

**MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 13, 2020****SUPREME COURT - CIVIL CASES****BIEGEL V. GILMER****CIVIL - TORTS**

**CIVIL PROCEDURE - RES JUDICATA - EXCLUSION & ABATEMENT** - The test for determining whether a subsequent action should be abated because of a pending prior action is whether the judgment in the prior action would be res adjudicata of the issues presented in the subsequent action

**CIVIL PROCEDURE - RES JUDICATA - ELEMENTS** - Res judicata requires (1) identity of the action's subject matter, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made

**APPELLATE PROCEDURE - BRIEFS - WAIVER** - Any issue not specifically identified in an appellant's brief may not be argued by the appellant, unless requested by the court

**FACTS**

Chuck McRae sued Barry Gilmer in chancery court in a fee dispute. Gilmer then filed a suit in circuit court against McRae's chancery court attorneys, Michele Biegel and Bettie Johnson. Gilmer's circuit court complaint requested an injunction to stop Biegel, Johnson, and McRae from prosecuting frivolous claims against Gilmer. Biegel and Johnson filed a motion to dismiss the chancery court suit against them. McRae then requested the circuit court transfer the claims against McRae to the chancery court where he brought the underlying suit against Gilmer. The circuit court ordered the entire suit, including the claims against Biegel and Johnson, transferred. The circuit court denied Biegel and Johnson's motion to reconsider. The Supreme Court then granted interlocutory appeal.

**ISSUES**

Whether (1) the circuit court erred by transferring the suit against Biegel and Johnson to the chancery court and (2) a 12(b)(6) dismissal was procedurally barred.

**HOLDING**

(1) Because Biegel and Johnson were not parties to the chancery court action, there was no exclusion or abatement of the circuit court action against them and the circuit court erred by transferring the suit against Biegel and Johnson to the chancery court. (2) Because Biegel and Johnson did not raise the dismissal issue in their principal appellant brief, a 12(b)(6) dismissal was procedurally barred. Therefore, the Supreme Court reversed and remanded the judgment of the Madison County Circuit Court.

**Reversed & Remanded - 2018-IA-01172 (Feb. 13, 2020)**

Opinion by Justice Ishee

Hon. Christopher A. Collins (Madison County Circuit Court)

Robert G. Germany for Appellants - *Pro se* for Appellee

Briefed by [Joshua Crossover](#)

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**CENT. MISS. MED. CTR. V. MISS. DIV. OF MEDICAID**

## CIVIL - STATE BOARDS & AGENCIES

**ADMINISTRATIVE LAW - STATE BOARDS & AGENCIES - MEDICAID REIMBURSEMENT** - Agencies act arbitrarily or capriciously when they fail to utilize facts and governing principles to render decisions. The clear and unambiguous language of the Plan asserts that the DOM shall use the same audits utilized by Medicare to establish the final reimbursement

**PROPERTY - EQUITABLE DEFENSES - ESTOPPEL** - In order to prove equitable estoppel, one must show (1) proof of a belief; (2) reliance on some representation; (3) a change of position as a result of the representation; and (4) detriment or prejudice caused by the change of position

**ADMINISTRATIVE LAW - STATE BOARDS & AGENCIES - PROCEDURAL DUE PROCESS** - In order to assert a claim for procedural due process, a party must demonstrate a property interest that is entitled to protection under the Constitution

### FACTS

The Mississippi State Plan Agreement (“the Plan”) mandated that the Mississippi Division of Medicaid (“DOM”), the state Medicaid entity, use the Medicaid Notice of Program Reimbursement (“NPR”) to determine final reimbursement. Central Mississippi Medical Center (“CMMC”) purchased the former Methodist Healthcare-Jackson Hospital, which consisted of a North Campus and Main Campus. CMMC eventually closed the North Campus. The North Campus only operated for a term of eight months during the 2000 fiscal year, but the previous cost reports relied upon by the DOM to project costs included twelve months of costs. CMMC then filed an amended cost report with the DOM, which failed to include both costs associated with the North Campus and days in operation at the North Campus. The DOM used these numbers to revise CMMC’s reimbursement. CMMC received its NPR based on final adjustments to CMMC’s medical cost reports. The DOM, however, did not receive a copy of the Medicare NPR until seven years later. Once the DOM received the NPR, the DOM established final reimbursement in the amount of \$1.226 million. CMMC did not challenge the accuracy of the NPR until more than seven years after receiving the NPR. The DOM argued that CMMC failed to correct the data because doing so would have reduced the amount of reimbursement. CMMC filed an administrative appeal before the DOM, which found the appeal meritless. CMMC appealed the decision to the Hinds County Chancery Court who also found in favor of the DOM. CMMC appealed.

### ISSUES

Whether (1) the DOM acted arbitrarily or capriciously by relying on the Medicare NPR to set CMMC’s reimbursement rather than earlier submissions to the DOM by CMMC; (2) Miss. Code Ann. §§ 43-13-117(J) and 43-13-118 restrict the DOM’s authority to adjust CMMC’s reimbursement; and (3) the DOM violated CMMC’s due-process rights by adjusting CMMC’s reimbursement.

### HOLDING

(1) Because CMMC accepted the benefits of the Medicare NPR reimbursement levels and failed to exercise its right to correct the incorrect data, knowing that the DOM would use the NPR to determine reimbursement, and because the Plan did not authorize the DOM to amend the NPR itself, the DOM did not act arbitrarily or capriciously by relying on the Medicare NPR to set CMMC’s reimbursement. (2) Because there was a readily discernable harmonization of Mississippi Code Sections 43-13-117(J), 121, the recovery of funds through adjusting prospective reimbursement into final reimbursement was not a “cut” within the meaning of section 43-13-117(J), but an adjustment as directed by the Plan. Moreover, because section 43-13-118 did not set forth a statute of limitations, and even if so, statutes of limitation do not run against the State, and because the record indicated that CMMC was aware that the DOM would seek a final reimbursement and that the DOM would use the NPR, not older cost reports, to determine final reimbursement, CMMC’s claim of equitable estoppel fails. (3) Because CMMC had an opportunity to appeal the NPR, and because CMMC was granted an administrative hearing on its claims against the DOM and was granted the opportunity to appeal to the Chancery Court and to the Mississippi Supreme Court, CMMC’s claim that it was denied due process rights was without merit. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

### CONCURRENCE

Justice Kitchens argued that judicial deference should not be extended to an executive agency’s interpretations of its rules and regulations.

## DISSENTS

Justice Coleman argued that the court should not defer to executive agency interpretations of regulations and that the Department of Medicaid violated Mississippi law by cutting CMMC's reimbursement. The majority used sections 43-13-117(D) and 43-13-121(1)(j) to erase subsection J's prohibition against cuts. Justice Griffis argued that the DOM was not required to calculate CMMC's final Medicaid reimbursement rates based solely on the Medicare NPR. Further, CMMC had no obligation to appeal its Medicare NPR to Medicare in order to correctly determine Medicaid reimbursement rates. The DOM had the discretion and authority to accept, reject, or modify adjustments made in common audits "as appropriate." Further, the DOM was responsible for correctly setting CMMC's Medicaid reimbursement rate. Finally, the Plan authorized the DOM to correct mistakes in data from the NPR.

### **Affirmed - 2018-SA-01410-SCT (Feb. 13, 2020)**

En Banc Opinion by Chief Justice Randolph - Concurrence by Justice Kitchens - Dissents by Justice Coleman & Justice Griffis  
Hon. J. Dewayne Thomas (Hinds County Chancery Court)  
George H. Ritter & Rebecca L. Hawkins for Appellant - Janet McMurtray, Samuel Philip Goff, Laura L. Gibbes, & Dion Jeffery  
Shanley for Appellees  
Briefed by [Jennifer Lee](#)

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## SUPREME COURT - ORDERS

### FORKNER V. STATE

#### ORDER

#### ORDER

Winfred Forkner filed an Application for Leave to Proceed in the Trial Court. The application was denied and deemed frivolous because it was successive, and it did not qualify under the successive-writ bar exceptions of Miss. Code Ann. § 99-39-27(9). The Mississippi Supreme Court warned that if he filed another frivolous application that there would be monetary sanctions, or he would receive restrictions on his ability to file for post-conviction collateral relief (or pleadings in that nature) in forma pauperis.

#### OBJECTION

Presiding Justice King agreed the application should be denied lacking merit, however, he argued that it should not have been deemed frivolous. This Mississippi Supreme Court has defined frivolous claims as claims with "no hope of success," and if a claim is "weak or light-headed" that does not mean it is "sufficient to be labeled frivolous." *Roland v. State*, 666 So. 2d 747, 751 (Miss. 1995); *Calboun v. State*, 849 So. 2d 892, 897 (Miss. 2003). Presiding Justice King believed the argument Forkner made was reasonable. Further, the warnings for monetary sanctions and restrictions on the ability to file for post-conviction collateral relief in forma pauperis wrongly preclude a criminal defendant from his right to appeal. These punishments may deter frivolous applications, but they prevent indigent defendants' constitutional rights in criminal proceedings.

### **Ordered - 2018-M-00115-SCT (Feb. 11, 2020)**

Order by Justice Ishee - Objection by Justice King  
Briefed by [Liza Linginfelter](#)

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## SUPREME COURT - CRIMINAL CASES

## BRENT V. STATE

### CRIMINAL - FELONY

**APPELLATE PROCEDURE - INDIGENT CRIMINAL DEFENDANT - LINDSEY BRIEF** - A *Lindsey* brief is filed where appellate counsel represents an indigent criminal defendant and does not believe his or her client's case presents any arguable issues on appeal

**RETRIAL - DOUBLE JEOPARDY - ACTUAL ACQUITTAL** - No person's life or liberty shall be twice placed in jeopardy for the same offense, but there must be an actual acquittal or conviction on the merits to bar another prosecution

**PRIOR CONVICTIONS - VIOLENT HABITUAL OFFENDER - SEPARATE TERMS** - The State must prove that a defendant has not only been at least twice previously convicted but that he has been sentenced to and has served separate terms of one year or more in any state and/or federal penal institution

### FACTS

James Brent approached a bystander at a gas station demanding money and threatened to shoot by pressing what felt like a gun to the back of the bystander's head. Afterwards, the police arrested Brent and never recovered a gun. Brent was indicted on three counts — one count of armed robbery, one count of kidnapping, and one count of possession of a firearm by a convicted felon. Following his trial, the jury convicted Brent on all three counts, and Brent appealed. The Court of Appeals reversed and rendered Brent's felon-in-possession-of-a-firearm conviction finding the evidence of firearm possession insufficient. The Court of Appeals reversed and remanded the two other convictions for a new trial. After retrial, the jury convicted Brent of armed robbery and kidnapping and sentenced him to life without parole as a violent habitual offender. Brent appealed pro se, and his appellate counsel filed a *Lindsey* brief certifying that there were no arguable issues supporting Brent's appeal.

### ISSUES

Whether (1) the State's evidence was insufficient to prove the elements of armed robbery and kidnapping; (2) Brent's retrial for armed robbery and kidnapping subjected him to double jeopardy; (3) the jury instructions constructively amended the armed-robbery indictment; and (4) the State failed to prove Brent's status as a violent habitual offender.

### HOLDING

(1) Because a reasonable juror could have found that the State proved beyond a reasonable doubt that Brent exhibited a deadly weapon and forcibly seized the bystander, the State's evidence was sufficient to prove the elements of armed robbery and kidnapping. (2) Because Brent did not receive an actual acquittal on the merits of either conviction before the court, Brent's retrial for armed robbery and kidnapping did not subject him to double jeopardy. (3) Because the jury instructions did not modify an element of armed robbery, the jury instructions did not constructively amend the armed-robbery indictment. (4) Because the State presented sufficient evidence for the trial judge to find that Brent previously served one year or more on each of his previous armed-robbery convictions, the State did not fail to prove Brent's status as a violent habitual offender. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2019-KA-00095-SCT (Feb. 13, 2020)**

Opinion by Justice Chamberlin

Hon. Steve S. Ratcliff, III (Madison County Circuit Court)

Erin E. Briggs & George T. Holmes (Pub. Def. Office) & *Pro se* for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Philip Lott](#)

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## JOHNSON V. STATE

## CRIMINAL - FELONY

**CRIMINAL LAW - ACCESSORY TO FELONY - PRINCIPAL** - An accessory to any felony before the fact is a principle and may be convicted as a principal in an indictment charging him or her as principal

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PLAIN ERROR** - If a party fails to object to the jury instructions at trial, the plain error standard of review applies to determine whether there was an error and whether that error adversely affected a defendant's substantive rights, causing a miscarriage of justice

**CRIMINAL LAW - SUFFICIENCY OF EVIDENCE - REQUIREMENTS** - The evidence must show beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction

### FACTS

Raheem Johnson was found guilty of murdering James White. On the day of the murder, James White, Brad Reed, Ledesmond Shotwell, and Johnson's father were partying at Reed's house. Johnson stopped by the house to pick his father up. Reed and others were in Reed's bedroom and did not see Johnson, but Reed heard his voice. Immediately after Johnson and his father left, Reed and the others heard gunshots and heard White call out for help. Johnson was arrested and told the sheriff that he dropped Roderick Johnson off at a driveway near Reed's home with the knowledge that Roderick intended to kill White. At the end of the State's case-in-chief, Johnson moved for a directed verdict, and it was denied. Johnson was found guilty of first-degree murder and sentenced to life in prison. Johnson appealed.

### ISSUES

Whether (1) the trial court erred by denying Johnson's motion challenging the sufficiency of the evidence; (2) the trial court erroneously instructed the jury; (3) Johnson's grand jury indictment was improper; and (4) Johnson's jury verdict form was erroneous.

### HOLDING

(1) Because there was evidence Johnson knew Roderick was going to kill White and acted in concert with him, the evidence was sufficient to support Johnson's conviction. (2) Because the jury instructions regarding whether Johnson committed the murder or was an accessory before the fact did not amount to plain error, there was no error in the jury instructions. (3) Because Johnson did not object to the indictment at trial, his argument that it was improper was waived; however, even if it was not waived, the indictment still was sufficient to notify Johnson of the crime. (4) Because the evidence showed that Johnson was guilty as an accessory before the fact, his jury verdict form for guilty as an accessory before the fact was valid. Therefore, the Supreme Court affirmed the judgment of the Clay County Circuit Court.

**Affirmed - 2018-KA-00429-SCT (Feb. 13, 2020)**

Opinion by Justice Griffis

Hon. James T. Kitchens Jr. (Clay County Circuit Court)

George T. Holmes, Justin Taylor Cook (Pub. Def. Office) & *Pro se* for Appellant - Kaylyn Havrilla McClinton & Scott Winston Colom (Att'y Gen. Office) for Appellee

Briefed by [Winston Hudson](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 11, 2020

### COURT OF APPEALS - CIVIL CASES

## BEST V. OLIVER

### CIVIL - DOMESTIC RELATIONS

**DOMESTIC RELATIONS - CHILD SUPPORT - MODIFICATION** - A parent seeking modification of child support must show a substantial or material change in the circumstances not reasonably foreseeable at the time of the most recent support decree

**DOMESTIC RELATIONS - CHILD SUPPORT - MODIFICATION** - Possible factors which may constitute a material change in circumstances are increases in the children's expenses; a substantial increase in the financial resources of the non-custodial parent; and inflation since the original decree

**DOMESTIC RELATIONS - CHILD SUPPORT - MODIFICATION** - There is no reason in law why a father's obligation to support his children should be minimized because his ex-wife remarries well

## **FACTS**

Kimberly Oliver and Charles Best, Jr. were married and had a daughter together. During the divorce proceedings, they both agreed to retain joint legal custody of the child, with Kimberly keeping sole physical custody and Charles paying \$830 a month in child support. During this time, Kimberly lived rent-free in a converted barn on the former marital property. After she remarried and moved to Virginia, she filed a motion for an increase in child support to \$3,000 a month on account of increased expenses associated with raising their child as well as an increase in general living expense. During this same time period, Charles's income had increased from \$211,000 to \$260,000. The chancery court rejected Kimberly's request for an increase to \$3,000, but instead only increased Charles's required payments to \$1,000 a month. Charles appealed.

## **ISSUE**

Whether the expenses associated with the child's increased age and Charles's increased income constitute a material change in circumstances warranting modification.

## **HOLDING**

Because the chancery court considered all the *Adams* factors, and because it found that the combination of increased expenses associated with raising the child, Charles's substantial increase in income, Kimberly's changed financial position, and inflation constituted a material change warranting a modification of child support, it did not err in increasing the child support payments. Further, the chancery court rejected the amount suggested by Kimberly and only settled on an increase of \$170. In addition, the chancery court did not err by failing to consider Kimberly's new husband's income as a factor in determining the amount of child support. Therefore, the Court of Appeals affirmed the judgment of the Madison County Chancery Court.

**Affirmed - 2019-CA-00271-COA (Feb. 11, 2020)**

Opinion by Judge McCarty

Hon. James Christopher Walker (Madison County Chancery Court)

John R. Reeves for Appellant - Kimberly Davis McCormack for Appellee

Briefed by [Reid Hudson](#)

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## **CUTRER V. SINGING RIVER HEALTH SYS.**

### **CIVIL - CONTRACT**

**CIVIL PROCEDURE - SUMMARY JUDGMENT - ELEMENTS** - In a motion for summary judgment, a moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law

**CIVIL PROCEDURE - INTERLOCUTORY ORDERS - RECONSIDERATION** - Partial Summary Judgment is an interlocutory order and not a final judgment on the merits; under Miss. R. Civ. Pro. 54(b), any order which is not a final judgment and adjudicates fewer than all of a party's claims is subject to reconsideration and reversal

## **FACTS**

Susan Cutrer, Richard Saucier, Barbara James, Sherman Miller, Karen Reeves, and Michael Reeves (“Plaintiffs”) were employees of Singing River Health Systems. In 2005, Plaintiffs elected to take a special early retirement benefit package offered by Singing River, which included continuation of coverage under Singing River’s Health Plan. Plaintiffs were given an Information Guide detailing the early retirement package, and, with respect to health insurance, a “Continuation of Benefits” section specified that early retirees could opt to continue coverage under Singing River’s Health Plan by paying only the employee’s share of the health insurance premium until they were Medicare-eligible. The Health Plan was an extensive document detailing the health care benefits available to Singing River employees and retirees, and included a reservation-of-rights provision which gave Singing River “the right to amend, modify, or suspend the terms of the Plan at any time and for any reason.” In 2014, Singing River notified retirees, including plaintiffs, they would now be required to pay the full monthly premium in order to maintain coverage under the Health Plan. Plaintiffs sued Singing River claiming breach of contract and anticipatory breach of contract. Plaintiffs relied on the “Continuation of Benefits” section to support their argument that they were contractually entitled to continue their health insurance benefits at the same rate as Singing River’s employees until Plaintiffs were Medicare-eligible. The Jackson County Circuit Court initially granted partial summary judgment in Plaintiffs’ favor; however, on Singing River’s motion for reconsideration, the circuit court reversed its decision and granted summary judgment to Singing River. Plaintiffs appealed.

## **ISSUES**

Whether (1) the circuit court erred in granting Singing River’s motion for summary judgment and (2) the circuit court abused its discretion by reconsidering its original grant of partial summary judgment in plaintiffs’ favor and then granting summary judgment in Singing River’s favor.

## **HOLDING**

(1) Because the early retirement benefit package did not create a separate contract entitling plaintiffs to continue health insurance benefits, but, rather, simply advised plaintiffs that they had the option to continue to remain covered under the Health Plan, Plaintiffs did not have a valid, enforceable contract to provide health insurance, and because Singing River reserved the right to amend or modify the terms of the Health Plan, the circuit court did not err in granting summary judgment in Singing River’s favor. (2) Because the circuit court’s partial summary judgment in Plaintiffs’ favor was an interlocutory order and not a final judgment, under Miss. R. Civ. P. 54(b), the circuit court was free to reconsider and reverse its original partial summary judgment in Plaintiffs’ favor. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

## **DISSENT**

Judge McCarty argued summary judgment should not have been granted. He held that the existence and terms of a contract between Singing River and plaintiffs were genuine issues of material fact that should be decided by a fact-finder and not by a judge on summary judgment.

### **Affirmed - 2018-CA-00445-COA (Feb. 11, 2020)**

En Banc Opinion by Presiding Judge Carlton - Dissent by Judge McCarty

Hon. James D. Bell (Jackson County Circuit Court)

Russell S. Gill & Scott Corlew for Appellants - A. Kelly Sessoms III & Brett K. Williams for Appellee

Briefed by [Melissa Fenwick](#)

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## **HILL V. MOORE**

### **CIVIL - PERSONAL INJURY**

**NEGLIGENCE - DUTY - SPECIAL RELATION** - A duty to control a third person’s conduct only arises if a special relation exists between the actor and the third person, which imposes a duty upon the actor to control the third

person's conduct, or a special relation exists between the actor and the other which gives to the other a right of protection

**NEGLIGENCE - SPECIAL RELATION - RESPONDEAT SUPERIOR** - A special relation in the form of an employer/employee relationship can arise if a negligent employee's conduct occurred within the scope of employment

**CIVIL PROCEDURE - SUMMARY JUDGMENT - BURDEN OF PROOF** - The nonmovant bears the burden of presenting affirmative evidence that a genuine issue of material fact exists

## **FACTS**

In March 2015, William Browning was killed in a collision with a vehicle driven by Yolanda Wofford. Wofford was a temporary employee assigned to MTD Holdings Inc. ("MTD") by staffing agency Hamilton-Ryker. She had just finished her work shift and was driving home when the accident occurred. Soon afterward, she tested positive for a variety of drugs. MTD on-site nurse Janice Moore stated that Wofford had apparently "hit the floor" near the end of the shift, but when she spoke with her, Wofford was sitting up and conscious. Wofford claimed she suffered from insomnia and had not slept well. Moore asked if she needed a ride home, and Wofford responded that her cousin and sister had ridden with her to work and could drive. Someone who Moore believed was a relative of Wofford came into the first-aid room, and Moore believed the relative would drive Wofford home. Kylie Browning Hill, as administrator of Browning's estate, filed suit against Wofford, Moore, MTD, and Hamilton-Ryker for negligence. MTD and Moore filed for summary judgment saying Hill could not demonstrate any genuine issue of material fact that they owed a duty to prevent Wofford from leaving the premises. Hamilton-Ryker also filed for summary judgment saying they were not liable because Wofford was not acting in the scope of her employment, she was under MTD's exclusive control even if she had been, and liability would not extend to a duty to protect Browning from Wofford's acts or omissions by preventing her from leaving the premises. Hill opposed the motions saying Moore should have foreseen the danger of letting Wofford leave given her state, that there was a special employer/employee relationship, and employing a medical professional enhanced MTD's duty. The circuit court rejected Hill's reasoning and granted the motions for summary judgment. Hill appealed.

## **ISSUES**

Whether (1) MTD and Moore owed a duty to make sure Wofford posed no danger to herself or others and (2) Hamilton-Ryker voluntarily assumed a duty to control its employee through its contract with MTD.

## **HOLDING**

(1) Because Wofford was not acting within the scope of her employment, MTD did not contribute or seek to accommodate intoxication, and because Hill did not demonstrate how employing an on-site healthcare professional imposed a greater legal duty, MTD did not owe a duty to Browning. (2) Because the contract between Hamilton-Ryker and MTD relinquished any such duty of Hamilton-Ryker to control its employee and Hill did not present affirmative evidence that a genuine issue of material fact existed, Hamilton-Ryker did not owe a duty to Browning. Therefore, the Court of Appeals affirmed the judgment of the Chickasaw County Circuit Court.

**Affirmed - 2019-CA-00365-COA (Feb. 11, 2020)**

Opinion by Chief Judge Barnes

Hon. Andrew K. Howorth (Chickasaw County Circuit Court, First Judicial Dist.)

Mark Anthony Lambert for Appellant - Robert F. Stacy Jr., Sam Starnes Thomas, Tiffany Nicole Carey, & Owen Patrick Terry for Appellees

Briefed by [Kaitlin Bethay](#)

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## **LEWIS V. STATE**

### **CIVIL - POST-CONVICTION RELIEF**

**CIVIL PROCEDURE - STATUTORY AMENDMENTS - RETROACTIVE APPLICATION** - No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat prosecution of



any crime committed prior to its enactment, or the collection of any penalty, unless otherwise specifically provided in a newly enacted statute

**CIVIL PROCEDURE - PROBATION - ARREST** - Mere arrest of a probationer is not a violation of probation and cannot be the sole basis for probation revocation

**CIVIL PROCEDURE - PROBATION REVOCATION - STANDARD OF PROOF** - The State must show actual proof of an actual conviction, or that a crime has been committed and that it is more likely than not that the probationer committed the offense, when alleged criminal activity is the basis for revocation

### **FACTS**

In 2007, Don Lewis pled guilty to fondling of a child and was sentenced to four years incarceration and eleven years of post-release supervision (“PRS”). He was also ordered to pay a \$1,500 fine and \$654.00 in restitution. Later, an MDOC officer alleged Lewis violated the terms of his PRS by failing to pay his fines and being arrested three times: once for simple assault, and twice for DUI. The Pearl River County Circuit Court held a revocation hearing in 2015, and subsequently revoked Lewis’s PRS. At the hearing, Lewis admitted to his arrests, but no further testimony or evidence of conviction was provided. The circuit court did not conduct any evidentiary inquiries of Lewis or anyone else. The circuit court failed to reference any evidentiary basis for revoking Lewis’s PRS because of the status of his fines. Miss. Code Ann. § 47-7-37 was amended in 2018, changing the focus of such hearing from the number of technical violations to the number of prior revocations. Lewis filed a motion for post-conviction relief, claiming his probation was unlawfully revoked, which was denied by the circuit court in 2018. Lewis appealed.

### **ISSUES**

Whether (1) the 2018 amendment to Miss. Code Ann. § 47-7-37 applies retroactively to Lewis’s 2015 hearing; (2) an arrest constitutes a probation violation worthy of revocation; and (3) the State may deem a probationer guilty on the sole basis of his own admissions.

### **HOLDING**

(1) Because no statutory amendment to a criminal code applies retroactively unless specifically provided in the newly enacted statute, and because the 2018 amended section did not specifically provide for retroactive application, Lewis cannot benefit from the amendment. (2) Because mere arrest is not a violation of probation under Mississippi law, Lewis’s admission to his arrests cannot constitute a basis for revocation of his probation. (3) Because the only evidence of criminal conduct by probationer Lewis was his own admissions to arrest, and because the State presented no evidence to dispute that he had timely paid his fines, there was insufficient evidentiary basis for the revocation of Lewis’s probation. Thus, the Court of Appeals reversed and remanded the judgment of the Pearl River County Circuit Court.

### **Reversed & Remanded - 2018-CP-00970-COA (Feb. 11, 2020)**

Opinion by Judge Westbrook

Hon. Anthony Alan Mazingo (Pearl River County Circuit Court)

*Pro se* for Appellant - Barbara Wakeland Byrd (Att’y Gen Office) for Appellees

Briefed by [Charles Ellzey](#)

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## **MCKENZIE V. HOWARD INDUS. INC.**

### **CIVIL - WORKERS’ COMPENSATION**

**WORKERS’ COMPENSATION - DISABILITY - BURDEN OF PROOF** - The burden of proving disability and its extent under Miss. Code Ann. § 71-3-7 lies with the claimant, who must show that there was (1) an actual physical injury and (2) a loss of wage-earning capacity

**WORKERS’ COMPENSATION - LOSS OF WAGE-EARNING CAPACITY - PRESUMPTION** - A rebuttable presumption of no loss of wage-earning capacity arises when the claimant’s post-injury wages are equal to or exceed their pre-injury wage

## FACTS

Michelle McKenzie was employed by Howard Industries as a Division 1 coil helper earning \$12.46 per hour. In this role, McKenzie primarily operated two machines—a paper extension machine and a fast cutter machine. In 2012, McKenzie injured her neck while operating the paper extension machine. Following her injury, McKenzie underwent surgery for an acute herniated disc. Dr. David Yeh, McKenzie’s surgeon, eventually determined that McKenzie had reached maximum medical improvement but restricted her to a light-work level. In 2013, McKenzie returned to work and resumed her same position as a Division 1 coil helper. She was moved to a different machine as a result of her restrictions, but her wages were increased to \$12.56 per hour. Not long after her return, McKenzie filed a workers’ compensation claim against Howard Industries. In 2018, an administrative judge (“AJ”) held a hearing to determine the existence and extent of any permanent disability. At the hearing, McKenzie testified that she continued to work full-time, was earning higher pay than before, and her restrictions did not prevent her from earning overtime hours. However, she also testified that she continued to suffer from chronic neck and arm pain following her 2012 surgery. Both parties introduced testimony from vocational rehabilitation experts and from other medical professionals. After hearing the merits of case, the AJ found that McKenzie had suffered a 10% loss of wage-earning capacity and awarded her permanent disability benefits continuing for a period of 450 weeks. On review, the full Workers’ Compensation Commission (“the Commission”) reversed the decision of the AJ, finding that McKenzie had not sustained a loss of wage-earning capacity. McKenzie appealed.

## ISSUE

Whether the Commission erred in finding that McKenzie had not sustained a loss of wage-earning capacity as a result of her injury.

## HOLDING

Because McKenzie returned to work in the same plant, resumed her same position as a Division 1 coil helper, and earned increased per hour wages after her injury, a rebuttable presumption of no loss of wage-earning capacity was triggered, and because McKenzie failed to offer evidence sufficient to rebut the presumption, the Commission did not err in finding that McKenzie had not sustained a loss of wage-earning capacity. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers’ Compensation Commission.

### **Affirmed - 2018-WC-01756-COA (Feb. 11, 2020)**

Opinion by Judge Tindell

Mississippi Workers’ Compensation Commission

Floyd E. Doolittle for Appellant - Richard Lewis Yoder Jr. for Appellee

Briefed by [Harrison Smith](#)

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## PRESLEY V. STOKES

### CIVIL - REAL PROPERTY

**PROPERTY - ADVERSE POSSESSION - CLAIM OF OWNERSHIP** - A claim of ownership fails if the claimant was aware of information, such as the description of the property lines in the deed or a prior surveyor’s opinion, that would have put her on notice that she did not own the property

**PROPERTY - ADVERSE POSSESSION - CONTINUOUS & UNINTERRUPTED CONTROL** - Vague and uncertain dates of possession, as well as possession that only occurred once or twice a year, are insufficient evidence of maintaining continuous and uninterrupted control for the required ten-year period

## FACTS

Salathiel Presley and Larry Moorehead entered into an option to purchase approximately sixty acres of real estate (“the Cannon Place”) and had a warranty deed for the property (“Parcel 7”) executed and recorded. In Presley and Moorehead’s deed, four parcels totaling thirteen acres (“Parcel 5”) were conveyed to Byron Cannon and his wife and

were exempt from the conveyance to Presley and Moorehead. Cannon later conveyed Parcel 5 to Ronald Stokes and Billy Heard. Approximately two years later, Presley and Moorehead filed a petition for adverse possession against Stokes and Heard. Stokes and Heard filed a counterclaim against Presley and Moorehead for confirmation of their title of the disputed Parcel 5. At trial, the chancellor granted Stokes and Heard's motion to dismiss pursuant to Miss. R. Civ. P. 41(b). Presley and Moorehead's motion for a new trial was denied, and they appealed the denial. The Court of Appeals reversed the denial and remanded the case for a second trial, in which the chancellor denied Presley and Moorehead's adverse possession claim. The chancellor found that they presented vague and uncertain evidence of their claim to Parcel 5 and failed to establish a ten-year period of continuous and uninterrupted actual possession of Parcel 5 as required for an adverse possession claim. Presley and Moorehead appealed.

## **ISSUES**

Whether the chancery court erred in (1) finding that Presley and Moorehead did not have a claim of ownership to Parcel 5 and (2) denying Presley and Moorehead's claim that they maintained continuous and uninterrupted control of Parcel 5 for a ten-year period.

## **HOLDING**

(1) Because Presley and Moorehead's deed clearly stated that the disputed Parcel 5 was not conveyed to them by their deed, and because Presley was put on notice by a surveyor that their property intersected with Parcel 5, Presley and Moorehead did not have a claim of ownership to Parcel 5. (2) Because Presley and Moorehead were unable to provide any specific dates about when their cattle occupied Parcel 5, and because they confirmed that they only allowed others to cut hay on Parcel 5 once or twice a year, Presley and Moorehead failed to establish a continuous and uninterrupted ten-year period of control of Parcel 5. Therefore, the Court of Appeals affirmed the judgment of the Winston County Chancery Court.

### **Affirmed - 2018-CA-01236-COA (Feb. 11, 2020)**

Opinion by Judge Westbrook

Hon. Robert L. Lancaster (Winston County Chancery Court)

Steven Detroy Settlemires for Appellants - John Dickson Mayo & Zachary Andrew Madison for Appellees

Briefed by [Anna McLemore](#)

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## **SEAHORN INVS. LLC V. MERIDIEN PROP. MGMT. LLC**

### **CIVIL - CONTRACT**

**CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT** - A final, appealable, judgment is one that "adjudicates the merits of the controversy and settles all the issues as to all the parties and requires no further action by the lower court"

**CIVIL PROCEDURE - MOTION PRACTICE - SUMMARY JUDGMENT** - Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and the evidence must be viewed in the light most favorable to the non-moving party

### **FACTS**

SeaHorn purchased, renovated, and opened an apartment complex in Bay St. Louis, MS. SeaHorn contracted with Meridien to manage these apartments, and Meridien was to advertise, lease, and provide maintenance for the property. The agreement provided that either party could terminate the agreement for any reason upon 30 days written notice. SeaHorn terminated the agreement in 2011. SeaHorn alleged that the office at the property was often closed during the apartment's business hours, and that Brandon Wilson, the man hired to provide maintenance to the apartment complex, was working other jobs and not providing maintenance to SeaHorn's apartments. SeaHorn filed suit in 2014 against Meridien for allegedly mismanaging the apartment complex and causing it to suffer financial losses. The circuit court entered an omnibus order granting the following motions and certifying these rulings as final and appealable: (1)

Meridien's motion for partial summary judgment as to SeaHorn's claims for lost revenue and excess financing costs; (2) Meridien's motions to exclude or limit the testimony of SeaHorn's expert witnesses, Steven Dockens and Patrick Coffey; and (3) Meridien's motion for partial summary judgment as to SeaHorn's claim for breach of fiduciary duty. Additionally, the circuit court denied Meridien's motion for partial summary judgment as to SeaHorn's breach of contract claim and denied SeaHorn's motion to amend its complaint. SeaHorn appealed from the circuit court's omnibus order and the order denying SeaHorn's motion to amend its complaint. Meridien cross-appealed the denial of its motion for partial summary judgment as to SeaHorn's breach of contract claim.

## **ISSUES**

Whether the trial court erred in (1) granting Meridien's motion for partial summary judgment on SeaHorn's claim for breach of fiduciary duty; (2) granting Meridien's motion for partial summary judgment as to any "Damages for Lost Revenue and Excess Financing Costs"; (3) excluding or limiting of the testimony of two of SeaHorn's expert witnesses; and (4) denying Meridien's motion for partial summary judgment on SeaHorn's claim for breach of contract.

## **HOLDING**

(1) Because a majority of the Judges of the Mississippi Court of Appeals could not agree whether to affirm, reverse, or dismiss the grant of partial summary judgment on SeaHorn's claim for breach of fiduciary duty, the circuit court's grant was affirmed by operation of law. (2) Because the grant of Meridien's motion for partial summary judgment as to any "Damages for Lost Revenue and Excess Financing Costs," (3) the exclusion or limitation of the testimony of two of SeaHorn's expert witnesses, and (4) the denial of Meridien's motion for partial summary judgment on SeaHorn's claim for breach of contract were not certifiable as final under Miss. R. Civ. P. 54(b), the Court did not have appellate jurisdiction to rule on them. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Circuit Court in part.

## **CONCURRENCES IN PART/DISSENTS IN PART**

Presiding Judge Carlton stated that she believed the circuit court properly certified its grant of partial summary judgment as to SeaHorn's claims for damages as final. However, she noted that because the damages SeaHorn sought for lost revenue and excess financing costs fell under the category of special damages, these damages should have been specifically pled pursuant to Miss. R. Civ. P. 9(g). Thus, these damages were properly excluded by the circuit court. Further, she argued that SeaHorn did not prove that a fiduciary duty existed between Meridien and SeaHorn. Therefore, she would affirm the summary judgment in favor of Meridien on that claim. Carlton declined to address the motions in limine in her opinion and also noted that SeaHorn's motion to amend its complaint would be properly dismissed by the Court of Appeals as it did not have jurisdiction. Presiding Judge Wilson argued that the appeal and cross appeal should be dismissed wholesale for lack of appellate jurisdiction, as all of the issues raised were ineligible or inappropriate for certification under Miss. R. Civ. P. 54(b). He also concurred with Presiding Judge Carlton's opinion that the court lacked jurisdiction over Meridien's cross-appeal from the denial of its motion for summary judgment on SeaHorn's claim for breach of contract as well as SeaHorn's attempt to appeal from the denial of its motion to amend its complaint. Further, Judge McDonald agreed with Presiding Judge Carlton that the grant of summary judgment claim was certifiable under Miss. R. Civ. P. 54(b). She did not believe that the breach of fiduciary duty claim was dependent upon the proof of the breach of contract claim. However, she disagreed with Presiding Justice Carlton's view regarding affirmation of the circuit court's grant of summary judgment on the breach of fiduciary duty claim. She agreed that the court lacked jurisdiction to consider Meridien's cross-appeal of the circuit court's denial of summary judgment regarding SeaHorn's breach of contract claim. Judge McDonald joined Presiding Judge Wilson's opinion with respect to the court's lack of jurisdiction to review the circuit court's grant of partial summary judgment as to damages for lost revenue or excess financing costs and the exclusion of experts. She agreed that those issues had not been fully and finally adjudicated and were not properly certifiable under Rule 54(b). McDonald would have ruled that SeaHorn had met the threshold necessary to survive summary judgment on the breach of fiduciary duty claim.

### **Affirmed in Part; Dismissed in Part - 2017-CA-01064-COA (Feb. 11, 2020)**

En Banc Opinion -Per Curiam - Concurrence in Part & Dissent in Part by Presiding Judge Carlton, Presiding Judge Wilson, & Judge McDonald

Hon. Christopher Louis Schmidt (Hancock County Circuit Court, Second Judicial Dist.)

David Wayne Baria & Brandon Currie Jones for Appellant - Ryan O'Neil Luminais for Appellee

Briefed by [David Boydston](#)

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## SHERMAN-OLIVER V. PUB. EMPS.' RET. SYS.

### CIVIL - STATE BOARDS & AGENCIES

**ADMINISTRATIVE LAW - AGENCY CONCLUSIONS - DEFERENCE** - When reviewing the decision of an administrative agency, an agency's conclusions must remain undisturbed unless the agency's order: (1) is not supported by substantial evidence; (2) is arbitrary or capricious; (3) is beyond the scope or power granted to the agency; or (4) violates one's constitutional rights

**ADMINISTRATIVE LAW - AGENCY CONCLUSIONS - SUBSTANTIAL EVIDENCE** - Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion

**ADMINISTRATIVE LAW - AGENCY CONCLUSIONS - DUE PROCESS** - Although formal rules of practice, procedure, and evidence are more relaxed in administrative agency proceedings than in courts of law, due process always stands as a constitutionally grounded procedural safety net in administrative hearings

### FACTS

Amy Sherman-Oliver was employed as an Administrative Agent/Purchasing Agent for the Jackson-George Regional Library System for about eleven years until her resignation in August 2012. In September 2012, Sherman-Oliver applied for non-duty-related disability retirement benefits with the Public Employees' Retirement System of Mississippi ("PERS"). She indicated that she was unable to perform her job duties due to cervical dystonia and depression. The PERS Medical Board denied Sherman-Oliver's application for disability benefits after they found she failed to provide sufficient objective medical evidence to support her claim. Sherman-Oliver appealed to the PERS Disability Appeals Committee ("the Committee"). The Committee recommended that the PERS Board of Trustees deny Sherman-Oliver's claim for non-duty-related disability retirement benefits. Sherman-Oliver appealed to the circuit court, but before the court could hear the matter, the court reporter present at the prior hearing died, and the transcript of the prior hearing went missing. The circuit court issued an order remanding the matter to PERS for a de novo hearing. The Committee held the hearing, where Sherman-Oliver testified that she often lifted boxes of paper that weighed about twenty pounds. Sherman-Oliver also testified that she left her job when she started suffering headaches, pulling in her neck, anxiety, and having trouble sitting in a chair. Sherman-Oliver described the symptoms of her cervical dystonia, which caused headaches and pain in her shoulder and neck. She received treatment in the form of Botox injections every three months for these symptoms and also had taken Morphine to alleviate her pain. In a note, Sherman-Oliver's doctor stated that Sherman-Oliver could not perform all her duties due to her severe headaches and neck pain. The employer stated that the library system had provided accommodations for Sherman-Oliver, including an ergonomic chair and any medical leave as needed. The Committee reviewed medical evidence from several physicians and psychiatrists. One physician stated that Sherman-Oliver was disabled and that she had reached maximum medical improvement. Sherman-Oliver's psychiatrist stated that Sherman-Oliver was not psychiatrically disabled and that she would soon reach maximum medical improvement for her psychiatric problems. At PERS's request, Sherman-Oliver underwent an Independent Medical Examination, where the doctor stated Sherman-Oliver had multiple trigger points in her cervical region, but her range of motion was intact. The doctor concluded that Sherman-Oliver's duties of her job were within her functional capacity, minus lifting over thirty-five pounds. Sherman-Oliver alleged that the doctor who testified to this information, Dr. Collipp, was not the doctor who performed the examination. Sherman-Oliver then underwent an Independent Medical Examination by a psychiatrist, who stated her prognosis was fair. The PERS Medical Board denied Sherman-Oliver's request for disability retirement benefits, and Sherman-Oliver appealed to the Hinds County Circuit Court. The circuit court found that PERS's decision was supported by substantial evidence and that Sherman-Oliver waived her claim that her right to due process had been violated. Sherman-Oliver appealed.

### ISSUES

Whether the circuit court erred in finding that (1) PERS's denial of disability retirement benefits was supported by substantial evidence and (2) Sherman-Oliver waived her claim that her right to due process had been violated.

### **HOLDING**

(1) Because PERS failed to provide substantial evidence to support its conclusion that Sherman-Oliver was not disabled, and because no physician examining Sherman-Oliver disputed her diagnosis of spasmodic torticollis and headache, PERS's decision that Sherman-Oliver was not disabled was not supported by substantial evidence. (2) Because Sherman-Oliver's attorney neither objected to Dr. Collipp's findings being included in the record nor raised any argument that Dr. Collipp's findings should be disregarded, Sherman-Oliver waived her due process claim. Therefore, the Court of Appeals reversed and rendered the judgment of the Hinds County Circuit Court, First Judicial District.

### **CONCURRENCE IN PART/DISSENT IN PART**

Judge Greenlee agreed that Sherman-Oliver waived her due process claim but disagreed with the majority's determination that the substantial evidence did not support PERS's decision that Sherman-Oliver was not disabled. Evidence by doctors who examined Sherman-Oliver and determined she was not disabled did exist in the record. Considering the limited standard of review, the deference that must be afforded to the agency, and the substantial evidence that was presented in PERS's finding that Sherman-Oliver was not disabled, Judge Greenlee believed the circuit court's decision should have been affirmed.

### **Reversed & Rendered - 2018-SA-01183-COA (Feb 11, 2020)**

En Banc Opinion by Presiding Judge Carlton - Concurrence in Part/Dissent in Part by Judge Greenlee  
Hon. Joseph Anthony Sclafani (Hinds County Circuit Court, First Judicial Dist.)  
George S. Luther for Appellant - Samuel Martin Millette (Att'y Gen. Office) for Appellee  
Briefed by [Allison Middleton](#)

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## ***COURT OF APPEALS - POST-CONVICTION RELIEF***

### **HUGHES V. STATE**

#### **CIVIL - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - STATUTORY BASES - NEW EVIDENCE** - Under Miss. Code Ann. § 99-39-5, a defendant may seek post-conviction relief upon the discovery of new evidence

**POST-CONVICTION RELIEF - EVIDENTIARY HEARING - ISSUES** - Under Miss. Code Ann. § 99-39-23(5), a court's failure to address each issue presented in a PCR motion amounts to reversible error

**EVIDENCE - HEARSAY - ADMISSIBILITY** - Under Miss. R. Evid. 804, a statement made by an unavailable witness is admissible at trial if it is a statement against his penal interest

#### **FACTS**

On July 5, 1997, two men attempted to rob Andrew Hairston in the Sonic parking lot in Nettleton, Mississippi. In August 2000, Augusta Hughes was convicted of armed robbery and sentenced to serve twenty-five years in prison. On appeal, the Court of Appeals affirmed his conviction. Hughes filed a motion for post-conviction relief ("PCR") on June 14, 2017, based on the discovery of new evidence since his trial that included a confession by John Edwards Jr. to Edwards's family. On July 23, 2018, the circuit court held an evidentiary hearing and denied Hughes a new trial. Hughes appealed.

#### **ISSUES**

Whether (1) the circuit court erred by failing to address issues and evidence and (2) an admission by an unavailable witness is admissible at a new trial.

## **HOLDING**

(1) Because the court failed to address several issues raised by Hughes, the denial of Hughes's motion warranted reversal and remand. (2) Because Edwards's confession satisfied the requirements for a hearsay exception, the trial court erred by holding that it would be inadmissible at a new trial. Therefore, the Court of Appeals reversed the judgment of the Lee County Circuit Court.

### **Reversed & Remanded - 2018-CA-01506-COA (Feb. 11, 2020)**

Opinion by Judge McDonald

Hon. Thomas J. Gardner III (Lee County Circuit Court)

William Tucker Carrington & Sandra Kay Levick for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Luke Seymour](#)

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## **WHITEHEAD V. STATE**

### **CIVIL - POSTCONVICTION RELIEF**

**CRIMINAL LAW - GUILTY PLEA - WAIVER OF RIGHTS** - When a defendant pleads guilty, they waive all claims of ineffective assistance of counsel, except insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea

**CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - VOLUNTARY GUILTY PLEAS** - If a defendant has pleaded guilty on a claim of ineffective assistance of counsel, he must show that the counsel's errors proximately resulted in the guilty plea and, but for this error, the defendant would not have pleaded guilty

### **FACTS**

Angela Whitehead pled guilty for possession of methamphetamine, grand larceny, shooting into a dwelling house, and escape. Whitehead confirmed by signing the plea petitions that her defense counsel, Richard Carter, counseled and advised her on regarding the nature of each charge and possible defenses. She additionally confirmed that Carter advised her of the probabilities of her being convicted and thoroughly discussed all aspects of her case with her. By signing the petition, she further confirmed her satisfaction with the advice and help that Carter provided her. At the plea hearing, Whitehead also confirmed under oath that she understood her constitutional rights, the consequences of pleading guilty, and certified that Carter met her expectations and that she was completely satisfied with Carter's representation of her. After entering a guilty plea, Whitehead was sentenced to serve fifteen years in the custody of the MDOC. Subsequently, Whitehead filed a PCR motion claiming that Carter rendered ineffective assistance of counsel. Specifically, Whitehead alleged that Carter (1) failed to review her plea petition with her; (2) did not go over any discovery material with her; (3) failed to properly inform her about the consequences of her guilty plea; (4) discouraged the suggestion that Whitehead could appeal her conviction if she went to trial; (5) told her that if she did not plead guilty she would be convicted and sentenced to life without parole; and (6) told Whitehead that she would be eligible for early release in order to persuade her to plead guilty. After holding an evidentiary hearing, the trial court denied Whitehead's PCR motion. The trial court found no merit to Whitehead's claims that Carter failed to go over the guilty plea petitions, stating that the transcript of Whitehead's guilty pleas and Carter's testimony at the hearing totally refuted Whitehead's claim of Carter's failure to go over the guilty petitions with her. The trial court also found that Whitehead's claim that Carter failed to go over discovery materials with her and failed to properly investigate the case was without merit. In particular, the uncontradicted testimony offered at the hearing shows that Carter did go over discovery material and also properly investigated the case. Further, the trial court found no merit to Whitehead's claim that she lacked the competency to enter her guilty pleas. Whitehead testified under oath and affirmed in her plea petitions that she did not have any mental disabilities that would affect her ability to understand the proceeding. Additionally, the trial court observed Whitehead during the plea proceedings and found nothing to suggest her being mentally incompetent. Whitehead appealed.

### **ISSUES**

Whether the court erred in denying Whitehead's PCR motion.

## HOLDING

Because Whitehead's allegations of ineffective assistance of counsel were contradicted by her own sworn statements in her petitions and at the plea hearing and the sworn testimony of her counsel, Whitehead failed to prove that her counsel's performance was deficient. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

### **Affirmed - 2018-CA-01086-COA (Feb. 11, 2020)**

Opinion by Presiding Judge Carlton

Hon. Joseph H. Loper Jr. (Attala County Circuit Court)

Cynthia Ann Stewart for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Haley Nutt](#)

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## **COURT OF APPEALS - CRIMINAL CASES**

### **HUGHES V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - BURGLARY - ELEMENTS** - There must be evidence of breaking and of entering for a person to be charged with burglary

**CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER** - Verbal notice by the prosecutor and verbal acknowledgement by defense counsel of enhanced sentencing does not meet the requirement of Miss. R. Crim. P. 14.1(b)

#### **FACTS**

Winnie Smith and Gene Smith owned a house in Scott County, Mississippi. No one lived in the house at the time of the incident, but there was personal property in the home. The property also had several structures on it, including a large padlocked shed. Cardarius Hughes and his girlfriend, Stacey Holmes, saw the vacant house and burglarized it. Later that day, someone came to check on the house for the Smiths, and they noticed several items missing from the house and that the padlock had been broken on the shed. Nothing from the shed was missing. Both Holmes and Hughes were questioned by the police, and both admitted to their involvement in the burglary. Hughes specifically stated that he kicked the door down and took property from the house and that he used bolt cutters to cut the padlock on the big shed. A Scott County grand jury indicted Hughes for one count of burglary of a dwelling pursuant to Miss. Code Ann. § 97-17-23 and one count of burglary of a shed pursuant to Miss. Code Ann. § 97-17-33(1). After a jury trial, Hughes was sentenced as a habitual offender for a total of thirty-two years without parole between the two counts. The State did not initially indict Hughes as a habitual offender, and the State did not file its motion or formal notice of enhanced sentencing with the trial court at least thirty days before trial post-indictment. Hughes filed for a judgment notwithstanding the verdict, or, alternatively, a new trial. After the motion was deemed denied, Hughes appealed.

#### **ISSUES**

Whether (1) the trial court erred in denying Hughes's motion for a judgment notwithstanding the verdict on Count II and (2) Hughes's sentencing as a habitual offender was improper.

#### **HOLDING**

(1) Because the essential element of breaking and *entering* (emphasis added) was missing from the record in this case, no rational juror could have found Hughes guilty of the crime of burglary of the shed, and the trial court erred in its denial of a judgment notwithstanding the verdict. (2) Because verbal notice by the prosecutor and verbal acknowledgement by defense counsel of enhanced sentencing does not meet the requirement of Miss. R. Crim. P. 14.1(b), Hughes was not sentenced under the new rules of criminal procedure, and his sentence was vacated and remanded for a new sentence



in regard to Count I. Therefore, the Court of Appeals affirmed in part, vacated in part and remanded for re-sentencing on Count I, and reversed and rendered on Count II the judgment of the Scott County Circuit Court.

### **CONCURRENCE IN PART/DISSENT IN PART**

Judge Lawrence argued that the evidence used to convict Hughes under Count II was insufficient, but he disagreed with the decision to vacate Hughes's classification as a habitual offender. He argued that Hughes and his attorneys were both aware of the motion to amend months before the trial began and that was sufficient under the new criminal procedure rules.

### **Affirmed in Part, Vacated in Part & Remanded for Re-Sentencing on Count I; Reversed & Rendered on Count II - 2018-KA-00980-COA (Feb. 11, 2020)**

En Banc Opinion by Judge Westbrook - Concurrence in Part & Dissent in Part by Judge Lawrence

Hon. Christopher A. Collins (Scott County Circuit Court)

George T. Holmes & Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Jack Byrd](#)

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## **PRUITT V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL LAW - CRIMES - GRAND LARCENY** - Pursuant to Miss. Code Ann. § 97-17-41(1), a person is guilty of grand larceny if he feloniously takes and carries away personal property of another with value of more than \$1,000  
**APPEALS - REMANDS - DIRECT-REMAND RULE** - Under the direct-remand rule, an appellate court may remand a case to the trial court for sentencing on the lesser-included offense where the greater offense was not proved, but the elements of the lesser-included offense were sufficiently met; the rule is grounded on the fact that guilt of a true lesser-included offense is implicitly found in the jury's verdict of guilt on the greater offense

**CRIMINAL LAW - LESSER-INCLUDED OFFENSE - PETIT LARCENY** - Pursuant to Miss. Code Ann. § 97-17-43(1), a person is guilty of petit larceny if he feloniously takes and carries away personal property of another with a value of less than \$1,000; petit larceny is a lesser-included offense of grand larceny

### **FACTS**

George Wise installed four motion-activated cameras upon realizing that items in his warehouse were disappearing. On two occasions, the camera captured an image of a man inside his building. Wise compiled a list of all the items that were missing. The estimated value of those items was \$3,377 based on similar items for sale on eBay and other websites. Deputy Lee Johnson identified Jose Pruitt as the man in the photographs. Testimony later revealed that Pruitt was frequently seen wearing a towel draped over his head. This corroborated with the August 18<sup>th</sup> photo that showed the intruder wearing a towel over his head. This led Deputy Johnson to believe Pruitt was the man in the two photographs from the warehouse. Further, testimony from Deputy Ricky Payne revealed that when Pruitt was arrested, he was wearing the same pants as the man in the August 27<sup>th</sup> photo. At trial, the jury was instructed on the elements of burglary of a building, grand larceny, and the lesser-included offense of petit larceny. The jury found Pruitt guilty of burglary and grand larceny. Pruitt appealed.

### **ISSUES**

Whether (1) the State presented insufficient evidence to convict Pruitt of grand larceny and (2) Pruitt's taking of the router was sufficient to satisfy the elements of the lesser-included offense of petit larceny.

### **HOLDING**

(1) Because Wise only identified the router in the crate the intruder was carrying, and because the router was only valued at \$100, it was determined to be well below the \$1,000 threshold for grand larceny. As a result, it was found that there

was insufficient evidence to support a conviction for grand larceny. (2) Because it could be determined that Pruitt did take and carry away Wise's personal property that was valued less than \$1,000, there was found to be sufficient evidence to convict Pruitt of petit larceny. Therefore, the Court of Appeals reversed the judgment of the Monroe County Circuit Court.

**Reversed & Remanded - 2018-KA-01620-COA (Feb. 11, 2020)**

Opinion by Presiding Judge Wilson

Hon. James Lamar Roberts Jr. (Monroe County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - John R. Henry Jr. (Att'y Gen. Office) for Appellee

Briefed by [Brittany Brewer](#)

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## REINDOLLAR V. STATE

### CRIMINAL - FELONY

**CRIMINAL LAW - CONTROLLED SUBSTANCES - POSSESSION** - When a defendant does not physically possess illegal drugs, the State must prove constructive possession of the drugs in order to prevail

**CRIMINAL LAW - CONTROLLED SUBSTANCES - CONSTRUCTIVE POSSESSION** - The following guidelines are utilized to establish constructive possession: (1) there must be sufficient facts to warrant a finding that the defendant was aware of the presence and character of the particular substances and was intentionally and consciously in possession of it; (2) the drug involved was subject to the defendant's dominion or control; and (3) proximity is usually an essential element, but by itself it is not adequate in the absence of other incriminating circumstances

**CRIMINAL LAW - CONTROLLED SUBSTANCES - CONSTRUCTIVE POSSESSION** - When contraband is found in a vehicle that is not owned by a defendant, mere physical proximity to the contraband does not, in itself, show constructive possession; in such circumstances, the State is required to establish additional incriminating circumstances in order to prove constructive possession

**CRIMINAL LAW - TRIAL - JURY INSTRUCTIONS** - Instructions in a criminal case which follow the language of a pertinent statute are sufficient

### FACTS

Charles Reindollar was indicted for possession of methamphetamine under Miss. Code Ann. § 41-29-139 after Sergeant Overby approached Reindollar alongside his parked vehicle on the side of the highway. Sergeant Hamilton arrived on the scene to aid Sergeant Overby and observed that Reindollar was under the influence of some type of stimulant because Reindollar seemed fidgety, was sweating, and his pupils were constricted. Reindollar informed Sergeant Hamilton that he was driving his brother's vehicle and subsequently consented to a search. Sergeant Hamilton found digital scales, which tested positive for leftover residue of methamphetamine, in the door pocket. Sergeant Hamilton also discovered two bags of methamphetamine stashed in the headliner of the vehicle above the steering wheel. At trial, Sergeant Hamilton testified that the set of scales, which are commonly used for weighing narcotics, was located in plain view of the driver and also in reaching distance of the driver's door pocket. Additionally, Sergeant Hamilton testified that the headliner of a vehicle is a common place where people conceal narcotics or paraphernalia. As such, a jury convicted Reindollar of possession of a controlled substance pursuant to Miss. Code Ann. § 41-29-139; his motion for judgment notwithstanding the verdict or, alternatively, a new trial, was denied. Reindollar appealed.

### ISSUES

Whether (1) substantial evidence existed for a jury to find that Reindollar constructively possessed methamphetamine under Miss. Code Ann. § 41-29-139 and (2) the trial court erred in giving the S-1 jury instruction.

### HOLDING

(1) Because Reindollar was in control of the premises where the contraband was found and knew or should have known that the contraband was present, in addition to the discovery of other incriminating circumstances, there was substantial

evidence for a jury to find that Reindollar constructively possessed methamphetamine under Miss. Code Ann. § 41-29-139. (2) Because the S-1 jury instruction tracked the language of Miss. Code Ann. § 41-29-139, the statute under which Reindollar was indicted, and set forth the elements necessary for proving possession of methamphetamine, the jury instruction was sufficient. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2018-KA-01606-COA (Feb. 11, 2020)**

Opinion by Presiding Judge Carlton

Hon. John Huey Emfinger (Rankin County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Nicole Broussard](#)

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