

IN THE COURT OF APPEALS OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI

APPELLANT

VS.

CAUSE NO. 2009-CA-00350

MYRT NAYLOR RHALY

APPELLEE

**On Appeal From The Circuit Court
of Hinds County, Mississippi
Cause Number 251-02-1822 CIV
Honorable Swan Yerger**

Reply Brief

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TITLE	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
SUMMARY OF THE REPLY	1
ARGUMENT	2
I. There is no evidence that the City willingly, knowingly or intentionally concealed the Manual.	2
A. There is no showing of willfulness or bad faith	4
II. Plaintiff's Trial Preparation was not Substantially Prejudiced.	7
III. The lower Court never entered an Order compelling discovery, therefore, the Court abused its discretion in entering a default judgment.	9
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

CASES

PAGES

<i>Caracci v. Int'l Paper Co.</i> , 699 So.2d 546 (Miss. 1997).....	11
<i>City of Jackson v. Internal Engine Parts Group, Inc.</i> , 903 So.2d 60 (Miss. 2005).....	8
<i>Ford Motor Company v. Tennin</i> , 960 So.2d 379 (Miss. 2007)	10
<i>Mosby v. Moore</i> , 716 So.2d 551 (Miss. 1998)	8
<i>Robert v. Colson</i> , 729 So.2d 1243 (Miss. 1999).....	11
<i>State Hwy. Comm'n v. Havard</i> , 508 So.2d 1099 (Miss. 1987)	10
<i>Warren v. Sandoz Pharm. Corp.</i> , 783 So.2d 735 (Miss.Ct.App. 2000)	11, 12

OTHER AUTHORITIES

Mississippi Rule of Civil Procedure 37(a)(2)	10
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SUMMARY OF REPLY

Plaintiff's Response does not demonstrate that the City intentionally concealed evidence in this matter. Rather, instead of focusing on the fact that the City referenced the Manual in its Discovery Response, the Plaintiff reiterates the same argument that was made to the lower court and makes unprofessional and underhanded comments towards the Office of the City Attorney. Simply put, the Plaintiff failed to demonstrate that the City willfully concealed the existence of the Operations and Procedure Manual ("the Manual") during discovery. In fact, the lower court specifically found that the City did not intentionally fail to conceal the document, yet awarded approximately \$185,000 to the Plaintiff anyway. Most importantly, **the City disclosed the existence of the Manual in discovery**. The Plaintiff misleads this Court by only focusing on **half** of the City's discovery response. The other half clearly references the Manual; however, another document was inadvertently produced. Admittedly, the discovery response was not clearly written; however, the City disclosed the existence of the Manual. Therefore, the Court abused its discretion in awarding a default judgment to the Plaintiff.

ARGUMENT

I. There is no evidence that the City willingly, knowingly or intentionally concealed the Manual.

There is no evidence before this Court that the City willingly or knowingly concealed evidence in this matter. There are two issues fatal to Plaintiff's argument: 1) the City identified the Manual in its Response to Request for Production No. 2, thus there is no indication of willfully concealing evidence; and 2) the City participated in discovery by disclosing thousands of pages of documents, producing 14 deponents and a 30(b)(6) deponent, therefore, there is no indication that the City intentionally misled the Plaintiff.

The discovery request that is central to this matter is Plaintiff's Request for Production of Documents No. 2. The Plaintiff's Request for Production Number 2 and the City's Supplemental Response is as follows:

REQUEST NO. 2: Any standard operating procedure (SOPs) which govern the site of the subject incident.

CITY'S RESPONSE NO. 2: None. Will supplement upon receipt of any information.

CITY'S SUPPLEMENTAL 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 [on April 6, 2003]. Matters 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 [to] a Storm**

Water Drainage Maintenance Plan for water quantity purposes. A copy is produced.

R. at 172 (emphasis added). The City clearly referenced an Operations and Maintenance Manual, but inadvertently produced the Storm Water Drainage Maintenance Plan instead. Admittedly, the Response is vague and should have been more clearly written. However, the City references the Manual and states that the Manual was applicable at the time of the incident. This is not indicative of intentionally concealing evidence. Rather, it is indicative of the City fully cooperating and participating in discovery.

Further, Plaintiff never made any additional request for the referenced document. Nevertheless, over three years later, the lower court entered a default judgment and sanctions against the City. The lower court's draconian sanction of a default judgment is in error because (1) there is no evidence of willfulness or bad faith on behalf of the City, as the City disclosed the existence of a manual in February 2005; (2) the City did not refuse to comply with a court order, thus the act of failing to disclose a document is not commensurate with the harsh act of default judgment; (3) the document in question is far from a "smoking gun" document, i.e., it does not unequivocally determine liability on behalf of the City; and (4) the trial judge specifically found that the City did not act intentionally or willfully in failing to disclose the Manual.

A. There is no showing of willfulness or bad faith.

Plaintiff's Brief does not demonstrate that the City's failure to produce the manual was in bad faith. Plaintiff does not acknowledge the fact that the manual itself was disclosed, and inadvertently a different manual was produced. Rather, Plaintiff merely asserts that this is a "meritless" argument. More importantly, Plaintiff fails to address the lower court's opinion that specifically states "[t]he Court does not find that the City intentionally concealed or knowingly concealed the document" as the Court is aware that some turnover of personnel exists in the City Attorney's Office." T. at 51; Findings of Facts and Conclusions of Law, ¶8 (May 14, 2008) (emphasis added), R.E.3.¹ Yet, notwithstanding the fact that the lower court specifically found that the City did not intentionally or knowingly conceal a document, the Plaintiff still asserts that there was "an intentional concealment of material evidence." Appellee's Brief, p. 6. There was neither an "intentional concealment" nor is the Manual considered "material evidence."

Most importantly, the City referenced the manual in its Responses to Plaintiff's Requests for Production of Documents in February 2005. R. at 172. Throughout the entire litigation in this matter, Plaintiff has only called the lower court's attention to the first part of the City's response and failed to direct the lower court to the entire response where the City does

¹ This denotes that this document can be found under Number 1 of the City's Record Excerpts.

in fact reference a manual. T. at 46; R. at 157. When one reads the City's Supplemental Response Number 2 in its entirety, the manual was inadvertently not produced; however, the document was clearly referenced.

If the City's document produced in response to Request Number 2 was not adequate, Plaintiff's counsel should have brought this to the attention of the City for clarification. Plaintiff could have sent a letter seeking clarification, which would have alerted the City to the production error, or the Plaintiff could have asked for clarification of the Operations and Maintenance Manual referenced in Supplemental Response Number 2 during the deposition of when David Willis, the City's Rule 30(b)(6). Plaintiff did none of the aforementioned. Rather, Plaintiff bypassed any good faith efforts choosing to play a "gotcha game" on the eve of trial.

Likewise, Plaintiff misconstrues the City's discovery response with a focus the first part of the Response, while ignorint the last part explaining that "*the City adapted from the Operations and Maintenance Manual prepared for water quality requirements of the EPA [to] a Storm Water Drainage Maintenance Plan for water quantity purposes.*" The fact that the Manual was referenced clearly demonstrates that the City was not intentionally concealing evidence in this matter.

Moreover, the City cooperated in good faith with the Plaintiff during discovery by producing thousands of pages of documents, including:

- All complaints relating to the street upon which Plaintiff lives, R. at 171;
- The EPA Storm Water Drainage Maintenance Plan, R. at 172;
- The Storm Water Permit form the Mississippi Department of Environmental Quality that governs water drainage quality, R. at 172;
- All documents related to the Community Development Block Grant administered by HUD in connection with the rip rap applied to Eubanks Creek, R. at 173;
- All documents showing agency approval for work on Eubanks creek, R. at 173;

The City further cooperated with the Plaintiff in allowing the Plaintiff to depose nearly fourteen (14) City employees regarding the incident, as well as a 30(b)(6) deponent. Therefore, this is not a case where the City failed to produce any discovery documents and failed to cooperate with the Plaintiff whatsoever. Rather, this is a case where the City inadvertently failed to produce one document and was sanctioned by the harshest sanction possible. Had the City wholly failed to participate in discovery, a default judgment perhaps would have been appropriate. This is not the case here.

Further, the lower court had various alternatives it could have employed instead of issuing a default and sanctioning the City \$185,000. The court could have granted a trial continuance to allow the Plaintiff to

conduct discovery on the manual. There would have been no prejudice to the Plaintiff if the Court would have allowed a continuance. The lower court failed to consider lesser sanctions and arbitrarily issued a default judgment against the City. This was an abuse of the court's discretion, and the lower court's ruling must be reversed.

II. Plaintiff's Trial Preparation was not Substantially Prejudiced.

As previously mentioned, the Manual is not the "smoking gun" document that Plaintiff claims in this matter. In fact, had the lower court inquired into the probative value of the Manual, it would have determined that the Manual is not "material evidence." The City produced a multitude of other documents that are more damaging to the City's defense than the Manual. However, because of Plaintiff's "gotcha tactics" employed throughout this litigation, the Plaintiff chooses to focus on the one document, out of thousands of pages of discovery, and argue that the Manual is crucial to Plaintiff's case. This is a disingenuous assertion.

The Plaintiff asserts that the City made "outright misrepresentations of fact in discovery . . . and/or deliberate concealment of material evidence. (The manual) proves that the City of Jackson failed in its duties to properly inspect and maintain the subject Creek prior to the subject flooding." R. at 157. However, this is not what the lower court found. Further, if the lower

court would have examined the pleadings along with the manual, it would have discovered that the manual was in fact disclosed in February 2005 (thus, it was not intentionally concealed), and that the manual did not “prove that the city failed its duty to properly inspect.” R. at 157. If this Court reviews the manual in question in its entirety (R. 181 - 225), the Court will find that the manual does not positively impose a duty on the City by law, such that it is clear that the City has a ministerial function to inspect the drainage system. See **Mosby v. Moore**, 716 So.2d 551, 558 (Miss. 1998). R. at 181 – 247. Therefore, the Plaintiff cannot argue in good faith that the nondisclosure of the manual substantially hindered his preparation for trial.

Plaintiff focuses on the matter of **Internal Engine Parts Group, Inc., v City of Jackson**, Civil Action No. 251-02-912 CIV, which made reference to the manual. The Mississippi Supreme Court decision of **Internal Engine** was handed down on March 31, 2005. See **City of Jackson v. Internal Engine Parts Group, Inc.**, 903 So.2d 60 (Miss. 2005). Thus, the record reveals that (1) the City disclosed the existence of the Manual in February of 2005, and (2) the Mississippi Supreme Court decided an issue that was arguably similar to the case at bar in March of 2005. Yet, the Plaintiff claims that the City “made a calculated decision” to conceal evidence and was “caught in its underhanded discovery abuses and blatant misrepresentations of material fact.” This is simply not true.

The exaggerated allegations made by Plaintiff's counsel have no merit, and Plaintiff cannot produce any evidence to support these outrageous and unprofessional contentions. However, there is evidence that the Plaintiff was made aware of the manual in 2005, and that a nearly case of public record addressing the issue of flooding in the City of Jackson was decided in 2005, yet Plaintiff's counsel did not exercise any diligence and failed to attempt to obtain the manual until days before the trial in April 2008. For the City to have to pay expenses and attorney's fees incurred for three years of litigation, when the Plaintiff failed to attempt to obtain this manual in 2005, is an abuse of the lower court's discretion. Furthermore, there is no evidence that if the Plaintiff would have obtained the manual in 2005 that Plaintiff would not have engaged in the lengthy discovery process anyway. As such, the City respectfully requests that this Court reverse the lower court's judgment.

III. The lower Court never entered an Order compelling discovery, therefore, the Court abused its discretion in entering a default judgment.

Perhaps most importantly, the lower court never entered an order compelling the City to produce the manual, yet the lower court sanctioned the City anyway. This is a clear abuse of discretion. The Mississippi Supreme Court has stated that "the discovering party must seek and obtain an order compelling a more detailed response as a precondition of

obtaining Rule 37(b) sanctions.” *State Hwy. Comm’n v. Havard*, 508 So.2d 1099, 1104 (Miss. 1987)(emphasis added). This never occurred in the case at bar.

As discussed *supra*, the existence of the Manual was disclosed but was not produced. Admittedly, the City’s Response No. 2 is poorly written; however, the City clearly references that the Manual was applicable at the time of the flood. Plaintiff had ample opportunity inquire into contents of the manual, yet failed to do so. Plaintiff also had ample opportunity to question the City’s 30(b)(6) witness as to the contents of the manual, yet failed to do so.

The Plaintiff never conferred with the City as to the existence of the referenced manual, never filed a Good Faith Certificate with the lower court, and never filed a Motion to Compel. So, how was the City supposed to know that the Plaintiff was unsatisfied with the Supplemental Responses? The Plaintiff never called this to the City’s attention until **April 2008**, when a Motion for Sanctions was filed; yet, the lower court **still** sanctioned the City. This is a draconian sanction that clearly demonstrates that the trial court abused its discretion **because the trial court sanctioned the City no Order Compelling was entered.**

Mississippi caselaw establishes that this Court will reverse sanctions where the lower court did not enter an order to compel. See ***Ford Motor Company v. Tennin***, 960 So.2d 379 (Miss. 2007). When a party is

aware of an incomplete or evasive discovery response, that party should take affirmative action by seeking an order compelling discovery pursuant to Miss.R.Civ.P. 37(a)(2). **Warren v. Sandoz Pharm. Corp.**, 783 So.2d 735, 743 (Miss.Ct.App. 2000). That is what Plaintiff should have done in the case at bar.

In **Caracci v. Int'l Paper Co.**, 699 So.2d 546, 557 (Miss. 1997), the Mississippi Supreme Court outlined the appropriate procedure under the rules for dealing with a party's failure to fully respond to discovery:

Under our rules of civil procedure, failure to make or cooperate in discovery should first be resolved by making a motion in the proper court requesting an order compelling such discovery. See M.R.C.P. 37(a)(2). The remedy for failing to comply with the discovery requests when the trial court grants an order to compel falls under M.R.C.P. 37(a)(4) in the form of awarding the moving party the expenses for such motion. See M.R.C.P. 37; **January v. Barnes**, 621 So.2d 915, 922 (Miss. 1992). **After such an order to compel has been granted under M.R.C.P. 37(a)(2), and the party ordered to answer fails to respond, then the remedy may be sanctions in accordance with M.R.C.P. 37(b).**

(emphasis added).

The City should not be punished because the Plaintiff opted to continue with discovery rather than request and pursue specific action earlier in the litigation. See **Caracci**, 699 So.2d at 557 (sanctions reversed where there was no order compelling plaintiff to fix discovery deficiencies); **Robert v. Colson**, 729 So.2d 1243, 1247 (Miss. 1999) (sanctions for failing to timely answer interrogatories reversed where no order to compel

had been entered); *Warren v. Sandoz Pharms. Corp.*, 783 So.2d 735, 741 (Miss.Ct.App.2000) (sanctions improper where “there were no prior orders in place to compel discovery.”) Thus, because the lower court issued sanctions although there was no order compelling discovery, the trial court’s ruling is an abuse of discretion and must be reversed.

CONCLUSION

The lower court abused its discretion in issuing a default judgment against the City. The record demonstrates that the City did not act in bad faith or willfulness in its discovery responses, and that the City actually referenced the Manual in 2005. Further, the lower court entered a default judgment against the City for a discovery violation without entering an Order Compelling Discovery. This is an abuse of discretion. As such, the lower court’s ruling should be reversed. And the City of Jackson prays for such other relief as this Court deems appropriate.

Respectfully submitted this the 28th day of July, 2010.

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CERTIFICATE OF SERVICE

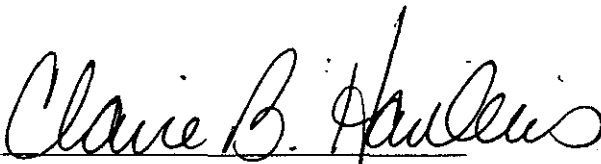
The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing ***Reply Brief*** to the following:

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So certified, this the 28th day of July, 2010.


CLAIRE BARKER HAWKINS