

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CP-00874

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., PEARL
AUTOMOTIVE & TOWING;
AND JOHN DOES (unnumbered)**

APPELLEE

BRIEF OF APPELLEE R & L TOWING

APPEAL FROM THE COUNTY COURT OF RANKIN COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

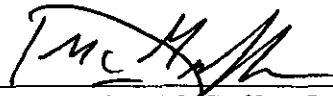
The undersigned counsel for the Appellee, R & L Towing, does hereby certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. John T. Whitley, Sr., Appellant;
2. W.O. "Chet" Dillard, Esq., Attorney for Appellant;
3. Harry J. Rosenthal, Esq., Attorney for Appellant;
4. City of Pearl, Appellee;
5. Mark Figman, Esq., Attorney for City of Pearl;
6. James A. Bobo, Attorney for City of Pearl;
7. Hayles Towing and Recovery, Appellee;

8. John P. Randolph, Esq., Attorney for Hayles Towing and Recovery;
9. R & L Towing, LLC., Appellee;
10. Durwood McGuffee, Jr., Attorney for Appellee;
11. Capitol Body Shop, Appellee;
12. J. Scott Rogers, Esq., Attorney for Capitol Body Shop and Ward's Wrecker Service;
13. Halls Body Shop, Appellee;
14. Paul B. Henderson, Esq., Attorney for Halls Body Shop;
15. Ward's Wrecker Service, Appellee;
16. Pearl Automotive and Towing, Appellee;
17. Judson M. Lee, Esq., Attorney for Pearl Automotive and Towing.
18. The Honorable Kent McDaniel, Rankin County Court Judge.

R & L TOWING, APPELLEE

BY:



Durwood E. McGuffee, Jr.,
Attorney for Appellee

STATEMENT REGARDING ORAL ARGUMENT

The Appellee requests oral argument.

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APPELLEE

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT DENIED THE APPELLANT HIS RIGHTS TO DUE PROCESS.**
- II. WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO RECUSE AND OTHER REQUESTED RELIEF.**
- III. WHETHER THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO APPEAL.**

STATEMENT OF THE CASE

On or about July 18, 2001, the City of Pearl filed a Petition with the Chancery Court of Rankin County seeking declaratory relief against John Whitley, Appellant, (hereinafter referred to as "Whitley"). 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. (R. 76). The Judgment required Plaintiff to comply with the City of Pearl's zoning ordinance and bring the subject property into compliance within sixty (60) days. (R. 76). Plaintiff then filed a Notice of Appeal on August 1, 2003. The appeal was later dismissed due to failure 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 Plaintiff to comply with the prior Judgment. After this point, the Plaintiff again filed a motion to reinstate his appeal. On March 26, 2004, the Mississippi Supreme Court dismissed his appeal but allowed him leave to reinstate it. Whitley failed to reinstate the appeal and also failed to comply with the Final Judgment. On August 11, 2004, the trial court ordered Whitley to comply with the Final Judgment no later than August 27, 2004. (R. 79). Whitley again refused to comply. On October 26, 2004, the Rankin County County Court issued an Order to Show Cause and commanded Whitley to appear and show cause as to why he did not comply with the Final Judgment. (R. 82). On November 29, 2004, the Rankin County Court entered an Order compelling Whitley to abide by the Final Judgment, and in the event that Whitley refused to comply, the trial court authorized the City of Pearl and its contractors, agents and employees to enter Whitley's property and enforce the Final Judgment. (R. 84). On that same day, Whitley filed a Motion for Supersedeas and Stay of Judgment Pending Appeal, which was denied by the Mississippi Supreme Court on December 8, 2004. On January 5, 2005, the Mississippi Supreme Court dismissed Whitley's appeal. Whitley took no further action at this point to contest the validity of the Final Judgment.

On March 17, 2005, the City of Pearl enforced the lower court's order and had various items of personalty towed from the Plaintiff's property. On April 15, 2005, Whitley filed a complaint in the United States District Court, Southern Division, against most of the named Defendants in this action. (R. 89-99). Whitley alleged various constitutional deprivations pursuant to 42 U.S.C. § 1983. The various defendants in that action filed motions to dismiss or for summary judgment. Whitley did not respond to said motions and Whitley's case was

dismissed. R & L Towing's Motion to Dismiss was granted on January 6, 2006.

On April 14, 2006, Whitley filed his complaint in this action. (R. 10). Said Complaint is identical to the complaint filed in federal court, except that Pearl Automotive & Towing was added as a defendant. Whitley filed suit alleging 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, Judge Thomas L. Zebert recused himself from this case and transferred it to Judge Kent McDaniel of the County Court of Rankin County, Mississippi. (R. 24). R & L Towing later filed a Motion to Dismiss and/or for Summary Judgment. (R. 149). On March 9, 2007, Whitley filed a Motion to Reverse, Transfer to Chancery or in the Alternative to Reassign the Case to Another Judge. (R. 214).

On March 27, 2007, the trial court denied Whitley's Motion and Granted R & L Towing's Motion to Dismiss. On April 4, 2007, Judge McDaniel entered an Order and Final Judgment dismissing all claims against the various Defendants, with prejudice, and entered an Order denying Appellant's Motion. (R. 233). Mr. Whitley then filed a Notice of Appeal on April 9, 2007. (R. 238).

STATEMENT OF FACTS

As previously stated, on July 18, 2001, in a separate civil action, the City of Pearl petitioned the Chancery Court of Rankin County for declaratory and injunctive relief. The City of Pearl sought an order requiring Whitley to clean up the clutter, debris and trash on his property within the City of Pearl. (R. 60). The City of Pearl also requested an order requiring Mr. Whitley to maintain his property in conformity with the City of Pearl's zoning ordinance. (R. 60). On July 19, 2001, the Chancery Court transferred the action to the County Court of Rankin

County. (R. 60).

On June 20, 2003, the County Court of Rankin County found that Mr. Whitley's property was a "mess" and "littered with every sort of debris" and in need of immediate cleanup. (R. 61). The court also found that the City of Pearl's ordinances were constitutional. (R. 68). On July 3, 2003, 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; 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 sidewalks. (R. 78).

Mr. Whitley was also permanently enjoined from engaging in any of the business enterprises of the same nature that he was conducting on the property. (R. 76). The Final Judgment prohibited the operation of: (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 of Pearl. (R. 76). Mr. Whitley was given sixty (60) days to comply with the Final Judgment. (R. 77). Mr. Whitley refused to comply and attempted to appeal the Judgment to the Mississippi Supreme Court.

On March 26, 2004, the Mississippi Supreme Court dismissed Mr. Whitley's appeal but allowed him leave to reinstate. Mr. Whitley did not reinstate his appeal and did not comply with the Final Judgment. On August 11, 2004, the trial court ordered Mr. Whitley to comply with the Final Judgment no later than August 27, 2004. (R. 79). Mr. Whitley again refused to comply.

On October 26, 2004, a Show Cause Order was entered. (R. 82). On November 29, 2004, the County Court of Rankin County entered an Order compelling Mr. Whitley to abide by

the Final Judgment, and in the event he failed to comply, the trial court authorized “[t]he City of Pearl ... its contractors, agents and employees ... to go up the (sic) property and fulfill the Final Judgment.” (R. 84). On that same day, Mr. Whitley filed a Motion for Supersedeas and Stay of Judgment Pending Appeal with the Mississippi Supreme Court that was denied on December 8, 2004. On January 5, 2005, the Mississippi Supreme Court dismissed Mr. Whitley’s appeal and he took no further action to contest the validity of the Final Judgment.

On March 17, 2005, the Chief of Police for the City of Pearl, contacted several local wrecker services, including R & L Towing, and requested their assistance in fulfilling the Final Judgment of the County Court of Rankin County. On that same day and pursuant to the instruction of the Chief of Police, R & L Towing removed certain vehicles and items from Mr. Whitley’s property.

On April 15, 2005, Mr. Whitley filed suit in the United States District Court, Southern District of Mississippi, against R & L Towing and various other Defendants. (R. 89). Mr. Whitley filed suit alleging deprivation of property in violation of the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R. 89-99). Various Defendants filed motions to dismiss and for summary judgment, to which Whitley did not respond. The United States District Court dismissed Mr. Whitley’s complaint for failure to prosecute.

On April 14, 2006, Mr. Whitley filed this civil action, which is virtually identical to the civil suit filed in federal court. (R. 10). Mr. Whitley bases his claims upon the assertion that Judge McDaniel’s Final Judgment, in the previous action, was unconstitutional. (R. 10-19). This appeal is from a previous action which has been fully adjudicated.

SUMMARY OF THE ARGUMENTS

Whitley's Brief does not discuss the merits of the trial court's order in dismissing his claims. Whitley argues that he was denied due process, that the court committed procedural errors, and that the court should have recused itself from hearing the case.

The trial court was correct in granting the Appellee's Motions to Dismiss and/or for Summary Judgment, and denying Appellant's Motion to Reverse, Transfer to Chancery Court or in the alternative to Reassign Case to Another Judge. Appellant's argument that he was denied due process of law must fail both in substance and as a matter of law. Due process required notice and an opportunity to be heard. Appellant had notice and attended the hearing and responded to the various motions to dismiss. The doctrines of *res judicata* and collateral estoppel bar the Appellant's cause of action. Appellant had an opportunity to litigate all of the issues presented in this case in his prior actions.

Appellant asserts that Judge McDaniel should have recused himself from these proceedings in the lower court. However, Judge McDaniel did not err in failing to recuse himself. The trial court properly denied Appellant's requested relief on the basis that Appellant could not ask the Court to reverse a Final Judgment previously rendered in a separate civil action. Accordingly, there was no legal basis justifying recusal of the trial judge. Further, as an additional basis, Appellant failed to comply with the requirements set forth in Rule 1.15 of the Uniform Circuit and County Court Rules in regards to motion for recusals. Appellant's Motion for Recusal was not timely filed and failed to comply with Rule 1.15. Accordingly, the trial court's decision should be affirmed.

Appellant also failed to comply with Rule 48B of the Mississippi Rules of Appellate

Procedure. Rule 48B requires a litigant to file a Petition to the Mississippi Supreme Court within fourteen (14) days of the trial court's order and attach a true copy of the order and the hearing transcript. Appellant did not comply with Rule 48B. Accordingly, this Court should decline to hear this appeal.

STANDARD OF REVIEW

As to Whitley's argument that Judge Mcdaniel should have recused himself, this Court will review the trial court's ruling using the manifest error standard. *See 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).

ARGUMENT

I. WHETHER THE TRIAL COURT DENIED THE APPELLANT HIS RIGHTS TO DUE PROCESS.

In his first assignment of error, Whitley states that he was denied his rights to due process when the trial court issued an Order Dismissing the Defendant's from the litigation prior to an evidentiary hearing of the cause.

Mississippi Constitution, Due Process Clause, Sec. 14, provides: "No person shall be deprived of life, liberty or property except by due process." In *Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 985 (Miss. 2004), the Court stated that procedural due process is met when a party receives "[n]otice and an opportunity to be heard."

On March 27, 2007, the trial court held a hearing on Whitley's Motion to Reverse, Transfer to Chancery Court or in the alternative to Reassign Case to Another Judge, and on the

various Defendant's Motions to Dismiss and/or for Summary Judgment. (T. 151). At the hearing, the trial court allowed both sides to present their arguments and evidence to the court regarding the dismissal of Whitley's causes of action. (T. 19-51). Whitley was served with copies of the various Motions and was served with Notice of Hearing in time to prepare for the hearing. (R. 207, 210, 212). The trial court allowed Whitley to present his arguments and evidence, and Whitley did in fact argue against the dismissal of his case. Accordingly, the requirements of due process were complied with in this matter.

Whitley cites several cases in support of his argument. *City of Jackson v. Lee*, 106 So.2d 892 (Miss. 1958) is cited for the proposition that a judge must base his findings, not upon his personal knowledge of the case, but upon the evidence and testimony presented at trial. Whitley also cites *Wisdom v. Stegall*, 70 So.2d 43 (Miss. 1954) and *Pulliam v. Chandler*, 872 So.2d 752 (Miss. Ct. App. 2004) for the legal premise that an essential part of procedural due process allows a party to interrogate the witnesses upon whose evidence the decree is based.

It appears that Whitley bases his due process argument upon the fact that Judge McDaniel made his decision upon personal knowledge of the case. Whitley makes this allegation without producing any evidence to substantiate his statement. The only knowledge that Judge McDaniel had about the case is the knowledge he gained from presiding over this matter and the first proceeding which was dismissed. (T. 14). No evidence is proffered to demonstrate that Judge McDaniel based his ruling on anything other than the arguments and evidence presented at the hearing of this matter.

The Mississippi Rules of Civil Procedure have requirements for filing and responding to Motions to Dismiss and for Summary Judgment. These procedures are in place for determining

whether these is a legal basis for the suit or a genuine issue for a trial on the merits. Whitley had notice of the motions filed against him and was afforded an opportunity to respond to said motions. Counsel for Whitley presented to the trial court its arguments as to why the motions should be denied. Accordingly, Whitley was not denied due process.

Whitley also asserts that he was denied due process based upon the fact that property was taken from him pursuant to Judge McDaniel's Final Judgment, which Whitley asserts is unconstitutional. Whitley is continuing to argue substantive issues of other complaints which have been decided by the trial court. Judge McDaniel in his Order, dated April 4, 2007, found that such arguments were barred by the doctrines of *res judicata* and collateral estoppel.

Under the doctrine of collateral estoppel, "[an] appellant is precluded from relitigating in the present suit specific questions actually litigated and determined by and essential to the judgment in the prior suit, even though a different cause of action is the subject of the present suit." *Lyle Cashion Co. v. McKendrick*, 87 So.2d 289, 293 (Miss. 1956). *Res judicata* is a doctrine which protects the finality of judgments, and applies to final judgments on the merits. *Anderson v. LaVere*, 895 So.2d 828, 833 (¶ 10) (Miss. 2004). *Res judicata* prevents the parties from relitigating all issues tried in the prior lawsuit, as well as all matters which should have been litigated and decided in the prior suit. *Dunaway v. W.H. Hopper & Assocs., Inc.*, 422 So.2d 749, 751 (Miss. 1982). *Res judicata* bars litigation in a second action "of all grounds for, or defenses to, recovery that were available to the parties regardless of whether they were asserted or determined in the prior proceeding." *Johnson v. Howell*, 592 So.2d 998, 1002 (Miss. 1991) (quoting *Dunaway*, 422 So.2d at 751 (1982)).

Whitley has again set forth identical claims and issues that he previously brought in his

county court actions and in his federal action. The trial court issued a final judgment. *Res judicata* and collateral estoppel bar the claims and issues asserted by Appellant. Accordingly, the trial court ruling must be affirmed.

II. WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO RECUSE AND OTHER REQUESTED RELIEF.

In his second assignment of error, Whitley argues that Judge McDaniel should have recused himself because he was not "sufficiently neutral to render a fair and impartial decision." Whitley's apparent argument is that Judge McDaniel is not a neutral and impartial decision maker because he previously presided over the initial action in this matter and issued a Final Judgment in that case against Whitley, as stated *supra*.

In support of his second assignment of error, Whitley cites the case of *Collins v. Dixie Transport, Inc.*, 543 So.2d 160 (Miss. 1989). However, *Collins* is completely distinguishable from the present case. In *Collins*, one of the parties involved had personal conversations with the judge concerning the issues of the case, and the judge, himself, in that case asked the clerk to swear him in as a witness so that he could testify in the case. *Id.* at 167.

None of the issues in *Collins* are applicable to the present case. Judge McDaniel issued an Order and stated: "The Court does not possess 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." (R. 223-34). The Order also stated that Whitley "[h]as 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 the Plaintiff otherwise provided any ground set forth in the Code of Judicial Conduct to support recusal in this matter." (R. 234). Judge McDaniel stated

that he had no outside personal knowledge of the case and that his knowledge of the case came from the court file and the courtroom. (T. 14). He further stated that he had no *ex parte* facts and knowledge from the case outside of the courtroom. (T. 14). Whitley has not offered evidence to show that Judge McDaniel had personal or *ex parte* knowledge concerning the facts or issues of Whitley's case. The trial court's knowledge of the case was obtained through actual court proceedings. Therefore, Whitley did not provide a basis to support the recusal of Judge McDaniel.

In his third assignment of error, Whitley argues that Judge McDaniel "[s]hould 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." Whitley basically asserts that since this action seeks to overturn the Final Judgment previously issued by Judge McDaniel, that Judge McDaniel is placed into the position of having to reverse his own decision.

In support of his third assignment of error, Whitley cites *Brent v. State*, 929 So.2d 952 (Miss. Ct. App. 2005). In *Brent*, a county court judge issued a search warrant and was asked to review the same warrant while serving in his new capacity as circuit court judge. *Id.* In issuing the search warrant, the judge learned about certain facts of the crime or where evidence related to a crime may be found. *Id.* at 955. The court also noted that this judge had previously served as a prosecutor and prosecuted a case involving the Defendant for aggravated assault where he was charged as a habitual defender. *Id.* Accordingly, as a result of this knowledge, when he later became circuit judge and was asked to review the search warrant, the trial judge should have recused himself due to this prior knowledge of the facts and evidence.

Unlike the trial court judge in *Brent*, McDaniel's knowledge of the case came from the

actual case itself, not from any personal knowledge. Whitley has not offered this Court any evidence to show that Judge McDaniel had personal knowledge of the case.

In the Order denying Whitley's Motion to Recuse, Judge McDaniel held that Whitley was "[b]arred 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). As previously stated *supra*, Whitley is forever barred from contesting the merits of the previous Final Judgment. No jurisdictional basis exists to examine the prior litigated claims and issues. Accordingly, Judge McDaniel was not placed in the position of having to reverse his prior ruling.

In further support of the trial court's ruling, Whitley failed to properly petition the court for a recusal of Judge McDaniel. Rule 1.15 of the Uniform Circuit and County Court Rules provides that a party has thirty days from the date a judge is assigned to a case to file a request for a recusal. Rule 1.15 also requires the party seeking recusal to file an "[a]ffidavit 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." U.C.C.C.R 1.15. Whitley failed to file his request within thirty days and did not file an affidavit when he finally did file it. Whitley filed his last action on April 14, 2006. The case was transferred to Judge McDaniel on May 8, 2006. The Order denying Whitley's motion found that Whitley failed to comply with the procedural requirements of Rule 1.15. A review of the evidence supports Judge McDaniel's decision. Accordingly, this Court should affirm the judgment of the lower court.

thereon shall be submitted with the petition in the Supreme Court.

Rule 48B required Whitley to file a Petition with a true copy of the order and transcript. Whitley failed to comply with said requirements. Judge McDaniel's Order was entered on April 4, 2007. (R. 233). Whitley did not file a petition with the Supreme Court requesting review of the trial court's decision of the recusal motion. He instead filed a Notice of Appeal on April 9, 2007. (R. 238). Whitley filed his Appellant's Brief on July 16, 2007, and designated it as an interlocutory appeal.

R & L Towing is at a loss for how Whitley was denied his right of appeal. He had fourteen days to seek review of the motion for recusal and thirty days to file a Notice of Appeal on the trial court's ruling in granting the various Motions to Dismiss. Whitley did in fact file a Notice of Appeal, but he did not argue the substantive issues of the trial court's dismissal of his claims. Whitley had the option to seek review of the trial court's ruling on the Motion to Recuse, as well as the substantive ruling on the various motions to dismiss. Further, after denying his Motion to Recuse, Whitley did not object to the trial court hearing the various motions to dismiss and did not ask the trial court to stay the proceedings while he sought review of the trial court's decision on the Motion to Recuse.

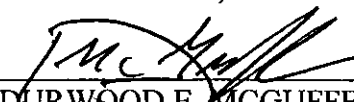
CONCLUSION

The County Court of Rankin County, Mississippi should be affirmed.

RESPECTFULLY SUBMITTED,

R & L TOWING, LLC

BY:


DURWOODE MCGUFFEE, JR.,
Attorney for Appellee

CERTIFICATE OF SERVICE

I, Durwood E. McGuffee, Jr., attorney for R & L Towing, Appellee, do hereby certify that I have this day filed this Brief of Appellee with the Clerk of this Court to be received on behalf of the Mississippi Supreme Court and have mailed a true and correct copy of the Brief to the following:

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CERTIFIED, this the 19th day of October, 2007.



DURWOOD E. MCGUFFEE, JR.

AMENDED CERTIFICATE OF SERVICE

I, Durwood E. McGuffee, Jr., attorney for R & L Towing, Appellee, do hereby certify that I, on October 19, 2007, filed this Brief of Appellee with the Clerk of this Court to be received on behalf of the Mississippi Supreme Court and mailed a true and correct copy of the Brief to the following:

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Honorable Kent McDaniel
Rankin County County Judge
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Brandon, MS 39043

CERTIFIED, this the 25th day of October, 2007.



DURWOOD E. MCGUFFEE, JR.