

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LISA CHAMBERS

APPELLANT

VERSUS

NO. 2010-CA-00845

ROBERT K. BROWN

APPELLEE

**APPEALED FROM THE CIRCUIT COURT OF GRENADA COUNTY
CASE NO. 2006-268-CVM**

BRIEF OF APPELLANT

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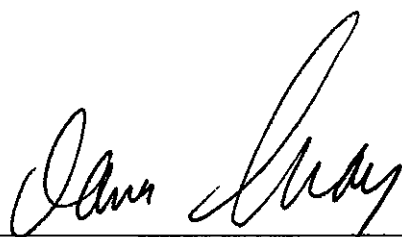
CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate potential disqualifications or recusal.

Honorable Clarence E. Morgan, III
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Dana J. Swan, MSB No. [REDACTED]

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BRIEF OF APPELLANT

COMES NOW THE APPELLANT/PLAINTIFF, by and through counsel, and files this her Brief of Appellant and would show unto the Court that the trial court was in error in dismissing this cause with prejudice for failure to appear at a status conference when the Appellant/Plaintiff's attorney received no notice of the hearing and in failing to grant the Appellant's motion to reinstate, after having previously granted said motion.

I.

COURSE OF PROCEEDING BELOW

As a result of an accident which occurred on or about January 10, 2006, suit was filed in the Circuit Court of Grenada County, Mississippi by Appellant Lisa Chambers ("Chambers") on May 8, 2006. The Defendant-Appellee filed his answer on or about June 6, 2006. After engaging in discovery, the cause was set for trial on July 28, 2009 but was continued by agreement of the parties. A second trial scheduled for December 1, 2009 was continued by the trial court. The Appellee then filed a motion to dismiss on February 16, 2010. The motion was granted on March 24, 2010 and was certified as a final order on May 7, 2010. From that order, the Appellee filed her appeal to this court on May 21, 2010.

II.

FACTS

The accident which is the subject of this appeal occurred on or about January 10, 2006, when Lisa Chambers was operating her vehicle in an easterly direction on and along Sunset Drive in Grenada, Grenada County, Mississippi. She was stopped behind two (2) other vehicles at the intersection of Sunset Drive and Wal-Mart Drive. At that time, the Appellee Robert K. Brown was

operating his vehicle in a westerly direction on and along Sunset Drive, when he attempted to turn left onto Wal-Mart Drive. After the Appellee started his vehicle forward to turn left, he looked down, and his vehicle entered the east bound traffic lane. The Appellee's vehicle first struck a vehicle in front of Chambers' vehicle, being operated by Margarete L. Eskridge, pushing Ms. Eskridge's vehicle into Ms. Chambers' vehicle, and then Appellee's vehicle also struck the Chambers' vehicle. As a result of the accident, Chambers received injuries to her neck and had headaches.

III.

SUMMARY OF ARGUMENT

Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue her claim and should be reserved for the most egregious cases. *Wallace v. Jones*, 572 So.2d 371 (Miss. 1990).

IV.

ARGUMENT

The trial court abused its discretion in dismissing this cause of action for discovery violations. Dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue her claim and should be reserved for the most egregious cases. *Wallace v. Jones*, 572 So.2d 371 (Miss. 1990). According to the Appellee, Chambers withheld certain medical information concerning her injuries. Specifically, Appellee argues that Chambers suffered a neck injury prior to the accident in question and denied having ever experienced a prior injury. Appellee points to medical records concerning an MRI at Grenada Lake Medical Center and medical records from a treating chiropractor, Dr. Ballard. The accident occurred on or about January 10, 2006. The Appellee points to medical records of Dr. Ballard which indicated that Chambers was treated in August of 2004 with complaints of headaches and neck pain. (R. 172, 179, 182). Ballard's records further indicated that she was treated on October 11, 2-5 for neck pain and constant headaches. @. 188). Dr. Ballard was never deposed.

Further, records from Grenada Lake Medical Center reveal that Chambers on January 25, 2005 underwent an MRI of her cervical spine and of her lumbar spine by a radiologist, Dr. Bart Bristow.

(R. 165, 184, 186-187). The MRI was ordered by the treating physician, Dr. Keith Stanford, for neck and back pain and for sciatica, whose medical records were unavailable and whose deposition was never taken. Dr. Stanford had left the State of Mississippi and his whereabouts could not be located.

The trial court concluded that Chambers has misled the Appellee through her discovery violations and ordered her cause to be dismissed. (R. 196-200). Chambers would state unto the Court that the sanctions were too harsh and that other sanctions, if appropriate, were available.

With respect to the Grenada Lake records, there are two MRI reports done by Dr. Bristow, one of the cervical spine and one of the lumbar spine. The report notes that the reason for the exam is neck and back pain, sciatica. The ordering physician was Keith Stanford, M.D. However, the actual complaint to the referring physician, Dr. Stanford, was lumbar back pain, as indicated by an EMG report at Grenada Lake signed by Karen Plunkett, M.D. According to the report, "this is a 38 year old female complaint of **lumbar back pain** that has been constant for the past 3 weeks since riding on a roller coaster in Branson. Chambers does not know what Dr. Stanford's diagnosis was but only that he referred her to Grenada Lake for an MRI on **her back**. She cannot be responsible for what he put on his diagnosis. His records are unavailable and he was never deposed.

With respect to Dr. Ballard, he reported neck pain and headaches on August 25, 2004 that began three days ago, but were resolved shortly afterwards. In discussing this with the Client, Chambers remembers going to him for headaches and neck pain, but the pain was very minor and ultimately resolved. She did not think that it was important and did not disclose it during her deposition.

In support of his motion to dismiss, the Appellee relied *inter alia* the decisions of *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss.1997) and on *White v. White*, 509 So.2d 205 (Miss.1987). Neither of these decisions support the extreme remedy of dismissal. Indeed, in *White*, this Court reversed the granting of dismissal and held that other sanctions were available.

In *Pierce*, the plaintiff was injured when a ceiling fan fell on him. The trial court dismissed the plaintiff's cause for falsely stating in discovery responses that no one else was present in her apartment when the fan fell on her. In fact, she was in bed with a male companion when the accident

occurred. In *Pierce*, the Plaintiff admitted to lying under oath. There is no such admission in the case *sub judice*. The failure to disclose was, at most, inadvertent. The Court in *Pierce* noted that dismissal is warranted only when no other sanction is available. In the present case, neither Dr. Ballard nor Dr. Stanford were deposed. Nor was Chambers redeposed concerning the prior injury. The Appellee did not meet his burden in persuading the trial court for dismissal.

MRCP 37 (e) has its limits. It should only be used when other sanctions are not appropriate. *Caracci v. International Paper Co.*, 699 So.2d 546 (Miss.1997). In this case, other sanctions if appropriate are available. This cause is consistent with the Court's reversal of a dismissal for alleged discovery violations in *Wood v. Biloxi Public School District*, 757 So.2d 190, 189 (Miss.2000) in which this Court held that a single response to discovery does not lead to a pattern of false information which is necessary for dismissal.

V.

CONCLUSION

Dismissal with prejudice as a sanction should only be affirmed upon a showing of "a clear record of delay or contumacious conduct" by the plaintiff. *Id.* No sanctions, or at least fewer severe sanctions are appropriate. The Appellant would respectfully request that this cause be reversed and reinstated for a trial on the merits.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

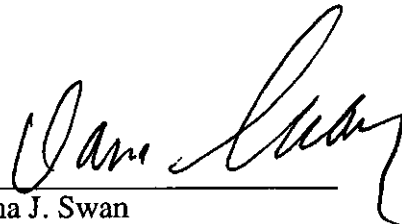
I, Dana J. Swan, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

Honorable Clarence E. Morgan, III
Circuit Court Judge
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Ms. Kathy Gillis
Supreme Court Clerk
Court of Appeals of the State of Mississippi
P. O. Box 249
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THIS, The 9th day of December 2010.



Dana J. Swan