

MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 15, 2019**SUPREME COURT - CIVIL CASES****MISS. DEPT. OF HUMAN SERVS. V. D.C.****CIVIL - PERSONAL INJURY**

CIVIL PROCEDURE - STATE DEPARTMENTS - IMMUNITY - Under Miss. Code Ann. § 43-15-125, the Department of Human Services and/or its officers, employees, attorneys and representatives shall not be held civilly liable for any findings, recommendations or actions taken pursuant to this article

CIVIL PROCEDURE - STATE DEPARTMENTS - LICENSING AUTHORITY - Miss. Code Ann. § 43-15-125 establishes DHS as the licensing authority and vests it with the authority to approve, extend, deny, suspend and revoke licenses for foster homes

CIVIL PROCEDURE - STATE DEPARTMENTS - DISCRETIONARY-FUNCTION IMMUNITY - Under the public-policy function test, the Court first must ascertain whether the activity in question involved an element of choice or judgment, and if so, then decide whether that choice or judgment involved social, economic, or political-policy considerations

FACTS

Jason Case was approved as a foster parent after he passed the Department of Human Service's ("DHS") statutorily required background checks. DHS placed brothers B.W. and D.W. with Case but received allegations of physical abuse by Case against the brothers. However, DHS determined that the allegations of physical abuse were unsubstantiated. DHS then placed D.C., a minor child, with Case and a DHS caseworker visited D.C. in Case's home on November and December 2011. On January 1, 2012, D.C. called a DHS caseworker and informed her that Case had sexually abused him. DHS contacted a judge who authorized the removal of D.C. from Case's home and the placement of D.C. with his mother. Next, DHS conducted an investigation into D.C.'s allegations which included interviewing B.W. and D.W. They reported (for the first time) that Case had sexually abused them as well. D.C., through his natural mother, Georgia Morin, sued Case, DHS, Richard Berry (in his capacity as executive director of DHS) and John Does One through Five. DHS moved for summary judgment and maintained that it had complied with all of the statutorily required background checks of Case and had conducted a thorough home study of Case's home. D.C. responded to DHS's motion for summary judgment and detailed the abuse against him and alleged that DHS "made no effort to provide psychiatric care or counseling" to him after Case's abuse of him. Next, DHS moved to strike each of D.C.'s exhibits to his motion for summary judgment except the sentencing order. Two years later, DHS renewed its motion for summary judgment and its motion to strike. The circuit court denied DHS's renewed motion for summary judgment as well as its motion to strike. DHS filed a petition for interlocutory appeal.

ISSUES

Whether the trial court erred in denying summary judgment (1) by failing to acknowledge DHS's licensing immunity under Miss. Code Ann. § 43-15-125 and (2) by failing to grant DHS's immunity under the Mississippi Tort Claims Act ("MTCA").

HOLDING

(1) Because Miss. Code Ann. § 43-15-125 grants immunity to DHS for its licensing of foster homes, the circuit court erred in denying DHS's motion for summary judgment as to any claims that sought to hold DHS liable for its findings, recommendations or action in licensing the foster home. (2) Because there was no evidence in the record that DHS followed its policies and regulations regarding DHS's care and treatment of D.C. during placement or after the abuse

allegations were reported and investigated, DHS failed to meet its dual burdens of production and persuasion, and thus, was not entitled to summary judgment under MTCA.

Affirmed in part; Reversed in Part & Remanded - 2018-IA-00592-SCT (Aug. 15, 2019)

Opinion by Justice Chamberlin

Hon. Michael M. Taylor (Lincoln County Circuit Court)

C. Stephen Stack, Jr. for Appellants - Joseph P. Durr, W. Brady Kellems, and Cheli K. Durr for Appellees

Briefed by [Sarah Schofield](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 13, 2019

COURT OF APPEALS - CIVIL CASES

BRADSHAW V. BRADSHAW

CIVIL - CUSTODY

DIVORCE - ADULTERY - DEGREE OF PROOF - To prove adultery by circumstantial evidence, plaintiff must provide clear and convincing evidence supporting a finding of (1) an adulterous inclination, and (2) a reasonable opportunity to satisfy that inclination

DIVORCE - GROUNDS - CRUELTY - Habitual cruel and inhumane treatment may be established by a showing of conduct that either (1) endangers life, limb, or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief; or (2) is so unnatural and infamous as to make the marriage revolting to the non-offending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance

DIVORCE - PROPERTY DIVISION - FACTORS AND CONSIDERATIONS - When dividing marital property, chancellors are directed to (1) classify the parties' assets as marital or separate; (2) determine the value of those assets; (3) divide the marital estate equitably based upon the *Ferguson* factors; and (4) consider the appropriateness of alimony if either party is left with a deficiency

FACTS

Loyd and Martha Bradshaw were married in 1989. On February 19, 2016, Loyd filed a complaint for divorce, alleging uncondoned adultery and habitual cruel and inhumane treatment, or in the alternative, irreconcilable differences. Martha filed an answer and a counter-complaint, denying the allegations, asserting several affirmative defenses, and requesting a divorce on the ground of cruel and inhumane treatment, or in the alternative, irreconcilable differences. Martha also requested custody of their child, alimony, and attorney's fees. After Loyd rested his case-in-chief, following testimony by Martha, Loyd, and their child regarding property, custodial preferences, and marital conditions, the chancellor reserved ruling on the ground for divorce until the second day of trial. Several months later, the trial resumed, and after Martha's request to have her case-in-chief reopened for her sister to testify was granted, the chancery court entered its final judgment, granting Loyd a divorce on the ground of adultery. Martha appealed.

ISSUES

Whether the chancellor erred by (1) granting Loyd a divorce on the ground of adultery; (2) denying Martha a divorce on the ground of habitual cruel and unusual punishment; (3) failing to recuse; (4) awarding physical custody of the minor child to Loyd; (5) dividing the property; and (6) denying Martha's request for attorney's fees.

HOLDING

(1) Because Martha refused to testify, and because Loyd proffered uncontradicted evidence as corroborated by their child, the evidence was sufficient to prove Martha's adultery by clear and convincing evidence. (2) Because Loyd's conduct did not rise to the level of unnatural and infamous behavior, which supports granting a divorce, the chancellor

did not abuse his discretion by denying Martha a divorce on the ground of habitual cruel and inhumane treatment. (3) Because Martha did not raise the issue of chancellor recusal until appeal, and because she had ample opportunity to do so, Martha waived the issue. (4) Because there was substantial evidence supporting the chancellor's findings regarding the child custody *Albright* analysis, the chancellor properly granted custody of the child to Loyd. (5) Because the chancellor did not distribute separate property, and because he did consider the relevant *Ferguson* factors, the division of the property was not an abuse of discretion. (6) Because there was insufficient evidence in the record that Martha was unable to pay her attorney's fees, the chancellor did not abuse his discretion in denying Martha's request for attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

CONCURRENCE

Judge McCarty argued that while he agreed with the court's opinion, he found issue with the chancellor's granting of the final judgment of divorce to the husband at the end of the first trial day. He noted that the majority correctly noticed that the judgment of divorce was set aside, but that this was only done so the wife would not lose her insurance during the gap between the ruling and the later division of marital assets. Judge McCarty argued that because of this decision by the chancellor, no one could reasonably have been assured that the chancellor could have still been fair and impartial for the remainder of the trial. He stated that without all the facts, the chancellor made a split-second decision and memorialized that decision in a written order. He concluded his concurrence by quoting Justice Griffith: a chancellor will still be "unable to render righteous judgments unless he hear[s] every matter fully"

Affirmed - 2017-CA-01731 (Aug. 13, 2019)

Opinion by Judge Greenlee - Concurrence by Judge McCarty
Hon. D. Neil Harris Sr. (Jackson County Chancery Court)
Mark V. Knighten for Appellant - Gary L. Roberts for Appellee
Briefed by [Joshua Crownover](#)

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HAYS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - Under Mississippi's Uniform Post-Conviction Collateral Relief Act the denial of a post-conviction relief motion is a final judgment and bars subsequent requests for post-conviction relief unless the petitioner can prove a violation of (1) the right against double jeopardy; (2) the right to be free from an illegal sentence; (3) the right to due process at sentencing; or (4) the right not to be subject to ex post facto laws

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - WAIVER - The statute of limitations may be waived when a fundamental constitutional right is implicated

FACTS

Howard Hays pled guilty to one count of commercial burglary and one count of auto theft in 2015. The Leflore County Circuit Court sentenced Hays to serve seven years, day for day, as a non-violent habitual offender for the burglary and five years, day for day, as a non-violent habitual offender for the auto theft. Hays's sentences were to run consecutively. He filed his first post-conviction relief ("PCR") motion in 2016 in which he asserted (1) ineffective assistance of counsel, (2) failure to provide a timely initial appearance, (3) that the State unlawfully detained him for more than 180 days without a formal charge, and (4) that the State charged him with grand larceny based upon an affidavit for petit larceny. The trial court dismissed the motion, and Hays did not make a timely appeal. He filed a second PCR motion in 2017 in which he made the same assertions plus additional claims alleging violations of his constitutional rights. The trial court again dismissed the motion, finding that it was barred as an impermissible successive writ. Hays appealed.

ISSUE

Whether the trial court erred by dismissing Hays's second PCR motion as procedurally barred.

HOLDING

Because under Mississippi's Uniform Post-Conviction Collateral Relief Act any order denying or dismissing a PCR motion is a bar to a second or successive PCR motion unless it was an error that affects certain fundamental rights, and because, in order for his subsequent PCR motion to succeed, Hays needed to prove that he had been subjected to either (1) double jeopardy, (2) an illegal sentence, (3) a violation of due process at sentencing, or (4) an ex post facto law, and because Hays did not provide evidence of violations of the fundamental rights that were exceptions to the procedural bar, and because the remainder of the issues he raised had already been addressed in his first PCR motion and were barred, the trial court did not err by dismissing his second PCR motion as procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Leflore County Circuit Court.

CONCURRENCE

Judge McCarty agreed with the conclusion but argued that there should not be a limited list of fundamental rights that are exceptions to the PCR procedural bar. He also argued that applying a procedural bar to errors affecting fundamental rights was a significant deprivation of liberty, and, rather than enumerate a list of things that were barred, would instead recommend proceeding on the merits of the case in order to make sure any issues regarding fundamental, constitutional rights were adequately reviewed and resolved.

Affirmed - 2018-CP-00593-COA (Aug. 13, 2019)

Opinion by Judge Wilson - Concurrence by Judge McCarty

Hon. Margaret Carey-McCray (Leflore County Circuit Court)

Pro se for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [David Boydston](#)

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HERRIN V. PERKINS

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - APPEALS - WAIVER - Appellate courts will not review matters on appeal that were not raised at the trial court level

CIVIL PROCEDURE - APPEALS - FAILURE TO CITE AUTHORITY - It is the duty of the appellant to provide authority in support of an assignment of error

CIVIL PROCEDURE - APPEALS - ATTORNEY'S FEES - A request for appellant attorney's fees must be made in a motion that complies with Miss. R. App. P. 27(a)

FACTS

Marshall Herrin and Lacey Perkins had a child, K.W.H., in 2015. Testing confirmed Herrin was the father, and Perkins sued him for paternity and other relief. The Rankin County Chancery Court entered an agreed temporary judgment ordering Herrin to pay \$250 per month for child support and an additional \$100 per month for daycare. A few months later, Perkins filed a "Petition for Citation for Contempt" against Herrin for failure to pay child support. At the time, Herrin was working two jobs and had child support obligations for his other child. The parties incorporated an agreement into an agreed final judgment, which granted physical custody to Perkins, but the parents shared legal custody. According to the agreement, Herrin had to provide health insurance and pay \$300 per month in child support, plus \$50 per month in past-due child support payments. Herrin also agreed to pay Perkins's attorney fees of \$1,500 at \$125 per month, and the parties decided to split daycare costs evenly. Perkins, Herrin, and their attorneys signed the order entered by the court. After this agreement was made, Herrin's nine-year-old son moved in with him, but he continued to pay his child support for that child and received no additional support. Herrin decided to go to paramedic school, which reduced his income and caused him to miss his payments to Perkins. Perkins filed a petition for contempt and demanded \$1,695. Herrin was subsequently served, and he made no demand for a more specific pleading and admitted that he was behind on his payments for attorney's fees. Herrin asked for a modification because he could no longer pay the amount owed. Perkins filed an amended petition, and Herrin answered. At the hearing, Perkins testified that Herrin had only

made two payments toward attorney's fees and had not paid any portion of his daycare obligation. Herrin denied knowledge of his daycare obligation despite the fact his signature is on the final judgment and offered no proof to challenge Perkins's monetary figures. The Rankin County Chancery Court ruled from the bench and found by clear and convincing evidence that Herrin was in contempt. The court ordered him to pay the past due attorney's fees within 60 days and to pay the amount owed for daycare at a rate of \$100 per month. The court also awarded attorney's fees to Perkins but was sympathetic to Herrin and lowered his child support obligation from \$300 to \$180 for the following six months. Herrin appealed.

ISSUES

Whether (1) the chancery court erred by not dismissing Perkins's petition because it was insufficient and (2) Perkins was entitled to attorney's fees on appeal.

HOLDING

(1) Because Herrin waived his issue on appeal, failed to cite authority, and Perkins's petition contained a short and plain statement showing she was entitled to relief and a demand for judgment, the petition complied with the liberal pleading requirement of Miss. R. Civ. P. 8 and was therefore sufficient. (2) Because the Mississippi Supreme Court recently held that a request for appellate attorney's fees must be made in a motion that complies with Miss. R. App. P. 27(a), Perkins's request for appellate attorney's fees was denied without prejudice. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - 2018-CA-00868-COA (Aug. 13, 2019)

Opinion by Judge McDonald

Hon. Haydn Judd Roberts (Rankin County Chancery Court)

M. Judith Barnett for Appellant - Katrina M. Bibb Gibbs for Appellee

Briefed by [Allison Middleton](#)

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ITTA BENA PLANTATION III V. GATES

CIVIL - WORKERS' COMPENSATION

AGENCIES - WORKERS' COMPENSATION - WAGE-EARNING CAPACITY - Decisions as to loss of wage-earning capacity are factual and left to the discretion and estimate of the Commission

AGENCIES - WORKERS' COMPENSATION - MEDICAL TESTIMONY - The Commission is the ultimate fact-finder in addressing conflicts in medical testimony and opinion

FACTS

Raymond Gates suffered a work-related injury while employed for Itta Bena Plantation. Gates was treated for one year by Dr. Rahul Vohra, who determined that Gates had reached maximum medical improvement and assigned Gates's permanent work restrictions to light duty. Gates later underwent an independent medical evaluation by Dr. Howard Katz, who determined that Gates was capable of medium-duty work. Vocational expert, Angela Malone, calculated Gates's loss of access to the labor market using both the light-duty work restriction assessed by Vohra and the medium-duty work restriction assessed by Katz. Malone calculated that Gates's restriction to light-duty work resulted in a 74% loss of access to the labor market, and his restriction to medium-duty work resulted in a 17% loss. After a hearing, the administrative judge ("AJ") found that Gates had suffered a 75% loss of wage-earning capacity and awarded him permanent partial disability ("PPD") benefits. The AJ's findings were affirmed by the Mississippi Workers' Compensation Commission ("the Commission"). Itta Bena appealed, and Gates cross-appealed.

ISSUES

Whether the Commission erred in (1) calculating the loss of wage-earning capacity; (2) interpreting medical evidence regarding Gates’s permanent work restrictions; (3) not finding Gates to have a permanent total disability (“PTD”); and (4) permitting and relying upon Malone’s evaluation and testimony.

HOLDING

(1) Because the Commission considered the record as a whole, including Gates’s loss of access to the job market, the Commission did not err in calculating wage-earning capacity. (2) Because Vohra, as Gates’s treating physician, was in a position of superior knowledge regarding Gates’s medical impairment, there was substantial evidence to support the Commission’s findings. (3) Because Gates remained employable and the Employer rebutted the presumption of permanent total disability, the Commission did not err in finding that Gates had a PPD. (4) Because the Commission is entitled to resolve any conflicts or inconsistencies in the evidence and is the ultimate judge of the credibility of witnesses, they did not err in allowing Malone’s testimony. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers’ Compensation Commission.

On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2018-WC-00958-COA (Aug. 13, 2019)

Opinion by Judge McCarty

(Mississippi Workers’ Compensation Commission)

Loraleigh Christine Phillips for Appellants - Joseph Rodney Franks for Appellee

Briefed by [Melissa Fenwick](#)

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JOHNSON V. JOHNSON

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - DISTRIBUTION OF PROPERTY - When ordering an equitable distribution of property, a chancellor must determine findings of fact based on the *Ferguson* factors: (1) contribution to the accumulation of property, (2) dissipation of 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

EVIDENCE - HEARSAY - INADMISSIBILITY - Prior to the trial or hearing at which the record will be offered, the proponent must notify the adverse party of their intent to offer the record—and provide a copy of the record and certificate—so that the party has a fair opportunity to voice any objection. Otherwise, the record is not self-authenticating under Miss. R. Evid. 902(11)

EVIDENCE - OBJECTIONS - WAIVER - If not stated specifically in writing and served within 15 days after receiving the notice required by subparagraph (B), or at a later time that the parties agree on or that the court allows, the adverse party waives any objection

FACTS

Terry and Teresa Johnson married in 1998. They lived in Teresa’s mother’s house that was eventually deeded to Teresa in 2003 and then purchased by Terry in 2008. In November 2017, Teresa filed for divorce, alleging habitual cruel treatment. Terry filed a counter-complaint also alleging cruel treatment, as well as adultery. Teresa admitted to engaging in extramarital affairs with two men and also testified that both her and Terry were physically abusive, but that Terry was emotionally and verbally abusive as well. In 2012, Teresa started counseling which she was still receiving at the time of the trial. The chancery court admitted Teresa’s counseling records into evidence. The chancery court awarded Terry a divorce based on adultery. Teresa was awarded the Johnson’s house in addition to the three acres surrounding the home and several cars. Terry was also awarded several cars, as well as his retirement account. Terry appealed.

ISSUES

Whether the chancellor erred by (1) failing to consider Teresa's extramarital affairs when dividing the marital property and (2) admitting Teresa's counseling records into evidence.

HOLDING

(1) Because the order shows that the chancellor considered Teresa's adultery in his *Ferguson* analysis, and because each party received property of nearly identical monetary value, the chancellor did not err in failing to consider Teresa's extramarital affairs in dividing the marital property. (2) Because the court will not consider matters which do not appear in the record, and because Terry waived his claims concerning Teresa's counseling records, and because any error in admitting the record is harmless, the chancellor did not err in admitting Teresa's counseling records into evidence. Therefore, the Court of Appeals affirmed the judgment of the Chickasaw County Chancery Court.

CONCURRENCE

Judge Tindell argued that Terry's failure to comply with Miss. R. Evid. 902(11)(C) did not waive his claim that Teresa's counseling records were not properly certified and that he did not receive notice of the records. Judge Tindell argued that receiving notice the night before the trial would not comply with the purpose of 902(B). Further, the record contains no proof of notice. Therefore, Terry's oral objection to the admission of records at trial would suffice, and Teresa's counseling records would be inadmissible at trial. However, Judge Tindell agreed with the majority that the admission of the counseling records was harmless and thus, he concurred with the majority's result.

DISSENT

Judge Westbrook argued that the chancellor failed to consider the impact Teresa's extramarital affairs had on the marriage. She argued that the order failed to elaborate how Teresa's affairs affected the harmony and stability of the marriage. Therefore, the case should be remanded for recalculation of marital assets based on Teresa's adulterous actions.

Affirmed - 2018-CA-00900-COA (Aug. 13, 2019)

Opinion by Judge Greenlee - Concurrence by Judge Tindell & Dissent by Judge Westbrook
Hon. Kenneth M. Burns (Chickasaw County Chancery Court, Second Judicial Dist.)
Gene Barton for Appellant - *Pro se* for Appellee
Briefed by [Jennifer Lee](#)

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LOPEZ V. BELLAMARE DEVELOPMENT LLC

CIVIL - PERSONAL INJURY

WORKERS' COMPESATION - INDEPENDENT CONTRACTOR - IMMUNITY - The owner or occupier of a construction project is under no duty to protect an independent contractor or its employees against a risk arising from or intimately connected with defects of the premises, or of machinery or appliances located thereon, which the contractor has undertaken to repair

CIVIL PROCEDURE - SUMMARY JUDGMENT - MATERIAL FACTS - The focal point of the standard for summary judgment is on material facts: those facts that matter in an outcome determinative sense

FACTS

Bellamare Development LLC, owned by Sandeep Sethi, contracted with Certified Construction Company to do work for a Holiday Inn in Brookhaven, Mississippi. Certified Construction Company subcontracted with Varnell Framing Contractors to complete a portion of the work. Varnell Framing Contractors hired several people, including Juan Mendez, to do this work. While working, Mendez fell three stories from a telehandler and fractured his spine making him a quadriplegic. Mendez filed a complaint in the Lincoln County Circuit Court. After discovery, Bellamare Development LLC moved for summary judgment and the circuit court granted that motion. Mendez appealed.

ISSUES

Whether (1) Miss. Code Ann. § 11-1-66 immunity applies; (2) the circuit court erred when it failed to address Mendez's negligence claims; (3) summary judgment was proper; and (4) the circuit court abused its discretion when it determined that the Bank First records were not discoverable.

HOLDING

(1) Because both elements were met without dispute of material fact, Miss. Code Ann. § 11-1-66 immunity applies. (2) Because Mendez's issue was without merit and there was no issue of material fact, the circuit court did not err when not addressing Mendez's negligence claims. (3) Because Miss. Code Ann. § 11-1-66 applied, there was no genuine issue of material fact and the appellees were entitled to judgment as a matter of law. (4) Because the Bank First records were not relevant, material, or admissible evidence, the circuit court did not abuse its discretion when it determined that the records were not discoverable. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Circuit Court.

Affirmed - 2018-CA-00018-COA (Aug. 13, 2019)

Opinion by Judge Greenlee

Hon. David H. Strong Jr. (Lincoln County Circuit Court)

Nathan Henry Elmore, Bryan J. O'Connor Jr., & Bryan J. O'Connor for Appellant - Donna Marie Meehan & Justin Ronald Glenn for Appellees

Briefed by [Philip Lott](#)

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M&R BUILDERS LLC V. WILLIAMS EQUIP. & SUPPLY CO.

CIVIL - CONTRACT

CIVIL PROCEDURE - EQUITY JURISDICTION - INDEPENDENT BASIS - The Mississippi Supreme Court has consistently held that if it appears from the face of a well-pleaded complaint that an independent basis for equity jurisdiction exists, our chancery courts may hear and adjudge law claims

CIVIL PROCEDURE - QUANTUM MERUIT - ELEMENTS - The plaintiff must prove: (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably notified person sought to be charged that plaintiff, performing such services, was expected to be paid by person sought to be charged

CONTRACTS - REMEDIES - ATTORNEY'S FEES - Attorney's fees are a special remedy available only when expressly provided for in either a statute or contract, or when there is sufficient proof to award punitive damages

FACTS

Triangle Construction Company, Inc., a general contractor, subcontracted M&R Builders, LLC, to do foundation work. Their subcontract provided that M&R Builders was fiscally responsible for all necessary equipment. Another provision stated M&R Builders would incur the cost of any attorney's fees. The subcontracted work required metal concrete forms, which were rented from Williams Equipment and Supply Company, Inc. An initial payment was made by Triangle Construction to Williams Equipment; however, the final invoice remained unpaid. Williams Equipment filed a complaint in Hinds County Chancery Court against both Triangle Construction and M&R Builders to recover the rental payment, alleging both parties were liable under contract, under the laws of agency, under a theory of quantum meruit, and under a theory of unjust enrichment. Triangle Construction and M&R Builders then filed cross-claims against each other for breach of contract, alleging that the terms of the subcontract agreements regarding foundation work meant that the other party was responsible for the rental payments to Williams Equipment. At a hearing, all parties agreed that no express contract, written or oral, existed between Williams Equipment and M&R Builders or Triangle Construction. Williams Equipment, therefore, amended its complaint to withdraw the breach of contract claim. In the same hearing, the chancellor determined that the subcontract agreements between M&R Builders and Triangle Construction were ancillary determinations to the real claim regarding which one of the parties owed Williams Equipment rental payments

for the metal forms. After trial, the chancellor found that according to the subcontract agreements, M&R Builders was responsible for paying Williams Equipment the rental costs of the metal concrete forms. Accordingly, M&R Builders was ordered to pay Williams Equipment damages and attorney's fees. M&R Builders was also found responsible for paying damages and attorney's fees to Triangle Construction. M&R Builders appealed.

ISSUES

Whether the trial court (1) had subject matter jurisdiction; (2) erred by implicitly finding that Williams Equipment proved the essential elements of its claims; (3) erred in finding that M&R Builders was responsible for the rental costs of the metal concrete forms; and (4) erred in awarding damages and attorney's fees to Williams Equipment and damages and attorney's fees to Triangle Construction.

HOLDING

(1) Because Williams Equipment's amended complaint is quantum meruit, being equitable in nature, and the contract-based cross-claims are ancillary determinations to the real claim of which party owes Williams Equipment rental payments, subject matter jurisdiction was proper. (2) Because there was sufficient evidence presented at trial to satisfy a quantum meruit claim, finding Williams Equipment was entitled to receive payment for the rental costs of concrete forms was proper. (3) Because the subcontract unambiguously provided that M&R Builders was responsible for equipment, and because concrete forms were unambiguously categorized as equipment, finding M&R Builders responsible for the rental costs was proper. (4) Because attorney's fees may be awarded when a contractual agreement provides for such an award, awarding payment of Triangle Construction's attorney fees was proper; however, because there was no contract between M&R Builders and Williams Equipment, the trial judge erred in ordering M&R Builders to pay Williams Equipment's attorney fees. Therefore, the Court of Appeals affirmed in part, and reversed and rendered in part, the judgment of the Hinds County Chancery Court.

Affirmed in Part; Reversed & Rendered in Part - 2018-CA-00334-COA (Aug. 13, 2019)

Opinion by Presiding Judge Carlton

Hon. Denise Owens (Hinds County Chancery Court, First Judicial Dist.)

Brian Craig Kimball & Kathleen Elizabeth Carrington for Appellant - M. Reed Martz & Macy Derald Hanson for Appellees

Briefed by [Frank Wood](#)

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MILLER V. VICKSBURG MASONIC TEMPLE

CIVIL - PROPERTY DAMAGE

PROPERTY LAW - NEGLIGENCE - ADJOINING LANDOWNERS - An adjoining property owner, in excavating on one's own land, who removes lateral support to the injury of a neighbor's land, is liable in an action, therefore, without proof of negligence

PROPERTY LAW - NEGLIGENCE - DAMAGES - A plaintiff can choose to prove either reasonable cost of replacement or repairs or diminution in value, and if he proves either of these measures with reasonable certainty, damages are allowable, so long as the plaintiff will not be unjustly enriched and the defendant does not demonstrate that there is a more appropriate measure of damages

CIVIL PROCEDURE - JURY INSTRUCTION - DAMAGES - When costs of repairs are relied upon as a measure of damages it is necessary for a plaintiff to establish by a preponderance of the evidence that (1) the repairs are necessary as a result of the alleged wrongful act and (2) the cost of the repairs are necessary and reasonable

FACTS

The Vicksburg Masonic Temple ("the Lodge") owned property in Vicksburg, Mississippi. In 1997, Lewis Miller Jr. bought the adjacent property for various uses associated with his construction company. After consulting the Lodge's president at the time, Miller excavated a vertical cut up to the property line of the Lodge. Miller then installed a drainage system and ditch to remedy any water run off to the Lodge's property, as well as fencing at the top of the ditch per the

Lodge's request. In 2010, soil erosion caused parts of the ditch to fail. Miller implemented plastic sheets to slow the erosion. In either 2013 or 2014, Miller also excavated a swale to direct water away from the Lodge's property and towards the main road. In 2015, the Lodge brought suit against Miller for damages resulting from the erosion. At trial, the Lodge presented witness testimony that Miller had plans to build a retaining wall to mitigate the damage to the Lodge's property. The Lodge also presented expert testimony as to the tendency of soil erosion, indicating that a lack of maintenance of the drainage structure was the cause of the damage. Miller argued that he built the ditch at the Lodge's request and that he only warranted the work for one year, after which time it would become the Lodge's responsibility. The jury awarded the Lodge \$200,000 in damages for the cost of a retaining wall. Miller filed a motion for a judgment notwithstanding the verdict ("JNOV") and for a new trial. The trial court denied his motion. Miller appealed.

ISSUES

Whether the trial court erred by denying Miller's request for JNOV and a new trial after the jury found Miller liable (1) for the damage to the Lodge's property (2) in the amount of \$200,000.

HOLDING

(1) Because Miller paid for the ditch's installation and provided occasional maintenance to the ditch, indicating some acceptance of responsibility in that regard, there was sufficient evidence to support the jury's finding that Miller was liable for the damage to the Lodge's property. (2) Because there was sufficient evidence that the retaining wall was necessary and reasonable, the trial court did not err in accepting the jury's award of \$200,000 in damages. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

DISSENT

Judge Greenlee argued that the Lodge failed to prove the proper measure of damages by not offering proof of any decrease in value of the real property. The amount of cost damages required by law is the lesser of either the cost to repair or the diminution in value of the land. Because no evidence was presented as to the value of the land before and after the erosion, neither the court nor the jury had the ability to assess the proper measure of damages required by law.

Affirmed - 2018-CA-00112-COA (Aug. 13, 2019)

En Banc Opinion by Chief Judge Barnes - Dissent by Judge Greenlee
Hon. M. James Chaney Jr. (Warren County Circuit Court)
David M. Sessums for Appellant - Frank G. Vollar for Appellee
Briefed by [Charles Matranga](#)

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ROWSEY V. MDOC COMM'R FISHER

CIVIL - STATE BOARDS & AGENCIES

CIVIL PROCEDURE - STANDARD OF REVIEW - AGENCY ACTION - When reviewing a decision by a chancery or circuit court regarding an agency action, the same standard of review that the lower courts are bound to follow is applied

CIVIL PROCEDURE - MOTION FOR RECONSIDERATION - RULE 60(B) - A Rule 60(b) motion should be denied where it is merely an attempt to relitigate

CIVIL PROCEDURE - STANDARD OF REVIEW - ABUSE OF DISCRETION - The grant or denial of a motion for reconsideration is reviewed under an abuse of discretion standard

FACTS

James Rowsey was serving a life sentence at the South Mississippi Correctional Institute in Leakesville when his unit was searched, and contraband was confiscated. Rowsey filed a grievance through MDOC's ARP program, claiming that his religious books were confiscated. MDOC found that Rowsey's claim was without merit. Rowsey filed what was treated as a petition for a writ of mandamus, claiming MDOC failed to timely process his submission. The circuit court

acknowledged that MDOC failed to timely process Rowsey’s submission, but nevertheless, upheld MDOC’s ARP ruling and denied Rowsey’s application for judicial review. Rowsey filed a motion for reconsideration of the circuit court’s decision, and the circuit court denied this motion. Rowsey appealed.

ISSUE

Whether the circuit court erred in its denial of Rowsey’s motion for reconsideration.

HOLDING

Because Rowsey’s handwritten list of the materials allegedly confiscated was insufficient to establish ownership under MDOC policy, Rowsey failed to establish that MDOC’s decision was in violation of his constitutional or statutory rights. Accordingly, there was no error in the circuit court’s denial of Rowsey’s motion for reconsideration. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Circuit Court.

Affirmed - 2017-CP-00355-COA (Aug. 13, 2019)

Opinion by Judge Westbrook

Hon. Margaret Carey-McCray (Sunflower County Circuit Court)

Pro se for Appellant - Darrell Clayton Baughn (Att’y Gen. Office) for Appellees

Briefed by [Winston Hudson](#)

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WAITE V. ADKISSON

CIVIL - DOMESTIC RELATIONS

PROTECTION OF ENDANGERED PERSONS - DOMESTIC ASSAULT - PROTECTION FROM DOMESTIC ABUSE LAW - Before a court may grant relief under the Protection From Domestic Abuse Law, the petitioner must prove the existence of abuse to either themselves or a minor child

INJUNCTIONS - ACTIONS AND PROCEEDINGS - PERMANENT RESTRAINING ORDERS - Permanent injunctive relief may be granted only to protect and prevent the violation of some substantive legal right

APPEAL AND ERROR - REVIEW - DECISIONS AND FINDINGS BY COURT - The trial court, as the finder of fact, must be the one to determine whether or not a party is entitled to relief.

FACTS

Shelby Waite filed a Petition for “Emergency Temporary Restraining Order Without Notice” and for “Protection from Domestic Abuse” against Justin Adkisson in the Madison County Chancery Court. Waite alleged that she had been living with Adkisson until she was forced to leave out of fear for her and her child’s life and personal safety. Waite sought an emergency domestic abuse protection order under the Protection from Domestic Abuse Law (“PDAL”). The Madison County Chancery Court made no finding that Waite was or was not entitled to relief under PDAL. Alternatively, the court granted a permanent restraining order under Miss. R. Civ. P. 65. Waite appealed.

ISSUES

Whether (1) the chancery court erred in granting Waite a permanent restraining order under Miss. R. Civ. P. 65 rather than a final domestic abuse protection order under PDAL and (2) whether Waite is entitled to a final domestic abuse protection order under PDAL.

HOLDING

(1) Because Waite was granted relief only under Miss. R. Civ. P. 65 and the merits of her case were not analyzed under PDAL, the chancery court erred in granting her a permanent restraining order. (2) Because the chancery court is the finder of fact and must be the one to determine whether Waite is entitled to relief under PDAL, Waite cannot be granted a final domestic protection order on appeal. Therefore, the Court of Appeals reversed and remanded the judgment of the Madison County Chancery Court.

Reversed & Remanded - 2018-CA-00561-COA (Aug. 13, 2019)

Opinion by Presiding Judge J. Wilson

Hon. Cynthia L. Brewer (Madison County Chancery Court)

Derek L. Hall & Megan Elizabeth Timbs for Appellant - Cynthia Hewes Speetjens for Appellee

Briefed by [Cristofor Taylor](#)

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RAINER V. RIVER OAKS HOSP., LLC

CIVIL - MEDICAL MALPRACTICE

CIVIL PROCEDURE - MEDICAL NEGLIGENCE - SUMMARY JUDGMENT - Once the defendant meets the burden of proof to establish summary judgment, the burden then shifts to the plaintiff, who has the opportunity to submit sworn expert testimony that supports the plaintiff's allegations

MISS. CIVIL PROCEDURE - MOTION FOR CONTINUANCE - ABUSE OF DISCRETION - Miss. R. Civ. P. 56(f) provides that, when affidavits are unavailable to the moving party, the court may use its sole discretion to determine whether to grant the motion for a continuance in order to allow for further discovery. The party moving for a continuance must present specific facts demonstrating why they cannot oppose the motion for summary judgment and must demonstrate how granting the motion for continuance will benefit discovery

CIVIL PROCEDURE - MOTION FOR NEW HEARING OR RECONSIDERATION - ABUSE OF DISCRETION - The trial court does not abuse its discretion by refusing to accept affidavits that could have and should have been submitted with the party's response to summary judgment

FACTS

Annis Rainer alleged that, while a patient at River Oaks Hospital, she was injured from exposure to latex during radiological tests. Three weeks after Rainer filed the complaint, River Oaks served Rainer with interrogatories that requested her to identify any expert that was set to testify as a medical expert in support of her claims and to provide the subject matter that the expert was set to testify about. After Rainer's failure to comply with their requests, the Rankin County Circuit clerk filed a notice to dismiss Rainer's case for lack of prosecution. Rainer applied to deny the clerk's notice to dismiss, which the trial court granted. Subsequently, Rainer continued to be uncooperative with River Oaks's discovery request, which prompted the clerk to file a second notice of dismissal. The trial court dismissed the notice and set hard discovery deadlines. Once Rainer continued to miss more discovery deadlines, River Oaks filed a motion for summary judgment based on Rainer's failure to designate a medical expert to testify on her behalf in support of her medical negligence claim. Rainer failed to respond to the motion for summary judgment. Further, Rainer did not submit a supporting expert affidavit before the hearing regarding the summary judgment motion. However, on the day of the hearing, Rainer filed a motion to continue that included an attached report from a medical expert regarding her case. The trial court dismissed the motion to continue and granted River Oaks's motion for summary judgment. Subsequently, Rainer filed a motion for a new hearing or reconsideration which was denied. Rainer appealed.

ISSUES

Whether the trial court (1) erred in its decision to grant summary judgment; (2) abused its discretion by denying Rainer's motion for a continuance; and (3) abused its discretion by denying Rainer's motion for a new hearing or reconsideration.

HOLDING

(1) Because Rainer failed to come forth with sworn expert testimony stating that River Oaks breached the applicable standard of care, the trial court did not err by granting summary judgment. (2) Because Rainer had over three years to produce sworn expert testimony supporting her allegations, and because Rainer did not timely file a supporting affidavit from her medical expert, the trial court did not abuse its discretion by denying her motion for a continuance. (3) Because Rainer did not make a claim of an intervening change in law, and because she showed no evidence of why her medical expert was not previously available, and because she showed no evidence to support the idea that a new trial or

reconsideration was necessary to correct a clear error or prevent injustice, the trial court did not abuse its discretion by denying her motion for a new hearing or reconsideration. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2018-CA-00267-COA (Aug. 13, 2019)

Opinion by Presiding Judge Carlton

Hon. John Huey Emfinger (Rankin County Circuit Court)

J. Edward Rainer for Appellants - Mark P. Caraway & Kimberly Nelson Howland for Appellee

Briefed by [Matthew Russ](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

PULLIAM V. STATE

CIVIL - POST-CONVICTION RELIEF

APPELLATE PROCEDURE - OUT-OF-TIME APPEAL - EFFECT OF DELAY - A defendant seeking an out-of-time appeal must, by a preponderance of the evidence, demonstrate that he asked his attorney to appeal within the time allowed but that the attorney failed to appeal, and such failure was not the defendant's fault

APPELLATE PROCEDURE - OUT-OF-TIME APPEAL - EVIDENTIARY HEARING - For purposes of determining a convicted defendant's entitlement to an out-of-time appeal, where affidavits of defendant and attorney are contradictory as to a material fact, an evidentiary hearing is generally required on the question of whether defendant asked attorney to appeal; an evidentiary hearing is also necessary when there is no documentary evidence that contradicts a petitioner's claim that he asked his attorney to appeal his conviction

FACTS

Undra Pulliam was found guilty for the sale, transfer, and distribution of more than two grams but less than ten grams of crack cocaine. He was sentenced as a non-violent habitual offender to serve twenty years in the Mississippi Department of Corrections. Pulliam's appointed attorney for the trial informed him via a letter of his conviction and his habitual offender label. He did not notify Pulliam of his right to an appointed appellate lawyer and informed him that the case was closed. Pulliam filed a post-conviction petition for an out-of-time appeal and attached the letter as evidence. The Lee County Circuit Court denied the petition without a hearing. Pulliam appealed.

ISSUES

Whether the Lee County Circuit Court erred in denying (1) an evidentiary hearing and (2) the petition for post-conviction out-of-time appeal.

HOLDING

(1) Because Pulliam attached the letter from his attorney to his petition for post-conviction out-of-time appeal, and because no documentary evidence contradicted Pulliam's claim, he was entitled to an evidentiary hearing. (2) Because the trial court only evaluated Pulliam's petition under Miss. R. App. P. 4(a) and 4(g) and should have evaluated this case under the Uniform Post-Conviction Collateral Relief Act, the trial court erred in denying Pulliam's petition for post-conviction out-of-time appeal. Therefore, the Court of Appeals reversed the judgment of the Lee County Circuit Court.

CONCURRENCE

Judge Tindell argued that trial judges should tell the defendants of their right to an appellate attorney at the sentencing hearing, on the record, to prevent future cases such as these in the future.

Reversed & Remanded - 2018-CA-00380-COA (Aug. 13, 2019)

Opinion by Judge Greenlee - Concurrence by Judge Tindell
Hon. Thomas J. Gardner III (Lee County Circuit Court)
James H. Powell III for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee
Briefed by [Liza Linginfelter](#)

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SWAIM V. STATE

CIVIL - POST-CONVICTION RELIEF

CONSTITUTIONAL LAW - DUE PROCESS - PROCEDURE FOR PAROLE REVOCATION - Miss. Code Ann. § 47-7-27(5) meets the requirements of due process enshrined by the Constitution

CONSTITUTIONAL LAW - DOUBLE JEOPARDY - PROTECTIONS - The double-jeopardy clause provides protection from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense

CONSTITUTIONAL LAW - DOUBLE JEOPARDY - PAROLE REVOCATION - A petition to revoke probation is not a criminal case and not a trial on the merits of the case, and therefore double jeopardy does not apply

FACTS

On May 4, 2009, James Swaim was charged with burglary to which he pled guilty to and was eventually sentenced to five years in custody of the Mississippi Department of Corrections (“MDOC”) with three years suspended. Swaim was arrested in 2011 for DUI, and the State filed a petition to revoke Swaim’s probation on August 15, 2011. Swaim waived his right to a preliminary probation-revocation hearing and confessed that he had violated the terms of his probation. He was sentenced to serve his original five years in the custody of MDOC. In March 2012, Swaim was charged with another DUI offense, which was a felony charge due to his prior offenses. Swaim pled guilty, and he was sentenced to serve five years, leaving Swaim with two years left to serve followed by three years of post-release supervision. On April 4, 2014, Swaim was charged with another DUI offense, which he pled guilty to on May 18, 2015. On October 19, 2015, Swaim was sentenced to serve thirty months in the custody of MDOC without eligibility for parole or probation, and his parole was consequently revoked from his March 2013 sentence pursuant to Miss. Code Ann. §47-7-27(5). On October 7, 2016, Swaim was arrested on yet another DUI charge, and the State subsequently filed a petition to revoke his post-release supervision from his March 2013 sentence. Following a hearing, the court revoked Swaim’s post-release supervision, and he was sentenced to his original five years (with credit for two years served), leaving three years to serve before serving his October 2015 sentence. On August 8, 2017, Swaim filed a post-conviction relief (“PCR”) petition, which he last amended on November 1, 2017. After review, the Harrison County Circuit Court dismissed Swaim’s amended PCR petition. Swaim appealed pro se.

ISSUES

Whether (1) Swaim’s constitutional right to due process was violated by Miss. Code Ann. §47-7-27(5); (2) the trial court applied the correct version of Miss. Code Ann. §47-7-27; and (3) Swaim’s double jeopardy rights were violated when his parole and post-release supervision were revoked.

HOLDING

(1) Because the Mississippi courts have repeatedly held that Miss. Code Ann. § 47-7-27(5) meets the requirements of due process, Swaim’s constitutional rights were not violated. (2) Because Swaim’s parole was revoked in November 2015, based on his May 2015 conviction, the trial court applied the correct version of Miss. Code Ann. §47-7-27, and because both versions of the statute contained the same language relied upon by the trial court, Swaim’s reliance on the prior version was misplaced. (3) Because a petition to revoke probation is not a criminal case and not a trial on the merits of the case, double jeopardy does not apply. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2018-CP-00817-COA (Aug. 13, 2019)

Opinion by Judge Lawrence
Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)
Pro se for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee
Briefed by [Jack Byrd](#)

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