

**MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 8, 2019*****SUPREME COURT - CIVIL CASES*****MISS. SAND SOLUTIONS, LLC V. OTIS****CIVIL - REAL PROPERTY**

**DUE PROCESS - PROCEDURAL - NOTICE** - Every defendant or respondent has the right to notice in a court proceeding involving him, and to be present, and to introduce evidence at the hearing

**CIVIL PROCEDURE - TRIAL - DISCOVERY** - A trial setting requires both notice and ample time for discovery.

**CIVIL PROCEDURE - HEARINGS - SUBJECT MATTER JURISDICTION** - Trial courts are required to hear motions regarding lack of subject matter jurisdiction

**CIVIL PROCEDURE - HEARINGS - SUMMARY JUDGMENT** - Motion for summary judgment requires notice and a hearing

**FACTS**

Mississippi Sand Solutions (“MSS”) hauled sand and gravel using a private road owned by the Fisher heirs. The agreement eventually ended between the parties, and MSS sued in chancery court, asking that the court find an easement over the heirs’ property. The chancery court did not find an easement over the property, and the Mississippi Supreme Court affirmed the ruling. All settlement negotiations between the parties subsequently broke down, and the heirs demanded MSS cease and desist traveling across their property. MSS ignored the new “no trespassing” signs and tore down the recently installed gate. The heirs later reported that MSS was also dumping trash and gravel on the property and its waterways, which resulted in a citation from the Mississippi Department for Environmental Quality. This led them to sue MSS for trespass in chancery court on August 1, 2017. On August 4, 2017, the heirs filed an Emergency Motion for Temporary Restraining Order and asked that the court set a hearing for final and permanent injunction. On August 9, 2017, the heirs filed a Notice of Hearing for the Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction. The hearing began on August 23, 2017, but was continued to mid-October. During the continuance, the heirs amended their complaint, and MSS answered a few days before the new hearing date requesting the case be transferred to circuit court due to lack of subject matter jurisdiction. At the beginning of the October hearing, the court specifically stated that it was a continuation of the first hearing from August 23, 2017. At the end of the hearing, the heirs requested trespass damages and attorney’s fees. Both parties argued the issue of preliminary injunction, and the court took it under advisement. In November, the heirs filed a Motion for Trial Setting. In December, the chancery court filed a decree finding the requirements of a preliminary injunction were not met. It also ruled on the merits of the trespass complaint in favor of the heirs, awarding them attorney’s fees and damages. MSS appealed.

**ISSUES**

Whether (1) MSS was deprived of due process; (2) there was a lack of subject matter jurisdiction; and (3) the chancellor erred in awarding damages and attorney’s fees.

**HOLDING**

(1) Because MSS did not receive notice that the complaint was being tried on the merits and did not have an opportunity to meaningfully engage in the discovery process, MSS was deprived of due process. (2) Because the chancery court did not hear the issue of subject matter jurisdiction, and because the arguments and evidence were underdeveloped, the court declined to rule on this issue. (3) Because the court reversed the chancery court’s decree in full and remanded the case for proper disposal of the case on the merits, the issue of fees and damages were moot. Therefore, the Supreme Court reversed and remanded the judgment of the Warren County Chancery Court.

**Reversed & Remanded - 2017-CA-01762-SCT (Aug. 8, 2019)**  
Opinion by Presiding Justice King  
Hon. Jane R. Weathersby (Warren County Chancery Court)  
Kenneth B. Rector for Appellant - Kevin Earl Gay for Appellees  
Briefed by [Kaitlin Bethay](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 6, 2019

### COURT OF APPEALS - CIVIL CASES

#### ALMASRI V. MISS. DEP'T OF REVENUE

##### CIVIL - STATE BOARDS & AGENCIES

**TAXATION - RELIEF AGAINST ASSESSMENTS - APPELLATE JURISDICTION** - Pursuant to Miss. Code Ann. § 27-77-7, the court lacks jurisdiction if the appellant fails to post a surety bond with the petition for half of the amount in controversy or to pay the assessments under protest prior to filing the petition

**TAXATION - RELIEF AGAINST ASSESSMENTS - MOTION FOR A REDUCTION OR WAIVER** - Pursuant to Miss. Code Ann. §27-77-7, an appellant with the financial inability to post the bond or to pay the assessments may file a motion for a reduction or waiver of the bond

**CIVIL PROCEDURE - CONSTITUTIONAL QUESTION - NOTICE & TIMING OF THE MOTION** - Constitutional challenges are procedurally barred if they are raised for the first time on appeal or if the Attorney General is not given proper notice of the challenge pursuant to Miss. R. Civ. P. 24(d)

**CIVIL PROCEDURE - PLEADINGS - MOTION TO STRIKE** - A motion to strike an appellant's reply brief is properly granted if it does not cite applicable law, is outside of the record, or merely contains the appellant's personal opinions about the case

##### FACTS

The Mississippi Department of Revenue ("MDOR") audited Ali Almasri and his businesses and issued five separate tax assessments against him for sales tax, special county tax, withholding tax, prepaid wireless tax, and individual income tax. Almasri appealed to MDOR's Board of Review ("the Board"), which reduced two of the assessments and affirmed all five assessments. Almasri appealed to the Board of Tax Appeals, which affirmed the Board's decision through five separate orders. Almasri subsequently appealed to the Lee County Chancery Court, which consolidated the cases. MDOR filed a motion to dismiss, claiming the chancery court lacked jurisdiction based on Almasri's failure to comply with Miss. Code Ann. § 27-77-7 by failing to post a surety bond for half of the amount in controversy or to prepay the assessments under protest. Although Almasri's attorney claimed that Almasri was unable to pay the bond or the assessments, he failed to properly support this claim with an affidavit or sworn testimony. The chancery court found that it lacked jurisdiction based on Almasri's failure to comply with Miss. Code Ann. § 27-77-7 and granted MDOR's motion to dismiss. Almasri appealed.

##### ISSUES

Whether the chancery court erred in (1) dismissing Almasri's appeals due to lack of jurisdiction under Miss. Code Ann. § 27-77-7, and (2) applying Miss. Code Ann. § 27-77-7 to unconstitutionally deny Almasri's right of access to the court due to his inability to pay the required bond or assessments.

##### HOLDING

(1) Because Almasri failed to post a surety bond for half of the amount in controversy, to pay the tax assessments under protest, or to file a motion for a reduction or waiver of the bond, the chancery court lacked jurisdiction pursuant to Miss. Code Ann. § 27-77-7. (2) Because Almasri failed to raise the constitutional challenge of Miss. Code Ann. § 27-77-

7 before the trial court and to properly notify the Attorney General, the constitutional challenge was procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Lee County Chancery Court.

### **CONCURRENCE**

Judge Westbrook emphasized the importance of following the necessary procedures to ensure that relevant statements are eligible to be admitted as evidence and to be made part of the record and argued that Almasri's counsel failed to do this by neglecting to provide an affidavit or sworn testimony to support the claim that Almasri was unable to pay the required bond or assessments.

#### **Affirmed - 2018-CA-00105-COA (Aug. 6, 2019)**

Opinion by Judge Lawrence - Concurrence by Judge Westbrook

Hon. C. Michael Malski (Lee County Chancery Court)

William C. Stennett for Appellant - Jon Francis Carmer Jr. & Morton Ward Smith for Appellee

#### **Consolidated with:**

#### **Affirmed - 2018-CA-00107-COA (Aug. 6, 2019)**

Hon. C. Michael Malski (Lee County Chancery Court)

William C. Stennett for Appellant - Jon Francis Carmer Jr. & Morton Ward Smith for Appellee

#### **Consolidated with:**

#### **Affirmed - 2018-CA-00108-COA (Aug. 6, 2019)**

Hon. C. Michael Malski (Lee County Chancery Court)

William C. Stennett for Appellant - Jon Francis Carmer Jr. & Morton Ward Smith for Appellee

#### **Consolidated with:**

#### **Affirmed - 2018-CA-00109-COA (Aug. 6, 2019)**

Hon. C. Michael Malski (Lee County Chancery Court)

William C. Stennett for Appellant - Jon Francis Carmer Jr. & Morton Ward Smith for Appellee

#### **Consolidated with:**

#### **Affirmed - 2018-CA-00110-COA (Aug. 6, 2019)**

Hon. C. Michael Malski (Lee County Chancery Court)

William C. Stennett for Appellant - Jon Francis Carmer Jr. & Morton Ward Smith for Appellee

Briefed by [Anna McLemore](#)

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## **HAYES V. HOWARD INDUS., INC.**

### **CIVIL - WORKERS' COMPENSATION**

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

**WORKERS' COMPENSATION - DISABILITY - TEST** - A conclusion that an employee is disabled rests on a finding that the claimant could not obtain work in similar or other jobs and that claimant's unemployability was due to the injury in question

**WORKERS' COMPENSATION - EVIDENCE - DISCRETION** - The Mississippi Workers' Compensation Commission has wide discretion in the administration of compensation claims and operates under a relaxed standard in making evidentiary findings

### **FACTS**

Linda Hayes sustained a neck injury while working at Howard Industries, Inc. After one physician told her she was not a candidate for surgery, she was referred to another for pain management, who gave her work restrictions that Howard

Industries accommodated. Hayes filed for workers' compensation and a few months later the physician placed her at maximum medical improvement ("MMI") but assigned her a 5% whole-person impairment and requested that she have permanent accommodations. After two more physicians returned conflicting opinions in their assessments, Howard Industries required that Hayes undergo another independent medical exam ("IME"), which placed her at MMI and assigned her a 0% impairment rating. Hayes worked an accommodated job for two years during this time period and a full duty job for a few months after the last IME, before being terminated for refusal to work. Hayes's grievance was appealed to arbitration, and she was granted a six-month suspension, after which she refused to work full duty and was terminated again. Her grievance was once again appealed to arbitration, and she was found to have been correctly terminated for violating company rules. An administrative judge ("AJ") held a hearing regarding this matter and entered an order finding that Hayes sustained a loss of wage-earning capacity and required Howard Industries to pay permanent partial disability benefits and future medical benefits. Howard Industries appealed this to the Mississippi Workers' Compensation Commission ("the Commission"), which then entered an order rejecting the AJ's order. The Commission also rejected a decision to allow a deceased vocational expert's testimony to be admitted and admitted both arbitration orders into evidence, which the AJ declined to do. Hayes appealed.

### **ISSUES**

Whether (1) the Commission's decision is supported by substantial credible evidence; (2) the Commission's decision is contrary to the law; and (3) the Commission erred in excluding the deceased expert's vocational report and in admitting the two arbitration orders.

### **HOLDING**

(1) Because the Commission found, based on the evidence as a whole, that Hayes did not sustain a loss of wage-earning capacity as a result of her injury, and because the Commission gave greater weight to Howard Industries' expert and the doctors who found 0% impairment, the Commission's decision was supported by substantial credible evidence. (2) Because the Commission concluded that Hayes's termination was because of her subordination, instead of her injury, its decision did not turn on any finding related to the rebuttable presumption of no loss of wage-earning capacity and, therefore, was not contrary to the law. (3) Because Hayes's deceased expert could not be cross-examined and because exclusion of his report did not injure Hayes, the Commission did not err in excluding the expert's vocational report. Because Hayes did not offer any caselaw showing why it was improper to admit relevant arbitration orders into evidence and because she was not prejudiced or adversely affected by this admission, the Commission did not err in admitting this evidence. Also, the Commission's order appropriately set forth its factual findings and the law it followed in reaching its conclusion. Therefore, the Mississippi Court of Appeals affirmed the decision of the Mississippi Workers' Compensation Commission.

**Affirmed - 2018-WC-01160-COA (Aug. 6, 2018)**

Opinion by Judge C. Wilson

Mississippi Workers' Compensation Commission

Floyd E. Doolittle for Appellant - Richard Lewis Yoder Jr. & William Lawrence Thames for Appellee

Briefed by [Reid Hudson](#)

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## **HUNT V. HUNT**

### **CIVIL - DOMESTIC RELATIONS**

**CIVIL PROCEDURE - CIVIL CONTEMPT - STANDARD OF REVIEW** - Contempt matters are committed to the substantial discretion of the trial court, and the findings of the chancery court will not be disturbed unless manifestly wrong

**CIVIL PROCEDURE - FINAL JUDGMENTS - CONTEMPT OF COURT** - A contempt citation is proper when the contemnor has willfully and deliberately ignored the order of the court

**CIVIL PROCEDURE - CONTEMPT - ATTORNEY'S FEES** - The award of attorney's fees is generally proper if a party is found in contempt of a previous judgment

### **FACTS**

In 2013, Marina Hunt filed a complaint for divorce, child custody, and other relief against Marvin Hayes Hunt ("Hayes"). The parties agreed to a divorce in accordance with a "Child Custody and Property Settlement Agreement" ("the Agreement"). In the petition, Hayes was ordered to return Marina's personal effects pursuant to the Agreement. Marina filed a contempt petition against Hayes seeking the return of those personal effects. Upon not receiving her effects, Marina filed a second contempt petition against Hayes that again sought return of her personal effects and other personal items. Marina later testified that she visited Hayes's shop and subsequently located items belonging to her. After questioning Marina as well as Hayes's daughter from another marriage, the chancellor established that the items in Hayes's shop were indeed the items listed in the "personal effects" provision of the Agreement. The chancery court entered its final judgment in which the court found Hayes in willful contempt and ordered that Hayes tender over to Marina the property granted to her in the Agreement. In addition, Hayes was ordered to pay Marina's attorney's fees. Hayes appealed.

### **ISSUES**

Whether the chancery court erred (1) in finding Hayes in contempt of court and (2) in awarding Marina attorney's fees based upon its contempt determination.

### **HOLDING**

(1) Because Hayes willfully and deliberately ignored both the "personal effects" provision of the Agreement that was part of the Hunts' divorce decree and the chancellor's judgment on Marina's first contempt petition on the same issue, the chancellor's contempt determination against Hayes was affirmed. (2) Because the chancellor found that Hayes was in contempt of both the divorce decree incorporating the Agreement and the court's prior order on Marina's first contempt petition, no error was found in the chancellor's decision to award attorney's fees to Marina. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Chancery Court.

**Affirmed - 2017-CA-01764-COA (Aug. 6, 2019)**

Opinion by Presiding Judge Carlton

Hon. H.J. Davidson Jr. (Oktibbeha County Chancery Court)

Tom P. Calhoun III for Appellant - Rodney Purvis Faver for Appellee

Briefed by [Brittany Brewer](#)

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## **MARTIN V. MARTIN**

### **CIVIL - CUSTODY**

**FAMILY LAW - DIVORCE - FERGUSON FACTORS** - The foundational step to make an equitable distribution of marital assets is to determine the value of those assets, where the chancery court must apply the *Ferguson* factors which include: (1) contribution to the accumulation of the marital property; (2) dissipation of the assets; (3) the market or emotional value of assets subject to distribution; (4) the value of assets not subject to distribution; (5) the tax and economic consequences of the distribution; (6) the extent to which property division may eliminate the need for alimony; (7) the financial security needs of the parties; and (8) any other factor that in equity should be considered

**FAMILY LAW - MARITAL ASSETS - VALUATION** - It is incumbent upon the parties, not the chancery court, to prepare the evidence needed to clearly make a valuation judgement; and where a party fails to provide accurate

information, or cooperate in the valuation of assets, the chancery court is entitled to proceed on the best information available

**FAMILY LAW - CHILD CUSTODY - GUARDIAN AD LITEM** - The chancery court, not the guardian ad litem, is the ultimate finder of fact, thus, an appellate court will uphold a chancery court's custody order even if it is partly based on a less than perfect guardian ad litem investigation

### **FACTS**

Shann Martin and James "Mitch" Martin petitioned for a divorce on the ground of irreconcilable differences. Shann and Mitch's union produced one child, a son. During their marriage, Mitch's parents gifted the couple three different parcels of property totaling thirty-five acres. One of the parcels contained Mitch's parents' home, which the couple obtained in exchange for Shann's mobile home. Following the trade, the couple used their joint tax returns to make repairs and improvements to the property. During the asset distribution, neither Mitch nor Shann provided the trial court with a single valuation of the assets at issue. The trial court conducted a *Ferguson* analysis and awarded Mitch the thirty-five acres, including the marital home. The trial court awarded Shann \$20,000 in compensation for the improvements to the marital home. During the custody proceedings, an appointed guardian ad litem recommended that custody be awarded to Mitch. After considering the guardian ad litem's report and conducting a thorough *Albright* analysis, the trial court awarded physical custody of the couple's son to Mitch and ordered Shann to pay \$382 a month in child support. Shann appealed.

### **ISSUES**

Whether the trial erred in (1) the division of the marital assets and (2) the determination of child custody.

### **HOLDING**

(1) Because the trial court fully explored the available proof and arrived at the best conclusions that it could in light of the lack of evidence concerning property values, it did not err in its division of marital assets. (2) Because the trial court performed a thorough *Albright* analysis in addition to considering the guardian ad litem's report, it did not err in awarding physical custody of the couple's son to Mitch. Therefore, the Court of Appeals affirmed the judgment of the Warren County Chancery Court.

**Affirmed - 2018-CA-00423-COA (Aug. 6, 2019)**

Opinion by Judge McCarty

Hon. Jane R. Weathersby (Warren County Chancery Court)

David M. Sessums for Appellant - Branan Patrick Southerland for Appellee

Briefed by [Harrison Smith](#)

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## **RUSHING V. MOBILE FOREST PRODS., INC.**

### **CIVIL - PERSONAL INJURY**

**CIVIL PROCEDURE - AUTOMOBILE ACCIDENTS - ADMISSION OF DRIVER'S TOXICOLOGY RESULTS** - The Mississippi Supreme Court has granted substantial leeway to the finders of fact in determining whether one was intoxicated during the accident; allowing them to take judicial notice of the presence of even small amounts of alcohol or drugs in the driver's system

**CIVIL PROCEDURE - JURY INSTRUCTIONS - PROPER EXCLUSION** - In considering whether the grant or refusal of jury instructions constitutes reversible error, a court reads the instructions actually given as a whole and will not reverse a verdict so long as the instructions, taken together, fairly announce the law and create no injustice

### **FACTS**

Dennis Houston Rushing ("Dennis") was killed while riding as a passenger in an ambulance, driven by William Smith, when it crashed into an eighteen-wheeler driven by Charles Bexley. Bexley was driving northbound on Highway 63 with

Dason Arrington driving another eighteen-wheeler behind him. Bexley, planning on making a left turn, radioed Arrington to inform him of the turn before slowing down and putting on his blinker. Arrington also began to slow down. Unbeknownst to either truck driver, Smith and his passenger, Dennis, were rapidly approaching both trucks in the northbound lane while traveling over the speed limit (55 miles per hour) at a rate of 75 miles per hour. As Smith approached the trucks, he attempted to pass them in the southbound lane; however, Bexley was already in the process of his left turn, and the ambulance struck Bexley's eighteen-wheeler on its front-left side near the fuel tank. The ambulance caught fire on impact, and both Smith and Dennis perished. Arrington's truck was not involved in the collision. Dennis's father, Steven Rushing, brought a wrongful death suit against Charles Bexley and his employer, Henderson Timber Felling Inc., as well as against Arrington and his employer, Mobile Forest Products Inc., claiming they were negligent for failing to come to a stop on the right side of the road when the ambulance passed, and for failing to remain at least 300 feet from another motor truck as required by Mississippi law. Before trial, Rushing settled his claims against Bexley and Henderson. Arrington testified he was at least 300 feet from Bexley's truck before the crash occurred and that he never heard sirens nor saw the ambulance. Four other witnesses testified they heard the ambulance sirens as it passed a church. Dr. John Stevenson of the Mississippi Forensics Laboratory was admitted as an expert in forensic toxicology and tested Smith and Dennis's blood samples after the tragedy. Dr. Stevenson testified that Smith, the ambulance driver, tested positive for amphetamine and methamphetamine. Rushing objected to this testimony, claiming it had little probative value because the mere presence of amphetamines did not prove Smith was under the influence at the time of the accident. The court overruled the objection, the jury found Arrington was not negligent, and it returned a verdict for Arrington. Rushing appealed.

### ISSUES

Whether the circuit court erred in (1) admitting the ambulance driver's blood-test results into evidence and (2) denying jury instruction P-5.

### HOLDING

(1) Because the jury was entitled to judge the expert's opinion in the context of all of the evidence in the case and the jury's own general knowledge of affairs, the threshold for admitting toxicology evidence regarding drivers in an automobile accident is notably low, and the court did not err in admitting the ambulance driver's blood-test results into evidence. (2) Because the given instructions announce both the statute requiring a driver to stop on the right side of the road when an ambulance passes and the statute requiring eighteen wheelers to keep a distance from each other of 300 feet, the exclusion of jury instruction P-5 did not constitute reversible error. Therefore, the Court of Appeals affirmed the judgment of the Greene County Circuit Court.

**Affirmed - 2018-CA-00075-COA (Aug. 6, 2019)**

Opinion by Judge Lawrence

Hon. Kathy King Jackson (Greene County Circuit Court)

Wayne Dowdy & Dunbar Dowdy Watt for Appellant - J. Stephen Kennedy & Samuel Deucalion Gregory for Appellee

Briefed by [Charles Ellzey](#)

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## WASTE MGMT. OF MISS. INC. V. JACKSON RAMELLI WASTE LLC

### CIVIL - CONTRACT

**CONTRACTS - EXPIRED CONTRACTS - CONTINUED BUSINESS DEALINGS** - If a contract expires and the parties continue their business relations, they are not bound by the terms of the expired contract

**PLEADINGS - AMENDMENTS - PREJUDICE** - The court should not allow an amendment where the motion to amend comes so late that the defendant would be prejudicially affected

**CONTRACTS - QUANTUM MERUIT - REASONABLE EXPECTATION** - For a quantum meruit claim, a claimant must establish their reasonable expectation of compensation

**EVIDENCE - ADMISSIBILITY - SUMMARY EVIDENCE** - The court should exclude summary evidence if the underlying records are not produced or made available

### **FACTS**

Waste Management of Mississippi Inc. (“Waste Management”) contracted with Jackson Ramelli Waste LLC (“Ramelli”) for Ramelli to perform trash-collection services. After their contract expired, Ramelli and Waste Management continued their business dealings. Ramelli subsequently sued Waste Management, alleging it failed to pay for trash-collection services for additional houses, consumer price index (“CPI”) increases, and work performed during this period. Waste Management counterclaimed, alleging breach-of-contract and fraud-based causes of action. At trial, Ramelli used a demonstrative exhibit (“P-32”) with a chart setting forth calculations for additional compensation. The Hinds County Circuit Court treated P-32 as a summary and allowed it into evidence and allowed the jury to have it during deliberations. At the close of evidence, the Hinds County Circuit Court allowed Ramelli to amend its complaint to include a quantum meruit claim. Thus, two theories of recovery were submitted to the jury: breach of contract and quantum meruit. The Hinds County Circuit Court granted Ramelli’s motion for a directed verdict on Waste Management’s counterclaim and issued a general judgment in Ramelli’s favor, awarding \$1,017,527.56 in damages. Waste Management appealed.

### **ISSUES**

Whether the trial court erred in (1) denying Waste Management’s motions for directed verdict and a JNOV on Ramelli’s breach-of-contract claim; (2) allowing Ramelli’s quantum meruit amendment; (3) denying Waste Management’s motion for a directed verdict and a JNOV on Ramelli’s quantum meruit claim; (4) allowing P-32 into evidence; and (5) granting Ramelli’s motion for a directed verdict on Waste Management’s breach-of-contract and fraud counterclaims.

### **HOLDING**

(1) Because the expired contract did not bind the parties, and because evidence failed to show Waste Management’s agreement to pay for the additional homes or CPI rate adjustments, the trial court erred in allowing Ramelli’s breach-of-contract claim to go to the jury. (2) Because Waste Management had no opportunity to conduct discovery or prepare a defense to the quantum meruit claim, the trial court abused its discretion in allowing the amendment after the close of trial. (3) Because Ramelli had a reasonable expectation of compensation for the additional homes served and annual CPI increases, the trial court did not err in denying Waste Management’s motion for a directed verdict and a JNOV, but because it should have been a fact question for the jury, the issue was remanded for discovery and a new trial. (4) Because Waste Management did not receive underlying documentation supporting the P-32 chart’s calculations, the summary exhibit should not have been allowed. (5) Because there was not legally sufficient evidence that Ramelli breached the contract or that Ramelli’s alleged misrepresentations injured Waste Management, the trial court did not err in granting Ramelli’s motion for a directed verdict on Waste Management’s counterclaims. Therefore, the Court of Appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part the judgment of the Hinds County Circuit Court.

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

Judge J. Wilson argued that Waste Management’s consistent refusal to agree to an increase in compensation precluded Ramelli from a “reasonable expectation” of additional compensation. Consequently, Ramelli’s quantum meruit claim should be reversed and rendered, and a final judgment entered for Waste Management.

#### **Affirmed in Part; Reversed & Rendered in Part; Reversed & Remanded in Part - 2018-CA-00164-COA (Aug. 6, 2019)**

Opinion by Presiding Judge Carlton - Concurrence in Part/Dissent in Part by Presiding Judge J. Wilson

Hon. Tomie T. Green (Hinds County Circuit Court, First Judicial Dist.)

Latoya Cheree Merritt, Fred L. Banks Jr., & Nikita Sherrell McMillian for Appellant - Sheldon G. Alston, Matthew Wade Allen, & Catherine E. Lasky for Appellee

Briefed by [Haley Nutt](#)

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## BENNETT V. STATE

### CIVIL - POST-CONVICTION RELIEF

**ETHICS - INEFFECTIVE ASSISTANCE OF COUNSEL - CONFLICT OF INTEREST** - Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial

**CRIMINAL PROCEDURE - COUNTY COURTS - JURISDICTION** - Pursuant to Miss. Code Ann. § 9-9-21, county courts shall have jurisdiction over criminal matters in the county assigned by a judge of the circuit court district in which the county is included

**JUDGES - RIGHTS, POWERS, DUTIES, & LIABILITIES - EXERCISE OF POWERS BEYOND TERRITORIAL LIMITS OF JURISDICTION** - Lack of written order of assignment to a county court judge does not divest the county court judge of authority & jurisdiction to accept pleas and impose sentences in felony cases

### FACTS

Rafeal Bennett was indicted on two counts of bank robbery along with two codefendants. The court appointed Ray Charles Carter, an attorney with the Hinds County Public Defender (“HCPD”) to represent Bennett. After Bennett waived arraignment and pled not guilty, Carter moved to withdraw as counsel for Bennett because HCPD already represented one of Bennett’s codefendants. Carter advised the court of the clear conflict of interest, and the court granted Carter’s motion to withdraw and subsequently appointed Stevenson, a conflict-free attorney, to represent Bennett. Bennett, ultimately, pled guilty to two counts of armed robbery. Hinds County Court Judge Melvin Priester conducted Bennett’s plea hearing and sentencing, although the record and docket lacked a showing that an order was entered assigning the case to Judge Priester. Bennett filed a post-conviction relief (“PCR”) motion and alleged that his plea and conviction should be set aside because of Carter’s conflict of interest and Judge Priester’s lack of jurisdiction and authority. The Hinds County Circuit Court denied Bennett’s motion for PCR. Bennett appealed.

### ISSUES

Whether the circuit court erred in denying Bennett’s motion for post-conviction relief based on (1) his ineffective assistance of counsel and (2) the county court judge, who accepted his plea and sentenced him, lacking jurisdiction and authority.

### HOLDING

(1) Because counsel moved to withdraw and properly disclosed his office’s conflict of interest, and because a conflict-free attorney was appointed and represented Bennett during his plea and sentencing, there was no ineffective assistance of counsel per se, and the circuit court did not err in denying Bennett’s motion for PCR. (2) Because Judge Priester had jurisdiction and authority to accept pleas and impose sentences in felony cases assigned to him pursuant to Miss. Code Ann. § 9-9-21, and because Bennett failed to object to the lack of written order assigning the case to Judge Priester, there was proper jurisdiction and authority; thus, the circuit court did not err in denying Bennett’s motion for post-conviction relief. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

### CONCURRENCE IN PART/DISSENT IN PART

Judge McCarty agreed with the majority’s conclusion as to the ineffective assistance of counsel issue. However, he argued that the lack of written order of assignment involved a jurisdictional issue rather than an administrative oversight and dissented with the majority’s application of wavier.

#### **Affirmed - 2018-CA-00624-COA (Aug. 6, 2019)**

En Banc Opinion by Presiding Judge Wilson - Concurrence in Part/Dissent in Part by Judge McCarty

Hon. Tomie T. Green (Hinds County Circuit Court, First Judicial Dist.)

Cynthia Ann Stewart for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [Nicole Broussard](#)

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## MORALES V. STATE

### CIVIL - POST-CONVICTION RELIEF

**CRIMINAL PROCEDURE - TRIAL IN ABSENTIA - WAIVER** - A court may allow a trial in absentia when the defendant has notice of the allegations against him but has nonetheless voluntarily fled

**POST-CONVICTION RELIEF - PROCEDURAL BARS - EXCEPTIONS** - Four fundamental rights have been expressly found to survive PCR procedural bars: (1) the right against double jeopardy; (2) the right to be free from an illegal sentence; (3) the right to due process at sentencing; and (4) the right not to be subject to ex post facto laws

**SENTENCING ORDERS - CLERICAL ERRORS - DISCRETION** - A trial court has inherent power to direct the entry of nunc pro tunc sentencing orders to correct a clerical error by the court

#### FACTS

Juan Morales was indicted in August 2005 for two counts of sexual battery and one count of fondling. The indictment listed the charges, in order, as (Count One) sexual battery, (Count Two) fondling of a child, and (Count Three) sexual battery. At his arraignment, Morales pled not guilty and was released on bond. On the morning of trial, Morales did not appear. Counsel for Morales stated that he had confirmed that Morales knew of the date, time, and place of trial. The Lee County Circuit Court entered a warrant for Morales's arrest, and further found that Morales had willfully, voluntarily, and deliberately avoided trial and that trial in absentia was appropriate. Counsel for Morales cross-examined witnesses and presented a defense. The Lee County Circuit Court instructed the jury not to draw any inference from Morales's absence. The jury found Morales guilty on all three counts. On February 9, 2007, the Lee County Circuit Court sentenced Morales to twenty-five years with five years suspended and five years post-release supervision for Count One, fifteen years to be served concurrent to Count Three for Count Two, and twenty years to be served consecutively to Count One for Count Three. However, the sentencing order transposed the titles of Counts Two and Three so that Count Two was titled "sexual battery" and Count Three was titled "fondling." The United States Marshals found Morales in Mexico in 2012 and remanded him to the custody of the Mississippi Department of Corrections ("MDOC"). Morales filed his petition for post-conviction relief ("PCR") in September 2017, asserting the trial court erred by allowing trial in absentia, imposition of an illegal sentence, and ineffective assistance of counsel. In May 2018, the Lee County Circuit Court entered an order granting relief with regard to the illegal sentence and denying relief to the other two claims. The partial relief granted was to amend the sentencing order so that the sentences aligned with the proper charge. Morales appealed.

#### ISSUES

Whether (1) the trial court erred by allowing trial in absentia; (2) Morales was given an illegal sentence; and (3) Morales received ineffective assistance of counsel.

#### HOLDING

(1) Because Morales filed his petition outside the statutory period for filing such a motion, had not demonstrated any exception to the time-bar was relevant or applicable, and had notice of his trial but voluntarily fled, the trial court's denial of relief with regard to his trial in absentia was appropriate. (2) Because an illegal sentence is an allegation that survives the procedural time bar, and because the trial court has inherent power to direct the entry of nunc pro tunc sentencing orders to correct a clerical error by the court, the trial court's grant of relief to amend the sentencing order was appropriate. (3) Because Morales filed his petition outside the statutory period for filing such a motion and had not demonstrated any exception to the time-bar was relevant or applicable, the trial court's denial of relief with regard to his ineffective assistance of counsel claim was appropriate. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

**Affirmed - 2018-CP-00737-COA (Aug. 6, 2019)**

Opinion by Judge C. Wilson

Hon. Paul S. Funderburk (Lee County Circuit Court)

*Pro se* for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Michael Stirgus](#)

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

### **GRAYER V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTION - LESSER-INCLUDED OFFENSE** - A defendant is entitled to a lesser-included offense instruction if there is an evidentiary basis for the instruction in the record

**CRIMINAL PROCEDURE - JURY INSTRUCTION - LESSER-INCLUDED OFFENSE** - A lesser-included offense instruction should be given if a rational or reasonable jury could find a defendant guilty of the offense

**CRIMINAL PROCEDURE - LESSER-INCLUDED OFFENSE - BURGLARY** - Trespass is a lesser-included-offense to every burglary

#### **FACTS**

Melvin Grayer was convicted of burglary and sentenced to serve fourteen years in custody as a habitual offender. Officer Victor Moreno and Officer Zachary Couey responded to an alarm call at the Tabernacle Faith Ministries Church in Gulfport and found Grayer lying face down on the floor in the church's kitchen area. The officers noticed a broken window on the side of the church. They searched Grayer and found an identification card, rolls of masking tape, batteries, a jersey, and a bottle of liquid. The usher room appeared to be ransacked, but Pastor Anthony Thompson indicated that the items that were usually in the room did not seem to be missing. Grayer denied that he was committing burglary and stated that he saw a man named Larry Smith break into the church and run away. Officer Couey believed that "Larry Smith" was an alias that Grayer used for himself. Grayer stated that he entered the church to have a place to sleep. At trial, the jury was only given an instruction for burglary and returned a guilty verdict. Grayer appealed.

#### **ISSUE**

Whether the trial court erred by refusing to give a jury instruction on the lesser-included-offense of trespass.

#### **HOLDING**

Because Grayer presented an alternative explanation of his presence in the church for which a rational jury could have found him guilty, the trial court should have given a jury instruction on trespass. Therefore, the Court of Appeals reversed and remanded the judgment of the Harrison County Circuit Court.

#### **DISSENT**

Judge Lawrence argued that ample evidence existed to demonstrate Grayer's intent to steal from the church. He agreed with the reasoning and precedent cited by the trial court that included facts similar to those in the present case. He also argued that the trial court did not abuse its discretion or misapply the law.

#### **Reversed & Remanded - 2018-KA-00391-COA (Aug. 6, 2019)**

Opinion by Judge McCarty - Dissent by Judge Lawrence

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, First Judicial Dist.)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Luke Seymour](#)

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