

MISSISSIPPI SUPREME COURT DECISIONS – JANUARY 10, 2019***SUPREME COURT - CIVIL CASES*****CLINTON HEALTHCARE V. ATKINSON****CIVIL - PERSONAL INJURY**

EVIDENCE - SPOILIATION - DETERMINATIONS - Spoliation is a jury instruction which requires the issue to be submitted to a jury at trial; mandating that a spoliation instruction be given at trial before a trial even happens is inappropriate

CIVIL PROCEDURE - JURISDICTION - INTERLOCUTORY APPEALS - The Mississippi Supreme Court's rules take precedence over Miss. Code Ann. § 11-51-79, allowing the Court to hear an interlocutory appeal from a county court

FACTS

Mary Mac Atkinson alleged that she injured her knee after slipping at Clinton Healthcare ("Clinton") on December 24, 2015. After the claim was filed, the two parties conducted significant discovery, which produced differing stories about the course of events. Some Clinton employees discussed video surveillance of the hallway where Atkinson fell. Clinton's system overwrote old video once storage was full, a time period that averaged about ten days. Clinton received the summons in this case on January 21, 2016 and informed Atkinson that the video was automatically erased prior to receipt of the summons. Atkinson moved for a spoliation determination over the missing video. She also moved for partial summary judgment on liability, and Clinton separately moved for summary judgment. The trial court granted Atkinson's motion for spoliation, denied Clinton's motion for summary judgment, and granted Atkinson's motion for partial summary judgment on liability. A panel of the Supreme Court granted permission for an interlocutory appeal. Clinton appealed.

ISSUES

Whether (1) the interlocutory appeal was properly before the Supreme Court; (2) Atkinson's brief was timely filed and could be considered by the Supreme Court; (3) the trial court properly granted partial summary judgment for Atkinson; (4) the trial court properly denied summary judgment for Clinton; and (5) the trial court properly found that spoliation had occurred.

HOLDING

(1) Because the Supreme Court's rules regarding appeals from county courts take precedence over Miss. Code Ann. § 11-51-79, the interlocutory appeal was properly before the Supreme Court. (2) Because Clinton did not cite any authority barring consideration of Atkinson's brief, nor do any rules require the Court to exclude the brief, Atkinson's brief was properly before the Court. (3) Because there were two versions of the factual circumstances giving rise to Atkinson's injury, the trial court should not have granted summary judgment for Atkinson. (4) Because there was doubt about whether any genuine issue of material facts existed when viewing the facts in the light most favorable to Atkinson, the trial court properly denied summary judgment for Clinton. (5) Because spoliation is a jury instruction, the jury must first hear the evidence or argument regarding the issue for it to be proper, and the trial court should not have mandated a spoliation instruction prior to trial. Therefore, the Supreme Court affirmed in part, reversed in part, vacated in part, and remanded the judgment of the Hinds County Court.

DISSENT

Justice Coleman argued that the Supreme Court lacked jurisdiction to hear the interlocutory appeal because the Mississippi Legislature mandates that circuit courts have the power to hear interlocutory appeals from county courts, not the Supreme Court. Justice Coleman would have dismissed the appeal for want of jurisdiction.

Affirmed in Part, Reversed in Part, Vacated in Part, & Remanded - 2017-IA-00946-SCT (Jan. 10, 2019)

En Banc Opinion by Justice King - Dissent by Justice Coleman

Hon. Larita M. Cooper-Stokes (Hinds County Court)

Kelly Hollingsworth Stringer & S. Mark Wann for Appellant - Warren Louis Martin Jr. for Appellee

Briefed by [David Wellen](#)

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SUPREME COURT - ORDERS

MISSISSIPPI BAR V. CRITES

ORDER

STATE BAR - RULES OF DISCIPLINE - DISABILITY INACTIVE STATUS - Whenever it has been determined that any attorney subject to the disciplinary jurisdiction of the Court is personally incapable of practicing law, he shall be transferred to disability inactive status and not permitted to practice law until further order from the Court

FACTS

On April 7, 2017, the Supreme Court of Tennessee concluded that Kenneth K. Crites is currently incapacitated from continuing the practice of law and indefinitely transferred Crites to disability inactive status. Due to Crites's status in Tennessee, the Mississippi Bar initiated disciplinary proceedings against Crites under Rules 18 and 19 of the Rules of Discipline for the Mississippi State Bar, seeking to transfer Crites to disability inactive status in Mississippi. On November 5, 2018, Crites filed his motion to stay proceedings in the Mississippi Supreme Court, alleging that the Tennessee order was obtained through a violation of his Fourteenth Amendment due process rights.

ORDER

The Supreme Court found that Crites's transfer to disability inactive status until further order of this Court was an appropriate sanction under Rule 13 of the Rules of Discipline for the Mississippi State Bar. The Supreme Court ordered Crites to be placed on disability inactive status and not permitted to practice law in the State of Mississippi until reinstatement of privileges by order of the Court. The Supreme Court further found that Crites must seek reinstatement pursuant to Rules 12 and 25 of the Rules of Discipline for the Mississippi State Bar should he seek to be reinstated to the practice of law in Mississippi, Crites shall remit the costs and expenses incurred in the filing of the Mississippi Bar's petition pursuant to Rule 27 of the Rules of Discipline for the Mississippi State Bar; and the Clerk of the Court shall send copies of the order to Crites and to the Mississippi Bar.

Granted - 2018-BD-01238-SCT (Jan. 10, 2019)

En Banc Order by Chief Justice Waller

Briefed by [Ryan Overturf](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 8, 2019

COURT OF APPEALS - CIVIL CASES

EMERY V. GREATER GREENVILLE HOUS. & REVITALIZATION ASS'N

CIVIL - REAL PROPERTY

CIVIL PROCEDURE - MOTION PRACTICE - DEFAULT - When considering a Rule 55(c) motion to set aside an entry of default, the court may, for good cause shown, set aside the motion, but in the event that a default judgment has been entered, the moving party must make a showing sufficient to vacate the judgment under Miss. R. Civ. P. Rule 60(b)

CIVIL PROCEDURE - DEFAULT JUDGMENT - BALANCING TEST - When considering a Rule 60(b) motion to set aside a judgment, the trial court must apply a three-part balancing test, weighing (1) the nature and legitimacy of the defendant's reasons for his default, i.e. whether the defendant has good cause for his default, (2) whether the defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside

FACTS

In 2011, Odis Emery and Greater Greenville Housing and Revitalization Association ("Greater Greenville") executed an option to purchase six properties in Greenville, Mississippi. Later, four additional properties were added to the sale. Emery paid Greater Greenville \$75,000, and Greater Greenville executed and delivered a warranty deed conveying all ten properties to Emery. Four years after conveying the property to Emery, Greater Greenville discovered the discrepancy between the home addresses listed in the option to purchase and the warranty deed's legal description. Greater Greenville attempted to contact Emery directly but did not receive a response. Greater Greenville filed a complaint to reform the deed. Emery was personally served with the summons and a copy of the complaint, but Emery did not serve any responsive pleading within thirty days. Counsel for Greater Greenville filed a request for an entry of default against Emery and the clerk entered a default against Emery for failure to appear, plead, or otherwise defend the action. The next day, Greater Greenville filed its motion for default judgment and mailed a copy of the motion to Emery. A final judgment was entered by the chancery court, granting a default judgment against Emery and reforming the warranty deed from Greater Greenville to Emery to exclude the four additional properties due to mutual mistake. Three weeks after the entry of the default judgment, Emery filed his motion to set aside the default judgment and for leave to file an answer. After a hearing, the chancery court entered its final order denying Emery's motion to set aside the default judgment. Emery appealed.

ISSUE

Whether the chancery court erred in failing to set aside the entry of default for lack of good cause under Miss. R. Civ. P. Rule 55(c) and the default judgment under Miss. R. Civ. P. Rule 60(b).

HOLDING

(1) Because Emery made no good cause challenge to the entry of default before the chancery court, and because Miss. R. Civ. P. Rule 55(c) provides in the event a default judgment has been entered the moving party must make a showing sufficient to vacate the judgment under Miss. R. Civ. P. Rule 60(b), the chancery court did not err in failing to set aside the entry of default. However, because Emery showed a colorable defense under the applicable law, and Greater Greenville would not suffer prejudice under the Miss. R. Civ. P. Rule 60(b) balancing test context, the chancery court erred in denying Emery's motion to set aside the default judgment. Therefore, the Court of Appeals reversed and remanded the judgment of the Washington County Chancery Court.

Reversed & Remanded - 2016-CA-01439-COA (Jan. 8, 2019)

En Banc Opinion by Presiding Judge Carlton

Hon. Marie Wilson (Washington County Chancery Court)

Derek D. Hopson & Derek Dewayne Hopson Jr. for Appellant - Robert N. Warrington & Alexandra Hutton Oglesby for Appellee

Briefed by [Carson Phillips](#)

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JOHNSON V. JOHNSON

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - CONTINUANCE - DENIAL - The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be reversed unless the decision results in manifest injustice
DOMESTIC RELATIONS - DIVORCE - ABSENCE OF DEFENDANT - If the plaintiff can prove the alleged ground for divorce, the chancellor has authority to grant the divorce despite the absence of the defendant
DOMESTIC RELATIONS - DIVORCE - CRUEL & INHUMAN TREATMENT - Generally, the cruel and inhuman treatment must be shown to be routine and continuous; however, a single occurrence may be sufficient for a divorce on this ground

FACTS

Daniel and Nikki Johnson were married on June 21, 1997 and separated in December of 2012. On December 21, 2012, Nikki filed a complaint for divorce, alleging habitual cruel and inhuman treatment and, alternatively, irreconcilable differences. The chancery court entered an order setting trial for August 5, 2014. A continuance was granted. After two additional continuances, trial was set for May 24, 2016. On May 24, Daniel did not appear. His attorney stated that Daniel was in the hospital and requested a continuance. The chancery court granted the request, but the chancellor noted that the trial had been continued several times before and stated that should Daniel again fail to appear, the trial would proceed without him and suggested that Daniel's deposition be taken. On June 3, 2016, Daniel filed a motion for an extension of time, and thereafter the chancery court entered an order setting the new trial date for November 16, 2016. On November 16, Daniel did not appear, nor did he inform his attorney that he would be absent. The trial proceeded. The only witnesses were those called by Nikki. Nikki and her witnesses testified as to Daniel's jealousy, verbal abuse, repeated threats, physical abuse, and destructive behavior. Pictures of bruises on Nikki's body were admitted into evidence. Following trial, the chancery court granted divorce on the ground of cruel and inhuman treatment. Daniel subsequently filed a Rule 59 motion for a new trial or to alter or amend the judgment. In his motion, Daniel claimed that he missed the trial due to dangerously high blood sugar and other health issues for which he sought hospital care, and that, because of the chancellor's failure to grant a continuance, he was unable to present evidence in his favor. The chancery court denied the motion. Daniel appealed.

ISSUES

Whether (1) the chancellor erred in failing to grant a continuance; (2) Daniel was unable to present evidence in his favor; and (3) sufficient proof supported the judgment of divorce.

HOLDING

(1) Because Daniel did not provide the chancery court with any verification of his claim that he was hospitalized, and therefore, the chancery court had only the representation of Daniel's uninformed and surprised trial counsel, the chancery court did not err in failing to grant a continuance. (2) Because Daniel forfeited his right to testify when he failed to appear at trial, ignored the chancellor's prior suggestion that he have a deposition available to present in the event of his absence, and because Nikki was still required to prove the alleged ground for divorce, the chancellor did not err. (3) Because Nikki and her witness's testimonies demonstrated a pattern of abuse that enabled the chancellor to grant a divorce on the grounds of habitual cruel and inhuman treatment, the chancellor did not err. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Chancery Court.

Affirmed - 2017-CA-01071-COA (Jan. 8, 2019)

En Banc Opinion by Judge Greenlee

Hon. Dorothy Winston Colom (Lowndes County Chancery Court)

William W. Housley Jr. for Appellant - Carrie A. Jourdan for Appellee

Briefed by [Natalie McCarty](#)

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MARK V. CITY OF HATTIESBURG

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

TORTS - MISSISSIPPI TORT CLAIMS ACT - IMMUNITY - The MTCA provides immunity to government entities for employee conduct constituting fraud, malice, libel, slander, and defamation

TORTS - INVASION OF PRIVACY - ELEMENTS - The elements of invasion of privacy are (1) the intentional intrusion upon the solitude of another, (2) the unpermitted appropriation of another's identity, (3) the public disclosure of private facts, and (4) holding another to the public eye in false light

FACTS

Sharon Mark, while acting as a municipal-court clerk in Hattiesburg, was investigated for wrongdoing including hiding paperwork, shredding documents, accepting bribes, dismissing tickets, and engaging in inappropriate contact with judges. After an internal investigation, Mark was disciplined and re-assigned to another office. She subsequently filed a complaint against the City of Hattiesburg (the "City"), Mayor Johnny Dupree (the "Mayor"), and the City Council alleging slander, invasion of privacy, and intentional infliction of emotional distress. The Forrest County Circuit Court granted the City's motion for summary judgment and then granted the Mayor and City Council's motions for a directed verdict after a five-day trial. Mark appeals.

ISSUES

Whether Mark presented sufficient evidence to survive (1) the City's summary judgment motion; and (2) the Mayor and the City Council's directed-verdict motion.

HOLDING

(1) Because Mark was an at-will employee and the mayor followed the City's grievance policy, summary judgment was appropriate. Further, because the Mississippi Tort Claims Act provides immunity for government entities against claims of slander, summary judgment was appropriate. Finally, because Mark did not show proof of injury or harm, there was no genuine issue of material fact and summary judgment was appropriate. (2) Because there was no evidence that false or defamatory statements were made, and because Mark did not prove that the disclosures would be offensive to a reasonable person, there was no invasion of privacy and a directed verdict was appropriate. Further, because Mark presented no evidence to show that the conduct was so extreme as to be beyond the bounds of public decency, there was no intentional infliction of emotional distress and a directed verdict was appropriate. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2016-CA-01638-COA (Jan. 8, 2019)

Opinion by Judge Tindell

Hon. Michael H. Ward (Forrest County Circuit Court)

Kim T. Chaze for Appellant - L. Clark Hicks Jr. & James W. Gladden Jr. for Appellees

Briefed by [Karen Lott](#)

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ROBINSON V. ROBINSON PROP. GRP. CORP.

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - CONTINUANCE - DISCRETION - The circuit court has sound discretion to grant or deny a continuance under Miss. R. Civ. P. 56(f), and an appeals court will only reverse a circuit court where its decision can be characterized as an abuse of discretion

TORTS - NEGLIGENCE - BURDEN OF PROOF - To prevail on a negligence claim, a plaintiff must establish, by a preponderance of the evidence, duty, breach, causation and injury

CIVIL PROCEDURE - SUMMARY JUDGMENT - NON-MOVANT'S BURDEN - Summary judgment is appropriate when the non-moving party has failed to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial

FACTS

Linda Robinson was at the Horseshoe Casino in Tunica, Mississippi when Arthur Johnson, another patron at the casino, stumbled and knocked a free-standing casino sign onto her. An EMT immediately attended to Robinson, but she did not require serious medical attention. Robinson filed a complaint in the Tunica County Circuit Court against Robinson Property Group d/b/a Horseshoe Casino (the "Casino"), alleging the sign was negligently and improperly stowed, constituted a dangerous condition of the property, and caused her injury. Following discovery, the Casino filed a motion for summary judgment. Three days before the motion hearing, Robinson responded to the Casino's motion for summary judgment and filed a motion for a continuance. The Casino replied that Robinson's response was untimely and procedurally improper and requested that its summary judgment motion be granted. The trial court concluded that Robinson failed to show a breach of duty for the premises-liability claim, thus, denied Robinson's motion for a continuance and granted the Casino's motion for summary judgment. The trial court also denied Robinson's motion for reconsideration. Robinson appealed.

ISSUES

Whether (1) the circuit court's denial of Robinson's Miss. R. Civ. P. 56(f) motion for a continuance was an abuse of discretion; and (2) the circuit court erred in granting the Casino's motion for summary judgment.

HOLDING

(1) Because Robinson did not reply to the motion for summary judgment within the ten day requirement of Rule 4.03(2) of the Uniform Rules of Circuit and County Court, and because Robinson did not inform the Casino or the trial court in a timely manner of her desire to present additional evidentiary material, Robinson's motion for a continuance was untimely and the trial court did not abuse its discretion by denying the motion. (2) Because Robinson did not provide sufficient evidence to establish that a dangerous condition existed on the premises and that the Casino breached any duty owed to her as an invitee, the trial court did not err in granting the Casino's motion for summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Tunica County Circuit Court.

Affirmed - 2013-CA-01838-COA (Jan. 8, 2019)

En Banc Opinion by Presiding Judge Barnes

Hon. Albert B. Smith III (Tunica County Circuit Court)

Drayton D. Berkley for Appellant - Pope Shannon Mallette for Appellee

Briefed by [Baxter Geddie](#)

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SHRIVER V. BOYD BILOXI, LLC

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - GAMING - REGULATIONS - The commission shall adopt regulations which prescribe the manner in which winnings, compensation from games and gaming devices, and gross revenue must be computed and reported by the licensee

ADMINISTRATIVE LAW - GAMING - PATRON DISPUTE - A claim by a patron of a licensee for payment of a gaming debt not evidenced by a credit instrument, and a dispute between a licensee and a patron associated with a promotional activity as defined in Miss. Code Ann. § 75-76-5, shall be resolved by the executive director in accordance with Miss. Code Ann. §§ 75-76-159 through 75-76-165, inclusive; the resolution of such a claim or dispute by the executive director shall include any claims for alleged winnings or losses

ADMINISTRATIVE LAW - GAMING - JURISDICTION - The Mississippi Gaming Control Act makes all gaming matters the exclusive jurisdiction of the Mississippi Gaming Commission

FACTS

Christian and Michelle Shriver were a married couple who won \$41,000 worth of slot vouchers at the Imperial Palace Casino Resort Spa (the “IP Casino”). Each voucher had the phrase “Ticket void after 60 days” written clearly on its face. The Shrivens won the vouchers in 2013 and tried to redeem them in 2015. IP Casino refused to honor the vouchers because the vouchers had expired. The Shrivens filed a patron dispute with the Mississippi Gaming Commission (the “Commission”). The Executive Director of the Commission found that the Shrivens were not entitled to a redemption. Next, the Shrivens requested a hearing to reconsider the Executive Director’s findings. The hearing examiner found that the Shrivens were not entitled to a redemption, and that IP Casino had complied with the applicable law in denying the Shrivens’ attempted voucher redemption. The Shrivens appealed to the Harrison County Circuit Court. The Harrison County Circuit Court declined to review the hearing examiner’s decision. The Shrivens appealed.

ISSUES

Whether (1) the Executive Director of the Commission exceeded his statutory authority in allowing IP Casino’s internal rules to determine whether the Shrivens’ vouchers were expired; (2) the Commission had jurisdiction over the dispute; (3) the Shrivens were bound by the patron-dispute process; (4) the Commission’s Executive Director had jurisdiction over common-law tort claims; and (5) there were strong policy reasons why the Commission’s Executive Director should not have been allowed to exceed its statutory authority.

HOLDING

(1) Because IP Casino’s vouchers adhered to the requirements promulgated by the Executive Director and the promulgation of these requirements was completely within the Executive Director’s statutory authority, the Executive Director did not exceed its statutory authority. (2) Because the vouchers qualified as gaming debts and the Executive Director had statutory authority over gaming debts, the Executive Director had jurisdiction over the dispute. (3) Because the Commission had exclusive jurisdiction over all gaming matters, the Shrivens were bound by the patron-dispute process. (4) Because the Shrivens’ dispute was not a common-law tort claim, the Executive Director had jurisdiction over the dispute. (5) Because the Shrivens’ policy argument was not supported by statutory provision or case law, the Executive Director did not exceed his authority. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2018-CC-00206-COA (Jan. 8, 2019)

En Banc Opinion by Judge Greenlee

Hon. Lisa P. Dodson (Harrison County Circuit Court, Second Judicial Dist.)

Marvin M. Vining for Appellants - Kathryn H. Hester for Appellee

Briefed by [Davis Pigg](#)

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TOWNSEND V. WHAT A COMBO INC.

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

CIVIL PROCEDURE - SERVICE OF PROCESS - SERVICE BY PUBLICATION - Pursuant to Miss. R. Civ. P. 4(c)(4)(A), service by publication is only permitted if an affidavit or sworn complaint states the defendant’s post-office address, if known, or swears that it could not be determined after a diligent inquiry

EMPLOYMENT LAW - EMPLOYMENT AT-WILL - TERMINATION - The general rule of employment at-will is that an employer may terminate an at-will employee for a good reason, a wrong reason, or no reason at all

TORTS - VICARIOUS LIABILITY - SCOPE OF EMPLOYMENT - An employer is liable for the torts of his employee only when they are committed within the scope of employment

FACTS

Donyanique Townsend filed a complaint against What a Combo Inc. (“What a Combo”), Aleiandria Watkins, Alonzo Stubbs, and Eric Shackelford for wrongful termination, false imprisonment, and false arrest. Townsend attempted to

serve Watkins, Stubbs, and Shackelford by publication. Townsend's attorney filed an affidavit of diligent search and inquiry, but he did not state the defendants' post-office addresses in it or swear that they were indeterminable following diligent inquiries. Townsend did not allege that she had an employment contract with What a Combo for a specified period of time, but alleged that Watkins, Stubbs, and Shackelford detained her, that the police were called, and that she was arrested. Townsend did not allege that they were acting within the scope of their employment with What a Combo when the arrest occurred. The Pike County Circuit Court granted What a Combo's motion to dismiss as well as the joint motion to dismiss of Watkins, Stubbs, and Shackelford, and Townsend appealed the orders of dismissal. The Pike County Circuit Court affirmed the decisions. Townsend appealed.

ISSUE

Whether the court properly dismissed the claims against Watkins, Stubbs, Shackelford and What a Combo for wrongful termination, false imprisonment, and false arrest.

HOLDING

(1) Because Townsend's attorney did not state the defendants' post-office addresses in the affidavit of diligent search and inquiry or swear that they were indeterminable following diligent inquiries, the court properly dismissed the claims for insufficient service of process. Additionally, because Townsend was an at-will employee, the court properly dismissed the wrongful termination claim. Finally, because Townsend did not allege that Watkins, Stubbs, and Shackelford were acting within the scope of their employment with What a Combo, the court properly dismissed the false imprisonment and false arrest claims. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

Affirmed - 2017-CA-01168-COA (Jan. 8, 2019)

En Banc Opinion by Judge Greenlee

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

Charles E. Miller & Angela Taylor Miller for Appellant - Doris Theresa Bobadilla & Matthew Miles Williams for Appellees

Briefed by [Luke Phillips](#)

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TRAPPEY V. NEWMAN

CIVIL - REAL PROPERTY

REAL PROPERTY - REZONING - SPOT ZONING - Spot Zoning is where a zoning ordinance is amended reclassifying one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith

CIVIL LAW - APPELLATE AUTHORITY - SUBSTANTIAL EVIDENCE - Where there is substantial evidence supporting both sides of a rezoning application, it is hard to see how the ultimate decision could be anything but 'fairly debatable,' not 'arbitrary and capricious,' and therefore beyond the Courts authority to overturn

FACTS

Rosa Newman applied for a special exception to the City of Natchez Development Code to resume the commercial use of her property in a residential area. Randolph and Frances Trappey objected to the special exception. The Planning Commission held a study session to discuss factors necessary to justify a grant of the special exception and eventually approved the special exception with conditions, by a four to three vote. The circuit court affirmed the decision of the Planning Commission. The Trappeys appealed.

ISSUES

Whether (1) the approval of the application for the special exception lacked evidentiary support and was without merit; (2) the decision of the Planning Commission was invalid because it did not consider the factors necessary to justify a

grant of the special exception; (3) the Planning Commission’s vote was invalid because it was not based on a super majority; and (4) approval for the application was impermissible as a form of spot zoning.

HOLDING

(1) Because there was substantial evidence supporting both sides of the rezoning application, the ultimate decision was “fairly debatable” and not without merit. (2) Because the minutes of the Planning Commission note a discussion of the factors in a study session, there was sufficient evidence in the record that the Planning Commission did consider the required factors prior to approving the special exception. (3) Because the record did not indicate that enough citizens within the required one-hundred-sixty-foot radius had raised timely objections, the special exception did not require a super-majority vote. (4) Because Newman was not specifically favored over the Trappeys, and the property had previously been for commercial use, the grant of the special exception did not constitute impermissible spot zoning. Therefore, the Court of Appeals affirmed the judgment of the Adams County Circuit Court.

Affirmed - 2017-CA-00891-COA (Jan. 8, 2019)

Opinion by Chief Judge Griffis

Hon. Lillie Blackmon Sanders (Adams County Circuit Court)

Lucien C. Gwin Jr. for Appellants - Earnestine Alexander for Appellee

Briefed by [Jack Schultz](#)

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WHITE V. CITY OF STARKVILLE

CIVIL - OTHER

MUNICIPAL LAW - ZONING - REZONING APPLICANT REQUIREMENTS - A rezoning applicant must prove by clear and convincing evidence that either (1) there was a mistake in the original zoning or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need for such rezoning exists

MUNICIPAL LAW - ZONING - CHANGED CONDITIONS - Significant changes in accessibility of goods and services wrought by new infrastructure can provide a reasonable basis for the changed conditions of a neighborhood for the purpose of rezoning

FACTS

In January 2017, the Starkville Board of Aldermen approved an application filed on behalf of the City of Starkville (the “City”) to rezone approximately 360 acres within the city for the purpose of building an industrial park. Laura White and other property owners adjacent to the land proposed for rezoning filed a bill of exceptions and appealed the decision to the Oktibbeha County Circuit Court. Upon finding sufficient evidence that the Board of Aldermen had a reasonable and not arbitrary, capricious, or illegal basis for its decision, the circuit court affirmed the decision. White appealed.

ISSUES

Whether the trial court erred in affirming the Board of Aldermen’s approval of the rezoning application filed on behalf of the City.

HOLDING

Because a court will only set aside a zoning authority’s decision if the decision was arbitrary, capricious, discriminatory, illegal, or without substantial evidence, and because the application included reasonable and debatable appeals to public need because of the changes to the area wrought by the nearby highway, municipal sewer lines, and other infrastructure, the trial court did not err in affirming the Board of Aldermen’s approval of the rezoning application on behalf of the City. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

Affirmed - 2017-CA-00760-COA (Jan. 8, 2019)

En Banc Opinion by Presiding Judge Tindell

Hon. James T. Kitchens Jr. (Oktibbeha County Circuit Court)

G. Dewey Hembry III & Taylor Allison Heck for Appellants - Christopher James Latimer, Lisa Anderson Reppeto, & Christopher Steven Pace for Appellees
Briefed by [Jon-Paul Bushnell](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

KEYES V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - THREE YEAR DEADLINE - PROCEDURAL BAR - In case of a guilty plea, a motion for post-conviction collateral relief must be filed within three years after entry of the judgment of conviction; when a time-barred post-conviction collateral relief motion is filed, the burden falls on the movant to show he has met a statutory exception

POST-CONVICTION RELIEF - SUCCESSIVE MOTIONS - PROCEDURAL BAR - An order denying a PCR motion shall be conclusive until reversed, and shall be a bar to a second or successive PCR motion

CONSTITUTIONAL LAW - RIGHT TO FACE ACCUSER - WAIVER - The constitutional right to face an accuser is waived by a valid guilty plea

FACTS

On September 30, 1983, Juarez Keyes submitted a valid guilty plea on multiple charges, including rape. The plea-hearing transcript shows that Keyes admitted to the rape charge and detailed how the rape occurred. During his incarceration, Keyes filed four motions for post-conviction collateral relief. Keyes made his fourth motion thirty-three years after his conviction, which the trial court denied as procedurally barred. Keyes appealed.

ISSUES

Whether (1) the motion for PCCR was procedurally barred; (2) Keyes was denied his right to confront his accuser; (3) there was sufficient evidence linking Keyes to the rape; and (4) the circuit court intentionally withheld records pertaining to the rape.

HOLDING

(1) Because Keyes's motion was filed thirty-three years after entry of the judgment of conviction and he failed to satisfy any of the statutory exceptions that would allow a successive motion, the motion for PCCR was procedurally barred. (2) Because Keyes entered a valid guilty plea, his right to confront his accuser was waived. (3) Because Keyes admitted to the rape charge, the issue was without merit. (4) Because Keyes failed to provide evidence that the State suppressed material evidence, the issue was without merit. Therefore, the Court of Appeals affirmed the decision of the Hinds County Circuit Court.

Affirmed - 2017-CP-00712-COA (Jan. 8, 2019)

En Banc Opinion by Chief Judge Griffis

Hon. Jeff Weill Sr. (Hinds County Circuit Court)

Pro se for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Drey Russell](#)

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WALKER V. STATE

CIVIL - POST-CONVICTION RELIEF

FALSE PRETENSE - INDICTMENT - MATTERS OF PROOF - In an indictment for false pretense, injury, detriment, and loss are not essential elements of the offense but matters of proof

POST-CONVICTION RELIEF - INVOLUNTARY GUILTY PLEA - BURDEN - The burden of proving the invalidity of a guilty plea rests with the defendant and must be proven by a preponderance of the evidence

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - GUILTY PLEA - In the context of a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty, would have insisted on going to trial, and the outcome would have been different

FACTS

Demario Walker was indicted for felony false pretense. He was assigned a public defender and entered an open plea of guilt. The factual basis of his plea was read by the state at his plea hearing and showed that he provided a fraudulent check to Pop's Auto Sales in order to obtain a vehicle. He was sentenced to serve ten years in the custody of the Mississippi Department of Corrections. In September 2016, Walker filed a motion for post-conviction relief with the trial court on various grounds, including defective indictment, ineffective counsel, involuntary guilty plea, illegal sentencing, and lack of jurisdiction. The trial court summarily dismissed Walker's motion, stating that the claims were waived and procedurally barred because none of his grounds for relief were made at the time of his plea or sentencing. Walker appealed.

ISSUES

Whether the trial court erred in dismissing Walker's motion for post-conviction relief because (1) the false pretense indictment did not include the elements of injury, detriment, or loss to Pop's Auto Sales; (2) his guilty plea had no factual basis and was involuntary; (3) the court and law enforcement lacked jurisdiction; and (4) his counsel was ineffective.

HOLDING

(1) Because the purpose of the indictment was to provide the accused reasonable notice of the charges against him so that he may prepare an adequate defense, and because injury, detriment, and loss were matters of proving false pretense and were not essential elements, the indictment was not defective. (2) Because Walker was thoroughly informed and understood the nature and consequence of his guilty plea, and because the statute only required that Walker obtain the vehicle, the plea was voluntary and the factual basis was not deficient. (3) Because the offense occurred in Florence, and because Rankin County includes both Florence and Richland, where the proceedings occurred, jurisdiction was proper. (4) Because the defendant must show reasonable probability that, but for counsel's errors, he would not have pled guilty and that the outcome would have been different at trial, and because nothing in the record supported such an argument, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2017-CP-01191-COA (Jan. 8, 2019)

Opinion by Presiding Judge Barnes

Hon. Steve S. Ratcliff III (Rankin County Circuit Court)

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

Briefed by [Tucker Hood](#)

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COURT OF APPEALS - CRIMINAL CASES

ESTERS V. STATE

CRIMINAL - FELONY

CRIMINAL - CONVICTIONS - EVIDENCE SUFFICIENCY - When the sufficiency of evidence for a conviction is challenged, the court must determine whether the evidence shows beyond a reasonable doubt that the accused committed the crime and that the accused committed every element of the offense

CRIMINAL - BURGLARY EVIDENCE - INFERENCE OF BURGLARY - To determine whether there is sufficient evidence supporting an inference of burglary, the court considers the: (1) temporal proximity of the possession to the crime, (2) number of fruits of the crime possessed, (3) nature of the possession, and (4) plausibility of the explanation for the possession

CRIMINAL - JURY INSTRUCTIONS - REVERSIBLE ERROR - There is reversible error regarding jury instructions where the trial court fails to instruct the jury on the essential elements of the crime

FACTS

Antwoine Esters stole several items from the vehicle of Melinda Bowens and was convicted of burglary of an automobile in Forrest County Circuit Court. Esters was sentenced as a habitual offender to seven years in the Mississippi Department of Corrections without eligibility of parole or probation. Esters filed a motion for JNOV, but his motion was denied. Esters appealed.

ISSUES

Whether the trial court erred regarding (1) the sufficiency of evidence to support the conviction; and (2) the court's jury instructions pertaining to the elements of automobile burglary.

HOLDING

(1) Because neither the relevant statutes nor applicable caselaw require the State to identify the legal description of the vehicle burglarized and a reasonable jury could conclude Esters was guilty beyond a reasonable doubt, there was sufficient evidence to support his conviction. (2) Because the jury instruction embodied the substance of the essential elements of automobile burglary, the jury was properly instructed on the crime charged. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2017-KA-01300-COA (Jan. 8, 2019)

En Banc Opinion by Judge Tindell

Hon. Jon Mark Weathers (Forrest County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Brandon H. Wilson](#)

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LAVANT V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - CONTROLLED SUBSTANCES - INTENT - Miss. Code Ann. § 41-29-139(a)(1) makes it unlawful for any person to knowingly or intentionally possess with intent to sell a controlled substance; methamphetamine is a schedule II drug under the statute

CRIMINAL PROCEDURE - JNOV - SUFFICIENCY OF EVIDENCE - When reviewing a case for sufficiency of evidence, all credible evidence that is consistent with guilt must be accepted as true; the State is given the benefit of all favorable inferences that may be reasonably drawn from the evidence

CRIMINAL LAW - CONSTRUCTIVE POSSESSION - EVIDENCE - Constructive possession is established by showing that the contraband was under dominion and control of the defendant; if the accused is the owner of the premises, the exclusive user for some extended time, or if there are additional incriminating circumstances, then inferences of constructive possession may be permissible

FACTS

Police stopped Shawn Lavant for driving without his headlights on. Dorothy Parnell owned the car Lavant was driving. Police recovered two pill bottles, containing 176 pills, from the car. The pills were tested and contained methamphetamine. At trial, Lavant admitted he frequently used Parnell's vehicle and had been in the passenger's seat of the vehicle earlier during the day of the arrest. A unanimous jury found Lavant guilty of possessing forty or more units of methamphetamine with intent to transfer or distribute in violation of Miss. Code Ann. § 41-29-139(a)(1). Lavant was sentenced to twenty-five years, with the first ten to be served day-for-day. The trial court denied Lavant's post-trial motion for a judgment notwithstanding the verdict (JNOV) and his motion for a new trial. Lavant appealed.

ISSUES

Whether the trial court erred in denying (1) Lavant's motion for JNOV because there was insufficient evidence to support his conviction for possession of forty or more units of methamphetamine; and (2) Lavant's motion for a new trial because the verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because the record included additional incriminating circumstances, including testimony that Lavant was the driver and sole occupier of the vehicle, sat in the passenger seat earlier the same day, and frequently used the vehicle, to show constructive possession, and the pills tested were homogeneous, there was sufficient evidence for the jury to conclude Lavant possessed forty or more units of methamphetamine. (2) Because there was no evidence presented to show the verdict was so against the overwhelming weight of evidence as to sanction an unconscionable injustice, the new trial motion was without merit. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2018-KA-00124-COA (Jan. 8, 2019)

En Banc Opinion by Presiding Judge Carlton

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, Second Judicial Dist.)

W. Daniel Hinchcliff & George T. Holmes (Pub. Def. Office) for Appellant - Katy Taylor Gerber (Att'y Gen. Office) for Appellee

Briefed by [Katelin Davis](#)

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LIDDELL V. STATE

CRIMINAL - FELONY

HEARSAY - ADMISSIBILITY - OFFICER'S TESTIMONY - Pursuant to *Jefferson*, an officer's testimony that explains why he or she acted as he or she did, and not for the truth of the matter asserted, is not hearsay and is admissible
HEARSAY - ADMISSIBILITY - HARMLESS ERROR - The admission of testimony outside the scope of a co-conspirator's involvement in a crime is an error; however, the admission may be harmless error if none of the testimony given was to prove elements of the charges against the defendant

CRIMINAL PROCEDURE - MISTRIAL - JUDICIAL DISCRETION - Pursuant to *Williams*, a trial judge possesses the authority to declare a mistrial where prosecutorial conduct substantially deflects the attention of the jury from the issues that it has been called upon to decide or appeals to bias, passion, or prejudice, and, therefore, significantly impairs a defendant's right to a fair trial

FACTS

In March 2014, Eric Williams Sr. was killed at his home during a burglary. Antwaine Liddell and five others were indicted in Sharkey County for the crime. In August 2016, Liddell's motion for a change of venue was granted, and venue was transferred to Forrest County Circuit Court. After a jury trial in October 2016, Liddell was convicted on seven counts, including deliberate design murder, burglary of a dwelling, armed robbery, kidnapping, and conspiracy to commit armed robbery. Liddell was sentenced to life plus fifty years. Liddell filed a motion for JNOV or, in the alternative, a new trial. The circuit court denied his motion. Liddell appealed.

ISSUES

Whether the circuit court erred in (1) overruling Liddell's hearsay objections; and (2) denying Liddell's motion for mistrial.

HOLDING

(1) Because Investigators Oliver and Clark's statements were made about the description of the course of action they had taken when investigating the crime, not for the truth of the matter asserted, the circuit court properly allowed the testimony. Further, because the other disputed testimony was not used to prove any of the seven charges against Liddell, allowing this testimony constituted harmless error. (2) Because the trial judge is permitted considerable discretion in determining whether a mistrial is warranted by measuring prejudicial effect, and the circuit court allowed Liddell time to interview witnesses before he took the stand, this issue lacked merit. Therefore, the Court of Appeals affirmed the judgment of the Sharkey County Circuit Court.

Affirmed - KA-01656-COA (Jan. 8, 2019)

En Banc Opinion by Judge Westbrook

Hon. M. James Chaney Jr. (Sharkey County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Whitney Jackson](#)

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TUBWELL V. STATE

CRIMINAL - MISDEMEANOR

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice; this high standard is necessary because any factual disputes are properly resolved by the jury, not by an appellate court

CRIMINAL PROCEDURE - COURT COSTS & FINES - INDIGENT STATUS - The determination of indigent status is within the sound discretion of the trial judge and such determination shall not be overturned unless there is a showing of manifest error or abuse of discretion

FACTS

Officer Matt Defore of the Southaven Police Department observed Joe Clyde Tubwell operating a motor vehicle at forty miles-per-hour in a twenty-five miles-per-hour zone. As a result, Officer Defore made a traffic stop and cited Tubwell for the unsafe operation of a motor vehicle and the failure to dim high beams. Tubwell was convicted in the Municipal Court of the City of Southaven, and an appellate court affirmed the county court's judgment. Tubwell appealed.

ISSUES

Whether the county court erred in (1) finding there was sufficient evidence to support Tubwell's convictions; (2) allowing Tubwell's witness to be arrested in open court; (3) threatening Tubwell with practicing law without a license; and (4) imposing fines and court costs due to Tubwell's indigent status.

HOLDING

(1) Because Officer Defore testified that Tubwell was driving forty miles-per-hour in a twenty-five miles-per-hour zone and Tubwell offered no evidence, other than his own self-serving statement, that his truck lights did not work on bright, there was sufficient evidence to support Tubwell's convictions. (2) Because Tubwell's witness was arrested following her trial testimony, after she was released by the court, and outside of the court's presence, the issue was without merit. (3) Because the court merely explained to Tubwell that any issue regarding his witness's arrest should be raised by her, the issue was without merit. (4) Because Tubwell filed an affidavit stating that he was indigent but gave testimony that

was inconsistent with indigent status, the court's imposition of fines and court costs was not improper, excessive, or erroneous. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2017-KM-00795-COA (Jan. 8, 2019)

Opinion by Chief Judge Griffis

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

Pro se for Appellant - Robert E. Hayes Jr. for Appellee

Briefed by [Katie Humphries](#)

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