

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00322 COA**

**1989 CHEVROLET CORVETTE, VIN
#1G1YY2182K5105049**

APPELLANT

v.

**STATE OF MISSISSIPPI, EX REL OFFICE OF THE
DISTRICT ATTORNEY AND THE NORTH
MISSISSIPPI NARCOTIC UNIT**

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	3/13/95
TRIAL JUDGE:	HON. FRANK ALLISON RUSSELL
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KELLY HARWICK
ATTORNEY FOR APPELLEE:	JIM FRAISER
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	CORVETTE ORDERED FORFEITED
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

KING, J., FOR THE COURT:

The Circuit Court of Lee County entered a default judgment resulting in the forfeiture of a 1989 Chevrolet Corvette, VIN number 1G1YY2182K5105049. Tom Jackson, the owner of the vehicle, appeals the court's ruling. Jackson alleges the following errors:

- I. It was an abuse of discretion for the trial judge to deny his Motions for Summary Judgment.
- II. It was an abuse of discretion for the trial judge to sanction him by granting a Default Judgment in a forfeiture action.

III. It was a violation of the United States and the Mississippi State Constitutions to use court rules to circumvent constitutional requirements in a forfeiture action thereby causing Section 41-29-153 of the Mississippi Code Annotated of 1972 to be unconstitutional.

IV. It was a violation of due process for the court to allow the taking of property without allowing an opportunity to challenge the allegations of the State through a hearing.

V. It was a violation of the Eighth Amendment's strict prohibition against excessive fines as punishment for established wrongdoing to allow the State to take the automobile.

Finding no reversible error, we affirm the judgment of the trial court.

FACTS

In February 1993, the North Mississippi Narcotics Unit (NMNU) seized a 1989 Chevrolet Corvette, VIN number 1G1YY2182K5105049, alleging that it was used or intended to be used for the transportation, sale, receipt, possession or concealment of controlled substances in violation of the Mississippi Uniform Controlled Substance Law. Pursuant to section 41-29-153(a) of the Mississippi Code Annotated of 1972, the State filed a Petition for Forfeiture of the automobile on March 10, 1993. An amended Petition was filed on March 19, 1993. Tom R. Jackson, as title holder, GMAC, as lienholder, and Marvin Jackson, as the person in possession, were served with a copy of the Petition. GMAC was served on April 15, 1993. Service for the Jacksons was made upon their attorney on April 14, 1993.

The Jacksons filed an Answer, Counter-claim, and Response to Request for Admissions on May 6, 1993. The State answered the counter-claim on June 7, 1993. The case was set for trial on September 17, 1993.

On August 16, 1993, the State filed a Motion to Compel Discovery contending that the Jacksons failed to comply with discovery. The State requested a hearing on the motion and a continuance of the trial in order to review the discovery provided and time to complete further discovery. The court granted the hearing and entered an Order Compelling Discovery on October 27, 1993. The Jacksons were ordered to comply with discovery by November 29, 1993. Counsel for the Jacksons withdrew on November 18, 1993. The Jacksons did not meet the discovery deadline set by the court.

On November 30, 1993, the State filed a Motion to Strike the Claimants' Answer and Motion for Default Judgment. The court granted the Motion to Strike on that same day. Then on December 7, the court granted a Motion to Set Aside Order Striking Answer of Tom Jackson. A Default Judgment of the Interest of Marvin Jackson was granted on December 14, 1993. Tom Jackson then filed a Motion for Summary Judgment and Supplemental Responses to Interrogatories and Request

for Production of Documents on December 29, 1993. The State contended that Jackson's responses were incomplete and filed a Motion for Sanctions and to Dismiss Claimant's Motion for Summary Judgment, or in the Alternative to Stay Plaintiff's Response to Claimant's Motion for Summary Judgment.

In the Motion for Summary Judgment, Jackson recapitulated his initial answer to the petition. He denied the allegations of the State and argued that the State failed to prove that he, as the owner of the vehicle, had knowledge of or gave consent to the illegal use of the vehicle. The State contended that Jackson had not complied with the Order Compelling Discovery and therefore, the court should order sanctions against him under Mississippi Rule of Civil Procedure 37. In addition, the State moved the court to dismiss Jackson's Motion for Summary Judgment because he had not provided supporting affidavits, exhibits, or other evidentiary materials. It was also contended that because the court entered the Order to Strike Jackson's Answer, he did not have pleadings before the court for its review pursuant to M.R.C.P. 56. In the alternative, the State moved the court to stay the State's response to Jackson's motion for summary judgment alleging that it was filed untimely. After a hearing on the motions, the court set aside the order striking Jackson's answer and dismissed the motion for summary judgment on January 7, 1994.

In a separately filed motion, the State renewed its request for Rule 37 sanctions. The State contended that Jackson's Supplemental Responses were incomplete, evasive, and did not comply with the court's order of November 29, 1993. On January 12, 1994, Jackson filed a Response to the Motion for Sanctions and a Motion for Summary Judgment. He also filed three affidavits listing his monthly income and expenses for the years of 1989 thru 1991. In response, the State filed a Motion to Dismiss Jackson's Motion for Summary Judgment on January 18, 1994.

The case had little or no activity until May 17, 1994 when the court entered a second Order Compelling Discovery. The court ordered Jackson to produce the requested documents and answers to interrogatories by June 24, 1994. Nothing else seemed to occur until June 15, 1994. At that time, the court *again* entered an order dismissing Jackson's Motion for Summary Judgment.

When Jackson did not respond to the court's order compelling discovery by June 24, the State filed a Motion to Renew Motion for Sanctions. Not receiving any additional discovery responses from Jackson, the State filed a Motion for Default Judgment on July 6, 1994. Contending that he had complied with discovery to the best of his abilities, Jackson filed Responses to the Motion to Renew the Motion for Sanctions and Motion for Default Judgment on July 13 and 14. A hearing was set for October 14, 1994.

In the mean time, GMAC filed a Separate Answer to the Amended Petition for Forfeiture. GMAC acknowledged that Tom Jackson was the title holder and had made payments for the vehicle through April of 1994. Jackson defaulted on the payments and was in arrears for the months of May thru September 1994. The amount due on the vehicle was \$9,776.15 plus storage fees accruing since the seizure in February of 1993. As the first lienholder, GMAC asked the court to enter an order to protect its security interest and to provide any other relief the court deemed proper. The record does not indicate that the court responded to GMAC. However, in a subsequent hearing on a Motion to Vacate and Set Aside a Default Judgment, the State indicated that it had payed GMAC \$10,000.

Although Tom Jackson filed a Motion to Stay Proceedings because of a related proceeding pending

suit in U.S. District Court, the court granted a Default Judgment of the Interest of Tom Jackson on November 10, 1994. Jackson responded by filing a Motion to Vacate and Set Aside Default Judgment. The State filed a response and the court set a hearing date of March 6, 1995. After the hearing, the court entered an Order Overruling the Motion to Vacate and Set Aside the Default Judgment on March 13, 1995. Thereafter, Jackson perfected this appeal.

I.

WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION BY DENYING TOM JACKSON'S MOTIONS FOR SUMMARY JUDGMENT.

Tom Jackson moved the trial court for a Summary Judgment on December 29, 1993 and on January 12, 1994. The court denied each. Jackson contends that the trial judge abused his discretion by denying the motions because the State failed to present any genuine issues of material fact to support its Petition for Forfeiture.

In its supporting briefs, the State contends that the trial judge's denials of Jackson's Motions for Summary Judgment were correct because Jackson failed to fully comply with discovery requests. The State contends that Jackson's failure to complete discovery denied the State and the court access to relevant facts necessary to determine whether genuine issues of material fact existed.

However, this Court's review of the record reveals that Jackson's failure to complete discovery was not the basis of the motion to dismiss before the trial court. The State moved to dismiss Jackson's motions for summary judgment because Jackson did not comply with Mississippi Rule of Civil Procedure 56. The State contended that Jackson failed to support the motion with affidavits, exhibits, or other evidentiary materials.

The court did not reach the merits of Jackson's Motion for Summary Judgment. Granting, instead, the State's motion to dismiss based upon the State's contention that Jackson failed to comply with Rule 56. Because the trial court sustained the motion to dismiss and did not reach the merits of Jackson's Motion for Summary Judgment, we are bound to review the dismissal on the basis which it was granted.

While the Mississippi Supreme Court has delineated a standard of review for a grant or denial of a summary judgment, it has not announced a specific standard of review for a motion to dismiss a motion for summary judgment. In the absence of such a pronouncement, we look to the standard for similar non-substantive motions. The general standard of review for non-substantive motions is abuse of discretion. *Taylor Machine, Inc. v. Great American Surplus Lines Ins. Co.*, 635 So. 2d 1357, 1362 (Miss. 1994); *Swan v. I.P., Inc.*, 613 So. 2d 846, 859 (Miss. 1993).

The court did not consider the merits of Jackson's motion for summary judgment because he failed to include supporting affidavits, exhibits, or other evidentiary materials. However, M.R.C.P. 56 does not require the movant to provide supporting documentation for a motion for summary judgment, the rule states:

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a

declaratory judgment is sought may, at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

M.R.C.P. 56(a)(b).

However, the movant bears the burden of demonstrating that no genuine issue of fact exists. *Short v. Columbus Rubber & Gasket Co., Inc.*, 535 So. 2d 61, 63-64 (Miss. 1988). This burden on the moving party is one of persuasion, not of proof. *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983).

By sustaining the State's Motion to Dismiss, the trial court placed a burden on Jackson that he was not bound to bear. Under Rule 56, Jackson could move for summary judgment with or without supporting documents at the risk of having the motion denied by the court. As the movant, the choice was his. Although having the choice to provide supporting documentation, Jackson was encumbered with persuading the court that there were no genuine issues of material fact. *Id.* If Jackson could overcome this burden without providing affidavits, exhibits, or other evidentiary materials, Rule 56 would allow him to do so.

As to Jackson's first assignment of error, we find that the trial judge did abuse his discretion in dismissing the motion for summary judgment. However, at most, Jackson was entitled to a resolution of the case on the merits, and the dismissal of the summary judgment motions did not preclude him from receiving such. Therefore, we find that the trial court's dismissal amounts to harmless error. M.R.C.P. 61.

II.

WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL JUDGE TO SANCTION JACKSON BY GRANTING A DEFAULT JUDGMENT IN A FORFEITURE ACTION.

The State filed the original petition for forfeiture on March 10, 1993. On March 19, 1993, an amended petition was filed. Jackson was served with discovery requests on April 14, 1993. While Jackson made some response to the State's discovery requests, he did not fully comply with discovery, and the trial court entered an Order to Compel Discovery on October 27, 1993. The order compelled Jackson to comply with discovery by November 29, 1993. Still, Jackson did not provide complete responses to discovery requests. The State then moved the court to strike Jackson's answer as a sanction for failure to respond appropriately to discovery. The court entered the Order to Strike on November 30, 1993.

As a result of the Order to Strike, Jackson, in effect, did not have an answer to the Petition for Forfeiture filed. The State then moved the court for a default judgment.⁽¹⁾ In response, Tom Jackson moved the court to set aside the motion striking his answer to the petition and filed a response to the Motion for a Default Judgment. Jackson assured the court that he would comply with discovery and the Order to Compel Discovery. On December 29, 1993, Jackson filed Supplemental Responses to Interrogatories and Request for Production of Documents. The record indicates that of the twenty-

two interrogatories propounded, Jackson answered eight and did not produce any of the documents requested. Still, the court granted Jackson's motion to set aside the motion to strike his answer and the default judgment on January 7, 1994. On that same day, the State filed a Motion for Sanctions contending that Jackson's responses to the interrogatories were evasive, incomplete, and did not comply with the Order to Compel of November 29, 1993. The record does not indicate the court's response to this motion.

On May 17, 1994, the State's moved the court for a second Order to Compel Discovery. Jackson did not comply with this order. On June 27, 1994, the State renewed its motion for sanctions due to Jackson's failure to comply with the second order to compel. Thereafter, the State moved for a default judgment under M.R.C.P. 37(b)(2)(C), which states:

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

The record indicates that the court allowed Jackson over one and a half years to comply with the discovery requests of the State. Jackson failed to do so. Now, he contends that the trial court abused its discretion by granting a default judgment in an action for the forfeiture of his automobile. We disagree.

Under Rule 37(b)(2)(C), the court may render a default judgment as a sanction for discovery violation and to protect the integrity of the judicial process. *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997). The decision to impose sanctions for discovery abuse or violations is vested in the discretion of the trial court. *White v. White*, 509 So. 2d 205, 207 (Miss. 1987). When discovery abuses occur the rules allow the court great latitude. *Id.* at 207. The power to dismiss (or to grant a default judgment) "is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket." *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1367 (Miss. 1990) (*quoting Watson v. Lillard*, 493 So. 2d 1277, 1278 (Miss. 1986)). Absent an abuse of discretion by the trial court, we will not disturb its grant of a default judgment. *Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1992). As an appellate court, our duty is to decide not whether we would have dismissed the action as an original matter, but whether the trial court abused its discretion in doing so. *Pierce*, 688 So. 2d at 1388 (*citing National Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)). Nevertheless, the trial court should not grant a dismissal (or render a default judgment) for a party's failure to comply with discovery if the party can show an inability to comply that did not arise from fault of their own, or willfulness and bad faith. *Hapgood v. Biloxi Reg'l Med. Ctr.*, 540 So. 2d 630, 634 (Miss. 1989).

To determine whether a trial court has abused its discretion for a dismissal under M.R.C.P. 37(b)(2)(C), our supreme court has considered several factors. We will consider those same factors in a

default under M.R.C.P. 37(b)(2)(C):

First, dismissal is authorized only when the failure to comply with the court's order results from wilfulness or bad faith, and not from the inability to comply. Dismissal [or default] is proper only in situation where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the other party's preparation for trial was substantially prejudiced. Finally, dismissal [or default] may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders.

Pierce, 688 So. 2d at 1389 (quoting *Batson v. Neal Spelce Assoc.*, 765 F.2d 511, 514 (5th Cir. 1985))

In the present case, the trial court found that Jackson and his attorney had not complied with two orders compelling discovery. It was the trial court's determination that Jackson's failure to comply with the requested discovery did not result from an inability to comply but from wilfulness and bad faith. The court further determined that the deterrent value of Rule 37 could not be substantially achieved by the use of less drastic sanctions. In granting the default judgment under Rule 37, the court pronounced it as a remedy of last resort due to extreme circumstances which warranted such a sanction.

Our review of the record indicates that Jackson did not comply with discovery. He failed to answer many of the interrogatories, which would have provided critical fact information concerning the actual ownership of the vehicle. When the owner of a vehicle that has been seized in connection with the transport of illegal controlled substances asserts the "innocent owner" defense, the State must then prove whether the claim of ownership was legal or a sham. *One Ford Mustang Convertible Bearing VIN # 1FACP45EXLF192944 v. State*, 676 So. 2d 905, 906 (Miss. 1996). The interrogatories that Jackson did not answer related to the ownership of the vehicle and Jackson's financial ability to own the 1989 Corvette. Some of the interrogatories were as simple as requesting that Jackson: (1) provide facts to support the assertion that the car was not in close proximity to a controlled substance, (2) provide information that would support the contention that the car did not represent proceeds traceable to any exchange for controlled substance, (3) provide any and all sources of income and employment, and (4) provide a list all insurance companies providing automobile insurance coverage. In most instances, Jackson did not attempt to answer or indicate that any answer was beyond his knowledge or his capability to obtain an answer. According to M.R.C.P. 37(a)(3), Jackson's evasive and incomplete answers amounted to a failure to answer at all.

The record indicates that the trial court gave Jackson ample time and opportunity to comply with discovery. Jackson's failure to comply with discovery continued for almost two years. During which time, he either failed to respond to discovery or provided incomplete and evasive answers. Before granting the default judgment, the court attempted to apply the less severe sanction of striking Jackson's answer to the petition. Jackson moved to set aside the motion to strike and assured the court that he would comply with the order to compel. The court set aside the motion, but he did not comply. When Jackson still failed to comply the court finally sanctioned him by granting a default judgment. After having considered the record, we find that the trial court did not abuse its discretion

by rendering a default judgment as a sanction for Jackson's dilatory response to discovery.

III.

WHETHER IT WAS A VIOLATION OF THE UNITED STATES AND THE MISSISSIPPI STATE CONSTITUTIONS TO USE COURT RULES TO CIRCUMVENT CONSTITUTIONAL REQUIREMENTS IN A FORFEITURE ACTION THEREBY CAUSING SECTION 41-29-153 OF THE MISSISSIPPI CODE ANNOTATED TO BE UNCONSTITUTIONAL.

AND

IV.

WHETHER IT WAS A VIOLATION OF DUE PROCESS FOR THE COURT TO ALLOW THE TAKING OF PROPERTY WITHOUT GIVING THE PROPERTY OWNER OPPORTUNITY TO CHALLENGE THE ALLEGATIONS OF THE STATE THROUGH A HEARING.

In issues three and four, Jackson alleges that the trial court violated due process requirements of the both the Mississippi and the United States Constitutions. Jackson contends that the court circumvented the due process requirements of a forfeiture action by using procedural rules to cause a default judgment. Thus, rendering the forfeiture statute, Section 41-29-153 of the Mississippi Code Annotated, unconstitutional. These contentions are without merit.

First, Jackson would have this Court find Section 41-29-153 of the Mississippi Code Annotated of 1972 unconstitutional. Jackson contends that the statute gives law enforcement unbridled discretion in determining when property is "intended to be used" for drug related activity. This contention is without merit. Section 41-29-153 indicates that property is subject to forfeiture when used or intended to be used for transporting, sale receipt, possession or concealment of any illegal controlled substance as proscribed by the legislature within the statute. This statute is neither vague nor overly broad, and citizens are afforded protective safeguards. Any property seized under Section 41-29-153 is subject to judicial proceedings in which the State must prove by a preponderance of the evidence that the property was used as proscribed by the statute. *See* Miss. Code Ann. § 41-29-179 (Rev. 1993). Therefore, Section 41-29-153 is not unconstitutional and does not offend substantive due process.

Next, Jackson contends that his procedural due process rights were violated. The components of due process under the Federal Constitution and the Mississippi Constitution are fair notice and an opportunity for a hearing. *American Fidelity Ins., Co. v. Athens Stove Works, Inc.*, 481 So. 2d 292, 295 (Miss. 1985). The record indicates that Jackson was given fair and timely notice of the Section 41-29-153 forfeiture action in March of 1993. He was served with discovery in April of 1993. His

failure to comply with discovery led to two orders compelling discovery. Jackson still did not complete discovery and upon the State's motion and hearings on the motion, the court rendered a default judgment.

It is our finding that Jackson was given the requisite notice and an opportunity for a hearing on the merits of the forfeiture action. However, his subsequent dilatory response to discovery and failure to comply with court orders resulted in sanctions, which precluded a hearing on the merits. While the Federal and State Constitutions do require due process of the law for each citizen faced with the deprivation of property, the citizen is responsible for complying with the rules of court that afford an orderly and efficient judicial process. In this case, the trial court allowed Jackson well over a year and a half to comply with the State's discovery requests. Jackson failed to do so, and the court rendered a default judgment. The court acted within its authority and discretion. *Palmer*, 564 So. 2d at 1367; M.R.C.P. 37(b)(2)(C).

V.

WHETHER IT WAS A VIOLATION OF THE EIGHTH AMENDMENT'S STRICT PROHIBITION AGAINST EXCESSIVE FINES AS PUNISHMENT FOR ESTABLISHED WRONGDOING TO ALLOW THE STATE TO TAKE THE AUTOMOBILE.

Jackson contends that the forfeiture of his vehicle was a violation of the Eighth Amendment's prohibition against excessive fines as punishment for wrongdoing. This argument fails because Jackson's vehicle was lost as a result of sanctions imposed due to his failure to comply with discovery not as a fine or punishment for a wrong committed. In short, the Eighth Amendment's Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense." *Austin v. U.S.*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris*, 492 U.S. at 265). The circumstances of the court's disposition of this case did not give rise to an Eighth Amendment challenge; therefore, we do not address this issue.

THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. At this point in the proceedings, a default judgment for the interest of Marvin Jackson was entered as a result of failing to fully comply with discovery.