to lying to the Court, and with a general pattern of intentional discovery abuses, without a meaningful penalty. The Mississippi Supreme Court specifically confirmed in *Pierce* that the "death penalty", as a sanction for discovery violations, is not reserved for contemptuous plaintiffs, but that **the Supreme Court will affirm an**

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Trial Court's "death penalty" sanction for violation of a discovery order, it certainly did not articulate any obstacles to the Court having exercised its discretion to enter such a sanction.

**entry of Default Judgment as a sanction against a Defendant that engages in intentional or bad faith discovery misconduct.** (*Pierce*, at 1392).

(Emphasis added.) Obviously, therefore, the Trial Court did not abuse its discretion in this instance.

8. Lesser sanctions than those requested by the Plaintiffs, such as an Order to pay attorneys' fees, costs, and expenses, and to produce previously concealed evidence and otherwise remedy the Defendant City's apparent willful discovery violations, especially on the eve of trial, would only have further delayed the proceedings, and would have endowed this Defendant, that proved it has contempt for this Court, the Rules of Discovery, and our Judicial process, with the ultimate right to control what evidence and testimony would be released, with absolutely no mechanism to ensure credible compliance. In fact, an Order short of Default Judgment on all the claims of the Plaintiffs would **reward** this Defendant for its intentional and abusive discovery practices and send the message to like-minded defendants that there is no meaningful penalty in this Court for lying or misrepresenting material matters to the Court and concealing and controlling material evidence. It is apparent that the City, through one of its departments, made a calculated decision that the risk of any sanction likely to be granted by this Court, should it be caught in its discovery abuses and blatant misrepresentations of material fact to the Court. It is apparent that such conduct would be far outweighed by the advantages of not producing the Manual, and denying this Court an opportunity to consider the Plaintiffs' claims on their merits in light of said Manual. The Plaintiffs submitted to the Trial Court that it was time

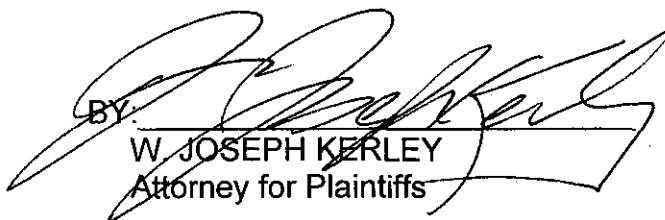
to send a crystal clear message that such conduct would not be tolerated in that Court. This is precisely what the Trial Court found, and why it entered the sanctions that it did.

9. As to specific relief sought by the Plaintiffs, and recognizing the Plaintiffs were seeking very reasonable compensatory damages from the Defendant City of Jackson, the Plaintiffs sought the relief set forth in its Motion for Sanctions and its Supplement to that Motion. (R. 156-247, Supp.R.E. 3-170 *excluding exhibits contained in the Record*; Supp.R.105-116, Supp.R.E. 18-29) This included the striking of the Defendant's Answer and the entering of a Default Judgment against said Defendant, for the imposition of monetary sanctions in the form of the amount of damages sought by the Plaintiffs and for reasonable attorneys fees and expenses for the time and monies spent by counsel for Plaintiffs directly as a result of the discovery abuse(s) as found by the Trial Court. After the evidentiary hearing this is precisely what the Trial Court did. This was done pursuant to the evidentiary hearing conducted therein in which the Defendant/Appellant offered little, if any defense. (See Supplemental Volume consisting of the Hearing Transcript, and accompanying Exhibits filed subsequent to said Transcript.) Again, the Trial Court took these actions after reviewing the record before it, assessing the evidence at an evidentiary hearing, and then entering its Order based thereon. The Trial Court, based on the case law, statutory law, rules of discovery, and particularly Rules 11 and 37, M.R.Civ.P., as well as §11-55-5, Miss. Code 1972, annotated, did not abuse its

simply no basis for a finding that the Trial Court abused its discretion in this case, and the Order and Judgment should be affirmed by this Honorable Court.

DATED, this 9<sup>th</sup> day of June, 2010.

HENRY CRAWFORD RHALY, JR., ET AL.

BY:   
W. JOSEPH KERLEY  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

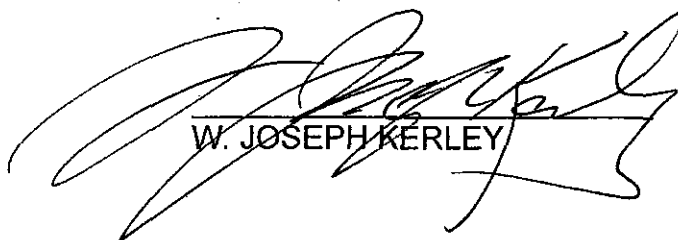
I do hereby certify that I have this day served a true and correct copy of the above and foregoing *Brief of Appellees* to the following:

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