IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUPREME COURT CAUSE NO.

2015-CA-00256-COA

CYNTHIA KULJIS **APPELLANTS**

VERSUS

WINN-DIXIE MONTGOMERY, LLC **APPELLEE**

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

This is a Petition for Certiorari of the Court of Appeals' March 29, 2016 decision affirming the Chancery Court of Harrison County's ruling granting Winn-Dixie Montgomery, LLC's Motion to Dismiss Plaintiff/Appellant, Cynthia Kuljis', Complaint for Discovery. The Plaintiff/Appellant, Cynthia Kuljis, hereinafter referred to as "KULJIS", filed a Complaint for Discovery on or about June 4, 2014 against the Defendant/Appellee, Winn-Dixie Montgomery, LLC, herein after referred to as "WINN-DIXIE".

Winn-Dixie filed its Motion to Dismiss on or about September 9, 2014. Kuljis filed her response to said motion on September 11, 2014. A hearing on said motion was held on December 18, 2014 with the parties presenting oral arguments. The Chancery Court of Harrison County, Second Judicial District, entered an Order granting Winn-Dixie's Motion to Dismiss on February 6, 2015 and Kuljis timely filed her Notice of Appeal on February 11, 2015.

The majority of the Court of Appeals, **in a divided decision**, affirmed the decision of Harrison County Chancery Court on March 29, 2016. More importantly, the Mississippi Court

of Appeals wholly and patently failed to address the exact issue before them as to whether the "Complaint in Discovery" remains a viable cause of action within the jurisdiction of the Chancery Court of the State of Mississippi. The dissenting opinion, joined by 4 other Justices, addressed this issue and should be reconsidered and adopted by the Honorable Supreme Court of the State of Mississippi.

Kuljis timely filed her Motion for Rehearing with the Mississippi Court of Appeals on April 4, 2016. The Court of Appeals denied Appellant's Motion for Rehearing on August 23, 2016. Again, four Justices of the Court of Appeals would have granted the Appellant's Motion for rehearing.

It is from these Orders that Kuljis timely files this Petition of Writ of Certiorari with the Supreme Court of Mississippi. Kuljis submits to this Honorable Court that she is entitled to a reversal of Court of Appeals' ruling and that this matter should be remanded back to the Chancery Court for further proceedings as it solely relates to this Complaint for Discovery.

B. Statement of the Relevant Facts

Cynthia Kuljis is an adult resident of Biloxi, Harrison County, Mississippi. On July 27, 2013, she was a business invitee and patron at the Winn-Dixie store in D'Iberville, Mississippi. Kuljis was walking into the entrance to the store when suddenly and without any warning she tripped over a piece of rubber/plastic sticking up which was supposed to hold down the carpet mat. She sustained permanent medical injuries as a direct result of this fall.

Following the fall, an incident report was completed by Winn-Dixie, a copy of which was never given nor provided to Kuljis. As previously mentioned, a Complaint for Discovery was filed with the Harrison County Chancery Court, Second Judicial District requesting that Winn-

Dixie "produce incident reports, photographs, video surveillance, investigation reports, work orders, witness statements of the incident in question and all other information that may be in their possession…"

Kuljis was contacted the day following the incident and given a claim number and a telephone number to contact a Winn-Dixie representative. Kuljis tried contacting the representative no less than ten occasions only to be ignored. Some months later Kuljis went back to Winn-Dixie to speak to the store manager to request a copy of the incident report to get witness names, addresses and phone numbers. She was informed that they would not give her a copy. Also, it was confirmed by Winn Dixie's counsel at the Chancery Court motion hearing in this matter that the requested information would not be given to Kuljis or her attorney, without a formal tort lawsuit.

The materials sought are solely and exclusively in the power and custody of Winn-Dixie. Kuljis has personally requested said information and had been vehemently denied.

SUMMARY OF THE ARGUMENT

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT A "COMPLAINT FOR DISCOVERY" IS A VIABLE CAUSE OF ACTION WITHIN THE JURISDICITON OF THE CHANCERY COURT.

This Honorable Supreme Court is faced with a divided Court of Appeals opinion on whether or not a "Complaint in Discovery" is still a viable cause of action within the jurisdiction of the chancery courts in the state of Mississippi.

Kuljis submits that the Court of Appeals erred as a matter of law in granting Winn-Dixie's Motion to Dismiss Kuljis' Complaint for Discovery. The Court of Appeals wholly and patently ignored established precedent and prior Mississippi Supreme Court case law. The Court

of Appeals dissenting opinion was directly on point and correct in relying upon the Supreme Court decision of *State Oil & Gas Board v. McGowan*, 542 So.2d 244 (Miss. 1989). *McGowan* explains that the Chancery Court procedure of a "Complaint in Discovery" is still a viable and relevant legal remedy. Feeling aggrieved, the Kuljis has filed this Writ of Certiorari petitioning this Honorable Supreme Court of Mississippi to reverse and render/remand the Court of Appeals decision of March 29, 2016.

Kuljis would submit that this Court has misapplied the law previously established by the Mississippi Supreme Court. This miss-application of law was laid out and succinctly written by the dissent entered by Justice Eugene Fair of the Mississippi Court of Appeals.

ARGUMENT

THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT A "COMPLAINT FOR DISCOVERY" IS A VIABLE CAUSE OF ACTION WITHIN THE JURISDICITON OF THE CHANCERY COURT.

The Court of Appeals erred as a matter of law in affirming the lower court's decision to grant Winn-Dixie's Motion to dismiss. This Writ of Certiorari is filed in an attempt to respectfully request the Mississippi Supreme Court to evaluate the Court of Appeal's opinion in light of the written dissent.

Very simply put, we as attorneys have an obligation to our clients to represent them zealously. We also have a concurrent obligation to the court and our civil justice system. We as lawyers have rules that guide our advocacy. These rules create a level playing field for all parties in seeking justice. It could be argued that this system is not perfect but that is not the purpose of this brief, it is our system and the rules that must be followed.

We as counselors and advocates of the law have rules that prevent us from filing

frivolous and blatantly unmeritorious claims. The Litigation Accountability Act of the State of Mississippi protects the civil justice system with the teeth of sanctions and reprimands to prevent unmeritorious/frivolous claim from being filed to harass or burden a defendant.

We as counselors and advocates of the law have rules of ethics that require us to keep our clients reasonably informed. We must instruct our clients based upon our past experience, education and training. We must be open and honest with our clients about the pros and cons of bringing a lawsuit. We must be open and honest with our client about the costs and risks associated with bring a formal law suit. Our clients rely upon that information in determining whether they want to pursue a certain cause of action.

We as counselors and advocates of the law have rules providing multiple avenues to pursue justice. We have the duty to do what is best for our clients. We as counselors and advocates have a discovery procedure called a "Complaint in Discovery" which is a Chancery Court filing that has survived the passage of time. No court rules, no legislation and no decision has ever abolished this cause of action. Although it may be less common than most causes of action it is still a valid vehicle to pursue justice.

In this case, the Chancellor dismissed the Complaint for Discovery on the basis that the information sought applied to a "slip and fall" tort action which was more properly vested in the Circuit Court than in Chancery. Plaintiff's counsel is well aware that if a personal injury matter is to be filed it will be filed in the circuit or county court where jurisdiction is proper. Importantly, this filing was not a complaint for personal injury, it was a complaint for "pure discovery." This is the point that the Chancellor and majority of this Court fails to appreciate.

As previously pointed, Kuljis asserts that the filing of a formal "trip and fall tort

complaint," to seek discovery, the allegations of which may or may not be supported by evidence such as video surveillance records, witness statements and employee reports which Winn-Dixie will not disclose, will expose Kuljis and her attorneys to unnecessary costs and the possibility of a suit against the attorney and client for wrongfully filing of such a suit. Kuljis' counsel does not want to subject himself and his client to be the proverbial "guinea pig" and file a formal law suit on every single potential "premises liability case", without reasonable investigation.

In this case, this Honorable Court is directly presented with the issue of whether or not the jurisdiction of a pure discovery action, more recently called a "Complaint for Discovery," remains a viable cause of action within the jurisdiction of the chancery court.

Based up on the facts in this case, as laid out above, it is nearly impossible for counsel to inform Mrs. Kuljis of the likelihood of success because neither she nor her counsel were allowed the information solely held by the "potential tortfeasor." Instead of "just hauling off and filing an unfounded tort lawsuit" against Winn-Dixie, Kuljis decided to file a Complaint in Discovery to ascertain the facts and discovery solely in Winn-Dixie's hands, who was refusing to release said information as confirmed by Winn-Dixie's attorney, David Stewart, at the Chancery hearing.

Appellant provides for this Court's review as R. E. #10, Chapter 22, Section 429, "Requisites of a Modern Bill of Discovery", of Griffith "Mississippi Chancery Practice Second Edition, 1950" which clearly sets out the purpose for the Bill of Discovery as follows:

> "Much has been said and written upon the details of this exact subject but when it is all examined it amounts simply to this: that a Bill of Discovery which will draw the whole controversy into equity upon the equity of the discovery alone and without the presence of any other equity must be (1) of a meritorious case for the enforcement of a civil or property right, (2) wherein the discovery is of material and relevant matters which are exclusively within the knowledge or within the power or custody of the defendant, (3) which is not within the reasonable reach of the complainant to obtain without the aide

> of the discovery prates, and (4) which are such that it is practically indispensable to the ends of full and exact justice that discovery be had. The bill must of course be against the party shown there by to be liable to the complainant, and may not be maintained against a mere witness, with the exception that in the case of a corporate defendant, if the information be more certainly and definitely within the knowledge or possession of some particular officer or agent thereof he may be made a joint party in his official capacity in order to better ensure a complete discovery. The bill must contain a sufficient averment of facts to disclose and actual, existing cause of action in complainant's behalf and these averments must be as definite and positive as the circumstances will permit. Although it may be true that facts and proof thereof may be within the exclusive possession and keeping of the defendant and although for that reason it may be difficult to state them in such a way as to disclose a meritorious cause of action, nevertheless, since discovery is merely a means to the end of making the necessary proof of a case for relief the complainant must show himself entitled to relief against the party made defendant without which showing the bill would be only a fishing bill, and therefore non-maintainable. *See Bank v. Phillips*, 15 So. 229; *George v. Salomon*, 14 So. 531.
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> In the very nature of orderly judicial procedure, a discovery could not be permitted merely to search for grounds upon which the basis suit. And moreover, the case must be stated in such a manner that the Court may see that the matters of which discovery are sought are really material to the case."

As this Court can readily ascertain, Kuljis was injured as a result of a fall at the Winn-Dixie store and counsel herein made a request to Winn-Dixie to provide them with all of the materials and documents to further its investigation into a cause of action against Winn-Dixie Montgomery, LLC. Kuljis has met the requisites of the Bill of Discovery and as this Court can readily ascertain, all of the material sought herein were material and relevant to the issue of the liability *vel non* of Winn-Dixie Montgomery, LLC, for the damages and injuries suffered by the Plaintiff.

This is not a "fishing expedition" but it is to further a reasonable investigation prior to filing a lawsuit against the Defendant, Winn-Dixie Montgomery, LLC.

The information sought from the Winn-Dixie cannot be obtained without the aid of the

discovery prayed for and this action is indispensable to the ends of full and exact justice that the discovery should be received. Furthermore, the discovery is material and relevant which is exclusively within the knowledge, power and custody of Winn-Dixie. Winn-Dixie would not be in any way, shape or form prejudiced or put through undue expense in providing such information, **that only they have possession**.

At the hearing on this matter, counsel for Winn-Dixie admitted that the documents were not and would not be produced to Kuljis or her attorneys without a Court Order. It was also stated in the hearing by the counsel for Winn-Dixie as follows *Hearing Transcript pg. 8, Line 15-27, (*December 18, 2014):

> Mr. Wetzel: Now, Judge, I'll be candid with you, and I think David, as an officer of the court – he and I have known each other since he was a very young man and when I practiced in front of his father like you did for many, many years – I believe he'll tell you Winn-Dixie doesn't allow that information to be released because everybody that walk in, they're not going to give it to them. And specifically, even when a lawyer requests that information, they're not going to provide that information. Am I correct, David?
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> Mr. Stewart: That's correct

The Mississippi Supreme Court in *State Oil & Gas Board v. McGowan,* 542 So.2d 244, (Miss. 1989), clearly stated that a Bill of Discovery or Complaint under modern nomenclature continues to be available despite the adoption of the Mississippi Rules of Civil Procedure.

Counsel for Kuljis has used Bills of Discovery on no less than 10 prior occasions to have this type of information provided to them and it is not attempting to deviate from the Mississippi Rules of Civil Procedure pertaining to discovery, all of which would be available to Kuljis if she filed suit in the matter. Furthermore, the documentation which the Plaintiff is seeking was prepared contemporaneous with the fall of Kuljis and it is not work product but information that

is purely contemplated by the Mississippi Rules of Civil Procedure that would have to be provided to Kuljis had a Complaint for damages been filed.

Finally, this precise issue has already been decided in this exact Chancery district by the Senior Chancellor, Jim Persons, who issued a ruling on the legitimacy of the Bill of Discovery. In the case of *Rodney Jackson v. Beau Rivage Resorts, Inc.*, Cause No. 2401-09-00916, Judge Persons ordered: "The Court finds that the adoption of the Mississippi Rules of Civil Procedure has not supplanted the equitable remedy of a bill or complaint for discovery. *Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC,* 864 So.2d 939 (¶¶ 32,33) (Miss. 2004). The equitable remedy of discovery remains viable and available. *Bell Chevrolet,* (¶ 31), at 946 (emphasis added)." *R. E. #11*.

Lastly, this Writ of Certiorari is filed in an attempt to respectfully request this Court to evaluate the Court of Appeals order in light of Judge Eugene Fair's written dissent. The majority erroneously ignored established case law and precedent. In response to the majority's conclusion, Justice Eugene Fair's dissent posits:

> In 1981 the Mississippi Rules of Civil Procedure were adopted by the Supreme Court of Mississippi, to become effective on January 1, 1982.
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> Seven years later in *State Oil & Gas Board v. McGowan*, 542 So.2d 244 (Miss. 1989), the supreme court was presented with the question of whether or not the Rules abolished the common law right to a "Bill of Discovery in Chancery."
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> *McGowan* involved an administrative agency, which was found not to be subject to the Mississippi Rules of Civil Procedure, nor did it provide for discovery in its own rules. The Supreme Court found that, at least in such context, the common law Bill/Complaint for Discovery proceeding in chancery court was still available. It stated:
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> > The bill of discovery is one of the ancient bills used in equity practice. Griffith, Mississippi Chancery Practice,

1925, § 427 p. 422. The Board argues that the bill is no longer available as a discovery devise in Mississippi practice as it was abolished or rendered obsolete by the Mississippi Rules of Civil Procedure effective January 1, 1982. This Court disagrees with this premise. (Emphasis added)

Griffith, *supra*, addresses the Bill of Discovery:

> But there is a distinct bill in chancery known, strictly speaking, as the bill of discovery, by the use of which disclosure may be required of material facts exclusively within the knowledge or possession of the defendant and which without such discovery no full and adequate proof of them could be made. It had its origin out of the common law rule that no party in interest was a competent witness in any case; and it began at an early date to be allowed in the court of chancery in order to relieve against what otherwise would have resulted in a denial of justice when it happened that the facts or the documents establishing a right or materially aiding therein rested in the exclusive possession or control of the opposite party; and, originally its office was simply to aid a pending suit at law or one about to be brought, and the chancery part of the proceedings were usually deemed\ as concluded upon the coming in of the full answer making the disclosures or producing the documents sought. In other words, the obtaining of the discovery was the sole object and end of the bill, no relief other than the discovery being prayed. It was therefore purely ancillary to a trial in some other case and ordinarily in some other forum."

Id. at pp. 422, 423.

Rule 82(a), M.R.C.P. makes clear that nothing in the rules alters the jurisdiction of any court, nor is the power of any court to grant substantive relief changed from what it was before the rules.

It is true that the nomenclature of the legal practice was changed by the abolition of the names of the old writs and

> procedural names. M.R.C.P. Rule 2. See Dye v. State Ex Rel. Hale, 507 So. 2d 332, 337 n.4 (Miss. 1987). As such, the terminology of a "Bill of Discovery" has been rendered obsolete, and procedurally it is referred to as a "complaint." However, the adoption of the rules affected procedure, not substance. The power and authority of the Chancery Court to grant the substantive relief of "discovery" remains viable and available although it has been broadened and simplified by M.R.C.P. 26-37. The need for this substantive remedy is evident by this lawsuit. (emphasis added).

> In *Leaf River Forest Products Inc. v. Deakle*, 661 So. 2d 188 (Miss. 1995), the court relied heavily on *McGowan*, including the quotations above, in holding that the jurisdiction of a chancellor to grant a "Bill of Peace" also survived enactment of the Rules of Civil Procedure.
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> The more recent case of *Moore v. Bell Chevrolet-Pontiac-Buick-GMC LLC*, 864 So. 2d 939 (Miss. 2004), similarly dealt with a case involving discovery of information in the hands of an administrative agency, quoting *McGowan* with approval."

Kuljis would submit to this Honorable Court that after the foregoing is reviewed in its entirety, this Court will be left with the clear and firm conviction that a mistake has been made by the majority of the Court of Appeals in their application of established Mississippi Juris Prudence.

Therefore, the Appellant, Cynthia Kuljis, would respectfully request this Honorable Court to reevaluate the majority's opinion and reverse and remand this case to the Chancery Court.

CONCLUSION

Therefore, Kuljis requests this Honorable Court to grant the Writ of Certiorari so that these legal issues may be finally addressed by this Honorable Court.

RESPECTFULLY SUBMITTED, this the 25th day of August, 2016.

CYNTHIA KULJIS

By: s:/GARNER WETZEL

CERTIFICATE OF FILING

Pursuant to Rule 25(a) of the Rules of Appellate Procedure, I, the undersigned counsel of record of Appellant, Cynthia Kuljis, certify that I have this day addressed and directed to the Clerk of this Court, electronically filed the Appellant's Petition for Writ of Certiorari

DATED this the 25th day of August, 2016.

s:/GARNER J. WETZEL
Attorney for Appellant, Cynthia Kuljis

CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Petition for Writ of Certiorari to the following counsel of record: David W. Stewart, Esquire, attorney for Defendant.

A copy is being mailed via United State Post Office to the Honorable Judge Carter Bise, Chancery Court of Harrison County, Post Office Box 1542, Gulfport, MS 39502.

SO CERTIFIED, this the 25th day of August, 2016.

s:/GARNER J. WETZEL
s:/JAMES K. WETZEL

JAMES K. WETZEL & ASSOCIATES
James K. Wetzel (MSB No. 7122)
jkwetzel@wetzellawfirm.com
Garner J. Wetzel (MSB No. 103596)
gjwetzel@wetzellawfirm.com
Post Office Box I
Gulfport, MS 39502
(228) 864-6400 (ofc)
(228) 863-1793 (fax)
ATTORNEYS FOR PLAINTIFF/APPELLANT