IN THE SUPREME COURT OF MISSISSIPPI

WILTON ACQUISITIONS CORP. — PLAINTIFF / APPELLANT

VS. — CASE NO. 2010-TS-01457

FIRST METHODIST CHURCH OF BILOXI, MISSISSIPPI, INC. — DEFENDANT /APPELLEE

APPEAL FROM THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI, SECOND JUDICIAL DISTRICT

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# BRIEF OF THE APPELLEE

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CLYDE H. GUNN, III, MSB #[redacted]
CHRISTOPHER C. VAN CLEAVE, MSB #[redacted]
W. CORBAN GUNN, MSB #[redacted]
CORBAN, GUNN & VAN CLEAVE, PLLC
Post Office Drawer 1916
Biloxi, Mississippi 39533-1916
Phone: (228) 432-7826
Fax: (228) 456-0998

ATTORNEYS OF RECORD FOR APPELLEE,
FIRST METHODIST CHURCH OF BILOXI, MISSISSIPPI, INC.

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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| **WILTON ACQUSITIONS CORP.** | **APPELLANT** |
| **VS.** | **CASE NO. 2010-CA-00058** |
| **FIRST METHODSIT CHRUCH OF BILOXI, MISSISSIPPI, INC.** | **APPELLEE** |

## 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.

| | |
|---|---|
| Chancery Court Judge, (Harrison County): | The Honorable Jim Persons |
| Appellant: | Wilton Acquisitions Corp. |
| Appellee: | First Methodist Church of Biloxi, Mississippi, Inc. |
| Attorneys for Appellant: | Ronald G. Peresich, Esquire<br>Ronald G. Peresich, Jr., Esquire<br>Johanna M. McMullan, Esquire<br>Page, Mannino, Peresich & McDermott, PLLC<br>Biloxi, Mississippi 39533 |
| Former Attorney for Appellant: | Scott D. Smith, Esq.<br>P.O. Box 4603<br>Biloxi, Mississippi 39535 |
| Attorneys for Appellee: | Clyde H. Gunn, III, Esquire<br>Christopher C. Van Cleave, Esquire<br>W. Corban Gunn, Esquire<br>David N. Harris, Jr., Esquire<br>Corban, Gunn & Van Cleave, PLLC<br>Biloxi, Mississippi 39533 |

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## ORAL ARGUMENT NOT REQUESTED

Appellee First Methodist Church of Biloxi, Mississippi, Inc. respectfully submits oral argument in this case will not materially aid the Court in determining whether dismissal with prejudice was within the Chancery Court's discretion. Thus, Appellee, First Methodist Church of Biloxi, Mississippi, Inc. is not in favor of oral argument but will participate if the Court is inclined to hear oral argument.

## STATEMENT OF THE ISSUES

The issue presented is whether the Chancery Court was within its discretion, after thoughtful consideration of lesser available sanctions, in dismissing the Plaintiff / Appellant's case with prejudice as a direct result of the willful violations of an Agreed Order to appear and provide certain witnesses when Plaintiff / Appellant had previously not appeared for properly noticed and agreed deposition(s), and who was specifically warned by the Chancery Court that failure to appear and provide certain witness for the Court ordered depositions could result in the dismissal of Plaintiff / Appellant's case with prejudice.

## STATEMENT OF THE CASE

### A. Procedural History and Facts in Chancery Court

This case involves an underlying contract dispute by and between Defendant / Appellee, First Methodist Church of Biloxi, Mississippi, Inc. ("Church"), and Plaintiff / Appellant, Wilton Acquisitions Corporation ("Wilton"), a California based real estate developer, arising out of a real estate purchase agreement ("Agreement") to buy the Church's property located in Biloxi, Mississippi. R. 17.

As part of the Agreement, Wilton paid earnest money deposit installments equaling $300,000.00 to the Church in an effort to purchase its property and buildings. R. 10. The Agreement included a Due Diligence Period, which was mutually extended, until April 26, 2007, to conduct

any inspections of the subject property for which Wilton felt necessary. R. 21. The structures of the Church property were old, the main sanctuary and related buildings were constructed in the 1950s and the Church's office was built many years prior thereto. It is common knowledge that structures built prior to the 1980s may contain non-friable asbestos materials. R. 46. The Agreement provided: "if, during its Due Diligence Period, Wilton was not satisfied with its investigation, Wilton could terminate the Contract..." R. 10, 21.

Wilton obtained a report from Covington & Associates Corp. regarding the presence of non-friable asbestos on the Church property. The report was dated June 6, 2007, following an inspection of the Church property on May 25, 2007. R. 31. The Due Diligence Period, as extended, had expired as of April 26, 2007. R. 29.

On or about June 14, 2007, Wilton sought to terminate the Agreement allegedly due to the discovery of asbestos and requested the return of the earnest money deposit installments previously provided; however, the time to terminate the Agreement by Wilton was to be prior to the end of the Due Diligence Period which expired April 26, 2007. R. 40, 29. Per the Agreement, the Church did not refund the earnest money deposit installment(s) totaling $300,000.00 to Wilton. R. 45-51. Wilton sued the Church in the Chancery Court of Harrison County, Mississippi, Second Judicial District for specific performance of the purchase agreement, breach of contract, breach of good faith and fair dealing, promissory estoppel, misrepresentation, and equitable estoppel. R. 1, 9. The Church denied the claims of Wilton and filed its *Answer to Wilton's First Amended Complaint.* R. 45-51.

Pursuant to the Mississippi Rules of Civil Procedure, discovery ensued. R. 58, 64, 66, 68, 70. On June 16, 2009, the Chancery Court entered an *Agreed Scheduling Order* which set the trial of this matter for September 9, 2009. The *Agreed Scheduling Order* included a deadline for the completion of discovery on or before July 24, 2009. R. 77.

Soon thereafter, the Church requested dates for the depositions of the owner / agent / employees of Wilton, including the owner of Wilton, Mr. Jay Wilton; the in-house counsel for Wilton, Mr. Scott D. Mayer, Esq.; and Wilton's agent, representative, and/or employee Mr. Kyle Bunstein. In addition, the Church requested dates to conduct the 30(b)(6) deposition of the designated corporate representative of Wilton. Per the agreement of counsel the appropriate notices were filed for the above and the depositions of Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and Wilton's 30(b)(6) corporate representative were noticed to begin at 9:00 a.m. on July 13, 2009 in Biloxi, Mississippi. R.E. 9-19, R. 89-99.

On the morning of July 13, 2009 prior to the start of the agreed depositions, counsel for Wilton, Scott Smith, Esq., informed counsel for the Church that (1) Mr. Jay Wilton, owner of Wilton, was ill and could not attend his deposition; (2) Wilton's agent, representative, and/or employee Kyle Bunstein would not attend his agreed deposition; (3) Wilton's in-house counsel, Mr. Scott D. Mayer, did not choose to come to Biloxi to be deposed; and (4) Wilton would not be able to provide a 30(b)(6) corporate representative to be deposed and respond on behalf of Wilton. R.E. 20, R. 234, 290-300.

In an effort to accommodate all parties, the Church filed its *Motion to Amend Scheduling Order* to extend the deadlines for discovery, including depositions of all parties, until September 2, 2009, one week before the scheduled September 9, 2009, trial date. R. 84-99. Soon thereafter Wilton filed its *Motion to Continue Trial and Motion to Determine Deposition Location or in the Alternative for Telephonic Depositions* and requested the Court to continue the trial of this matter and force counsel for the Church to travel to California to conduct depositions or limit counsel for the Church to telephonic depositions. R. 100-104.

On September 1, 2009, the parties appeared before the Chancery Court for status conference in regard to the Church's *Motion to Amend Scheduling Order* and, more particularly, Wilton's

*Motion to Determine Deposition Location, or in the alternative for Telephonic Depositions*. The Chancery Court ordered the trial of this matter be set for October 21, 2009. R. 100-104. In an effort to assist Wilton and prevent the owner, corporate counsel, and agents and/or employees of Wilton from being required to travel to Mississippi on more than one occasion, counsel for the Church agreed that if depositions could be held on October 19 and 20, 2009, the Church would agree to continue the trial of this matter until October 21, 2009. R.E. 62, Tr. 28.

Chancery Court granted Wilton's *Motion to Continue* but denied Wilton's *Motion to Determine Deposition Location or in the Alternative for Telephonic Depositions*, and ordered the following:

> "...[P]laintiff shall present its witnesses both corporate and individuals notice for deposition in Biloxi, Mississippi on Monday and Tuesday, October 19th and 20th, 2009. These witnesses shall include Mr. Jay Wilton, Mr. Scott D. Mayer, and Mr. Kyle Bunstein, and a corporate representative to respond to Defendant's Rule 30(b)(6) deposition notice. The depositions shall be held at the offices of Corban, Gunn & Van Cleave or such other location as can be agreed between the parties. **In the event the Plaintiff fails to provide these witnesses for their pre-trial testimony, the Court will consider any and all appropriate sanctions including but not limited to sanctions set forth in Rule 37 of the Mississippi Rules of Civil Procedure which may include the dismissal of Plaintiff's Complaint with prejudice and the striking of Plaintiff's Answer and Defenses to Counterclaims of Defendants ...."**

R.E. 21-22, R. 106-107.

In accordance with the agreement of counsel, on September 24, 2009, the Church re-noticed the depositions of Jay Wilton, Scott D. Mayer, Kyle Bunstein, and the 30(b)(6) corporate representative of Wilton for October 19, 2009. R.E. 23-33, R. 262-272. In addition, counsel for the Church made every effort to make certain members of the Church and the 30(b)(6) corporate representative available for deposition. R.E. 34, R. On September 30, 2009, counsel for Wilton unilaterally canceled all potential depositions of the Church for which Wilton sought to conduct. R. 287-288.

On October 7, 2009, counsel for Wilton requested confirmation of the scheduled dates and

times for the above depositions. R.E. 34, R. 273. Counsel for the Church immediately provided additional copies of the Chancery Court's September 8, 2009, *Order* and *Notice(s) of Deposition(s)*. Counsel for the Church advised counsel for Wilton that he intended to conduct and complete all the above depositions on October 19, 2009. R.E. 34, R.273.

On Saturday, October 17, 2009, at approximately 6:34 p.m., counsel for Defendant emailed counsel for the Plaintiff and requested that "if you get this email on your Blackberry, please call me on my cell. 228-596-1897. Thanks." R. 177. On Sunday morning, October 18, 2009, counsel for the Church attempted to contact counsel for Wilton as requested but counsel for Wilton was unavailable. R. 177.

On October 19, 2009, at approximately 8:00 a.m. counsel for Wilton contacted counsel for the Church on his cell phone and stated that his daughter was ill and that his clients' plane did not arrive in Gulfport until 2:30 p.m. because deponents "believed" the depositions were on October 20, 2009. R. 177. As noticed and ordered, the Church was ready to depose Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and the 30(b)(6) corporate representative at 9:00 a.m. on October 19, 2009. Unfortunately, for the second time, Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and Wilton's 30(b)(6) corporate representative failed to appear for their duly noticed and ordered depositions. R. 290-300.

On October 19, 2009, at approximately 9:00 a.m., counsel for the Church made a record of the failure of Wilton and the deponents to appear for their duly noticed and ordered depositions in the presence of a court reporter. R. 290-300. After Wilton and the deponents did not show nor contact counsel through the day on October 19, 2009, the Church filed its *Motion to Dismiss and For Sanctions Pursuant to Rule 37(b)(2)(C) and 37(d) of the Mississippi Rules of Civil Procedure for Plaintiff's Discovery Misconduct.* R.174-302.

Wilton was warned by the Chancery Court that failure to appear and provide the above

named witnesses for their pre-trial testimony could result in any and all appropriate sanctions, including dismissal of Wilton's Complaint with prejudice. R.E. 21-22, R. 106-107. With the trial of this matter set to being on October 21, 2009, the Church, as the defendant, faced trial by ambush. R.E. 61, Tr. 27.

On October 20, 2009, the Chancery Court held an emergency hearing on the Church's *Motion for Sanctions*. R.E. 35-65, Tr. 1-31. The hearing consisted of argument from all counsel and the sworn testimony of Mr. Jay Wilton, owner of Wilton, and Wilton's (former) counsel, Scott Smith, Esq.[1] R.E. 35-65. Tr. 1-31.

The sworn testimony of Jay Wilton provided the following facts, under oath, regarding his actions:

- Jay Wilton authorized the filing of suit against the Church;
- Jay Wilton knew this litigation had been pending for well over a year;
- Jay Wilton could not recall if he traveled to Biloxi, Mississippi on July 13, 2009 for his scheduled deposition;
- Jay Wilton was aware of the depositions being requested;
- Jay Wilton understood he was supposed to come to Mississippi Gulf Coast for his deposition;
- Jay Wilton made reservations to travel on October 18, 2009, to Biloxi, Mississippi from Los Angeles, California for his deposition on October 19, 2009;
- Jay Wilton participated in a pre-testimony / pre-deposition conference call regarding the depositions scheduled for October 19, 2009, on Saturday, October 17, 2009, with his in-house counsel Mr. Scott Mayer, Kyle Bunstein, and his counsel or record, Scott Smith, Esq.
- Jay Wilton communicated directly with his in-house counsel Mr. Scott D. Mayer after the pre-testimony / pre-deposition conference call;
- Jay Wilton communicated directly with Scott Smith, Esq. after the pre-testimony / pre-deposition conference call;
- Jay Wilton instructed Scott Smith, Esq. that his in-house counsel Scott D. Mayer deposition should be taken before his deposition;
- Jay Wilton made the decision to not travel on October 18, 2009, to the Mississippi Gulf Coast for his deposition on October 19, 2009;

[1] Scott Smith, Esq., on September 9, 2010, filed his *Motion to Withdraw* as counsel for Wilton stating: "despite repeated attempts, the Plaintiff (Wilton) has failed and continues to fail to pay the agreed upon fees due and past due in this matter." Thus, not only did Wilton not follow orders of a Mississippi Court, Wilton had not paid its Mississippi attorney as of the date of the *Motion to Withdraw*

- Jay Wilton was not instructed by his counsel, Scott Smith, Esq., to not travel on October 18, 2009, to the Mississippi Gulf Coast for his deposition;
- Jay Wilton made the decision to not travel on November 18, 2009, to Mississippi Gulf Coast for his deposition because "didn't believe it was necessary or useful to come without all of the parties;
- Jay Wilton was unable on October 18, 2009 to contact his in-house counsel, Scott D. Mayer;
- Jay Wilton traveled to the Mississippi Gulf Coast on November 19, 2009, and arrived in Gulfport, Mississippi at approximately 3:00 p.m.;
- Jay Wilton, under oath, testified he believed that the depositions had been rescheduled by counsel for the Church for Tuesday, October 20, 2009;
- Jay Wilton had previously fired his in-house counsel Scott D. Mayer, Esq. approximately thirty days prior to October 20, 2009;

R.E. 38-48, Tr. 4-14

The sworn testimony of Scott Smith, Esq., counsel for Wilton provided the following facts, under oath, in regard to his actions;

- Scott Smith, Esq. did not participate in any discussion with counsel for the Church that the October 19, 2009, depositions would be rescheduled;
- Scott Smith, Esq. advised his client that the depositions would be conducted on October 19, 2009;
- Scott Smith, Esq. forwarded all Notice(s) of Deposition, including the 30(b)(6) Notice of Deposition to his client;
- Scott Smith, Esq. forwarded the September 8, 2009 Order requiring Mr. Jay Wilton, Mr. Scott Mayer, Mr. Kyle Bunstein, and Wilton 30(b)(6) corporate representative to appear for deposition October 19 and 20, 2009, to his client along with a very long email;
- Scott Smith, Esq. held a conference call with Mr. Jay Wilton and Mr. Scott D. Mayer, Esq. on Saturday, October 17, 2009;
- Scott Smith, Esq. was told on Saturday, October 17, 2009, that Mr. Jay Wilton, Mr. Scott D. Mayer, Esq., and Mr. Kyle Bunstein would travel to the Mississippi Gulf Coast on Sunday, October 18, 2009;
- Scott Smith, Esq. was not the cause of his client not coming to the Mississippi Gulf Coast on October 18, 2009 and not appearing for court ordered depositions on October 19, 2009;
- Scott Smith, Esq. was aware the October 19, 2009 depositions were scheduled to accommodate his client;
- Scott Smith, Esq. was aware the October 19, 2009 depositions were ordered because his client(s) failed to appear on July 13, 2009;
- Scott Smith, Esq. was aware the Chancery Court had provided a special setting and trial was to begin on October 21, 2009;
- Scott Smith, Esq. never disclosed any difficulties with Scott Mayer or communication with his client prior to his testimony on October 20, 2009;
- Scott Smith, Esq. never disclosed the fact that Wilton's in-house counsel Scott

D. Mater had been fired by Mr. Jay Wilton approximately thirty days prior to the hearing on October 20, 2009.

- Scott Smith, Esq. had communicated more with Mr. Jay Wilton than Scott D. Mayer leading up top the court ordered depositions.

R.E. 48-55, Tr.14-21.

After due consideration of the above, and in considering the availability of lesser sanctions, the Chancery Court dismissed Wilton's *Complaint* with Prejudice and entered judgment in favor of the Church. R.E 35-63, Tr. 1-29, R.E. 66-67, R.303-304. The Chancery Court reserved its ruling on the Church's claim for attorney's fees, costs, and expenses. R.E. 66-67. R. 303-304.

On November 12, 2009, Wilton filed its *Motion for Reconsideration Pursuant to M..R.Civ.P 59.* R. 306-443. On November 25, 2009, the Church filed its *Response in Opposition to Plaintiff's Motion for Reconsideration Pursuant to M..R.Civ.P. 59.* R. 444-509. On January 6, 2009, the Chancery Court held a hearing on Wilton's Motion for Reconsideration and heard arguments from counsel for Wilton, counsel for the Church, and allowed Jay Wilton to address the Court. R.E. 68-88, Tr. 32-55. On August 2, 2010, the Chancery Court denied Wilton's Motion for Reconsideration of the order of dismissal and Wilton filed this appeal. R.E. 91-94, R. 526-529.

## SUMMARY OF ARGUMENT

In this case, dismissal of Wilton's Complaint with prejudice was proper and just. The Chancery Court did not abuse its discretion in leveling the ultimate sanction for discovery abuse when Wilton, by and through its owner, Mr. Jay Wilton, intentionally violated the *Agreed Order* of the Chancery Court. Although Jay Wilton testified that he was "unaware" of the *Agreed Order* and "misunderstood" the date and time of his scheduled deposition, the entire set of facts clearly demonstrate Mr. Wilton's testimony was, at best, self serving.

The Chancery Court unquestionably warned Wilton and entered an *Agreed Order* that failure to appear for court ordered depositions would result in the Chancery Court considering any and all appropriate sanctions set forth in Rule 37 of the Mississippi Rules of Civil Procedure "which

may include the dismissal of Plaintiff's Complaint with prejudice and the striking of Plaintiff's Answer and Defenses to Counterclaims of Defendants." R.E. 21-22, R. 106-107.

As a result of Wilton's intentional failure to appear for court ordered depositions and to present a corporate representative to respond to the Church's 30(b)(6) notice, the Church faced trial by abuse, the ultimate prejudice. The Chancery Court considered lesser sanctions including requiring Wilton to pay costs and expenses (for the second time) and the possibility of disallowing Wilton from offering any proof; however, the Chancery Court properly determined that dismissal with prejudice was warranted in this case. For the foregoing reasons, the Chancery Court's judgment should be upheld.

## ARGUMENT

### I. THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING WILTON'S CASE WITH PREJUDICE.

#### A. Standard of Review

Whether to impose sanctions for discovery abuses is entrusted to the trial court's discretion. *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942, 948 (Miss.2000). "The power to dismiss is inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket." *Id.* The trial court has great latitude in determining what sanctions are appropriate. *Pierce v. Heritage Props., Inc.* 688 So.2d 1385, 1388 (Miss. 1997). Nonetheless, "the trial court should dismiss a cause of action for failure to comply with discovery only under the most extreme circumstances." *Id.*

Rule 37 of the Mississippi Rules of Civil Procedure is designed to vest with the trial court great latitude in deciding when and what sanctions will be imposed for a discovery violation. *Marshall v. Burger King*, 2 So. 3d 702, 706 (Miss. Ct. App. 2008). Consequently, we review the trial court's decision to grant discovery sanctions for an abuse of discretion. *Pierce*, 688 So.2d at 1388. If the trial court applied the correct standard, the Supreme Court will affirm unless there lies 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." *Id.*

### B. The Chancery Court Did Not Abuse its Discretion in Dismissing the Case with Prejudice

Miss. R. Civ. P. 37(b)(2)(C) states, in part:

> (b)(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party failed to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and amoung others the following:
> (C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or *dismissing the action or proceeding or any part thereof*, or rendering a judgment by default against the disobedient party ....

Miss.R.Civ.P. 37(b)(2)(C)

Miss. R. Civ. P. 37(b)(2)(C) provides *inter alia* that if a deponent fails to appear for a deposition after being directed by the trial court to do so, the trial court may dismiss the action. *Salts v. Gulf Nat'l Life Ins. Co.*, 872 So.2d 667, 674 (Miss. 2004). A rule which is not enforced is no rule at all. *Id.*

This case demonstrates a clear example of a party failing to adhere to the explicit Agreed Order of the Chancery Court. The record clearly demonstrates that Wilton, a corporate entity, along with specifically identified deponents, Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and the 30(b)(6) corporate representative willfully and/or intentionally made the decision to not appear for court ordered depositions. Moreover, Wilton was specifically warned by the Chancery Court that failure to appear could result in "dismissal of Plaintiff's Complaint with prejudice and the striking of Plaintiff's Answer and Defenses to Counterclaims of Defendants ...." R.E. 21-22, R. 106-107.

Appellants contend that few Mississippi cases address sanctions for failure to appear at a deposition. However, multiple cases demonstrate the discretion of the trial judge to dismiss the

action of a party is inherent and does not abuse the court's discretion when a party violates a court order. See, generally, *Salts v. Gulf Nat'l Life Ins. Co.*, 872 So.2d 667 (Miss. 2004) (dismissal of plaintiff's complaint for not appearing for deposition in violation of court order); *Young v. Merritt*, 40 So.3d 587 (Miss. Ct. App. 2010) (dismissal of plaintiff's complaint for failing to respond to discovery in violation of agreed court order); *Beck v. Sapet*, 937 So.2d 945 (Miss. 2006); *Gilbert v. Wal-Mart Stores, Inc.*, 749 So.2d 361 (Miss. 1999) (dismissal of plaintiff's complaint for not appearing for deposition in violation of court order).

In *Salts v. Gulf Nat'l Life Ins. Co.* 872 So.2d 667 (Miss. 2004), as a result of an order signed by the trial court and agreed to by counsel for the parties, the plaintiffs and other witnesses were to submit to depositions on specified dates; however, the plaintiffs failed to appear and be deposed. *Id.* at 670 (¶6). The plaintiffs in *Salts* argued, as Wilton does in the case sub judice, that they did not willfully fail to comply with the agreed order, but they merely "misunderstood" the order; that the extreme sanctions of dismissal was improper because the order of the trial court did not indicate that lesser sanctions were ever considered; and that defendant was not prejudiced in any way by the plaintiffs continuing the scheduled depositions. *Id.* at 670-671.

This Court in *Salts* set forth plaintiffs' assertions that they merely misunderstood the trial court's order was without merit. This Court correctly identified the subject order for Plaintiffs and their witnesses to appear for court ordered depositions was approved by one of the attorneys for the plaintiffs, and clearly and unequivocally directed the Plaintiffs and other witnesses to be deposed on a specific day agreed to by and between the parties. *Id.* Thus, there can be no misunderstanding in regard to an Agreed Order.

This Court in *Salts* found the trial court considered lesser sanctions by relying on all arguments set forth by the defendant in its Motion to Dismiss, Memorandum Brief in support of the motion and the Rebuttal in support of the Motion whereby defendant sought alternative lesser

sanctions if the Court was not in favor of dismissal with prejudice. *Id.* at 671. Absent a trial date, defendant argued that it was substantially and materially prejudiced by the plaintiffs' repeated attempts to thwart the discovery process. *Id.* The Supreme Court agreed with the trial court and pursuant to Miss. R. Civ. P. 37(b)(2)(C) stated "[T]o hold otherwise would render this provision of the rule meaningless and one we should simply judicially abrogate if it is not going to be enforced." *Id.* at 674. Stated again, a rule which is not enforced is no rule at all. *Id.*

In *Young v. Merritt*, 40 So.3d 587 (Miss. Ct. App. 2010), the plaintiff was dilatory in responding to defendant's written discovery requests. *Id.* at 588. The plaintiff's dilatory conduct was created by communication difficulties by and between counsel for plaintiff and his client. *Id.* Counsel for defendant forwarded multiple correspondence regarding plaintiff's outstanding discovery responses. *Id.* After counsel for plaintiff assured responses would be forthcoming on a specific date, the specific date came with no responses to discovery forwarded to defendant. *Id.* As a result, defendant filed his Motion to Compel. *Id.*

Prior to the hearing on defendant's Motion to Compel, counsel for plaintiff contacted counsel for defendant. *Id.* Counsel for plaintiff, in lieu of a hearing on defendant's Motion to Compel, agreed and approved an order to be entered by the trial court to allow plaintiff until March 31, 2008, to respond to Plaintiff's written discovery. *Id.* at 588-589. The order also stated the case would be dismissed with prejudice if responses were not filed by this date. *Id.*

On March 31, 2008, counsel for plaintiff was unable to contact his client; however, attempted to serve unsigned incomplete responses to written discovery. *Id.* However, Federal Express was unable to deliver by the close of business. Thus, counsel for plaintiff forwarded the unsigned incomplete responses to written discovery on April 1, 2008 via overnight mail. *Id.* Appropriately, defendant filed his Motion to Dismiss. *Id.* The trial court heard arguments on the motion and dismissed the case with prejudice. *Id.*

This Court upheld the trial court's ruling finding that the trial court did not err in enforcing the agreed order. *Id.* Despite agreeing to a dismissal with prejudice for failure to respond to discovery, plaintiff argued that the order dismissing his case with prejudice was unduly harsh and that the trial court should have considered a lesser sanction. *Id.* This Court found it was within the trial court's discretion provided by Miss. R. Civ. P. 37(b) to dismiss the case with prejudice if a party fails to comply with an order. *Id.* Although counsel for plaintiff experienced communication difficulties with his client, the Supreme Court upheld the trial court's dismissal with prejudice.

In this case, the Chancery Court did not abuse its discretion. This Court has not outlined any predicates or repetition patterns required under Miss. R. Civ. P. 37 before a trial court can sanction a party, such as Wilton, for violation of an agreed court order. Wilton willfully and/or intentionally violated the *Agreed Order* by not appearing for depositions. Wilton failed to comply with the *Agreed Order* in its failure to produce Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and 30(b)(6) corporate representative for court ordered depositions. Wilton's excuse that its owner, Mr. Jay Wilton was confused and, that counsel for Wilton had difficulty communicating with Wilton's in-house counsel, Scott D. Mayer, who was designated by Mr. Jay Wilton as the contact person for Wilton, is not convincing based on the facts. In the case at bar, the facts speak for themselves and support the decision of the Chancery Court to dismiss Wilton's Complaint with prejudice.

**1. Key Facts Demonstrate No Abuse of Discretion**

On June 16, 2009, the Chancery Court entered an *Agreed Scheduling Order* presented by all parties which set certain deadlines, including the completion of discovery on or before July 24, 2009, and set the trial of this matter for September 9, 2009. R.E. 7-8, R. 77-78. Per the agreement of counsel, on July 2, 2009, the Church noticed the depositions of Mr. Jay Wilton, Mr. Scott D. Mayer, and Mr. Kyle Bunstein for July 13, 2009 in Biloxi, Mississippi. On July 11, 2009, the Church noticed the 30(b)(6) notice of deposition and provided counsel for Wilton certain areas of inquiry

for which Wilton should provide a designated corporate representative to be deposed on July 13, 2009 in Biloxi, Mississippi. R.E. 9-19, R. 89-99

On the morning of July 13, 2009, approximately one hour prior to the start of Mr. Jay Wilton's deposition, counsel for Wilton told counsel for the Church that (1) Mr. Jay Wilton was ill[2] and would be unable to attend his deposition; (2) Mr. Scott D. Mayer, Esq. chose not travel to Biloxi, Mississippi for his agreed and scheduled deposition; (3) Mr. Kyle Bunstein refused to appear for his agreed and schedule deposition; and (4) Wilton would be not be able to provide a 30(b)(6) corporate representative to testify on behalf of Wilton at the agreed and scheduled deposition. Notwithstanding Mr. Jay Wilton's illness, the undisputed facts demonstrated the Wilton's agents, employees, and/or witnesses willfully and/or intentionally refused to appear for their properly noticed and agreed deposition(s). R.E. 20, R. 234.

In an effort to keep the September 9, 2009 trial date, a *Motion to Amend Scheduling Order* was filed. R. 84-99. However, on July 30, 2009, Wilton filed its *Motion to Continue Trial and Motion to Determine Deposition Location, Or in the Alternative For Telephonic Depositions* to force the Church to travel to Los Angeles, California to conduct depositions of Wilton and its witnesses or limit the Church to telephonic depositions. R. 102-104.

On September 1, 2009, the parties appeared before the Chancery Court regarding Wilton's pending Motions. The Chancery Court, in an effort to accommodate Wilton, granted the *Motion to Continue* but denied Wilton's *Motion* regarding the venue of depositions. R.E. 62, Tr. 28.

On September 8, 2009, the Chancery Court entered its Order resetting the trial for October 21, 2009, and specifically set forth:

> "...[T]he Plaintiff (Wilton) **shall** present its witnesses both corporate and individuals noticed for deposition in Biloxi, Mississippi on Monday and Tuesday, October 19 and 20, 2009. These witnesses shall include Mr. Jay Wilton, Mr. Scott D. Mayer,

[2] The Church does not dispute Mr. Jay Wilton's illness and the effect that illness may have had on his personal inability to be deposed on July 13, 2009.

> Mr. Kyle Bunstein, and a corporate representative to respond to Defendant's Rule 30(b)(6) deposition notice ...**[I]n the event the Plaintiff (Wilton) fails to provide these witnesses for their pre-trial testimony, the Court will consider any and all appropriate sanctions including but not limited to sanctions set forth in Rule 37 of the Mississippi Rules of Civil Procedure which may include the dismissal of Plaintiff's Complaint with prejudice and the striking of Plaintiff's Answers and Defenses to the Counterclaim of Defendants**."

R.E. 21-22, R. 106-107.

The *Agreed Order* was approved and agreed to by Scott Smith, Esq., attorney for Wilton. R.E. 21-22. R. 106.107. The *Agreed Order* was clear. The *Agreed Order* was not confusing. The *Agreed Order* was forwarded to Wilton by its attorney. R.E. 52, Tr. 18. The Agreed Order provided Wilton clear warning of possible sanctions, including dismissal of Plaintiff's Complaint with prejudice for noncompliance. R.E. 21-22, R. 106-107. The *Agreed Order* cannot be misunderstood.

On September 24, 2009, the Church noticed the depositions of Mr. Jay Wilton for 9:00 a.m. on October 19, 2009; Mr. Scott D. Mayer, Esq. for 11:00 a.m. on October 19, 2009; Mr. Kyle Bunstein at 2:00 p.m on October 19, 2009; and the 30(b)(6) corporate representative at 3:00 p.m. on October 19, 2009. R.E. 23-33, R. 262-272. All were to be conducted at the office of counsel for the Church. The *Notice(s)* were clear. The *Notice(s)* were not confusing. The *Notice(s)* were forwarded to Wilton by its attorney. R.E. 49, Tr. 15. The *Notice(s)* cannot be misunderstood.

On October 7, 2009, counsel for Wilton, Scott Smith, Esq., emailed counsel for the Church to confirm "the order and the times for the depositions scheduled for Oct. 19 and 20? Thanks." R.E. 34, R. 273. Less than two (2) hours later, counsel for the Church replied and provided each of the *Notice(s) of Depositions* referenced above along the *Agreed Order* of the Court ordering that Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and the 30(b)(6) corporate representative of Wilton to appear for depositions as noticed. Moreover, the email stated the following:

> "[I] believe the attached will answer all questions...**[I]t is my intent to have all depos completed on October 19, 2009...**[F]or the 30(b)(6) deponent, if the individual ...deposed in his individual capacity ... agree that we can cover the areas of inquiry then as opposed to separate deposition...Thanks."

R.E. 34, R. 273.

The email was clear. The email was not confusing. The email was forwarded and received by counsel for Wilton. R.E. 34. R. 273. The email cannot be misunderstood.

On October 17, 2009, Scott Smith, Esq., counsel for Wilton, along with Mr. Jay Wilton and Mr. Scott D. Mayer held a pre-testimony / pre-deposition conference call. R.E. 54, Tr. 20. Mr. Jay Wilton told Scott Smith, Esq. that each of the Wilton's witnesses required to be present for deposition were to travel to Biloxi, Mississippi on October 18, 2009, for their court ordered depositions on October 19, 2009. R.E. 51, Tr. 17.

On October 18, 2009, Mr. Scott D. Mayer, who was identified as Wilton's in-house counsel throughout the course of this case, willfully and/or intentionally refused, for the second time, to travel to Biloxi, Mississippi in violation of the *Agreed Order*. According to the sworn testimony of Mr. Jay Wilton, Mr. Scott D. Mayer stated the reason he could not travel to Biloxi, Mississippi for his court ordered deposition is that "he would be unavailable on ... Sunday (October 18, 2009) ... he said, well, I have to be on a boat at 6:00 a.m. in the morning and will not be back until 8:00 (p.m.)." R.E. 45, Tr. 11.

Wilton, a corporate entity, was ordered to provide Mr. Scott D. Mayer, its in-house counsel, for deposition on October 19, 2009. Wilton did not produce Mr. Scott D. Mayer for his court ordered deposition. Any excuse regarding a break down of communication is without merit. At no such time prior to the October 20, 2009 hearing on the Church's *Motion for Sanctions* did Wilton disclose any communication problems in dealing with its in-house counsel, Mr. Scott D. Mayer. In fact, Wilton did not disclose to the Church or the Chancery Court that approximately thirty (30) days prior to the hearing on Plaintiff's *Motion for Sanctions* Mr. Jay Wilton fired Mr. Scott D. Mayer. R.E. 47-48, 54-55, Tr. 13-14, 20-21. As clearly set forth by the Chancery Court, "the issues surrounding Mr. Mayer's attendance or failure to cooperate where known or should have been

known ... in some period of time prior to this weekend when travel plans were be accommodated." R.E. 63, Tr. 29.

Wilton was required by the *Agreed Order* to provide a 30(b)(6) corporate representative most knowledgeable about the areas of inquiry and facts set forth in the Church's Notice *of 30(b)(6) Depositions and Subpoena Duces Tecum of Wilton Acquisitions Corporation.* R.E. 21-22, R. 106-107. Wilton did not appear for its court ordered 30(b)(6) deposition on October 19, 2009. R. 290-300. Wilton did not provide a 30(b)(6) corporate representative to respond as mandated by Miss. R. Civ. P. 30(b)(6). See, M.R.C.P. 30(b)(6). Thus, Wilton willfully and/or intentionally violated and did not comply with the *Agreed Order.*

Wilton, a corporate entity, was ordered to provide Mr. Jay Wilton, owner of Wilton, and Mr. Kyle Bunstein for their depositions on October 19, 2009. R.E. 21-22, R. 106-107. Mr. Jay Wilton made the decision, without consulting Wilton's attorney Scott Smith, Esq., for he and Mr. Kyle Bunstein to willfully and/or intentionally not travel to Biloxi, Mississippi on October 18, 2009. Mr. Jay Wilton and Mr. Kyle Bunstein were willfully and/or intentionally not present for their court ordered deposition on October 19, 2009 because Mr. Jay Wilton "didn't believe it was necessary or useful to come without all the parties." R.E. 41, Tr. 7. Mr. Jay Wilton and Mr. Kyle Bunstein willfully and/or intentionally violated and did not comply with the *Agreed Order.*

Mr. Jay Wilton attempted to rationalize the willful and/or intentional violations of the *Agreed Order* by attempting to assert there was "sincere" miscommunication and attempted to blame all of the above conduct on Mr. Scott D. Mayer unwillingness to cooperate. This testimony was disingenuous.

As a result of Mr. Scott D. Mayer's willful and/or intentional refusal to attend his court ordered deposition, Mr. Jay Wilton testified he expressed his desire to unilaterally change the schedule of the court ordered depositions because "it would be important to this case to have Mr.

Mayer have his deposition taken first because he's the most familiar with all the facts." R.E. 45-46, Tr. 11-12. Mr. Jay Wilton clearly understood he was to be deposed first on May 19, 2009, and he willfully and/or intentionally did not appear for his court ordered deposition in clear violation of the *Agreed Order.*

In addition, Mr. Jay Wilton attempted to blame counsel for the Church for the miscommunication by falsely asserting the schedule of the depositions had been altered by the Church. R.E. 43-44, Tr. 9-10. Scott Smith, Esq. plainly stated the there was no discussion or communication from counsel for the Church and no such communication was forwarded to Wilton. R.E. 49, Tr. 15. There was absolute no basis for Mr. Jay Wilton's testimony. Thus, there was no "sincere" miscommunication or misunderstanding, only self serving baseless testimony.

The willful and/or intentional violations of the *Agreed Order* were attributable to Wilton and not its counsel, Scott Smith, Esq. R.E. 51, Tr. 17. The September 9, 2009 *Agreed Order* was forwarded to Wilton by Scott Smith, Esq. The September 24, 2009 *Notice(s) of Depositions* were forwarded to Wilton by Scott Smith Esq. Mr. Jay Wilton and Mr. Scott D. Mayer, Esq. held a pre-testimony / pre-deposition conference with Scott Smith, Esq. on October 17, 2009, two days before the start of the court ordered depositions on October 19, 2009. Mr. Jay Wilton had airline reservations for all of Wilton's witnesses for October 18, 2009. Mr. Jay Wilton willfully and/or intentionally made the decision not travel to Biloxi, Mississippi on October 18, 2009. Mr. Jay Wilton willfully and/or intentionally made the decision to not appear for deposition on October 19, 2009. R.E. 35-65, Tr. 1-31. When Mr. Jay Wilton finally arrived in Biloxi, Mississippi late in the afternoon on October 19, 2009, Scott Smith, Esq. asked "Where is Scott Mayer?" R.E. 47, Tr. 13.

At the October 20, 2009 hearing, the Chancery Court judiciously heard all arguments and testimony, including Wilton's request for a continuance. R.E. 35-65, Tr. 1-31. In addition, the Chancery Court heard from all parties on whether there were lesser available sanctions, including

(1) ordering Wilton to pay all costs and expenses for the Church's trial preparation; (2) ordering Wilton to pay all costs and expenses of the court reporter; (3) ordering Wilton to pay monetary sanctions; and (4) ordering and/or precluding Wilton from offering proof and/or evidence in support of its claims. R.E. 55-65, Tr. 21-31.

The above key facts were presented to the Chancery Court on the eve of trial. Wilton willfully and/or intentionally violated the *Agreed Order*. As a result, the Church faced trial by ambush, the ultimate prejudice, and had been irreparably harmed in its ability to defend itself against claims alleged by Wilton. In considering the above in relation to the conduct of Wilton, the Chancery Court, within its discretion provided by Rule 37 of the Mississippi Rules of Civil Procedure, correctly determined no lesser sanction would be appropriate except for the dismissal of Wilton's Complaint with Prejudice and entering judgment in favor of the Church.

### C. Factors Demonstrate Dismissal With Prejudice Was Not an Abuse of the Chancery Court's Discretion

The following factors should be considered in determining if a dismissal with prejudice is the proper remedy for discovery violations: (1) whether the discovery violation resulted from willfulness or inability to comply; (2) whether the deterrent value of Rule 37 could not have been achieved through lesser sanctions; (3) whether the other party's trial preparation has been prejudiced; (4) whether the failure to comply is attributable to the party itself, or their attorney; and (5) whether the failure to comply was a consequence of simple confusion or a misunderstanding of the court's order. *Beck v. Sapet*, 937 So. 2d 945, 949 (Miss. 2006). "These factors are considerations and not four absolute requirements." *Marshall*, 2 So. 3d at 706.

#### 1. The Record Sets Forth Ample Evidence of Willfulness and Gross Indifference

The record sets forth ample evidence of intentional, willful, bad faith conduct by Wilton, a corporate entity, and its witnesses including Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and the never designated 30(b)(6) corporate representative. This Court has held that "[a]

finding of willfulness may be based upon either a willful, intentional, and bad faith attempt to conceal evidence or a gross indifference to discovery obligations." Amiker, 796 So. 2d at 951 (quoting Pierce, 688 So.2d at 1388). This Court has stated in *Amiker* that gross indifference is the functional equivalent of willfulness. *Id.*

The Appellant would suggest that the mere fact that it participated in written discovery and responded to the Church's written discovery requests suggests that Wilton acted in "good faith." In truth, Wilton was acting in accordance with the Mississippi Rules of Civil Procedure. Wilton did what all litigants in Mississippi Courts are required to do, follow the rules and orders of the Court. That is not "good faith." This is what this Court and all courts in Mississippi demand from litigants.

Mr. Jay Wilton attempts to set forth that he was "unaware" of the court order and believed that the depositions were Monday and Tuesday, October 19 and 20. The underlying facts throughout Mr. Jay Wilton's artful testimony demonstrate he was aware of Wilton's obligations under the *Agreed Order* and the date and times of the noticed and agreed depositions. The actions of Mr. Jay Wilton in violating the *Agreed Order* were intentional and/or willful; or in the alternative, a gross indifference to discovery obligations. R.E. 38-48, Tr. 4-14.

Mr. Jay Wilton would want this Court to believe that he was unaware of the Agreed Order mandating his and other Wilton witnesses to appear for depositions because of "great difficulty" with Mr. Scott D. Mayer. This is of no consequence. Mr. Jay Wilton authorized, by and through his in-house counsel Scott D. Mayer, to file suit against the Church. Obviously, Mr. Jay Wilton, as owner of Wilton, appointed his in-house counsel, who had been with Wilton for approximately 12 years, to be the contact person and to coordinate the litigation against the Church along with Scott Smith, Esq. R.E. 38-48, Tr. 4-14. Accordingly, Scott Smith Esq. forwarded correspondence, including *Notice(s)* and the *Agreed Order* to Wilton's in-house counsel Scott Mayer, as instructed. However, as Scott Smith, Esq. testified, his communication had been directed to Mr. Jay Wilton

"more" than Scott D. Mayer leading up to the court ordered depositions. R.E. 54-55, Tr. 20-21.

The sworn testimony of Scott Smith Esq. demonstrates that Wilton had full knowledge of the *Agreed Order* and the understanding of the requirements and obligations Wilton was ordered to fulfill by the Chancery Court. Scott Smith, Esq. provided sworn testimony that he (1) advised his client that all depositions would be conducted on October 19, 2009; (2) did not participate in any discussion with counsel for the Church that the October 19, 2009 would be altered; (2) forwarded the September 8, 2009 *Agreed Order* to his client along with a very long email;. (3) held a pre-testimony / pre-deposition conference call with Mr. Jay Wilton and Mr. Scott D. Mayer on October 17, 2009, two days prior to the October 19, 2009 depositions; (4) during the pre-testimony / pre-deposition was told by his client that Mr. Jay Wilton, Mr. Scott D. Mayer, and Mr. Kyle Bunstein would travel to Biloxi, Mississippi on October 18, 2009; (5) was aware the October 19, 2009 depositions were scheduled to accommodate his client; (6) was aware the October 19, 2009 depositions were ordered because his client and certain witnesses failed to appear for deposition(s) on July 13, 2009; (7) was aware that Chancery Court had provided a special setting and trial date to begin on October 21, 2009; (8) was not the cause of his client and other witnesses from not appearing for depositions on October 19, 2009. R.E. 48-55, Tr. 14-21. The failure of Wilton and its witnesses to abide the *Agreed Order* was intentional and/or willful and clearly a gross indifference to discovery obligations.

After failing to abide by the *Agreed Order*, Mr. Jay Wilton seeks this Court to excuse Wilton's conduct because of his failure to control Wilton's in-house counsel. This is disingenuous. Throughout the course of the year long discovery process Wilton did not disclose any difficulties or communication issues with Mr. Scott D. Mayer prior to the October 20, 2009 hearing on the Church's *Motion for Sanctions*. In fact, Mr. Jay Wilton fired Mr. Scott D. Mayer approximately thirty (30) days prior to the failure of Wilton and its witnesses to appear for court ordered

depositions. Thus, not only is Mr. Wilton attempting to shift blame and justify Wilton's clear violations of the *Agreed Order* on Mr. Scott D. Mayer, he is attempting to shift blame on his chosen in-house counsel and designated contact person for this litigation for whom he personally fired thirty days (30) prior to the violations of the *Agreed Order* because of cash flow problems within Wilton, not incompetence. R.E. 38-48, Tr. 4-14.

In fact, the actions of Mr. Jay Wilton, as owner of Wilton, demonstrate willful bad faith conduct and gross indifference to discovery obligations. Mr. Jay Witlon personally made the decision, without consulting Scott Smith, Esq., to intentionally not travel to Biloxi, Mississippi on October 18, 2009. Mr Jay Witlon personally made the decision for he and Mr. Kyle Bunstein to not appear for their court ordered October 19, 2009 depositions because he "did not think it was necessary...." Mr. Jay Wilton personally expressed his desire to unilaterally change the schedule of the court ordered depositions so that Mr. Scott D. Mayer be deposed before him. The only plausible conclusion is that Mr. Jay Wilton clearly understood that his deposition had been agreed and noticed first on October 19, 2009. R.E. 38-48, Tr. 4-14. The actions of Mr. May Wilton were willful and committed in bad faith and were a gross indifference to Wilton's discovery obligations.

**2. Dismissal of Wilton's Complaint With Prejudice was Proper Sanction**

In *Pierce*, the Mississippi Supreme Court held that "dismissal is proper only in situation where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. *Pierce*, 688 So. 2d at 1389 (quoting *Batson v. Neal Spelce Assoc.*, 765 F.2d 511, 514 (5th Cir. 1985)). Moreover,

At the October 20, 2009 hearing, the Chancery Court, after hearing argument and sworn testimony, considered the availability and impact of potential lesser sanctions to impose upon Wilton for its willful bad faith conduct and gross indifference to the order of the Court. The Chancery Court considered (1) ordering Wilton to pay all costs and expenses of the Church's trial

preparation; (2) ordering Witlon to pay all costs and expenses of the court reporter; (3) ordering Wilton to pay monetary sanctions; (4) ordering and/or precluding Wilton from offering any proof and/or evidence in support of its claims. R.E. 55-65, Tr. 21-31

The intentional and/or willful violations of the Agreed Order occurred on the eve of trial for which the Chancery Court had provided the parties to accommodate Wilton. The Chancery Court, within its discretion reasoned "[I] do not find that a lesser sanction would achieve the purposes of compliance with rules." R.E. 63, Tr. 29. As this court has stated, "[t]he control of discovery is a matter committed to the sound discretion of the trial judge. *Holland v. Mayfield*, 826 So.2d 664,673 (Miss. 1999). The action of the Chancery Court and sanction levied was within the sound discretion of the Chancery Court and was not an abuse of discretion.

**3. The Church was Substantially Prejudiced**

Wilton sued the Church for breach of contract, breach of good faith and fair dealing, promissory estoppel, misrepresentation, and equitable estoppel. R. 1, 9. Although the underlying claim in this litigation arose out of a breach of contract, the Church is entitled to defend its self against each and every claim asserted by Wilton.

In defense of the cause of actions asserted by Wilton, the Church was entitled to conduct discovery in accordance with the Mississippi Rules of Civil Procedure, including Miss.R.Civ.P 30. See. M.R.C.P. 30. The depositions of the Wilton and its witnesses were vital to the Church to defend itself against each and every allegation and to have sufficient knowledge of what evidence Wilton would attempt to include in support of its claims. As the Chancery Court correctly identified, "this case is important ...$300,000 is not an insignificant sum of money to either the plaintiff or I'm sure to a church...." R.E. 63, Tr. 29.

The Chancery Court provided the special trial setting of October 21, 2009 to accommodate Wilton and its witnesses, if the Church had the opportunity to conduct pre-trial depositions on

October 19, 2009. Without the ability to conduct discovery pursuant to the Mississippi Rules of Civil Procedure, the Church was subject to trial by ambush, the ultimate prejudice. Thus, the Chancery Court, within its discretion granted to it by Rule 37 of the Mississippi, correctly found that the Church had been severally prejudice by the willful and/or intentional discovery violations of Wilton.

**4. Facts Demonstrate Wilton Was Clearly Aware of Agreed Order**

As set forth herein above, Mr. Jay Wilton attempts to rationalize the willful and/or intentional violations of the *Agreed Order* by attempting to assert there was "sincere" miscommunication and confusion and attempted to blame all of the above conduct on Mr. Scott D. Mayer unwillingness to cooperate. This testimony was disingenuous.

Wilton's attorney forwarded the *Agreed Order* and *Notice*(s) of Depositions for the October 19, 2009 depositions of Mr. Jay Wilton, Mr. Scott D. Mayer, Mr. Kyle Bunstein, and Wilton's 30(b)(6) corporate representative to his client by and through Wilton's in-house counsel Scott D. Mayer as instructed. R.E. 38-48, Tr. 4-14. However, as Scott Smith, Esq. testified, his communication had been directed to Mr. Jay Wilton "more" than Scott D. Mayer leading up to the court ordered depositions. R.E. 54-55, Tr. 20-21There was no miscommunication.

Mr. Jay Wilton testified he expressed his desire to unilaterally change the schedule of the court ordered depositions because "it would be important to this case to have Mr. Mayer have his deposition taken first because he's the most familiar with all the facts." Mr. Jay Wilton clearly understood he was to be deposed first on May 19, 2009, and he willfully and/or intentionally did not appear for his court ordered deposition in clear violation of the *Agreed Order*. In addition, Mr. Jay Wilton attempted to blame counsel for the Church for the miscommunication by falsely asserting the schedule of the depositions had been altered by the Church. E. 38-48, Tr. 4-14. Scott Smith, Esq. plainly stated the there was no discussion or communication from counsel for the Church and the

court ordered depositions had not be altered. R.E. 49, Tr. 15. Thus, there was no "sincere" miscommunication or misunderstanding only self serving baseless testimony.

**D. The Chancery Court Considered Less Sanctions**

As previously set forth herein above, this Court in *Salts* found the trial court considered lesser sanctions by relying on all arguments set forth by the defendant in its Motion to Dismiss, Memorandum Brief in support of the motion and the Rebuttal in support of the Motion whereby defendant sought alternative lesser sanctions if the Court was not in favor of dismissal with prejudice. *Salts*, 872 So2d. at 671. This finding was in response to plaintiff's argument that dismissal was improper because the trial court did not indicate in its order that lesser sanctions were ever considered. Id. at 671.

In the case at bar, at the October 20, 2009 hearing, the Chancery Court judiciously heard all arguments and testimony, including Wilton's request for a continuance. In addition, the Chancery Court heard from all parties on whether there were lesser available sanctions, including (1) ordering Wilton to pay all costs and expenses for the Church's trial preparation; (2) ordering Wilton to pay all costs and expenses of the court reporter; (3) ordering Wilton to pay monetary sanctions; and (4) ordering and/or precluding Wilton from offering proof and/or evidence in support of its claims. R.E. 55-65, Tr. 21-31

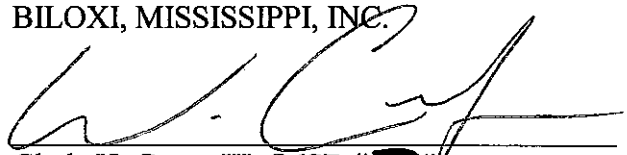
The Chancery Court clearly considered the possibility of leveling lesser sanctions for the willful bad faith conduct and/or gross indifference of discovery obligations of Wilton. However, Chancery Court, within its discretion provided by Rule 37 of the Mississippi Rules of Civil Procedure, stated "I do not find that a lesser sanction would achieve the purposes of compliance with the rules." Thus, the Chancery Court correctly determined no lesser sanction would be appropriate except for the dismissal of Wilton's Complaint with Prejudice and entering judgment in favor of the Church.

## CONCLUSION

Based on all of the foregoing facts, reasons, and arguments set forth herein, the Chancery Court was within its discretion, after thoughtful consideration of lesser available sanctions, in dismissing the Plaintiff / Appellant's Complaint with prejudice and entering judgment in favor of the Defendant / Appellee as a direct result of the willful and/or intentional violations of an Agreed Order.

Respectfully submitted, this the 27th day of May, 2011.

FIRST MEHTODIST CHURCH OF
BILOXI, MISSISSIPPI, INC.



Clyde H. Gunn, III, (MSB #[redacted]
Christopher C. Van Cleave, (MSB #[redacted]
W. Corban Gunn, (MSB #[redacted]
CORBAN, GUNN & VAN CLEAVE, PLLC
P.O. Drawer 1916
Biloxi, Mississippi 39533
Telephone: (228) 432-7826
Facsimile: (228) 456-0998
Corban@cgvclaw.com.