

**IN THE SUPREME COURT / COURT OF APPEALS
OF THE STATE OF MISSISSIPPI**

JOHN T. WHITLEY, SR.

APPELLANT

VS.

NO. 2007-CA-00874

**CITY OF PEARL, MISSISSIPPI,
HAYLES TOWING & RECOVERY,
R & L TOWING, CAPITOL BODY SHOP,
WRECKER SERVICE, WASTE MANAGEMENT,
PEARL AUTOMOTIVE & TOWING and JOHN DOES**

APPELLEES

**APPEAL FROM THE COUNTY COURT OF
RANKIN COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEE,
HAYLES TOWING & RECOVERY**

ORAL ARGUMENT REQUESTED

COUNSEL FOR THIS APPELLEE:

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CERTIFICATE OF INTERESTED PARTIES

THE UNDERSIGNED counsel of record certifies that the following persons have an interest in the outcome of this case, the presentation of which is made in order that the Justices of the Court may evaluate possible disqualifications or recusal:

1. John T. Whitely, Sr., Plaintiff/Appellant;
2. W. O. "Chet" Dillard, Esq., counsel for Plaintiff;
3. Harry J. Rosenthal, Esq., counsel for Plaintiff;
4. City of Pearl, Mississippi, Defendant/Appellee;
5. James A. Bobo, Esq., Akers & Bobo, former counsel for City of Pearl;
6. Gary E. Friedman, Esq. and Mark Fijman, Esq., Phelps Dunbar, LLP, former counsel for City of Pearl;
7. Hayles Towing & Recovery, Defendant/Appellee;
8. J. Peyton Randolph, II, Esq., counsel for Defendant, Hayles;
9. R & L Towing, LLC, Defendant/Appellee;
10. Durwood McGuffee, Jr., Esq., counsel for Defendant, R & L;
11. Capitol Body Shop, Defendant/Appellee;
12. Ward's Wrecker Service, Defendant/Appellee;
13. J. Scott Rogers, Esq., Scott, Sullivan, Streetman & Fox, PC, counsel for Defendants, Capitol and Ward's;
14. Hall's Body Shop, Defendant/Appellee herein;
15. Paul B. Henderson, Esq., counsel for Defendant, Hall's;
16. Pearl Automotive and Towing, Defendant/Appellee;
17. Judson M. Lee, Esq., counsel for Defendant, Pearl Automotive; and,
18. Honorable Kent McDaniel, County Court Judge for Rankin County, Mississippi.

Respectfully submitted,

HAYLES TOWING & RECOVERY

BY:


J. PEYTON RANDOLPH, II

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STATEMENT OF THE ISSUES

- I. The trial court did not deny Whitley's rights to due process in dismissing this action.
- II. The trial court did not err in denying Whitley's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge.

STATEMENT OF THE CASE

I. Nature of the Case

This matter involves an appeal filed by Plaintiff/Appellant, John T. Whitley, Sr. (hereafter "Whitley") wherein he seeks review of the Order and Final Judgment dismissing all claims against the various Defendants/Appellees, including Defendant, Hayles Towing & Recovery (hereafter "Hayles"), with prejudice, and the Order denying Whitley's Motion to Reverse, Transfer to Chancery or in the Alternative to Reassign this case to Another Judge, both of which were entered by the County Court of Rankin County, Mississippi.

II. Course of Proceedings and Disposition in the Court Below

Whitley filed a Complaint in the Chancery Court of Rankin County on the 14th day of April, 2006. Similar to Whitley's previously filed federal court complaint, Whitley alleged that his cause of action arose under the Fourth and Fourteenth Amendments to the *United States Constitution* and 42 *U.S.C.A.* § 1983. Whitley also filed suit against the same defendants as named in the federal court complaint, with the exception of adding Pearl Automotive & Towing as a defendant.

On the 8th day of May, 2006, this case was transferred from the Rankin County Chancery Court to the County Court of Rankin County with the Honorable Kent McDaniel

presiding. Subsequently, various Defendants filed motions to dismiss and motions for summary judgment. Whitley then filed a Motion to Reverse, Transfer to Chancery or in the alternative to Reassign this case to Another Judge.

On the 4th day of April, 2007, Judge McDaniel entered an Order and Final Judgment dismissing all claims against the Defendants, including Hayles, with prejudice. Judge McDaniels also entered an Order denying Whitley's Motion to Reverse, Transfer to Chancery or in the Alternative to Reassign this case to Another Judge. This appeal followed.

III. Statement of the Facts

The facts underlying this appeal began on the 18th day of July, 2001, when the City of Pearl, Mississippi, filed a Petition with the Chancery Court of Rankin County seeking declaratory and injunctive relief against Whitley for his non-compliance with the City of Pearl's ordinances. (R. at 59.) On the 19th day of July, 2001, this case was transferred to the County Court of Rankin County, with the Honorable Kent McDaniel presiding. (R. at 59.) After arguments and briefs, on the 20th day of June, 2003, Judge McDaniel entered findings of facts and conclusions of law, finding Whitley's property to be in need of immediate cleanup. (R. at 61.) Judge McDaniel also found the ordinance to be "enforceable and not unconstitutional." (R. at 68.)

The court subsequently entered a Final Judgment against Whitley on the 3rd day of July, 2003, requiring Whitley to bring his property into compliance with the City of Pearl's zoning ordinances within sixty (60) days. Specifically, Whitley was ordered to: 1) remove all unmounted tires from his property, 2) remove or fill in every source of standing or stagnant water which may breed mosquitoes, 3) remove all trash, rubbish, and litter which

may serve as a breeding ground for vermin, 4) cut all grass and weeds to a reasonable height, and kept it cut to that height, and 5) keep all vegetation of all kinds off any sidewalk(s) on or abutting the subject property. (R. at 78.)

Whitley was also enjoined from engaging in any business enterprises of the same nature he was conducting on the property. (R. at 76.) In particular, Whitley was prohibited from operating 1) a trucking terminal, 2) a used car lot, 3) a storage facility or junkyard, and 4) any business enterprise not permitted by the Zoning Ordinances of the City of Pearl, not properly allowed by variance, and not licensed by the City. (R. at 76.)

Unsatisfied with the ruling, Whitley filed a Notice of Appeal with the Mississippi Supreme Court on the 1st day of August, 2003; however, said appeal was dismissed for failure to pay costs of the appeal. Whitley failed to reinstate his appeal and he also refused to comply with the court's order.

The City of Pearl subsequently filed a Motion to Enforce Judgment and for Contempt on the 17th day of October, 2003. At a hearing for the City of Pearl's Motion held on the 4th day of November, 2003, Judge McDaniel ordered Whitley to comply with the prior judgment. Whitley then filed a motion to reinstate his appeal. On the 29th day of November, 2004, Judge McDaniel again ordered Whitley to comply with the court's prior judgment. (R. at 84.) On the same day, Whitley filed a Motion for Supersedeas and Stay of Judgment Pending Appeal with the Mississippi Supreme Court, which was denied on the 8th day of December, 2004. Whitley's appeal was again dismissed by the Supreme Court and Whitley took no further action to contest the validity of Judge McDaniel's order.

After Whitley was given ample time to comply with the numerous orders of the court, the City of Pearl, Mississippi enforced the order. On the 17th day of March, 2005, the Chief of Police for the City of Pearl contacted several local wrecker services, including Hayles, and requested their assistance in fulfilling Judge McDaniel's Order.

Less than one month later, on the 15th day of April, 2005, Whitley filed a Complaint in the United States District Court, Southern District, Jackson Division, against the City of Pearl, Mississippi and several local wrecker services, including Hayles. (R. at 89-99.) When Whitley failed to respond Defendants motions to dismiss and motions for summary judgment, Whitley's case was dismissed. Whitley subsequently filed this civil action.

SUMMARY OF THE ARGUMENT

Whitley claims that he was not afford due process regarding the County Court of Rankin County's dismissal of his all claims against Defendants. Due process requires that parties be given notice and an opportunity to be heard, Whitley has been given both. Whitley's Complaint in this action consists of the same facts, issues and parties as that of Whitley's prior actions; therefore, Whitley's claims should be barred by the doctrines of *res judicata* and collateral estoppel.

Whitley also argues that Judge McDaniel should have recused himself. Whitley offers no evidence tending to show that grounds underlying this assertion. Furthermore, Whitley failed to correctly file his Motion for Recusal as required under the *Uniform Chancery Court Rule* 1.11. In attempting to appeal the judge's denial of Whitley's Motion

for Recusal, Whitley failed to follow the procedure in *Miss. R. App. P.* 48B regarding our Supreme Court's review of the such denial.

For these reasons, Judge McDaniel's Order and Final Judgment dismissing all claims against Defendants shall be affirmed. The Order denying Whitley's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge shall likewise be affirmed.

ARGUMENT

I. Standard of Review

A chancellor will not be reversed "when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was used." *Kilpatrick v. Kilpatrick*, 732 So.2d 876, 880 (Miss. 1999). A chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings or unless the chancellor was manifestly wrong or clearly erroneous. *Turnpin v. Turnpin*, 699 So.2d 560, 564 (Miss. 1997). As to matters of law, however, the review is *de novo*, and if the chancellor applied an incorrect legal standard he must be reversed. *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994). The court reviews all of the evidence in a light most favorable to the appellee. *Rawson v. Buta*, 609 So.2d 426, 429 (Miss. 1992).

II. The trial court did not deny Whitley's right to due process in dismissing this action.

Whitley's first assignment of error contends that he was not afforded with due process because the Order Dismissing the Defendants from the litigation was entered prior to an evidentiary hearing. The due process clause of the *Mississippi Constitution* provides that

“No person shall be deprived of life, liberty, or property except by due process.” Miss. Const. art. 3, § 14. This Court has held that procedural due process is satisfied with a party is given “notice and an opportunity to be heard.” *Harris v. Miss. Valley State University*, 873 So.2d 970, 985 (Miss. 2004).

On the 27th day of March, 2007, a hearing was held on Whitley’s Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge, and on various Motions to Dismiss and Motions for Summary Judgment filed by the Defendants. Prior to the hearing, Whitley was served with copies of the various Motions filed by the Defendants and was served with Notice of Hearing within time to prepare for the hearing. During the hearing, both sides presented their evidence and arguments to the court regarding the dismissal of Whitley’s cause of action. Whitley argued against the dismissal of his case; however, the trial court found that dismissal of the case was warranted. Whitley was given both notice and the opportunity to be heard; therefore, the requirements of due process were complied with in this matter.

In Whitley’s brief, he relies on three cases in support of his due process argument. In particular, Whitley cites the case *City of Jackson v. Lee*, 106 So.2d 892 (Miss. 1958), as standing for the proposition that the trial judge may not base his findings on his personal knowledge, but must base his findings on the evidence and testimony presented in a trial of the cause; however, Whitley failed to provide any evidence supporting this assertion. The only knowledge Judge McDaniel had prior to the dismissal of this case was that that he derived solely from the judicial process and presiding over the original action.

Whitley also cites *Wisdom v. Stegall*, 70 So.2d 43 (Miss. 1954) and *Pullian v. Chandler*, 872 So.2d 752 (Miss. Ct. App. 2004) for support that it is an essential part of procedure due process that a party may interrogate the witnesses upon whose evidence the decree is based. Whitley cites these cases in a way to insinuate that due process unequivocally guarantees that every case will proceed to trial where the judge may review evidence and may interrogate witnesses; however, this is not the case. Cases may be dismissed through the use of Default Judgment, Summary Judgment, and Dismissal. Whitley's reliance on these cases is mistaken.

Even though Whitley contends he was denied due process in the dismissal of the Defendants in this case, his contentions sound in grievance over the underlying matters and allegations set forth in previous complaints. Judge McDaniel's Order of the 4th day of April, 2007, correctly found Whitley's arguments of denial of due process barred by the doctrines of *res judicata* and collateral estoppel. "[R]es judicata law is conclusive not only of what was actually contested, but also all matters that might have been litigated and determined in that suit." *City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So.2d 742, 748 (Miss. 1996). "All claims which have been litigated in a prior suit, as well as claims which should have been litigated in the prior suit, are barred from relitigation under the doctrine of *res judicata*." *Id.* (citing *Johnson v. Howell*, 592 So.2d 998, 1002 (Miss. 1991)). "Collateral estoppel . . . precludes parties from relitigating the exact issue in a different and subsequent cause of action." *Id.* at n. 1 (citing *Dunaway v. W. H. Hopper and Assoc., Inc.*, 422 So.2d 749 (Miss. 1982)). Since Whitley sets forth identical issues and claims as though set forth in both his federal court complaint and previous county court action, he is barred from bringing

this appeal under the doctrines of *res judicata* and collateral estoppel. Whitley's appeal must fail and Judge McDaniel's Order entered into on the 4th day of April, 2007, should be affirmed.

III. The trial court did not err in denying Whitley's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge.

Whitley contends as his second assignment of error that the County Court Judge should have recused himself. Supporting this argument, Whitley cites *Collins v. Dixie Transport, Inc.*, 543 So.2d 160 (Miss. 1989). The facts of the case are distinguishable from the facts at hand since the judge in *Collins* should have recused himself because he actually held personal conversations with one of the parties regarding the matters of the case. Whitley's reliance on *Collins* is misplaced. Furthermore, Whitley failed to provide evidence to support his argument that Judge McDaniel had personal knowledge of the facts at issue through an avenue other than the judicial process and in the course of proceeding of the prior civil action involving Whitley. Whitley's second assignment of error is unsupported and must also fail.

Whitley's third argument is also flawed. Whitley argues that Judge McDaniel must recuse himself because he was the judge who issued the Order requiring Whitley to bring his property into compliance with the ordinances of the City of Pearl, Mississippi. As support for his argument, Whitley cites *Brent v. State*, 929 So.2d 952 (Miss. Ct. App. 2005). The facts in this case are easily distinguishable from the facts in *Brent*. In *Brent*, Judge DeLaughter issued a search warrant as a County Court Judge, and was then asked as a Circuit Court Judge to review the same warrant. *Id.* The court also noted that Judge

DeLaughter had previously served as a prosecutor and actually prosecuted a case involving the Defendant for aggravated assault. *Id.* Whitley erroneously relied on *Brent*. In the case at hand, Judge McDaniel ruled on the actual case itself, and not on any personal knowledge. In the event this cause was transferred to another judge or court, the next Judge or Chancellor would have the same access to the file that Judge McDaniel used. His third assignment of error must fail and is inapplicable to this appeal.

Whitley's fourth assignment of error contends that Judge McDaniel erred in failing to grant the automatic interlocutory appeal with under *Miss. R. Civ. P.* 48B and that he also erred in granting the Defendants' Motions to be dismissed from the litigation. Whitley must have been referring to *Miss. R. App. P.* 48B instead. Whitley takes the position that Judge McDaniel's dismissal of his action denies his right to an appeal. On the contrary, the rules provide that Whitley is entitled to an appeal. *Miss. R. App. P.* 48B only grants the Supreme Court the power to order the recusal of a trial judge if the judge abused his discretion. As shown above, Hayles has illustrated that Judge McDaniel was acting within his discretion when he denied Whitley's motion and ordered a dismissal of Defendants.

Irrespective of whether Judge McDaniel erred in failing to recuse himself, Whitley failed to properly follow the procedure as set out in the *Uniform Chancery Court Rule* 1.11. Under this rule, Whitley had thirty (30) days from either his knowledge of the judge's assignment in the case or thirty (30) days from the date he reasonably ascertained that the judge had knowledge of facts underlying the case. Whitley filed the Motion to Reverse, Transfer to Chancery Court, or in the Alternative to Reassign this case to Another Judge nearly one year after the case was open. Since Whitley contends that Judge McDaniel had

knowledge of the case based on his prior involvement in an underlying action, Whitley had thirty days from the time the case was assigned to Judge McDaniel to file his Motion.

Not only was Whitley's appeal untimely filed, but it was also incorrectly filed. *Uniform Chancery Court Rule 1.11* also requires that the moving party file an affidavit of the party or the party's counsel along with the Motion. The affidavit should set forth the facts underlying the asserted grounds for recusal and declare that the motion is filed in good faith. The rule also requires the affiant should also state that he or she truly believes the facts underlying the grounds stated to be true. Whitley failed to submit an affidavit with his motion and he also failed to file his motion within the thirty (30) days set out in the rule. Since Whitley failed to follow procedures of *Uniform Chancery Court Rule 1.11*, he has waived his right to an appeal on his recusal argument and his fourth assignment of error must fail.

CONCLUSION

Despite Whitley's contentions, he was adequately afforded due process since he was given both notice and an opportunity to be heard. Furthermore, Whitley's claims should be barred under the doctrines of *res judicata* and collateral estoppel because Whitley has had the opportunity to litigate all of these issues in his prior action. Accordingly, Judge McDaniel's dismissal of Defendants, including Hayles, was properly granted and must be affirmed.

Judge McDaniel did not abuse his discretion in denying Whitley's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge because Judge McDaniel had no personal knowledge of the matters involved. Whitley failed

to properly and timely file his according to the *Uniform Chancery Court Rule* 1.11 regarding Motions for Recusal of Judges. For all these reasons, Whitley's appeal must fail and the Order and Final Judgment dismissing Defendants, including Hayles, from this case, must be affirmed. Furthermore, the Order denying Whitley's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge must also be affirmed.

WHEREFORE, PREMISES CONSIDERED, Defendant/Appellee, Hayles Towing & Recovery, respectfully requests that this Honorable Court affirm the findings of the County Court of Rankin County, Mississippi, in this matter and assess all attorney's fees and costs of this appeal against Whitley.

Respectfully submitted,

HAYLES TOWING & RECOVERY,
APPELLEE

BY:



J. PEYTON RANDOLPH, II

CERTIFICATE OF SERVICE

I, J. Peyton Randolph, II, do hereby certify that I have this date, filed the Brief of Appellee, Hayles Towing & Recover, with the Clerk of this Court and have served a copy of this Brief by United States mail with postage prepaid on all counsel of record as follows:

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James A. Bobo, Esq.
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Durwood E. McGuffee, Jr., Esq.
J. Scott Rogers, Esq.
Paul B. Henderson, Esq.
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Honorable Kent McDaniel

This the 20th day of November, 2007.



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