

In the Supreme Court of Mississippi

No. 2008-CP-01464

George Dunbar Prewitt, Jr., Appellant

v.

P. Scott Phillips, Appellee

Brief of Appellant

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. George Dunbar Prewitt, Jr.,
2. All judges who have been appointed to vacancies in, or on, the Circuit Courts, Chancery Courts, and Supreme Court of Mississippi.

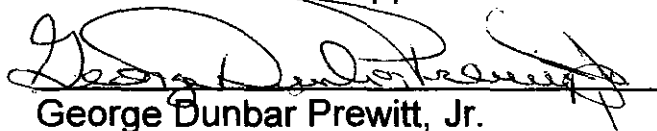

George Dunbar Prewitt, Jr.

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Statement of Issues

1. Whether a **void judgment** in a foreign jurisdiction was relevant to the subject matter of a judicial proceeding in the Mississippi State trial court below whose appeal was summarily dismissed by the Court's clerk and affirmed by this Court?
2. Whether the trial judge erred in concluding that the defendant's use of a **void judgment** from a foreign jurisdiction was protected by a judicial privilege, on a 12(b)(6) motion, without determining if the foreign judgment was indeed void and without providing notice to the parties that the void judgment issue would require that the 12(b)(6) motion be converted into a Rule 56 summary judgment motion?
3. Whether a defendant, who is placed on actual notice by court documents which charge a conspiracy by members of the Mississippi Bar to subvert the administration of justice, is entitled to the benefits of the judicial privilege if that defendant uses the fruits of that alleged conspiracy, i.e., the **void judgment**, in a Mississippi State trial court?
4. Whether a complaint, which charges (a) a conspiracy by members of

the Mississippi Bar to subvert the administration of justice and (b) the defendant's knowing use of the fruits of that conspiracy, i.e., a void judgment, merely states a defamation claim?

5. Whether a judicial privilege can ever be invoked without consideration of the underlying policy, that provides the genesis for the judicial privilege, which is the unfettered administration of justice?

6. Whether Article 3, Section 13 of the Mississippi Constitution abolished the common law judicial privilege in Mississippi?

7. Whether a judicial privilege, like all Mississippi privileges, is a mixed question of law and fact and, therefore, constitutes a jury question?

8. Whether the defendant's use of opprobrious language which implied that an attorney's motion is dishonest, inter alia, is protected by the judicial privilege since an allegation of dishonesty on the part of an attorney is possible grounds for disciplinary action by the Mississippi Bar?

Statement of the Case

This case began on or about April 4, 2006 when defendant/appellee P. Scott Phillips, as the attorney for David Howell Lee, entered docket sheets, in the Washington County Circuit Court case of Prewitt v. Lee, No. 2003-223, from a void judgment in the U.S. District Court in Greenville,

Mississippi. Along with the irrelevant docket sheets from the void judgment, Phillips alleged that U.S. District Court “has assessed sanctions or attorney's fees against Plaintiff for his behavior”, and that the plaintiff/appellant George Dunbar Prewitt, Jr., had been “less than candid” in a motion for leave to amend the Prewitt v. Lee complaint.

The motion for leave to amend the complaint was based on the filing of the federal court documents by Phillips, and requested that the appellant be permitted to add claims against Phillips. As one statute of limitations deadline approached without any response from the trial court on the motion for leave to amend, the appellant filed the 2007 action against Phillips, which is the subject of this appeal, as an independent complaint.

Following an adverse judgment in the trial court, the appellant appealed the trial court's judgment, in the related case of Prewitt v. Lee, to this court where the appeal was summarily dismissed by the court clerk pursuant to Rule 2, Mississippi Rules of Appellate Procedure (MRAP). The clerk's summary disposition of the appeal, in Prewitt v. Lee, No. 2007-TS-02096, was affirmed by this court on January 16, 2008.

On September 4, 2007, Phillips filed a Motion to Dismiss and subsequently scheduled an October 2, 2007 hearing on his Motion to

Dismiss the case of Prewitt v. Phillips. The trial court took the case under advisement after the October 2, 2007 hearing, and issued a decision that was entered 281 days later on July 9, 2008.

The July 9, 2008 judgment, of the trial court, rested on the following bases; (a) the only claim related to defamation, (b) the defamation claim failed to state a cause of action because the judicial privilege bars all claims for defamation (c) that the relevance of allegations in pleadings are legal issues to be resolved by a judge rather than by a jury, and (d) that the documents from the federal court judgment “were relevant to Defendant’s request for sanctions” “in the matter of George Dunbar Prewitt v. David Lee, No. 2003-233Cl. This appeal followed.

Summary of the Argument

The trial court erred, with respect to granting the 12(b)(6) motion to dismiss. Specifically, the trial court judge erred by finding that the federal court documents were relevant to the Lee’s motion for sanctions in Prewitt v. Lee, No. Cl2003-223 without addressing the subject matter of Prewitt v. Lee, No. Cl2003-223 , i.e., whether a medical contract, drawn up by Lee, had established a price for services that was binding on both parties. If a contract lacks a stated price, that contract is void in Mississippi. However,

the existence, or not, of a contract is a jury question in Mississippi, and the trial judge should not have granted the motion to dismiss in Prewitt v. Lee; Thus, in this case, the trial judge, having granted Lee's motion to dismiss after failing to present the question of valid contract formation, vel non, to a jury in Prewitt v. Lee, could not re-visit the subject matter in Prewitt v. Lee without raising the bona fides of the motion to dismiss which was granted in Prewitt v. Lee. Therefore, the trial judge was trapped between the legal equivalence of Scylla and Charybdis or, as we say in the South, between a rock and a hard place. Additionally, because the subject matter in Prewitt v. Lee was outside of the pleadings in Prewitt v. Phillips, the trial court was obligated (a) to provide notice to the parties that it intended to convert the 12(b)(6) motion to dismiss into a motion for summary judgment, (b) to provide ample time for discovery, and (c) to at least provide the 10 days in Rule 56, for evidentiary submissions, before taking the case under advisement as the trial court did on October 2, 2007 less than 6 months after the filing of the complaint.

A void judgment, whether from a foreign jurisdiction or not, cannot be relevant to any state judicial proceeding in Mississippi. The trial judge erred by failing to determine if the foreign judgment was void (a) due to a

lack of subject matter and personal jurisdiction or void (b) due to actions taken by federal judges to conceal Voting Rights Act violations from which they benefitted while the federal judges were Mississippi state officials in contravention of due process. There is also a question, under Section 13 of the Mississippi Constitution, whether the common law judicial privilege was abolished by Section 13 of the Mississippi Constitution.

The trial judge erred in concluding that the complaint, in Prewitt v. Phillips, only alleged a defamation claim. In Mississippi, a “conspiracy is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully.” Gallagher Bassett Servs., Inc. v. Jeffcoat, 887 So.2d 777, ¶37 (Miss. 2004). The complaint, in paragraphs 7-26, charged a conspiracy.

The trial judge erred by granting the motion to dismiss on a mixed question of law and fact. In Mississippi, the existence of a privilege, or not, is a mixed question of law and fact, and Section 31 of the Mississippi Constitution guarantees that the facts shall be determined by a jury.

The trial judge erred in concluding that accusing an attorney of being “less than candid” is merely zealous advocacy. A lack of honesty, on the part of an attorney, is an invitation for disciplinary action by the Mississippi

Bar and this court. The defendant should have been required to provide evidence of my lack of honesty, or be sanctioned when no proof of dishonesty was forthcoming.

Argument

The trial judge, on pages 2-4 of her order granting appellee Phillips' motion to dismiss, determined that appellant Prewitt's complaint failed to state a cause of action because the documents at issue "were relevant to Defendant's request for sanctions" in Prewitt v. Lee, No. CI2003-223. On its face, therefore, the trial judge's order referred to matters outside the pleadings in this case under review, i.e. Prewitt v. Phillips, No. CI2007-73, and therefore required the trial judge to announce, to the parties, that she was converting the 12(b)(6) motion to dismiss into a motion for summary judgment and to provide 10 days to the non-moving party for the provision of evidence to oppose the motion for summary judgment. Rein v. Benchmark Constr. Co., 865 So. 2d 1134, ¶24 (Miss. 2004); Gulledge v. Shaw, 880 So. 2d 288, (¶7) (Miss. 2004).

The trial judge's order also mis-applied the law on when the judicial privilege is applicable. Having correctly stated the applicable law, by citing McCorkle v. McCorkle, 811 So.2d 258, ¶18 (Miss. App. 2001), the trial

judge erroneously concluded that the benchmark, for determining whether the judicial privilege applied to this case, was whether the foreign jurisdiction documents "were relevant to Defendant's request for sanctions". However, the McCorkle standard is not whether the documents at issue related to the defendant's request for sanctions, but whether the documents were "relevant to the subject matter of the action" in Prewitt v. Lee. The gist of Prewitt v. Lee was a dispute over whether the contract stated a definite price. Under Rule 401, Mississippi Rules of Evidence (MRE), "Relevant Evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, the defendant's foreign jurisdiction's documents were irrelevant, and the judicial privilege inapplicable, unless the documents would assist in resolving whether a definite price was stated in the contract at issue in Prewitt v. Lee, i.e., Rotenberry v. Hooker, 864 So. 2d 266, ¶13. (Miss. 2003); (Price is an essential term that must be stated with specificity. ... The contract fails when the price has not been stated with specificity .") (emphasis added). Furthermore, because the central issue in Prewitt v. Lee was contract formation, the trial judge should

have allowed a jury to pass judgment on that issue because the "existence of a contract is a question of fact that is to be determined by a jury"

Hunt v. Coker, 741 So. 2d 1011, 1014 (¶6) (Miss. Ct. App. 1999) (citing 75A Am. Jur. 2d Trial § 791 (1991) (emphasis added). If the contract is determined to be ambiguous, then the question of the meaning of its terms usually should be submitted to a jury. Farm Mut. Auto. Ins. Co., 725 So. 2d 779, ¶5 (Miss. 1998).

The trial judge erred in failing to determine if the foreign judgment was void, as alleged in the complaint. As alleged in paragraph 27 of the complaint, a judgment is void if the rendering court lacked jurisdiction of the subject matter, or of the parties, **or otherwise acted in a manner inconsistent with due process of law**. Wright & Miller, Federal Practice and Procedure: Civil § 2862 (1973); Miss. Dep't of Human Servs. v. Shelby, 802 So.2d 89, ¶28 (Miss. 2001). Paragraph 30 of the complaint alleged that void decisions are invalid ab initio, cannot be given recognition by a Mississippi Court, and can be attacked anytime, whether collaterally or directly. See generally, Duvall v. Duvall, 224 Miss. 546, 552, 80 So. 2d 752, 754 (1955). Although there is Mississippi precedent which establishes that re-litigation of jurisdictional issues is not permitted, i.e.,

Global Oceanic Enterprises, Inc. and Richard Coppola v. Wayne Hynum, No. 2002-CA-00471-SCT, ¶18 (Miss. 2003), the U.S. Supreme Court, in Ward v. Village of Monroe, 409 U. S. 57, 61-62 (1972), wrote that even if an impartial adjudication is offered at the appellate level, a litigant is entitled to “a neutral and detached judge in the first instance.” Thus, if there was a failure of the U.S. District Court to provide impartial judges at the trial court level, that due process defect cannot be cured by a fair appellate procedure and therefore no re-litigation of settled issues can be said to take place if the initial court hearing took place before biased judges. Therefore, the trial court judge erred in not ascertaining whether the federal court judges were partial jurists who acted in a manner inconsistent with due process.

The trial judge erred in failing to consider whether Section 13 of the Mississippi Constitution abrogated the common law judicial privilege and required the submission of judicial privilege to a jury. Section 13 provides that “The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and

was published with good motives and for justifiable ends, the party shall be acquitted." This court has written that "Those principles of the common law which are unsuited to our conditions, or repugnant to the spirit of our institutions, are not in force in this state. Only such rules of the common law as are adapted to our institutions and circumstances and not repealed by the Legislature or varied by usage are in force." Planters' Oil Mill v. Yazoo & M.V.R. Co., 153 Miss. 712, 717, 121 So. 138, 140 (1929), cited in Clark v. Luvel Dairy Prods., Inc., 731 So. 2d 1098, ¶20 (Miss. 1998). It appears that the common law judicial privilege may be repugnant to the express provision in Section 13 of the Mississippi Constitution.

The trial judge erred in concluding that the complaint, in Prewitt v. Phillips, only alleged a defamation claim. In Mississippi, a "conspiracy is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." Gallagher Bassett Servs., Inc. v. Jeffcoat, 887 So.2d 777, ¶37 (Miss. 2004). The complaint, in paragraphs 7-26, plainly charged a conspiracy by federal court officials to subvert the provisions of the Voting Rights Act, in an effort to construct an unlawful, appointment-and-retention judiciary system in Mississippi, and this unlawful, partially-appointed judiciary began with the repeal, in Chapter

362, Mississippi Laws of 1973, of special election provisions, in Section 3312 of the Mississippi Code of 1942, which were used to fill vacancies in circuit and chancery courts, as well as vacancies in district attorney offices. The special elections used to fill vacancies on the Mississippi Supreme Court, in Section 3316 of the Mississippi Code of 1942, appeared to have been unlawfully altered in the the Mississippi Code of 1972, as amended, without there being a contemporaneous preclearance of the altered provisions. Yet, some of the federal judges who should have recused themselves from deciding the issues relating to the special election provisions in Section 3312, i.e., Federal Judge Glen Davidson, remained part of the 3-judge panel in Prewitt v. Moore, 840 F. Supp. 428, (1993), which **falsely** claimed (a) that Section 3312 had never been used for special elections in judicial elections and (b) had even been repealed, by implication, in 1935. Yet, Federal Judge L.T. Senter won a 1968 special election, to fill a vacancy in the 1st Circuit Court District of Mississippi, that was held expressly pursuant to Section 3312 and, as noted above, the Mississippi Legislature, in March of 1973, expressly removed the special election provisions from Section 3312. The trial judge should have permitted a jury to determine if federal judges conspired to deprive me of

my right to practice law in the federal courts to prevent me from pursuing Voting Rights issues, relating to Section 3312 and 3316 of the Mississippi Code of 1942, which could have raised legal impediments to the de facto, appointment-and-retention judiciary system now operating in Mississippi.

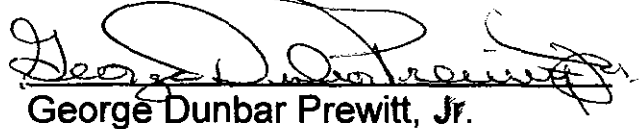
The trial judge erred by granting the motion to dismiss on a mixed question of law and fact. In Mississippi, the existence and application of a privilege, or not, is a mixed question of law and fact. Hewes v. Langston, 853 So. 2d 1237, ¶13 (Miss. 2003) . Section 31 of the Mississippi Constitution guarantees that factual issues shall be determined by a jury.

The trial judge erred in concluding that accusing an attorney of being “less than candid” is merely zealous advocacy. A lack of honesty, on the part of an attorney before a court, is an invitation for disciplinary action by the Mississippi Bar and this court because of Rule 3.3, Mississippi Rules of Professional Conduct. Appellee Phillips should have been required to provide evidence of my lack of honesty, or to be sanctioned when no proof of my lack of candor with the trial court was forthcoming.

Conclusion

Appellant Prewitt requests that this court reverse the judgment of the trial court on the issues raised above.

Respectfully,



George Dunbar Prewitt, Jr.

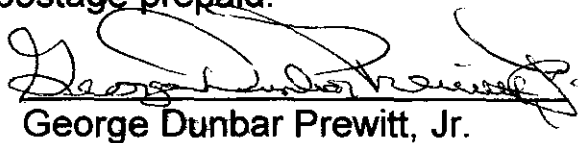
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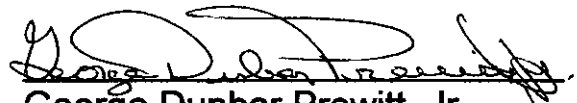
I certify that I will mail an original and three copies of the Appellant's Brief, and an original and three copies of the Appellant's Record Excerpts on December 2, 2008 to the Clerk of the Supreme Court at P.O. Box 249, Jackson, MS 39205, by first class mail, postage prepaid.



George Dunbar Prewitt, Jr.

Certificate of Service

I certify that I have served a copy of the Record Excerpts and Brief for Appellant, in No. 2008- CP-01464, George Dunbar Prewitt, Jr., Appellant v. P. Scott Phillips, Appellee, on P. Scott Phillips by first class mail, postage prepaid, to his address of P.O. Box 1856, Greenville, MS 38702-1856, on December 2, 2008.


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