

**MISSISSIPPI SUPREME COURT DECISIONS – MARCH 26, 2020*****SUPREME COURT - CIVIL CASES*****MISS. TRUE V. DZIELAK****CIVIL - STATE BOARDS & AGENCIES**

**ADMINISTRATIVE LAW - STATE AGENCIES - PRESUMPTION OF APPROVAL** - Pursuant to Miss. Code Ann. § 25-9-120(4), any contract submitted to the Personal Service Contract Review Board for review and approval is presumed to be approved if the review board does not object to the contract within thirty days of the submission of the contract

**ADMINISTRATIVE LAW - STATE AGENCIES - CONFLICT OF INTEREST** - Pursuant to 27 Miss. Admin. Code Pt. 1, R. 6-203(a)-(b), it is a breach of ethical standards for any employee to participate directly or indirectly in the procurement of a contract when the employee knows about their conflict of interest; however, the employee is only required to recuse and submit the question to the Ethics Commission when the employee discovers an actual or potential conflict of interest

**ADMINISTRATIVE LAW - EXECUTION OF CONTRACTS - CONSIDERATION OF PROTEST** - Pursuant to Miss. Code Ann. § 25-61-5(1)(b), the production of competitive sealed proposals shall be no later than seven working days after the notice of intent to award is issued to the winning proposer; a person making a request for production of competitive sealed proposals shall have a reasonable amount of time, but in no event less than seven working days, to protest the procurement or intended award prior to contract execution

**ADMINISTRATIVE LAW - STATE AGENCIES - BIAS & PREJUDICE** - State agencies are allowed to exercise their professional judgment in scoring proposals and the review of these professional judgments is outside the court's standard of review unless the scoring of proposals implies a lack of understanding or a disregard of the surrounding facts by the state agency

**FACTS**

The Division of Medicaid ("DOM") implemented a managed-care program for Mississippi Medicaid beneficiaries called Mississippi Coordinated Access Network ("MississippiCAN"). Subsequently, the DOM issued a Request for Proposal ("RFP") for managed or coordinated-care contractors for the MississippiCAN program. The DOM received proposals from seven offerors, including Mississippi True. Dr. David J. Dzielak was the executive director of DOM during the issuance of the RFP and the execution of the MississippiCAN contracts. Based on scoring by an evaluation committee, the DOM awarded the contracts to three companies: Magnolia Health ("Magnolia"), Molina Healthcare of Mississippi, Inc. ("Molina"), and UnitedHealthcare of Mississippi, Inc. ("United"). The DOM awarded the three contracts before obtaining approval from the Personal Service Contract Review Board ("PSCRB"). Mississippi True filed a protest and, after review, the DOM denied Mississippi True's protest. Eventually, the DOM did submit the contracts to the PSCRB for their approval and the PSCRB neither approved or disapproved the contracts. As a result, the DOM interpreted the PSCRB's inaction as statutory approval of the contracts and decided to proceed with contract implementation. Mississippi True objected to this and filed suit in the Hinds County Circuit Court, which was ultimately transferred to the Hinds County Chancery Court. Mississippi True argued that the contracts awarded to Magnolia, Molina, and United were unlawfully procured, executed, and implemented. Also, Mississippi True argued that the totality of the evidence indicated the DOM's decision to deny Mississippi True's protests and to implement MississippiCAN contracts was arbitrary and capricious and contrary to state law. The trial court affirmed the DOM's decision to implement the MississippiCAN contracts. Mississippi True appealed.

**ISSUES**

Whether the trial court erred in failing to: (1) consider Mississippi True’s contention that the MississippiCAN contracts were illegal; (2) conclude Dr. Dzielak had a conflict of interest; (3) find the DOM violated Miss. Code Ann. § 25-61-5(1)(b) by executing the contracts before consideration of protest; and (4) conclude the DOM engaged in bias and prejudice in scoring proposals.

### **HOLDING**

(1) Because the PSCRB approved the contracts, the MississippiCAN contracts were not illegal. (2) Because mere socialization with representatives from companies with which the DOM did business over the course of several years did not establish a prima facie case of conflict of interest, the trial court did not err in not finding a conflict of interest. (3) Because the DOM executed the contracts in a reasonable amount of time after Mississippi True submitted its protest, the DOM did not violate Miss. Code Ann. § 25-61-5(1)(b). (4) Because the reasons given for the scores fell within the realm of the evaluators’ professional judgment, the DOM did not engage in bias and prejudice in scoring the proposals. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

### **DISSENTS**

Justice Coleman agreed with Justice Griffis’s dissent, but sought to address the standard of review for agency interpretations. He argued that deferring to executive agencies when interpreting agency regulations was unconstitutional and, rather, these issues should be subject to de novo review in the courts.

Justice Griffis argued that the DOM and its former executive director, Dr. Dzielak, violated various statutory and regulatory requirements in awarding the public contracts. He would have reversed the decision and argued that the public contracts should have been vacated.

#### **Affirmed - 2018-CC-01522-SCT (Mar. 26, 2020)**

Opinion by Justice Ishee - Dissents by Justice Coleman & Justice Griffis

Hon. William H. Singletary (Hinds County Chancery Court)

George H. Ritter & Charles Edward Cowan for Appellant - Kathryn Russell Gilchrist, Brant James Ryan, Elizabeth Erin Hyde, & Patrick H. Black (Att’y Gen. Office) for Appellees

Briefed by [David Boydston](#)

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## **NICKSON V. STATE**

### **CIVIL - CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - VERDICT - PARTIAL VERDICTS & MISTRIAL** - Pursuant to Miss. R. Crim. P. 24.4(b), a jury may return partial verdicts as to multiple counts

**CONSTITUTIONAL LAW - DOUBLE JEOPARDY - MISTRIAL** - In order for the Double Jeopardy Clause to be applicable, there must be an actual acquittal or conviction on the merits to bar another prosecution

**CRIMINAL LAW - TRIAL - INCLUDED OFFENSES** - Second-degree murder is a lesser-included offense of first-degree murder

### **FACTS**

Johnathan Nickson was charged with two counts of first-degree murder (“Counts 1 and 2”) and one count of possession of a firearm as a convicted felon (“Count 3”). At trial, the jury was instructed on first-degree murder and second-degree murder for Counts 1 and 2 and possession of a firearm as a convicted felon for Count 3. Additionally, the form of the verdict for both Counts 1 and 2 allowed the jury to find Nickson guilty or not guilty of first-degree murder and, in the event the jury found him not guilty, then guilty or not guilty of second-degree murder. The jury unanimously acquitted Nickson on the two counts of first-degree murder but deadlocked as to the second-degree murder and the felon-in-possession charge. Following a *Sharplin* instruction, the jury notified the court that it was “hopelessly deadlocked.” As a result, the trial court declared a mistrial on all three counts, reasoning that the jury returned an incomplete verdict on Counts 1 and 2 and no verdict on Count 3. Nickson appealed.

## ISSUES

Whether (1) the jury verdict was complete; (2) Nickson could be retried for first-degree murder; and (3) Nickson could be retried for second-degree murder.

## HOLDING

(1) Because the jury unanimously agreed against guilt on the charged offense of first-degree murder, and because the verdict was in writing and in proper accordance with the jury instructions, the jury's verdict was complete as to the charged offense of first-degree murder in Counts 1 and 2. (2) Because the jury's verdict contained the finality necessary to constitute an acquittal on first-degree murder, a retrial for first-degree murder would violate Nickson's constitutional right against double jeopardy. (3) Because second-degree murder is a lesser-included offense of first-degree murder, Nickson could be retried on the lesser-included offense of second-degree murder. Therefore, the Supreme Court affirmed in part, reversed and rendered in part, and remanded the judgment of the Hinds County Circuit Court.

### **Affirmed in Part; Reversed & Rendered in Part; Remanded - 2018-IA-01030-SCT (Mar. 26, 2020)**

Opinion by Justice Griffis

Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)

William S. Kellum for Appellant - Sue Miller Perry & Patrick Joseph McNamara Jr. for Appellee

Briefed by [Nicole Broussard](#)

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## **SMITH V. STATE**

### **CIVIL - STATE BOARDS & AGENCIES**

#### **APPELLATE PROCEDURE - ADMINISTRATIVE AGENCIES - REBUTTABLE PRESUMPTION -**

There is a rebuttable presumption in favor of the agency's decision and the burden is on the challenging party to prove to the contrary

#### **APPELLATE PROCEDURE - ADMINISTRATIVE REVIEW - STATUTE OF LIMITATIONS -**

Pursuant to Miss. Code Ann. § 47-5-807, any offender aggrieved by an adverse decision rendered pursuant to any administrative review procedure under § 47-5-801 through § 47-5-807 may seek judicial review of the decision within thirty days after receipt of the agency's final decision

**APPELLATE PROCEDURE - ADMINISTRATIVE REVIEW - NOTICE -** Since seeking judicial review is the final step in the administrative review procedure, rather than a new lawsuit, no more than notice to the agency of intent to appeal should be required

## FACTS

In June 2009, Donald Keith Smith pled guilty to one count of kidnapping, armed carjacking, and felony fleeing. Two years later, Smith filed a pro se motion for post-conviction relief, attacking his armed car-jacking conviction. The Mississippi Supreme Court remanded the case to the trial court for an evidentiary hearing. After the hearing, the trial court determined that Smith had not undergone a court-ordered competency evaluation and reversed Smith's conviction. Smith was later evaluated and found to be competent. In December 2016, Smith pled guilty to attempted kidnapping, armed carjacking, felony fleeing. The trial court sentenced him to thirty years, with eighteen years to serve, for attempted kidnapping, thirty years, with eighteen years to serve, for armed carjacking, and five years for felony fleeing. In July 2017, the trial court amended Smith's sentencing order to reflect that he should have been sentenced to ten years for attempted kidnapping, while the rest of his sentencing order remained the same. Smith filed an initial grievance through the Administrative Remedy Program ("ARP") at the Mississippi Department of Corrections ("MDOC"), which asserted that his time computation was incorrect. In ARP's two-step response, an MDOC auditor first determined that Smith's time was correctly calculated, then the second response concluded that Smith received credit for time served and federal credit. The MDOC auditor also found Smith was not entitled to parole or early release because he had committed crimes of violence under Miss. Code Ann. § 97-3-2. On October 10, 2017, after receiving his second-step response, Smith filed a Petition Seeking Judicial Review of an Adverse Administrative Remedy Decision

in the Green County Circuit Court. The circuit court found that armed carjacking was included in Miss. Code Ann. § 97-3-2 and summarily affirmed the ARP's decision. Smith appealed.

### ISSUES

Whether the circuit court had jurisdiction over Smith's petition for judicial review according to rules regarding (1) the statute of limitations and (2) service of process.

### HOLDING

(1) Because the record indicated that Smith received his second step response on September 19, 2017, and because Miss. Code Ann. § 47-5-807 gave Smith thirty days after his receipt of the MDOC's final decision to seek judicial review of the decision, Smith did not violate the statute of limitations by filing his petition for judicial review twenty-one days after receiving the MDOC's final decision on October 10, 2017. (2) Because Smith failed to provide the MDOC with notice of his petition for judicial review, the circuit court lacked personal jurisdiction over the MDOC. Therefore, the Supreme Court vacated and remanded the judgment of the Greene County Circuit Court.

**Vacated & Remanded - 2018-CP-01235-SCT (Mar. 26, 2020)**

Opinion by Justice Griffis

Hon. Robert P. Krebs (Greene County Circuit Court)

*Pro se* for Appellant - Darrell Clayton Baughn (Att'y Gen. Office) for Appellee

Briefed by [Kaitlin Bethay](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 24, 2020

### COURT OF APPEALS - CIVIL CASES

#### CAPLINGER V. WHITNEY BANK

#### CIVIL - CONTRACT

**CONTRACTS - BREACH - IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING** - All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement; good faith has been defined by courts as the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party; bad faith has been defined as requiring a showing of more than bad judgment or negligence, but rather implies some conscious wrongdoing because of dishonest or moral obliquity

**CONTRACTS - BREACH - IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING** - A party does not breach the implied covenant of good faith and fair dealing when the party took only those actions which were authorized by the contract

**CIVIL PROCEDURE - SUMMARY JUDGMENT - DISCOVERY** - A party against whom a claim, counter-claim, or cross-claim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof; summary judgment should not ordinarily be granted before discovery is completed, while acknowledging that such might be available in the proper case

### FACTS

In November 2014, Pass Business Terminal, the debtor, executed a consolidated promissory note in favor of Whitney Bank, its lender, in the amount of \$473,162.64. In addition, the Guarantors executed continuing-guaranty agreements and the loan was secured by commercial real property. One year later, Pass Business Terminal's note matured and neither Pass Business Terminal nor the Guarantors paid Whitney Bank. Whitney Bank entered into a forbearance agreement with them that extended the loan's termination date by six months. This agreement also postponed foreclosure of the collateral, stated that Whitney Bank had no further obligation to forbear, and gave Whitney Bank the sole discretion to extend the forbearance period beyond the termination date. After the expiration of the forbearance

agreement, both Pass Business Terminal and the Guarantors, failed to pay Whitney Bank. Whitney Bank then initiated a foreclosure sale. However, Pass Business Terminal filed a Chapter 11 bankruptcy petition staying the foreclosure. Throughout the bankruptcy case, Whitney Bank demanded the Guarantors remit their obligations under their continuing-guaranty agreements and the forbearance agreement. The Guarantors refused. In response, Whitney Bank alleged breach of their guarantee agreements and the forbearance agreement. In the bankruptcy proceedings, Whitney Bank and Pass Business Terminal reached an agreement that was later reflected in an agreed order that the bankruptcy court entered. Whitney Bank also filed suit against the Guarantors. In response to Pass Business Terminal's suggestion-of-bankruptcy exhibit, the Guarantors filed an answer and counterclaim, alleging that Whitney Bank breached the implied covenant of good faith and fair dealing and was willfully and intentionally negligent in its valuation practice. The case was later dismissed without a confirmed Chapter 11 plan and the parties failed to engage in discovery. Whitney Bank filed a motion for summary judgment, and the Guarantors and Pass Business Terminal filed a motion to amend. The amendment sought to add Pass Business Terminal as a counter-plaintiff and Integra as a counter-defendant. The Harrison County Circuit Court denied the Guarantor's motion to amend, granted Whitney Bank's motion to strike and their motion for summary judgment, and dismissed the Guarantor's counterclaim. The Guarantors and Pass Business Terminal appealed.

### **ISSUES**

Whether the court erred in (1) granting summary judgment despite the breach of implied covenant of good faith and fair dealing; (2) granting summary judgment based on waiver and release; (3) denying Pass Business Terminal's request to intervene and to join Integra as a counter-defendant; and (4) granting summary judgment prior to discovery.

### **HOLDING**

(1) Because Whitney Bank and the Guarantors contractually altered the standard of conduct in their forbearance agreement, and because Whitney Bank was authorized to deny further forbearance, Whitney Bank did not breach the implied covenant of good faith and fair dealing and the court did not err in granting summary judgment. (2) Because the subsequent agreement, reflected in the agreed bankruptcy order, released Pass Business Terminal's claims against Whitney Bank, this issue was without merit and the court did not err in denying the motion to amend based on waiver and release. (3) Because Pass Business Terminal had knowledge of Whitney Bank's original action for over a year before attempting to join, was not an omitted party with an interest derived by statute, and put forth no effort until after Whitney Bank filed its motion for summary judgment, Pass Business Terminal waived and released its claims against Whitney Bank and Integra and the court waived this issue due to failure to show that Integra was a necessary party to the case. (4) Because the Guarantors had ample time and opportunity to conduct discovery during the eighteen-month period and failed to do so, the court did not err in granting summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2018-CA-01700-COA (Mar. 24, 2020)**

Opinion by Judge Greenlee

Hon. Roger T. Clark (Harrison County Circuit Court, First Judicial Dist.)

Matthew Louis Pepper for Appellants - Jeffrey R. Barber for Appellee

Briefed by [Brittany Brewer](#)

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## **HEARN V. SQUARE PROP. INVS., INC.**

### **CIVIL - PERSONAL INJURY**

**TORTS - DUTY - BUSINESS OWNER** - A business owner is not required to insure against all injuries; instead, he owes a duty to an invitee to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition or to warn of dangerous conditions not readily apparent, which the owner or occupant knows of, or should know of, in the exercise of reasonable care

**TORTS - PREMISES LIABILITY - SLIP & FALL** - In a slip and fall case, the plaintiff must prove that: (1) the defendant's negligent act caused the injury; (2) the defendant had actual knowledge of the dangerous condition; or (3) the condition existed for a sufficient amount of time to put the defendant on constructive notice

### **FACTS**

Clair Hearn slipped and fell in a puddle of water at the Piggly Wiggly in Olive Branch, Mississippi. Hearn had been in the grocery store for less than ten minutes before she injured her foot by slipping in the puddle, which was approximately three feet in diameter. Although she was unsure how long the puddle had been on the floor, it appeared to Hearn that other people had walked through the puddle because there were footprints and shopping cart tracks running through it. Following the incident, Hearn filed a premises-liability action in the DeSoto County Circuit Court against Piggly Wiggly. David Reed, one of the store owners, admitted during a deposition that Piggly Wiggly had no written policies, they did not maintain a written sweep log of floor conditions, and that he did not know when the floor was last checked before Hearn's injury occurred. Piggly Wiggly moved for summary judgment, arguing that Hearn could not establish the essential elements for a premises-liability claim. The circuit court granted Piggly Wiggly's motion. Hearn appealed.

### **ISSUES**

Whether the circuit court erred in granting summary judgment due to genuine issues of material fact concerning if (1) a negligent act of Piggly Wiggly caused Hearn's injury; (2) a dangerous condition existed for a sufficient amount of time to impute constructive knowledge to Piggly Wiggly; (3) reasonable inspections would have revealed the dangerous condition; and (4) Piggly Wiggly's lack of written policy was reasonable.

### **HOLDING**

(1) Because there was nothing in the record to indicate that a negligent act of Piggly Wiggly or its employees caused Hearn's fall, it was not a negligent act. (2) Because Hearn failed to present any evidence showing that the condition existed for a sufficient amount of time or that Piggly Wiggly should have known as a result that there was a puddle on the floor, the claim of constructive knowledge failed. (3) Because Hearn failed to present any evidence to show the length of time the puddle existed, the claim that reasonable inspections would have revealed the dangerous situation failed. (4) Because the Court of Appeals denied to adopt the mode of operation theory, the claim that there was a genuine issue of material fact regarding whether Piggly Wiggly's lack of written policy was reasonable failed. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

### **DISSENT**

Judge McCarty argued that because there was proof that Piggly Wiggly failed to exercise reasonable care to keep its floors reasonably safe and that the spill had been there long enough to impute constructive notice, the summary judgment should be reversed and remanded for a jury trial.

**Affirmed - 2018-CA-01576 (Mar. 24, 2020)**

En Banc Opinion by Judge Greenlee - Dissent by Judge McCarty

Hon. Gerald W. Chatham Sr. (Desoto County Circuit Court)

D. Reid Wamble for Appellant - Richard W. Wackerfuss for Appellee

Briefed by [Haley Nutt](#)

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## **LEWIS V. RULA**

### **CIVIL - REAL PROPERTY**

**PROPERTY - DUTY TO DISCLOSE - "AS-IS" CLAUSE** - The affirmative duty to disclose defects within the property to prospective buyers still applies, regardless of an "as-is" clause; although an "as-is" clause may waive a warranty, this would only occur after the satisfaction of the affirmative duty to disclose property defects

**PROPERTY - DUTY TO DISCLOSE - PERSONAL KNOWLEDGE** - The seller is only under a duty to disclose information that he or she has personal knowledge of and cannot be liable for defects or conditions that he or she was not personally aware of at the time of the sale

### **FACTS**

Adam and Shannon Lewis hired Jack McCabe to install an iron brace on a parapet wall in their house to prevent bricks from cracking and to tighten up or stabilize the wall. When the Lewises later sold the house to Richard and Cheryl Rula, they failed to disclose any of the parapet wall repairs in the disclosure statement. No defects were found during a home inspection before the purchase and the parties signed an acceptance statement, in which the Rulas accepted the home “as-is.” Later, the Rulas were forced to repair the parapet wall at a cost of \$75,000. The Rulas brought a claim against the Lewises for negligent and intentional misrepresentation, claiming that the Lewises failed to disclose a known structural defect in the parapet well. The Rulas sought damages for both the cost of the repairs to the parapet wall and the house’s diminished value relating to the parapet well. The Lewises moved for a directed verdict, which the trial court denied. The trial court returned a verdict in favor of the Lewises as to intentional misrepresentation and in favor of the Rulas on the issue of negligent misrepresentation. The trial court entered a final judgment against the Lewises in the net amount of \$204,450 in accordance with the percentages of fault allocated by the jury. The Lewises moved for judgment notwithstanding the verdict (“JNOV”), which the trial court denied. The Lewises appealed.

### **ISSUE**

Whether an “as-is” clause relieved the Lewises, the sellers, of statutory disclosure requirements and resulting liability.

### **HOLDING**

Because the Lewises had personal knowledge of the defects, and because it was undisputed that the Lewises had repair work done on the parapet wall and surrounding areas, the Lewises had an affirmative duty to disclose these known defects to the buyers and the “as-is” clause did not absolve the Lewises of this duty and resulting liability. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2018-CA-01713-COA (Mar. 24, 2020)**

Opinion by Judge Westbrook

Hon. John Huey Emfinger (Madison County Circuit Court)

Clyde X. Copeland, William Matthew Vines, & Matthew William Vanderloo for Appellants - David Bonds Ellis & David W. Mockbee for Appellees

Briefed by [Reid Hudson](#)

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## **SMITH V. BELLVILLE**

### **CIVIL - CUSTODY**

**CIVIL PROCEDURE - FAILURE TO CITE AUTHORITY - STRIKING A BRIEF** - While Miss. R. App. P. 28(a)(7) requires citations to authority and parts of the record relied on, there is no provision striking a brief for failure to do so; rather, such failure to provide proper citations may merely render an argument procedurally barred

**FAMILY LAW - ALBRIGHT FACTORS - BEST INTEREST OF THE CHILD** - The polestar consideration in a child custody case is the best interest and welfare of the child

**FAMILY LAW - CUSTODY - MODIFICATION** - At trial, the parent seeking custody modification must show that: (1) a substantial change in circumstances has occurred since the issuance of the custody decree; (2) this change adversely affects the child’s welfare; and (3) the child’s best interest mandates a change of custody

### **FACTS**

In April 2015, the Lamar County Chancery Court awarded Nathan Bellville a divorce from Tiffany Bellville Smith on the grounds of uncondoned adultery. Both parties agreed to joint legal and physical custody of their child, B.B. At the time of the custody decree, both parties lived in Lamar County and agreed to week-to-week physical custody with

exceptions for holidays. After the divorce, Tiffany married Danny Smith and gave birth to triplets two years later. In April 2018, Danny informed Nathan that his job required him to relocate from Hattiesburg to Tupelo, which was approximately 250 miles away. Nathan asserted that the move would render the previous custody arrangement impractical and difficult to maintain and requested the chancery court modify custody to give him sole physical custody of B.B. Tiffany filed an answer and counterclaim, admitting joint physical custody would not be feasible after the move to Tupelo. However, Tiffany asserted that Nathan's parenting skills and bizarre behaviors, such as allowing B.B. to use a hammer and carry a machete and firearms, constituted a material change that adversely affected B.B. As a result, Tiffany requested the court modify custody to give her sole physical custody of B.B. During trial, the chancellor expressed her opinion that the parties should have to "live up to" their original agreement. The chancellor further stated that the court did not like it when people agreed to a custody arrangement without considering its implications and then tried to change it later due to a relocation. She also stated her belief that joint physical custody was "impossible in today's society" and that it was not in children's best interest because it made them victims who lived with backpacks on their backs. Despite these remarks, the chancellor ultimately concluded her decision must be based on the best interest of the child and conducted an *Albright* analysis. The chancellor carefully weighed each *Albright* factor, noting the facts relevant to each factor, and found that the majority of these factors weighed in Nathan's favor. The chancellor entered an opinion and order finding that Tiffany's move to Tupelo was a material change in circumstances that would render joint physical custody impractical or impossible, and that it would be in B.B.'s best interest to award sole physical custody to Nathan. Tiffany filed a Miss. R. Civ. P. 59 Motion for New Trial or to Alter or Amend the Final Judgment or, in the alternative, a Miss. R. Civ. P. 52 Motion to Amend Findings and Judgment. The chancellor entered an order denying Tiffany's post-trial motion. Tiffany appealed.

### ISSUES

Whether (1) the chancellor applied an erroneous legal standard in awarding Nathan sole physical custody and (2) the chancellor abused her discretion by finding that it was in the child's best interest to award Nathan sole custody.

### HOLDING

(1) Because the chancellor ultimately rendered her decision based on the best interests of the child and conducted an *Albright* analysis, her comments did not constitute application of an erroneous standard of law. (2) Because the record showed that the chancellor was aware of the facts relevant to each *Albright* factor, and because deference is given to the weight that a chancellor assigned to each factor, the weight that the chancellor assigned to each factor was not an abuse of discretion. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Chancery Court.

**Affirmed - 2018-CA-01305-COA (Mar. 24, 2020)**

Opinion by Judge Greenlee

Hon. Deborah J. Gambrell (Lamar County Chancery Court)

Terry L. Caves & Risher G. Caves for Appellant - S. Christopher Farris for Appellee

Briefed by [Charles Ellzey](#)

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

### **BELK V. STATE**

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

**APPELLATE PROCEDURE - APPELLATE JURISDICTION - FINAL JUDGMENT** - In consideration of jurisdiction, the appellate court may question only a final, appealable judgment or that which adjudicates the merits of the controversy and settles all issues as to all the parties and requires no further action by the trial court

**APPELLATE PROCEDURE - APPELLATE JURISDICTION - FINAL JUDGMENT** - Notice of appeal from a judgment or order that is not final is premature and will not confer jurisdiction on the appellate court



## FACTS

An Oktibbeha County grand jury indicted Kentrail Belk on nine separate counts of controlled substance violations. Belk pleaded guilty to count nine and counts one through eight were retired to the file. The trial court sentenced Belk to serve a term of ten years in the custody of the Mississippi Department of Corrections (“MDOC”). Belk filed a pro se “Verified Motion For Post-Conviction Relief” in the Oktibbeha County Circuit Court, arguing that his guilty plea was involuntary and the product of ineffective assistance of counsel that resulted in an illegal sentence. At the resentencing hearing, the circuit court stated that it was only considering Belk’s claim that he received an illegal sentence. The circuit court determined it would consider Belk’s other post-conviction relief (“PCR”) claims later and would order another hearing if necessary. The circuit court then re-sentenced Belk to serve a term of eight years in the custody of the MDOC, pay all court costs, pay a \$1,000 fine, and submit himself to any alcohol or drug counseling the MDOC deemed necessary. This conclusion resolved one of Belk’s PCR issues. The circuit court entered a written order on the re-sentencing, but did not address Belk’s remaining PCR claims. Belk appealed.

## ISSUE

Whether the Court of Appeals had jurisdiction to hear Belk’s PCR claim.

## HOLDING

Because the circuit court had not ruled on Belk’s other PCR issues, especially in the context of ineffective assistance of counsel, the Court of Appeals lacked jurisdiction to consider Belk’s appeal of these matters. Therefore, the Court of Appeals dismissed the appeal and remanded the matter to the Oktibbeha County Circuit Court to finish its resolution of Belk’s PCR motion.

### **Appeal Dismissed - 2018-CP-01143-COA (Mar. 24, 2020)**

Opinion by Judge McDonald

Hon. Lee J. Howard (Oktibbeha County Circuit Court)

*Pro se* for Appellant - Allison Elizabeth Horne (Att’y Gen. Office) for Appellee

Briefed by [Daniel Bond](#)

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

### **CURETON V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PRESERVATION FOR APPEAL** - To preserve a jury instruction issue on appeal, the defendant must make a specific objection to the proposed instruction to allow the trial court to consider the issue

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - ELEMENTS OF THE CRIME** - The jury must be instructed regarding the elements of the crime with which a defendant is charged

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - DEADLY WEAPON** - A jury instruction that includes the weapon used in a crime does not assume or charge the jury that the weapon was in fact a deadly weapon

## FACTS

In September 2011, Leonard Cureton was arrested after stabbing Steven Jennings in the head with a knife outside of a grocery store in Columbus, Mississippi. Cureton testified in his own defense at trial and stated that he was panhandling outside of the grocery store when he and Jennings got into an argument. He admitted to hitting Jennings in the head during the altercation, but claimed that Jennings approached him in a threatening manner. Cureton was found guilty of aggravated assault and was sentenced to serve twenty years as a habitual offender. He moved for a new trial but his motion was denied. Cureton appealed.

## ISSUE

Whether the trial court erred by giving Jury Instruction S-2.

## HOLDING

Because Cureton failed to object to Jury Instruction S-2, and because Jury Instruction S-2 properly set forth the essential elements of aggravated assault, Cureton's argument was procedurally barred and the trial court did not err by giving the instruction. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

### **Affirmed - 2018-KA-00862-COA (Mar. 24, 2020)**

Opinion by Judge Greenlee

Hon. Lee J. Howard (Lowndes County Circuit Court)

W. Daniel Hinchcliff & George T. Holmes (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Luke Seymour](#)

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## **JOHNSON V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - EVIDENCE - DISCLOSURE** - The prosecution does not have a duty to disclose evidence which is already in the defendant's possession and available to introduce as evidence

**EVIDENCE - TESTIMONY - PROFFER** - When a trial court rules to prevent certain testimony from being introduced, it is incumbent on the party to make a proffer of what the witness would have testified to or the point is waived for appellate review

**EVIDENCE - TESTIMONY - EXCLUSION** - Pursuant to Miss. R. Evid. 611(a), the trial court has control over whether to accept testimony and should exercise reasonable control over the mode and order of examining witnesses to avoid wasting time

**CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - WAIVER** - The failure to contemporaneously object at trial will result in a waiver of the issue on appeal

**APPELLATE REVIEW - JUDGMENT NOTWITHSTANDING THE VERDICT - SUFFICIENCY OF EVIDENCE** - In addressing whether the evidence was sufficient to support a conviction, the question is whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt

**APPELLATE REVIEW - MOTION FOR NEW TRIAL - WEIGHT OF EVIDENCE** - An appellate court will disturb the trial court's verdict only when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice

**APPELLATE REVIEW - MOTION FOR NEW TRIAL - FALSE TESTIMONY** - To prove the defendant's rights have been violated, a defendant must first demonstrate that a prosecution witness knowingly provided false testimony, and a new trial is appropriate when the false testimony has any reasonable likelihood that may affect the judgment of the jury

## FACTS

Daryl Johnson was convicted on two counts of transferring cocaine. Tiffany Young, a police informant, purchased cocaine from Daryl on two separate occasions. Prior to those transactions, Young had also purchased cocaine from Daryl's nephew, Tyrice Johnson. Although police video-recorded the second transaction between Young and Daryl, the video did not reveal any distinguishing characteristics of the dealer or show the transfer of drugs. Notably, Daryl had gold teeth and tattoos on his left arm (two of the physical characteristics Young used to identify Daryl), and he went by the aliases "D.J." and "Roughhouse." Young told the police immediately after the exchange that she had purchased cocaine from "D.J." She also subsequently picked Daryl out of a photo lineup. At trial, Daryl argued that he was not the person in the video, but rather, it was his brother, Terry Johnson. Daryl attempted to introduce twelve separate lay witnesses to support his theory. However, the trial court reduced this to three opinion witnesses and one eyewitness.

The three defense witnesses each testified that it was not Daryl in the video. Terry testified that he was in the video, but he denied ever selling Young drugs. Young testified that she had briefly seen Terry before and was certain it was Daryl in the video. Additionally, the prosecution introduced testimony from several local police officers that were familiar with Daryl. Each officer testified that it was Daryl in the video. Daryl failed to object to any of the officers' testimonies. The prosecution moved to introduce a prior drug conviction and other prior charges, including assault and possession, to establish Daryl's knowledge and intent. The trial court allowed only the drug conviction to be admitted, finding it more probative than prejudicial. Daryl objected, arguing that the drug conviction was also prejudicial, but the trial court overruled the objection. However, the prosecution referenced the disallowed prior criminal charges in court during Tyrice's cross-examination. Daryl also attempted to introduce the police video recording of Tyrice's exchange with Young because Young stated in the video that she could not tell Terry and Daryl apart. The prosecution objected and claimed that there had been a discovery violation, but later withdrew the objection because Daryl had already failed to cross-examine Young. Lastly, Daryl testified and revealed the tattoos on his left arm to the jury. During jury deliberations, the jury asked for clarification concerning Daryl's tattoos and birthmark scar, but the trial court directed the jury to continue their deliberations and Daryl did not object. The Harrison County Circuit Court jury found Daryl guilty of both counts. Daryl appealed.

### **ISSUES**

Whether (1) the State had a duty to disclose a recording from Young's interaction with Tyrice; (2) the trial court abused its discretion in limiting the defense's lay witness testimony; (3) the State committed prosecutorial misconduct; (4) the trial court erred by preventing Daryl from displaying his arm tattoos to the jury during deliberations; (5) the State presented sufficient evidence to support Daryl's convictions, or whether the jury's verdict was against the overwhelming weight of the evidence; (6) the State presented false testimony; (7) the trial court erred in denying the defense's motion for a new trial based on new evidence; (8) the trial court erred in declining to appoint an attorney to represent Daryl at the hearing on his post-trial motions; and (9) the cumulative effect of the errors required reversal.

### **HOLDING**

(1) Because the recording of Young and Tyrice was in Daryl's possession and Daryl could have introduced it at trial, the prosecution did not have a duty to disclose the recording. (2) Because Daryl failed to make a proffer on the record to alert the trial judge as to what each individual witness was expected to say, this issue was waived for appellate review. (3) Because Daryl did not object to the prosecution's conduct at trial, this issue was waived for appellate review. (4) Because Daryl had already shown the jury his tattoos once, the jury's request was not reasonably required and the trial court did not err by preventing the second display. (5) Because a rational juror could have found that the State proved each element of the crime, and because the jury was given sufficient evidence to determine Daryl's guilt, the State provided sufficient evidence to support Daryl's convictions and the jury's verdict was not against the overwhelming weight of the evidence. (6) Because Daryl did not meet his burden to prove that the State presented false testimony, the issue was without merit. (7) Because the evidence of the recordings of Tyrice and Young was available to Daryl at trial, the trial court did not err in denying Daryl's motion for a new trial based on new evidence. (8) Because Daryl chose to fire his attorney and proceed on his own pro se, the trial court did not abuse its discretion and the issue was without merit. (9) Because Daryl's other issues on appeal were without merit, there was no cumulative error and the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

### **CONCURRENCE**

Judge McCarty argued that the trial court's restriction on the number of witnesses was arbitrary, and had Daryl not failed to object, the restriction would have been violative of Daryl's constitutional right to present witnesses in his own defense. He highlighted that Miss. R. Evid. 611(a) mandates a reasonable curtailment of evidence.

#### **Affirmed - 2017-KA-01483-COA (Mar. 24, 2020)**

Opinion by Judge Lawrence - Concurrence by Judge McCarty

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Eli Scott](#)

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