

# The Truth Shall Set You Free...

## Assuming of Course, the Other Side Lied About it in the First Place

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"Beauty is truth, truth beauty, —  
that is all  
Ye know on earth, and all ye  
need to know."

- John Keats, Ode on a Grecian Urn  
(1819)

For most defense lawyers, there are few things as beautiful as an Order of Dismissal with Prejudice. Presenting a judgment of dismissal to the client is the legal equivalent of the Tiger Woods fist pump. The order, itself, may be only a fraction of an ounce, but the satisfaction weighs a ton.

In truth, dismissals are rarely the result of shrewd lawyering. The majority of the credit generally goes to friendly facts and good case law. Sure, we like to pretend that we've just sunk an impossible forty foot chip on the 16th at Augusta (*see* Woods, '05), but usually it was a two-footer at most, slightly uphill.

Occasionally, however, the dismissal of a case is the result of defense lawyers fulfilling perhaps their most fundamental and essential purpose. While finding the truth in any case is difficult, lies, omissions and other inaccuracies can obscure it to the point of invisibility. When lawyers are able to spot the truth through the camouflage of deception, they can truly claim to have not only served their client, but the integrity of the entire judicial process. Say it loud, say it proud ... "I AM Tiger Woods."

Not surprisingly, Courts have demonstrated a willingness to reward the lawyer who exposes the untruthful

litigant. The lie must be proven, of course -- ours is mercifully a system that rejects mere suspicion -- but when the fallacy is shown, justice comes swift and severe. As demonstrated by the cases discussed below, courts have taken an unforgiving stance on parties that refuse to acknowledge the true facts of the case, including dismissal with prejudice, the "death penalty" of civil law and imposing sanctions.

### A. Mississippi Cases

To their credit, the Courts of Mississippi have demonstrated a particular intolerance for litigants who willingly conceal the truth. In its landmark decision, *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997), the Mississippi Supreme Court upheld the dismissal of a case where the plaintiff responded untruthfully to both written discovery requests and inquiries posed during her sworn deposition. *Pierce*, 688 So.2d at 1390. The Court specifically found that the plaintiff's conduct "constitute[d] bad faith," and further held as follows:

In this instance, *Pierce's* failure to comply was a result of willfulness. *Pierce* consistently obstructed the progress of the litigation by filing admittedly false responses to various discovery requests and by swearing to false testimony in depositions. ... *Pierce* only admitted that she had been untruthful in her responses to discovery when she

realized that the defense knew the truth and confronted her with it.

*Pierce*, 688 So.2d at 1390 (emphasis added) (citations omitted).

Two (2) years after *Pierce*, in *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990 (Miss. 1999), the Supreme Court again affirmed the dismissal with prejudice of premises liability claims, where the Court found discrepancies between the plaintiff's written discovery responses concerning preexisting injuries and her medical records. *Scoggins*, 743 So.2d at 995. In so ruling, the Court affirmatively cited the trial court's discussion of the plaintiff's conduct, which stated as follows:

More importantly, however, she impeded the orderly administration of the judicial system and subverted the very reason for implementation of the discovery rules. ... *The Defendant inquired in good faith several times whether Ms. Scoggins had any prior medical conditions that might bear on the question of the extent of her damages. Each time her answer under oath was in effect, 'No, nothing.'*

*Scoggins*, 743 So.2d at 994 (emphasis added).

More recently, in *Jones v. Jones*, 995 So.2d 706 (Miss. 2008), the Court reiterated its harsh stance on dishonesty in the judicial process. Since *Jones* was a divorce matter, the sanction of dismissal was unavailable. Nevertheless, the Court demonstrated that the punitive spirit of *Pierce* and *Scoggins* remains viable, and further suggested that civil penalties may not be the only retribution faced by dishonest litigants:

It is beyond dispute that Nevada abused the discovery process by resisting discovery. She resisted discovery by admittedly lying under oath about staying the night at

Paxton's house and having sexual intercourse with Paxton. She resisted discovery also by lying under oath about when her sexual relationship with Paxton commenced and intentionally destroying her personal computer immediately after her March 8 deposition. The question is whether the chancellor abused his discretion by not imposing sanctions against Nevada for her admitted perjury and destruction of evidence.

\* \* \*

*Having examined the record and having reviewed our case law, we agree with the dissenting judges below that Nevada's misconduct must "not go unpunished." As we previously have stated, such attempts to subvert the judicial process will not be tolerated. When faced with such egregious misconduct, courts are obligated to consider sanctions that are severe enough to deter others from pursuing similar courses of action. The chancellor in this case did not satisfy that obligation and abused his discretion by not addressing Nevada's misconduct. Accordingly, the chancellor, on remand, must consider imposition of sanctions and/or a referral to the district attorney to consider criminal prosecution for perjury and destruction of evidence.*

*Jones*, 995 So.2d at 711-12 (emphasis added).

Following the lead of the Supreme Court, the Mississippi Court of Appeals has likewise demonstrated little patience for parties engaged in judicial deception. In *Grant v. Kmart Corp.*, 870 So.2d 1210 (Miss. Ct. App. 2001), another premises liability matter, the Court held that dismissal was the proper remedy where the plaintiff failed to offer complete responses to written discovery. In so ruling, the Court offered the following relevant discussion, highlighting the notion that lawyers sometime share in their clients' transgressions, particularly when they attempt to justify disingenuous conduct:

Grant was explicitly ordered by the court to provide a complete answer to the interrogatories. Grant failed to reveal the fall at Sam's Club subsequent to her fall at Kmart. For the trial court to conclude that such failure was intentional was no strained interpretation of the evidence. Grant claims in her brief that she "was not requested through written discovery to answer whether she had any other falls before or after the accident referred to in the complaint." Interrogatory No. 12 specifically requested whether Grant suffered any injuries to shoulders, back, knees, or hip in any accident either prior to or subsequent to the accident referred to in the complaint. The type of information sought by this question is easily understood. *Grant argues that the answer was complete because the question did not specifically include the term "fall," and instead referred to "injuries" and "accidents." This is not a serious argument.* Her attorney's ability to equate "accident" with "fall" appears in the complaint that was filed in this case, which stated ... "she suddenly and without warning came into contact with water on the floor of said store which caused Plaintiff, Dorothy Grant, to fall to the floor with great force and violence, thereby sustaining serious bodily injuries. Said accident and injuries to Plaintiff, Dorothy Grant, resulting therefrom were solely caused by the negligence of the Defendant."

Grant also responded in an interrogatory that "I am not able to enjoy my normal activities as I did before my accident." Perhaps the fall at Kmart was an "accident," but the fall at Sam's Club was not. For the trial court to fail to see the distinction was not an abuse of discernment.

*Grant*, 870 So.2d at 1214 (emphasis added).

#### **B. Federal Cases**

While Mississippi courts may well have taken the lead in issuing severe sanctions

to parties that fail to offer legitimate information during discovery, their federal counterparts have shown that they view judicial dishonesty will equal disdain. Relying on Rule 37 of the Federal Rules of Civil Procedure, the United States Supreme Court reinstated the district court's dismissal of a case as a sanction for the plaintiff's bad-faith. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43, 96 S.Ct. 2778, 2780-81 (1976). In its decision, the Supreme Court specifically rejected the notion that "outright dismissal" is too severe a sanction, reasoning that it serves as the ultimate deterrent to other litigants inclined to engage in bad faith:

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.

*But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that These respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.*

*National Hockey League*, 427 U.S. at 642-43, 96 S.Ct. at 2780-81 (emphasis added).

Similarly, in *Jones v. Louisiana Bar Ass'n*, 602 F.2d 94, 97 (5th Cir. 1979), the Fifth Circuit issued a *per curiam* decision upholding dismissal with prejudice where the plaintiff “persisted in her disobedience.” *Jones*, 602 F.2d at 97. Like its judicial parent in Washington, D.C., the New Orleans-based court also addressed the notion that dismissal is too harsh a sentence to impose in cases involving discovery violations, and whether a lesser penalty should be faced:

It is clear that Fed.R.Civ.P. 37(b)(2) (C) empowers the District Court to dismiss a complaint when a party refuses to obey a valid discovery order. On appeal, the question is not whether this Court would have acted similarly but whether the District Court abused its discretion. Previous cases decided by this Court have noted that the District Court’s discretion under Rule 37 is broad but not unlimited. Dismissal with prejudice, a “sanction of last resort,” will not be upheld if the noncompliance, even if repetitive, is due to inability rather than to willfulness, bad faith, or disregard of the party’s responsibilities. *In reviewing the District Court’s exercise of discretion, one concern is whether a less drastic, but equally effective, remedy could have been fashioned. Here, the only other Rule 37 remedy the District Court could have applied in these circumstances would have been prohibiting Appellant from using the tape recording in evidence and/or striking all reference to the alleged conversation from Appellant’s pleadings. In view of Appellant’s deliberately obstructive conduct, however, we hold that the District Court did not abuse its discretion by ordering the more severe remedy of dismissal.* Our review of this record convinces us that the District Court here was faced with the sort of repeated refusal to comply with a valid order which calls for dismissal.

*Id.* (emphasis added) (internal citations omitted); see also *Griffin v. Aluminum Co. of America*, 564 F.2d 1171, 1172 (5th Cir. 1977) (“Rule 37 empowers the district court to compel compliance with Federal discovery procedures through a broad choice of remedies and penalties, **including dismissal with prejudice.**”) (emphasis added); *Yazdchi v. American Honda Finance Corp.*, 217 Fed. Appx. 299 (5th Cir. 2007) (“Under Rule 37(b)(2) of the Federal Rules of Civil Procedure, a district court may impose ‘just’ sanctions on a party who fails to comply with a discovery order, **including the dismissal of a plaintiff’s action with prejudice.**”) (emphasis added); see also *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103 (D. Md. 1989) (dismissing plaintiff’s claim for lost income with prejudice where plaintiff offered false responses to written discovery and deposition questions concerning his past income).

### C. “Your Honor, I Can Explain That ...”

*“Men stumble over the truth from time to time, but most pick themselves up and hurry off as if nothing happened.”*  
- Winston Churchill

Not surprisingly, when it is exposed that a litigant has offered less than complete or honest information, their attorney is often quick to explain such conduct -- to “pick them up,” as Churchill might say. While sympathy is hardly guaranteed, pleas of innocence do not fall on deaf ears. In *Beck v. Sapet*, 937 So.2d 945 (Miss. 2006), the Supreme Court clarified the standards by which it decides whether the sanction of dismissal is warranted, and expressly acknowledged that the willfulness of the violation is to be considered. Specifically, the Court offered the following:

Trial courts have considerable discretion in discovery matters, and their decisions will not be overturned unless there is an abuse of discretion. Further, this Court looks to the following factors to determine if a dismissal with prejudice is the proper remedy for discovery violations:

(1) *whether the discovery violation resulted from willfulness or an inability to comply*; (2) whether the deterrent value of Rule 37 could not have been achieved through lesser sanctions; (3) whether the other party’s trial preparation has been prejudiced; (4) whether the failure to comply is attributable to the party itself, or their attorney; and (5) whether the failure to comply was a consequence of simple confusion or a misunderstanding of the trial court’s order. This Court only reverses if it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors.

*Beck*, 937 So.2d at 948 (emphasis added) (internal citations omitted).

As set forth above, the primary factor in determining whether dismissal is appropriate is whether the failure to offer a complete disclosure was willful. Not surprisingly, litigants often claim that the failure to offer accurate information is the result of poor memory. As many defense lawyers likely would attest, “I don’t recall” is the single-most commonly uttered phrase in any given deposition. In this regard, the Mississippi Supreme Court has demonstrated that it is not afraid to delve into the full circumstances in order to evaluate the legitimacy of such claims. For example, in *Scoggins*, the Court examined the plaintiff’s claim that “she either did not remember visiting a doctor or did not think her prior medical problems were important.” *Scoggins*, 743 So.2d at 992. In rejecting the plaintiff’s claim that her failure to remember her extensive back pain was the product of a faulty memory, the Court stated as follows:

The trial court noted that during her deposition and at the hearing, Scoggins “could recall specific incidents, dates, chronologies and places as far back as 1958 and as recently as a few months ago. She could name all of her relatives, and specifically recalled the events of both the hunting season prior to the accident and the accident itself. ... *The only thing she was not*

*apparently able to recall were the visits to Dr. Pace and Dr. Bowlus which went unreported to the Defendant. Such highly selective memory loss, especially when it is unsupported by any medical opinion of genuineness, is simply not credible."*

*Scoggins, 743 So.2d at 993 (emphasis added).*

The *Scoggins* case is not the only time the Mississippi Supreme Court has been called upon to address a litigant's claim that the submission of false discovery responses was the result of poor memory. In *Allen v. National R.R. Passenger Corp.*, 934 So.2d 1006 (Miss. 2006), the Court held that an employee's failure to disclose that he had previously suffered disc injuries to his lower back while working as police officer resulted from willfulness or bad faith, and not from a legitimate lapse of memory, such that dismissal of his claims was warranted:

*We find it to be unusual that Allen would have forgotten about a*

*back injury which occurred in the same place on his spine eight years earlier, which resulted in his missing work, and for which he was awarded workers' compensation benefits. Allen's argument that an accident occurring eight years earlier was far enough away in time to have been easily forgotten weakens when we consider the undisputed fact that Allen told his family physician about the 1993 incident in 2000, only one year before the injury giving rise to this litigation, and seven years after the earlier injury occurred.*

*Allen, 934 So.2d at 1012-13 (emphasis added).*

#### **D. Closing Thoughts**

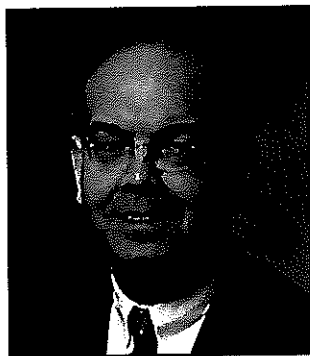
*"A trial is a proceeding designed to be a search for the truth.' When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only*

*cut short, but that the penalty will be sufficiently severe to dissuade others from following suit."*

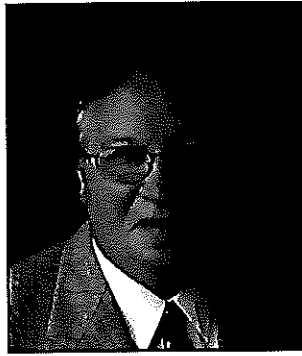
*Scoggins, 743 So.2d at 994-95 (quoting Sims v. ANR Freight Systems, Inc., 77 F.3d 846, 849 (5th Cir. 1996)) (emphasis added).*

The preceding quote succinctly conveys the logic underlying the judiciary's refusal to allow dishonesty to go unpunished. If ours is truly a noble profession, one worthy of self-regulation, then honesty and integrity must be preserved as its load-bearing pillars. To come full circle, it is again worthwhile to think of the game of golf, often the lawyer's other self-regulated passion. As Bobby Jones once famously said, "When you cheat in golf, the only person you're cheating is yourself." In this same context, those that cheat the law also cheat the stewards of the law -- namely, us lawyers. The next time your client begs for "winter rules," be sure and tell them it is always Summer in the Courts of Mississippi. ■

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