

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NUMBER 2007-CA-00874

FILED

JOHN T. WHITLEY, SR.

APPELLANT

JUL 16 2007

VS.

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

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

INTERLOCUTORY APPEAL

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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 Mississippi Supreme Court State of Mississippi may evaluate possible disqualification or recusal:

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14. Capitol Body and Towing Service
15. Halls Wrecker and Towing Service
16. Hayles Towing & Recovery Co.
17. Pearl Automotive & Towing Service
18. Waste Management of Mississippi
19. R. & L. Towing Service
20. Mayor Jimmy Foster- City of Pearl, Mississippi
21. John T. Whitley, Sr. Pearl, Mississippi
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I.

STATEMENT OF THE CASE

THIS Appeal involves the failure of the County Court Judge of Rankin County, Mississippi to recuse himself pursuant to Rule 16A-Motion For Recusal of Judges of the Mississippi Rules of Civil Procedures. The case was transferred to the County Court Judge of Rankin County, Mississippi by the Chancery Court of Rankin County, Mississippi to serve as a "special Chancery Court Judge" and is governed by the Uniform Rules of Chancery Court Practice adopted April 4, 2002. See also M.R.A.P. 48B and M.R.A.P. 21.

Collins vs. Dixie Transport, Inc. 543 So2d 160 (miss. 1989) holds that due process requires that judge who is qualified to preside at trial or other proceeding must be sufficiently neutral and free of disposition to be able to render a fair decision. U.S.C.A, Const. Amend 14.

It is essential part of procedural due process that a party to a suit may interrogate the witnesses upon whose evidence the decree is based. U.S.C.A. Const. Amend 14 Pulliam vs. Chandler, 872 So2d. 752, Miss App. 2004.

This case is so unusual that there are no cases reported in the Mississippi Digest of Disqualification to act section 48 titled review by judge of his own decision except Brent vs. State, 929 So2d. 923 (Miss. App. 2005), rehearing, and certiorari denied 929 So2d 923.

In this case the the judge failed to recuse himself where prior to selection as Circuit Court Judge he served as County Court Judge and had previously issued several warrants that led to defendant's arrest and indict-

ment. The Defendant was brought before the judge in his capacity as Circuit Court Judge on the validity of the warrant signed by the same judge while serving as County Court Judge. So the judge was asked to review his former ruling on the issuance of the warrant which he had previously signed while serving as County Court Judge. The Mississippi Supreme Court held that this was a violation of the Code of Judicial Conduct, Cannon 3(e).

The error involved on this appeal goes back to the Order transferring this case to the County Court of Rankin County, Mississippi. Chancellor Tommy Zebert on his own motion pursuant to Section 9-9-23 (Ex."A") Mississippi Code of 1972 transferred the case to the County Court of Rankin County, Mississippi due to the fact that he had previously represented one of the Defendants in this case; However, the Chancellor specifically provided, " the jurisdiction authorized under the foregoing proviso shall cease upon denying or granting of the application" (R-00024) This statute was designed to relieve the Court of its work load, not to get around the usual practice of the Supreme Court appointing another Chancellor where there is a conflict. Judge Kent McDaniel stated that Judge Tommy Zebert brought the case to him because he had previously served as the City Attorney for the City of Pearl, Mississippi. There is no reason shown as to why it was not transferred to the other Chancellor , Hon. John Grant, of Rankin County, Mississippi.

As will be shown the County Court Judge then made neumerous errors by issuing follow up Orders concerning execution, seizure of private property,

cleaning up of the private property, assessing ad valorem taxes to the extent that he became an advocate and participant in the same as well as requiring that all grass on the private property be cut to a certain height. The Court exceeded its authority in that it had numerous other defendant in the litigation to participate in the actual seizure of the private property of the Appellant, John Whitley, Sr.; he had it placed in storage and further authorized various individuals who had actually participated in the taking of the Appellant's private property to then sell said private property and to thereafter retain all monies derived from the sale of the Appellant's property to be kept by them as their own individual funds; further, there was no accounting required of the Court as to the disposal of the Appellant's private property.

The Appellant, John T. Whitley, Sr., would respectfully show unto the Court an example of this was that among many motor vehicles owned by the Appellant, as well as many other items of value, the Appellant owned a certain 18 wheeler truck and several trailers which had a value in excess of \$90,000.00; this vehicle as well as many other automobiles and equipment was removed from the Appellant's private property by various towing companies selected by the City of Pearl, Mississippi; on the instant concerning the eighteen (18) wheeler and the trailers, the towing company conducted a private sale and sold the same for less than \$10,000.00; these funds were kept 100% by the towing company which they received for having made a one time towing which would have been less than \$500.00; these excess funds were never offered to the Appellant; nor was any of the sales ever accounted for to the Court; in every incident, the towing companies and private

individuals were allows to keep all of the proceeds derived from their private sales of the Appellant's property. The 18 wheeler truck and trailer was a single incident; there was over one hundred (100) automobiles removed by the Defendant from the Appellant's private property under one or several Orders issued by the County Court Judge. Every Defendant, took the same action, of taking the private property of the Appellant, selling the same for a considerable amount over and above their towing charges, and thereafter converting all of the proceeds from the sale to their own individual use. Many items of the Appellant's private property was merely thrown in Waste Management containders and was then hauled to the land field for the City of Pearl, Mississippi; many of the employees and other individuals who participate in the taking of the private property of the Appellant and placing the same in the dumpsters, did thereafter go to the City of Pearl Land fill, and get these items out of the dumpsters and place the items in their individual automobiles and thereafter considered the same to be their individual property due to the fact that they had gotten the same from the garbage dumpster. Items which were placed in the dumpsters were such things as tools, jacks, shop equipment, lawn mowers, air compressors, new tires, and other equipment used in the automobile industry.

On several occasions, some of the individuals who had purchased some of the vehicles from some of the towing companies thereafter offered to sell the item back to the Appellant, John Whitley, Sr. for the money which they had purchased the vehicles for. The property of the Appellant,

John Whitley, Sr. which was placed in the garbage dumpsters owned by Waste Management of Mississippi was taken to the City of Pearl, Mississippi Land Fill; the Appellant, John Whitley, Sr. made every effort possible to have Waste Management take the dumpster to his private farm of 90 acres or more located in close proximity to the land fill, and agreed to pay to have the dumpster transported to his private property; as a result of the City of Pearl, Mississippi and its agents, the City of Pearl denied all request by the Appellant to move the dumpster and even denied the Waste Management of Mississippi their own request to move said dumpster.

Further, under the County Court's Order, the Appellant, John T. Whitley, Sr., was denied the right to place any property of any description which had been previously removed from his private property back on the same private property. (The property which the items had been removed consist of approximately 27 acres of fenced in wood land).

The Seizure of other private property included all of the items which were placed in the dumpsters owned by Waste Management of Mississippi, consisting of new tires, generators, tools, compressors, air hammers, jacks of various description, tools chest full of hand tools, electrical parts cables, canvases of various sizes, tie down, ratches wrenches, truck and automobile parts, generators, transmissions, motors, wheels, trailers lawn mowers, tractors, and farm equipment, hay bayers, washing machines, refrigerators, stoves, drink boxes and various signs used in his trucking business.

To make things worst, when the Defendants were removing the private property of the Appellant from his own land, the City of Pearl, Mississippi allowed various individuals from the general public to just come on to his private property, take various items of his private property, place the same into their vehicles and allowed them to drive off; there was no accounting or inventory taken of the Appellant's property and there was no inventory made of the same, all of this was done pursuant to one of Judge McDaniel's subsequent Order of enforcement; and even so, there should have been an inventory made and some type of accounting required by the government and any of it's agents acting under the City of Pearl, Mississippi orders and instruction, including the failure of the City of Pearl, Mississippi to protect and preserve any and all items belonging to the Appellant which was removed or taken at any time without the owner's permission.

A careful reading of the Court's Order reflects that the County Court Judge acted beyond his authority which had been assigned to him as a special Chancellor.

ASSIGNMENT OF ERROR NUMBER ONE

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

It is essential 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. City of Jackson vs. Lee, 234 Miss. 502, 106 So2d 892 (1958).

"It is indeed an essential part of procedure due process that a party may interrogate the witnesses upon whose evidence the decree is based." Wisdom vs. Stegall, 219 Miss 776, 70 So2d 43 (1954) and further discussed in Pullian vs. Chandler, 872 So2d 752 (Miss. App. 2004).

In this case John Whitley, Sr. has lost all of his privately owned and personal property that was taken and seized by the various towing companies and unknown individual off the public street. To top all of this off several of the towing companies (defendants) are now seeking to recover various towing and storage charges in excess of fifty thousand (\$50,000.00) Dollar; all of which was incurred as a result of them having acting under the Judge's Ordr and instructions from the City of Pearl, Mississippi to take the private property of the Appellant from his own private property; there was no inventory taken or accounting of the same furnishdd or required; and on top of this the Defendant converted all of the Appellant's private property to their own individual use and for their own source of income without any accounting for to the Court , the Appellant or to anyone; all without due process; and the same is prohibited by the Constitution of the State of Mississippi or the Constitution of the United States of America, Amendment IV. which reads as follows:

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)

MISSISSIPPI STATE CONSTITUTION

ARTICLE 14

"No person shall be deprived of life, liberty, or property except by due process of law."

ASSIGNMENT OF ERROR NUMBER TWO

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. U.S.C.A. Const. Amen. 14).

In the case of Collins vs. Dixie Transport, Inc. 543 So2d 160 (Miss. 1989) which involves the enforcement of an offer of settlement, the Judge became involved in the Agreement Settlement which was previously disputed by the parties. The Court in no certain terms held that the Judge should have recused himself in order that the constitutional rights of the parties could be protected. In stead the Judge found that there was a settlement and order in effect and orderit to be enforced; in this case the judge was making a ruling on his own order previously entered in another case.

From para. 111 page 166:

"No man may serve as judge of his own cause. Dr. Bonham's Case, 8 Co.Rep. 114a, 118a, 77 Eng. Rep. 646, 652 (c.P. 1610; In re Murchinson, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955). We doubt a more powerful principle may be found in law. We have labeled it "the ancient first principle of justice" (emphasis added) Bell vs. City of Bay St. Louis, 467 So2d 657, 662 (Miss 1985).. The principle's power extends beyond the case of the judge-liyigant to that of the judge-witness, to the case where the judge judges his own credibility as a player in the events whose trurh is sought."

ASSIGNMENT OF ERROR NUMBER THREE

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.

The County Court Judge was acting as a Special Chancery Court Judge in issuing the Order to clean up the Appellant's lot and remove the private items of property from the Appellant's lot. In this case the Judge, Kent McDaniel issued the Order to clean up the lot, and then Kent McDaniel acting as the County Court Judge, was asked to review his own prior Order and determine it's validity in the appellant's suit for damages.

The County Court Judge was first appointed to serve as the Special Chancery Court Judge by Chancellor Tommy Zebert, and once the hearing was held and the relief was granted and the Order of the Chancery Court in accordance with the Rules which the Chancery Court Ordered and for his appointment to serve as said Special Chancellor; then when the Appellant, John Whitley, Sr., filed a separate suit for damages for the wrongful taking, conversion and destruction of his private property; it is crystal clear that the same judge cannot review his own prior Order if Constitutionally challenged and by the standards set by the prior case laws in the State of Mississippi.

This is the exact same situation which occurred in the case of Brent vs. State. 929 So2d 952, page 955, where Judge Delaughter was asked

to review a warrant for arrest he had previously issued as a County Court Judge after he became a Circuit Court Judge; the Court said that the issuing Judge and the trial Judge could not be the same. This would be like a member of the Supreme Court passing judgment on a case where he served as the trial judge. It is extremely essential that the reviewing judge must be different. The Court in Brent said: page 955-

" Here the issuing and reviewing judges are one and the same. The problem created by this scenario is patently obvious. Not only might a reasonable person harbor doubts about the impartiality of the judge in the situation, we find that any reasonable person should have such doubts. The trial judge committed manifest error in failing to recuse himself, despite his subjective pronouncements that he held no bias against Brent. According to the objective "reasonable person" test established by Mississippi precedent, we must reverse this case and remand it for trial with a new judge."

ASSIGNMENT OF ERROR NUMBER FOUR

Judge Kent McDaniel erred in refusing to recuse himself, then granting the automatic interlocutory appeal within the 14 days under MRCP 48-B; and then entered an Order dismissing the Defendants on their Motion to be dismissed from the litigation.

In the case now before this Court, Judge Kent McDaniel denied the Appellant's Motion to recuse himself, and then granted the Defendants Motion To Dismiss the case against each of the Defendants; this in effect denied the appellants' right to appeal which is provided by the rules itself. The Court must have thought that it would save time since a new Chancery Court Judge had recently been elected to replace Judge Tommy Zebert, who has previously had a conflict due to the fact that he had previously represented the City of Pearl, Mississippi one of the Defendants. The newly elected Chancery Court Judge, Dan Fairly, would not have had such a conflict of interest and could have heard the Appellant's case. We can find no precedent for such even in Rankin County, Mississippi. The error committed here are numerous and are self evident; this case must be sent back to the Chancery Court of Rankin County, Mississippi where it was originally filed for a new beginning especially in a Court of Equity and due to the equity requested by the Appellant and the nature of the case itself.

CONCLUSION

One important factor which must be brought to this Court's attention, is the fact, that Rankin County Chancery Court has two Chancellors, and it should be the better wisdom of the court, that if one chancellor has a conflict, that the Chancellor would simply swap a case with the other Chancellor or merely just let the Clerk reassign the case. This works extremely well in Hinds County Chancery Court where there are four chancellor and where for many years that I sat on the bench and to my personal knowledge no case was ever assigned to the County Court Judge of Hinds County, Mississippi to serve as a Special Chancellor.

The Mississippi laws does not have any statute which gives the authority to a Chancellor to select a judge of his choice; that authority is vested in the Mississippi Supreme Court where a Chancellor or Circuit Court Judge recuse themselves. It is a must and it must be this way to avoid the judge to which the case is assigned being influenced by the assigning judge; the Mississippi Supreme Court should never assign a case to another Judge in the same county because it would amount to passing the buck in unpopular cases.

There are provisions where if the Chancellor needs help in sorting out the issues and facts of a case; the Court is empowere to select a jury whose verdict would be advisory only.

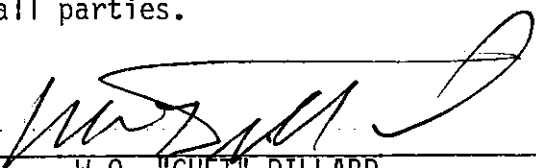
The basis argument of the Appellant is to seek honest and fair dealing before the Court. The law requires this and justice demands the same in all cases under our system of justice. The Appellant ask for no more nor no less.

Impartial, prior knowledge of the facts of a case, ruling of a judge on his own prior judgments, are not merely words to mention, but are facts and circumstances which must be dealt with under our system of government and our system of justice demands that every case be properly attended to in such a manner that only justice would be provided to all parties; And most and not least, the Appellant would be provided with an opportunity to present evidence, examine witnesses and then a joudge could make a fair and impartial decision based on the facts and evidence presented at the trial of the cause. In the case now before the Court, the Appellant was denied all of these rights especially the fact that he dismissed the Defendants in the case even before having given the Appellant a chance to present his case.

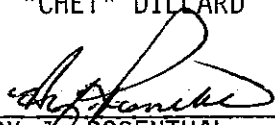
Not only does the Appellant request that this Court should reverse and remand this case to the Chancery Court of Rankin County, Mississippi; Justice itself call out loudly, that justice can only be served by this Court acting and making such a decision.

The case can be remanded to the Chancery Court of Rankin County, Mississippi; if the new Chancellor at that time recuse himself for any reason, then under the provisions of this Court's authority, a Special Chancellor could be appointed from another jurisdiction, who would not have the appearance of impropriety or a Chancellor who would not be influenced by local political policies, or the appearance thereof.

Justice demands fairness to all parties.



W.O. "CHET" DILLARD



HARRY J. ROSENTHAL

ATTORNEYS FOR THE APPELLANT, JOHN WHITLEY, SR.

CERTIFICATE OF SERVICE

I, Harry J. Rosenthal, one of the attorneys for the Appellant, John Whitley, Sr. do hereby certify, that I have this day mailed a true and correct copy of the above and foregoing Appellant's Interlocutory Appeal to the following:

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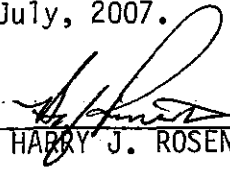
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So certified on this the 16th day of July, 2007.


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Power of County Court Judge

Mississippi Code 9-9-23

"The County judge shall have power to issue writs, and to try matters, of habeas corpus on application to him therefor, or when made returnable before him by a superior judge. He shall also have the power to order the issuance of writs of certiorari, supersedeas, attachments, and other remedial writs in all cases pending in, or within the jurisdiction of, his court. He shall have the authority to issue search warrants in his county returnable to his own court or to any court of a justice of the peace within his county in the same manner as is provided by law for the issuance of search warrants by justice of the peace. In all cases pending in, or within the jurisdiction of, his court, he shall have, in term time, and in vacation, the power to order, do or determine to the same extent and in the same manner as a justice of the peace or a circuit judge or a chancellor could do in term time or in vacation in such cases. But he shall not have original power to issue writs of injunction, or other remedial writs in equity or in law except in those cases hereinabove specified as being within his jurisdiction: Provided, however, that when any judge or chancellor authorized to issue such writs of injunction, or any other equitable or legal remedial writs hereinabove reserved, shall so direct in writing the hearing of application therefor may be by him referred to the county judge, in which event the said direction of the superior judge shall vest in the same county judge all authority to take such action on such application as the said superior judge could have taken under the right and the law, had the said application been at all times before the said superior judge. The jurisdiction authorized under the foregoing proviso shall cease upon the denying or granting of the application." (emphasis added)

Exhibit "A"