IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
2007-TS-00874

JOHN T. WHITLEY, SR. — **APPELLANT**

VS.

CITY OF PEARL, MISSISSIPPI;
HAYLES TOWING & RECOVERY;
R & L TOWING;
CAPITOL BODY SHOP;
HALL'S TOWING SERVICE, INC.;
WARD'S WRECKER SERVICE;
WASTE MANAGEMENT;
PEARL AUTOMOTIVE & TOWING; and
JOHN DOES [unnumbered] — **APPELLEES**

BRIEF OF APPELLEE

ON APPEAL FROM THE COUNTY COURT OF RANKIN COUNTY

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CERTIFICATE OF INTERESTED PERSONS

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 evaluate possible disqualification or recusal.

1. John T. Whitley, Sr. .....Appellant
2. W.O. "Chet" Dillard, Esq. .....Attorney for Appellant
3. Harry J. Rosenthal, Esq. .....Attorney for Appellant
4. Pearl Automotive & Towing.....Appellee
5. Judson M. Lee, Esq. .....Attorney for Pearl Automotive & Towing
6. R & L Towing .....Appellee
7. Durwood E. McGuffee, Jr., Esq. .....Attorney for R & L Towing
8. Ward's Wrecker Service.....Appellee
9. Capitol Body Shop.....Appellee
10. J. Scott Rogers, Esq. .....Attorney for Ward's Wrecker Service and Capitol Body Shop

11. City of Pearl, Mississippi.....Appellee

12. Mark Fijman, Esq. .....Attorney for City of Pearl

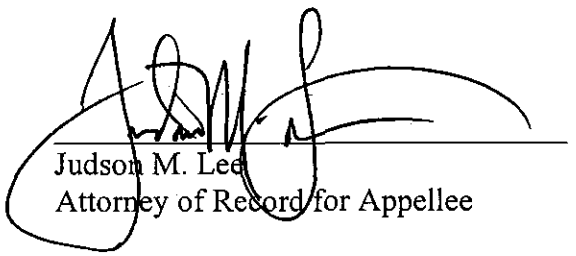
13. James A. Bobo, Esq. .....Attorney for City of Pearl

14. Hall's Towing Service, Inc. .....Appellee

15. Paul B. Henderson, Esq. .....Attorney for Hall's Towing Service, Inc.

16. Hayles Towing & Recovery.....Appellee

17. John P. Randolph, II, Esq.....Attorney for Hayles Towing & Recovery



Judson M. Lee
Attorney of Record for Appellee

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STATEMENT OF THE CASE

A. Course of Proceedings

The Plaintiff/Appellant in this case is John T. Whitley (hereinafter "Whitley"). The Defendant/Appellant is Pearl Automotive & Towing (hereinafter "Pearl Automotive").[1] On April 14, 2006, Whitley filed this civil action against Pearl Automotive in the Chancery Court of Rankin County, Mississippi. (R. 10). Whitley filed suit against Pearl Automotive for deprivation of property in violation of the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. On May 8, 2006, the Honorable Thomas L. Zebert recused himself from this case and transferred it to the Honorable Kent McDaniel of the County Court of Rankin County, Mississippi. (R. 24).

On June 27, 2006, Pearl Automotive filed its Motion for Summary Judgment, or in the Alternative, Motion to Dismiss. (R. 119). On March 9, 2007, Whitley filed his Motion to Reverse, Transfer to Chancery Court or in the Alternative for the Judge in this Court to Recuse Himself/ or in the Alternative to Reassign this Case to Another Judge (hereinafter "Motion to Recuse"). (R. 214). On March 22, 2007, Pearl Automotive filed its opposition to this motion to recuse. (R. 219).

On March 27, 2007, following a hearing, the trial court denied Whitley's Motion to Recuse and granted Pearl Automotive's Motion for Summary Judgment. On April 4, 2007, the trial court entered its Order denying the Motion to Recuse and its Order and Final Judgment dismissing Pearl Automotive and its co-defendants from this action. (R. 233-237). On April 9, 2007, Whitley filed a Notice of Appeal; however, he did not designate which of the trial court's

[1] Whitley named several defendants, some of whom were also dismissed from this action along with Pearl Automotive. These similarly-dismissed defendants include: Hayles Towing & Recovery; R & L Towing; Capitol Body Shop; Hall's Towing Service, Inc.; and Ward's Wrecker Service. Reference is made herein to all defendants collectively as "Defendants."

orders he was appealing. (R. 238). From the text of Whitley's Appellant's Brief, Whitley has appealed only the trial court's denial of his Motion to Recuse.

B. Statement of Facts

On July 18, 2001, in an entirely separate civil action from this matter, the City of Pearl, Mississippi, petitioned the Chancery Court of Rankin County for declaratory and injunctive relief against Whitley. (R. 59). Specifically, the City of Pearl sought an order requiring Whitley to clean up the clutter, debris and trash on his property located on Highway 80, within the city limits of Pearl. (R. 60). Additionally, the City of Pearl requested an order requiring Whitley to maintain his property in conformity with the limited commercial zoning ordinances for which it was designated and to cease operating various unlicensed business enterprises on the property. (R. 60). On July 19, 2001, the Chancery Court transferred that action to the County Court of Rankin County, with the Honorable Kent McDaniel presiding. (R. 59).

On June 20, 2003, after arguments and briefs, the Rankin County Court entered its Findings of Fact and Conclusions of Law, in which it found Whitley's property was a "mess" and "littered with every sort of debris" and in need of immediate cleanup. (R. 61). Additionally, the court found that "[t]he challenged ordinances are enforceable and are not unconstitutional." (R. 68).

On July 3, 2003, in accordance with its Findings of Fact and Conclusions of Law, the court entered a Final Judgment and ordered Whitley 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 keep it cut to that height; and 5) keep all vegetation of all kinds off any sidewalk(s) on or abutting the subject property. (R. 78).

property and transferred them to its storage facility. On March 21, 2005, pursuant to applicable laws, Pearl Automotive advised Whitley by letter as to how he could reclaim his property. (R. 86). Although Whitley acknowledged receiving notification on April 12, 2005, he never responded. (R. 88).

On April 15, 2005, less than one month after the City of Pearl fulfilled the Final Judgment, Whitley filed suit in federal court against the City of Pearl and several local wrecker services for deprivation of property. (R. 89-99). Whitley alleged that his cause of action arose under the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Pearl Automotive was not named in that lawsuit. Shortly thereafter, the federal court dismissed Whitley's action without prejudice for lack of prosecution.

On April 14, 2006, over one year and three weeks after his property was cleaned up, Whitley filed this civil action against the same defendants, only this time, Whitley named Pearl Automotive as a Defendant. (R. 10-19). The Complaint for this action is identical to the Complaint that Whitley filed in federal court. In particular, Whitley asserts a claim for deprivation of property under the Fourth and Fourteenth Amendments and 42 U.S.C. 1983. (R. 12). Moreover, Whitley bases these claims on his assertion that Judge McDaniel's Final Judgment issued in the previous action brought by the City of Pearl was unconstitutional. Whitley, therefore, brought this civil action to contest the merits of the Final Judgment issued in the previous action and which has been fully and finally adjudicated.

SUMMARY OF THE ARGUMENT

Whitley failed to comply with Rule 48B of the Mississippi Rules of Appellate Procedure. Whitley has incorrectly characterized this as an "interlocutory appeal" from the trial court's Order denying his Motion to Recuse. M.R.A.P. 48B, however, requires a litigant to file a petition with the Supreme Court within 14 days of the trial court's order and attach a true copy of the order and the hearing transcript. Whitley did not file a petition nor did he comply with the remaining requirements of M.R.A.P. 48B. This Court should decline to hear Whitley's appeal.

In the event this Court considers the merits of Whitley's appeal, there are only two issues to decide. First, whether the trial court acted properly when it denied Whitley's Motion to Recuse. Second, whether the trial court was procedurally correct when it dismissed Whitley's claims after it denied his Motion to Recuse.[2] In both instances, the trial court acted properly and this Court should deny Whitley's appeal.

Whitley filed this civil action to contest the merits of a Final Judgment issued by Judge Kent McDaniel in a previous and separate action brought by the City of Pearl against Whitley to force him to clean up his property. Whitley asserts that Judge McDaniel should have recused himself from this action because he would be placed in the position of "reversing his own prior decision." (R. 215). Whitley is barred from pursuing this theory by the doctrines of *res judicata* and collateral estoppel, which provide that a litigant cannot contest the merits of a judgment rendered in a prior case and which has been finally adjudicated on appeal. The trial court properly denied Whitley's Motion to Recuse on the basis that Whitley could not ask the Court to reverse a Final Judgment rendered in a separate civil action, and therefore, there was no conflict requiring recusal. Further, the trial court properly denied Whitley's Motion to Recuse because

[2] Whitley has not raised any issue with the merits of the trial court's dismissal of his claim against Pearl Automotive. Instead, Whitley only contends that the trial court should not have dismissed his claims after it denied his Motion to Recuse.

Whitley failed to comply with the requirements for filing a motion for recusal set forth in Rule 1.15 of the Uniform Circuit and County Court Rules.

Next, the trial court acted properly when it dismissed Whitley's claims against Pearl Automotive after denying the Motion to Recuse. First, the trial court's denial of Whitley's Motion to Recuse did not stay the underlying proceedings in this case and Whitley did not request a stay of proceedings. Second, contrary to Whitley's contention, the trial court held an evidentiary hearing on the Defendants' motions to dismiss. During this time, Whitley was given the opportunity to present evidence and call witnesses; however, he did not do so. For these reasons, Pearl Automotive respectfully requests that this Court affirm the trial court's Orders denying recusal and dismissing Whitley's claims against Pearl Automotive.

ARGUMENT

I. WHITLEY FAILED TO COMPLY WITH M.R.A.P. 48B

On March 27, 2007, the Rankin County Court, with the Honorable Kent McDaniel presiding, held a hearing on Whitley's Motion to Recuse and Pearl Automotive's Motion for Summary Judgment, or in the Alternative, Motion to Dismiss. (T. 1-51). After hearing Whitley's Motion to Recuse, Judge McDaniel denied it, finding no basis for recusal. (T. 13-17). Before the hearing on Pearl Automotive's motion, however, Whitley's counsel made an *ore tenus* motion for permission to take an interlocutory appeal from Judge McDaniel's ruling on the Motion to Recuse. (T. 18). Judge McDaniel reviewed and read Rule 48B of the Mississippi Rules on Appellate Procedure into the record and recognized that he had no discretion to grant Whitley leave to take an interlocutory appeal. (T. 18-19). Rather, Judge McDaniel stated that Whitley had a right to appeal his order under M.R.A.P. 48B, if he so chose. (T. 19). In other words, a litigant's right of review under Rule 48B is permissive, not automatic.

Rule 48B, which sets forth several requirements, states, in relevant part:

> If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge's recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, ***the filing party may within 14 days following the judge's ruling***, or 14 days following the expiration of the 30 days allowed for ruling, ***seek review of the judge's action by the Supreme Court. A true copy of any order entered*** by the subject judge on the question of recusal ***and transcript of any hearing*** thereon ***shall be submitted with the petition*** in the Supreme Court.[]

M.R.A.P. 48B (emphasis added).

Under the terms of Rule 48B, Whitley was required to file a petition with a true copy of Judge McDaniel's Order and the hearing transcript attached. Whitley did not comply with these requirements. Judge McDaniel's Order was entered on April 4, 2007. (R. 233). Instead of filing a petition with the Supreme Court, Whitley filed a Notice of Appeal on April 9, 2007. (R. 238).

On July 16, 2007, Whitley filed his Appellant's Brief and incorrectly designated it as an interlocutory appeal.

This Court should decline to hear Whitley's Appellant's Brief for failure to timely file a petition within 14 days of the trial court's Order in accordance with M.R.A.P. 48B. In the event the Court accepts Whitley's Appellant's Brief, it should nonetheless decline to consider it on the merits for Whitley's failure to file a proper Notice of Appeal.

II. THE TRIAL COURT PROPERLY DENIED WHITLEY'S MOTION TO RECUSE

A. Standard of Review

In the event this Court considers the arguments set forth in Whitley's Appellant's Brief, then the Court will necessarily review the trial court's April 4, 2007, Order denying Whitley's Motion to Recuse. This Court "[r]eviews a judge's refusal to recuse himself using the manifest error standard." *Davis v. Neshoba County Gen. Hosp.*, 611 So.2d 904, 905 (Miss. 1992). "The Court will not reverse the ruling on the motion for recusal unless the trial judge abused his discretion in overruling the motion." *Bredemeier v. Jackson*, 689 So.2d 770, 774 (Miss. 1997).

B. Whitley Has Not Shown Any Basis to Support Recusal

In his second and third assignments of error, Whitley contends the trial court erred in denying his Motion to Recuse for two reasons.[3] Specifically, Whitley contends that Judge McDaniel was not impartial because he presided over the City of Pearl's enforcement action against Whitley which resulted in the Final Judgment. Further, because Whitley brought this action in an effort to overturn the Final Judgment, Whitley contends Judge McDaniel would be in the position of reversing his own prior decision. Whitley is incorrect on both assignments.

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[3] In his Appellant's Brief, Whitley assigns four errors to the trial court. In the second and third assignments of errors, Whitley contends that the trial court erred in denying Whitley's Motion to Recuse. In the first and fourth assignments of error, Whitley contends the trial court erred procedurally by dismissing Whitley's claims after it denied the Motion to Recuse. For clearer presentation of the issues, this brief will initially address the second and third assignments of error.

There are two civil actions relevant to the issue at hand. The first action was brought by the City of Pearl against Whitley and sought an injunction to get him to clean up his property because it was in violation of numerous city ordinances. That case was filed in the Rankin County Chancery Court; however, because of a conflict, the Chancellor, the Honorable Thomas L. Zebert, recused himself and transferred the case to the Honorable Kent McDaniel. After numerous proceedings and hearings, Judge McDaniel issued a Final Judgment which required Whitley to clean up his property. Under the terms of the Final Judgment, if Whitley refused to comply, which he did, the City of Pearl was empowered to take necessary steps to clear the property, which it did. Whitley failed to perfect an appeal of the Final Judgment and all appeal times have passed. The first action, therefore, has been concluded and the Final Judgment stands as fully-adjudicated.

The second action is the present case which Whitley filed against Pearl Automotive and the other Defendants. In this second action, Whitley asserts that the Defendants violated his Constitutional right to due process by clearing his property in accordance with the Final Judgment. The basis for Whitley's assertion is his belief that the Final Judgment was unconstitutional. ***In other words, Whitley filed the second action to contest the merits of the Final Judgment obtained in the first action.***

As with the first action, this case was assigned to Judge McDaniel. Almost a year after Judge McDaniel was assigned to this case, Whitley filed his Motion to Recuse and asserted, "The major issue in the Plaintiff's present cause of action involves the opinion previously rendered in the prior County Court case, which was rendered by Judge Kent McDaniel; which would place Judge McDaniel in a position of reversing his own prior decision." (R. 215). Clearly, Whitley filed this action in an improper effort to contest the validity of the Final Judgment.

Returning to Whitley's assignments of error, in his second assignment, Whitley asserts that Judge McDaniel should have recused himself because he was not "sufficiently neutral to render a fair and impartial decision." Although Whitley does not articulate the basis for his contention, presumably it is because Judge McDaniel presided over the first action and issued the Final Judgment. Regardless, there is no merit to Whitley's second assignment of error.

Following a hearing, Judge McDaniel issued an Order denying the Motion to Recuse and stated:

> That the Court does not posses any unique knowledge or facts about the parties and subject matter of this civil action that was not properly gained by the Court through the judicial process and in the course of proceedings of a prior and separate civil action involving [Whitley];
>
> That [Whitley] has not provided any basis for a reasonable person knowing all of the circumstances of this matter to question the impartiality of this Court nor has [Whitley] otherwise provided any ground set forth in the Code of Judicial Conduct to support recusal in this matter.

(R. 233-34).

In other words, Judge McDaniel's prior knowledge about Whitley was derived solely from the judicial process and presiding over the first action. That does not constitute a sufficient basis to question Judge McDaniel's impartiality. Because Whitley did not provide any legal or logical basis to support recusal, Judge McDaniel did not abuse his discretion when he denied Whitley's Motion to Recuse. For this reason, the Court should disregard Whitley's second assignment of error.

Regarding the third assignment of error, Whitley contends that Judge McDaniel erred in refusing to recuse himself because, by remaining on the case, he would be in the position of reviewing and/or reversing the Final Judgment, which was his own prior decision. There is no merit to Whitley's third assignment of error. In his Order denying recusal, Judge McDaniel held that Whitley "[i]s barred by the doctrines of *res judicata* and collateral estoppel from requesting

the Court to reverse an order and opinion which it rendered in a prior and separate civil action involving [Whitley] and which was fully and finally adjudicated." (R. 233).

It is an established principle of law that a litigant cannot bring a separate action to reverse a decision rendered in a previous and separate case which has been finally adjudicated on appeal. "[*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) (citation omitted). "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, Whitley is precluded by the doctrine of collateral estoppel from relitigating the issues that were fully and finally adjudicated in the Final Judgment. "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 Associates, Inc.*, 422 So.2d 749 (Miss. 1982).

Because Whitley is barred by *res judicata* and collateral estoppel from contesting the merits of the Final Judgment, his assertion that Judge McDaniel should recuse himself from hearing this case because he would be in the position of reversing his own decision is unfounded. For this reason, this Court should disregard Whitley's third assignment of error.

C. Whitley Failed to Comply with U.C.C.C.R. 1.15

This Court should affirm Judge McDaniel's Order denying recusal because Whitley also failed to comply with the requirements for filing a motion for recusal which are set forth in Rule 1.15 of the Uniform Circuit and County Court Rules. In particular, Rule 1.15 requires that a party seeking the recusal of a judge file an "affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion

is filed in good faith." *See* U.C.C.C.R. 1.15. Whitley did not file any such affidavit with his Motion to Recuse. Further, Rule 1.15 requires a party to file the motion to recuse and affidavit "within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted." *See* U.C.C.C.R. 1.15.

In his Order denying Whitley's motion, Judge McDaniel found:

> That [Whitley] has failed to properly comply with the procedural requirements of Rule 1.15 of the Uniform Circuit and County Court Rules, in particular, [Whitley] has failed 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 and that [Whitley] failed to file his Motion to Recuse and supporting affidavit within 30 days following notification to the parties that this Court was assigned to the case.

(R. 234).

Whitley filed this action on April 14, 2006. This action was transferred to Judge McDaniel by Order dated May 8, 2006. Almost one year later, on March 9, 2007, Whitley filed his Motion to Recuse. Even by a loose interpretation of Rule 1.15, Whitley has failed to comply with its requirements. This Court, therefore, should affirm Judge McDaniel's Order denying recusal.

III. THE TRIAL COURT PROPERLY DISMISSED WHITLEY'S ACTION

In his first and fourth assignments of error, Whitley asserts that the trial court erred in dismissing his claims after denying his Motion to Recuse. ***Whitley does not contest the merits of the dismissal of his claims in any part of his Appellant's Brief.*** Instead, Whitley argues that the trial court committed two procedural errors. In his first assignment, Whitley asserts he was not provided an evidentiary hearing prior to dismissal. In his fourth assignment, Whitley contends the trial court should not have dismissed his claims after denying his Motion to Recuse. Whitley is incorrect on both assignments.

A. The Trial Court Held an Evidentiary Hearing Prior to Dismissal

Whitley contends that the trial court denied him due process by dismissing his claims without an evidentiary hearing. Whitley is confused. On March 27, 2007, the trial court held a hearing on Whitley's Motion to Recuse and Pearl Automotive's Motion for Summary Judgment, or in the Alternative, Motion to Dismiss. (T. 1-51). At this hearing, both sides were given the opportunity to present their arguments and evidence regarding the dismissal of Whitley's claims. (T. 19-51). Indeed, both of Whitley's attorneys argued in opposition to Pearl Automotive's motion for dismissal. Further, Whitley attended this hearing with his attorneys, however, he did not offer any testimony and he did not call any witnesses to testify on his behalf. Whitley was given ample opportunity to present evidence to oppose the dismissal of his claims.[4]

The meaning behind Whitley's assertion that he was denied due process without an evidentiary hearing surfaces on page 7 of his Appellant's Brief. Here, Whitley refers to the City of Pearl's enforcement action filed against him and declares that his property was taken from him pursuant to Judge McDaniel's Final Judgment and that this denied him due process because the Final Judgment was unconstitutional. Again, it is clear that Whitley is using this case to improperly attack the merits of the Final Judgment, which has been fully and finally adjudicated. Whitley's assertion that the Final Judgment denied him due process is a matter that is barred from collateral attack by the doctrines of *res judicata* and collateral estoppel. For these reasons, there is no merit to Whitley's first assignment of error.

B. The Trial Court Properly Dismissed Whitley's Claims After Denying His Motion to Recuse

In Whitley's fourth assignment of error, he argues the trial court erred in dismissing his claims after it denied the Motion to Recuse. Presumably, Whitley believes that his *ore tenus*

[4] Pearl Automotive filed its Motion for Summary Judgment, or in the Alternative, Motion to Dismiss on June 27, 2006. Although the motion was not heard until nine months later on March 27, 2007, Whitley never filed any response or opposition.

request to take an interlocutory appeal of the Order denying recusal should have precluded the trial court from hearing the Defendants' motions to dismiss. Whitley offers no authority for this argument. Contrary to his assertion, the trial court acted properly.

During the March 27, 2007 hearing, Whitley's counsel moved for an interlocutory appeal on the denial of the Motion to Recuse. (T. 18). Whitley's counsel made this *ore tenus* motion prior to the trial court hearing Pearl Automotive's Motion for Summary Judgment, or in the Alternative, Motion to Dismiss. (T. 18). After an on-the-record review of Rule 48B of the Mississippi Rules of Appellate Procedure, the trial court acknowledged Whitley's right to petition the Mississippi Supreme Court for review of the trial court's Order.[5] (T. 19). Thereafter, the trial court heard the motions to dismiss. (T. 19).

> Rule 48B states, in part:
>
> If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge's recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, ***the filing party may*** within 14 days following the judge's ruling, or 14 days following the expiration of the 30 days allowed for ruling, ***seek review of the judge's action by the Supreme Court.***[]

M.R.A.P. 48B (emphasis added).

In other words, Whitley had the ***right*** to petition the Supreme Court for review of the trial judge's refusal to recuse himself -- whether he exercised that right was his choice. Contrary to Whitley's assertion, however, the trial judge did not grant him leave to take an interlocutory appeal nor did the trial judge issue any order. The trial court simply recognized that Whitley had this right.

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[5] Contrary to Whitley's assertion, the trial court did not grant him leave to take an interlocutory appeal, rather, the trial court simply recognized Whitley's right under M.R.A.P. 48B to petition the Supreme Court for review of the recusal decision. In the present appeal, however, Whitley has confused the term "interlocutory appeal" with a litigant's right to seek review of a denial of a motion to recuse under M.R.A.P. 48B. Rule 5(a) of the Mississippi Rules of Appellate Procedure controls interlocutory appeals. According to M.R.A.P. 5(a), "An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a ***question of law***..." M.R.A.P. 5(a) (emphasis added). Interlocutory appeals, by definition, must present a question of law and a trial judge's refusal to recuse himself does not present a question of law -- that issue is controlled by another rule, M.R.A.P 48B.

Regardless, what is clear is that the proceedings in the trial court were not stayed. (T. 18-19). Although Rule 48B does not address the issue of a stay of proceedings, it is respectfully submitted that if the decision to petition the Supreme Court for review of a trial judge's refusal to recuse is left up to the aggrieved litigant, then it follows that that litigant must also move the trial court to stay all proceedings pending the outcome of the petition.[6] In other words, if the aggrieved litigant does not file a petition with the Supreme Court, then the issue is of no consequence to the trial court. Further, unless the aggrieved litigant files a petition with the Supreme Court, there is no reason the underlying proceedings would be stayed unless a party requests a stay.

Whitley did not ask the trial court to stay the underlying proceedings. (T. 18-19). Immediately after the trial court recognized Whitley's right to petition the Supreme Court, the trial court heard the motions to dismiss and Whitley did not object. (T. 19). Instead, Whitley's counsel participated in the hearing and opposed the motions on substantive grounds. (T. 19-51). Because Whitley did not request a stay of the proceedings pending review of the recusal decision, there is no basis for his assertion that the trial court erred in dismissing his claims after it denied the Motion to Recuse. For these reasons, Whitley's fourth assignment of error is without merit.

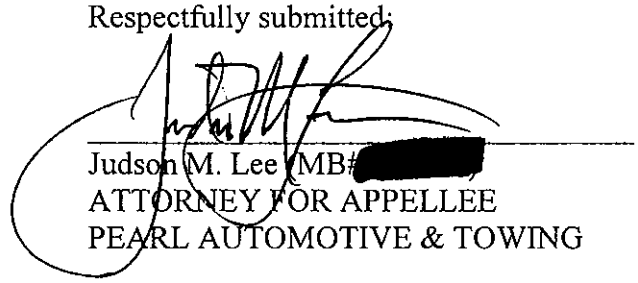
[6] M.R.A.P. 5(f) does address this issue with regard to interlocutory appeals. In particular, Rule 5(f) states, "The petition for appeal ***shall not stay*** proceedings in the trial court unless the trial judge or the Supreme Court shall so order." M.R.A.P. 5(f) (emphasis added).

CONCLUSION

For the foregoing reasons, the Appellee, Pearl Automotive & Towing, respectfully requests that this Court affirm the trial court's April 4, 2007 Order denying Motion to Recuse and Order and Final Judgment dismissing Pearl Automotive & Towing from this action.

This the 28th day of August, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via U.S. Mail, postage pre-paid, to:

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This the 28th day of August, 2007.

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