

# Winning Your Case With Cross-Examination

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There is no substitution for thorough preparation prior to conducting cross-examination of an adverse witness. In civil litigation today the overwhelming percentage of cross-examinations are conducted during the discovery phase of the case. Through proper and thorough preparation you can prevail and ultimately win during discovery by proving your case through adverse witnesses. Moreover, you can significantly damage the credibility of experts.

As lawyers and sworn officers of the Court we do not create, alter or change the facts. Such conduct can and will lead to severe sanctions including the loss of the great privilege of being members of an honorable profession. If we have clients who demonstrate a propensity to tell anything but the truth, as lawyers, we have a duty to advise that client "don't let the doorknob hit you in the rear end on the way out the door." No client and no case is, or ever will be, worth a lawyer compromising his or her honor, credibility and reputation.

We have all seen cases where parties to litigation have made a determination that they are willing to face all potential sanctions rather than reveal the truth. Such a cavalier attitude can and should be devastating to either a plaintiff or a defendant.

Win through your cross-examination by preparing yourself well. The impeachment of critical witnesses in most cases will result in a favorable outcome for your client. If, however, a party chooses to practice deceit, dishonesty and bad faith,

then through your preparation and diligent research, you can and should prevail on a motion for sanctions afforded through Mississippi Rule of Civil Procedure 37.

## A. Sanctions Specifically Authorized by the M.R.C.P.

Gross misconduct in discovery should lead to a Motion for Sanctions. Appropriate redress is afforded through Mississippi Rule of Civil Procedure 37, sub-sections (b); (d) and (e). Rule 37(b) (which is incorporated by reference into sub-sections (d) and (e)) directs that a Court considering a Motion of this nature:

[M]ay make such orders in regard to the [discovery abuses] as are just, and among others the following:

- (A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim[s] of the party[s] obtaining the order;
- (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence;

*Continued on next page*

# Winning Your Case With Cross-Examination

(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**;

(D) in lieu of any of the foregoing orders **or in addition thereto**, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or **in addition thereto**, the court **shall require** the party failing to obey the order . . . to pay the reasonable expenses, including attorneys' fees, caused by the failure . . . .

M.R.C.P. 37(b)(2) (emphasis added). Subsections (d) and (e) of Rule 37, in addition to incorporating the range of remedies set forth above, also authorize the Court to "make such orders" or "impose upon a party . . . such sanctions" as "are just."

## B. Standard

"The decision to impose sanctions for discovery abuse is vested in the trial court's discretion." *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942, 948, ¶ 24 (Miss. 2000) (*reh'g denied*, Oct. 11, 2001) (citations omitted). "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.* Where a trial court applies the proper standard in choosing to enter sanctions of dismissal or default for discovery violations, the Mississippi Supreme Court "will uphold the decision unless we have a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors.'" *Smith v. Tougaloo College*, 805 So.2d 633, 640, ¶ 23 (Miss. Ct. App. 2002) (*quoting Wood v. Biloxi Pub. Sch. Dist.*, 757 So.2d 190, 192 (Miss. 2000)).

## C. Default Judgment in Favor of Movants is the Proper Sanction for Willful and Bad Faith Discovery Violations

The seminal case in Mississippi on the issue of appropriate sanctions for abusive discovery practices is *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997). *Pierce* involved a plaintiff in a personal injury case whose case was dismissed (with prejudice) by the Hinds County Circuit Court as a sanction for discovery violations because the plaintiff concealed the identity of a material witness. Specifically, the Court discovered the Plaintiff, Tyner Pierce, gave false testimony (through responses to various interrogatories, deposition testimony and trial testimony) that she was alone at the time of her injury.<sup>1,2</sup> Between the time the jury's verdict was overturned and the second trial, Defendants' counsel received an anonymous tip that the Plaintiff was *not* alone in bed at the time of the incident. Counsel for the Plaintiff, after being informed the Defendants knew the Plaintiff gave false testimony, identified the individual who was in bed with Ms. Pierce at the time of her injury, and the Defendants took his deposition. Ms. Pierce admitted she gave false testimony and maintained her purpose was not to deceive the Court, but to protect her parents from the fact that she was accompanied by a male companion in bed at the time of her injury. *Pierce*, 688 So.2d at 1387-88.<sup>3</sup>

The Defendants filed motions asking the Court to dismiss the Plaintiff's claims

with prejudice for her failure to identify a material witness, and corresponding false testimony. The Court concluded the nature of Pierce's misconduct merited dismissal of her claims with prejudice with costs assessed against the Plaintiff, and ordered sanctions of that magnitude. *Id.* at 1388. In formulating its holding, **the Court focused on the intentional nature of the Plaintiff's misconduct, and on the effect intentional discovery misconduct has on the litigation process as a whole. The Court observed that a false answer to a discovery request is in some ways worse than no answer, because it misleads the opposing party and casts doubt on the credibility of the entire body of the offender's testimony.** *Pierce*, 688 So.2d at 1389 (citations omitted).

In reaching its conclusions, the Mississippi Supreme Court carefully considered holdings of the Fifth Circuit, and other jurisdictions, concerning similar discovery abuses. The Court examined several such cases in detail, including *Batson v. Neal Spelce Associates*, 765 F.2d 511, 514 (5<sup>th</sup> Cir. 1985) (holding dismissal is appropriate where discovery violations result from willfulness or bad faith, and where the deterrent purpose of Rule 37 can not be achieved by lesser sanctions); *Medina v. Foundation Reserve Insurance Co.*, 870 P.2d 125, 126 (N.M. Sup. Ct. 1994) (holding dismissal appropriate for willful violation of discovery rules, and that the requisite degree of willfulness may be found upon a showing of "conscious or intentional failure to comply

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with the rule's requirements" or a finding of "either a willful, intentional or bad faith attempt to conceal evidence or a gross indifference to discovery obligations."); and *Orkin Exterminating Co. v. McIntosh*, 452 S.E.2d 159 (Ga. Ct. App. 1994) (faced with a Georgia rule that only permitted certain sanctions when a party completely failed to answer interrogatories, holding failure to punish a party for giving false or erroneous answers to interrogatories "would force parties to assume the falsity of every sworn interrogatory response and file endless motions preserving their right to relief" and that such a rule "would allow the unscrupulous to conceal documents . . . by the simple expedient of denying their existence, without fear of penalty if the deception were discovered," and concluding that less than diligent and/or candid discovery responses "would not only go unpunished, it would be rewarded"). See *Pierce*, 688 So. 2d at 1390.

The Mississippi Supreme Court emphasized the holding by the New Mexico Supreme Court that *it is not necessary to make a finding that concealed information is critical to trial preparation*

in order to dismiss a party's claims. *Pierce*, 688 So.2d at 1390 (citing *Medina*, 870 P.2d at 128). In so doing, the Mississippi Supreme Court adopted a no frills **policy that willful or bad faith discovery violations will not be tolerated in this State**, whatever the circumstances, and endorsed the use of the severest possible sanctions to provide necessary deterrents under Rule 37, and to preserve our Judicial process. Notwithstanding the fact Ms. Pierce's concealment of the identity of a witness to her injury was not critical to the prosecution/defense of the case, the high Court held:

[T]he instant case provides the **paradigm situation** [for granting the "death penalty" sanction of dismissal] in which the plaintiff **knowingly refused to be forthcoming and actively withheld the truth** from the Court . . .

. . . The same reasoning [as the reasoning applied by the Court in *The Mississippi Bar v. Land*, 653 So. 2d 899 (Miss. 1994)] applies to a client

who knowingly gives false testimony under oath and conceals significant facts from the court. **Such action by any party should not and will not be tolerated. If a Defendant had done the same in this case, the trial court would have been affirmed if it struck the answer and allowed a default judgment to occur.**

*Pierce*, 688 So.2d at 1391-92 (emphasis added).<sup>4</sup> Emphasizing the need for "death penalty" sanctions as punishment for a party who intentionally and/or in bad faith conceals evidence, the Court noted that the trial court considered lesser sanctions, including the right to cross examine the Plaintiff on her previous concealment of the identity of a material witness, and monetary sanctions in the amount of *all costs incurred by the Defendants in the litigation*. *Id.* at 1390. After discussing the availability of these lesser sanctions, the Mississippi Supreme Court concluded:

The other sanctions considered by the court **would not achieve the deter-**

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# Winning Your Case With Cross-Examination

rent value of dismissal. Since *any other sanction beside dismissal would virtually allow the Plaintiff to get away with lying under oath without a meaningful penalty*, the trial court's decision regarding this factor was correct.

*Pierce* 688 So.2d at 1391 (emphasis added).

The Mississippi Supreme Court specifically confirmed in *Pierce* that the "death penalty" as a sanction for discovery violations is not reserved for contemptuous plaintiffs, but that **the Supreme Court will affirm an entry of default judgment as a sanction against a defendant that engages in intentional or bad faith discovery misconduct.** (*Pierce*, at 1392).

Appellate courts reviewing "death penalty" sanctions subsequent to *Pierce* interpret *Pierce* as setting forth four (4) "considerations" a trial court should examine when evaluating the appropriateness of entering such sanctions. *See, e.g. Smith v. Tougaloo College*, 805 So. 2d 633 (Miss. Ct. App. 2002). Those considerations are: (1) whether the discovery violation is the result of willfulness or bad faith; (2) whether the deterrent value of Rule 37 may be achieved by lesser sanctions; (3) whether the wronged party has suffered prejudice as a result of the discovery violation; and (4) whether the discovery abuse is attributable solely to trial counsel instead of a blameless client. *Id.* at 640, ¶ 24.

Both the *Pierce* and *Smith* Courts held that **the requisite 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 1390; *Smith*, 805 So.2d at 641, ¶ 25.

## D. Case Law From This, And Other Jurisdictions Supports Entry of the Sanctions

"Death Penalty" sanctions have a necessary place in the jurisprudence of this, and many jurisdictions. The findings and holdings of some of the Courts faced with these issues are as follows:

*Amiker v. Drugs for Less, Inc.*, 796 So.2d 942 (Miss. 2000) (*rehearing denied*, Oct. 11, 2001) – in a case where the

Mississippi Supreme Court was faced only with the issue of whether a successor judge could reverse the original judge's order entering default judgment against a defendant who committed willful discovery violations, and concluded the original Judge's order could not be countermanded by the successor judge, the Court observed, in a concurring opinion, that, "[where the actions of the Plaintiff whose \$500,000 verdict we took away in *Pierce* were not as severe as the actions of the Defendant in this case, the default judgment entered by the original Judge was appropriate, and] What is sauce for the goose is sauce for the gander."<sup>5</sup> 796 So.2d at 949, ¶ 30.

*Henry v. Sneiders*, 490 F.2d 315 (9th Cir. 1974) (**cited in *Amiker***) – holding default judgment against a defendant, and evidentiary hearing by the trial court to determine amount of damages wherein evidence pertaining to liability was excluded, were proper where defendant refused to produce certain documents; and finding that it was not necessary for a court's order to produce documents to be reduced to writing in order for default judgment to be an appropriate sanction.

*Billman v. State of Maryland Deposit Ins. Fund Corp.*, 585 A.2d 238 (Md. App. 1991) (**cited in *Amiker***) — holding trial Court's entry of default judgment under Maryland Rule of Civil Procedure 2-433(a) [worded nearly identically to M.R.C.P. 37(b)] was proper, even without clear finding on the Record that plaintiff's trial preparation was prejudiced).

*Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990 (Miss. 1999) — upholding dismissal of plaintiff's claim based on trial court's findings that plaintiff gave untruthful discovery responses, and that the plaintiff's explanation that her failure to identify previous medical treatment was not intentional lacked credibility.

*Cunningham v. Mitchell, M.D.*, 549 So.2d 955 (Miss. 1989) – affirming decision of the Jackson County Circuit Court to dismiss a plaintiff's claims for discovery violations, and emphasizing a court's ability to impose discovery sanctions under M.R.C.P. 37(e) notwithstanding the presence of an order from the court directing that certain discovery responses be made.

The decisions listed above represent a very small example of cases in which dismissal of a plaintiff's claims and/or default judgment against a defendant have been upheld by appellate courts as proper sanctions for discovery violations. The following is a list of multi-jurisdictional cases which address these issues:

*Amiker v. Drugs For Less, Inc.*, 796 So. 2d 942 (Miss. 2001)

*Baston V. Neal Spelce Associates, Inc.*, 765 F.2d 511 (5th Cir. 1985)

*Billman v. State of Maryland Deposit Insurance Fund Corp.*, 86 Md. App.1, 585 A.2d 238 (1991)

*Cunningham v. Mitchell*, 549 So. 2d 955 (Miss. 1989)

*Grant v. Kmart Corp.*, 2001 WL 1610095 (Miss. Ct. App. 2001)

*Hawes Firearms Co. v. Edwards*, 634 P.2d 377 (Alaska 1981)

*Henry v. Sneiders*, 490 F. 2d 315 (9th Cir. 1974)

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*Illinois Central Railroad No. v. Winters*, 815 So. 2d 1168 (Miss. 2002)

*Kilpatrick v. Mississippi Baptist Medical Center*, 461 So. 2d 765 (Miss. 1984)

*Malautea V. Suzuki Motor Company, LTD.*, 987 F.2d 1536 (11<sup>th</sup> Cir. 1993)

*Medina v. Fountain Reserve Insurance Co.*, 870 P.2d 125,126 (N.M. 1994)

*Mississippi Bar v. Land*, 653 So. 2d 899 (Miss. 1995)

*Orkin Exterminating Co. v. McIntosh*, 452 S.E.2d 159 (Ga. Ct. App. 1994)

*Owens v. Whitwell*, 481 So. 2d 1071 (Miss. 1986)

*Pierce V. Heritage Properties, Inc.*, 688 So. 2d 1385 (Miss. 1997)

*Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990 (Miss. 1999)

*Smith v. Tougaloo College*, 805 So. 2d. 633 (Miss. App.2002)

*Square D. Company v. Edwards*, 419 So. 2d 1327 (Miss. 1982)

*Wood v. Biloxi Public School District*, 757 So. 2d 190 (Miss. 2000) ■

<sup>1</sup> Ms. Pierce's case originally went to trial, at which time she was awarded a \$500,000 jury verdict. The trial Court overturned the verdict on a finding of improper closing argument by Ms. Pierce's counsel, and ordered a new trial. The discovery violations that resulted in dismissal of Ms. Pierce's claims with prejudice were uncovered during the period preceding the second trial.

<sup>2</sup> The Plaintiff's cause of action arose from injuries allegedly received when a ceiling fan above a bed became dislodged from the ceiling and fell onto the Plaintiff.

<sup>3</sup> Note that the previously concealed witness' deposition *was taken*, and there is no indication in the Court's opinion that his testimony about the circumstances surrounding the injury was any different than the Plaintiff's. As stated, the Plaintiff explained her concealment was for the sole purpose of protecting her parents from unpleasant facts. Notwithstanding the fact the Plaintiff's concealment of the identity of a material witness had no effect on facts concerning the causation of injury, and would thus not materially prejudice the Defendants' defenses (in fact, one would have to assume the male companion's testimony would support the Plaintiff's claims), the Supreme Court affirmed absolute dismissal of the Plaintiff's claims because of the intentional nature of her misconduct, and because of the fact lesser sanctions would effectively let the Plaintiff get away with lying with no meaningful consequence, and would not provide the necessary deterrent to prevent future litigants from engaging in similar misconduct — results that would erode the integrity of the judicial process.

<sup>4</sup> Note that the Supreme Court's very strongly stated holding that intentional concealment of evidence *by any party* will not be tolerated, and that "death penalty" sanctions are just in such a situation, is without dissent.

<sup>5</sup> Although the Court was only faced with the issue of whether the successor judge could enter a different sanction than his predecessor, the Supreme Court made a point to emphasize that the "death penalty" is not reserved for naughty plaintiffs, but that, in cases where there is evidence of intentional and/or bad faith discovery violations by the defendant, entry of default judgment is an appropriate sanction.

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