

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 31, 2019**SUPREME COURT - CIVIL CASES****LOZIER V. STATE****CIVIL - OTHER**

SEX OFFENDER REGISTRATION - RELIEF FROM DUTY - MINIMUM PERIOD - Miss. Code. Ann. § 45-33-47 does give credit for the period of time a sex offender was required to register in another state

CIVIL PROCEDURE - CIRCUIT COURTS - FOREIGN JUDGMENTS - The Full Faith and Credit Clause generally does not apply to sex-offender registration laws amongst states

FACTS

Christopher Lozier currently resides in Mississippi but was tried for rape in Massachusetts. After a mistrial, he pled guilty in 1993 to one count of indecent assault and battery upon a person over the age of fourteen. He began registering as a sex offender in 1996 as required by Massachusetts law after he was discharged from probation. He moved to Mississippi in 2006 and registered with the Mississippi Sex Offender Registry as required by state law. He has complied with the Mississippi Sex Offender Registry Law (“MSORL”) since that time. In 2017, Massachusetts’ Sex Offender Registry Board sent a letter notifying Lozier that he did not have a duty to register anymore, as Massachusetts law allowed a sex offender to stop registering after twenty years from conviction, adjudication, or release from custody/supervision, whichever occurs last. Later that year, Lozier filed a petition with the trial court seeking relief from MSORL’s registration requirements under the Full Faith and Credit Clause of the United States and Mississippi Constitutions. The trial court denied Lozier’s petition, interpreting Miss. Code Ann. § 45-33-47 to mean that the clock began on the time he must register when he moved to Mississippi and that even if his offense fell under tier one, he would need to continue registering until 2021. Lozier appealed.

ISSUES

Whether (1) the trial court misinterpreted Miss. Code Ann. §45-33-47 and (2) full faith and credit should be given in Mississippi to another state’s administrative rulings.

HOLDING

(1) Because Miss. Code Ann. §45-33-47(2)(a) states that “[r]egistration in any other jurisdiction does not reduce the minimum requirement for maintaining registration in Mississippi,” the trial court correctly interpreted the statute to mean that the MSORL does not provide credit for the period of time Lozier was required to register in Massachusetts.

(2) Because Lozier’s relief from the duty to register came from an executive action taken by the Massachusetts’ Sex Offender Registry Board instead of a judgment, decree, or order from a United States court, and because the Supreme Court of the United States held that the Full Faith and Credit Clause does not require a state to substitute its own statute for the conflicting statute of another state, Lozier’s full-faith-and-credit claim fails. Therefore, the Supreme Court affirmed the judgment of the Pearl River County Circuit Court.

Affirmed - 2018-CA-00795-SCT (Oct. 31, 2019)

Opinion by Justice Beam

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

Vicki L. Gilliam for Appellant - Lora Elizabeth Hunter for Appellee

Briefed by [Kaitlin Bethay](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 29, 2019

COURT OF APPEALS - CIVIL CASES

CARVER V. PUB. EMPS.' RET. SYS.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - AGENCY REVIEW - AGENCY CONCLUSIONS - The conclusion of the agency withstands appellate review unless the decision: (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 REVIEW - SUBSTANTIAL EVIDENCE - Substantial evidence is defined as such relevant evidence as reasonable minds might accept as adequate to support a conclusion

ADMINISTRATIVE LAW - AGENCY REVIEW - ARBITRARY & CAPRICIOUS ACTIONS - An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on will alone; an administrative agency's act is capricious if it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles

CIVIL PROCEDURE - PUBLIC EMPLOYMENT - DUTY-RELATED DISABILITY - Miss. Code Ann. § 25-11-114(6) provides duty-related disability benefits for any active member who becomes disabled as a direct result of an accident or traumatic event resulting in a physical injury occurring in the line of performance of duty, regardless of the number of years of service

FACTS

Brian Carver worked as a patrolman for the Jackson Police Department ("JPD") and experienced anxiety after he shot and killed an individual while on duty. Following this incident, Carver became "highly anxious" when responding to thefts, burglaries, and domestic-violence calls. Carver did not take time off from work or seek professional counseling, but eventually transferred from to the police-motor unit, which dealt with traffic-related matters. Although the transfer helped, Carver's anxiety remained with him, and he feared that he would be placed in a position that required him to use deadly force. Years later, Carver sought assistance from a licensed professional counselor with hopes to manage his anxiety; the counselor subsequently informed Carver's supervisors about Carver's anxiety regarding inappropriate use of his weapon. Following the disclosure, JPD relieved Carver of his gun, and he took a medical leave of absence. The next week, Carver received two letters terminating his employment. After his termination, Carver's counselor wrote a letter opining that Carver suffered from post-traumatic stress disorder ("PTSD"); Dr. Webb, a psychiatrist, confirmed the counselor's diagnosis. Sometime thereafter, Carver applied for non-duty and duty-related disability benefits. The Public Employees' Retirement System of Mississippi Medical Board ("the PERS Board") granted him non-duty related disability benefits but denied his request for duty-related disability benefits. The PERS Board made its ruling stating that Dr. Webb's testimony indicated he was referring to the physical symptoms associated with a mental illness, not an actual acute physical injury caused by an outside force. Carver appealed the decision to the Disability Appeals Committee ("the DAC"), which agreed with the Board's decision and recommended denial of duty-related disability benefits. The PERS Board adopted the DAC's findings and recommendations and Carver appealed, but the Hinds County Circuit Court affirmed. Carver appealed.

ISSUES

Whether the PERS Board's decision was (1) supported by substantial evidence and (2) arbitrary and capricious.

HOLDING

Because Miss. Code Ann. § 25-11-114(6) requires evidence that the disability was directly caused by a duty-related accident or traumatic event that resulted in physical injury, and because Carver suffered from PTSD, which was not a physical injury resulting from the traumatic event, there was substantial evidence to support a denial of Carver's duty-related disability benefits. (2) Because the PERS Board's decision was based upon agreement with Dr. Webb's findings,

the decision was neither arbitrary nor capricious. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

DISSENT

Judge Lawrence argued ample evidence provided that Carver's PTSD was not just a mental affliction, but one that manifested itself physically and became a physical injury. Lawrence argued that because Dr. Webb opined on several occasions that PTSD was a physical injury, and because no evidence was offered to contradict Dr. Webb's substantial evidence, Carver proved a physical injury under Miss. Code Ann. § 25-11-114. Therefore, Judge Lawrence respectfully dissented.

Affirmed - 2018-SA-01045-COA (Oct. 29, 2019)

En Banc Opinion by Judge Greenlee - Dissent by Judge Lawrence

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

George S. Luter for Appellant - Samuel Martin Millette III (Att'y Gen. Office) for Appellee

Briefed by [Nicole Broussard](#)

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DAVENPORT V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - PAROLE - ELIGIBILITY - A inmate who qualifies for parole on one conviction is not excused from serving a mandatory sentence for another, separate conviction

CONSTITUTIONAL RIGHTS - CRIMINAL - PAROLE - In Mississippi, a prisoner is afforded no constitutionally recognized liberty interest in parole

POST-CONVICTION RELIEF - SENTENCING - PAROLE - The granting or denial of parole is the exclusive responsibility of the parole board, which is independent of the circuit court's sentencing authority

FACTS

Davenport was convicted of robbery, armed robbery, and murder in 1991 and in 1992 was sentenced to serve three years for robbery concurrent with twenty years for armed robbery. He was also sentenced to life for murder, to run concurrently to the sentence for armed robbery. In 2000, Davenport was convicted for possession of marijuana while incarcerated and sentenced to three more years without eligibility for parole. Davenport was scheduled to be eligible for parole in 2011, but the Mississippi Department of Corrections ("MDOC") deemed him ineligible. After being denied for parole again in 2013, Davenport was granted parole from his life sentence by the Parole Board in 2017, but still had to serve the additional three years for his mandatory possession conviction. Davenport filed a motion to "show cause" in the circuit court, and the circuit court denied his motion, finding the Parole Board acted within its authority. Davenport appealed.

ISSUES

Whether (1) the MDOC erred when it did not conduct a parole hearing in 2011 and (2) Davenport was denied his constitutional right to parole.

HOLDING

(1) Because, under the Supreme Court's decision in *Keys v. State*, Davenport was required to serve a mandatory sentence of three years for his possession conviction, the MDOC did not err when it deemed him ineligible without a hearing in 2011. This is so even if he was eligible for parole on his life sentence. (2) Because the Parole Board did not act arbitrarily, and because the decisions of the Board and circuit court were supported by substantial evidence, Davenport was not denied his constitutional right to parole. Therefore, the Mississippi Court of Appeals affirmed the decision of the trial court.

Affirmed - 2018-CP-00734-COA (Oct. 29, 2019)

Opinion by Justice Lawrence
Hon. Margaret Carey-McCray (Washington County Circuit Court)
Pro se for Appellant - Darrell Clayton Baughn (Att’y Gen. Office) for Appellee
Briefed by [Reid Hudson](#)

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DAVIS V. PUB. EMPS.’ RET. SYS.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - PERS DISABILITY CLAIMS - MISS. CODE ANN. § 25-11-113(1)(A) - To receive disability retirement benefits, a PERS member must prove that (1) the member is mentally or physically incapacitated for the further performance of duty; (2) the incapacity is likely to be permanent; and (3) the member should be retired

ADMINISTRATIVE LAW - PERS DISABILITY CLAIMS - MISS. CODE ANN. § 25-11-114(6) - In addition to the requirements under Miss. Code Ann. § 25-11-113(1)(a), an individual who applies for duty-related disability benefits must prove that she was disabled as a direct result of an accident or traumatic event resulting in a physical injury occurring in the line of performance of duty

ADMINISTRATIVE LAW - BURDEN OF PROOF - MISS. CODE ANN. § 25-11-113(1)(A) - The applicant for disability benefits carries the initial burden of proving to PERS, through objective medical evidence, that she is disabled

EVIDENCE - DUE PROCESS - ADMINISTRATIVE BOARDS - Administrative boards are not required to adopt particular procedures to meet their due process requirements; also, the formalities of practice, procedure, and evidence are relaxed in all administrative proceedings

FACTS

Erin Davis, a teacher, was attacked by a student. According to her testimony, this incident involved Davis being thrown to the ground and having her head slammed with the classroom door. Two days later, Davis received a CT scan which proved inconclusive, and the doctor informed her that she likely sustained a concussion from the incident. Davis continued to teach for nine more months but periodically used medical leave due to subjective neurological and physical symptoms. Davis was fired for failing to return to work after exhausting her medical leave, and she applied for both non-duty-related and duty-related PERS disability retirement benefits. The PERS Medical Board denied Davis’s claims citing insufficient evidence. Davis appealed, and the PERS Disability Appeals Committee held two hearings in which they considered: Davis’s testimony, Davis’s husband’s testimony, and Davis’s medical records. The Appeals Committee recommended the claim be denied in view of: (1) eight medical opinions which did not conclude that Davis was permanently disabled; (2) Davis’s symptoms preceding the incident; and (3) work conditions reconcilable with Davis’s symptoms. The PERS Board adopted the Appeals Committee’s findings and accepted their recommendation to deny Davis’s claims. Davis appealed to the Hinds County Circuit Court which affirmed the PERS Board’s decision. Davis appealed.

ISSUES

Whether (1) the PERS Board’s denials of Davis’s disability claims were supported by substantial evidence and (2) Davis’s due process rights were violated.

HOLDING

(1) Because no medical opinion indicated Davis was permanently disabled, the PERS Board’s denials of Davis’s disability claims were supported by substantial evidence. (2) Because a breadth of evidence was considered, Davis’s due process rights were not violated. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2018-SA-00974-COA (Oct. 29, 2019)

Opinion by Judge C. Wilson
Hon. Joseph Anthony Sclafani (Hinds County Circuit Court, First Judicial Dist.)

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LIBERTY INS. CORP. V. TUTOR

CIVIL - INSURANCE

INSURANCE - BURDEN OF PROOF - BAD-FAITH CLAIM - To prove a bad-faith claim, the plaintiff/claimant bears the burden of proving that the insurer either lacked a legitimate or arguable basis for denying his claim or that it committed a willful or malicious wrong or acted with gross and reckless disregard for his rights

INSURANCE - AWARDS - EXTRA-CONTRACTUAL DAMAGES - Extra-contractual damages, such as awards for emotional and attorneys’ fees, are not warranted where the insurer can demonstrate an arguable, good-faith basis for denial of a claim

INSURANCE - BURDEN OF PROOF - DISABILITY - In order to make a prima facie case of disability, a claimant must show by a fair preponderance of the evidence that (1) an accidental injury occurred (2) which arose out of and in the course of employment and (3) that the injury and claimed disability are casually connected; the claimant bears the burden of establishing every essential element of the claim, and it is not sufficient to leave the matter to surmise, conjecture, or speculation; the evidence used to prove causation must be credible medical evidence and not mere speculation

FACTS

Anthony Lee Tutor was employed as a package driver at the United Parcel Service, Inc (“UPS”). While delivering a package, he was startled by a dog. As a result, he twisted and hurt his back. His business manager, April Dallas, appointed Gary Bishop to help Tutor finish his route. Dallas informed Tutor that because of the late hour, he should go to the emergency room. Tutor told Dallas that he would have preferred to visit his personal physician the next day. Additionally, he told Dallas that prior to the current injury, he had been receiving treatment from his chiropractor. From this, Dallas deduced that Tutor was suffering from a previous injury and that the injury he suffered after the dog startled him was not work related. As a result, Dallas did not report Tutor’s injury to Liberty Insurance Corporation (“Liberty”). The next day, Tutor sought treatment from his family medicine doctor, Dr. Brad Crosswhite. Based on Tutor’s injury, Dr. Crosswhite referred Tutor to receive an MRI. The MRI results concluded that there was no objective injury. Tutor returned to work; however, he was unable to work due to his back pain. Tutor asserted to Dallas that the injury should be covered under workers’ compensation. Dallas told him to work full-time, call the union, or file for short-term disability. Tutor successfully applied for short-term disability and started receiving benefits. After multiple therapist and doctor visits, Tutor’s pain still continued. Tutor hired an attorney to represent him for the injury. The attorney filed a petition to controvert with the Mississippi Workers’ Compensation Commission (“the Commission”). Liberty received notice of this petition. Upon receiving Tutor’s medical records, Liberty accepted compensability of Tutor’s claim without conducting a functional-capacity evaluation. Liberty ultimately paid Tutor for his total loss of wage-earning capacity. Tutor filed a complaint asserting that he was entitled to extra-contractual compensatory and punitive damages from Liberty’s alleged bad-faith handling of his prior workers’ compensation claim. After the close of the trial, the jury returned a verdict awarding Tutor \$500,000 in extra-contractual damages against UPS and \$100,000 against Liberty. Liberty then filed a judgment notwithstanding the verdict (“JNOV”) asserting that they had a good-faith basis for denying Tutor’s claim. Liberty appealed.

ISSUES

Whether the evidence presented at trial was insufficient to support the jury's verdict that Liberty was liable to Tutor for extra-contractual damages.

HOLDING

Because Liberty possessed an arguable good-faith basis for its delay in paying Tutor's claim, Tutor failed to meet his burden and thus the evidence presented at trial was insufficient to support the jury's verdict. Therefore, the Court of Appeals reversed the judgment of the Clay County Circuit Court and rendered a verdict in favor of Liberty.

CONCURRENCE

Judge Lawrence argued that the Commission's rules allowed and authorized discovery, and the law should not punish that party with allegations of bad faith when they avail themselves of that right. As a result, there was insufficient evidence to demonstrate bad faith.

DISSENT

Judge Westbrook argued that the appellate court must leave the weighing of evidence to juries and only evaluate the evidence and testimony offered at trial to determine if it was sufficient. She believed, there was substantial, credible, and reasonable evidence to support the jury's finding that Liberty lacked an arguable reason for delay and thus the court should have affirmed.

Reversed & Rendered - 2018-CA-00091-COA (Oct. 29, 2019)

En Banc Opinion by Presiding Judge Carlton - Concurrence by Judge Lawrence - Dissent by Judge Westbrook

Hon. Lee Sorrels Coleman (Clay County Circuit Court)

Clifford Kavanaugh Bailey III & Gregg A. Caraway for Appellant - Lance L. Stevens & Roderick D. Ward III for Appellee

Briefed by [Brittany Brewer](#) & [Haley Nutt](#)

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PINION V. PUB. EMPs.' RET. SYS.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - The Court of Appeals has the authority to reverse a decision of PERS if the decision (1) was not supported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond PERS Board's power to adopt, or (4) violated a constitutional or statutory provision

ADMINISTRATIVE LAW - DISABILITY - DUTY-RELATED BENEFITS - To qualify for duty-related disability benefits under Miss. Code Ann. § 25-11-114(6), an applicant must demonstrate that the claimed disability directly resulted from a physical injury sustained from an accident or traumatic event caused by external violence or physical force occurring in the line of performance of duty

FACTS

Shirley Pinion, a University of Mississippi Medical Center ("UMMC") employee, was diagnosed with carpal-tunnel-syndrome ("CTS") around 1997. Despite her diagnosis, and its accompanying discomfort, Pinion continued to perform computer-based work. In 1999, Pinion elected to undergo carpal-tunnel-release surgery. After the surgery, Pinion's pain persisted and in 2004, she underwent a second surgery. Even though she reported increased pain following the second surgery, Pinion returned to work. Failed by surgical solutions, Pinion visited a physician who placed her on a pharmacologic-pain-management regimen designed to relieve CTS symptoms. While she experienced notable relief and continued to work, the drugs used in her treatment included a number of narcotic pain medicines and analgesic patches. In 2012, Pinion was evaluated by a UMMC family physician, which resulted in a determination that Pinion could not safely perform the work tasks required of her and simultaneously adhere to the drug regimen prescribed. Following the

evaluation, UMMC placed Pinion on leave pending the discontinuation or significant decrease in the use of narcotics. Based on her inability to work without the medication, Pinion filed for duty-related and non-duty-related disability benefits with the Public Employees' Retirement System ("PERS") Medical Board ("the Board"). After reviewing Pinion's application, the Board denied her request for disability retirement. Subsequently, Pinion appealed the to the PERS Disability Appeals Committee. The Appeals Committee denied her request for duty-related disability benefits but granted her non-duty-related disability benefits. In 2013, the PERS Board of Trustees ("PERS Board") adopted the Appeals Committee's conclusion. Pinion then appealed the PERS Board's determination, which the circuit court affirmed. Pinion Appealed.

ISSUE

Whether the PERS Board's and subsequent court's decision to deny Pinion's request for duty-related benefits was supported by substantial evidence.

HOLDING

Because Pinion's record was devoid of any alleged accident or traumatic event as defined by Miss. Code Ann. § 25-11-114(6), the PERS Board had substantial evidence to deny Pinion's request for duty-related disability benefits. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2018-SA-01044-COA (Oct. 29, 2019)

Opinion by Judge Westbrook

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

George S. Luter for Appellant - Samuel Martin Millette III & Jane L. Mapp (Att'y Gen. Office) for Appellee

Briefed by [Harrison Smith](#)

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REVERIE BOUTIQUE, LLC V. CITY OF WAYNESBORO

CIVIL - PROPERTY DAMAGE

MISS. TORT CLAIMS ACT - SOVEREIGN IMMUNITY - NEGLIGENCE - Under the public-policy function test in *Wilcher*, a municipality will be granted immunity from a negligence claim, if the activity in question involved an element of choice or judgment, and if that choice or judgment involved social, economic, or political-policy considerations

CIVIL PROCEDURE - SUMMARY JUDGMENT - INTERVENING LAW - Intervening change in the law will grant reversal if the shift back to the public-policy test and the renewed viability of claims for negligence, reversal and remand will guarantee all parties the application of current law to their claims and defenses

FACTS

The owners of Reverie Boutique ("Reverie") were away acquiring inventory, when their clerk found that the store's floor was covered in sewage water. They discovered that the sewer system backed up due to a mophead clogging the sewer pipes, which caused storm water to overflow from Reverie's toilet. The manhole in front of Reverie was known to have issues and was put on a list to be checked daily along with other problem manholes. Reverie sued Waynesboro for negligent maintenance of the sewage pipes which led to the inventory and store damages. In its argument for negligence, Reverie claimed that Waynesboro violated Miss. Department of Environmental Quality ("MDEQ") regulations, as well as the Federal Clean Water Act. Waynesboro motioned for summary judgment, and both parties presented arguments centered around a two-prong test established by precedent. Two weeks after the parties presented the arguments, the Supreme Court completely transformed the test for municipal liability under the Miss. Tort Claims Act ("MTCA") in *Wilcher v. Lincoln County Board of Supervisors & City of Brookhaven*. The parties did not alert the Wayne County Circuit Court about the ruling, despite *Wilcher* explicitly overruling precedent. Therefore, the circuit court granted summary judgment after the Supreme Court decided *Wilcher*. The order did not cite to *Wilcher* but instead relied upon outdated precedent for the basis of dismissal. The parties did not seek reconsideration but filed a notice of appeal.

ISSUE

Whether Waynesboro was properly granted summary judgment as immune under the MTCA based on the *Wilcher* public-policy function test.

HOLDING

Because Waynesboro had the discretion to create a sewer system, and because Reverie showed Waynesboro's acts were negligent and that their acts were not of a choice or judgment involving social, economic, or political-policy considerations, Waynesboro was not properly granted summary judgment according to the *Wilcher* public-policy function test. Therefore, the Court of Appeals reversed and remanded the judgment of the Wayne County Circuit Court.

CONCURRENCE

Judge Wilson argued that a significant part of Reverie's claim to this point cannot survive under the public-policy function test. Most of Reverie's claims of negligence were due to the inappropriate allocation of the city's scarce resources and the low prioritization of the sewage pipes. These complaints all concern policy decisions made by the city through its elected leaders, which cannot give rise to liability under the public-policy function test.

Reversed & Remanded - 2018-CA-01064-COA (Oct. 29, 2019)

Opinion by Judge McCarty - Concurrence by Presiding Judge J. Wilson

Hon. Lester F. Williamson Jr. (Wayne County Circuit Court)

John Ray Gunn & Patrick H. Zachary for Appellant - William Robert Allen & Jessica Susan Malone for Appellee

Briefed by [Daniel Bond](#)

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COURT OF APPEALS - CRIMINAL CASES

CLARK V. STATE

CRIMINAL - FELONY

EVIDENCE - EXPERT TESTIMONY - DAUBERT HEARING - A proper *Daubert* hearing must determine whether a witness is qualified to testify as an expert and whether the offered expert testimony is relevant and reliable

EVIDENCE - EXPERT TESTIMONY - DAUBERT HEARING - Under Mississippi's heightened *Daubert* standard, experts must offer proof that their offered opinion evidence is fundamentally scientifically reliable beyond mere general acceptance by peers in their scientific discipline

EVIDENCE - ADMISSIBILITY - EXPERT TESTIMONY - An expert witness's prior acceptance as an expert does not automatically award that expert continued certification as an expert in her field or subspecialty in any future litigation

FACTS

Josh and Bethany Clark lived with their three children, two-year-old Cadence and four-month-old twins Kyllie and Quinton, teenagers Haley Parker and Morgan Wright, and Bethany's five-year-old daughter, Savannah. Josh worked out of state and took care of the children while he was home on the weekends. One Saturday, Bethany and the teenagers went into town and left the four children in Josh's care. Josh testified that minutes before Bethany and the teenagers returned, Kyllie made a gasping sound. Morgan called 911 and Josh took Kyllie into the bedroom, where Kyllie went limp. Josh and Bethany took Kyllie to the hospital, where the hospital staff made multiple attempts to perform CPR. Kyllie was diagnosed with rib fractures, brain swelling, and retinal and subdural hemorrhages. She was ultimately declared brain dead and taken off of life support. Although her medical records did not show recent trauma, Haley admitted to seeing Cadence fall on Kyllie and a babysitter testified that she found Kyllie on the floor after Cadence said Bethany dropped her. Dr. Karen Lakin, a pediatrician, found that because Kyllie had no history of significant trauma,

the hospital's findings of her injuries combined to support her opinion that Kyllie died due to shaken baby syndrome ("SBS"). Josh was suspected because Kyllie's breathing trouble began while she was in his exclusive care and he pled guilty to the reduced charge of depraved heart murder. He was later granted a motion for post-conviction relief due to ineffective assistance of counsel because his attorney failed to call an expert to rebut the State's SBS theory and Josh was required to retain a rebuttal expert. Before trial, Josh moved to suppress the State's introduction of Dr. Lakin's testimony about SBS/abusive head trauma ("SBS" and/or "AHT"), claiming SBS was no longer a generally accepted diagnosis without external injuries and it could not be used to accurately determine the time of Kyllie's injuries. The circuit court held a *Daubert* hearing and denied Josh's motion. At trial, the State relied heavily on Dr. Lakin's testimony that Kyllie's injuries could have only occurred during the time when she was in Josh's sole care and she was killed either by being shaken or hitting her head. Dr. Lakin only cited to the American Academy of Pediatrics ("AAP"), in which AHT is supported by findings of intracranial hemorrhages. She also claimed that various peer reviewed articles recognize AHT, although she could not name or cite any of them. On cross examination, she admitted that the AAP removed language that presumed child abuse when injuries such as Kyllie's occurred, that Kyllie's rib fractures appeared to be healing rather than recently sustained, and, as a result, it was unlikely that they occurred during the time that Kyllie was in Josh's care. She also agreed that a differential diagnosis would have had to be performed on Kyllie to eliminate other potential causes of death, which was not done in Kyllie's case. Dr. Lakin also admitted that she was unaware of any studies on SBS's diagnostic error rate, had not conducted personal research to eliminate short falls as a cause of these injuries, and had no training in determining cause of death. After her full testimony, Josh requested an opportunity to recross Dr. Lakin, which the circuit court denied. Dr. Mark Shuman, a forensic pathologist, testified as an expert for Josh and found that Kyllie's injuries were not caused by shaking but rather by blunt head injury. Dr. Shuman testified that even severe symptoms of a fatal brain injury could be delayed and that children who suffer this type of injury might show subtle or no symptoms at all. He also contradicted Dr. Lakin's testimony and testified that retinal hemorrhages do not necessarily mean that some type of child abuse occurred and that short falls can cause significant injury. He also supported his testimony with an expert report listing numerous academic and peer reviewed studies and testified that no scientific evidence showed that a human could shake a child hard enough to cause a primary brain injury. Additionally, Josh denied ever abusing Kyllie, no witnesses testified that Josh shook Kyllie, and the State presented no physical evidence of any witnessed trauma to Kyllie. The jury convicted Josh of second-degree murder. Josh appealed.

ISSUE

Whether the circuit court abused its discretion by admitting Dr. Lakin's expert testimony and ruling that her qualifications as a pediatrician and child abuse treatment provider adequately supported her opinion that a causal connection existed between Kyllie's medically identifiable injuries and her conclusion as to the specific timing of Kyllie's purported SBS injuries.

HOLDING

Because the circuit court based the *Daubert* hearing solely on Dr. Lakin's expert qualifications rather than the relevance and reliability of her expert testimony on shaken baby syndrome, because Dr. Lakin's expert testimony on the cause and timing of Kyllie's death was unreliable based on lack of both supporting scientific studies and proof that her testimony reliably aided the jury's understanding, and because the circuit judge made no on-the-record findings regarding Dr. Lakin's qualifications or the reliability of her expert testimony, Dr. Lakin's expert testimony failed to meet the criteria required by *Daubert* and Miss. R. Evid. 702, and the circuit court abused its discretion in admitting her expert testimony into evidence. Therefore, the Court of Appeals reversed and remanded the judgment of the Itawamba County Circuit Court.

DISSENT

Judge Lawrence argued that the circuit court did not abuse its discretion in admitting Dr. Lakin's expert testimony because it was proper to admit her expert opinion on Kyllie's injuries and their effects, Dr. Lakin's opinions were not the sole basis for guilt, and the case was ultimately a battle of the experts. He also expressed concern that overturning the circuit court's decision would either create an impossibly high expert admission standard or lead to the appellate court replacing the trial court as the gatekeeper of expert testimony.

Reversed & Remanded - 2017-KA-00411-COA (Oct. 29, 2019)

En Banc Opinion by Judge Tindell - Dissent by Judge Lawrence

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LEWIS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INDICTMENT - CAPITAL MURDER - In capital murder cases, the State is not required to set forth the elements of the underlying felony in the indictment

CRIMINAL PROCEDURE - CAPITAL MURDER - AGGRAVATING CIRCUMSTANCES - According to the court in *Loden*, “an indictment is sufficient without listing aggravating circumstances. . .”

CONSTITUTIONAL LAW - DUE PROCESS RIGHTS - SPOILATION OF EVIDENCE - To prove one’s due process rights have been violated based upon spoliation of evidence, one must show (1) the evidence in question possessed a significant, exculpatory value that was apparent before it was destroyed or lost; (2) the defendant had no possible means by which to obtain comparable evidence; and (3) the State destroyed or failed to preserve the evidence in bad faith

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - EVIDENTIARY BASIS - A criminal defendant is entitled to jury instructions supporting his theory of the case but only where sufficient evidence supports such instructions

FACTS

Oren Lewis was indicted for capital murder for his daughter Ma’Leah’s death. At trial, the jury heard testimony from numerous witnesses including Lewis, two of his other children, and several physicians who testified as medical experts. Lewis claimed that he found Ma’Leah unresponsive and that she had fallen out of her bed. Lewis’s children gave conflicting testimony about the events which occurred the night of Ma’Leah’s death. The medical experts testified that Ma’Leah had been abused and that her death was probably the result of non-accidental trauma. The jury convicted Lewis of capital murder, and the court sentenced him to life imprisonment without eligibility for parole. Lewis appealed.

ISSUES

Whether (1) Miss. Code Ann. § 97-5-39(2) (Supp. 1989) applies and whether the amended statute is constitutional; (2) a capital murder indictment must include all of the elements of the underlying felony; (3) the indictment must include aggravating factors and mens rea elements for capital murder cases; (4) the trial court erred by denying Lewis’s motion to dismiss and refusing a jury instruction regarding spoliation of evidence; (5) the trial court erred by admitting improper 404(b) evidence before the jury; (6) the trial court erred by denying Lewis’s culpable-negligence instruction; (7) the underlying felony of child abuse may be used as an aggravating factor; and (8) the trial court was required to hold a jury hearing before sentencing Lewis to life without eligibility for parole.

HOLDING

(1) Because the statute cited by Lewis was no longer in effect when he committed the crime, and because the current statute is more detailed and more specific than its predecessor which was held to be constitutional, Lewis’s constitutional argument was without merit. (2) Because Lewis’s indictment included the elements of capital murder and identified the underlying felony, the indictment comported with Mississippi law and due process. (3) Because the State did not seek the death penalty, the aggravating factors and mens rea element of the crime did not need to be listed on the indictment. (4) Because Lewis failed to satisfy the three prong test for a violation of due process rights based upon destruction or spoliation of evidence, and because Lewis’s counsel admitted that he offered no evidence to warrant an instruction on spoliation, the trial court did not err by denying Lewis’s motion to dismiss and his instruction on spoliation of evidence. (5) Because the State did not attempt to make a connection between Lewis’s past actions and Ma’Leah’s death, and because Lewis initially introduced the evidence to the jury, and because Lewis did not object to the evidence at trial, the trial court did not err by admitting evidence of past occurrences to the jury. (6) Because a sufficient evidentiary basis

was not provided, the trial court did not err by refusing to grant a culpable-negligence instruction. (7) Because the State did not seek the death penalty, the underlying felony of child abuse was permissible as an aggravating factor. (8) Because life without parole was the only statutorily available sentence, the trial court did not err by sentencing Lewis without holding a jury hearing. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Circuit Court.

Affirmed - 2018-KA-00130-COA (Oct. 29, 2019)

Opinion by Judge Tindell

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

Cynthia Ann Stewart for Appellant - Matthew Wyatt Walton (Att’y Gen. Office) for Appellee

Briefed by [Luke Seymour](#)

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WILLIS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - NO APPEALABLE ISSUES - BRIEF REQUIREMENTS - In their Rule 28 brief, counsel must certify he or she reached this conclusion after thoroughly examining: (a) reason for and circumstances surrounding the arrest; (b) any possibly violations of client’s right to counsel; (c) the entire trial transcript; (d) all trial court rulings; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; and (h) possible misapplication of the law in sentencing

CRIMINAL PROCEDURE - NO APPEALABLE ISSUES - NOTICE REQUIREMENTS - Counsel must send a copy of the Rule 28 brief to the defendant, inform the client that counsel could not find any arguable issues in the record, and advise the client of their right to file a pro se brief

CRIMINAL PROCEDURE - AGGRAVATED ASSAULT - DEADLY WEAPON - A person is guilty of aggravated assault if he or she attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

FACTS

Travell Moore was shot following a confrontation he had with Kedarious Willis and his uncle Michael. Patricia Ford, the first eyewitness, testified that she saw Willis pull a gun and shoot Moore as he tried to run away. Patricia and her husband Paul both testified Moore did not have a gun. Moore testified he heard Michael say “shoot, shoot” and saw Willis pull a gun before he shot him twice from behind as Moore turned to run. Willis was arrested within minutes of the shooting. Willis first denied the shooting, then changed his story to shooting Moore in self defense. The jury convicted Willis on aggravated assault. Willis filed an unsuccessful JNOV motion after trial. Willis’s counsel filed a brief pursuant to *Lindsey v. State*, asserting he found no arguable issues for review. Willis counsel asserted he reviewed: (a) the reason for the arrest and the circumstances surrounding Willis’s arrest; (b) any possible violation of Willis’s right to counsel; (c) the entire trial transcript; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all jury instructions including the right to an instruction on Willis’s theory of the case; (g) all exhibits, whether admitted into evidence or not; (h) possible misapplication of the law in sentencing; (i) the indictment and all pleadings in the record; (j) any possible ineffective assistance-of-counsel issues; (k) any speedy trial issues; (l) any Fourteenth Amendment due process issues; (m) any evidence of other bad acts and hearsay testimony; and (n) any other possible reviewable issues. Counsel also mailed Willis a copy of this brief, and informed him of his right to file a pro se brief. Upon request of Willis’s counsel, the court entered an order giving Willis an additional forty days to file a pro se supplemental brief. No such brief has been filed to date. Willis appealed.

ISSUES

Whether (1) Willis’s counsel’s Rule 28 brief complied with all of the requirements set forth in *Lindsey*; (2) Willis’s counsel fulfilled the notice requirements of such brief; and (3) there is sufficient evidence to support Willis’s conviction.

HOLDING

(1) Because Willis's counsel filed that appropriate brief stating he diligently searched the record and failed to find any arguable issues, and because asserted he reviewed all proper materials, counsel has complied with all requirement set forth in *Lindsey*. (2) Because Willis's counsel mailed Willis a copy of the brief, informed his client he had found no arguable issues, and informed Willis of his right to file a pro se brief counsel has complied with the notice requirements laid down in *Lindsey*. (3) Because Patricia Ford testified that Willis shot Moore, Moore identified Willis and the man who shot him, and Willis eventually admitted to shooting Moore following a confrontation, the record contained sufficient evidence to show Willis purposely or knowing caused bodily injury to Moore with a deadly weapon. Further, several witnesses testified Moore was unarmed. Thus, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2018-KA-01317-COA (Oct. 29, 2019)

Opinion by Judge Westbrook

Hon. Lamar Pickard (Copiah County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Billy L. Gore (Att'y Gen Office) for Appellee

Briefed by [Charles Ellzey](#)

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