

IN THE CIRCUIT COURT OF WILKINSON COUNTY, MISSISSIPPI

CLARA MEALEY, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 02-0082

PRE-PAID LEGAL SERVICES, INC., HARLAN (SIC) C.  
STONECIPHER, BROOKS WERKHEISER, DYRE LAW  
FIRM, PLLC, AND ARNOLD D. DYRE

DEFENDANTS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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The Chamber of Commerce of the United States, by and through counsel, hereby moves this Court for leave to file as *amicus curiae*, in support of defendants' motion for attorney's fees and expenses, the brief attached and made a part hereof as Exhibit "A". Defendants' counsel has consented to the filing of this brief.

The Chamber, a non-profit corporation organized under the laws of the District of Columbia, is the largest federation of business, trade, and professional corporations in the United States. The Chamber represents an underlying membership of approximately three million businesses and organizations of every size and every business sector, and from every geographic region of the country, including the State of Mississippi. A central function of the Chamber is to represent the interests of its members in important matters before the courts, and toward that end the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the national and Mississippi business community.

The Chamber believes that this case presents the Court with a valuable opportunity to apply and clarify the recent line of cases issued by the Mississippi Supreme Court, and followed by various lower courts throughout this state, seeking to eliminate the abuses which have been associated with tort litigation in Mississippi in recent years. In a recent line of cases beginning with *Jansen Pharmaceutica, Inc. v. Armond*, 866 So.2d 1092 (Miss. 2004), the Mississippi Supreme Court has redefined the interpretation of Rule 20 governing the joinder of multiple defendants and multiple plaintiffs in a single case. The effect of these decisions has been to significantly circumscribe the practice of tort litigation in the state of Mississippi. While doing so, the Mississippi Supreme Court has made clear that no case should be filed unless and until plaintiffs' counsel has made a good faith effort to confirm that each plaintiff named in the complaint has a legitimate cause of action to assert against at least one of the defendants. *Harold's Auto Parts, Inc. et al. v. Flower Mangialardi, et al.* (Docket No. 2004-LA-01308-SCT (Miss. 2004, copy attached).

The recent line of decisions issued by the Mississippi Supreme Court paring back on tort litigation practice in Mississippi will only become truly effective when appropriate sanctions are issued against counsel who solicit these types of cases through mass media advertisements and subsequently file claims without performing the due diligence required under the Mississippi Rules of Civil Procedure. This case presents an egregious example of the type of conduct which must be sanctioned in order for real reform to occur in Mississippi's legal system. The Chamber, on behalf of its member businesses in Mississippi and throughout the United States, has a substantial interest in seeing that the restrictions on tort litigation announced by the Mississippi

Supreme Court are effectively implemented, and toward that end it requests this Court to grant its motion for leave to file the accompanied brief as *amicus curiae*.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Wilson H. Carroll, do hereby certify that I have this date mailed, by United States Mail, first class postage prepaid, a true and correct copy of the foregoing document to:

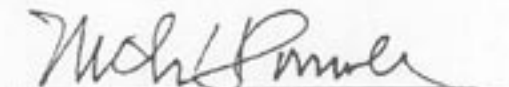
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This the 19<sup>th</sup> day of November, 2004.



WILSON H. CARROLL

IN THE CIRCUIT COURT OF WILKINSON COUNTY, MISSISSIPPI

CLARA MEALEY, ET AL.

PLAINTIFFS

VS.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED  
STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

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Interest of the *Amicus Curiae*

The interest of the Chamber of Commerce of the United States as *amicus curiae* is described in the accompanying motion for leave to file this brief.

Statement

The core facts of this case are described in detail in Defendants' Memorandum in Support of their motion for attorneys' fees and expenses, and will not be repeated at length here. However, the highlights are as follows:

1) In the spring of 2002, an entrepreneurial attorney ran advertisements in the local newspaper soliciting clients to participate in a "collective lawsuit" against Pre-Paid Legal Services, Inc.;

2) In response to this solicitation, at least 25 individuals contacted this attorney and were promptly enrolled as plaintiffs in the lawsuit. Defendants named in the lawsuit included Pre-Paid Legal Services, Inc., Harland Stonecipher, Brooks Werkheiser, the Dyre Law Firm,

PLLC, and Arnold D. Dyre, individually (the attorneys who handled the legal work for individuals covered by Pre-Paid Legal Services, Inc.);

3) The complaint alleged, *inter alia*, violations of the Mississippi Deceptive Trade Advertising Act, the Mississippi Deceptive Trade Practices Act, deceit, civil conspiracy, professional negligence, negligent misrepresentation, breach of fiduciary duty, and illegal payments to the Dyre defendants;

4) During motion practice, the vast majority of the plaintiffs were dropped and many of the claims were dismissed as well;

5) After nearly two years of expensive and time consuming litigation, a trial was held on the claims of just two of the original plaintiffs, and a jury promptly returned defense verdicts in both of the cases. The jury determined that none of the plaintiffs' claims had any merit and rendered verdicts in favor of all plaintiffs on all counts.

Based on the foregoing, the Defendants are now asking this Court to award attorneys' fees under the Mississippi Litigation Accountability Act of 1988, Miss. Code Ann. §§ 11-55-1 et seq. (Supp. 2001). Because this case epitomizes the worst abuses which the Legislature sought to forestall by its adoption of the Act, the United States Chamber of Commerce supports the Defendants' Motion for Sanctions and Attorneys' Fees.

**1. The Mississippi Legislature and the Supreme Court have both clearly stated that attorneys should be sanctioned for filing frivolous lawsuits.**

Mississippi's Litigation Accountability Act of 1988 provides:

Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorneys fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is *without substantial justification*, or that the action, or any claim or defense asserted, was interposed for delay or

harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

Miss. Code Ann. §§ 11-55-5(1) (emphasis added). The critical test is determining whether a complaint or motion has been filed "without substantial justification." A claim is without substantial justification for purposes of the Litigation Accountability Act when it is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss.Code Ann. §§ 11-55-3(a); *see also* *Scruggs v. Saterfiel*, 693 So.2d 924 (Miss.1997). Stated alternatively, a case is said to be frivolous when the movant has "no hope of success." *Stevens v. Lake*, 615 So.2d 1177, 1184 (Miss.1993). *See also* *Smith v. Malouf*, 597 So.2d 1299, 1303 (Miss.1992)(applying Rule 11 definition to Litigation Accountability Act context).

Furthermore, litigants are not entitled to file a frivolous lawsuit and then cure shortcomings through discovery. "Filing is that which triggers the possibility of sanctions." *Eatman v. City of Moss Point*, 809 So.2d 591, 593 (Miss. 2000) *citing*, *Nationwide Mut. Ins. Co. v. Evans*, 553 So.2d 1117, 1120 (Miss.1989). In considering whether an action is frivolous a court must look to the facts known at the time of filing the complaint. *Bean v. Broussard*, 587 So.2d 908, 912 (Miss.1991) ("We begin with the frivolousness standard. We focus upon the information Bean had at the time he filed the complaint.") A pleading or motion is frivolous within the meaning of the Act, therefore, when a plaintiff or his attorney, at the time the complaint was filed, and without the benefit of additional discovery, "has no hope of success." *Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331 at 1336.

While Rule 11 imposes no continuing duty upon an attorney or party to abandon a complaint that is later learned to be frivolous, the Litigation Accountability Act of 1988 does

impose such an obligation. Miss. Code Ann. §§ 11-55-5 (Supp.1999); *see also Eatman, supra; In Re Fankboner*, 638 So.2d 493, 498 (Miss.1994).

When granting an award of costs and attorneys' fees under the Mississippi Litigation Accountability Act, a court must "specifically set forth the reasons for such award" and shall consider the following factors, among others:

- (a) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed;
- (b) The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;
- (c) The availability of facts to assist in determining the validity of an action, claim or defense;
- (d) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;
- (e) Whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;
- (f) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;
- (g) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;

- (h) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court; (i) The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;
- (i) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and
- (j) The period of time available to the attorney for the party asserting any defense before such defense was interposed.

Miss. Code Ann. §§ 11-55-7.

Applying these standards, the Mississippi Supreme Court has recently upheld sanctions under the Mississippi Litigation Accountability Act against attorneys who misrepresented facts to the court in order to obtain injunctive relief (*In re Estate of Ladner*, Lexis 2535438 (Miss. 2004)); against a *pro se* litigant who brought suit against a municipal judge despite warnings that the judge was immune from suit (*Wheeler v. Stewart* 798 So.2d 386 (Miss. 2001)); against a potential heir who sought to set aside certain lifetime transfers to another heir without submitting any proof of a confidential relationship between the decedent and the recipient (*Foster v. Ross*, 804 So.2d 1018 (Miss. 2002)); against attorneys who filed an amended complaint which was substantially the same as the original complaint which had been dismissed for failure to state a claim (*Triplett v. Brunt-Ward Chevrolet*, 812 So.2d 1061 (Miss. App. 2001)); against attorneys who failed to appear at scheduled status hearings (*Wyssbrod v. Wittjen*, 798 So.2d 352 (Miss. 2001)); and against a litigant who pursued a claim against an employer for injuries sustained in a car wreck even after learning that the driver of the vehicle was on vacation at the time of the

accident (*Eatman v. City of Moss Point*, 809 So.2d 591 (Miss. 2000)). Based on these and many other decisions rendered by the Mississippi Supreme Court, it is clear that lower courts can and should impose sanctions where frivolous cases are filed and pursued. The Mississippi Legislature, in enacting the Litigation Accountability Act, and the Mississippi Supreme Court, in applying that Act, clearly intend for the sanctions against frivolous litigation to have teeth.

2. **The Mississippi Supreme Court has specifically directed lower courts to impose sanctions in cases involving mass-tort plaintiffs where complaints are filed without basic due diligence to ascertain whether each plaintiff has a viable claim.**

In recent months the Mississippi Supreme Court has moved aggressively to rein in the coupled practices of "mass tort litigation" and forum shopping. In a series of cases beginning with *Janssen Pharmaceutica, Inc. v. Armond*, 866 So.2d 1092 (Miss.2004), the Court has redefined the limits of permissible joinder under M.R.C.P. Rule 20. In *Armond*, the Court held that claims against defendants with no connection to the named plaintiff must be severed, and the improperly joined plaintiffs' cases were to be transferred to a venue in which each could have been brought on its own merits. In an uninterrupted series of subsequent rulings, the Court has ordered the severance and transfer of unrelated cases. See *Janssen Pharmaceutica, Inc., v. Scott*, 876 So.2d 306 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss.2004); *Janssen Pharmaceutica, Inc. v. Keys*, 879 So.2d 446, 447 (Miss. 2004); *Purdue Pharma, L.P. v. Estate of Heffner*, 2004 WL 2249488 (Miss.2004).

In *Harold's Auto Parts, Inc. et al. v. Flower Mangialardi, et al.*, (Docket No. 2004-IA-01308-SCT (Miss. 2004, copy attached) the Court considered an interlocutory appeal involving the joinder of multiple plaintiffs in an asbestos, mass-tort litigation case. In a set of facts virtually identical to those in the case at bar, the complaint provided virtually no helpful information with respect to the claims asserted by the individual plaintiffs. The complaint did

not say which plaintiff was allegedly exposed to which product manufactured by which defendant at any particular time. When Defendants sought relief in the form of a severance order, the Supreme Court noted, *sua sponte*, that the matter "should not come before us because of a failure to comply with Rule 20, but rather because of an abuse of, and failure to comply with, Rules 8, 9, 10 and 11." The Court noted that in order to comply with basic pleading rules, the Complaint should have set forth "core information" which should have been known to plaintiff's counsel *prior to* the filing of the complaint, and not developed through discovery. In its Order the Court stated,

Complaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action. Absent exigent circumstances, plaintiffs counsel should not file a complaint until sufficient information is obtained, and plaintiff's counsel believes in good faith that *each plaintiff* has an appropriate cause of action against a defendant in the jurisdiction where the complaint is to be filed. *To do otherwise is an abuse of the system, and is sanctionable.*

*Harold's Auto Parts, Inc., et al. v. Flower Mangialardi, et al.*, 2004-IA-01308-SCT (Miss., 2004) (emphasis added).

As the Defendants' Motion aptly describes, Plaintiffs' counsel utterly failed to make any reasonable inquiry about the basic facts before filing the Complaint in issue. They did not provide any responses to discovery requests until some two years after filing suit; the responses provided at that time were unverified and inaccurate; subsequent verified responses directly contradicted information provided in the original responses; the vast majority of plaintiffs were dismissed from the case before trial; and the only two cases which went to trial resulted in quick defense verdicts. Without a doubt, this lawsuit was filed by Plaintiffs' counsel without performing even the most basic due diligence to ascertain whether these Plaintiffs did, indeed, have a viable claim against these Defendants.

Pursuant to the Mississippi Supreme Court Opinion in *Mangialardi*, and the long line of cases cited above supporting the imposition of sanctions for frivolous litigation, this Court should grant the relief requested by Defendants and impose costs and attorneys' fees on Plaintiffs' counsel.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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This the 19<sup>th</sup> day of November, 2004.

  
WILSON H. CARROLL

Serial: 116304

IN THE SUPREME COURT OF MISSISSIPPI

No. 2004-IA-01308-SCT

*HAROLD'S AUTO PARTS, INC., ET AL.*

v.

*FLOWER MANGIARDI, ET AL.*

**FILED**

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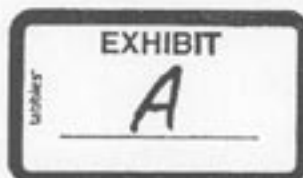
*Respondents*

ORDER

This matter is before the Court, en banc, on the Petition for Permission to Appeal From an Interlocutory Order and Motion for Stay filed by counsel for Petitioners. Also before the Court is the response and supplemental response filed by counsel for Respondents. Petitioners seek to appeal an interlocutory order of the Circuit Court of Bolivar County, Mississippi, which denied petitioners' motion to sever filed therein.

After due consideration, the Court finds that the petition for interlocutory appeal is well taken and should be granted. The Court further finds that no further briefing is needed, and we shall proceed to a consideration of the merits.

This interlocutory appeal concerns joinder of multiple plaintiffs in an asbestos, mass tort litigation case. This matter is controlled by *Jansen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004). Even though asbestos litigation is, indeed, a "mature tort," as discussed in dicta in *Armond*, this Court did not intend in that case, and we shall not proceed



here, to exempt asbestos cases from the requirements of Rule 20, of the Mississippi Rules of Civil Procedure.

The case before us has endured seven amended complaints, and now involves the claims of 264 plaintiffs against 137 named defendants who have identified approximately 600 different employers where asbestos exposure might have taken place. Approximately 220 of the plaintiffs are unable to identify any employment within the state of Mississippi. The complaint provides virtually no helpful information with respect to the claims asserted by the individual plaintiffs. We are provided the following allegations and information regarding the plaintiffs:

1. names and social security numbers;
2. they are "resident citizens of the State of Mississippi, or other states of the United States, or are personal representatives or wrongful death beneficiaries of deceased plaintiffs (we are not told which plaintiffs are citizens and which are representatives or beneficiaries);
3. they were exposed to asbestos products which were "mined, designed, specified, evaluated, manufactured, packaged, furnished, supplied and/or sold" by defendants during "all or part of the period 1930 through the present" (we are not told which plaintiffs were exposed to which products manufactured by which defendants; nor are we told when any particular plaintiff was exposed during the seventy-five year period);

In essence, we are told that 264 plaintiffs were exposed over a 75-year period of time to asbestos products associated with 137 manufacturers in approximately 600 workplaces. We are not told which plaintiff was exposed to which product manufactured by which defendant in which workplace at any particular time. We do not suggest that this lack of

basic information is the result of recalcitrance on the part of plaintiffs' counsel; perhaps plaintiffs' counsel has not furnished the information.

Defendants have strenuously objected to the failure and/or refusal of plaintiffs' to provide the information. They point out that it is impossible to argue to the trial court that joinder was improper, because they aren't provided basic information about each of the plaintiffs. Curiously, rather than filing a motion for more definite statement, or to dismiss, defendants' simply seek the information "as soon as practicable." The defendant's further argue that Rule 20 requires the disclosure to be made.

The position stated by plaintiffs is that defendant's do not need the information right now, since there apparently is a plan to try the cases, one at a time.

We find that all have missed the mark. This matter should not be before us because of a failure to comply with Rule 20, but rather because of an abuse of, and failure to comply with, Rules 8, 9, 10 and 11. What is referred to as "core information" and "disclosure" is basic information which should be known to plaintiffs' counsel *prior* to filing the complaint, not information to be developed in discovery or disclosure. The information should have been included in the complaint.

Complaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action. Absent exigent circumstances, plaintiffs' counsel should not file a complaint until sufficient information is obtained, and plaintiffs' counsel believes in good faith that *each plaintiff* has an appropriate cause of action to assert against a defendant in the jurisdiction where the complaint is to be

filed. To do otherwise is an abuse of the system, and is sanctionable. See Miss. R. Civ. P., Rule 11.

Rule 20 allows joinder only where the plaintiffs make certain assertions which demonstrate the matters set out in the rule. In this regard, plaintiffs have wholly failed. Indeed, plaintiffs have not even attempted to provide the information. They presume that they are entitled to proceed with their suit, as filed, and they will demonstrate later that joinder is proper. We can only presume from the record before us that plaintiff take this course because they don't know whether or not joinder is appropriate. This is so, apparently, because they don't know the claims of each plaintiff. They don't appear to know when they were exposed, where they were exposed, by whom they were exposed, or even if they were exposed. Presumably, when they learn this information, plaintiffs' counsel intends to dismiss those who should not have been joined. This is a perversion of the judicial system unknown prior to the filing of mass-tort cases.

We must point out that not all cases involving multiple plaintiffs and/or defendants which have come before this Court appear to have been filed in this manner. We note cases where counsel for the plaintiffs appear to have interviewed each plaintiff, investigated their claims, and developed information necessary to file a complaint on their behalf.

But here, not only have plaintiffs failed to furnish their counsel the necessary information to file the complaint, but plaintiff's counsel continues to resist furnishing to defendants and the court.

Incredibly, plaintiffs asked the trial court to set aside its order of certification for interlocutory appeal, claiming they got no notice of the motion, and that "[p]laintiffs were never afforded any of their constitutional rights of due process to contest such a motion." This complaint comes to us from plaintiffs who, more than three years ago, filed suit against 137 defendants; who have amended their complaint six times; and who are apparently unable to explain to the trial court, this Court, or to the defendants, exactly who each plaintiff has sued, and why.

We hereby reverse the trial court's June 23, 2004, Order, insofar as it denies the plaintiffs' motion to sever, and we order severance as to each plaintiff. We hold that plaintiffs have wholly failed in their obligation to assert sufficient information to justify joinder and, accordingly, this matter is remanded to the trial court for a transfer of each plaintiff to an appropriate court of venue and jurisdiction, where known. The trial court is hereby directed to dismiss, without prejudice, the complaint of each plaintiff who fails, within forty-five days of the date of this Order, to provide the defendants and trial court with sufficient information for such determination, and transfer if warranted. Such information must include, at a minimum, the name of the defendant or defendants against whom each plaintiff makes a claim, and the time period and location of exposure.

IT IS THEREFORE ORDERED that the Petition for Interlocutory Appeal by Permission filed by counsel for petitioners is hereby granted.

IT IS FURTHER ORDERED that this matter is hereby remanded to the Circuit Court of Bolivar County, Mississippi, for entry of an order granting the petitioners' motion to sever in accordance with the provisions of this Order.

IT IS FURTHER ORDERED that the Circuit Court of Bolivar County shall dismiss, without prejudice, each plaintiff who fails to provide the defendants and the court, within forty-five days of the date of this Order, with sufficient information as specified herein which allows the trial court to determine the appropriate court for transfer.

IT IS FURTHER ORDERED that Respondents are taxed with all costs of this appeal.

SO ORDERED, this the 23<sup>rd</sup> day of August, 2004.



JAMES W. SMITH, JR., CHIEF JUSTICE  
FOR THE COURT

TO GRANT: SMITH, C.J., WALLER AND COBB, P.JJ., CARLSON, GRAVES AND  
DICKINSON, JJ.

TO DENY: EASLEY, J.

NOT PARTICIPATING: DIAZ AND RANDOLPH, JJ.