

MISSISSIPPI COURT OF APPEALS DECISIONS – DECEMBER 18, 2018**COURT OF APPEALS - CIVIL CASES****LINDSEY V. FORD MOTOR CO.****CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE**

PRODUCTS LIABILITY - PRODUCT DEFECTS - OPPORTUNITY TO REPAIR - Before a buyer is entitled to a refund of a defective vehicle's purchase price, the manufacturer must be given a reasonable opportunity to cure the alleged defect; a "reasonable opportunity" consists of at least three attempts to repair the vehicle within a year of the purchase date

FRAUD - MISREPRESENTATION - NEW VEHICLE - A new motor vehicle is a motor vehicle which has not been previously sold to any person except a distributor or wholesaler or motor vehicle dealer for resale

CIVIL PROCEDURE - PLEADINGS - AMENDMENTS - Decisions to grant or deny motions for leave to amend complaints are left to the sound discretion of the trial court

FACTS

Edmond Lindsey went to Country Ford ("Ford") to purchase a new Ford Focus on April 4, 2012. After test-driving a similar model, Lindsey purchased the car used for a test drive. Two weeks later, Lindsey returned and complained to a service technician that there were several defects in the vehicle, such as jerking motions, brake issues, and random starting or stopping of the vehicle. Lindsey left the dealership that day after allegedly declining to accompany the sales manager on another test drive and after being refused a refund. Lindsey gave Ford no other opportunities to repair the vehicle. In March 2014, two field-service engineers test drove the vehicle and experienced none of the issues of which Lindsey complained. Lindsey additionally claimed that the vehicle was not new, as it had been previously titled, had stickers that might indicate it had been previously owned or wrecked, and had been test driven. After denying Lindsey's motion to amend his complaint and conduct additional discovery, the Desoto County Circuit Court granted Ford's motion for summary judgment. Lindsey appealed.

ISSUES

Whether the circuit court erred in (1) finding that Ford had not breached its duty of express warranty; (2) finding that Ford had not been given a reasonable opportunity to repair the allegedly defective vehicle; (3) finding that Ford had not committed any fraudulent misrepresentations; and (4) denying Lindsey's requests to amend the complaint and conduct additional discovery.

HOLDING

(1) Because Miss. R. Civ. P. 56(e) requires an adverse party to present evidence in rebuttal of affidavits offered by the party opponent, and because Lindsey presented no such evidence to rebut Ford's affidavits stating that the car was not operating defectively after the 2014 test drive, the circuit court did not err in finding that Ford had not breached its duty of express warranty. (2) Because a manufacturer must be given at least three opportunities to repair a defective vehicle within a year of its purchase, and because Lindsey did not provide Ford with at least three opportunities to repair his vehicle, the circuit court did not err in finding that Ford had not been given a reasonable opportunity to repair the vehicle. (3) Because a vehicle is new when it has not been previously sold to any person except a distributor, wholesaler, or motor vehicle dealer for resale, and because there was no evidence that showed the vehicle in question was ever sold to another person or party, the circuit court did not err in finding that Ford had not committed fraud against Lindsey. (4) Because motions for leave to amend complaints or expand discovery are left to the trial court's discretion, and because the circuit court determined that Lindsey's motions were both delayed and unlikely to benefit his case, the

circuit court did not err in denying Lindsey's requests to amend the complaint and conduct additional discovery. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2017-CP-00751-COA (Dec. 18, 2018)

Opinion by Judge Barnes

Hon. Celeste Embrey Wilson (Desoto County Circuit Court)

Pro se for Appellant - D. Sterling Kidd, William Albert Brown, & William Tyler Scott for Appellees

Briefed by [Corban Snider](#)

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MISS. STATE PORT AUTH. AT GULFPORT V. S. INDUS. CONTRACTORS, LLC

CIVIL - CONTRACT

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION - STANDARDS - In order to determine whether a dispute is subject to arbitration, the court must determine (1) whether the parties had a valid agreement in arbitration, and (2) whether the specific dispute falls within the substantive scope of that agreement

CONTRACTS - BREACH OF CONTRACT - MISSISSIPPI TORT CLAIMS ACT - Disputes arising from a breach of contractual obligations and not a duty independent of the contract do not implicate the Mississippi Tort Claims Act

CIVIL PROCEDURE - VENUE - TRANSFER - Improper venue is reason to transfer a case, not to dismiss it

FACTS

The Mississippi State Port Authority (the "Port Authority") in Gulfport awarded a public-works contract for a construction project to Southern Industrial Contractors, LLC ("SIC"). The Port Authority and SIC executed the contract on July 25, 2014. During construction, SIC encountered an underground debris field where foundation pilings were to be driven. This led to extra work for SIC, construction delays, and culminated in the Port Authority terminating the contract by letter on September 14, 2016. SIC sent the Port Authority a notice of intent to arbitrate and two days later filed a motion to compel arbitration in the Hinds County Circuit Court. The Port Authority responded by filing a motion to dismiss. The circuit court summarily granted SIC's motion to compel arbitration and denied the Port Authority's motion to dismiss. The Port Authority appealed.

ISSUES

Whether (1) the parties agreed to binding arbitration; (2) the Mississippi Tort Claims Act applies to the wrongful termination-of-contract claim; and (3) venue is improper in the First Judicial District of Hinds County, Mississippi, requiring dismissal or transfer to the First Judicial District of Harrison County, Mississippi is proper.

HOLDING

(1) Because the arbitration was not an exclusive dispute resolution mechanism and the parties did not specify rules for the arbitration process, the arbitration agreement was not valid. (2) Because the dispute arose from a breach of contractual obligations and not some duty independent of the contract, the Mississippi Tort Claims Act is not implicated. (3) Because the Port Authority's offices, employees, and commissioners along with the disputed construction project are located in Harrison County, and the enabling legislation describes the Port Authority as a "governing authority" rather than an agency, the dispute must be transferred to Harrison County where the Port Authority resides for purposes of venue. 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.

Affirmed in Part, Reversed & Rendered in Part, Reversed & Remanded in Part - 2017-CA-01393-COA (Dec. 18, 2018)

Opinion by Presiding Judge Carlton

Hon. Winston L. Kidd (Hinds County Circuit Court, First Judicial Dist.)

Ben Harry Stone & Michael Brant Pettis for Appellant - Christopher Solop, Brenda Tanner Redfern, John T. Andrishok, & Steven B. Loeb for Appellee

Briefed by [Nathaniel Snyder](#)

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OLSON V. BENNETT

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - CHILD'S SURNAME - STANDARD - The mother must show by a preponderance of the evidence that having the father's surname is not in the best interest of the child

APPELLATE PROCEDURE - CONSTITUTIONAL CHALLENGE - OTHER GROUNDS - A court will pass on a constitutional question when the issues involved in a particular case can be resolved on other grounds

FACTS

Noah, the son of Robert Bennett and Lana Olson, was born in 2008. Bennett was present but refused to sign the birth certificate or be listed as the father without a DNA test, which came back three weeks later, showing Bennett as the father. Bennett pursued neither to add his name to the birth certificate nor visitation rights with Noah, who has lived with Olson his entire life. At some point after, Bennett began to pay child support. In April 2016, Bennett filed a "Complaint for Child Custody and Support, Amendment or Correction of Birth Certificate, and Motion for Temporary Relief." All issues were resolved, except for Noah's surname. At a hearing on that specific subject, Bennett testified that he wished Noah to carry his surname in order to carry on the family name. Olson argued that changing Noah's surname could exacerbate issues Noah was having at school and could confuse or anger the child. Olson also argued that Bennett had ample opportunities to make these changes earlier. The chancellor stated, under the standard set forth in *Rice*, the Supreme Court is "pretty emphatic that the child shall take the last name of the father," needing more than embarrassment or confusion for the child to make an exception. The chancellor then entered judgment for Bennett, but stayed the judgment being registered pending appeal. Olson appealed.

ISSUES

Whether (1) the chancery court's ruling should be reversed because it would not be in Noah's best interest to change his surname; and (2) the statutory presumption that a child shall be given the father's surname violates the Equal Protection Clause of the Fourteenth Amendment to United States Constitution.

HOLDING

(1) Because the chancellor applied the wrong legal standard under *Rice*, and Olson provided reasons a surname change would not be in Noah's interest while Bennett only produced evidence of his own interest, the chancellor's ruling was manifestly wrong. (2) Because Olson failed to comply with Miss. R. App. P. 44(a), the constitutional issue was procedurally barred and the case was decided on other grounds. Therefore, the Court of Appeals reversed the judgment of the Harrison County Chancery Court.

DISSENT

Judge Westbrook argued that the facts of this case were sufficiently similar to *Rice*. She also argued that the reasons given by Olson to keep Noah's surname the same were not sufficient to overcome the presumption that the child have the father's surname.

Reversed - 2017-CA-01145-COA (Dec. 18, 2018)

En Banc Opinion by Judge Wilson - Dissent by Judge Westbrook
Hon. Sanford R. Steckler (Harrison County Chancery Court, First Judicial Dist.)
Michael C. Hester for Appellant - Reed S. Bennett for Appellee
Briefed by [James Adamoli](#)

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SMITH V. HOWARD INDUS., INC.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - PERMANENT TOTAL DISABILITY - PRIMA FACIE CASE - Under *Howard Indus. Inc. v. Satcher*, a claimant must show that he sought and was unable to find work in the same or other employment and took reasonable efforts to find other employment in order to establish a prima facie case for permanent disability; a claimant can also establish a prima facie case for total disability if he reports back to the employer for work after reaching maximum medical improvement and the employer refuses to reinstate or rehire him

WORKERS' COMPENSATION - PERMANENT TOTAL DISABILITY - BURDEN OF PROOF - Miss. Code Ann. § 71-3-17(a) states that a claimant must show something more than an inability to return to the job existing at the time of injury in order to be deemed permanently totally disabled

WORKERS' COMPENSATION - USUAL EMPLOYMENT - CRITERIA - Under *Meridian*, "usual employment" means the jobs in which the claimant has past experience, jobs requiring similar skills, or jobs for which the worker is otherwise suited by his age, education, experience, and any other relevant factual criteria

FACTS

Hazel Smith was working for Howard Industries, Inc. ("Howard") as a final assembler when she sustained an injury to her right upper extremity. After reaching maximum medical improvement, she was put on light duty and returned to work at Howard. Smith was offered a new job within her medical restrictions but claimed she was unable to perform it. After she was moved to another job, Smith burned her arm and was sent home. She was unsuccessful in her search for work elsewhere and filed a petition to convert. During her hearing, a vocational rehabilitation counselor testified that he found three jobs within Smith's medical restrictions at Howard and four jobs elsewhere for which Smith was suited. Howard's environmental and safety manager testified that Smith was unable to return to the job she held pre-injury. The administrative judge found Smith sustained a fifty percent industrial loss of use to her upper extremity and could not perform substantial acts of her usual employment. Smith appealed from these findings, and the Mississippi Workers' Compensation Commission (the "Commission") affirmed that Smith suffered a fifty percent loss of industrial use to her upper extremity but amended the order finding that Smith was capable of performing the substantial acts of her usual employment. Smith appealed.

ISSUES

Whether Smith (1) suffered permanent total disability; and (2) was capable of performing the substantial acts of her usual employment.

HOLDING

(1) Because Smith's testimony that she was unable to perform the jobs offered to her at Howard after her injury combined with her contention that she was unemployable were insufficient to overcome her burden of proving that the Commission's decision was unsupported by substantial evidence, the Commission correctly concluded that Smith was not permanently totally disabled. (2) Because Smith failed to show any evidence or testimony that she was unable to perform the new job offered to her by Howard and further testimony proved that the new job offered to her fell within her medical restrictions, the Commission properly found that Smith was capable of performing the substantial acts of her employment. Therefore, the Court of Appeals affirmed the judgment of the Workers' Compensation Commission.

Affirmed - 2018-WC-00019-COA (Dec. 18, 2018)

Opinion by Presiding Judge Irving

Workers' Compensation Commission

H. Alexander Brinkley for Appellant - Richard Lewis Yoder Jr. for Appellee

Briefed by [Lauren Rogers](#)

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VANAMAN V. AM. PRIDE PROP., LLC

CIVIL - REAL PROPERTY

CIVIL - REAL PROPERTY - PROOF OF SERVICE - If a process server has executed a return properly, there is a presumption that service of process has occurred

CIVIL - DEFAULT JUDGMENT - COLORABLE DEFENSE - The Supreme Court has established a three-prong balancing test, in light of Miss. R. Civ. P. 55(c), to set aside a default judgment, including (1) whether the defendant has good cause for default, (2) whether defendant has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice suffered by plaintiff if default judgment is set aside

CIVIL - REAL PROPERTY - TAX SALE - Statutes governing tax sale should be strictly construed in favor of landowners and any deviation from the statutorily mandated procedure renders the sale void

FACTS

John Frederick Vanaman Jr. and his mother owned a parcel of property where they operated a gas station and grocery store. His mother quitclaim deeded the property to him in 2001. The quitclaim deed listed Vanaman's address as a temporary trailer he was living in at the time. He fell behind on paying taxes on the property and a notice of sale of the property was sent to the address on the quitclaim deed. Vanaman only lived at the address temporarily, and he filed several documents with the chancery court clerk following execution of the quitclaim deed. After two failed attempts to deliver a notice of forfeiture to the old address, American Pride Properties, LLC ("American") published a notice in the Sun Herald. The court issued a default judgment against Vanaman when he failed to answer American's complaint to quiet and confirm tax title. Vanaman appealed.

ISSUES

Whether (1) Vanaman was properly served with a copy of the summons and complaint to quiet and confirm tax title; and (2) the chancery court erred in refusing to set aside the default judgment stating Vardaman failed to satisfy the three-part test for Miss. R. Civ. P. 55(c).

HOLDING

(1) Because Vanaman testified he was served with papers, the testimony stating the papers were only a few pages was not enough to find the chancery court abused its discretion in finding Vanaman was served with the complaint. (2) Because the colorable defense prong holds the most weight in the three-part test under Miss. R. Civ. P. 55(c), and the court found the colorable defense prong to strongly favor Vanaman, this was enough for the default judgment to be set aside. Therefore, the Court of Appeals reversed and remanded the judgment of the Harrison County Chancery Court.

Reversed & Remanded - 2017-CA-01231-COA (Dec. 18, 2018)

Opinion by Presiding Judge Irving

Hon. Carter O. Bise (Harrison County Chancery Court, First Judicial Dist.)

Michael B. Holleman for Appellant - Lewie G. "Skip" Negrotto IV for Appellee

Briefed by [Andie Szabo](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

COOPER V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - GUILTY PLEAS - INDICTMENT - The entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - AFFIDAVIT - In cases involving post-conviction relief, where a party offers only his affidavit, an ineffective-assistance-of-counsel claim is without merit

FACTS

Allan Cooper was initially indicted in DeSoto County for obtaining over \$35,000 with the intent to defraud. Cooper's indictment was later amended to classify him as a habitual offender under Miss. Code Ann. § 99-19-81, based on federal and state convictions in Tennessee. Cooper pled guilty as a habitual offender, and the trial court "reluctantly" accepted his plea. Cooper was sentenced to one day in prison and nine years and 364 days of post-release supervision. Four years into his post-release supervision, Cooper was found guilty of wire fraud in the U.S. District Court for the Western District of Tennessee. The State of Mississippi moved to revoke Cooper's post-release supervision because of his conviction, which the trial court granted. Cooper was sentenced to five years of imprisonment following his time in federal prison. Cooper moved for post-conviction relief over the revocation of his post-release supervision, and the trial court denied the motion. Cooper appealed.

ISSUES

Whether (1) the sentence was improper because the initial and amended indictments were fatally deficient; and (2) Cooper received ineffective assistance of counsel.

HOLDING

(1) Because Cooper knowingly and voluntarily pled guilty as a habitual offender, he waived his right to claim an improper sentence, so the issue of whether the indictments were fatally deficient was meritless. (2) Because Cooper offered nothing other than his own affidavit, his claim of ineffective assistance of counsel was meritless. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

DISSENT

Judge Irving argued that Mississippi law provides that defendants have the right to be properly indicted as a habitual offender before they may be found guilty and sentenced as such, and that the State of Mississippi failed to properly indict Cooper as a habitual offender. Judge Irving was also unpersuaded that the court's exchange with Cooper regarding his status as a habitual offender represented a waiver by Cooper of his right to later claim an improper sentence. Judge Irving argued that the trial court erred in its exchange with Cooper by asking him if he pled guilty as a habitual offender without advising him of the requirements under Miss. Code Ann. § 99-18-81.

Affirmed - 2018-CP-00021-COA (Dec. 18, 2018)

En Banc Opinion by Judge Greenlee - Dissent by Presiding Judge Irving
Hon. Gerald W. Chatham Sr. (DeSoto County Circuit Court)
Pro se for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee
Briefed by [Michael Lambert](#)

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COURT OF APPEALS - CRIMINAL CASES

COOLEY V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - APPEAL - JURY INSTRUCTIONS - The trial court possesses considerable discretion regarding jury instructions and the appellate court reviews only to determine whether the jury was fully and fairly instructed according to the applicable law

CRIMINAL LAW - APPEAL - INEFFECTIVE ASSISTANCE OF COUNSEL - The benchmark for any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result

APPELLATE PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - STRATEGY - In an appeal for ineffective assistance of counsel, the appellate court will presume the decisions of counsel were a sound strategy if reasonable under the circumstances

FACTS

Richard Cooley, the defendant, arrived in the parking lot of a convenience store to interrupt a confrontation between his unarmed son, Wesley Cooley, and Dustin Cooley. On the night of the incident, Wesley saw Dustin cross a nearby road with a rifle and head towards an abandoned building, but did not identify the person as Dustin. When Dustin and Wesley approached each other, Richard also approached in his truck, held up a badge, stated that he was a federal marshal, and told Dustin to drop his gun. Dustin refused to drop the gun and later testified that Wesley and Richard closed in on him and were trying to grab the gun. Richard had his own rifle and hit Dustin in the head with the butt of his gun multiple times. Dustin also testified that the barrel of his gun was always pointed upward, that he never made a threatening action, and denied pointing a gun at anybody. Richard testified Dustin pulled out a pistol and pointed it at Wesley's head and threatened to shoot him, and Richard hit Dustin with his shotgun to disarm him. Wesley's testimony also corroborated Richard's testimony. The trial court found Richard guilty of aggravated assault. Richard appealed.

ISSUES

Whether (1) the trial court erred in failing to instruct the jury on Richard's defense-of-others defense; (2) Richard's trial counsel was ineffective for failing to request such an instruction; and (3) the verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because there was no authority which placed a duty on the trial court to instruct the jury sua sponte on an alternative legal theory of defense simply because some of the evidence supported the theory, the trial court did not err in failing to instruct the jury on the defense-of-others defense. (2) Because Richard did not meet the high burden of showing his trial counsel was so ineffective by the omission of a defense-of-others instruction to prejudice him by undermining confidence in the trial's outcome, Richard's counsel was not ineffective for failing to request such an instruction. (3) Because the weight of the evidence, taken in the light most favorable to the verdict, supported the guilty verdict, the verdict was not against the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Perry County Circuit Court.

Affirmed - 2017-KA-01358 (Dec. 18, 2018)

Opinion by Judge Barnes

Hon. Jon Mark Weathers (Perry County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Chadwick Lamar](#)

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