

COPY

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI

APPELLANT

VS.

CAUSE NO. 2009-CA-00350

MYRT NAYLOR RHALY

APPELLEE

FILED

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**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

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

Supplemental Briefing on Writ of Certiorari

**PIETER TEEUWISSEN
CITY ATTORNEY
CLAIRE BARKER
DEPUTY CITY ATTORNEY**

**OFFICE OF THE CITY ATTORNEY
CITY OF JACKSON, MISSISSIPPI
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207
Telephone: 601-960-1799**

COUNSEL FOR APPELLANT

INTRODUCTION

This Court accepted the City's Petition for Writ of Certiorari, 4-4, on November 10, 2011. Prior to this Court's ruling, the Court of Appeals, in a 5-3 decision, affirmed the harshest sanction ever given to a party: striking its pleading and entering a judgment against it by default. This issue is a case of first impression to this Court.¹ There is no precedent to affirm a default judgment under the facts and circumstances in this case. Indeed, this is the most severe sanction imposed against any party in the State of Mississippi where the wrong document was inadvertently produced in discovery, where there was no violation of a discovery order, and where the lower court specifically found no intentional misbehavior. For this reason, the City respectfully requests this Court to reverse the Court of Appeal's ruling and remand this matter to the lower court.

Pursuant to the Court of Appeal's opinion, if a party does not produce a proper document, that litigant is subject to a default judgment notwithstanding the fact that no motion to compel was filed, no order compelling discovery was violated and no intentional conduct of concealing the document. This is an unreasonably harsh result that is unwarranted as to the City of Jackson and an unreasonably harsh result that establishes dangerous precedent for future parties in discovery disputes.

Furthermore, the Court of Appeal's decision in the instant matter could have a substantial impact on the trial that is currently held in abeyance between co-defendant Waste Management and Plaintiff. On the eve of trial, the lower court granted Waste Management's motion for summary judgment and issued a default judgment against the City of Jackson, assessing the entire amount of Plaintiff's damages and attorney's fees to the City of Jackson.

¹ The City is aware that it is not routine for this Court to hear oral argument on a Writ of Certiorari. However, due to the fact that the Court of Appeal's decision was split 5-3, and this Court's decision to grant Certiorari was split 4-4, the City welcomes the opportunity to present additional oral argument should the Court determine it helpful.

Both of these decisions were appealed. The Court of Appeals reversed the award of summary judgment in ***Rhaly v. Waste Management***, and that case is now pending before the Hinds County Circuit Court. The Court of Appeal's decision in the instant matter is untenable as it relates to the upcoming trial between Plaintiff and co-defendant. The trial court assessed the entire amount of Plaintiff's damages, costs and attorney's fees to the City of Jackson, leaving co-Defendant Waste Management defending a trial where damages have been already been awarded. As this case is currently postured, the Court of Appeal's resolution in the instant matter eviscerates the Court of Appeals decision in ***Rhaly v. Waste Management***.

ARGUMENT

I. The Court of Appeals imposed the harshest sanction possible under the circumstances. There is no precedent for this finding.

The Court of Appeal's opinion imposes the harshest sanction upon a party for inadvertently producing an incorrect discovery document. This sanction was imposed notwithstanding that: 1) there was no motion or order to compel discovery; 2) no discovery order was violated; and, 3) the lower court expressly found that the discovery violation was unintentional. No precedent in the State of Mississippi exists to support the majority's affirming of the ultimate sanction of default judgment against the City, especially without its having been first afforded any meaningful opportunity to correct the discovery violation. The Court of Appeal's opinion creates an alarming situation for all litigants in the State of Mississippi that inadvertently fail to produce a discovery document.

Based on the Court of Appeal's opinion, if there is a discovery dispute where a litigant does not produce the correct document, the trial court may strike the party's pleading and enter default judgment, without a finding of willfulness, without a prior motion to compel and opportunity to correct the alleged discovery violation, without an order compelling discovery

and without that party's violating an order compelling discovery. The Court of Appeal's opinion effectively eviscerates Rule 37(a) and (b) and replaces them with Rule 37(e). The end-result of the Court of Appeal's holding is that there is no longer any need for Rule 37(a)'s requirement that a party move for an order compelling discovery if it is not satisfied with a discovery response or for Rule 37(b)'s provision that if a party violates a court order, then it may be monetarily sanctioned, such as paying reasonable attorney's fees. Rather, the Court of Appeals completely sidesteps the heart of Rule 37, with which attorneys and litigants are well-familiar, and bases its opinion on the "catch all" provision, Rule 37(e) in order to come to a conclusion that affirms the lower court's decision. It is apparent from reading Rule 37(e), Comment, that the present situation is not what Rule 37(e) was intended to address – and certainly not with the ultimate sanction.

A. Contradictory Precedent: *Pierce v. Heritage Properties and Ford Motor v. Tennin*

The Court of Appeals likens this matter to *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997), where the Supreme Court dismissed Plaintiff's action with prejudice when it was revealed that Plaintiff intentionally lied and withheld material evidence as to another eye-witness to the incident. The case *sub judice* could not be more dissimilar to *Pierce*. *Pierce* consistently obstructed the progress of the litigation by filing admittedly false responses to various discovery requests and by swearing to false testimony in depositions. *Id.* at 1390. Here, there were no "admittedly false" responses; rather, the City inadvertently produced the wrong document. In *Pierce*, the circuit court judge found that some of the answers provided by *Pierce* were "manifestly false." *Pierce* at 1390. Here, the trial judge specifically found that the City did not willfully or intentionally fail to disclose the Manual. T. at 51. In *Pierce*, the parties endured an eight day jury trial before it was discovered that *Pierce* actually had her boyfriend in bed with her when the ceiling fan fell, causing her

injuries. **Pierce**. at 1388. Here, the Manual was discovered a week before trial, and rather than granting a continuance to allow the Plaintiff to conduct discovery on the manual, the trial judge issued a default judgment and sanctioned the City for the entire amount of damages. Extreme disregard of discovery obligations **Pierce**, combined with lying under oath, warranted the extreme sanction of dismissal, but its facts serve to underscore the inappropriateness of such a sanction in the case *sub judice*.

When the facts in **Pierce** are juxtaposed with the facts in the instant matter, the City of Jackson's actions are materially different from Pierce's. Here, although the City's Response to Request No. 2 is admittedly poorly written, the response states 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 demonstrates that the City was not intentionally concealing evidence in this matter.

Not only does the Court of Appeal's opinion impose the "death penalty" sanction without any precedent, but the Court's opinion overlooks caselaw that is contrary to its holding. In **Ford Motor Co. v. Tennin**, 960 So.2d 379 (Miss. 2007), the Supreme Court reversed the trial court's ruling when it ordered a new trial based on a discovery violation of a "perceived non-existent court order." **Id.** at 396. Throughout the discovery phase of the litigation, Ford Motor refused to turn over documents and, Ford was still producing documents on the third day of trial. **Id.** at 387. Plaintiff alleged that Ford intentionally withheld documents after the court ordered them produced. The trial judge, believing he had ordered the production of the documents at issue, vacated a unanimous jury verdict and ordered a new trial based on the perception that Ford violated a discovery order.

However, the record in Ford did not indicate that the Court entered an order. *Id.* The Supreme Court found that the Plaintiff filed motions to compel discovery, yet not all motions were heard and only one court order was violated. *Id.* at 394. The Supreme Court examined the seriousness of the sanctions imposed under Rule 37 and outlined what must be done in order for sanctions to be imposed. The Court outlined the parties' duties, as well as the trial court's duties, in stating that "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)." *Id.* at 393. The Court went on to cite *Caracci v. Int'l Paper Co.*, 699 So.2d 546, 557 (Miss.1997) for the appropriate procedure under the rules for dealing with a party's failure to fully respond to discovery. The Court specifically stated that "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)." *See also State Hwy. Comm'n v. Havard*, 508 So.2d 1099, 1104 (Miss.1987) ("the discovering party must seek and obtain an order compelling a more detailed response as a precondition of obtaining Rule 37(b) sanctions"). So, the Court found that although there were discovery documents that arguably should have been produced, it is the moving party's burden to see that that motion is heard in order for those documents to be produced. *Id.* at 393. This holding and logic is directly applicable to the case at bar. Plaintiff Rhaly should have filed a motion to compel when the City submitted its response in 2005 to clarify the poorly written response.

The Supreme Court emphasized the necessity of the moving party's burden to file a motion to compel and addressed the importance of Rule 37(a) requirement in stating that: "A party should not be punished because the other party opted to continue complaining to the trial court about perceived discovery abuses 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 v. Barnes**, 621 So.2d 915, 922 (Miss.1993) (sanctions reversed where the only order to compel was substantially complied with); **Harvey v. Stone County Sch. Dist.**, 862 So.2d 545, 550 (Miss.Ct.App.2004) (sanction of dismissal unwarranted where plaintiff complied with trial court's only order to compel one day late); **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”).

Interestingly, the **Ford** Court questions the Plaintiff's decision not to request a trial continuance after receiving thirty-plus boxes of discoverable documents during trial. **Ford Motors**, 960 So.2d at 395. This is important because the City suggested this exact remedy to the lower court. The City asserted in its Appellate Brief that Rhaly could have, and should have, requested a continuance of the trial and any prejudice to the Plaintiff could have been cured. Based on the *dicta* in **Ford**, the Supreme Court favors continuing a trial when documents are recently discovered, rather than dismissing the action or ordering a new trial.

Simply put, the party's actions in **Pierce** and **Ford Motors** were more egregious than the City's actions in the case at bar, yet the City received the harshest sanction. If the **Ford** case was presented to this Court, and the holding in **Rhaly** was applied, a different result would result: the lower court's order of a new trial would have been affirmed. Because this holding is contrary to previous caselaw, the City respectfully requests that this Court reverse the Court of Appeal's decision and remand this issue to the lower court.

B. Willfulness or Bad Faith

The lower court found that the City did not intentionally or willfully conceal the document. T. at 51. “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. Yet, the Court of Appeal’s decision dismisses the trial court’s specific finding of no evidence replaces its own finding for that of the trial court. The Court of Appeal’s stated that “the trial court specifically found that there was no evidence the City had intentionally concealed the manual, and the City argues that this precluded a finding of willfulness. We do not agree.” Opinion at ¶15.

With all due respect, the standard of review does not permit an appellate court to review the record *de novo* and determine whether the City acted with willfulness or gross indifference. Rather, in a discovery dispute it is the place of an appellate court to review the record to determine whether the trial court abused its discretion based upon the facts and circumstances presented to it. When this Court reviews a decision that is within the trial court’s discretion, it first asks if the court below applied the correct legal standard. *Wood ex rel Wood v. Biloxi Public School Dist.*, 757 So.2d 190, 192 (Miss. 2000). If the trial court applied the correct legal standard, then this Court will affirm a trial court’s decision

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).

Here, the Court of Appeals submitted its judgment for the trial court in finding that the City acted willfully, even though the trial court specifically stated that there was no evidence to support this finding. This is apparent because the Court of Appeals bases its decision on the idea that the lower court requested the City to explain the discovery error, and the City refused. Opinion ¶17. This never occurred. The Court of Appeals finds that the attribution of fault to the city attorney is not clear in the record, and states that the City made a “bare representation” that the discovery error was made because the high volume of staff turnover in the prior City Attorney’s administration. The Court of Appeals found that because the City did not produce affidavits or testimony from counsel that was involved the Court could not determine that the discovery error is plainly attributable to counsel. Importantly, the opinion states: “In fact, despite an offer from the trial court, the City declined to offer any evidence whatsoever to explain its discovery failure.” This fact is not contained in the record.

The lower court never requested that the City produce testimony or affidavits from counsel to explain the discovery error. The lower court never questioned counsel as to how or why this happened. More importantly, the City never “declined” the lower court’s invitation to produce such evidence. The lower court did not request evidence as to the fact that the prior City Attorney’s office had constant turnover because the Court was fully aware of the personnel situation. In fact, it was the lower court that found that the mistake was unintentional because of the constant turnover. For the Court of Appeals to base its conclusion that the City’s conduct was willful because of supposed exchange with the trial court is a misapprehension of fact. Because the Court of Appeals opinion is based partially on

a fact that is not in the record, the City requests that this Court reverse said ruling and remand this matter to the lower court.

C. The Probative Value of the Manual.

The Court of Appeals failed to utilize the proper standard of review in reference to the probative value of the manual. This is apparent when the majority states “one of the factors we are to consider is whether the Rhaly’s preparation for trial was substantially prejudiced.” Opinion ¶18 (citing *Pierce*, 688 2d at 1388). This statement of law is a misapprehension because this Court’s proper standard is to determine whether the lower court properly considered whether Rhaly’s preparation of trial was prejudiced. It is not this Court’s role to put itself in the place of the trial court.

Further, it is undisputed that the lower court failed to examine the manual to determine if it was probative to the claims and defenses of this case. Yet, the Court of Appeals dismisses this error and states, without citing precedent, “nonetheless, the relevant concern is not the probative value of the manual.” Opinion ¶20. The Court of Appeals goes on to review the manual, finding that the manual was relevant to the Plaintiff’s case. Opinion ¶14. The trial court should have made this determination, not the appellate court. Because the trial court failed to make this finding, its decision to default the City was an abuse of discretion.

The importance of the trial court’s failure to examine the manual to determine whether this evidence actually prejudiced the Plaintiff comes into play when the Plaintiff moved to dismiss this matter, claiming the City made “outright misrepresentations of fact in discovery . . . and/or deliberate concealment of material evidence.” The Plaintiff further alleged to the lower court that “(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.” 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.” Yet, the lower court wholly failed to address the relevancy of the manual and made a finding that the City should be sanctioned for this nondisclosure anyway. This was an abuse of discretion pursuant to ***Ford Motor***.

II. The Court of Appeals decision is in conflict with the decision rendered against co-defendant Waste Management.

The original co-defendants in this matter were the City of Jackson and Waste Management, Inc. On the eve of trial, the lower court granted Waste Management’s motion for summary judgment and issued a default judgment against the City of Jackson, assessing the entire amount of Plaintiff’s damages and attorney’s fees to the City of Jackson. From this ruling, the Plaintiff appealed the summary judgment decision (***Rhaly v. Waste Management of MS, Inc.***; Cause No. 2008-CA-01085), and the City of Jackson appealed the award of default judgment (***City of Jackson v. Rhaly***; Cause No. 2009-CA-00350).

The Court of Appeals reversed the award of summary judgment in ***Rhaly v. Waste Management***, and that case is now pending before the Hinds County Circuit Court. On October 7, 2010, the Court of Appeals heard oral argument in the instant matter of ***City of Jackson v. Rhaly***. After oral argument, the City was made aware of an Agreed Order between Plaintiff and co-defendant Waste Management staying all proceedings pending the final resolution of ***City of Jackson v. Rhaly***. The trial against the corporate defendant is now held in abeyance.

The Court of Appeal’s decision in ***City of Jackson v. Rhaly*** could have a substantial impact on the trial between Plaintiff and co-defendant Waste Management. As previously stated, the trial court assessed the entire amount of Plaintiff’s damages, costs and attorney’s

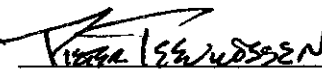

fees to the City of Jackson. This leaves co-Defendant Waste Management defending a trial where damages have been already been awarded. So, if this Court should affirm the lower court's decision in issuing a default judgment against the City for the entire amount of damages, the corporate defendant would be "off the hook," for lack of a better term, and a trial for damages would be moot. Moreover, such a resolution would eviscerate the Court of Appeals decision in *Rhaly v. Waste Management*.

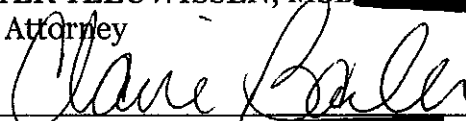

CONCLUSION

The City is respectfully requests that this Court grant reverse the Court of Appeal's ruling that issues the ultimate sanction of default against the City because this ruling is without any precedent and contrary to established Mississippi law. This is an unreasonably harsh result that was unwarranted as to the City of Jackson and an unreasonably harsh result that establishes dangerous precedent for future parties in discovery disputes, especially those that are not brought to the allegedly offending party's attention by a motion to compel or even an informal request to correct a shortcoming or deficiency in discovery response.

Respectfully submitted this the 21st day of November, 2011.

THE CITY OF JACKSON, MISSISSIPPI

By: 
PIETER TEEUWISSEN, MSB 
City Attorney

By: 
CLAIRE BARKER, MSB 
Deputy City Attorney

OF COUNSEL:

Office of the City Attorney
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207-2779
Telephone: 601-960-1799
Facsimile: 601-960-1756

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 ***Supplemental Briefing on Writ of Certiorari*** to the following:

W. Joseph Kerley, Esq.
Kerley & Clark
1855 Lakeland Drive, Suite B-20
Jackson, Mississippi 39216
Counsel for Plaintiff

Tom P. Calhoun, III, Esq.
Post Office Drawer 8047
Greenwood, Mississippi 38930
Counsel for Co-Defendant

Hon. Jeff Weil
Hinds County Circuit Judge
Post Office Box 22711
Jackson, Mississippi 39225
Circuit Judge

So certified, this the 21st day of November, 2011.


CLAIRE BARKER