

**IN THE COURT OF APPEALS OF MISSISSIPPI**

**CITY OF JACKSON, MISSISSIPPI**

**APPELLANT**

**VS.**

**CAUSE NO. 2009-CA-00350**

**MYRT NAYLOR RHALY**

**APPELLEE**

**CONSOLIDATED WITH**

**MYRT NAYLOR RHALY**

**APPELLANT**

**VS.**

**CAUSE NO. 2008-CA-01085**

**WASTE MANAGEMENT OF MISSISSIPPI**

**APPELLEE**

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

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**Brief of Appellant City of Jackson**

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**ORAL ARGUMENT REQUESTED**

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**N THE COURT OF APPEALS OF MISSISSIPPI**

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Miss.R.App. 28(a)(1), 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:

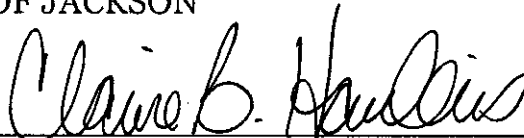
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Respectfully submitted,

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## **STATEMENT OF THE ISSUES**

The issue that this Court should resolve on this appeal is:

- Whether the lower court abused its discretion in issuing a default judgment against the City for a purported discovery violation.

## **STATEMENT OF THE CASE**

### **A. PROCEEDINGS BELOW**

On December 27, 2002 the Plaintiff filed the first Complaint in this matter alleging that the City of Jackson and co-defendants were liable for the flooding of his home. R. at 13. On November 1, 2004, the Plaintiff filed a second Complaint against the City and co-defendants alleging that the City of Jackson and co-defendants were liable for a second flooding of his home. Plaintiff originally filed two separate lawsuits in the Hinds County Circuit Court, which were subsequently consolidated into one action. R. at 36.

The normal course of discovery ensued from 2004 to 2007, and on July 27, 2007, the City filed its Motion for Summary Judgment arguing that maintenance of drainage systems is a discretionary function, and that Plaintiff failed procedurally to comply with the Mississippi Tort Claims Act. R. at 41. Plaintiff responded to the City's Summary Judgment Motion on November 2, 2007. R. at 75. Trial was originally set for December 3, 2007, but was continued to April 7, 2008. R. at 5 – 6.

On April 2, 2008, Plaintiff filed a Motion for Sanctions against the City alleging that the City “falsely represented to the Court that [it] did not have any type of manual, written policies, procedures . . . pertaining to the inspection of Eubanks Creek.” R. at 157. Specifically, the Plaintiff



complained that the City failed to produce a manual entitled Operations and Maintenance Manual of the Streets, Bridges and Drainage Division of the Public Works Department.<sup>1</sup> Plaintiffs did not notice said motion for hearing.

On April 7, 2008, the lower court denied the City's Summary Judgment Motion without stating any reason. R. at 248. On April 8, 2008, the day that trial was set to begin, a hearing was held on Plaintiff's Motion for Sanctions. T. at 1.<sup>2</sup> At the hearing on Plaintiff's Motion for Sanctions, the lower court issued a bench ruling against the City, ordering a default judgment for a purported discovery violation and assessing damages in the amount of \$149,872.10, and further found that Plaintiff is entitled to reimbursement for expenses and attorney's fees. T. at 54. The lower court ultimately entered a judgment against the City for the aforementioned damages, attorney's fees in the amount of \$31,226.84 and expenses in the amount of \$3,862.54, for a total judgment in the sum of \$184,961.48. R. at 250.

On April 23, 2008, the lower court dismissed co-defendant BFI Waste Systems of North America from this lawsuit. On May 7, 2008, the lower court granted co-defendant Waste Management of Mississippi's Summary Judgment Motion. The Plaintiff appealed the decision granting

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<sup>1</sup> A copy of said manual can be found at R. 181-225.

<sup>2</sup> This reference is made to the transcript on the lower court hearing in this matter that was held on April 8, 2008. This transcript can be found in the record of the consolidated matter, **Rhaly v. Waste Management**, Cause No. 2008-CA-01085.

Waste Management's Summary Judgment Motion, and that appeal is consolidated with the instant appeal styled ***Myrt Naylor Rhaly v. Waste Management of Mississippi, Inc.***, Cause No. 2008-CA-01085. On June 6, 2008, the City timely filed its Notice of Appeal, appealing the lower court's ruling of default judgment against the City. R. at 252.

## **B. STATEMENT OF THE FACTS**

This claim involves two separate incidents that were eventually consolidated in the lower court. R. at 36. The initial incident occurred on July 30, 2002 when the City of Jackson experienced an unexpected extremely heavy downpour of rain (Hinds County Circuit Cause No. 251-O-1882CIV). R. at 36. Plaintiff's property is located in the flood zone along the Eubanks Creek in the Meadowbrook and State Street area. R. at 37. On this date, a privately owned commercial trash dumpster, owned by Waste Management of Mississippi, moved away from its normal resting place, into the Eubanks Creek, becoming lodged against the State Street Bridge, which crosses over Eubanks Creek. *Id.* Also, Waste Systems of North America (BFI) owned another dumpster that was on the north side of the creek, and this dumpster allegedly swept into Eubanks Creek and upstream of the State Street Bridge. *Id.* Plaintiff contends that with the commercial trash container lodged in Eubanks Creek, the water backed up and caused the flooding of their property. *Id.*

On April 6, 2003, another heavy rain occurred in the area where Eubanks Creek passes under State Street. R. at 24. Eubanks Creek overflowed, and these flood waters caused a dumpster owned by co-defendant Waste Management to be swept into the waters of Eubanks Creek, allegedly creating a “dam” on the West side of State Street bridge. *Id.* This “dam” allegedly caused the back up of water onto the Plaintiff’s property, resulting in flooding and damage to their property. *Id.* The Plaintiff contends that the City of Jackson was negligent in the maintenance of the creek bed and failed to properly inspect and clean the creek bed and channel (Hinds County Circuit Cause No. 251-04-1214CIV). R. at 26.

The facts relevant to the issues on appeal, whether the trial court should have awarded a default judgment against the City as a discovery sanctions are as follows: 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.

## SUMMARY OF THE ARGUMENT

The City's argument in this matter is simple: First, the lower court abused its discretion by awarding a default judgment to the Plaintiff for a purported discovery violation because there is no evidence that the City willfully concealed the existence of the Operations and Procedure Manual ("the manual") during discovery. Second, the lower court erred in awarding sanctions to Plaintiff because the lower court never entered an Order compelling the production of the manual. As such, precedent dictates that this Court must reverse sanctions where the lower court did not enter an order to compel.

The discovery request that is central to this matter is Plaintiff's Request for Production of Documents No. 2. This Request asks the City to produce "any standard operation procedure (SOP's) which govern the site of the subject incident." R. at 171. Plaintiff contends that the responsive document was the Operations and Procedural Manual. However, in the City's Supplemental Response in February 2005 the manual was **disclosed**, but was not **produced**; instead, the City inadvertently produced a Storm Water Drainage Maintenance Plan. R. at 172. Plaintiff never filed a Motion to Compel or made any additional request for the referenced document. Nevertheless, over three after the City disclosed the manual, the lower court entered a default judgment and sanctions against the City on the day of trial.

The “gotcha” tactics employed by the Plaintiff throughout this litigation have done nothing but impede trial on the merits of this case. The City disclosed the manual in February 2005. The Plaintiff failed to exercise any diligence and request the production of the manual. Instead, a week before the trial, the Plaintiff filed a Motion for Sanctions, accusing the City of “underhanded discovery tactics.” Without reviewing the probative value of the manual, the Court granted a default judgment to the Plaintiff and sanctioned the City for \$184,961.48. Interestingly, the Court entered this draconian sanction, but specifically found that the City did not willfully conceal the document.

The entry of default is contrary to Mississippi caselaw. In order for this Court to uphold a lower court’s dismissal for a discovery violation, there must be a finding of willfulness. The record is devoid of any evidence that the City willfully and knowingly concealed the manual. Further, the record is devoid of any evidence that the City’s production of a different manual substantially prejudiced the Plaintiff in trial preparation. Because the lower court failed to review the manual, failed to make a finding that the City willfully concealed the document and still issued the harshest sanction possible, this Court must reverse the lower court’s ruling and remand this matter for further proceedings not inconsistent with this Court’s opinion.

Finally, the lower court's issuance of sanctions against the City must be reversed because there was never an order compelling the production of the manual entered. Mississippi caselaw establishes that a precondition of obtaining sanctions pursuant to Miss.R.Civ.P. 37(b), the discovering party must obtain an order compelling a more detailed response. The Plaintiff failed to do this in the case *sub judice*. The Plaintiff had over three years to inquire into the details of the disclosed manual; however, the Plaintiff failed to do so. The 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. As such, because the lower court issued sanctions when no order compelling the manual was in existence, the lower court abused its discretion.

## **STANDARD OF REVIEW**

The standard of review as to whether an action should have been dismissed as a sanction for discovery violations is abuse of discretion. ***Scoggins v. Ellzey Beverages***, 743 So.2d 991, ¶27 (Miss. 1999). An appellate court will affirm a trial court's decision about dismissal as a sanction unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." ***Pierce v. Heritage Properties, Inc.***, 688 So.2d 1385, 1388 (Miss. 1997) (quoting ***Cooper v. State Farm Fire & Cas. Co.***, 568 So.2d 687, 692 (Miss. 1990)). "The power to dismiss is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket." ***Tinnon v. Martin***, 716 So.2d 604, 611 (Miss. 1998). The exercise of that power **should be limited to "the most extreme circumstances."** ***Gilbert v. Wal-Mart Stores, Inc.***, 749 So.2d 361, 364 (Miss.Ct.App. 1999) (emphasis added).

In the case *sub judice*, the lower court abused its discretion in issuing a default judgment against the City for an alleged discovery violation. The City's conduct was not extreme, willful or in an attempt to conceal evidence. Therefore, the City respectfully requests this Court to reverse the lower court's ruling on the issue of the default judgment and



sanctions and remand this matter for further proceedings not inconsistent with this Court's ruling.

### **ARGUMENT**

#### **I. Whether the lower court abused its discretion in issuing a default judgment against the City for a purported discovery violation.**

The sole issue in this matter is whether the trial should have entered a default judgment and sanctions against the City for failing to produce the Operations and Procedure Manual ("the manual") during discovery. The discovery request that is central to this matter is Plaintiff's Request for Production of Documents No. 2. This Request asks the City to produce "any standard operation procedure (SOP's) which govern the site of the subject incident. R. at 171. In the City's Supplemental Response in February 2005 the manual was not produced; however, the City referenced the manual and produced a Storm Water Drainage Maintenance Plan instead. R. at 172. Plaintiff never filed a Motion to Compel or 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. Thus, because there is no evidence that the City willfully withheld the manual, and because the lower court issued sanctions against the City even though there was no order compelling production of a document, the City appeals.

- a. **Dismissal of this matter was an abuse of the lower court's discretion because there is no evidence the City willfully withheld the manual from Plaintiff.**

In evaluating the appropriateness of a lower court's dismissal as a sanction for a discovery violation, the Mississippi Supreme Court has outlined four factors as a basis in making such determination:

- (1) First, dismissal is authorized only when the failure to comply with the court's order results from willfulness, bad faith, and not from the inability to comply.
- (2) Dismissal is proper only in situation where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions.
- (3) Another consideration is whether the other party's preparation for trial was substantially prejudiced.
- (4) Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders.

*Pierce*, 688 So.2d at 1398. **"These are considerations and not four absolute requirements."** *Smith v. Tougaloo College*, 805 So.2d 633, 640 (Miss. 2002) (emphasis added).

Here, the lower court's entry of default judgment was in error because (1) there was 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 Plaintiff had a duty to mitigate damages, yet continued to conduct an exorbitant amount of discovery for nearly three years after the alleged document should have been discovered by Plaintiffs’ counsel.

### **1. Willfulness or Bad Faith**

The lower court did not find that the City intentionally or willfully concealed a document. T. at 51. “If the failure to comply is because of inability to comply, rather than because of willfulness, bad faith, or any fault of the party, the action may not be dismissed, nor a default judgment given and less severe sanctions are the most that can be invoked.” **White v. White**, 509 So.2d 205, 207 (Miss. 1987). “A finding of willfulness may be based upon either willful, intentional, or bad faith attempt to conceal evidence or a gross indifference to discovery obligations.” **Pierce**, 688 So.2d at 1390. Here, there is no evidence that the City’s failure to produce the manual was in bad faith. On the contrary, the manual itself was **disclosed**, and inexplicably a different manual was **produced**.

In the lower court’s bench ruling and in the Findings of Facts and Conclusions of Law, which was prepared by Plaintiff’s counsel and signed by the lower court judge, the lower court specifically stated that **“[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.3.3 Notwithstanding the fact that the lower court specifically found that the City did not willfully or knowingly conceal the document, the lower court still awarded the Plaintiff a judgment against the City, for their total damages of \$149,872.10, plus attorney's fees in the sum of \$31,226.84, and expenses in the sum of \$3,862.54, for a total judgment of \$184,961.48. R. at 250. This default judgment and award are entirely disproportionate to the City's actions in inadvertently failing to produce a disclosed document.

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 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 apparently not produced; however, the document was clearly referenced. The Plaintiff's Request for Production Number 2 is as follows:

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<sup>3</sup> This denotes that this document can be found under Number 1 of the City's Record Excerpts.

**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.

If the City's document produced in response to Request Number 2 was not adequate, it was the Plaintiff's burden to clarify the additional response. Plaintiff could have sent a letter seeking clarification, which would have alerted the City to the productions error, or the Plaintiff could have asked for clarification of the Operations and Maintenance Manual referenced in Supplemental Response Number 2 when David Willis, the City's Rule 30(b)(6) deponent, was deposed. Interestingly, Plaintiff's deposition notice of on July 2, 2007, two and a half years after the City referenced the manual, does not even reference the manual as subject

matter to be discussed in the Deposition Notice. Moreover, Plaintiff failed to question Willis about such manual during said deposition. R at 242 – 247. Apparently, the manual was not important enough to pursue during three years of discovery. There is no evidence that the City willfully concealed a document; accordingly, the lower court abused its discretion in granting a default judgment to the Plaintiff.

## **2. Trial Preparation Substantially Prejudiced**

Although the lower court found that the Plaintiffs were hindered in trial preparation because the Plaintiffs did not have the manual, this finding is contrary to the record evidence. First, the lower court failed to examine the manual to determine if it was probative to the claims and defenses of this case. Secondly, the Plaintiffs were notified in February 2005 that such a manual existed, yet did not specifically request said manual when the City disclosed its existence. Third, Plaintiff failed to establish that this manual was in effect at the time of one or both of the incidents. The record is devoid of any evidence that establishes the relevancy and admissibility of the manual.

As previously mentioned, there is no indication that the trial court examined the manual to determine whether or not this piece of evidence actually prejudiced the Plaintiff in trial preparation. 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, 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 (found at 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. Stated differently, this manual is far from the “smoking gun” document that the Plaintiff alleges “proves liability.”

Additionally, the City produced many documents during discovery that are arguably more damaging to the City’s case than the manual. In February 2005, the City produced the following documents in its Supplemental Responses to Plaintiff’s Requests for Production of Documents:

- 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;
- Minutes of City Council meetings that pertain to Eubanks Creek, R. at 173;
- Preliminary plans and writings for clearing or improvement to Eubanks Creek, R. at 173;
- Studies that were done on the cite in question, R. at 174; and
- Recommendations to the City pertaining to suggestions made by drainage engineers relating to the creek, R. at 174.

In fact, the Plaintiff relied on the Water Pollution Control Individual Storm Water Permit and the City of Jackson Landscape Ordinance in support of his Response to the City's Motion for Summary Judgment. R. at 85 – 128. The documents relied upon by the Plaintiff consisted of a document created by the Mississippi Department of Environmental Quality and an Ordinance enacted by the Jackson City Council. Arguably, these two documents could place a duty upon the City of Jackson, whereas the manual is simply a guide to the Public Works Department. The manual does not establish a ministerial duty as a matter of law. Therefore, the



Plaintiff cannot argue that the nondisclosure of the manual substantially hindered his preparation for trial.

Furthermore, the Plaintiff has a duty to mitigate damages in this matter. *See generally, Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1162 (Miss.1992); *Pelican Trucking Co. v. Rossetti*, 251 Miss. 37, 167 So.2d 924, 927 (1964); *Yazoo & M.V.R. Co. v. Fields*, 188 Miss. 725, 195 So. 489, 490 (1940). This duty also applies to discovery sanctions.

When the sanctions award is based upon attorney's fees and related expenses, an essential part of determining the reasonableness of the award is inquiring into the reasonableness of the claimed fee. Recovery should never exceed those expenses and fees that are reasonably necessary to resist the offending action.... **In assessing the damage done, the court should consider the extent to which it is self inflicted due to the failure to mitigate.**

*Fujimoto v. Au*, 95 Hawai'i 116, 19 P.3d 699, 751 (2001) (emphasis added).

The record establishes that the City disclosed the manual in its Supplemental Responses in February 2005. R. at 172. However, the City did not produce the manual; it produced the Storm Water Maintenance Plan instead. *Id.* If the Plaintiff was concerned as to the contents of the manual, he should have either filed a Supplemental Request for Production of Documents requesting the Manual, or he should have filed a Motion to Compel. Neither pleading was filed. The Plaintiff continued to engage in discovery over the next three years, and the Plaintiff deposed

approximately fourteen (14) City employees and the City's 30(b)(6) witness, David Willis.

On April 2, 2008, over three years since the City disclosed the existence of the manual, the Plaintiff filed his Motion for Sanctions because Plaintiff's counsel's staff "fortuitously" obtained copies of the City's post trial motions in 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 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."

These allegations of this nature made against the City are unfounded, and there is no evidence of "underhanded discovery abuses" by the City. These are exaggerated allegations made by Plaintiff's counsel. However, there is evidence that the Plaintiff was made aware of the manual in 2005, and that a nearly identical case 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 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.

### **3. Conduct Attributable to Client or Attorney**

The Court failed to make a finding as to whether the alleged discovery abuse is attributable to the attorney rather than a blameless client. The Mississippi Supreme Court has found that "dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounding in confusion or sincere misunderstanding of the court's orders." ***Pierce***, 388 So.2d at 1389. As demonstrated in the City's Supplemental Response Number 2, the City submitted the Storm Water Drainage Maintenance Plan rather than the Operations and Maintenance Manual. R. at 172. Due to the fact that there appeared to be some sort of confusion as to which document was controlling at the time of the incident, as reflected in the City's supplemental response, the manual was not produced. If the

Plaintiff was not satisfied with the clarity of the City's answer, the Plaintiff should have submitted an additional Request for Production of Document, stating his request more clearly. This was not done. So, as a result, the City's attorney submitted document that perhaps was not responsive to Plaintiff's request, rather than the manual.

There are reasonable inferences from the evidence in the record that confusion in producing this manual is attributable to the attorney, rather than the City itself. Furthermore, the lower court did not make any finding as to this factor. Therefore, the City respectfully submits that the lower court abused its discretion in issuing a default judgment against the City and requests that this Court reverse the lower court's ruling.

**b. Sanctioning the City was an abuse of the lower court's discretion because no order compelling discovery was entered.**

The lower court never entered an order compelling the City to produce the manual, yet the lower court sanctioned the City anyway. This is an 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 Plaintiff had ample opportunity to file the appropriate pleadings in order to determine the 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. Notwithstanding these facts, Plaintiff further failed to avail himself to the remedies of Uniform Circuit and County Court Rule 4.04 by filing a Good Faith Certificate and a Motion to Compel. Local Rule 4.04(B) specifically states that "No motion to compel shall be heard unless the **moving party shall incorporate in the motion a certificate** that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so." (emphasis added).

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). 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).

As the passage above indicates, a party must first file a motion to compel, and a court must then enter an order compelling before the court can issue sanctions against a party. 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); **January**, 621 So.2d at 922 (sanctions reversed where the only order to compel was substantially complied with); **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**

In order for this Court to reverse the lower court’s ruling, the Court needs a “definite and firm conviction that the court below committed a clear error of judgment.” The record indicates that the lower court abused its discretion in issuing a default judgment against the City. For the above reasons, the City of Jackson requests that this reverse the lower court’s ruling. The overwhelming weight of the evidence 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. 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 28<sup>th</sup> day of December, 2009.

THE CITY OF JACKSON, MISSISSIPPI

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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 ***Appellant's Brief*** to the following:

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So certified, this the 28<sup>th</sup> day of December, 2009.

  
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