IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI — APPELLANT

VS. — NO. 2009-CT-00350-SCT

MYRT NAYLOR RHALY, et al. — APPELLEES

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# SUPPLEMENTAL BRIEF OF APPELLEES

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DATED: November 21, 2011

**IN THE SUPREME COURT OF MISSISSIPPI**

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| **CITY OF JACKSON, MISSISSIPPI** | **APPELLANT** |
| **V.** | **NO. 2009-CT-00350-SCT** |
| **MYRT NAYLOR 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.

APPELLEES:

1. Henry Crawford Rhaly, 1081 Buckley Drive; Jackson, MS, 39206;
2. John Thomas and Deborah Rhaly, 132 Westline Drive, Madison, MS, 39110;
3. William DeWitt and Cynthia Rhaly, 206 Morningside South, Ridgeland, MS, 39157;
4. Mary Sue Cloer Creel, 625 Choctaw Road, Jackson, MS, 39206;
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6. Bill and Linda Wilson, 533 Choctaw Road, Jackson, MS, 39206;
7. William Joseph Kerley and John G. Clark, Esq, Kerley & Clark, 1855 Lakeland Drive, Suite B-20, Jackson, MS, 39211; Attorneys for Appellants; and
8. J. Patrick Frascogna, Esq., and Lisa N. Frascogna, Esq., Frascogna and Frascogna, 234 East Capitol, Suite 100, Jackson, MS 39201, Attorneys for Appellants/Plaintiffs;

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. Pieter Teeuwissen, Esq., and Claire Barker Hawkins, Esq., Office of the City Attorney, P.O. Box 17, Jackson, MS 39205, Attorney for Appellant/Defendant.

Respectfully submitted,

MYRT NAYLOR RHALY, et al.

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## STATEMENT OF ISSUES

As set forth in the Appellees' Brief in the Court of Appeals below, 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

Appellees respectfully refer this Honorable Court to the Statement of the Case in their Brief in the appellate court below. For brevity's sake here, the case revolved around a negligence claim against the City of Jackson and another defendant, which Plaintiffs/Appellees contend resulted in two floods, one in 2002 and the second in 2003, causing damages of varying degrees to the plaintiffs' real and personal property.

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) (Emphasis added.) 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) 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**. Matters were handled by exterior or interior complaint with routine inspections made before and after rain events on problem areas. **Beginning November 26, 2004**, *(over a year after the 2nd, 2003 flood)* 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/Appellees through counsel as responsive was the aforestated "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, therefore this was what was produced.)

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/Appellees had to initiate a much more circuitous route to establish negligence on the part of the City in maintenance of its drainage ditches and creeks,

As a result of the City having no written policy and procedure manual to inspect and determine if the City had, in fact, followed its own adopted procedures, Plaintiffs embarked on this 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, from a City Engineer with Public Works down to individuals who actually cleaned the ditches. (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 of the Appellees'/Plaintiffs' Brief for the Court of Appeals. [R. 69-71])

As set forth in the prior briefing, 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 (policy and 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 in a motion for post judgment relief by the City of Jackson, also the Defendant in that action, *Internal Engine Parts (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). After reviewing this document, the Appellees/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 scheduled and 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.

## ARGUMENT

As is well settled by this Honorable Court, and set forth in the briefing in the Court below, the one and only issue for consideration by this Honorable Court is whether or not the Trial Judge abused his discretion in his findings and Order.

The Appellant/Defendant City continues to assert that somehow the Plaintiffs, your Appellees herein, were required to file a motion to compel that which the Defendant had denied existed. (As set forth above, Plaintiffs diligently sought what it thought to be available and otherwise in their above-referenced *Plaintiffs' Motion to Compel Discovery of Defendant, City of Jackson [R. 58-8271]* and the resulting *Agreed Order Compelling Discovery Responses From Defendant, City of Jackson*

*[R.72—74].* If the Defendant/Appellant had not stated that no policy and procedure manual existed and, conversely, admitted that one did actually exist, this would also have been the subject of this Motion.

The accidental and fortuitous location of the Manual by Plaintiffs/Appellees occurred seven (7) days before trial. Plaintiffs/Appellees urge that for the Court have held other than it did may well have been an abuse of discretion in reopening discovery and requiring Plaintiffs/Appellees to then re-start the discovery process, including the re-taking of numerous depositions at great time and cost to the Plaintiffs/Appellees simply because the Defendant/Appellate denied the existence of a critical document it had recently produced in the similar *Engine Parts* case.

Additionally, in examining the Defendant/Appellant's position, when should the "motion to compel" have been filed? Are parties now to assume when discovery Answers and Responses are received from an adverse party that something, or everything, must be suspect and motions to compel be filed at that time? Extended evidentiary hearings should then be required to test the sufficiency of each interrogatory answer or production response? If we can no longer trust the veracity of interrogatory answers and responses to requests for production and must file motions to compel in follow-up, then our system is broken beyond hope.

Or should the Plaintiffs/Appellees, through counsel, have asked for a continuance of the trial and then filed the suggested motion to compel after it accidently discovered and came into possession of the operations manual seven (7) days before trial? This hardly seems a rational remedy.

## FINDINGS OF THE TRIAL COURT

The sole task before this Honorable Court now it appears to Plaintiffs/ Appellees, is simply to determine if the actions taken by the Trial Court in imposing the sanctions of striking the Defendant's/Appellee's Answer and entering a monetary judgment constituted such an abuse of discretion as to send this matter back to the trial court and start the discovery process over (which had gone on from 2002 through 2007). Also, the Defendant/Appellee is intent on arguing only one portion of this state's law allowing these sanctions, that the Court must find the offending party intentionally engaged in the questioned conduct. As this Honorable Court knows, this is simply not the law in Mississippi. The Trial Court did find that the Defendant/Appellee did engage in gross conduct in failing to produce the requested manual.

The following sections of the Findings of Fact and Conclusions of Law entered by the Trial Court should be determinative as to whether an abuse of discretion occurred:

8. The 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**. (Emphasis added.) Nevertheless, the City did have knowledge that this document was part of the *Internal Engine Parts* case and the manual should have been produced. Once the request was made for the production of documents, extensive search should have been undertaken by the City for all relevant documents, especially since there was an analogous flooding incident with 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.** (Emphasis added.)

9. The Court is of the opinion that parties should be deterred from being indifferent regarding violation of their discovery obligations. In this case, the City showed **gross indifference to its discovery obligations**. (Emphasis added.)

10. It is suggested by the City that the Plaintiffs be given an opportunity to reopen discovery. There is an old saying which is "the horse is out of the barn". The Plaintiffs (Appellees herein) 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. It would be an imposition not only on the Plaintiffs but on the Court and the Court's docket as well.** (Emphasis added.)

The Court is of the opinion that reopening discovery and resetting the trial is **not a proper nor appropriate sanction in this case.** The Plaintiffs have suffered enormous and substantial prejudice through no fault of the Plaintiffs. Plaintiffs asked the proper questions and the City did not give the proper responses. The only fault lies with the City of Jackson...(Emphasis added.) (Supp.R. 117-123; R.E. 16-23)

## LAW

In addition to the briefing for the Court of Appeals, Plaintiffs/Appellees would urge that this Honorable Court consider the following decisions:

1. *Holder v. Orange Grove Medical Specialties,* 2008-CT-01442-SCT (Miss. 2010): This is a medical negligence claim, suit being filed December 7, 2006. After discovery was not forthcoming, the Defendants filed a motion to dismiss for failure to prosecute the case on May 9, 2008. The basis was the Plaintiff's (through her attorney's) failure to prosecute the action, including failure to answer discovery. After a hearing on July 25, 2008, the Circuit Court of Harrison County dismissed the case for failure to prosecute. The dismissal was reversed by our Court of Appeals, and then reinstated by this Honorable Court.

While there is nothing in this decision to indicate that the actual Plaintiff played any role in the conduct which supported the dismissal, in this matter now before this Honorable Court that is clearly not the case. The subject *OPERATIONS AND MAINTANENCE AND POLICY MANUAL* (Supp.R. 38-82; R.E. 33-77) was

produced for the Streets, Bridges, and Drainage Division of the Public Works Department, City of Jackson, MS, by Neel-Schaffer, Inc. of Jackson, MS. This incidentally is the same engineering firm where the Defendant City's liability expert designee was employed. While The Trial Judge in his "Findings" did note "...that some turnover of personnel exists in the City Attorney's office", it is also clear that the City Attorney involved in the *Internal Engine Parts* case was the same City Attorney whose name appeared on the subject Defendant/Appellant's *Supplementation of Responses to Plaintiffs' First Request for Production of Documents and Things* (R. 171; R.E. 23-32)

But most importantly to the Trial Court's determination of appropriate sanctions in this matter, the actual Defendant, the City of Jackson through its Public Works Department, not only had the subject Manual prepared for its own use, it had also produced it six days before trial in the *Internal Engine Parts* case, objected to its admission into evidence at that trial, and then made it a basis for reconsideration by the Trial Court in its motion for post-trial relief.

In *Holder* this Honorable Court found "...that lesser sanctions in the present case would not serve the interests of justice. Thus, the trial judge did not abuse his discretion in dismissing this case..." (at ¶33). Our standard for reviewing a trial court's discretion is most aptly stated in Specially Concurring Opinion"...I admit that I have some discomfort with the decision of the trial court. (Footnote omitted). However, in agreement or disagreement, our level of deference remains unchanged. The record reflects that the trial court adequately made findings of fact and so came to a decision that is squarely within our precedent. I yield to that ruling." (At ¶ 38)

2. *Shepard v. Prairie Anesthesia Ass.*, 2009-CA-01267-COA (Miss. App.) 8-30-2011): This very recent case from the Court of Appeals similarly reviews the dismissal of an action for dilatory conduct and failure to prosecute. It, as well as the preceding case, considers whether or not the trial judge considered lesser sanctions as this is one test in determining abuse of discretion (at ¶ 29). In our case now before this Honorable Court, the Trial Judge specifically took into consideration the question of whether lesser sanctions would suffice in paragraph 10 of its *Findings of Fact and Conclusions of Law.* The Trial Court specifically found that, under these specific circumstances, lesser sanctions would be inadequate.

3. *Chambers v. Brown*, 2010-CA-00845-COA (Miss. App. 2011): This recent Court of Appeals decision involves an interrogatory answer which withheld information of a medical condition by a plaintiff seeking damages for personal injuries. She then went on to testify and deny the prior injury. In affirming a decision by the Trial Judge to dismiss her Complaint as an appropriate sanction, the Court of Appeals cited this Honorable Court's opinion in *Pierce v. Heritage Props., Inc.*, 688 So.2d 1385, 1388 (Miss. 1997) (citing *White v. White*, 509 So.2d 205, 207 (Miss. 1987). "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." *Id.* at 1388.

## CONCLUSION

In our present case the Defendant/Appellant not only denied the existence of any policies and procedures manual in its supplementation of its Responses, but in response to Request No. 4 asking for "All policy and procedure guidelines from any

## STATEMENT OF ISSUES

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Federal, State, or local agency that were in place at the time of the subject incident and applied to Eubanks Creek", the Response stated "none." And the Supplemental Response designated the "Storm Water Permit" referred to in the Supplemental Response to Request No. 2.

Plaintiffs/Appellants urge that there was no abuse of discretion by the Trial Judge and that the Judgment of the Trial Court and opinion of the Court of Appeals should be affirmed.

DATED, this 21st day of November, 2011.

MYRT NAYLOR RHALY, ET AL.

BY: _____
W. JOSEPH KERLEY
Attorney for Plaintiffs/Appellees

**CERTIFICATE OF SERVICE**

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

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This 21st day of November, 2011.

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