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

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification.

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ORAL ARGUMENT REQUESTED

Appellant, Wilton Acquisitions Corporation ("Wilton Corp.") requests that this Court allow oral argument as it will materially aid the Court in determining whether dismissal with prejudice was an appropriate sanction for a misunderstanding of a deposition date.

STATEMENT OF THE ISSUES

In this contract dispute, the issue presented on appeal is whether the Chancery Court abused its discretion in dismissing the case with prejudice without explaining why lesser sanctions were not appropriate, where no court order was violated, and where a short continuance and the imposition of monetary sanctions would have cured any prejudice to the Defendant.

STATEMENT OF THE CASE

A. Nature of the Case

This dispute involves a breach of contract and the loss of $300,000. On November 13, 2006, Wilton Corp. signed a real estate purchase agreement ("Agreement") to buy certain real property in Biloxi, Mississippi, owned by First Methodist Church of Biloxi, Mississippi, Inc. ("First Methodist"). R. 17. Wilton Corp. paid $300,000 in earnest money for the purchase. R. 10. The Agreement was contingent on certain warranties. R. 19. When an inspection revealed the presence of asbestos-containing materials at the property, Wilton Corp. exercised its right to terminate the contract. R. 40. The Agreement unambiguously provides: "if, during its Due Diligence Period, Wilton [Corp.] was not satisfied with its investigation, Wilton [Corp.] could terminate the Contract. . . ." R. 10, 21. Despite the clear agreement, First Methodist refused to refund the $300,000 in earnest money. Wilton Corp. filed suit for specific performance of the purchase agreement, breach of contract, breach of the duty of good faith and fair dealing, promissory estoppel, misrepresentation, and equitable estoppel. R. 1, 9. First Methodist alleges that the presence of asbestos-containing

materials on the property did not trigger the right to terminate. R. 45-46. First Methodist also contends that Wilton Corp. failed to comply with notice requirements of the agreement such that return of Wilton Corp.'s earnest money was not required. R. 45-46.

On the eve of trial, the Chancery Court granted First Methodist's Motion to Dismiss and for Sanctions and dismissed Wilton Corp.'s claims ***with prejudice***. R.E. 4; R. 303. The Chancery Court found that Wilton Corp. willfully failed to appear for certain depositions such that its claims should be dismissed with prejudice. R.E. 3, Tr. 27-29; R.E. 4; R. 303. On August 2, 2010, the Chancery Court denied Wilton Corp.'s motion for reconsideration of the order of dismissal and Wilton Corp. filed this appeal. R.E. 6; R. 526, 532.

B. Procedural Background and Facts.

On June 11, 2008, Wilton Corp. filed its Amended Complaint. R. 9. In addition to the claim for specific performance, Wilton Corp. asserted claims of breach of contract, breach of the duties of good faith and fair dealing, promissory estoppel, misrepresentation, and equitable estoppel. R. 11-15. On November 5, 2008, Wilton Corp. dismissed its claim for specific performance for the sale and purchase of the church property and released its Lis Pendens Notice. R. 56. First Methodist agreed to deposit $350,000[1] into the registry of the Court until resolution of Wilton Corp.'s remaining claims. R. 56-57. Discovery ensued and the exchange of written discovery and the production of documents occurred without incident. R. 58, 64, 66, 68, 70. On June 16, 2009, the Chancery Court entered an Agreed Scheduling Order, setting trial for September 9, 2009, with a discovery deadline of July 24, 2009. R. 77-78.

Depositions of Wilton Corp.'s representatives and corporate representatives, including

[1]The $350,000 deposited represented Wilton Corp.'s $300,000 and the additional $50,000 was to provide for attorneys' fees should the court award them. R. 505.

Messrs. Jay Wilton, Scott Mayer and Kyle Bunstein were scheduled for July 14, 2009. R. 89, 91, 93. Mr. Wilton, the president and principal owner of Wilton Corp., traveled to Mississippi for the depositions from his residence in California, but en route, became acutely ill. R.E. 3, Tr. 5; R. 100, 234. Immediately upon his arrival in Mississippi, Mr. Wilton was forced to return to California for medical treatment. R.E. 3, Tr. 5-6, 10. He was suffering from congestive heart failure, a mediastinal hemorrhage and severe aortic insufficiency.[2] R. 254. Mr. Wilton underwent aortic valve replacement surgery on July 25, 2009, and was hospitalized for six days. R.E. 3, Tr. 5-6, 10; R. 100, 254.[3] Mr. Wilton testified that he nearly died as a result of his medical condition. R.E. 5, Tr. 50.

Bunstein, an employee of Wilton Corp., also traveled to Biloxi on July 14, 2009, to attend his scheduled deposition. R. 234. Bunstein, however, was concerned about giving testimony in the absence of a Wilton Corp., corporate representative and therefore asked not to give his testimony at that time. *Id.* Scott Mayer, who had been Wilton Corp.'s in-house counsel for twelve years, (R.E. 5, Tr. 48) did not appear on July 14 for his scheduled deposition for unknown reasons. R. 234. As such, the depositions were postponed. Wilton Corp. paid all court reporter costs for the cancelled

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[2]A mediastinal hemorrhage is defined as bleeding in the mediastinum, the space in the chest between the lungs, which is caused by (1) an injury, blunt or penetrating; (2) a dissecting aneurysm; (3) a rupture of aortic aneurysm; (4) surgical procedures within the chest; (5) laceration of large blood vessels during angiography; (6) the placement of arterial catheters, or (7) erosion of tracheostomy tubes. 4-M *Attorneys' Dictionary of Medicine* M-72405 (Matthew Bender, 2009).

Aortic sufficiency is

> An imperfect closure of the aortic semilunar valve at the junction of the left ventricle and the aorta. This causes blood that has been ejected into the aorta to fall back into the left ventricle. It may produce volume overload of the ventricle and congestive heart failure.

Tabers Cyclopedic Med. Dict. (2002).

[3]At the January 6, 2010 hearing, Mr. Wilton testified his medical condition had caused him to loose his driver's license and that only recently, the State of California would allow him to reinstate his license. R.E. 5, Tr. 50.

depositions. R. 234.[4]

On July 27, 2009, First Methodist moved to Amend Scheduling Order to extend discovery, including Wilton Corp.'s depositions, until September 2, 2009, a week before the scheduled trial date. R. 84. On July 31, 2009, Wilton Corp. filed a Motion to Continue Trial and Motion to Determine Location or in the Alternative for Telephonic Deposition. R.100; 102. At the time of the Wilton Corp.'s motion, Mr. Wilton was still hospitalized and his availability for deposition and trial was uncertain. R. 100. Wilton Corp. also sought an order that, due to his health and need for recuperation, the depositions of Mr. Wilton and the other Wilton Corp. representatives be taken in California or taken telephonically. R. 102.

On September 1, 2009, the Chancery Court held a status conference on Wilton Corp.'s motion to continue trial. R.E. 2; R. 106. On September 8, 2009, the Court entered an order resetting trial for October 21, 2009, and denying Wilton Corp. any relief regarding the depositions, despite Mr. Wilton's inability to travel at that time. *Id.* Instead, the Chancellor ordered Wilton Corp. to present its individual and corporate witnesses for depositions on "***Monday and Tuesday, October 19 and 20, 2009***," at defense counsel's offices. R.E. 2; R. 106 (emphasis added). The Chancery Court noted that in the event Wilton Corp. failed to provide its witnesses for pre-trial testimony, it would consider sanctions, including the dismissal of Wilton Corp.'s complaint and striking Wilton

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[4]In correspondence to defense counsel, Wilton Corp.'s counsel explained:

> I do not know the reason for Mr. Mayer's absence. . . . Mr. Burnstein did not feel comfortable providing testimony without a corporate representative present. . . As for Mr. Wilton, no one has any control over his heart condition and the effects that condition has on his physical well-being. It is no one's fault that the flight to Biloxi through turbulent weather would cause a dramatic decline in his health that would prevent him from testifying today.

R. 234.

Corp.'s Answers and Defenses to the Counterclaim of First Methodist.[5] R.E. 2; R. 107. First Methodist, thereafter, noticed the depositions of Messrs. Wilton, Bunstein and Mayer and Wilton Corp.'s 30(b)(6) designee for October 19, 2009. R. 262-272.

On Saturday, October 17, 2009, Wilton Corp.'s counsel, Scott Smith, conferred with Messrs. Wilton and Mayer regarding their depositions and trial. R.E. 3, Tr. 20. Late, Saturday, October 17, Smith, upon request of Mr. Wilton, forwarded an electronic message to defense counsel to call him. R.E. 3, Tr. 12; R. 289; 296. Defense counsel returned the call on Sunday, October 18, but did not reach Smith. R. 297.

On October 19, 2009, at 7:45 a.m., Smith informed defense counsel that he was required to tend to his sick daughter and that the Wilton Corp. witnesses would arrive in Mississippi for their depositions at approximately 2:30 p.m. R.E. 3, Tr. 16; R. 297. Smith explained that Mr. Wilton and Bunstein believed that their depositions were set for October 20, 2009. R.E. 3, Tr. 12; R. 297.

Despite being informed of the conflict and confusion about the date of the deposition, on October 19, defense counsel, on the record, announced that the Wilton Corp. deponents were not present. R. 291-92. In a letter to Smith dated October 19, defense counsel expressed concern for Smith's daughter but noted that the Wilton Corp. witnesses should have appeared for their depositions in spite of Smith's emergency conflict. R. 301.

On October 20, 2009, First Methodist filed its Motion to Dismiss and for Sanctions pursuant to Mississippi Rules of Civil Procedure 37(b)(2)(C) and 37(d). R. 174. Wilton Corp.'s counsel received the motion after 5:00 p.m. on October 19, before it was filed. R. 593, Tr. 41. Defense counsel noticed its motion for the next morning, October 20, and the Chancellor heard testimony and

[5]The record does not, however, reflect that First Methodist ever filed a counter-claim against Wilton Corp. or that Wilton Corp. responded to any such counter-claim.

argument on the motion to dismiss and for sanctions. R.E. 3, Tr. 1.[6]

During the October 20 hearing, defense counsel cross-examined Mr. Wilton, who testified that he was aware that he was to appear for his deposition, but he did not know of a court order compelling him to do so. R.E. 3, Tr. 6. In addition, Mr. Wilton stated that he was not aware his deposition was noticed for October 19. R.E. 3, Tr. 9. Mr. Wilton stated that he made airplane reservations to travel to the Mississippi Gulf Coast on October 18. *Id.* He testified that despite his efforts he could not locate his corporate counsel, Mayer, to attend the depositions. R.E. 3, Tr. 7. Ultimately, Mr. Wilton did not travel to Mississippi on Sunday, October 18. He testified that Smith did not instruct him not to travel on Sunday, and that he made the decision to travel on Monday, October 19 because the depositions would not be useful without Mayer. *Id.* He stated:

> I believed sincerely and earnestly, as my corporate counsel and as one of the persons that was in the deposition that he [Mayer] would go first. And I was also told as recently as Friday you rescheduled depositions, so I though they were still fluid because on Friday your office changed the order of the depositions.
>
> Q. [Defense Counsel] Well, now what are you basing that testimony on?
>
> A. The conversation I had with my counsel that says that you wanted all of the depositions on Monday as opposed to one on Tuesday and two on Monday.
>
> Q. . . . are you not aware [that the depositions] were always noticed for October the 19th?
>
> A. ***No, sir, I'm not aware of that.***
>
> Q. You weren't aware of that at all.
>
> A. ***No.*** I had a discussion where I believed that the depositions - - because I got a

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[6]The title page of the hearing transcript indicates that Ronald G. Peresich appeared as attorney for the Appellant, Wilton Corp. at the October 20, 2009. Mr. Peresich, however, did not represent Wilton Corp. in the lower court and actually entered his appearance in this case on August 7, 2010, and represents Wilton Corp. in this appeal. Attorney Scott Smith represented Wilton Corp. in the lower court and the transcript's table of contents accurately reflects his appearance and representation of Wilton Corp. in the lower court.

notice that the deposition with Mr. Mayer was on Tuesday and the others were on Monday. I was told by counsel that for the convenience for all you had then requested on Friday to have the depositions all on Monday to have the day off on Tuesday to prepare for trial.

R.E. 3, Tr. 9 (emphasis added).

On direct examination Mr. Wilton testified:

Q. ***[Plaintiff's Counsel] The illness that you have described, Mr. Wilton, how has that affected your memory.***

A. Well, that illness caused me to have several seizures, and that has affected my memory dramatically and embarrassingly.

Q. Tell the court again why you didn't come on Sunday.

A. I had made a reservation at 10:50 leaving Los Angeles directly to New Orleans and then to rent a car and drive here on Sunday for all three of us. We had an exit row all sitting together. . . . We had a conference call on Saturday. My counsel, Scott Mayer, and myself . . . Mr. Bunstein tried to call in but could not get in [on the line] . . . It was sort of a predeposition/pretrial discussion to get organized to come down here. Mr. Mayer participated in that and gave me no indication that he wouldn't be here.

I [tried] . . . to reach him after the conference call, and he said to me that he would be unavailable on the Sunday. And I asked him, what did that mean. And he said, well, I have to be on a boat at 6:00 AM in the morning and will not be back until 8:00.

I then spoke with Scott [Smith], our counsel, and said, it will be important to this case to have Mr. Mayer have his deposition taken first because he's the most familiar with all of the facts, ***and my memory is not strong***. So we discussed that, and from that discussion – maybe it was my misimpression or my lack of understanding, I did not know that the depositions all had to be on Monday because, as I said to you, I believed there was a discussion between Mr. Smith's office and your office on Friday about rescheduling Mr. Mayer's deposition from Tuesday to Monday. So my innocent impression was they were still fluid, and I was unaware of the exact issues in the court order. So, I decided that it would be best for this case and for all of us involved in the depositions to come together. Mr. Mayer did not show up, so I thought Monday would be appropriate. We'd get here as early as we could.

R.E. 3, Tr. 11-12 (emphasis added). Wilton continued to try to contact Mayer, finally speaking to

Mayer's wife on Monday, October 19, who informed him that she could not find her husband and needed help in doing so. R.E. 3, Tr. 12. At the time of the scheduled October 19 depositions, Mayer was no longer Wilton Corp.'s general counsel, having been terminated a month earlier due to a declining real estate market. R.E. 3, Tr. 13.

Defense counsel then called Wilton Corp.'s Mississippi counsel, Scott Smith, to testify. R.E. 3, Tr. 14. Smith testified that there had been no discussions with defense counsel on the Friday preceding October 19 about changing the scheduled depositions. R.E. 3, Tr. 15. Smith testified that he advised Scott Mayer that the depositions were scheduled for October 19 and that Mayer was Smith's contact at Wilton Corp. *Id.* Smith stated that all emails and U.S. mailings were forwarded to Mayer, including the September 8 Order, the deposition notices and the Rule (30)(b)(6) notice. *Id.* Smith testified that as the case got closer to trial, Mayer was not returning his calls and electronic correspondence and he then began communicating with Mr. Wilton directly. *Id.*

Smith testified further that he called defense counsel at 8:15 a.m.[7] on Monday, October 19, to inform defense counsel that he had an emergency conflict. R.E. 3, Tr. 16. Smith was at his daughter's pediatrician's office with his daughter who had been hospitalized over the weekend and was being treated for the flu. R.E. 3, Tr. 16. Smith also called to inform defense counsel that the Wilton Corp. deponents misunderstood and believed that their depositions were scheduled for Tuesday, October 20, and were arriving at 2:30 p.m. on Monday, October 19. R.E. 3, Tr. 16-17.

Smith testified:

> [the] stumbling block in this whole process has been Mr. Mayer. I don't know what communications he has failed to make with . . . Mr. Wilton or Mr. Bunstein. Of course, they're in California. We're here in Mississippi.

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[7]The time of this call has been recalled to have been at various times, 7:45 a.m. (R. 297), 8:00 a.m. (R. 177), and 8:15 (Tr. 16).

> Controlling Mr. Mayer has been extremely difficult to say the least. Returning of phone calls with Mr. Wilton's severe illness, I don't know what he communicated to him or not.
>
> I don't believe that Mr. Wilton intentionally has done anything wrong. I think he may have been left out of the loop on a lot of things from Mr. Mayer. Him being the in-house counsel, I don't know the inner workings, but in cross-examination of myself, that's the best I know.

R.E. 3, Tr. 19.

> Following counsels' arguments, the Chancellor stated:
>
> Mr. Wilton and the other gentleman who are here today could easily have been here. Their presence should not have been conditioned on Mr. Mayer being present despite his knowledge and information that he would have at his deposition. The plaintiff does not control the order of the depositions when it's called by the other side.
>
> So it seems to me that at least in the context of the . . . case --Salts versus Gulf National Life that the defendant has been prejudiced where this trial date is tomorrow morning at 9:00. The Court understands and accepts that Mr. Wilton or the plaintiff apparently no longer has any control over Mr. Mayer, but certainly Mr. Wilton and the other witness could have been here yesterday morning and proceeded to submit themselves for their deposition.
>
> . . .
>
> I accept also that this case is important to both parties. $300,000 is not an insignificant sum of money to either the plaintiff or I'm sure to a church, but I do not find that a lesser sanction would achieve the purposes of compliance with the rules.
>
> . . .
>
> So the Court will grant the motion of the defendant, dismiss the plaintiff's complaint and enter judgment for the defendant. The Court reserves the issue of attorneys' fees and would ask for just a short two-letter brief on the issue of attorneys' fees. I'm not prepared to rule on that today.

R.E. 3, Tr. 28-29.

On November 2, 2009, judgment was entered dismissing the case ***with prejudice*** and awarding the earnest money held in the court's registry to First Methodist. R.E. 4; R. 303. The judgment stated that:

> the Court having considered the testimony of Mr. Jay Wilton and of Attorney, Scott Smith, and further having considered all submissions and argument of Counsel is of the opinion, for the reasons stated into the record at the Hearing hereon which reasons are incorporated herein by reference, the Motion [to Dismiss] is well taken and should be granted.

R.E. 4; R. 303. The Court reserved the issue of attorneys' fees until First Methodist submitted sufficient information for the Court to consider an award of attorneys' fees and costs. R.E. 4; R. 304.

On November 12, 2009, Wilton Corp. filed its Motion for Reconsideration, requesting reconsideration and the imposition of a less drastic sanction. R. 306. On January 6, 2010, the Court heard Wilton Corp. 's Motion for Reconsideration. R.E. 5, Tr. 32. At the hearing Smith noted that the order set the depositions for both October 19 and October 20. R.E. 5, Tr. 36; *see* R.E. 2. Also at the hearing, Mr. Wilton again apologized for the appearance that he had disrespected the Court and reiterated the severity of his health condition at the time of the July depositions and again explained his efforts to urge Mayer to appear for his deposition. R.E. 5, Tr. 48-49.

On August 2, 2010, the Court denied Wilton Corp.'s request for relief, finding that Wilton Corp.'s failure to appear on October 19 prejudiced the Defendants, (R.E. 6; R. 526) and that Mr. Wilton's reason for failing to appear at his deposition at the scheduled time was "not a valid excuse [for] his conduct." R.E. 6; R. 528. Although the Court stated that it considered lesser sanctions and that no less drastic sanction than dismissal would "achieve the purposes of compliance with the rules," it made no specific findings of why a less drastic sanction would not have been appropriate. *Id.* The Court again reserved the issue of attorneys' fees. *Id.*

Wilton Corp. appeals the harsh and drastic remedy of dismissal with prejudice and seeks reversal and remand of its case for a trial on the merits and consideration of lesser sanctions.

SUMMARY OF THE ARGUMENT

Dismissal with prejudice is the ultimate sanction intended for the most severe acts of bad

faith and fraud. In the face of testimony that Mr. Wilton was unaware of the Court's order, the Chancery Court abused its discretion in dismissing Plaintiff's case because there was no violation of the Court's order and there is no evidence that Mr. Wilton willfully or in bad faith failed to appear for his deposition. Any prejudice to First Methodist's preparation for trial could have been avoided by a short continuance to permit the depositions. Dismissing Wilton Corp.'s case was error because there was substantial evidence of Mr. Wilton's confusion and sincere misunderstandings regarding the depositions. The deterrent value of Rule 37 would have been achieved by the imposition of less drastic sanctions such as a short continuance, an order that the Plaintiff pay costs associated with the depositions or monetary sanctions. For these reasons, the Chancery Court 's judgment should be reversed and this matter should be remanded for trial and instructions for the imposition of a less drastic sanction.

ARGUMENT

I. THE CHANCERY COURT ABUSED ITS DISCRETION IN DISMISSING WILTON CORP.'S CASE WITH PREJUDICE.

A. Standard of Review

Mississippi Rule of Civil Procedure Rule 37 dismissals are reviewed for an abuse of discretion. *Beck v. Sapet*, 937 So. 2d 945, 947 (Miss. 2006). While trial courts are vested with considerable discretion as to discovery matters and are given substantial deference, "this does not mean that the trial court's decision[s are] beyond reproach." *White v. White*, 1987 Miss. LEXIS 2983, *7 (Miss. June 3, 1987); *Harvey v. Stone County Sch. Dist.*, 862 So. 2d 545, 549 (Miss. Ct. App. 2003) (Rule 37(b)(2)(C) "give[s] trial judges much discretion, but such is not unbridled.").

Where this Court finds error, reversal of a lower court's decision to dismiss with prejudice is proper. *Allen v. Nat'l R.R. Passenger Corp.*, 934 So. 2d 1006, 1008-09 (Miss. 2006); *Caracci*

v. Int'l Paper Co., 699 So. 2d 546, 556 (Miss. 1997). Indeed, the Mississippi Supreme Court has held that a dismissal for a discovery violation should only be used as a remedy of last resort. *Clark v. Miss. Power Co.*, 372 So. 2d 1077, 1080 (Miss. 1979). In *Clark*, the court instructed:

> 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. The parties should not be penalized for any procedural failure that may be handled without doing violence to court procedures.

Clark, 372 So. 2d at 1080.

Courts should not apply the ultimate sanction of dismissal with prejudice where a lesser alternative sanction would remedy a discovery violation. *Smith v. Tougaloo College*, 805 So. 2d 633, 641 (Miss. Ct. App. 2002). Dismissal with prejudice is a harsh sanction that should be imposed only in those rare instances where the conduct of a party is so egregious that no other sanction would meet the demands of justice. *Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990, 997 (Miss. 1999). Furthermore, dismissal with prejudice should be imposed only where the deterrent value of Rule 37 could not be achieved by the imposition of a less drastic sanction. *Salts v. Gulf Nat'l Life Ins. Co.*, 872 So. 2d 667 (Miss. 2004).

B. The Chancery Court Abused its Discretion in Dismissing the Case With Prejudice.

Mississippi Rule of Civil Procedure 37(b)(2)(C) allows a trial court to dismiss an action for disobedience of a court order, and Rule 37(d) allows the court to make orders regarding a party's failure to appear at their deposition. The Comment to Rule 37 states, however, that "[s]anctions customarily are not imposed until after there has been a refusal to comply with a second [court] order . . . ." M.R.C.P. 37 cmt. Again, denying a litigant's right to pursue its claims by dismissal with prejudice is a "drastic and harsh punishment," and such dismissals are reserved for the most

egregious cases. *See* M.R.C.P. 41(b) cmt;[8] *Wallace v. Jones*, 572 So. 2d 371, 376 (Miss. 1990); *Peoples Bank v. D'Lo Royalties, Inc.*, 206 So. 2d 836, 837 (Miss. 1968).

Few Mississippi cases addressing sanctions for failure to appear at a deposition exist.[9] In *Salts v. Gulf National Life Insurance Company,* 872 So. 2d 667 (Miss. 2004), the court dismissed the plaintiffs' lawsuit after four years of procedural wrangling which involved plaintiffs' failure to comply with discovery orders and ***refusal*** to appear at scheduled depositions. *Salts,* 872 So. at 671. Defendants made six (6) attempts to depose the plaintiffs. *Id.* at 669-72. The plaintiffs sought to avoid being deposed altogether, having moved for a protective order to prevent their depositions. Unlike this case, plaintiffs, thereafter, ***intentionally refused to appear*** for their depositions. *Id.* Both First Methodist and the Chancery Court relied on *Salts* to support the dismissal. Their reliance on *Salts* is misplaced because Wilton Corp. ***never sought to evade*** the scheduled depositions.[10] Indeed, Messrs. Wilton and Bunstein arrived on October 19 and were present that afternoon and were prepared to give their deposition testimony. Mr. Wilton had no obligation (or right) to present Mayer for a deposition in Mississippi, but nevertheless tried to do so as an accommodation to First Methodist which would otherwise have had to subpoena Mayer for deposition in California.

In *Gilbert v. Wal-Mart Stores, Inc.*, 749 So. 2d 361 (Miss. 1999), the Mississippi Supreme Court affirmed dismissal due to the egregious conduct of the plaintiff which required a dismissal

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[8]While Rule 37 is the mechanism used here to impose sanctions, courts' analyses of involuntary dismissals with prejudice for failure to prosecute under Rule 41(b) are similar to Rule 37 dismissals with prejudice for discovery violations.

[9]It is important to note that Mr. Wilton ***did*** appear for his deposition on October 20, only twenty-four hours after his deposition was noticed.

[10]As has been explained and accepted by the Chancery Court, Mr. Wilton could not force Mayer's appearance but had done everything he could to urge him to attend and even purchased his airfare to appear for the depositions. R.E. 3, Tr. 8-9.

with prejudice. In *Gilbert*, the plaintiff ***refused*** to submit to his deposition unless the defendant complied with a list of demands, including paying plaintiffs' attorney's fees relating to the deposition, compensating the plaintiff for the time spent being deposed, and paying plaintiff's travel expenses to attend the deposition. *Gilbert*, 749 So. 2d at 365. Plaintiff also demanded that a list of the subject areas that would be explored at the deposition, as well as "every specific question" that would be asked at the deposition. *Id.* After the defendant did not comply with plaintiff's demands, the plaintiff ***intentionally refused*** to appear at the deposition and the defendant moved for sanctions. *Id.* Despite plaintiff's egregious conduct, the trial court did not enter a dismissal, but rather ordered the plaintiff to appear for the deposition, without any preconditions to his appearance. After plaintiff ***again*** failed to appear for his depositions, the trial court dismissed the action with prejudice. *Id.* In its opinion, the Mississippi Supreme Court noted that plaintiff's conduct was in "***direct defiance of an explicit court order***," and affirmed dismissal as a sanction. *Id.* at 366.

Unlike *Gilbert*, the Wilton Corp. witnesses, Messrs. Wilton and Bunstein, ***did not intentionally refuse*** to appear for their depositions, but rather failed to attend due to miscommunications. Mr. Wilton did not violate the Court's order that he give deposition testimony on October 19 and 20, as Messrs. Wilton and Bunstein were present to give their testimony on the afternoon of October 19 and on October 20. In addition, Mr. Wilton cannot be held to have defied an "an explicit court order" because he did not know that the Chancery Court actually ordered his appearance, and because he sincerely believed that his deposition was set for Tuesday, October 20, and he was present on October 20 to be deposed. There is no testimony to the contrary and Smith's testimony corroborates the fact that Mr. Wilton had a misunderstanding about the depositions.

Other Mississippi cases supporting the severe sanction of dismissal with prejudice involve repeated or clear refusals to abide by court orders. *See e.g., Pierce v. Heritage Props.*, 688 So. 2d

1385, 1387 (Miss. 1997) (plaintiff gave false testimony and intentionally withheld information); *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1368-70 (Miss. 1990) (repeated failure to supplement discovery responses); *Beck*, 937 So. 2d at 948-49 (repeated refusal to respond to discovery despite two court orders); *Clark*, 372 So. 2d at 1079-80 (repeated failure to respond to interrogatories); *Smith*, 805 So. 2d at 633 (repeated refusal to answer discovery despite two court orders). These cases illustrate the type of egregious conduct that the Mississippi appellate courts deem so condemnable that dismissal with prejudice is justified. Mr. Wilton's confusion and misunderstanding regarding deposition dates coupled with his testimony that he had no knowledge of the Court's order is not the kind of egregious conduct that has been deemed sanctionable by the most draconian and harsh remedy available--dismissal with prejudice.

A example of the "extreme circumstances" warranting a dismissal is found in *Beck v. Sapet*, 937 So. 2d 945 (Miss. 2006). In *Beck*, plaintiffs failed to timely serve written discovery responses. *Beck*, 937 So. 2d at 946. The defendant filed a motion to compel that was granted by the trial court. *Id.* Thereafter, the plaintiffs failed to provide discovery responses before the date ordered by the court, and ten days after the deadline, plaintiffs served "unsigned draft responses." *Id.* at 947-48. Not only were the responses, "draft" responses, but they were incomplete. *Id.* Defense counsel requested supplementation of the responses to provide information not included in the draft responses. *Id.* Plaintiffs did not provide signed responses, or supplement the draft responses. *Id.* at 948. Defendant then filed a motion to dismiss for plaintiff's failure to comply with the court's order. *Id.* After the motion to dismiss was filed, plaintiffs again provided incomplete discovery responses. *Id.* Three (3) months later, defendant filed his second motion to compel, as the discovery responses were still incomplete. *Id.* Following a hearing, the court granted the defendant's second motion and compelled plaintiffs to provide complete discovery responses by a certain date. *Id.* The

plaintiff failed to comply with this order, and the trial court dismissed the plaintiffs' claim with prejudice as a sanction for their repeated discovery violations. *Id.* The Mississippi Supreme Court affirmed the dismissal of plaintiffs' claims based upon the clear pattern of willful and contumacious refusals to comply with the orders of the Court. *Id.* at 949-50. *Beck* stands as an example of the extreme, flagrant and repeated misconduct that supports a dismissal as a sanction for discovery violations.

Clear and repeated misconduct is absent here. The July depositions were cancelled as a result of Mr. Wilton's failing health–a justifiable excuse for non-attendance at the depositions. Mr. Wilton exhibited good faith in traveling to Mississippi for the July depositions that had been jointly set and noticed by First Methodist. There was no court order compelling the witnesses' attendance for the July depositions. The postponement of the July depositions cannot be deemed by Mr. Wilton as a refusal to appear. Exigent circumstances prevented Mr. Wilton from testifying. Moreover, additional evidence of good faith was Mr. Wilton's payment of the cancelled deposition expenses.

In *Hapgood v. Biloxi Regional Medical Center*, 540 So. 2d 630, 634 (Miss. 1989), the plaintiff sued her doctor and hospital alleging her doctor ordered certain treatments on her against her will. After the trial court granted summary judgment to defendants for a lack of disputed issues, the court also dismissed the case for plaintiff's repeated failures to produce certain documents in discovery, in spite of multiple orders and continuances of the court. *Hapgood*, 540 So. 2d at 633. The Mississippi Supreme Court reversed, finding that dismissal was not proper where there were other factors explaining plaintiff's "partial lack of compliance," with the trial court's order. *Id.* at 634. In so holding the Supreme Court observed that "[r]esort to such a remedy has been described by various courts as "'[d]raconian' or a 'remedy of the last resort.'" *Id.* (quoting *Nissho-Iwai Amer. Corp. v. Kline*, 845 F.2d 1300, 1304 (5th Cir. 1988)). The law is clear that a trial court should

dismiss a cause of action for failure to comply with discovery only under the most extreme circumstances.

The present case is not one of those extreme circumstances requiring dismissal and does not involve repeated instances of recalcitrant behavior. The July depositions were postponed because of Mr. Wilton's grave health condition which required open heart surgery. When Wilton Corp. sought a continuance of trial, Mr. Wilton was still hospitalized and being treated for and recovering from serious heart surgery. Respectfully, the Chancery Court failed to appreciate the severity of Mr. Wilton's heart-related health problems and the fact that at the time of the October depositions and trial, Mr. Wilton was still only twelve weeks from the date of his surgery. Furthermore, Mr. Wilton's failure to appear at his deposition was not intentional and the Court's order was not violated because Messrs. Wilton and Bunstein were present for their depositions on the afternoon of October 19 and October 20. Mr. Wilton did not avoid his deposition, did not file a motion for protective order, did not refuse to appear and did not deliberately defy a court order. In the absence of a pattern of intentionally violating court orders, the Chancery Court erred in imposing the most severe sanction--a dismissal with prejudice.

C. On Application of the Factors in *Pierce v. Heritage Properties*, 688 So. 2d 1385 (Miss. 1997), Dismissal With Prejudice Was an Abuse of the Court's Discretion.

The Mississippi Supreme Court looks to certain considerations to determine if dismissal with prejudice is the proper remedy for discovery violations. *Pierce v. Heritage Props.*, 688 So. 2d 1385 (Miss. 1997). Dismissal is permitted only (1) when the failure to comply the court's order results from wilfulness or from an inability to comply; (2) where the deterrent value of Rule 37 could not be achieved by the use of a less drastic sanction; (3) where the opposing party's preparation for trial was substantially prejudiced; (4) where 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 sincere misunderstanding of the court's orders. *Pierce*, 688 So. 2d at 1389.

1. The Record Reflects No Evidence of Wilfulness or Bad Faith.

The record does not reflect any evidence of wilfulness or bad faith by Mr. Wilton to give rise to the severe sanction of dismissal with prejudice. The Fifth Circuit Court of Appeals has held that "dismissal as a sanction imposed under Rule 37(d), [is proper only where] plaintiff's failure to comply with discovery has involved either repeated refusals or an indication of full understanding of discovery obligations ***coupled*** with a bad faith refusal to comply." *Griffin v. Aluminum Co. of Am.*, 564 F.2d 1171, 1172 (5th Cir. 1977) (emphasis added).

First, there is no evidence that Wilton Corp. failed to comply with any written discovery requests of First Methodist, evincing Wilton Corp.'s ***good faith*** participation in discovery. The July 14 depositions were rescheduled due to Mr. Wilton's serious heart condition. Wilton Corp. should not be sanctioned for its president and principal's potentially fatal medical condition. Mr. Bunstein explained that he was concerned about giving testimony in the absence of a Wilton corporate representative. Inasmuch as Mr. Wilton's deposition was to be rescheduled, it was reasonable to also reschedule Mr. Bunstein's deposition. As to Mayer, there is no explanation for his absence for the July depositions, but later information shows that Mayer was not within the control of Wilton Corp. Messrs. Wilton and Bunstein did in fact travel to Mississippi for the purpose of providing their deposition testimony, negating claims of willfulness and bad faith.

Second, Mr. Wilton's testimony fails to show he had a full understanding of his obligation to appear for his deposition on Monday, October 19, pursuant to a court order. Mr. Wilton testified that he was ***unaware*** of the court's order regarding the October depositions. R.E. 3, Tr. 9. Mr. Wilton consistently testified that he believed the depositions were to occur on Monday ***and*** Tuesday,

October 19 and 20. This testimony was corroborated by Smith who testified that all of his communications to Wilton Corp. were addressed to Mayer, as in-house counsel for Wilton Corp. and that he sent the September 8-Order compelling the depositions to Mayer, not to Messrs. Wilton or Bunstein. When Smith finally talked to defense counsel on Monday morning, October 19, he explained that Mr. Wilton believed that his deposition was on Tuesday, rather than Monday. R.E. 3, Tr. 16-17. As a result, the record establishes that Mr. Wilton ***did not know*** of the September 8-Order and misunderstood when his deposition was set to occur, making the Chancery Court's most severe penalty improper.

As to Mayer's failure to appear, the Chancery Court recognized that Wilton Corp. no longer had any control over Mayer as he was no longer employed with Wilton Corp. R.E. 3, Tr. 28. Mr. Wilton testified that he did not know until Sunday morning, October 18, that Mayer was not going to travel that day. Despite Mayer's separation from Wilton Corp., as of October 18, Mayer indicated his willingness to appear for his deposition. R.E. 3, Tr. 11. It was not until Monday, October 19 that Mr. Wilton learned that Mayer would not in fact appear voluntarily. R.E. 3, Tr. 12. Mr. Wilton and Smith testified that Mayer would be the lead witness as he had the most knowledge of Wilton Corp.'s contract with First Methodist. R.E. 3, Tr. 9, 11. At the January 10, 2010 hearing, Mr. Wilton testified:

> I don't know why [Mayer] did not come. I still don't know why. I talked to him on Sunday. He was supposed to meet me at the airport. He said he had a personal problem. He was very sorry. He'll come tomorrow, which was Monday. . . .I stood at the airport again on Monday morning waiting for him and Mr. Bunstein. He didn't show up.

R.E. 5, Tr. 49.

The fact that Mayer did not appear is insufficient grounds to support the most drastic sanction on Wilton Corp.--yet it appears that is what the Chancery Court did. The chancellor stated:

> It also appears to me that the issues surrounding Mr. Mayer's attendance or failure to cooperate were known or should have been known much before – some period of time prior to this weekend when travel plans were being accommodated.

R.E. 3, Tr. 29.

Respectfully, there was no evidence from which the Chancellor could have found that Wilton Corp. knew or should have known that Mayer would not appear until Mayer did not appear at the airport on October 19. The record establishes that Mr. Wilton, despite his best efforts could not coerce Mayer to attend his deposition, a fact acknowledged by the Chancery Court. R.E. 3, Tr. 7-10; R.E. 5, Tr. 48-49. Mr. Wilton purchased Mayer's air travel tickets and did all he could to persuade Mayer to travel for the October 19 deposition. R.E. 5, Tr. 48-49. The testimony demonstrates Mr. Wilton's good faith attempts to comply with the deposition notices and Mayer's refusals to do so. Mr. Wilton was without any legal authority to force Mayer to appear and from the record it is clear that there is nothing Mr. Wilton could have done to compel Mayer to appear. It is plainly evident that Mr. Wilton had no control over Mayer.[11]

Mr. Wilton further testified that as a result of his illness he had severe memory problems. R.E. 3, Tr. 10. Mr. Wilton's memory problems were evidenced in his confusion over whether he had in fact traveled to Mississippi for the July depositions. R.E. 3, Tr. 6, 10. On redirect, Smith cleared up Mr. Wilton's obvious confusion and his failure to recall his travels only three (3) months prior to giving his testimony. R.E. 3, Tr. 10.

The Chancery Court held that the Wilton Corp. witnesses' conduct in "deciding not to show

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[11]Mayer's conduct is difficult to understand. After agreeing to come to Mississippi for a deposition, he told Mr. Wilton that he could not travel on October 18 because he would be on a boat all day. R.E. 3, Tr. 11. Looking for Mayer, Mr. Wilton spoke to Mayer's wife on October 19, who told him she could not find her husband and needed help in doing so. R.E. 3, Tr. 12. Mr. Wilton spoke on the telephone to Mayer on October 18, and Mayer agreed to meet Mr. Wilton at the airport to fly to Mississippi on October 19, but Mayer failed to show up for the flight. R.E. 5, Tr. 49.

up at the Court ordered time for their personal deposition" was personal and intentional conduct. R.E. 6; R. 527. The Chancery Court's September 8 Order, however, did not set *both* the date and time for the Wilton Corp. depositions and *did not* state that Mr. Wilton's deposition would be taken on October 19. Rather, the order only provided that the depositions were to occur October 19 and 20. R.E. 2. In fact, the depositions of Messrs. Wilton and Bunstein could have been taken on October 20 in compliance with the Court's order. Instead, First Methodist chose to have a hearing on that date rather than take the depositions.

Unlike the facts in the *Salts* and *Gilbert* cases, there is no record of a continued effort to avoid the depositions. The evidence shows that the July 14 depositions were cancelled due to Mr. Wilton's illness, although there was no explanation why Mayer did not accompany Mr. Wilton and Bunstein on July 14. Nonetheless, the fact that Messrs. Wilton and Bunstein traveled to Mississippi for their scheduled depositions evinces their willingness to be deposed and their good faith in doing so. In addition, Messrs. Wilton and Bunstein's appearance on October 19 likewise demonstrates their willingness to offer their deposition testimony. Had Defendants taken the deposition on October 20, Wilton Corp. would have been in compliance with the order, except as to Mayer, whom the Court agreed Wilton Corp. could not control. Because there was no evidence of wilfulness and bad faith, the Chancery Court erred in dismissing Wilton Corp.'s claims.

2. Dismissal Was Improper Because Less Drastic Sanctions Were Available.

In *Pierce*, the Mississippi Supreme Court held that "dismissal is proper only in situation [sic] 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)). Rule 37(b)(2)(C) does not mandate dismissal of an action with prejudice. Rather,

the rule permits a court to enter orders it deems just. Here, the Chancellor had a number of options, other than dismissal with prejudice, to cure any prejudice or impart a penalty on Wilton Corp. The Chancery Court could have entered an order striking certain pleadings, staying the proceedings until the order was obeyed, continuing trial for a short period and compelling the depositions with monetary sanctions.

At the October 20 hearing, Wilton Corp.'s counsel advocated the following lesser sanctions:

> you could order the plaintiff to pay all costs of the court reporter, for any expenses he's had. You could also levy under rule 37 monetary sanctions. Even if we didn't go forward, you could sanction or award attorneys' fees if we continue the trial to allow more depositions. You could award the defendant all costs of that.

R.E. 3, Tr. 26. The trial was scheduled for Wednesday and Thursday, October, 21 and 22 and according the Chancellor, the following day was available should the time be needed. R.E. 3, Tr. 28. Consequently, the Chancery Court could have ordered the depositions to be taken on the afternoon of October 20[12] and continued trial to October 22 and 23. Defense counsel had already planned to have only one day's time to prepare for trial. R.E. 5, Tr. 41. With trial moved by one day, defense counsel would have had October 21 to use for trial preparation. Moreover, a trial at that time without Mayer would have served as a sanction in itself to Wilton Corp. Mr. Wilton had testified as to his importance to this case and his knowledge of the negotiations regarding the Agreement. R.E. 3, Tr. 9, 11

Even more, the Chancery Court could have continued trial to another trial setting altogether, allowing time for the depositions to be taken and the parties to obtain Letters Rogatory to compel Mayer to give his deposition testimony. In addition to these options, the Chancery Court could have

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[12]Defense counsel learned early October 19 that the Wilton Corp. witnesses would not arrive until the afternoon. Consequently, defense counsel had already prepared to take their depositions and would not have been prejudiced by being ordered to take the depositions a day later.

ordered Wilton Corp. to pay monetary sanctions. All of these lesser sanctions would have promoted Mississippi law that favors trials on the merits. *Watson v. Lillard,* 493 So. 2d 1277, 1278 (Miss. 1986); *Harvey*, 862 So. 2d at 549.

3. Defendant's Preparation for Trial Was Not Substantially Prejudiced.

The underlying claim in this case is a breach of contract. R. 9. The contract allowed for cancellation of the contract and return of its earnest money. First Methodist disagrees, arguing that Wilton Corp. failed to adhere to the contract's terms and therefore it is not required to return the earnest money. R. 46. It is undisputed that Wilton Corp. participated in good faith in all written discovery matters and produce all requested discovery. Consequently, First Methodist possessed all the documents and reports on which Wilton Corp. intended to rely for its claims against the church.

It is well settled that courts are obligated to enforce contracts as they are written--extrinsic oral testimony about what contract provisions means is inadmissible, unless the contracts are deemed ambiguous. *Ivison v. Ivison*, 762 So. 2d 329, 335 (Miss. 2000). Neither party in this case deemed the contract ambiguous; as such, the Chancery Court would have been required to determine the dispute in this case on the four-corners of the contract along with other supporting documents. Any parol or extraneous evidence as to the meanings of the provisions would have been subject to exclusion. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003) (holding that where language in a contract is without ambiguity, parol testimony and other extrinsic evidence are inadmissible to construe the meaning of the contract.).

Given that the issues in the present case involved construction of the contract, most of the testimony introduced at trial would have been for the admission of the relevant documents into evidence. Testimony about what the provisions were intended to mean, would have been subject to exclusion. Any prejudice to First Methodist could have been cured by a continuance of trial.

4. The Record Does Not Support Dismissal Because of Mr. Wilton's Confusion and Sincere Misunderstanding of the September 8, 2009 Order.

Mere negligence or confusion is not sufficient to justify a finding of willful misconduct. *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909, 914 (11th Cir. 2010) (citing *McKelvey v. AT&T Techs., Inc.*, 789 F.2d 1518, 1520-21 (11th Cir. 1986)). The record clearly establishes Mr. Wilton's misunderstanding regarding the dates and times of the October depositions.

Mr. Wilton testified that he was ***unaware*** of the Court's order regarding the October depositions and he believed that the depositions could be taken on Monday and Tuesday, October 19 and 20, respectively. R.E. 3, Tr. 12. Smith corroborated Mr. Wilton's testimony when he testified that ***all*** of his communications with his client were addressed to Mayer, as its then in-house counsel. R.E. 3, Tr. 19. Further, Smith testified that he sent the Court's September 8-Order compelling the depositions to Mayer, not to Messrs. Wilton or Bunstein. R.E. 3, Tr. 19.

At the time Mr. Wilton gave his testimony in October, it had been less than three months since his evasive heart surgery. Mr. Wilton testified about his memory problems as a result of his illness. R.E. 3, Tr. 10. Smith's testimony corroborated the fact that Mr. Wilton was confused about the deposition dates. As a result, the record reflects Mr. Wilton's confusion and his failure to appreciate the importance of this appearance for his deposition on Monday, rather than Tuesday. Mr. Wilton's apologies to the Court reflect his sincere remorsefulness and show a lack of intentional misconduct.

D. The Chancery Court Abused Its Discretion in Failing to Consider Lesser Sanctions.

The record reflects no findings by the Chancery Court explaining what lesser sanctions it considered. At the two hearings in this case, Chancery Court did not make specific findings of the lesser sanctions it considered nor is there any statement in its two orders of the less drastic sanctions

it considered. Rather, the Court merely stated it had considered lesser sanctions and found that "none would achieve the purposes of compliance with the rules." R. 528; R.E. 3, Tr. 29.

The Mississippi Supreme Court has held that to affirm an involuntary dismissal it must be clear that the lower court has considered lesser sanctions and why such sanctions would not provide a proper remedy. *See AT&T v. Days Inn*, 720 So. 2d 178, 181 (Miss. 1998) (court unlikely to affirm unless it is clear "trial court has considered lesser sanctions and has concluded that 'such sanctions would have been futile in expediting the proceedings.'") (Citing *Wallace v. Jones*, 572 So. 2d 371, 376 (Miss. 1990)); *McCloud River R.R. Co. v. Sabine River Forest Prods., Inc.*, 735 F.2d 879, 883 (5th Cir. 1984) (trial court order vacated for failure to consider lesser sanctions)). Moreover, the Mississippi Supreme Court has also noted that if the record does not reflect that the trial court considered alternative sanctions, then an involuntary dismissal is less likely to be affirmed. *Hoffman v. Paracelsus Health Care Corp.*, 752 So. 2d 1030, 1035 (Miss. 1999).

CONCLUSION

Wilton Corp.'s dismissal is due to be reversed for a trial on the merits. The Chancery Court's September 8, 2009 Order was not violated. The Wilton Corp. representatives were present in Mississippi and available for their depositions on October 19 and 20. The Chancery Court should not have imposed the most drastic of all sanctions and erred by failing to impose a lesser sanction of a continuance of trial and perhaps the imposition of monetary sanctions.

Respectfully submitted, this the 22nd day of February, 2011.

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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 BRIEF** was mailed, by United States mail, postage prepaid to

Hon. Jim Persons, Chancellor
Harrison County Chancery Court
Second Judicial District
P.O. Box 457
Gulport, MS 39502

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