I. CERTIFICATE OF INTERESTED PARTIES

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

DOCKET NO. 2010-CA-00845

LISA CHAMBERS APPELLANT

VS.

ROBERT K. BROWN APPELLEE

The undersigned counsel of record certifies that the following listed persons have 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 disqualifications or recusal.

1. Honorable Clarence E. Morgan, III, Trial Judge
2. Lisa Chambers, Plaintiff/Appellant
3. Robert K. Brown, Defendant/Appellee
4. Dana J. Swan, Counsel for Plaintiff/Appellant
5. J. Brian Hyneman, Counsel for Defendant/Appellee

J. BRIAN HYNEMAN, BAR NO. [redacted]
Counsel of Record

II. TABLE OF CONTENTS

TABLE OF AUTHORITIES

IV. STATEMENT OF THE ISSUES

ISSUE I

Whether the trial court abused its discretion in granting defendant's motion to dismiss pursuant to Rule 37 of the Mississippi Rules of Civil Procedure.

V. STATEMENT OF THE CASE

Plaintiff's cause of action arose out of a motor vehicle accident that occurred on January 10, 2006. The accident, itself, was not an issue as a stipulation of negligence was agreed upon by the parties and entered by the Court. With liability for the accident not in dispute, the only issue of dispute was the injuries claimed as a result of the accident.

A. PROCEDURAL HISTORY

Plaintiff filed her cause of action on May 8, 2006. Defendant timely filed his answer to the complaint, and discovery was conducted. The case was set for trial to be held on July 28, 2009. (R. at 196). This trial date was continued by agreement of the parties. A second order was entered scheduling the trial for December 1, 2009. (R. at 196). This date was ultimately continued on motion by the trial court. On February 16, 2010, Defendant Brown filed his motion to dismiss pursuant to Rule 37 of the Mississippi Rules of Civil Procedure. After considering the motion and arguments of counsel, the trial court granted the motion and entered an order dismissing plaintiff's cause of action on March 24, 2010. (R. at 196-199). The order was certified as a final order on May 7, 2010, and plaintiff timely filed her notice of appeal. (R. at 201-203).

B. STATEMENT OF FACTS

With stipulated liability, the facts surrounding the subject matter motor vehicle accident are secondary, if not impertinent to the issue at hand. The pertinent facts deal with the discovery phase of the litigation.

The discovery included interrogatories seeking information regarding plaintiff's alleged injuries and any past condition and/or injury she may have suffered that would be relevant to the claims involved in the subject matter litigation. These interrogatories and responses included the

following:

> **INTERROGATORY NO. 8:** Please describe all injuries, ailments or pain which you claim to have suffered as a result of the alleged occurrence complained of in the Complaint, stating the parts of your body so affected, the severity of such injuries, ailments or pains, and how long each lasted.
>
> **RESPONSE:** Objection, vague and impossible to answer as stated. Plaintiff would be willing to discuss this at her deposition. Plaintiff would refer Defendant to the attached medical records.
>
> **INTERROGATORY NO. 14:** During the ten (10) year period prior to, or at any time subsequent to, the date of the alleged occurrence, if you sustained any injury, illness or disability other than those you have described in response to any of the preceding Interrogatories, please state:
>
> a. A full and detailed description of each such injury, illness or disability;
>
> b. Where and when you sustained each such injury, illness or disability;
>
> c. For what period of time, giving dates, you suffered from each such injury, illness or disability;
>
> d. The name and address of each medical practitioner or other person or hospital, clinic, sanitarium, rest home or other institution visited by you or in which you were confined for the purpose of consultation, diagnosis, X-rays, treatment or other care, specifying the dates of such visits or the period of time of such confinement.
>
> **RESPONSE:** Objection. Beyond the scope of MRCP 26. (R. at 21-22).

Through the medical records attached to Chambers' responses, it was evident that she intended to claim problems with her neck (i.e. cervical spine) and headaches as a result of the motor vehicle accident. (R. at 31-110). The deposition of Lisa Chambers was also taken in response to proper notice of the same. During her deposition, Chambers was also questioned regarding her injuries and/or conditions suffered as a result of the accident. Chambers was questioned regarding

any previous conditions comparable to those claimed in her cause of action, and physicians who may have treated her prior to the motor vehicle accident.

Q: ...At the scene before you left the scene what problems were you having?

A: Oh, I just had a real bad headache and was sick to my stomach. I really thought it was my nerves at the time... (R. at 122-123).

****

Q: ...As far as had you ever had problems with headaches prior to this?

A: No, sir.

Q: We're simply talking since the accident until now September 26th [2006] your problems have been headaches. Any additional problems?

A: No, sir. (R at 127).

****

Q: Other than the nurse practitioner McGee have you seen any other doctors?

A: No, sir.

Q: Despite notwithstanding and not including the gallbladder and hysterectomy?

A: No, sir.

****

Q: No. Let's refrain it to the last ten years other than the nurse practitioner and the physicians who treated your gallbladder and the hysterectomy?

A: No because I've never really been sick to have to see one unless I had a cold or something.

****

Q: No, I don't want to know your OB, certainly not but just in general for sickness or any type of headache problems or neck problems, back problems, anything of that nature?

A: No. (R. at 128-129).

Subsequent to the deposition of Ms. Chambers, the case was set for trial to be held on July 28-29, 2009, yet was continued by agreement of the parties. The case was rescheduled for trial to begin on December 1, 2009. Although this setting was ultimately continued upon motion of the trial court, the defense discovered medical records from Ballard Chiropractic Clinic (hereinafter "Ballard") indicating that Chambers may have received treatment prior to the accident. Based upon those indications, a subpoena duces tecum was served upon Ballard for "any and all records" regarding the treatment of Chambers. (R. at 160).

The Ballard records revealed that Lisa Chambers had, in fact, sought chiropractic treatment from Ballard prior to the accident. (R. at 163-188). The intake sheet indicated that Chambers first presented to Ballard on August 25, 2004 with complaints of "neck pain and headaches." (R. at 172). According to responses provided by Chambers upon intake, her condition of neck pain and headaches was "often" and "getting progressively worse." (R. at 172). The records further indicated that she continued to experience neck pain and headaches to the extent that treatment was provided as of October 11, 2005 – a mere three months prior to the accident. (R. at 188).

After the records produced by Ballard were received and reviewed, an additional subpoena was issued upon Grenada Lake Medical Center (hereinafter "GLMC"). (R at 160-161). These records indicated that Chambers was referred for a MRI of her lower back and neck by Dr. Keith Stanford due to "neck and back pain" in January 25, 2005. (R. at 186-187). Upon receipt of these records, defendant filed his motion to dismiss the claims as a sanction for discovery abuse pursuant to Rule 37 of the Mississippi Rules of Civil Procedure given the false testimony proffered by the plaintiff.

VI. SUMMARY OF ARGUMENT

The dismissal issued by the trial court was not an abuse of discretion. The pre-accident records obtained by defense counsel clearly show that Chambers was treated for headaches and problems in her neck and back prior to the accident. Despite this fact, Chambers chose to make a false statement under oath regarding her past medical history and presentation to physicians for the same.

Lesser sanctions were contemplated, yet the trial court found that any sanction other than dismissal would not "achieve the deterrent value of Rule 37." (R at 199). This sanction was the only viable and proper option for the trial court as any lesser sanction would only reward the giving of false statements under oath. "[T]he most severe sanctions provided by statute or rule must be available to a trial court in appropriate cases, not just to penalize those whose conduct may warrant such a sanction, but to deter whose who might be tempted to engage in such conduct in the absence of a deterrent. *Pierce*, 688 So.2d 1385, 1389 (Miss.1997) (relying on *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 69 S.Ct. 2778, 2781, 49 L.Ed. 747 (1976)). Mississippi precedent supports the sanction of dismissal in cases akin to the present matter. *See Pierce*, 688 So.2d 1385 (Miss.1997); *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990 (Miss.1999); *Salts v. Gulf Nat. Life Ins. Co.*, 872 So.2d 667 (Miss.2004); *Allen v. National Railroad Passenger Corp.*, 934 So.2d 1006 (Miss.2006).

VII. ARGUMENT AND AUTHORITY

ISSUE I: Whether the trial court abused its discretion in imposing the sanction of dismissal for providing false testimony during the discovery process.

The sole issue on appeal is whether the dismissal of plaintiff's cause of action was an abuse of the trial court's discretion. A decision to impose sanctions for discovery abuse is vested in the trial court's discretion. *White v. White*, 509 So.2d 205, 207 (Miss.1987); *Pierce*, 688 at 1388. The provisions for imposing sanctions are designed to provide the trial courts great latitude. *White*, 509 So.2d at 207.

The Mississippi Supreme Court has adopted the Fifth Circuit's four-part test for determining if dismissal is an appropriate sanction. Dismissal is authorized only when the failure to comply with an order of the court is the result of willfulness or bad faith, and not the inability to comply. *Pierce*, 688 So.2d at 1389. Such a sanction is proper only when the deterrent value of Rule 37 cannot be substantially achieved through the issuance of lesser sanctions. *Id.* An additional consideration is whether the other party's preparation for trial was substantially prejudiced. *Id.* Lastly, the sanction of dismissal may not be appropriate when neglect is attributed to an attorney rather than a blameless client or when the failure was the result of confusion or sincere misunderstanding of the court's order. *Id.*

The power to dismiss is inherent in any court of law or equity, being a necessary means in which to conduct the orderly expedition of justice and control the court's docket. *Palmer v. Biloxi Regional Medical Center*, 564 So.2d 1346, 1367 (Miss.1990). Nevertheless, a dismissal of a cause of action for failure to comply with discovery is a sanction to be used only under the most extreme circumstances. *White*, 509 So.2d at 209. "This Court reviews a trial court's imposition of sanctions

for abuse of discretion." *Wyssbrod v. Wittjen*, 798 So.2d 352, 357 (Miss.2001).

Plaintiff attempts to categorize her abuse of the discovery process as merely withholding certain medical information, yet there is no question that her actions were much more than simply withholding medical information. Plaintiff gave a false statement under oath. She clearly responded to deposition questioning regarding prior treatment of headaches, back pain or neck pain in the negative. (R. at 128-129). This sworn statement was given despite the fact that she sought treatment for headaches and neck pain as late as three months prior to the subject matter accident from the same chiropractor who treated her after the accident. (R. at 188). This statement was also given despite the fact that plaintiff had received two MRIs approximately one year prior to the accident for what was termed "neck and back pain." (R. at 186-187).

The Mississippi Supreme Court has addressed the issue of false statements given during the discovery process, and the sanction of dismissal as a result. *See Pierce*, 688 So.2d 1385 (Miss.1997); *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990 (Miss.1999); *Salts v. Gulf Nat. Life Ins. Co.*, 872 So.2d 667 (Miss.2004); *Allen v. National Railroad Passenger Corp.*, 934 So.2d 1006 (Miss.2006).

Pierce involved a plaintiff filing suit for personal injury when a ceiling fan fell on her while she was in bed. *Pierce*, 688 So.2d at 1387. The plaintiff repeatedly denied that anyone was with her at the time of the incident. *Id.* Instead, the plaintiff insisted that she was alone. *Id.* This fact was not true as the plaintiff was accompanied by a male companion at the time of the incident. Pierce's reasoning for failing to disclose the existence of another person at the scene was that she did not want her parents to know she had a male companion in her apartment at the time. *Id.* at 1388. The trial court dismissed the case with prejudice. The dismissal was affirmed with the Mississippi

Supreme Court finding that "the trial court's sanction against Pierce was warranted to protect the integrity of the judicial process due to Pierce's abuse of the discovery process and presentation of false testimony." *Id.* at 1387. It was the Court's opinion that the failure to disclose the presence of another person at time of the incident constituted bad faith. *Id.* at 1390.

In *Scoggins*, the Mississippi Supreme Court affirmed the trial court's dismissal pursuant to Rule 37 finding that the plaintiff had repeatedly misrepresented her medical history involving the same area of the body as her claimed injury. 743 So.2d at 995. As in the present matter, liability was admitted and the only issue at trial was the determination of damages. *Id.* at 994. The trial court recognized its duty to impose a less severe sanction, yet found no other sanction appropriate to accomplish the intended purpose of the rule. *Id.* at 993. In its findings, the trial court stated:

> [T]he Court finds that perhaps the most compelling reason for granting the Defendant's motion is to redress an apparently deliberate attempt to subvert the judicial process. Having observed Ms. Scoggins's testimony as a witness and having examined the record – including her deposition and discovery responses – in great detail, and having given her the benefit of every reasonable doubt, the court is of the opinion that Ms. Scoggins has presented no credible explanation for the total lack of congruence between her testimony and her medical records. "A trial is a proceeding designed to be a search for the truth." *Sims v. ANR Freight System, Inc.*, 77 F.3d 846, 849 (5thCir.1996). When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit....

Id. at 994-95.

In *Salts*, a divided Court affirmed the trial court's dismissal for the plaintiffs failing to submit themselves for their scheduled depositions pursuant to court order. 872 So.2d at 669. In affirming the dismissal, the plurality of the Court found the plaintiffs' failure to constitute willful conduct. *Id.* at 674. Although the dissenting opinion disagreed with the holding under the particular facts of the case, it acknowledged that the sanction of dismissal was appropriately rendered in *Pierce* and

Scoggins because of misrepresentation of fact and the presentation of false testimony. *Id.* at 675 (Dickinson, J., dissenting).

The trial court in *Allen* dismissed the plaintiff's case for failing to disclose that he suffered previous injuries to his low back and received worker's compensation benefits as a result of that injury. 934 So.2d at 2008. The Mississippi Supreme Court affirmed the trial court's finding that the plaintiff's failure was the result of willfulness or bad faith, rather than the inability to comply. *Id.* at 1012. In doing so, the Court found that plaintiff's actions were akin to those present in *Pierce* and *Scoggins*. *Id.*

The facts in the present matter are more egregious than those in *Pierce* and akin to *Scoggins* in that the plaintiff has not and cannot produce a credible explanation for the false statements (if one exists). Plaintiff attempts to excuse her conduct by simply stating that she "did not think that it was important" referring to the pre-accident treatment she received, yet in essence, Chambers is stating that she "did not think that it was important" to provide accurate information during her sworn testimony.[1] Plaintiff further attempts to lessen the ramifications of her false statement and distinguish her situation from *Pierce* by stating that she has not admitted lying under oath. However, the fact remains that the statement she gave was completely and totally false, and there can be no excuse for her false statement. It is not for the plaintiff to decide what information she provides to the defense. She is required to truthfully answer any questions posed by the defense, and allow the chips to fall where they may. Failure to do so is at her peril.

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[1]The record contains no affidavit nor testimony from plaintiff regarding why the false statement was given. Plaintiff's counsel simply avers that he discussed it with his client, and she provided this reasoning. "This Court may not consider matters which do not appear in the record and must confine itself to what actually does appear in the record." *Fuselier v. State*, 654 So.2d 519, 521 (Miss.1995) (citations omitted)

The trial court weighed the relevant facts and found that the reasoning given by the plaintiff was "insufficient and lacks credibility" in light of the fact that the majority of the treatment was within 18 months of the subject matter accident. (R. at 199). Ultimately, the trial court reasoned that the false testimony was given in bad faith, and the defendant would have been "severely prejudiced" had the case gone to trial as originally scheduled. (R. at 199). Alternate sanctions were considered, yet the trial court was of the final opinion that no other sanction would achieve the deterrent value of dismissal. (R. at 199 and 232). It was only after careful scrutiny of the medical records provided that the defendant was "tipped" as to the possibility of prior treatment. Without such scrutiny, the prior treatment would have never been discovered, and odds are given plaintiff's reasoning for the false statement, she would have never revealed this fact if the case were tried as originally scheduled. "A trial is a proceeding designed to be a search for the truth." *Sims v. ANR Freight System, Inc.*, 77 F.3d 846, 849 (5thCir.1996). If the actions of Chambers in subverting the discovery process were left uncovered, the trial of this matter would have been anything but the search for truth.

Accordingly, dismissal of Chambers' cause of action was the only available sanction appropriate to penalize the conduct and deter others from following in her footsteps. No other sanction would send the message to all plaintiffs that the decision to provide false information or pick and choose what information you provide is done at your peril.

VIII. CONCLUSION

The facts of the present matter are akin to those in *Pierce, Scoggins* and *Allen*. Plaintiff provided false statements under oath concerning matters pertinent to the claims being prosecuted. The product of these statements was prejudice upon the defendant as the true facts would have never come to light without careful examination of the plaintiff's medical records. The reasoning provided by plaintiff is proof that defendant would have remained in the dark had plaintiff not been faced with dismissal of her action. Such conduct should not be rewarded by allowing plaintiff to continue to pursue her claims and provide her the opportunity to somehow excuse her false statements.

This Court will affirm a trial court's 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." *Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 692 (Miss.1990). Here, the trial court weighed all relevant factors and considered lesser sanctions, yet came to the ultimate determination that dismissal of the plaintiff's cause of action was the only appropriate sanction to achieve the deterrent value of Rule 37. Accordingly, this Honorable Court should affirm the ruling of the trial court of March 24, 2010.

RESPECTFULLY SUBMITTED, this the 20th day of December, 2010.

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CERTIFICATE OF SERVICE

I, J. BRIAN HYNEMAN, of Hickman, Goza & Spragins, Attorneys at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

Dana J. Swan
Chapman, Lewis & Swan
P. O. Box 428
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Honorable Clarence E. Morgan, III
Circuit Court Judge
P.O. Box 721
Kosciusko, MS 39090-0721

THIS, the 20th day of December, 2010.

J. BRIAN HYNEMAN