

Dear Subscribers,

This week's Brief*Serv* Newsletter, Exam Edition is below.

Thank you for your continued support of the *Mississippi Law Journal*. Due to our commitment to our studies during exam period, the Exam Edition of Brief*Serv* contains only summaries of the cases. The case summaries are longer and more detailed than the summaries that generally appear in the email and are intended to balance our needs in preparing for exams and your needs as a subscriber. Thank you again for your support.

Supreme Court – Civil

Miss. Bar v. Mount - Legal Ethics – Sanctions – Reciprocal Discipline – In 2017, Sean P. Mount, a member of the Louisiana Bar and the Mississippi Bar, was arrested and charged with operating a vehicle while intoxicated and for driving on a roadway landed for traffic. He pleaded guilty to the misdemeanor driving-while-intoxicated offense. The Office of Disciplinary Counsel (“ODC”) for the Louisiana Attorney Disciplinary Board opened an investigation into Mount's arrest and plea. As part of the investigation, Mount agreed to undergo a substance-use disorder evaluation and voluntarily entered into a two-year diagnostic-monitoring program. Before formal charges were filed, Mount and the ODC submitted a joint petition stipulating that Mount had violated Rule 8.4(b) of the Louisiana Rules of Professional Conduct, which prohibits committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. The Supreme Court of Louisiana accepted the joint petition and suspended Mount from the practice of law in Louisiana for a period of one year and one day, with the entire suspension deferred. Mount was placed on probation for a period that coincided with the term of his two-year diagnostic-monitoring agreement. The Mississippi Bar filed a formal complaint against Mount seeking reciprocal discipline and requesting that Mount pay the costs and expenses of the proceedings. Mount appealed.

In response to the Mississippi Bar's complaint, Mount requested a retroactive suspension of less than six months due to the differences between the reinstatement procedures of Mississippi and Louisiana. Although Mount offered a number of mitigating factors to support his request for a shorter retroactive sanction, the Mississippi Supreme Court found no extraordinary circumstances to support a deviation from Louisiana's suspension. However, the Court imposed the suspension retroactively to coincide with the effective date that Mount was suspended in Louisiana. The Court also assessed all costs associated with the disciplinary action to Mount and declined to lift Mississippi's reinstatement requirements other than the requirement that Mount take the MPRE before his reinstatement. Because this was a reciprocal-discipline case, the Court deferred to the Louisiana decision. Therefore, the Supreme Court suspended Mount from the practice of law in Mississippi for a period of one year and one day, with the entire suspension deferred.

Briefed by [Charity Karanja](#)

Moses v. Rankin Cty. - Civil – Property Damage – Immunity – Following a heavy rain in April 2017, several homes in the Mill Creek Place Subdivision flooded and were damaged. Several homeowners, whose homes had been damaged, sued Rankin County for failing to properly maintain Mill Creek, which is adjacent to the Mill Creek Place Subdivision. Rankin County filed a Miss. R. Civ. Pro. 12(b)(6) motion to dismiss the complaint.

The trial court granted Rankin County’s motion, finding that Rankin County was immune from liability—specifically discretionary function immunity—under the Mississippi Tort Claims Act. The homeowners appealed.

Mississippi law dictates that discretionary function immunity extends only to decisions centralized around matters of policy. In such instances, a two-part, public-policy function test is applied to determine whether immunity attaches. The court first must ascertain whether the activity in question involved an element of choice or judgment. If so, the court also must decide whether that choice or judgment involved social, economic, or political-policy considerations. Here, the alleged activity in question—Rankin County’s failure to properly maintain Mill Creek’s drainage path after it had undertaken the responsibility for doing so—involved an element of choice or judgment. Next, Rankin County’s alleged failure to maintain Mill Creek was a case of simple negligence; such maintenance decisions do not involve policy considerations. Therefore, the Supreme Court reversed the judgement of the Rankin County Circuit Court and remanded for further proceedings

Briefed by [Sarah Schofield](#)

Sheffield v. S.J. Louis Constr. Inc. - Workers’ Compensation – Appeals – Substantial Evidence – On June 1, 2015, while employed as a truck driver by S.J. Louis Construction Inc. (“S.J. Louis”), Robert Sheffield lost his balance when he attempted to look into the back of his dump truck. Sheffield missed the step beneath him and experienced immediate lower-back pain. In February 2016, Dr. Eric Wolfson found that Sheffield had reached maximum medical improvement (“MMI”) for his 2015 back injury, assigned Sheffield a 7% impairment rating to the body as a whole, and stated Sheffield was capable of performing light-duty work. Prior to his 2015 back injury, Sheffield suffered two other work-related injuries. In 1990, Sheffield fell while moving a dolly loaded with fifty-pound bags of sand. Sheffield had back surgery and fully recovered from that injury. In 2010, Sheffield injured his neck during a work-related automobile accident and underwent surgery. On October 24, 2011, Sheffield’s treating physician, Dr. Wolfson, placed Sheffield at MMI and released Sheffield to return to work with light-duty restrictions. Dr. Wolfson assigned Sheffield an 8% impairment rating to the body as a whole.

Following the 2015 injury, Sheffield filed a petition to controvert against S.J. Louis and its insurer, Zurich American Insurance Company (“Zurich American”). On August 26, 2016, Dr. Rahul Vohra conducted an independent medical evaluation (“IME”) on Sheffield. Dr. Vohra concurred with Dr. Wolfson’s finding that Sheffield had reached MMI on February 19, 2016. Dr. Vohra concluded that no additional impairment resulted from Sheffield’s 2015 back injury. In response to Sheffield’s petition to controvert, S.J. Louis and Zurich American admitted that Sheffield experienced a work-related injury, but they denied that he suffered any permanent injury or loss of wage-earning capacity due to the 2015 back injury. Following a hearing, the Administrative Judge (“AJ”) determined that Sheffield had suffered a 60% loss of wage-earning capacity for his 2015 back injury and was entitled to \$359.26 a week in permanent-partial disability benefits for 450 weeks. S.J. Louis and Zurich American appealed to the full Mississippi Workers’ Compensation Commission (“the Commission”). The Commission reversed the AJ’s finding that Sheffield suffered a loss of wage-earning capacity due to his 2015 back injury. Sheffield appealed. The Court of Appeals reversed the Commission and found that substantial evidence supported the AJ’s finding that Sheffield’s 2015 injury resulted in an additional loss of wage-earning capacity, and, therefore, the Commission’s decision was arbitrary and capricious.

Because the opinions of two medical experts and the essentially unchanged permanent impairment rating provided sufficient evidence from which reasonable minds could infer that Sheffield did not suffer additional permanent disability from the 2015 injury, the Court of Appeals erred in reversing the Commission's decision. Therefore, the Supreme Court reversed the judgment of the Court of Appeals and reinstated and affirmed the decision of the Mississippi Workers' Compensation Commission.

Briefed by [Jordan Thomas](#)

Supreme Court – Orders

[Carter v. State](#) - Post-Conviction Relief – Motions – Procedural Bars – Dwaliues Carter filed his fourth application for leave to pursue post-conviction relief, resting his application on the following claims: (1) trial counsel was ineffective; (2) his state and federal rights to be free from double jeopardy were violated; and (3) his state and federal due-process and equal-protection rights were violated. The Mississippi Supreme Court denied Carter's application. Although an ineffective counsel claim can, in exceptional circumstances, constitute an exception to the successive-writ bar, Carter's claim lacked merit. Carter's claims for double jeopardy, equal protection, and due process were not raised at trial or on direct appeal; therefore, Carter had to have shown both cause and actual prejudice to warrant relief from the waiver bar. The court found that Carter did not have an arguable basis for any of the claims. Additionally, the court warned Carter that any additional filings that are deemed frivolous may result not only in monetary sanctions but also in restrictions on filing applications for post-conviction collateral relief in forma pauperis. Therefore, the Supreme Court denied Carter's Application for Leave to Proceed in the Trial Court.

Presiding Justice King objected to the order in part. Justice King agreed that Carter's application for post-conviction relief lacked merits but disagreed with the majority's warning to Carter that any future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief in forma pauperis. Justice King argued that the imposition of monetary sanctions only serves to punish criminal defendants from exercising their lawful right to appeal. Accordingly, in Justice King's view, the court should simply deny or dismiss motions that lack merit.

Briefed by [Breland Parker](#)

[In re Code of Judicial Conduct](#) - Judicial Conduct – Rule Change – Partisan Support – After reviewing Canon 5C(2) of the Code of Judicial Conduct, the Miss. Supreme Court ordered that the code be amended hereafter to allow judicial candidates to personally solicit publicly stated support in their election campaigns. The court also amended Canon 5F of the Code of Judicial Conduct to allow Special Committees to be appointed no later than December 15 in the year prior to their service as opposed to February 1.

Justice King objected to the order in part in separate written statement and was joined by Presiding Justice Kitchens. Justice King argued that the ABA Model Code of Judicial Conduct continued to set apart nonpartisan judicial candidates from partisan politics, and the amendment (Canon 5C(2)) adopted by the court made no such divide. He believed the purpose of the amendment was to bring partisan politics into Mississippi's judicial elections.

Briefed by [John Forrest Kelly](#)

[In re Uniform Procedures for Data Collection Matters in Circuit, Chancery & County Court](#) - Civil Filing – Guardianship – Conservatorship – The Mississippi Guardianship and Conservatorship Act takes effect on January 1, 2020, and as such, the Supreme Court found that the Civil Case Filing Form Cover Sheet should be amended to add “Joint Conservatorship & Guardianship.” Therefore, the Miss. Supreme Court ordered that the Civil Case Filing Form Cover Sheet be amended to add “Joint Conservatorship & Guardianship” as set forth in the court’s opinion.

Briefed by [Bryant Carlton](#)

[Miss. Comm’n on Judicial Performance v. Just. Ct. J. Williams](#) - Court Order – Suspensions – The Mississippi Commission on Judicial Performance (“the Commission”) filed a petition for interim suspension of Justice Court Judge Wendell Williams, in which the petition alleged that Judge Williams pushed a deputy justice court clerk and slapped her hand. Further, it stated that Judge Williams had been impatient, rude, and threatening toward litigants, witnesses, attorneys, and court staff. The Commission charged him under Miss. Const. § 117A for “(b) willful misconduct in office; . . . [and] (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute.” Finally, the Commission alleged that Judge Williams violated Canons 1, 2A, and 3B of the Code of Judicial Conduct.

The Commission requested that Judge Williams be suspended from his duties, and after due consideration, the Miss. Supreme Court found that the petition should be granted, and Judge Williams be temporarily suspended from his duties as justice court judge pending resolution of the formal complaint filed by the Commission.

Briefed by [Robert M. Rhea](#)

Court of Appeals – Civil

[Cleveland v. Advance Auto Parts](#) - Workers’ Compensation – Post-Settlement Motion for Relief – Statute of Limitations – Sheree Cleveland was injured on the job while working for Advance Auto Parts. Cleveland, Advance Auto Parts, and their insurance company reached a settlement in a Mississippi Workers’ Compensation Commission (“the Commission”) administrative court in which the Employer/Carrier would pay for any reasonable medical expenses incurred owing to the injury. After failing to pay the medical bills, Cleveland filed post-settlement motions for relief, once again, before the Commission. These bills were incurred, and all parties were aware that they existed prior to the order approving a Final Compromise and Settlement and the filing of the Form B-31. Cleveland sought payment from the Employer/Carrier twice within the next year, but Cleveland filed her post-settlement motions with the Commission after the one-year period outlined in Miss. Code Ann. § 71-3-53. In response to the post-settlement motions, the Employer/Carrier filed a response, arguing that the Commission did not have authority to rule because it lacked jurisdiction. The administrative judge granted Cleveland relief, but after an appeal by the Employer/Carrier, the Commission vacated said judge’s order on statute-of-limitations grounds.

The Court of Appeals found that the Commission erred and reversed its decision for two reasons. First, the Employer/Carrier was estopped from asserting the statute-of-limitations defense because it knew of and previously agreed to pay Cleveland's outstanding bills and because it represented to the administrative judge that it was processing one bill and had paid the other bill. Second, although the Form B-31 was properly filed, Cleveland's contact with the Employer/Carrier sufficiently tolled any statutory limitations period that may have been applicable. Therefore, the Court of Appeals remanded for the reinstatement and enforcement of the administrative judge's order.

Chief Justice Barnes concurred with the majority's finding that the Form B-31 was properly filed but dissented from its holding that the one-year statute of limitations was tolled and that the Employer/Carrier was estopped from raising a statute-of-limitations defense. Therefore, he would have affirmed the Commission's decision.

Briefed by [Frank Wood](#)

[Coombs v. Jason Pilger Hyundai](#) - Civil Procedure – Arbitration – Waiver – Barbara Coombs leased/purchased a vehicle from Jason Pilger Hyundai on June 11, 2013. She already had full coverage, including uninsured motorist coverage, with another company, but an employee at Pilger Hyundai convinced her to switch to GEICO. Barbara believed she was purchasing full coverage with GEICO, but she claims the employee entered a rejection of uninsured motorist coverage on the computer and concealed this fraudulent act from her. Barbara also signed a “Dispute Resolution Agreement for Binding Arbitration.” On November 16, 2013, Barbara and her fourteen-year-old daughter were involved in an automobile accident with an uninsured motorist. She filed an uninsured motorist claim with GEICO and was denied because the insurance policy did not include uninsured motorist coverage. Barbara filed an action in the Jackson County County Court against Pilger Hyundai and Randy Workman claiming that they made a fraudulent misrepresentation to Barbara that she was getting full insurance coverage, which led her to believe she would have uninsured motorist coverage. The county court entered an order compelling arbitration of all claims. Coombs did not appeal the order compelling arbitration but chose to participate in the arbitration. The arbitrator ruled in favor of Pilger Hyundai and Workman, and Barbara appealed the arbitrator's decision to the county court. The county court denied the motion and she appealed to the Jackson County Circuit Court. The circuit court denied Coomb's request to vacate the arbitration decision because she failed to prove any of the grounds for vacation of an award. Coombs appealed the circuit court's decision.

Because Barbara Coombs and her daughter failed to timely appeal the order compelling arbitration, the Court of Appeals dismissed the claim. The court stated that Coombs waived the right to challenge the validity of an order compelling arbitration when she participated in the arbitration. The court found that the circuit court did not err in denying Coomb's motion to set aside the arbitrator's award. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Briefed by [Winston Hudson](#)

[Dobbs v. City of Columbus](#) - Mississippi Tort Claims Act – Personal Injury – Statutory Notice Requirement – Chaquita Dobbs was involved in a car crash with police officer Dalton Conwill, after which Dobbs sued the

city of Columbus, Mississippi, and Conwill in his official capacity as a city police officer. The trial court dismissed the action, finding Dobbs failed to comply with statutory notice requirements prescribed in Miss. Code Ann. § 11-46-11. On appeal, Dobbs argued that she substantially complied with the statute, that the city waived the statutory pre-suit notice requirement, and that she should have been allowed to conduct discovery prior to dismissal. Dobbs contended that that her service upon the city's COO was sufficient, although the MTCA provided for other steps, and she also contended that the city waived the pre-suit notice requirement under § 11-46-11 when the city's liability insurer made initial contact with Dobbs.

The court held that substantial compliance with Miss. Code Ann. § 11-46-11 is no longer enough, but strict compliance is necessary. Dobbs did not strictly comply with the MTCA pre-suit notice requirements, and her argument pertaining to discovery lacked merit. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Briefed by [Jack Byrd](#)

[Nungesser Indus. LLC v. City of Jackson](#) - Contracts – Breach – Standing – Following a tornado that destroyed buildings and power lines in Jackson, Mississippi, Jackson's mayor entered into an oral contract with Nungesser-Louisiana LLC for debris cleanup. A few weeks later, the Jackson City Council entered into a contract with Garrett Enterprises LLC ("Garrett"), who then entered into a subcontract with Nungesser-Louisiana LLC. Jackson's mayor was upset that Garrett was awarded the contract and thus, entered into another oral contract, which was later put into writing, with Nungesser-Louisiana LLC, offering to pay them an hourly raise. Garrett paid Nungesser-Louisiana LLC pursuant to its subcontract, but the City of Jackson neglected to pay Nungesser-Louisiana LLC under the second contract authorized by Jackson's mayor. Nungesser Industries LLC, a Mississippi limited liability company, filed a Certificate of Formation with the Mississippi Secretary of State and was formally registered in Mississippi. Nungesser Industries LLC ("Nungesser-Mississippi LLC") sued the City of Jackson and other defendants for breach of contract and tortious interference with business for failure to pay Nungesser-Mississippi LLC under the second contract with the mayor and lost business opportunities. The Hinds County Circuit Court dismissed the complaint holding that the Mississippi LLC and the Louisiana LLC were separate legal entities and that Nungesser-Mississippi LLC was not a party to the disputed contract, thus lacking standing to pursue a claim. Therefore, the court was without subject matter jurisdiction.

Because Nungesser-Mississippi LLC filed a "Certificate of Formation" with the Secretary of State, forming a domestic limited-liability company in the State of Mississippi, separate from the Louisiana limited-liability company, and because Nungesser Industries LLC made no assertions nor submitted evidence that the registration of the Mississippi company was an error at the trial court, the two corporations are separate and distinct entities under Mississippi law. Because Nungesser-Mississippi LLC was not a party to the second contract with the Jackson mayor nor was it a legal entity when the contracted work was undertaken, and because Nungesser-Mississippi LLC had no existent actionable interest in the claim when the lawsuit was filed, Nungesser-Mississippi LLC lacked standing, rendering the original action a nullity, and the court lacked subject-matter jurisdiction. Therefore, the trial court's judgment was affirmed.

Briefed by [Jennifer Lee](#)

Prestwood v. Prestwood - Domestic Relations – Divorce – Alimony – The Rankin County Chancery Court entered final judgment of divorce on the grounds of irreconcilable differences for Amanda and Gentry Prestwood on May 24, 2018. The couple had three minor children. Alimony was the only issue submitted to the chancellor for decision, and the chancellor awarded Amanda rehabilitative alimony for a period of five years in the amount of \$1,500 a month. Amanda filed a post-trial motion, requesting lump-sum alimony in the amount of \$300,000 paid by Gentry for ten years at the rate of \$2,500 per month. The court denied Amanda’s motion. Amanda appealed. Amanda argued that the chancellor incorrectly applied the *Armstrong* factors when considering the issue of alimony. The *Armstrong* factors are used to determine whether a spouse is entitled to alimony. Because the record provided substantial evidence to support the chancellor’s award after consideration of the factors and the chancellor did not abuse his discretion, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Briefed by [Allison Middleton](#)

Rogers v. Casey & Co. LLC - Valid Contract – Attorney’s Fees – Alaina Rogers hired Casey & Co. (“Casey”) to be her florist for her wedding. Rogers owned a furniture company, so she and Casey worked a deal where in exchange for a credit off the bill for her wedding, Rogers would provide Casey with a piece of furniture that she chose. Casey chose a couch and provided Rogers with her services as a florist. Rogers initiated no discussion of a quote or of a final price, but Rogers and Casey discussed generally how certain items were more expensive than others. There were exchanges on Facebook and text that made it clear that Rogers knew her wedding would be expensive, flowers included. After the wedding Casey delivered Rogers for \$8,872.44 from which \$3,799 was credited for the couch. Therefore, Rogers’s total bill was \$5,073.44. Rogers refused to pay this balance because she believed that Casey’s services were in exchange for the couch with no extra charge. The trial court ordered Rogers to pay the \$5,073.44 plus attorney’s fees of \$2,536.72. Rogers appealed that there was not a valid contract between the parties, nor a statutory basis for the assessment of attorney’s fees.

First, the court of appeals looked at the validity of the contract using six elements laid out in *Bert Allen Toyota*, 909 So. 2d at 768: “(1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with the legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contract formation.” Rogers asserted that the contract was not valid because it was not sufficiently definite since no price was agreed upon. So long as there is an idea of the price, the parties are in agreement that there are services to be performed, and the price is reasonable, then there can be a valid contract without a set final price stipulated. The trial court did not err in the finding that the contract was valid between the parties.

Second, the court evaluated whether attorney’s fees should be assessed to Rogers. In order for there to be a statutory or legal reason for attorney fees to be added to a judgment, there must be an open contract or the contract must stipulate that attorney’s fees would be included, should it become necessary. The contract between Rogers and Casey was an oral contract, not an open contract. An open account must contain a fixed and final price, which the contract between Casey and Rogers did not have. Further, there was no “running balance of credits and debits,” nor was there any testimony that the payment could occur at the convenience of the parties, which are attributes of an open account. Casey waited until the end of her job, itemized her services, and sent one invoice with the price to be paid. This contract was oral, and the trial court erred in

awarding legal fees to Casey. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Chickasaw County Circuit Court.

Briefed by [Liza Linginfelter](#)

Ross v. State - State Boards & Agencies – Eighth Amendment – In Forma Pauperis – Dudley Ross is a blind inmate at the Central Mississippi Correctional Facility serving a sentence of 12 years. In 2017, Ross requested a transfer to the East Mississippi Correctional Facility, a private prison, due to his blindness and psychological issues. He claimed he was receiving inadequate care for his mental health issues and that he was not receiving an escort to get meals when it rained. His request was denied. Ross filed a petition for an order to show cause. The Rankin County Circuit Court ordered the Mississippi Department of Corrections (“MDOC”) to respond to Ross’ petition. MDOC answered and moved to dismiss the petition. The circuit court found MDOC’s decision not to transfer Ross was supported by substantial evidence, was not arbitrary or capricious, was within MDOC’s scope or power, and did not violate Ross’s constitutional rights. In turn, the circuit court affirmed MDOC’s decision, denied the petition, and dismissed the case. Ross appealed.

On appeal, Ross raised issues of cruel and unusual punishment. To succeed on an Eighth Amendment claim, a plaintiff must prove deliberate indifference. Ross failed to prove that MDOC’s refusal to escort him in the rain rose to the level of deliberate indifference. Further, Ross failed to prove that MDOC’s denial of his transfer request was not supported by substantial evidence, was arbitrary and capricious, was beyond the agency’s scope or powers, or violated his constitutional or statutory rights. On the other hand, the state claimed that the circuit court should not have granted Ross’ motion for leave to proceed in forma pauperis (“IFP”). Because IFP status may be granted on appeal, the trial court did not err in granting him such status. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Briefed by [Cristofor Taylor](#)

Seals v. Pearl River Resort & Casino - Appeals – Administrative Law – Workers Compensation - In 2012, Sean Seals suffered an injury while working in the course and scope of his employment with Pearl River Resort and Casino (“Pearl River”). An Administrative Judge (“AJ”) found that Seals had not yet reached maximum medical improvement (“MMI”). The employer then appealed to the Mississippi Workers’ Compensation Commission (“the Commission”). The Commission reviewed the case, relying on the testimony and reports of numerous physicians, but the Commission did not rely on the report of Bruce Brawner, Seals’s rehabilitation consultant. The Commission found that Seals reached MMI on November 13, 2013, and also that Seals did not suffer a loss of wage-earning capacity. Seals appealed.

Because the Commission may determine the credibility of conflicting expert testimony, and because the Commission’s decision was supported by substantial evidence, the Commission did not err when it found that Seals had reached MMI on November 13, 2013. However, because the Commission gave no consideration to Bruce Brawner’s report regarding Seals’ loss of wage-earning capacity, as well as the concurring testimony of other physicians, the Commission erred when it found that Seals did not suffer a loss of wage-earning capacity. Additionally, because Seals provided evidence that he attempted to obtain alternative suitable employment and Pearl River did not show otherwise, Pearl River failed to rebut Seals’s presumption of disability. Therefore, the

Court of Appeals affirmed in part and reversed and remanded in part the decision of the Mississippi Workers' Compensation Commission.

Presiding Judge Wilson dissented in part, arguing that the Commission's finding regarding Seals's loss of wage-earning capacity was supported by substantial evidence and that it is the purpose of the Commission, not the court, to resolve any conflicting evidence and to weigh physician testimonial opinions. Additionally, Presiding Judge Wilson argued that because Seals did not present an argument regarding his entitlement to a presumption of a disability, or regarding his job search in general, the court improperly acted as an advocate for one party on appeal.

Briefed by [Charles Matranga](#)

[Ungarino & Maldonado LLC v. Eckert & Tarleton LLC](#) - Fee Dispute – Arbitration – Waiver – Operating Agreement – Nelda Polk retained the law firm Ungarino & Eckert (“Ungarino”) to represent her in a claim related to an automobile accident. Polk signed a contingency fee agreement with the firm. William Eckert handled the case for the firm for over a year before he and Michael Tarleton left Ungarino to start their own law firm, Eckert & Tarleton. Polk chose to move her case to Eckert & Tarleton and signed a separate contingency fee agreement with them. Following Tarleton and Eckert's departure from their prior firm, they demanded Ungarino participate in arbitration to determine their buy-out amount from the firm. The buy-out was successfully arbitrated, but following the arbitration, Ungarino sought reimbursement for his hourly attorney's fees related to the Polk case. There was a dispute about how much money Eckert owed Ungarino; as a result, Eckert filed a complaint requesting a declaratory judgment to determine the legal fees in the Polk case. Ungarino requested the fee dispute be arbitrated and subsequently filed a motion to compel arbitration. The trial court held that Ungarino waived its right to arbitration because it never raised the subject of legal fees in the Polk case during the prior buy-out arbitration with Eckert. Ungarino appealed.

The Court of Appeals affirmed the trial court's decision; however, it affirmed decision on different grounds. A party may waive arbitration by engaging in conduct inconsistent with timely enforcement of the arbitration agreement. Because the Polk case had not been settled at the time the buy-out arbitration occurred, Ungarino's failure to raise it as an issue did not waive its right to arbitration. However, the fee dispute did not fall within the scope of the Operating Agreement. The Operating Agreement only subjects disputes concerning management, accounting matters, transfer of interest, and other matters unrelated to the fee dispute to arbitration. The Operating Agreement does not mention fee disputes being subject to arbitration. Considering this, the Court of Appeals held that the trial court did not err by denying Ungarino's motion to compel arbitration. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Judge McCarty concurred in part and dissented in part, arguing that the trial court was correct in holding that Ungarino waived their right to arbitration by not bringing up the fee dispute in the buy-out arbitration.

Briefed by [Matthew Russ](#)

Court of Appeals – Post-Conviction Relief

Turner v. State - Habitual-Offender – Procedural Bar – Post-Conviction Relief – In 1981, Johnny Turner was convicted of aggravated assault, and in 1983, he was convicted of burglary. In 2002, Turner was indicted for manufacturing and possessing methamphetamine. He was sentenced to life imprisonment as a habitual offender. Turner filed a motion for post-conviction relief seeking to vacate and correct the sentence, and the motion was dismissed by the trial court. Turner appealed.

Because the motion for post-conviction relief was time-barred and Turner’s arguments did not fall within any exception, the trial court properly dismissed the motion for post-conviction relief. Furthermore, notwithstanding the procedural bar, Turner’s arguments were without merit. Therefore, the trial court’s judgment was affirmed.

Briefed by [Philip Lott](#)

Court of Appeals – Criminal

Gardner v. State - Motion to Suppress – Mistrial – Out-of-State Witnesses – In July 2015, a physical altercation occurred between Dameon Hale and Dewayne Gardner (“Dwayne”) at the home of Deon Grayer. Later that evening, Dewayne returned to the residence along with his brother Deunta Gardner (“Gardner”), who was carrying a firearm. During the course of the evening, Gardner repeatedly struck Grayer with the firearm and bound him with duct tape, and Hale, arriving later, was shot multiple times by Gardner. Grayer later identified Gardner in a photo lineup. Gardner filed a pretrial motion to suppress Grayer’s photo identification, arguing that the lineup was highly suggestive and prejudicial. His motion to suppress was denied. At trial, Grayer identified Gardner in the courtroom as the person who struck him. Hale also identified Gardner in the courtroom, stating that he was “positive” that Gardner was the person who shot him. Hale also testified that the chain of events at issue began during his earlier fight with Dewayne. Hale testified that, after the fight, Dewayne told Hale, “I’m going to get my brother and he [is] going to kill you; he already done killed somebody before.” Gardner objected to Hale’s testimony as hearsay, but the circuit court found the testimony admissible as an “excited utterance” under Miss. R. Evid. 803(2), and as a statement of Dewayne’s “then-existing state of mind” under 803(3). The testimony was also held to be more probative than prejudicial and, as such, was admissible under Miss. R. Evid. 403. The circuit judge then instructed the jury to disregard the last part of Hale’s testimony that “he already done killed somebody before,” and polled the jury to confirm that each juror would follow the court’s limiting instruction. Gardner testified and offered an alibi defense, though none of his subpoenaed witnesses appeared at trial. The jury convicted Gardner of conspiracy to commit aggravated assault, aggravated assault, kidnapping, and possession of a firearm by a felon. The circuit court denied Gardner’s post-trial motions for a judgment notwithstanding the verdict and for a new trial.

Gardner appealed, asserting that Grayer’s in-court and out-of-court identifications of Gardner were tainted by an overly suggestive photo lineup, and as such the photo lineup and identifications should have been suppressed. Gardner also asserted that Hale’s testimony regarding Gardner’s past criminal activity rendered his trial unfair, and the circuit court should have declared a mistrial. Lastly, Gardner argued that because he was denied reasonable funds to secure out-of-state witnesses to substantiate his alibi defense, he was denied a fair trial and due process. Because the photo lineup presented to Grayer was not impermissibly suggestive and because Grayer’s out-of-court identification of Gardner was otherwise reliable, the Court of Appeals found no error in the circuit court’s denial of Gardner’s motion to suppress. Because Hale’s statement was admissible

under Rule 803(2), (3) and Rule 403, and because the circuit court instructed the jury to disregard the evidence of Gardner's prior bad act, there was no "manifest necessity" for a mistrial as a result of Hale's statement, and the circuit court did not err in denying Gardner's motion for a new trial. Lastly, because the court followed the required procedure for summoning out-of-state witnesses under Miss. Code. Ann. § 99-3-33, as well as granted Gardner's motion for additional travel expenses, the witnesses non-appearance was not the result of any error by the circuit court. Therefore, the Court of Appeals affirmed the judgment of the Tallahatchie County Circuit Court.

Briefed by [Melissa Fenwick](#)

Miller v. State - Second-Degree Murder – Expert Testimony – Insanity – Around midnight on February 27, 2014, police were called to a home following a report of a noise outside of Leah McIntosh's home. Officer James Tucker responded to the call and found vehicle damage in McIntosh's driveway. Officer Tucker heard screams from the house next door, and when he arrived, he found Greg Scott lying on the floor bleeding, claiming that Jerry Miller stabbed him. As officers approached Miller's house, Miller stepped outside onto his front porch. According to the officers, Miller confessed to stabbing Scott "because they had been cyberstalking" Miller's VCR and DVD player. During an interview with Chief Dance, Miller stated that he had been hearing voices "on each side of . . . [his] ear for going on six years" and that "the house behind . . . [him] was heavily involved in trying to hurt" him. At trial, the court allowed McIntosh, who handled all the civil court commitments for Alcorn and other counties, to testify as to Miller's insanity. At trial, the prosecution also admitted into evidence a photograph of Scott's liver showing the stab wound. The jury convicted Miller of second-degree murder. Miller appealed.

On appeal, Miller argued that (1) the jury's verdict was against the overwhelming weight of the evidence; (2) the circuit court erred by allowing a lay witness to give an expert opinion; and (3) the circuit court erroneously admitted a photograph that was substantially more prejudicial than probative. The Court of Appeals held that substantial evidence supported the jury's findings as to Miller's sanity, there was no error in admitting the expert testimony given the overwhelming weight of the evidence, and the photograph helped to describe the victim's cause of death. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

Briefed by [Joshua Crownover](#)

**Interested in more specific details about a particular case? Click the case name to view the full opinion.*

Thank you for your contributions to BriefServ and the *Mississippi Law Journal*. As always, feel free to contact me with any comments or suggestions, or if you need to change your Subscriber information.