IN THE SUPREME COURT OF MISSISSIPPI

JANET K. SANFORD	**APPELLANT**
v.	**No. 2015-CA-00464**
WALTER DUDLEY & TRACY DUDLEY	**APPELLEES**

Principal Brief of Appellees Walter Dudley & Tracy Dudley

Oral Argument Not Requested

On Appeal from the Circuit Court of Lamar County, Mississippi No. 2014-037H

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Certificate of Interested Persons

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluation possible disqualification or recusal.

1. Janet K. Sanford, Appellant
2. David Neil McCarty, of the David Neil McCarty Law Firm, PLLC, and Donald W. Medley, of the Medley Law Group, *Counsel for the Appellant*
3. Walter Dudley & Tracy Dudley, Appellees
4. Brad A. Touchstone and John W. Land, of Nelson & Touchstone, PLLC, *Appellate and Trial Counsel for Appellees*
5. The Honorable Prentiss G. Harrell, of the Circuit Court of Lamar County, Mississippi

So Certified, this the 18th day of December, 2015.

Respectfully submitted,

/s/ Brad A. Touchstone

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STATEMENT REGARDING ORAL ARGUMENT

This case involves default admissions under M.R.C.P. 36. The precedent on this issue is well settled. The Court should rule on this case summarily without oral argument.

STATEMENT OF THE ISSUES

1. Whether it was within the sound discretion of the Trial Court to deny Sanford's Motion to Withdraw Admissions.

2. Whether prejudice would result by Sanford being allowed to withdraw default admissions *after* the Dudleys had moved for summary judgment.

STATEMENT OF THE CASE

The underlying facts of this civil action are not germane to the procedural question before the Court. The Dudleys propounded requests for admissions which were not answered by Sanford within the timeframe allowed under M.R.C.P. 36. The trial court correctly declined to withdraw the admissions, as it would have resulted in prejudice to the Dudleys. The facts admitted were legally dispositive and summary judgment was therefore properly granted in favor of the Dudleys.

COURSE OF PROCEEDINGS AND STATEMENT OF THE FACTS

The central issue in this appeal is whether the trial court was within its discretion to deny Sanford's Motion to Withdraw Admissions. Sanford readily admits her responses to the requests for admissions were filed late, without leave of court, and after the Dudleys had already moved for summary judgment. If the trial court was within its discretion in denying the motion, the lower court's granting of summary judgment based upon the conclusively established, legally dispositive facts should be affirmed.

The relevant statement of facts in this appeal deal only with the actual course of proceedings. After an Answer to the Complaint was timely filed, the Dudleys propounded Interrogatories, Requests for Production of Documents, and Requests for Admissions to Sanford on July 25th, 2014. (1:040). Sanford's responses to the discovery requests, including the requests for admissions, were therefore due on August 27th, 2014.[1]

It is undisputed the record is void of any correspondence, pleading, or trial court order wherein the parties moved for, agreed upon, or were granted an extension of time for Sanford to serve responses to the discovery requests. More than a week after the deadline to answer the discovery passed, the Dudleys filed a Motion for Summary Judgment on September 4th, 2014 based upon the default admissions. (R.E. 1). And for the purposes of providing the Court with a clear, accurate picture of all the pleadings submitted to the trial court for consideration of the issue, the Dudleys would note that a detailed, nine (9) page memorandum brief was also submitted in support of, and in addition to, the Motion for Summary Judgment and accompanying exhibits. (R.E. 2)[2]. As noted in the Motion for Summary Judgment and memorandum brief, the facts and issues conclusively established by default admission were dispositive to the central issues of liability, proximate cause, and damages-

[1] M.R.C.P 36(a) provides 30 days after service of the request for admission for the responding party to object or answer the matter addressed. M.R.C.P. 6(e) provides an additional 3 days to this proscribed period when the responding party is served by mail.

[2] A memorandum brief is not typically filed of record and thus is not in the record on appeal, however, it is being submitted herein as a record excerpt pursuant to M.R.A.P. 10(h) in an effort to provide this Court with "a fair, accurate, and complete account of what transpired".

thus rending the case ripe for summary judgment dismissal in favor of the Dudleys. *Id.*

More than a week passed after the Dudleys moved for summary judgment before Sanford filed a Motion to Withdraw Admissions, along with tardy responses to requests for admissions (served without leave of court). (1:67-71). The responses to the requests for admissions were filed some (16) sixteen days past the time proscribed by M.R.C.P. 36. Sanford never responded to the Dudleys' interrogatories and requests for production of documents. In support of the Motion to Withdraw Admissions, counsel for Sanford pled only that he "believed the parties had an agreement to extend the time for discovery, and that the Motion for Summary Judgment implied that it was only a 10 day extension[3]. (1:67). Sanford also alleged the Dudleys would not be prejudiced in any way by allowing her requests for admissions to be withdrawn. *Id.*

A hearing on the pending motions was heard by the trial court on November 7, 2014. (3:1-5.). While the trial court did not enter a written order on said date, it rendered a bench opinion granting the Dudleys' Motion for Summary Judgment and denying Sanford's Motion to Withdraw Admissions. In rendering its bench opinion, the Court noted that it "read [the motions] and again read the accompanying authority[4] that you both presented" and in making its ruling, concluded that "hard facts make hard law". (3:4). At that

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[3] Nothing in the Motion for Summary Judgment implied a 10-day extension, but even assuming *arguendo* such implication existed, the requests for admissions were still not filed within such a 10-day extension.

[4] i.e., memorandum brief submitted as R.E. 2.

time, Sanford's counsel made no additional arguments as to why he was under a mistaken belief of an extension of time to answer discovery.

It was only upon the Court's granting of summary judgment, and denial of her motion to withdraw admissions, did Sanford then decide to provide the trial court with a documented factual basis upon which counsel claims he believed he had an extension to answer the discovery, including requests for admission. On November 14th, 2014, Sanford filed a Motion for Reconsideration, which included an affidavit from counsel's legal secretary, Ms. Donna Walker. (1:88-92). The motion notes the discovery issue was due to either "clerical error, inadvertence, or misrepresentation." (1:89)

Walker's affidavit detailed how she believed an extension was in place based on upon a phone discussion she had with the Dudleys' undersigned counsel, on August 22, 2014[5], while he was out of the office attending the funeral of a close friend and colleague in the profession. (1:90). It is noteworthy that nowhere in the affidavit does Walker plainly state that a request for extension to answer requests for admission was requested of or explicitly granted by counsel. Instead, relying on innuendo, the affiant alleges she communicated to counsel that "discovery was *unanswered*" and that an electronic version was requested by her in order to assist in answering the discovery. She further notes that counsel opposite advised she could obtain the data from his secretary. *Id.* A single alleged comment by counsel -- "don't worry

[5] Five (5) days before the responses were due to be served.

about it" -- was implied by Walker to mean she believed he had conveyed some type of open-ended extension to answer all discovery outside the timeframe provided by the rules, including Rule 36.[6] Again, no email, letter, fax, motion, pleading or trial court order exists which would memorialize such an open-ended extension to answer all discovery- including responses to requests for admission.

In response to Sanford's Motion for Reconsideration, the Dudleys noted these new factual allegations were all improperly before the Court on reconsideration pursuant to M.R.C.P. 59 and 60. (1:97-100). Specifically, none of the facts and issues raised in the Motion for Reconsideration were previously argued to the Court, and the Dudleys noted that none of the evidence presented in reconsideration of the issue was newly discovered or previously unavailable.

Moreover, the Dudleys also attached a Declaration of their own counsel, who provided a much different account of the conversation between he and the staff of Sanford's counsel. (1:101). Counsel agreed that he and Ms. Walker had discussed conveying an electronic form of the discovery to counsel opposite to assist them with providing discovery responses, but he was unequivocally clear that he did not intend any comment made on the phone to be construed as some type of open-ended extension to answer all the discovery, including the requests for admission. *Id.* Counsel also noted such agreements would typically

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[6] Sanford also suggests opposing counsel agreed to an extension to the answer discovery because he said "he also needed more time to inspect the property."(1:91). The Dudleys were under no pending deadline to inspect the property and had properly requested such relief through written pleading. (1:38).

be made and communicated to opposing counsel, and not to law office staff, and that he would expect to memorialize any such an agreement in writing. *Id.* The Dudleys also pointed to instances where previous employers of Ms. Walker had used her affidavits for unethical purposes in litigation and were subsequently sanctioned. (1:102-104). Sanford's counsel acknowledged at the hearing that he never directly communicated with the Dudleys' counsel about an extension of time to answer discovery. (3:10, lines 25-29).

A hearing on Sanford's Motion for Reconsider was held on December 12, 2014. The Dudleys' counsel noted in arguments before the bench that the Dudleys would also be unfairly prejudiced by granting the motion to withdraw admissions, because it was being offered to circumvent summary judgment. (3:21, lines 3-27).

Agreeing with the Dudleys, the trial court denied the motion for reconsideration and subsequently entered an Order Granting Summary Judgment on February 26th, 2015. (R.E.3). In denying the motion, the Court opined at the December 12th hearing that:

> *"[the] subjectively on the agreement is just that, subjective. [Dudleys' counsel] forcefully states a disagreement with you. The prejudice may be, but that is a fact of life of a finality that the rule for admissions requires. And there has to be finality, and the rules for admissions on the finality is there for a reason."* (3:23-24)

It is this February 26th 2015 Order Granting Summary Judgment that Sanford appeals today.

SUMMARY OF THE ARGUMENT

The trial court appropriately exercised its broad discretion to deny Sanford's Motion to Withdraw Admissions and enter summary judgment in favor of the Dudleys. Despite Sanford's suggestions otherwise, Rule 36(b) does not dictate certain elements a trial court must consider in order to deny a request to withdrawal of admissions. Much to the contrary, the rule is permissive in nature in allowing a trial court to *withdraw* admissions upon a showing of the elements argued by Sanford in her brief. That is not the case here. The trial court declined to exercise its discretion to withdraw the admissions, finding that the basis argued by Sanford was subjective and disputed at best. Moreover, because the Motion to Withdraw Admissions was filed after the Dudleys had already moved for summary judgment, there would have been prejudice to the Dudleys if the motion was granted. Thus, it would have been improper for the trial court to allow Sanford to withdraw her admissions in this case. The actions of the trial court should be affirmed in all respects.

STANDARD OF REVIEW

This Court has long held that decisions made by the trial court regarding discovery will be examined by an appellate court under an abuse of discretion standard. *Prime Rx, LLC v. McKendree, Inc.*, 917 So. 2d 791, 794 (Miss. 2005)

(citing *DeBlanc v. Stancil*, 814 So. 2d 796, 798 (Miss. 2002)). Additionally, a trial judge will be granted great discretion with regard to whether it will take certain matters as admitted. *Earwood v. Reeves*,798 So. 2d 508, 514 (Miss. 2001).

ARGUMENT

1. IT WAS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT TO DENY SANFORD'S MOTION TO WITHDRAW ADMISSIONS AND ENFORCE THE PLAIN TERMS OF RULE 36

Unlike many procedures in civil practice, often filled with exceptions and nuance, Rule 36 is a pretty simple, straightforward concept. This Court has time and time again reaffirmed how Rule 36 operates and how a trial court should enforce it. "We have made it clear beyond peradventure that **Rule 36 means what it says.**" *Towner v. Moore*, 604 So. 2d 1093, 1099 (Miss. 1992)(emphasis added). *See also, Martin v. Simmons*, 571 So. 2d 254, 255 (Miss. 1990) ("We have stated that courts cannot give or withhold at pleasure; Rule 36 is to be enforced according to its terms."). This Court has also stated that Rule 36 is "well-delineated" and "carr[ies] harsh sanctions for failure to comply therewith." *Earwood,* 798 So. 2d 508, 515 (Miss. 2001).

As the Court is aware, Rule 36 allots a strict thirty (30) day window for a responding party to provide a response or objection to matters requested to be admitted under the rule; a failure to do so results in the matter being admitted by default. M.R.C.P. 36(b). Once a matter is admitted under the rule, the issue is conclusively established unless the court on motion permits the

withdrawal or amendment of the admission. *Id.; see also Locklear v. Sellers*, 126 So. 3d 978, 981 (Miss. Ct. App. 2013).

There is, however, an "escape hatch" that can be utilized by the trial court in exceptional, well-delineated circumstances. In pertinent part, the rule states "...the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." M.R.C.P. 36(b).

Again, despite Sanford's urging otherwise, a plain reading of the rule dispels any notion that a trial court is under some obligation to examine a "two part prong" when denying a Motion to Withdraw Admissions. This Court has expressly rejected the same arguments advanced by Sanford in this case:

> [T]he mandatory, two-pronged test urged by the dissent is contrary to both the plain language of Rule 36(b) and prior rulings of this Court. In using the permissive term "may" rather than the mandatory term "shall," Rule 36(b) does *not* create a mandatory, *per se* requirement that the lower court must apply before denying the withdrawal or amendment of a deemed admission.
>
> *Young v. Smith*, 67 So. 3d 732, 739, (Miss. 2011).

Instead, as the rule states on its face, those issues must be addressed by the Court only when exercising discretion to act in a manner *inconsistent* with the plain requirements of the rule (by allowing withdrawal of default admissions). It follows no logic that a trial court would be required to follow a special test in order to enforce the plain meaning of the rule—that is, require

answers to requests for admissions be served within 30 days or the matter is deemed admitted.

Moreover, our appellate courts have consistently upheld a trial court's refusal to exercise its discretion and allow for the extraordinary relief as requested by Sanford in this case. In *Sawyer v. Hannan*, the Hannans served interrogatories, requests for admissions and a request for production of documents. 556 So.2d 696, (Miss. 1990). Sawyer's response to the discovery requests were due January 8, 1987. Much like the Plaintiff in the case at bar, on March 3, 1987, the Hannans, having received no timely response to their request for admissions, moved for summary judgment, asserting that the matters contained in their request for admissions was deemed admitted under MRCP Rule 36; that there were no genuine issues of material fact; and that they were entitled to prevail as a matter of law. *Id.* at 696-697.

The trial court denied Sawyer's motion to withdraw admissions and file an answer to request for admissions, and granted summary judgment on the Hannans' motion in the sum of $80,000, with the following finding:

> The Court hereby finds that Plaintiffs' Request for Admissions were properly served upon Defendant on November 24, 1986; that by agreement of the parties same were due to be answered on January 13, 1987; that Defendant's Responses to Plaintiff's' Requests for Admissions were not filed until February 4, 1987; that such responses were neither properly served nor filed in a timely manner; that under Rule 36 the Requests for Admissions have been deemed admitted, and that, alternatively, Defendant has admitted Request for Admission No. 16 in his responses; that Defendant has not responded to Plaintiff's First Set of Interrogatories and Requests for Production of Documents which were

also due on January 13, 1987; and that based upon Defendant's admissions, there are no genuine issues of material fact, and Plaintiffs are entitled to judgment as a matter of law. *Id.* at 697 (Miss.1990).

On appeal, this Court upheld the trial court, "[W]e are of the opinion that the lower court did not abuse its discretion in refusing withdrawal of matter which had been deemed admitted by operation of Rule 36 and had been actually admitted in the untimely filed admissions. We are further of the opinion that the lower court did not err in granting the motion for summary judgment." *Id.,* 556 So. 2d 696, 698 (Miss. 1990).

This string of cases echoing this position have continued into most recent decisions of the appellate courts of this State. In fact, the Mississippi Court of Appeals most recently rejected strikingly similar arguments to that of Sanford and upheld summary judgment based upon default admissions under Rule 36. *See*, *Ross v. Wallack*, Mississippi Court of Appeals No. 2014-CA-00984-COA, (decided November 3rd, 2015).

In the *Ross* case, Ross failed to file timely responses to Dr. Wallack's requests for admissions. Wallack moved for summary judgment, like the Dudleys, based on legally dispositive facts having been admitted by Ross's default. *Id.* at 3. After a hearing, the circuit court deemed the admissions admitted and entered an order granting summary judgment in favor of Dr. Wallack. *Id.*

Thereafter, Ross filed a motion to alter or amend or for reconsideration and attached an affidavit from a the secretary who was responsible for opening

the mail at the law firm that represented Plaintiff, stating that she had never seen or opened a request for admissions from Dr. Wallack, and (3) an affidavit from R. Wayne Woodall, one of Ross's attorneys, that described his law firm's practice in handling discovery. The circuit court denied the motion, leading to the appeal. *Id.* at 4. The Court in *Ross* noted the trial court properly noted the matters were deemed admitted, and that it did not err by refusing to set aside the default admissions, as Ross never filed a motion to set the admissions aside. *Id.* at 6.

While it is conceded that Sanford followed the proper procedure by filing a motion to withdraw admissions, she has wholly failed to show how the trial court abused its discretion by denying her motion. The trial court plainly noted the basis of her request to withdraw the admissions was based on upon a purely subjective, disputed account of events.

In sum, a trial court of this State has broad discretion whether to allow a party to withdraw admissions. It also has broad discretion to enforce the rule according to its plain and unequivocal terms. Despite Sanford's suggestion otherwise, this discretion to enforce the rule according to its terms is not constrained by some two-prong test. To the contrary, only should a court grant a withdrawal of admissions must it consider any of the factors urged by Sanford in her brief.

In deciding this case, Sanford also urges this Court to place deep emphasis upon the number of days which lapsed past the procedural deadline

before her answers were filed. In other words, she argues while she was indeed late filing her responses to requests for admissions, she was not *very* late, thus it really shouldn't matter. This argument must also be flatly rejected. The legal profession needs rules that mean what they say. If a party to a civil action cannot rely on a procedural rule to mean (and do) what it says, then the rule should be changed. Further, if this Court were to begin following the fuzzy logic urged by Sanford, then it then begs the question "at what point does late become *too* late, for the purposes of enforcing the deadline proscribed by Rule 36? 1 day late? 1 week late? 1 month late? 1 year late? The Court should decline adoption of some unwritten dragnet clause for Rule 36 and follow its long standing precedent by enforcing the rule according to its plain terms.

2. THE DUDLEYS WOULD BE UNDULY PREJUDICED BY A WITHDRAWAL OF SANFORD'S ADMISSIONS PURSUANT TO RULE 36.

It is important for the Court to be mindful of what action, or lack thereof, set this dispute into motion. Through no fault of the Dudleys, Sanford did not abide by the terms of Rule 36 and object or respond to the matters requested to be admitted within 30 days. Nor did Sanford take the appropriate steps to memorialize in writing any believed extension, so any disagreements could have been fleshed out beforehand. In contrast, the Dudleys properly filed a Motion for Summary Judgment and accompanying exhibits, totaling twenty-three (23) pages, along with a detailed, nine (9) page memorandum brief in support thereof. The trial court previously rejected Sanford's plea that the

Dudley's would not be prejudiced by Sanford being allowed to circumvent summary judgment by withdrawal of her admissions.

The Mississippi Court of Appeals has addressed the issue of parties filing untimely responses to requests for admissions with the intent to circumvent summary judgment based on default admissions, as in the case *sub judice*. In *Triangle Const. Co., Inc. v. Foshee Const. Co., Inc.*, the Court ruled that the trial court's denial of Defendant's request to allow untimely filing of answers to Plaintiff's requests for admissions, after Plaintiff moved for summary judgment based on default admissions, was not an abuse of discretion. 976 So.2d 978 (Miss. Ct. App. 2008).

Specifically, in *Triangle*, the Court held as follows:

> We find that the trial court properly used its discretion to deny Triangle's request to withdraw the deemed admitted requests for admissions. The trial court granted Foshee's motion for summary judgment, noting that Triangle had waited to file its responses to the requests for admissions and its motion to withdraw the deemed admitted requests for admissions until after Foshee had moved for summary judgment. The trial court further opined that it appeared that Triangle's late responses seemed to have been produced with the intent to circumvent the effects of summary judgment. Further, the trial court considered Rule 36, applied the rule to the case, and determined that Foshee would be prejudiced if the admissions were allowed to be withdrawn; therefore, the trial court granted summary judgment in favor of Foshee.
>
> *Id.* at 981.

Sanford should not be allowed to cure her own error, at the expense of the Dudleys, by simply filing a Motion to Withdraw Admissions, along with tardy responses, to defeat summary judgment. The Dudleys would urge this

Court to follow *Triangle* and find that any withdrawal of admissions in this case would deeply prejudice them, an innocent party who had already moved for summary judgement dismissal when Sanford requested withdrawal of her admissions. If the relief sought by Sanford were allowed, the precedent set would be dangerous and would effectively render the timeframe allowed under the rule useless.

The trial judge in this case aptly noted that "hard facts make hard law". The *Triangle* Court likewise noted that "although the result is harsh, the broad power given to the trial court to regulate discovery made the decision to deny the request to withdraw the deemed admitted requests for admissions is well within the trial court's discretion. *Id. at 975.*

CONCLUSION

The trial judge was well within his discretion to deny Sanford's Motion to Withdraw Admissions. The basis of the request was subjective and disputed. Therefore, the trial court's decision to grant summary judgment based upon default admissions of legally dispositive facts must be affirmed.

The trial judge was further justified in rejecting Sanford's arguments that the Dudleys would not be prejudiced by a withdrawal of her admissions. The motion to withdraw admissions was produced with intent to circumvent summary judgement, and, therefore, would result in prejudice to the Dudleys.

In all respects, the judgment of the trial court should be affirmed.

This the 18th day of December, 2015.

Respectfully submitted,

/s/ Brad A. Touchstone

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Certificate of Service

I, Brad A. Touchstone, certify that I have served a copy of the above and foregoing document to the following via filing with the MEC electronic filing system:

Ms. Muriel B. Ellis, Clerk
Mississippi Supreme Court

Attorneys for Appellants:

David Neil McCarty
Donald W. Medley

And that I have further served a paper copy via first class U.S. Mail on the following:

Honorable Prentiss G. Harrell
Lamar County Circuit Court
P. O. Box 488
Purvis, MS 39475

This, the 18th day of December, 2015.

/s/ Brad A. Touchstone

Brad A. Touchstone