

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-00072-SCT

ALBERT J. KEA

APPELLANT

V.

SHERIFF KENNETH LEWIS,
ROBERT KEA, LISA KEYS AND
STATE FARM INSURANCE COMPANIES

APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF SIMPSON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE
STATE FARM INSURANCE COMPANIES

ORAL ARGUMENT IS NOT REQUESTED

SUBMITTED BY:

JAMES F. NOBLE III (MSB # [REDACTED])
NOBLE & NOBLE, PLLC
840 EAST RIVER PLACE, SUITE 500 [REDACTED]
POST OFFICE BOX 2569
JACKSON, MS 39207-2569
TELEPHONE: (601)355-1867
TELEFAX: (601) 355-1873

ATTORNEY FOR APPELLEE
STATE FARM INSURANCE COMPANIES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee 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 and Mississippi Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable Robert G. Evans, Circuit Court Judge [deceased];
2. Albert J. Kea, Defendant/Appellant;
3. Lisa Keys, Plaintiff/Appellee;
4. Robert Kea, Defendant [deceased];
5. Sheriff Kenneth Lewis, Simpson County, Mississippi, Defendant;
6. State Farm Insurance Companies, Intervenor/Appellee;
7. E. Michael Marks and Julie Ann Epps, attorneys for Defendant/Appellant on appeal;
8. E. Michael Marks, attorney for Defendant/Appellant at trial;
9. James F. Noble III, Noble & Noble, PLLC, attorneys for Intervenor/Appellee, State Farm;
10. Kimberly N. Howland and Charles Ross, Wise Carter Child & Carraway, P.A., attorneys for Plaintiff/Appellant Lisa Keys at trial and on appeal;
11. Martin R. Jeliffe, Wise Carter Child & Carraway, P.A., attorney for

Plaintiff/Appellant, Lisa Keys on appeal;

THIS, the 14th day of October, 2010.

BY: 

**JAMES F. NOBLE III (MSB # [REDACTED])
NOBLE & NOBLE, PLLC**

**COUNSEL FOR APPELLEES
STATE FARM INSURANCE COMPANIES**

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STATEMENT OF ISSUES
(AS ASSERTED BY APPELLANT)

- I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO DISMISS BECAUSE THE DEFECTS IN PLAINTIFF/APPELLEE'S PETITION WERE INSUFFICIENT TO CONFER JURISDICTION ON THE TRIAL COURT
- II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REVIVING PLAINTIFF/APPELLEE'S PETITION FOR REPLEVIN AFTER PLAINTIFF/APPELLEE DISMISSED HER CLAIM AND ARGUED THAT THE COURT LACKED JURISDICTION TO PROCEED BECAUSE HER PETITION WAS NOT PENDING
- III. WHETHER THE TRIAL COURT ERRED IN FAILING TO DISMISS PLAINTIFF/APPELLEE'S CLAIM BECAUSE HER SWORN FILINGS IN A PRIOR BANKRUPTCY PROCEEDING PRECLUDED HER FROM MAKING CONTRADICTORY CLAIMS IN THIS SUIT
- IV. WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO AWARD CERTAIN PROPERTY ITEMS TO DEFENDANT/APPELLANT BECAUSE OF AN ERRONEOUS BELIEF THAT THE COURT HAD NO AUTHORITY TO ADJUDICATE DEFENDANT/APPELLANT'S EQUITABLE INTEREST IN THOSE PROPERTY ITEMS
- V. WHETHER THE EVIDENCE SUPPORTS THE TRIAL COURT'S AWARD OF CERTAIN PROPERTY TO PLAINTIFF/APPELLEE

STATEMENT OF THE CASE

In this appeal by the Defendant/Appellant Albert Kea (hereinafter sometimes “Defendant/Appellant,” “Appellant” and/or “Kea”), Kea complains of rulings by the Simpson County Circuit Court (after a two-part trial) relative to entitlement to possession of 24 items of property held in the custody of the Simpson County Sheriff – which items were previously taken into said sheriff’s custody as evidence in connection with the criminal perjury prosecution of Albert Kea in State of Mississippi v. Albert Kea, In the Circuit Court of Simpson County, Mississippi, Cause No. 2005-133K. [See Record Excerpt “RE 11,” Appellant’s Record Excerpts.] That prosecution resulted in a conviction, which conviction was reversed in 2008 on appeal by the Mississippi Court of Appeals. See Kea v. State, 986 So. 2d 358 (Miss. Ct. App. 2008).

On appeal, Defendant/Appellant first attacks the jurisdiction of the trial court to render rulings as to entitlement to possession of all 24 items held by the sheriff, wherein the trial court ultimately awarded possession of 20 of those items to Plaintiff/Appellee Lisa Keys (hereinafter sometimes “Plaintiff/Appellee” and/or “Lisa Keys”) after awarding the other four items to Intervenor/Appellee, State Farm Insurance Companies (hereinafter sometimes “State Farm” and/or “Intervenor/Appellee”). Alternatively, should this appellate court find that the trial court had sufficient jurisdiction over the subject property, Defendant/Appellant nevertheless argues that those rulings by the trial court in favor of Plaintiff/Appellee were in error because: (1) Plaintiff/Appellee’s claim to the subject items conflicted with her prior sworn federal bankruptcy petition and pleadings therein; (2) the trial court erroneously found that it lacked authority to adjudicate the Defendant/Appellant’s claim to an equitable interest in the subject property, and (3) the evidence at trial did not support the trial court’s award of the 20 items to Plaintiff/Appellee.

While attacking the trial court's jurisdiction over the subject matter (and thus the items in the sheriff's custody), the Defendant/Appellant does not contest on appeal the trial court's award of four of the items to State Farm. Further, Plaintiff/Appellee has not filed a cross-appeal as to any ruling by the trial court, and thus also does not contest on appeal the trial court's award of those four items to State Farm – although Plaintiff/Appellee did object at trial to such award (which objection was overruled). Accordingly, Lisa Keys has abandoned any objection to the trial court's award of the four items to State Farm.

The only issue on appeal which Intervenor/Appellee State Farm must, and does below, address to this Court is the Defendant/Appellant's attack upon the trial court's subject matter jurisdiction. If the trial court could be found to be without jurisdiction over the subject matter at bar, then this appellate court may also find that the trial court was without authority to render an award of the four items to State Farm – even though there is no contest by any party to that award (and, in essence, Appellant Kea is contesting on appeal Appellee Keys' right to possession of 20 of the 24 items, after award of four of the items to State Farm). In other words, such a finding by this court may result in a reversal of even the trial court's ruling favoring or awarding to State Farm the four items which are not in dispute.

Yet, as shown below, the Simpson County Circuit Court's jurisdiction over all items in the sheriff's custody cannot be in dispute and is not subject to attack. Given the fact that the Appellant does not contest the trial court's ruling awarding four of the items to State Farm, State Farm does not respond, and it is not necessary to respond herein, to all of the issues as articulated and advanced by Appellant in his brief. Accordingly, State Farm must only address and respond to Issues "I" and "II" as articulated by Appellant in his brief, as these are the only two articulated issues which address

and contest the trial court's subject matter jurisdiction. No response of State Farm is necessary to the remaining three issues presented by the Appellant in his brief (denominated as Issues "III," "IV" and "V" in Appellant's brief).

SUMMARY OF THE ARGUMENT

In the exercise of its inherent powers, the trial court below conducted a two-part trial in a proceeding (which originated as a replevin action by Lisa Keys) to determine the rightful recipients to possession of certain items of personal property held in the custody of the Simpson County Sheriff as evidence in another Simpson County Circuit Court action. At the conclusion of the trial, in two separate orders the trial court awarded four of 24 items to Intervenor/Appellee State Farm, and the remainder of the items were awarded to Plaintiff/Appellee Lisa Keys.

The Appellant on appeal does not contest the award of the four items to State Farm. However, the Appellant does contest the trial court's jurisdiction -- not over the parties, but over the subject matter, i.e., the items held by the Sheriff. Contrary to the arguments asserted by the Appellant, the trial court exercised jurisdiction over the subject matter as same was in *custodia legis* -- or the custody of the law (the Simpson County Sheriff). The trial court properly, and pursuant to its inherent powers and upon its own motion, brought on for trial a determination as to the rightful possession of the items -- in which the parties, Alfred Kea, Lisa Keys and State Farm willingly submitted to the court's jurisdiction and all asserted claims to some or all of said items.

The Appellant's contentions notwithstanding, the trial court was never without jurisdiction over the subject items held by the Sheriff. The Appellant's arguments that the trial court lacked jurisdiction over those items are without merit.

ARGUMENT

A. Overview: The Trial Court Never Lacked Subject Matter Jurisdiction

On October 6, 2008, State Farm filed in the underlying action its Petition to Intervene and For Replevin of Certain Items of Personal Property. After a two-part trial, conducted on separate occasions in 2008 and 2009, the trial court awarded possession of four of 24 items held by the Simpson County Sheriff to State Farm in an Order Granting Petition of State Farm Insurance Companies To Intervene and For Replevin Of Certain Items of Personal Property (entered January 4, 2010).¹ Appellant Kea does *not* contest the award of the four items to State Farm in the instant appeal.

However, Appellant Kea attacks the jurisdiction of the trial court over the subject matter of the replevin proceeding, and hence over all the items in question held in the custody of the Simpson County Sheriff.² Kea makes a two-fold argument in attacking the trial court's jurisdiction: (1) Kea argues that the original petition for replevin filed by Plaintiff/Appellee Lisa Keys was so defective as to be insufficient to confer jurisdiction upon the trial court, and (2) alternatively, Kea argues that because Lisa Keys dismissed her original complaint for replevin, the trial court lacked jurisdiction and erred both in denying Kea's motion to dismiss and in entering a "nunc pro tunc" order which had the effect of reviving Lisa Keys' petition.

Interestingly, after State Farm filed its petition to intervene but before any rulings were

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See Record Excerpt "RE 5," Appellant's Record Excerpts.

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While the Sheriff of Simpson County was made a defendant in the original action filed by Lisa Keys, and is the party who has held the items, the Sheriff has asserted no entitlement to the items, did not contest entitlement as claimed by State Farm to any of the items, and is not a party to the instant appeal.

rendered by the trial court, Lisa Keys asserted an argument contesting the trial court's jurisdiction but later abandoned this argument. While State Farm in the proceeding below questioned Lisa Keys' argument that the trial court lacked jurisdiction over the items in question – wherein she (Keys) pointed out that she had dismissed her original petition³, State Farm never contended at trial that the Simpson County Circuit Court lacked jurisdiction over the items of which State Farm sought to take possession as these items were in the custody of the Simpson County Sheriff and were not the subject of any forfeiture.

Lisa Keys has filed no cross-appeal contesting the trial court's jurisdiction (and presumably is happy with the trial court's award of 20 of the remaining 24 items per its Order Reinstating Plaintiff's Petition Of Replevin And Disposition Of Property⁴). Further, Lisa Keys also does not now contest jurisdiction, and has filed no cross-appeal contesting the trial court's award to State Farm.

In the context of his appeal, Appellant Kea has in essence adopted Lisa Keys' earlier argument that her (Keys') voluntary dismissal (without prejudice) of her replevin petition divested the trial court of jurisdiction over the subject items, and the trial court's subsequent *nunc pro tunc* order is a nullity. However, the Appellant ignores the procedural effect and import of the material and undisputed fact that the items in issue were held by the Simpson County Sheriff, and the trial court did not need Lisa Keys' replevin action as a procedural vehicle through which to render a

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As referenced in Appellant's brief, Lisa Keys argued against State Farm's petition to intervene on the theory that her (Keys') petition had been dismissed and the trial court had no action pending in which State Farm could intervene. Yet, in contradictory fashion, Keys, through her attorneys, filed an "Entry of Appearance And Notice to Pursue Claim" in the underlying action on October 15, 2008. [See Record Excerpt "RE 4," Appellant's Record Excerpts.]

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See Record Excerpts "RE 6 - RE 8," Appellant's Record Excerpts.

ruling or rulings as to proper disposal of the items.

The subject items were not in the custody of the Sheriff as a result of a seizure or forfeiture action, but instead had been previously held as evidence in another, and concluded, Simpson County Circuit Court action . Further, the subject items were *already in the Sheriff's custody* when Lisa Keys' action was commenced. The Sheriff held these items for ultimate return or delivery to the person or persons who may be the rightful owners or possessors, and the Appellant has never contended that the Sheriff was unlawfully in possession of the subject items.

B. Any Defect In Lisa Keys' Petition Did Not Divest The Trial Court Of Jurisdiction Over the Items In Question

The Appellant contends that Lisa Keys' original petition for replevin was defective and failed to comply with Miss. Code Ann. §11-37-101 (1972, as amended), primarily because Keys failed to attach an affidavit describing and valuing the property sought. Even assuming Keys' petition failed to satisfy the statute, this defect was immaterial to the existence of the trial court's jurisdiction over the property in question.

The Appellant is correct that case law interpreting this statute holds that the foundation of a replevin action is an affidavit of the person seeking issuance of the writ and the absence of such may defeat the court's jurisdiction over the property in question. *See Giles v. Friendly Finance Co. Of Biloxi, Inc.*, 199 So. 2d 265 (Miss. 1967). However, the purpose of a description in an affidavit in replevin is to enable the officers serving the writ to identify the property, to let the defendant know what property he is charged with detaining, and to enable the trial court to make an award of the property. *See Oates v. McSwain*, 85 So. 2d 161 (Miss. 1956). The affidavit of Lisa Keys was unnecessary for this purpose since the property was already in the possession of the Simpson County

Sheriff, and thus already subject to the jurisdiction of the Simpson County Circuit Court, at the time her proceeding was commenced.

Stated differently, and specifically contrary to Appellant Kea's argument on appeal, it was not necessary for Lisa Keys to file an affidavit with her original petition in order to confer jurisdiction upon the trial court because the items in question were already in *custodia legis* – or the custody of the law (the Simpson County Sheriff). See Price v. Green, 186 So. 2d 460 (Miss. 1966).

While this court has held that a replevin action does not normally lie for property in *custodia legis*, the proceeding initiated by Lisa Keys existed ultimately as a mere procedural vehicle through which the trial court, via its inherent powers, could finally render a ruling or rulings disposing of the property in question.

C. The Trial Court's *Nunc Pro Tunc* Order Was Permitted By Its Inherent Powers

Appellant also argues that the trial court erred in denying his motion to dismiss Lisa Keys' petition, and in "reviving" Plaintiff Keys' petition in the context of its *nunc pro tunc* order⁵ – asserting that such error is founded upon the trial court's lack of jurisdiction over the property in question.⁶ This assertion by Appellant that the trial court lacked jurisdiction over the property is specious as addressed above.

Further, even after Lisa Keys' dismissal of her petition, the *nunc pro tunc* ruling of the trial court via *sua sponte* motion, asserting its continuing jurisdiction over the items and in essence

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According to prior rulings of the Mississippi Supreme Court, with the "nunc pro tunc" (now for then) procedure a trial court has the power to enter orders, judgments and decrees necessary for the attainment of justice. See, e.g., McDaniel Bros. Const. v. Jordy, 183 So. 2d 501, 507 - 08 (Miss. 1966).

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The Appellant makes reference to, of course, the trial court's Order Reinstating Plaintiff's Petition Of Replevin And Disposition Of Property, wherein Lisa Keys was awarded 20 of the 24 items in question. (See Record Excerpts "RE 6 - RE 8," Appellant's Record Excerpts.)

reviving the petition of Lisa Keys, was within the trial court's inherent powers and was not in error since the trial court was never without jurisdiction over the subject matter already in *custodia legis*. See, e.g., Miss. Dept. Of Human Services v. Guidry, 830 So. 2d 628 (Miss. 2002); Bynum v. State, 76 So. 2d 821, 825 (Miss. 1955). As this Court in Guidry recognized, a trial court's *sua sponte* motion or other action is considered an inherent power “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” Miss. Dept. Of Human Services v. Guidry, 830 So. 2d at 632, citing Link v. Wabash R. Co., 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed. 2d 734 (1962).

While State Farm does not address, and is not concerned herein, whether Appellant is correct in his assertion on appeal that he (appellant) as opposed to Keys was entitled to the remaining 20 of the total of 24 items, there can be *no issue* on appeal that the trial court possessed subject matter jurisdiction – and permissibly exercised its inherent powers to adjudicate a disposition as to all items held in the custody of the Simpson County Sheriff.

CONCLUSION

I, Appellant's argument that the trial court lacked subject matter jurisdiction fails, as indicated above and pursuant to applicable law. Hence, where the Appellant does not contest the trial court's award of four of the 24 items in question to Intervenor/Appellee State Farm, that decision remains intact and cannot be reversed where there can be no issue that the trial court maintained jurisdiction over all items sufficient to render rulings as to disposal of those items.


RESPECTFULLY SUBMITTED, this the 14th day of October, 2010.

**STATE FARM INSURANCE COMPANIES,
INTERVENOR/APPELLEE**

BY: 

JAMES F. NOBLE III (MSB )

OF COUNSEL:

JAMES F. NOBLE III (MSB # )
NOBLE & NOBLE, PLLC
840 EAST RIVER PLACE, SUITE 500 (39202)
POST OFFICE BOX 2569
JACKSON, MS 39207-2569
TELEPHONE: (601)355-1867
TELEFAX: (601)355-1873

CERTIFICATE OF SERVICE

I, James F. Noble III, do hereby certify that I have this day served via U.S. Mail, postage pre-paid a true and correct copy of this pleading to the following person(s):

Honorable Robert G. Evans [deceased]
Circuit Court Judge
VIA SPECIALLY SITTING CIRCUIT JUDGE
UPON APPOINTMENT
P.O. Box 545
Raleigh, MS 39153

E. Michael Marks, Esq.
Attorney At Law
120 N. Congress Street; Ste. 730
The Plaza Building
Jackson, MS 39201
ATTORNEY FOR DEFENDANT/APPELLANT, ALBERT KEA

Kimberly N. Howland, Esq.
Charles E. Ross, Esq.
Martin R. Jelliffe, Esq.
Wise Carter Child & Carraway, P.A.
P.O. Box 651
Jackson, MS 39225-0651
ATTORNEYS FOR PLAINTIFF/APPELLEE, LISA KEYS

Sheriff Kenneth Lewis
Simpson County Sheriff's Department
111 W. Pine Street; Ste. 1
Mendenhall, MS 39114
DEFENDANT

THIS, the 14th day of October, 2010.



JAMES F. NOBLE III