

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN T. WHITLEY, SR.

APPELLANT

VS.

**CITY OF PEARL, MISSISSIPPI,
HAYLES TOWING & RECOVERY,
R&L TOWING, CAPITOL BODY SHOP,
HALLS TOWING SERVICE, INC.,
WARD'S WRECKER SERVICE, WASTE
MANAGEMENT, INC. and JOHN DOES**

APPELLEES

CAUSE NO. 2007-CA-00874

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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JOHN T. WHITLEY, SR.

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HALLS TOWING SERVICE, INC.,
WARD'S WRECKER SERVICE, WASTE
MANAGEMENT, INC. and JOHN DOES**

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

- | | | |
|----|---------------------------------|---|
| 1. | John T. Whitley, Sr. | Plaintiff-Appellant |
| 2. | W.O. Chet Dillard | Attorney for Plaintiff-Appellant |
| 3. | Harry J. Rosenthal | Attorney for Plaintiff-Appellant |
| 4. | Mark Fijman
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| 5. | Paul B. Henderson | Attorney for Appellee
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R&L Towing |
| 9. | James A. Bobo, Esq. | Attorney for Appellee
City of Pearl |

SO CERTIFIED, this the 15th day of August, 2007.

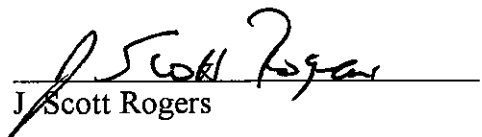

J. Scott Rogers

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STATEMENT OF THE ISSUES

At the outset, Appellees would bring to the Court's attention that Appellant's brief is, at times, difficult to understand and the true heart of the matters at issue are a bit clouded. Further, Appellees contend, and will demonstrate that matters at issue herein are barred and do not belong in this appeal. Appellees' brief will also address the following issues that we have gleaned and condensed from Appellant's four assignments of error contained his brief:

- I. Did the Order and Final Judgment, in which Defendants were dismissed from the case, deny Appellant his rights to due process?**
- II. Did the County Court Judge err in denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge?**

STATEMENT OF THE CASE

The roots of incident giving rise to this appeal run deep. On or about July 18, 2001, the City of Pearl filed a Petition with the Chancery Court of Rankin County seeking declaratory and injunctive relief against Appellant/Plaintiff, John Whitley, Sr. (hereinafter referred to as "Appellant"). The case was then transferred to the County Court of Rankin County on or about July 19, 2001. Judge Kent McDaniel entered a Final Judgment finding in favor of the City of Pearl on July 3, 2003. This Judgment required Appellant to comply with the City of Pearl's zoning ordinance and bring the subject property into compliance within sixty (60) days. Appellant then filed a Notice of Appeal on August 1, 2003. Said appeal was later dismissed due to failure of Appellant to pay the costs of appeal. On October 17, 2003, the City of Pearl filed a Motion to Enforce Judgment and for Contempt, and at the hearing thereof, on November 4, 2003, Judge McDaniel ordered Appellant to comply with the prior Judgment. At this point, Appellant again filed a motion to reinstate his appeal. On November 29, 2004, the County Court of Rankin County ordered Appellant to comply with the

court's prior judgment. On March 17, 2005, the City of Pearl enforced the lower court's order and had various items of personalty towed from Appellant's property. Then on March 21, 2005, Appellant again filed a motion to reinstate his appeal, which was granted on April 6, 2005.

On April 15, 2005, Appellant filed a Complaint in the United States District Court, Southern Division, against most of the named Defendants, including Appellees, in the case at bar. In said Complaint, Appellant alleged a myriad of constitutional deprivations pursuant to 42 U.S.C. § 1983. The various Defendants in that action filed motions to dismiss or for summary judgment. Appellant did not respond to these motions and, as a result, Appellant's case was dismissed.

Appellant then filed his Complaint in the Chancery Court of Rankin County on or about April 14, 2006, against the same Defendants, including Appellees. This case was also transferred to the County Court of Rankin County by Order dated May 8, 2006. The allegations in this Complaint are identical, as to the facts and relief requested, to Appellant's federal court Complaint, except that Defendant, Pearl Automotive & Towing, was added. Again, the various Defendants, including Appellees, filed motions to dismiss or for summary judgment. Appellant then filed a Motion to Reverse, Transfer to Chancery or in the alternative to Reassign this case to Another Judge.

On April 4, 2007, Judge McDaniel entered an Order and Final Judgment dismissing all claims against the various Defendants, including Appellees, with prejudice, and entered an Order denying Appellant's Motion to Reverse, Transfer to Chancery or in the Alternative to Reassign this case to Another Judge. Appellant, aggrieved by these orders, filed the instant appeal on April 9, 2007.

SUMMARY OF THE ARGUMENT

Appellant claims in his appeal that his rights to due process have been denied and that the County Court of Rankin County Judge erred in denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge. More specifically,

Appellant is aggrieved and feels that Judge McDaniel should have recused himself from the case at bar. Due process requires notice and opportunity to be heard. Appellant has had and exercised both. Therefore, under the doctrines of *res judicata* and collateral estoppel, because Appellant had an opportunity to litigate all of these issues in his prior actions, Appellant is barred from raising and relitigating these issues in the instant appeal. As such, Judge McDaniel's dismissal of the Defendants, including Appellees, was properly granted and must be affirmed.

Furthermore, because Judge McDaniel had not improperly gained personal knowledge of the matters involved in the issues below, he did not abuse his discretion in denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the alternative to Reassign this case to Another Judge. Appellant failed follow the procedure set forth in U.C.C.C.R. 1.15 regarding Motions for Recusal of Judges. Appellant's Motion requesting Recusal was not timely filed and failed to provide the content set out in that rule. For all these reasons, Appellees will show that Appellant's appeal must fail and the Order and Final Judgment dismissing the Defendants, including Appellees, from the case, as well as the Order denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge must be affirmed.

ARGUMENT

As stated *supra*, Appellant's argument is somewhat clouded at times, and bounces back and forth with points regarding grievances pertaining to due process and recusal. That being said, for the sake of organization and clarity, Appellee will first address the issue of due process and then move to recusal.

I. Did the Order and Final Judgment, in which Defendants were dismissed from the case, deny Appellant his rights to due process?

Appellant's first assignment of error states:

“The County Court of Rankin County, Mississippi denied the Appellant his rights to due process when he issued an Order Dismissing the Defendant’s [sic] from the litigation, prior to an evidentiary hearing of the cause.”

Appellant then cites, as support for his assignment of error, the case of *City of Jackson v. Lee*, 106 So.2d 892 (Miss. 1958), as standing for the proposition that a trial judge must base his findings upon the evidence and testimony presented in a trial of a cause and not upon his personal knowledge of the case. Appellant also cites to the cases of *Wisdom v. Stegall*, 70 So.2d 43 (Miss. 1954), and *Pullian v. Chandler*, 872 So.2d 752 (Miss. Ct. App. 2004), as stating “[i]t is an essential part of procedural due process that a party may interrogate the witness upon whose evidence the decree is based.” While Appellees certainly agree that these are true statements of the law, we contend that they are sorely misplaced here. First, Appellant has not brought forth a single shred of evidence toward proving that Judge McDaniel has made any decision in any matter involving this appeal, or any related matter, based on his personal knowledge. Further, Appellant uses these citations in such a way as to insinuate that due process unequivocally guarantees that every matter will proceed to trial where the judge may review evidence and parties may interrogate witnesses. Were this argument accepted as valid, it would be a complete usurpation of all vehicles of judicial economy including, but not limited to Default, Summary Judgment, and Dismissal. Due process requires nothing of the sort. This honorable Court, in *Harris v. Miss. Valley State. Univ.*, 873 So.2d 970, 985 (Miss. 2004), stated that “procedural due process requires that the party receive notice and an opportunity to be heard.” Appellees contend that Appellant has had both. Clearly, Appellant had notice of the various actions brought against him in all previous actions as he hired counsel to defend his interests in those matters. Further, Appellant had notice of all defendants’ defenses, including those of Appellees, to his allegations as he was served with copies of the various Motions to Dismiss and for Summary Judgment. Furthermore, Appellant was given Notice of Hearing on these motions by these various

defendants. As such, Appellant was given opportunity to be heard, either through personal appearance and argument or written response to these motions. In fact, Appellant's own Notice of Appeal states that "[t]his is an Interlocutor [sic] appeal of this case following a hearing held before the County Court of Rankin County, Mississippi on March 27, 2007." Therefore, by his own admission, Appellant had both notice and opportunity to be heard. That is all that due process requires. Therefore, Appellant's due process rights were not violated, and such argument must fail.

Although Appellant's first assignment of error specifically complains of a denial of due process from the Order dismissing the defendants from the instant case, his soliloquy both prior to and following this specific assignment sound in grievance over the underlying matters and allegations set forth in his previous complaints. Therefore, Appellees feel it necessary to address any possible interpretation of Appellant's grievances. If this is a correct understanding of Appellant's intent, then Judge McDaniel's Order of April 4, 2007 correctly found these arguments barred by the doctrines of *res judicata* and collateral estoppel. "[R]es judicata 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 all 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)). Further, Appellant is precluded from raising and relitigating the issues that were decided by the courts in their previous opinions rendered in the prior cases. "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)). Here, Appellant clearly sets forth identical issues and claims to those brought both in both his federal action and his previous county court action. Therefore, under the doctrines of *res judicata*

and collateral estoppel, Appellant's appeal and the issues contained therein are barred. Consequently, this appeal must fail and the April 4, 2007 Order of the County Court of Rankin County must be affirmed.

As for Appellant's argument regarding recusal, Appellees note that Appellant contends that there are three separate assignments of error. Appellees will touch on each one individually. However, Appellees feel that these three assignments can be addressed in one concise issue. As will be shown, the County Court Judge properly denied Appellant's Motion and the Order of the County Court should be affirmed.

II. Did the County Court Judge err in denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge?

In Appellant's second assignment of error, he states:

"The County Court Judge should have recused himself. Due Process requires that a judge that is otherwise qualified to preside at a trial must be sufficiently neutral to render a fair and impartial decision."

Garnering support for this assignment, he cites to *Collins v. Dixie Transport, Inc.*, 543 So.2d 160 (Miss. 1989), a case where this Court held that the Judge should have recused himself. However, Appellant fails to point out that, unlike the case at bar, this case had proceeded to trial. *Id.* Further, in *Collins*, one of the parties held personal conversations with the judge concerning the material issues of the trial. *Id.* at 167. In *Collins*, the judge even went so far as to ask the clerk to swear him in so that he could testify in the matter. *Id.* Clearly, as Appellant points out, this was a case where the judge should have recused himself. However, his reliance on *Collins* is misplaced and is not applicable to the case at bar. Appellant has failed to properly demonstrate that Judge McDaniel had any unique knowledge as to facts concerning any of the parties or subject matter of the case at bar that was not properly gained by the Court through the judicial process and in the course of

proceedings of the prior civil actions involving the Appellant. Therefore, Appellant's first assignment of error is fatally flawed, and is not applicable to this appeal.

Appellant's third assignment of error is equally flawed. Appellant states:

"The County Court Judge should have recused himself since the judge that issued the Order seizing the private property of the Appellant cannot be the same judge reviewing the prior order."

Appellant cites, as support for his third assignment of error, the case of *Brent v. State*, 929 So.2d 952 (Miss. Ct. App. 2005). In *Brent*, Judge Delaughter issued a search warrant as a County Court Judge and was later asked, in his position as Circuit Court Judge, to review the same warrant. *Id.* Aside from the fact that the case cited is a criminal matter, it has no place in this appeal. Appellant fails to point out the reasoning that Judge Delaughter had in issuing the warrant to begin with. Judge Delaughter clearly had a substantial basis for concluding that the warrant would expose contraband or evidence of a crime at the premises to be searched. *Id.* at 955. Otherwise, the learned Judge would not have issued the warrant at all. As such, Judge Delaughter was clearly biased when the matter came for review. Conversely, here, Judge McDaniel simply ruled on the matters presented to him and issued his orders based on his findings, and not on any personal knowledge. Appellant has wholly failed to prove otherwise. Further, in the event that Judge McDaniel had seen fit to recuse himself and transfer the case, the next Judge or Chancellor would have had equal access to the case file containing the same information and previous rulings of law that lead Judge McDaniel to rule in the manner that he did. Appellant's reliance on and reasoning based on *Brent* is misplaced and in erroneous. Therefore, Appellant's third assignment of error must fail and is inapplicable to this appeal.

Appellant's fourth assignment of error states:

"Judge Kent McDaniel erred [sic] in refusing to recuse himself, then

granting the automatic interlocutory appeal with the 14 days under MRCP [sic] 48-B [sic]; and then entered an Order dismissing the Defendants on their Motion to be dismissed from the litigation.”

Initially, Appellees would represent unto the Court that Appellant must have meant to refer to Mississippi Rule of Appellate Procedure 48 B, and not Mississippi Rule of Civil Procedure 48-B. Mississippi Rule of Appellate Procedure 48B deals with Proceedings on Motion for Disqualification of a Trial Judge. Appellant contends that Judge McDaniel’s Order of dismissal has somehow denied Appellant his right to an appeal. However, nowhere in that rule do Appellees find language supporting such allegation. To the contrary, this rule spells out in great detail the exact procedure for appealing to the Supreme Court, which is how Appellant brought this matter before the Court. Therefore, Appellees are puzzled as to how Appellant can be denied his right to appeal. What is fatal to Appellant’s appeal is the language in that rule which states, “The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion.” M.R.A.P. 48 B. As Appellees have demonstrated *supra*, Judge McDaniel was well within his given discretion when he ordered a denial of Appellant’s motions and ordered the dismissal of Appellees from the case at bar.

Further, irrespective of whether or not Judge McDaniel abused his discretion in denying Appellant’s Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge, Appellant failed to properly move or petition the Court to have Judge McDaniel recused. Please remember that Judge McDaniel was first assigned the instant case by court order on May 8, 2006. At that point, Appellant, per U.C.C.C.R. 1.15, had thirty (30) days in which to move or petition the Court for recusal. Further, according to that rule, Appellant was to file an Affidavit setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith. Appellant failed to file his Motion and supporting Affidavit within the

requisite 30 days following notification to the parties that the County Court was assigned to the case. In fact, Appellant waited nearly a year before filing his Motion on March 9, 2007. Therefore, Appellant, through his untimeliness and failure to follow procedure of Rule U.C.C.C.R. 1.15, has waived his right to appeal on recusal arguments. As such, this appeal must fail and the Order of the County Court of Rankin County must be affirmed.

Lastly, Appellees contend that all arguments regarding whether Judge McDaniel should have recused himself can be resolved by looking at the standard required for recusal. Canon 3 (E) of the Code of Judicial Conduct states in relevant part: “[j]udges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or as otherwise provided by law....” Canon 3(E)(1) Code of Judicial Conduct. This disqualification includes situations where a judge has personal knowledge of “disputed evidentiary facts concerning the proceedings.” Canon 3(E)(a). This honorable Court has adopted an objective test to determine when a judge should recuse himself. *McFarland v. State*, 707 So.2d 166, 180 (Miss. 1997). “A judge is required to recuse himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.” *Id.* (quoting *Green v. State*, 631 So.2d 167, 177 (Miss. 1994)). As Appellees have shown *supra*, Judge McDaniel had no personal knowledge of the matters relating to the instant case. Judge McDaniel simply made decisions on the evidence presented to him by all parties to the case at bar. As such, Judge McDaniel gained no personal knowledge that would demonstrate to any reasonable person, knowing all the circumstances surrounding the case at bar, that Judge McDaniel did not have the ability to remain impartial. Appellant disagrees. However, were the Court to accept Appellant’s argument, then all judges would have to recuse themselves after every hearing leading up to the trial in a particular matter. Then, a different judge would have to hear each subsequent

hearing. Finally, a new judge would have to be appointed to preside over the actual trial. This would be an absurd result. Because Judge McDaniel had no personal knowledge of the underlying matters surrounding this case, outside of the pleadings and normal progression of motion practice, he did not err in denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the alternative to Reassign this case to Another Judge, Appellant's appeal must fail and the Order of the County Court of Rankin County must be affirmed.

CONCLUSION

As stated above, due process requires notice and opportunity to be heard. Appellant has had and exercised both. Therefore, under the doctrines of *res judicata* and collateral estoppel, because Appellant opportunity to litigate all of these issues in his prior actions, Appellant is barred from raising and relitigating these issues in the instant appeal. As such, Judge McDaniel's dismissal of the Defendants, including Appellees, was properly granted and must be affirmed.

Furthermore, because Judge McDaniel had no improperly gained personal knowledge of the matters involved in the issues below, he did not abuse his discretion in denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge. Appellant failed follow the procedure set forth in U.C.C.C.R. 1.15 regarding Motions for Recusal of Judges. Appellant's Motion was not timely filed and failed to provide the content set out in that rule. For all these reasons, Appellant's appeal must fail and the Order and Final Judgment dismissing the Defendants, including Appellees, from the case, as well as the Order denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the Alternative to Reassign this case to Another Judge must be affirmed.

Respectfully submitted, this the 15th day of August, 2007.

**WARD'S WRECKER SERVICE AND CAPITOL
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By:


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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for Appellees, Ward's Wrecker Service and Capitol Body Shop, do hereby certify that I have this date caused to be delivered, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing pleading to the following:

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This the 15th day of August, 2007.


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