A TRIBUTE TO JUDGE E. GRADY JOLLY

*E. Farish Percy**

Attorney: As I read Title VII, it says that you cannot use race as a factor in hiring individuals.

Judge Jolly: No kidding.

— A Cordial Exchange at Oral Argument[1]

To know Judge E. Grady Jolly is to love him, and those who know him well know that he is beloved by all of his former clerks. Judge Jolly celebrated his tenth year on the bench during my clerkship with him in 1992. Former clerks from near and far returned to Jackson, Mississippi, for the celebration. Many of my predecessors told stories revering Judge Jolly for his dry wit, his

* Professor, University of Mississippi School of Law.

[1] During one oral argument, after being repeatedly interrupted, Judge Jolly told the plaintiff's attorney in a case alleging racial employment discrimination that he needed to "learn how to argue in the Fifth Circuit." Uncowered by this comment, the attorney responded, "I know how to argue in the Fifth Circuit. I've been doing it 40 years." The attorney then continued with his argument stating, "as I read Title VII, it says that you cannot use race as a factor in hiring individuals." Judge Jolly quickly responded, "[n]o kidding!" The attorney, apparently taken aback, asked "[b]eg your pardon?" to which Judge Jolly again responded, "[n]o kidding!" As the attorney continued about ten minutes into his argument, he finally got to the critical point at issue, at which point Judge Jolly stated "[f]inally, you got around to an important point of law, and that is what's going to save you here, or get you to the jury, is the cat's paw theory. And that's the first time you've even mentioned it." Although this exchange provided grist for bloggers who wrote "How Not to Behave at Oral Argument," and "A Double Bench-Slapping and Appellate Advocacy Basics," as is evidenced by the exchange in which the lawyer later apologized and Judge Jolly stated, "[y]ou have no problem with me," Judge Jolly was not trying to scold or embarrass the attorney so much as direct him to answer the questions that would facilitate getting to the heart of the issue rather than wasting his limited oral argument time rambling on misguidedly. *See* William Peacock, *A Double Bench-Slapping and Appellate Advocacy Basics*, FINDLAW (Sept. 10, 2014, 10:12 AM), http://blogs.findlaw.com/fifth_circuit/2014/09/a-double-bench-slapping-and-appellate-advocacy-basics.html [https://perma.cc/H84W-5Y39]; Joe Patrice, *How Not to Behave at Oral Argument*, ABOVE THE LAW (Sept. 8, 2014, 4:04 PM), http://abovethelaw.com/2014/09/how-not-to-behave-at-oral-argument/ [https://perma.cc/8HJ6-DRZM].

keen sense of humor, his ability to ask a question at oral argument that cut straight to the quick while still maintaining his affable nature, and his genuine love of and support for his clerks. Now, more than twenty-five years later, I am pleased to report that clerking for Judge Jolly was indeed a great experience—and that is an understatement. I consider myself privileged to have clerked for Judge Jolly, to have been mentored by him, to continue to learn from him and from his example, and to maintain a strong friendship with him to this day.

When I applied for a clerkship with Judge Jolly during my second year of law school at the University of Virginia in 1990, I wasn't entirely sure in what direction I wanted to steer my legal career, but I had some inkling that I might want to be a law professor one day. I had also been told that no matter what I ended up doing, clerking would be a great experience. I returned to my hometown of Greenville, Mississippi, for spring vacation that year and then drove to Jackson for my interview with Judge Jolly. He offered me the job during my interview and I was thrilled to accept, having no idea of the treat, privilege and honor that was in store for me.

During my year clerking, I came to see why all of his former clerks are so fond of Judge Jolly. In addition to being an exemplary judge who displays diligence, integrity, honesty, wisdom and common sense, Judge Jolly has a keen sense of humor and an extremely sharp and dry wit. He is fiercely devoted to family and friends, many of whom call him "Cookie." He does not suffer fools gladly[2] but does respect lawyers who are diligent and put forward their best effort. He is also not afraid to have a good time.

From his many widely cited opinions, some may hope to discern his character and judicial philosophy. In 1985, Judge Jolly wrote the unanimous panel opinion in *Aguillard v. Edwards*,[3] involving a Louisiana law requiring schools who chose to teach either evolution-science or creation-science, to teach both and to give balanced treatment to each theory. The panel concluded that the law violated the Establishment Clause because it did not have

---

[2] *See* Peacock, *supra* note 1.

[3] 765 F.2d 1251 (5th Cir. 1985), *aff'd*, 482 U.S. 578 (1987).

a secular legislative purpose but was rather intended to "discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief."[4]

More recently, Judge Jolly attracted attention for his majority opinion in *Jackson Women's Health Organization v. Currier*,[5] which upheld the district court's preliminary injunction prohibiting Mississippi from enforcing House Bill 1390[6] because doing so would have closed the sole abortion clinic in the state. The state had argued that closing the only abortion clinic in Mississippi would not impose an undue burden on Mississippi citizens because the procedure would still be available in neighboring states.[7] The majority rejected that argument, holding that Mississippi could not rely on neighboring states to protect its citizens' constitutional rights.[8] While I believe both of these opinions demonstrate Judge Jolly's unerring dedication to application of the "fundamental rules of decision-making"[9] rather than any individual judicial philosophy, I will leave it to others to attempt to interpret his numerous opinions in an effort to define or explain him.

Instead, as an example of Judge Jolly's collegiality, friendship, and his unwavering dedication to mentoring, encouraging and supporting his clerks, two interactions stand out to me. About five years after I clerked, I was practicing law in Oxford, Mississippi, and I returned to the Fifth Circuit Court of Appeals to argue before a panel consisting of Judges Reavley, Garwood and Jolly. My client, the appellant in a criminal case, whom I did not represent at trial, had been convicted of conspiracy, mail fraud, and interstate transportation of falsely made and counterfeited securities, all in connection with an automobile odometer rollback scheme. He had been acquitted of

---

[4] *Id.* at 1257.

[5] 760 F.3d 448 (5th Cir. 2014).

[6] H.B. 1390 requires that "[a]ll physicians associated with the abortion facility must have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians." *Id.* at 450 (internal quotation marks omitted).

[7] *Id.* at 455.

[8] *Id.* at 457.

[9] Edith H. Jones, *Foreword: Tribute to Judge Rhesa Hawkins Barksdale*, 79 MISS. L.J. 221, 222 (2009) (observing that a judge's craftsmanship rather than philosophy will be on display if he or she conscientiously employs the basic rules of decision making).

numerous counts of odometer rollback. As I recall, my argument that the trial court erred in using evidence of odometer rollbacks against the defendant during sentencing, even though the defendant had been acquitted of some of the same odometer rollbacks by the jury, did not gain much traction with the panel.[10] In affirming the sentence, however, Judge Jolly wrote that the appellant had "ably presented cogent arguments . . . both in his brief and at oral argument."[11] When I saw Judge Jolly not long after the opinion came down, I thanked him for "giving me a bone," and he graciously laughed but then said in earnest that I had earned it. I am not at all certain that I did, but I greatly appreciated the gesture and the encouragement.

Almost a decade later, in 2005, I mailed Judge Jolly a copy of my recently published law review article concerning fraudulent joinder.[12] In my article, I addressed a circuit court split over the rather obscure issue of whether a removing defendant may establish fraudulent joinder by relying on a common defense that not only defeats the claim against the non-diverse defendant but that equally defeats the claim against the diverse defendant. In *Smallwood v. Illinois Central Railroad*,[13] the Fifth Circuit joined the Third Circuit in holding that defendants may not point to common defenses in an effort to demonstrate fraudulent joinder. The Fifth Circuit's en banc opinion in that case is noteworthy for its spirited exchanges and the sharp division among the judges—eight judges joined Judge Higginbotham's majority opinion and six judges joined Judge Jolly's dissenting opinion.

It is evident from the first paragraph of Judge Jolly's dissent that he not only disagreed with the majority, but that he vehemently disagreed with it.

> I respectfully dissent from the majority's strange compulsion to amend the traditional rules of fraudulent joinder based on

---

[10] A year later, the U.S. Supreme Court resolved a circuit court split between the Ninth Circuit and other circuits, holding that the conduct underlying an acquitted charge may be used in sentencing if it is proved by a preponderance of the evidence. United States v. Watts, 519 U.S. 148, 149, 157 (1997).

[11] United States v. Sparks, 85 F.3d 622 (5th Cir. 1996).

[12] E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189 (2005).

[13] 385 F.3d 568 (5th Cir. 2004).

> a seldom cited 1914 fact-specific case. This is all the more strange in the light of the admonition we sounded recently: "[F]or the simple truth that we stand on the shoulders of those before us, if for no other reason, we must be hesitant when we act on recent flashes of 'new' insight to the fundamentals of governance". *Marathon Oil Co. v. Ruhrgas,* 145 F.3d 211, 227 (5th Cir.1998) (en banc), *rev'd,* 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (Higginbotham, J., dissenting). In my view, the majority, in accepting the plaintiff's briefing and "new insights", misreads the Supreme Court decision, disregards established precedent, designs a troublesome and unnecessary "common-defense" rule to amend a long established and fairer rule, offers meaningless reasoning to support its decision and creates confusion for the district courts—all for no other reason, as far as I can determine, than the satisfaction in finding a "buried treasure" obscured from our judicial predecessors for almost a century.[14]

No hiding the ball there. After that initial paragraph, Judge Jolly embarked upon a stinging critique of the majority opinion. Judge Jolly wrote that the majority seriously misread precedent and inflated the significance and relevance of a 1914 Supreme Court opinion that "has lain basically dormant for all of its 90-year life."[15] He continued: "[n]ot only does the majority's misreading and misapplication . . . betray the weakness of its position, the majority fails to come up with any compelling reasons that might otherwise support its misadventure."[16] Later in the opinion, Judge Jolly states that "the arguments that the majority makes to shore up its misreading [of the 1914 case] deflate under any careful examination and make unavoidable the conclusion that the majority has been beguiled by Smallwood's dare to this court to be modern—1914 style."[17] In true Judge Jolly fashion, however, he concluded by stating, "[e]ven though I am baffled why the majority would produce this aberrant writing, it is nevertheless with collegial respect that I dissent."[18]

---

[14] *Id.* at 577 (Jolly, J., dissenting) (alteration in original) (footnotes omitted).
[15] *Id.* at 581.
[16] *Id.*
[17] *Id.* at 583.
[18] *Id.* at 584.

In my article that I had forwarded to the judge, I agreed with and advocated for the position taken by the majority and critiqued Judge Jolly's dissent (not nearly as deftly as he had critiqued the majority opinion). While some judges might be offended by a former law clerk's critique of his or her opinion or respond by further explicating the points of disagreement, Judge Jolly sent me an email in which he simply and eloquently stated, "[t]hank you for forwarding your excellent fraudulent joinder article. It is scholarly and well-reasoned. If the majority in *Smallwood* had been so insightful and persuasive, there may have been no dissent." I am not naïve enough to believe that I altered Judge Jolly's opinion in any way. His response, however, not only demonstrates his collegiality and fondness for his former clerks, but also his true willingness and eagerness to listen to and to entertain opposing viewpoints and arguments in an effort to discern the manner in which the law should be applied.

I have read that Judge Jolly "do[es] not consider a judge's senior status to be as much a milestone as a gateway to a new phase of judicial responsibility" during which the judge will have more time to enjoy friends and family, hone old talents (possibly croquet in his case), and develop new talents.[19] I hope for our sake, that Judge Jolly continues to participate in decisions and that he lends his valuable experience, insight, wisdom, wit, candor, meticulous analysis, and craftsmanship in writing to the court. Happy eightieth birthday and cheers to you E. Grady!

---

[19] Jones, *supra* note 9, at 221.