IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

No. 2010-TS-01457

WILTON ACQUISITIONS CORP. — PLAINTIFF/APPELLANT

V.

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

On Appeal from the Chancery Court of
Harrison County, Mississippi, Second Judicial District

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The record in this case simply does not support the drastic "death penalty" sanction of dismissal with prejudice. Although Wilton Corp. representatives arrived late for their court-ordered depositions set for "October 19 ***and*** October 20, 2009,"[1] the record reflects that First Methodist could have obtained the requested depositions on October 19 and 20. R.E. 2. Instead, First Methodist pled a "gotcha" motion for sanctions.

There was no pattern of willful disregard of any discovery obligations prior to the September 8, 2009-Order of the Chancery Court. Prior depositions were clearly rendered impractical due to Mr. Wilton's health-related conditions. R.E. 3, Tr. 6; R. 100, 234.[2] The record also reflects disputed evidence concerning the reasons for Wilton Corp.'s late arrival for the October depositions. Although the Chancery Court certainly has discretion to impose a wide range of sanctions, the record here simply does not support the drastic remedy chosen.

First Methodist claims any other outcome would have resulted in its "ambush." This is unsupported exaggeration. The depositions could have been completed on October 19 and 20 and

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[1]First Methodist incorrectly refers to November 18, 2009 as the date "Wilton made the decision to not travel" and the date "Wilton traveled to the Mississippi Gulf Coast. . ." *See* First Methodist's Appellee Brief at 7 (hereafter "FM Br. at __"). Mr. Wilton was at the airport ready to depart for his deposition in Mississippi on October 18, 2009, and did travel on October 19, 2009. R.E. 5, Tr. 49.

[2]On Friday, July 10, 2009, counsel for Wilton Corp. had put First Methodist on notice that Mr. Wilton was scheduled to have surgery later the same week. R. 356. On July 14, 2009, after notifying First Methodist that Mr. Wilton became acutely ill while traveling to Mississippi and could not give his deposition testimony, Wilton Corp.'s counsel, Scott Smith, asked First Methodist to agree to continue the trial to allow Mr. Wilton to recuperate following his surgery. R. 358. First Methodist refused to agree to a continuance of trial. R. 358 (Corban Gunn's July 14, 2009 email--note that Mr. Gunn inadvertently referred to his client as the "Plaintiff." It is clear, however, that on behalf of First Methodist, he would not agree to a continuance even though he knew Mr. Wilton would be undergoing heart surgery). At the October 20, 2009-hearing, the Chancery Court noted that it had re-set trial for October 21 over First Methodist's objections. R.E. 3, Tr. 27-28.

followed by the trial or a short continuance could have been ordered. Indeed, Wilton Corp.'s counsel asked for the depositions to start at 2:30 p.m. on October 19 or early the following morning. R.E. 524. Rather than allowing the depositions to go forward on October 19 as the Order provided, First Methodist rejected Wilton Corp.'s request and filed its motion for sanctions. R. 524.

First Methodist recognizes that the first depositions were continued due to Mr. Jay Wilton's serious health issues. *See* FM Br. at 3. At the time he arrived in Mississippi for his deposition, Mr. Wilton was suffering from severe heart problems that required surgery on his return to California. R.E. 3, Tr. 5-6, 10; R. 254. There is no dispute as to the gravity of Mr. Wilton's health issues, yet First Methodist and the Chancery Court fail to give sufficient consideration for Mr. Wilton's health issues at that time. Indeed, First Methodist refused to agree to a continuance of the September 9 trial date. R. 358

The short continuance of the trial, from September 9 to October 21, supports the credibility of Wilton Corp.'s explanation of his confusion. The Chancery Court *only* allowed the parties to postpone trial until October 19, still less than three months following Mr. Wilton's heart surgery and knowing that the depositions and trial would require Mr. Wilton to travel a great distance. R.E. 3, Tr. 29. At the time of the October 20-hearing, Mr. Wilton was still recovering from his heart surgery. Further, Mr. Wilton was having problems with his memory as a result of his illness. R.E. 3, Tr. 10. These facts support Mr. Wilson's testimony concerning his misunderstandings and confusions about the date and time of his deposition.

First Methodist also exploits Mr. Wilton's recollections of the July 2009 scheduled depositions. FM Br. at 6. Mr. Wilton testified on cross-examination that he could not recall whether he had traveled to Mississippi in July 2009 for his scheduled deposition. R.E. 3, Tr. 5. On direct

examination, however, Mr. Wilton remembered that he had, in fact, traveled to Mississippi for his July 2009 deposition. R.E. 3; Tr. 10. Mr. Wilton's confusion is unsurprising given that he was still recovering from heart surgery, and the fact that he suffered from memory problems as a result of his illness. R.E. 3, Tr. 10. The Chancery Court's ruling on the motion for sanctions does not appear to reflect that it gave these circumstances any consideration. R.E 3, Tr. 27-28; R.E. 4.

First Methodist also fails to rebut the clear evidence in the lower court record that the miscommunication regarding the depositions resulted from the dismissal of in-house counsel, Scott Mayer. First Methodist states that Smith informed "his client" of the September 8, 2009-Order and forwarded the Notice of Depositions to "his client." FM Br. at 7. Smith *actually* testified that he "***advised Scott Mayer*** [of the depositions]." R.E. 3, Tr. 15. Smith unequivocally testified that Mayer "was the contact for me in California, and everything was forwarded to Mr. Mayer by email and U.S. mail." R.E. 3; Tr. 15. Smith informed the Chancery Court that he did not know what communications Mayer failed to make to Mr. Wilton and Mr. Kyle Bunstein. R.E. 3, Tr. 19. Further, Mr. Wilton's testimony was that approximately a month prior to the October 20, 2009-hearing, Mayer was dismissed from his position as general counsel of Wilton Corp. R.E. 3, Tr. 13. Smith did not learn of this fact until three days before the scheduled depositions on October 16, 2009. R.E. 3, Tr. 19. Smith testified that he had sent the deposition notices and court orders to Mayer, *not* Mr. Wilton. Further, he testified that working with Mayer had proved to be difficult.[3] Smith's testimony corroborates Wilton's testimony that he did not know of the Court's order

[3]First Methodist intentionally mischaracterizes the facts when it stated that Smith "never disclosed" the fact that Mayer had been fired by Mr. Wilton a month before the depositions. FM Br. at 8. Smith clearly testified that he only learned of Mayer's dismissal from Wilton Corp. on October 16, 2009. R.E. 3, Tr. 19.

regarding the October 2009 depositions. R.E. 3; Tr. 11-12.

In addition, even though Smith had direct communications with Mr. Wilton in the days leading up to the October depositions, there is no evidence that Mr. Wilton had personal knowledge of or had been given a copy of the Chancery Court's September 8, 2009-Order. Although Mr. Wilton testified that he knew the depositions were scheduled for "October 19 and 20," the undisputed testimony demonstrates that Mr. Wilton was not aware of the Order.

III. ARGUMENT

A. There Was No Evidence of an Intentional Violation of the Chancery Court's September 8- Order.

The Chancery Court Order provided that the Wilton Corp. depositions were to be taken on "October 19 and 20." R.E. 2. First Methodist contends that Wilton Corp., Mr. Wilton, Mayer and Mr. Bunstein willfully and/or intentionally decided not to appear for the court-ordered depositions. There is, however, no evidence that Wilton Corp. *intentionally* violated the court's order or sought to evade the depositions. The record reflects that Wilton Corp.'s former counsel, Mayer, the person most knowledgeable of the contract negotiations from Wilton Corp.'s perspective, communicated to Mr. Wilton that he would be present for the depositions. R.E. 3; Tr. 11-12; R.E. 5, Tr. 48-49. Consequently, Mr. Wilton reasonably expected his attendance but could not compel it. The record unequivocally shows that Mr. Wilton had no control over Mayer and that Mr. Wilton went to great lengths to ensure his attendance. R.E. 5, Tr. 48-49. Mayer's failure to appear should not be imputed to Wilton Corp.

First Methodist contends the Chancery Court "unquestionably warned Wilton" of the consequences for the failure to appear at the October depositions. The record, however, reflects a

dispute. Again, there was no evidence that Mr. Wilton knew of the Chancery Court's September 8, 2009-Order nor is there any evidence that Mr. Wilton participated in the September 1, 2009 hearing. The evidence is that Smith forwarded the Court order to Mayer, who at that time was still general counsel for Wilton Corp. R.E. 3, Tr. 15. Moreover, the evidence is that Mr. Wilton had no personal knowledge of the contents of the Chancery Court's Order. Mr. Wilton testified that he believed the depositions were to occur on Monday *and* Tuesday, October 19 *and* 20. Inasmuch as Messrs. Wilton and Bunstein appeared on October 19 and Wilton Corp.'s counsel requested that depositions begin at 2:30 p.m. that day, there was no violation of the September 8-Order.

B. The Chancery Court's Order Does Not Reflect Why Lesser Sanctions Were Not Appropriate.

The record reflects that the parties and the Chancery Court contemplated discovery occurring on "October 19 and 20," including the day before the scheduled trial. The misunderstanding and loss of one day, October 19, although regrettable, did not result in the undue prejudice. First Methodist clearly could have obtained a "preview" of the testimony in advance of trial.

The underlying claims in this case are not complex and the parties anticipated a trial of only two days. Messrs. Wilton and Bunstein arrived on Monday and were prepared to stay in Mississippi for the week, with trial set on Wednesday, October 21. In crafting a sanction for a discovery violation, Mississippi Rule of Civil Procedure Rule 37 grants trial courts a number of options including striking pleadings, staying the proceedings, or as a last resort, dismissing the action. M.R.C.P. 37(b)(2)(C). Here, the Chancery Court could have crafted an effective sanction much less severe than a dismissal with prejudice. The Court could have continued trial by one day, limited Wilton Corp.'s testimony and/or ordered Wilton Corp. to pay for the deposition costs or other fees.

Moreover, a trial without the testimony of Mayer would have served as a sanction in and of itself to Wilton Corp. as it has consistently stated that Mayer knew the most about the contract negotiations and agreement that were the subject of the case and his testimony would have been important to Wilton Corp.'s case-in-chief. These alternative sanctions were available to the Chancery Court, yet without explanation, the Court refused to impose any other sanction.

Dismissal with prejudice is only proper where the deterrent value of Rule 37 cannot be substantially achieved by the imposition of a less drastic sanction. *Pierce v. Heritage Props.*, 688 So. 2d 1385, 1389 (Miss. 1997) (citing *Batson v. Neal Spelce Assoc.*, 765 F.2d 511, 514 (5th Cir. 1985). Because there were other less drastic sanctions available, the Chancery Court's failure to impose less drastic sanctions here was error and an abuse of the Chancery Court's discretion.

C. Mr. Wilton *Was Not* Aware of the Court's September 8-Order.

The Church contends that the facts show that Mr. Wilton was aware of the September 8-Order, despite Mr. Wilton's direct testimony that he had no personal knowledge of the September 8-Order. Specifically, Mr. Wilton testified:

> Q. . . .Did you become aware of the fact that this Court had entered an order requiring discovery to go forward in the form of depositions.
> A. I was aware of depositions being asked for, yes.
> Q. Did you become aware of a court order requiring you to be here yesterday, October 19th, 2009?
> A. The only thing I was aware of was that I was supposed to come to depositions according to my counsel, Scott Smith. Whether there was a court order or not, I'm not sure.

R.E. 3, Tr. 6. This testimony was corroborated when Smith testified that he forwarded the Chancery Court's September 8-Order to Mayer "who was the contact for me in California, and everything was forwarded to Mr. Mayer by email and by U.S. mail." R.E. 3, Tr. 15, 18. There is no evidence that

Mayer actually gave Mr. Wilton the September 8-Order. Mr. Wilton's testimony is that he understood and believed the depositions were to be taken on "October 19 and 20," but that he did not know of the Chancery Court's Order setting the depositions on those dates. While Smith testified that in the two days prior to the depositions that he had talked to Mr. Wilton "more" than he spoke to Mayer, Smith's testimony still does not indicate that Mr. Wilton had personal knowledge of the September 8-Order.

Mr. Wilton's October 20-testimony reflects his confusion and misunderstandings about the depositions. The fact that Mr. Wilton--at first--did not recall flying to Mississippi in July 2009, evinces his mental confusion resulting from his recent surgery and illness of which he testified. R.E. 6, Tr. 6, 10. Mr. Wilton's testimony demonstrates that not only he *did not* know of the Chancery Court's Order, he failed to understand the significance of being present for his deposition on the specific date and time. R.E. 3, Tr. 9. Because the record establishes that Mr. Wilton ***did not know*** of the September 8-Order and that he misunderstood when his deposition was set to occur, the Chancery Court's imposition of the most severe penalty of dismissal was improper and an abuse of the court's discretion.

In addition, dismissal as a Rule 37 sanction "may be inappropriate when neglect is plainly attributable to an attorney. . . ." *Pierce*, 688 So. 2d 1389. Here, the evidence establishes that Smith forwarded the September 8-Order and deposition notices to Wilton Corp.'s counsel, Mayer, at the time when Mayer was employed as Wilton Corp.'s counsel. Mayer's failure make Mr. Wilton aware of the September 8-Order and the terms of the Chancery Court's Order amounts to attorney neglect such that the "death penalty" sanction of dismissal with prejudice is an improper sanction here.

D. *Salts v. Gulf National Life Insurance Company*, 872 So. 2d 667 (Miss. 2004) and *Young v. Merritt*, 40 So. 3f 587 (Miss. Ct. App. 2010) are Distinguishable.

First Methodist cites *Salts v. Gulf National Life Insurance Company*, 872 So. 2d 667 (Miss. 2004), in support of its contention that dismissal was the Chancery Court's only viable option. *Salts* is easily distinguished. In *Salts*, there was a clear and consistent pattern of discovery violations and refusals to abide by the court's orders. *Salts*, 872 So. at 669-671. The *Salts* case had lingered for more than four years due to procedural wrangling which involved plaintiffs' multiple failures to comply in discovery. Even further, the plaintiffs in *Salts* sought to avoid being deposed altogether by moving for a protective order to preclude their depositions. *Id.* Even after the protective order was denied, the *Salts* plaintiffs, thereafter, ***intentionally refused to appear*** for their depositions. *Id.*

Here, there is no pattern misconduct by Wilton Corp., and Wilton Corp. ***never sought to evade*** the scheduled depositions.[4] Moreover, there were no prior discovery disputes or orders. The record reflects that Wilton Corp. participated in responding to interrogatories and requests for documents. In addition, Messrs. Wilton and Bunstein arrived on October 19 and were present that afternoon to be deposed. This case has not languished for more than four years, and Wilton Corp. did not attempt to preclude their depositions with a motion for a protective order. Simply put, there was no showing of bad faith on the part of Wilton Corp., Mr. Wilton or Mr. Bunstein–a factor that should be established before a dismissal with prejudice should be entered. *See Wood ex rel. Wood v. Biloxi Pub. Sch. Dist.*, 757 So. 2d 190, 193 (Miss. 2000).

Dismissal is authorized only when the failure to comply with a court's order results from

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[4]Of course, Mr. Wilton, despite his best efforts, could not force Mayer's appearance. R.E. 3, Tr. 8-9. Although Mr. Wilton had no obligation (or right) to present Mayer for a deposition in Mississippi, he, nevertheless, tried to do so as an accommodation to First Methodist which otherwise would have had to subpoena Mayer for deposition in California.

wilfulness or bad faith. *Wood*, 757 So. 2d at 193. The Mississippi Supreme 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." *Pierce*, 688 So. 2d at 1388. The Chancery Court made no finding of wilfulness or bad faith on the part of Mr. Wilton; rather, the Court simply decided that Mr. Wilton's reasons for delay were not valid. R.E. 6 at 4. The facts here do not establish a "gross indifference to discovery obligations," especially where the evidence demonstrates that Mr. Wilton was not aware of the Chancery Court's September 8-Order.

First Methodist also relies on *Young v. Merritt*, 40 So. 3d 587 (Miss. Ct. App. 2010). *Young* is distinguishable for several reasons. *Young* involved a repeated failures to respond to discovery such that the defendant was forced to file a motion to compel. *Young*, 40 So. 3d at 588. The defendant had propounded discovery to the plaintiff and after three follow-up letters and more than four months had lapsed, defendant filed a motion to compel. *Id.* Plaintiff's counsel was unable to contact the plaintiff for a number of months and ultimately *agreed* that if discovery responses were not provided on an agreed-upon date, the matter "shall be dismissed with prejudice." *Id.* at 588-89. After the discovery responses were not provided, the defendant filed his motion to dismiss, a hearing was held and the court entered an order of dismissal. *Id.* at 589. In dismissing the case, the trial court observed the pattern of "bypassing deadlines." *Id.* The Mississippi Court of Appeals affirmed, noting that plaintiff's counsel had specifically *agreed* to a dismissal with prejudice. *Id.* at 590.

In the present case, Smith never agreed to dismiss Wilton Corp.'s claims with prejudice. There was no pattern of Wilton Corp. refusing to produce discovery responses or to give their deposition testimony. As principle of Wilton Corp., Mr. Wilton was unable to compel Mayer to testify and Mayer gave Mr. Wilton no explanations for his refusal testify. Wilton Corp. should not

be given a sanction of last resort for its inability to force Mayer to testify.

E. The Chancery Court Abused Its Discretion In Entering Dismissal With Prejudice.

The record in this case does not support the drastic sanction of dismissal with prejudice such that the Chancery Court abused its discretion in dismissing Wilton Corp.'s case. Mississippi Rule of Civil Procedure 37 dismissals are intended for the most egregious cases. *Pierce*, 688 So. 2d at 1388 (holding that "extreme circumstances" warrant dismissal). Moreover, the Mississippi Supreme Court has held:

> [D]ismissal is to be used as a sanction only as a last resort. Lower courts should be cautious in either dismissing a suit or pleadings or refusing to permit testimony . . . . The reason for this is obvious. Courts are courts of justice not of form.

Robert v. Colson, 729 So. 2d 1243, 1247-48 (¶28) (Miss. 1999) (internal quotations omitted). Mississippi appellate courts have not hesitated to reverse where a lower court has abused its discretion in imposing sanctions for discovery violations. *See Caracci v. Int'l Paper Co.*, 699 So. 2d 546, 557 (Miss. 1997) (sanctions reversed where there was no order compelling plaintiff to fix discovery deficiencies); *Robert,* 729 So.2d at 1247 (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 order to compel one day late). Respectfully, the Chancery Court abused its discretion in failing to impose some less drastic sanction than ordering dismissal with prejudice.

III. CONCLUSION

In the absence of a pattern of discovery abuse and the fact that Wilton Corp. representatives

arrived and were available, though regrettably late, for their court-ordered depositions set for "October 19 ***and*** October 20, 2009," the record does not demonstrate the "extreme circumstances" to warrant the severe penalty of dismissal with prejudice. Wilton Corp. respectfully requests that the Court reverse and remand this matter for a trial on the merits.

Respectfully submitted, this the 13 day of July, 2011.

WILTON ACQUISITIONS CORP.

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CERTIFICATE OF SERVICE

I, **JOHANNA M. MCMULLAN**, of the law firm of Page, Mannino, Peresich & McDermott, P.L.L.C. do hereby certify that a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was mailed, by United States mail, postage prepaid to

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This the 13 day of July, 2011.

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