

**MISSISSIPPI SUPREME COURT DECISIONS – JUNE 13, 2019****SUPREME COURT - CIVIL CASES****HINDS COUNTY V. SKINNER****CIVIL - OTHER**

**CIVIL - APPELLATE PROCEDURE - WRIT OF PROHIBITION** - The writ of prohibition can prevent courts from exercising jurisdiction with which they were not vested or may be extended to situations where, although an inferior court has jurisdiction, the superior court considers it necessary to issue the writ to prevent some irreparable injustice

**FACTS**

Hinds County Judges William Skinner and Larita Cooper-Stoke entered an administrative order, which set the salaries of the administrators at an amount greater than the amount budgeted and set by the Hinds County Board of Supervisors. Hinds County appealed.

**ISSUES**

Whether (1) the appeal was properly before the Mississippi Supreme Court and (2) Mississippi Supreme Court should assume jurisdiction over the case and order an extraordinary writ against the county judges.

**HOLDING**

(1) Because Hinds County still had an avenue to pursue justice through an appeal to circuit court, the appeal was not properly before the Supreme Court. (2) Because the Court did not find evidence that the case would result in irreparable injustice if the county judges were not prohibited from setting the salaries of court administrators, the Court refused to assume jurisdiction or order a writ of prohibition. Therefore, the Supreme Court dismissed & remanded the administrative order of the Hinds County Court to the Hinds County Circuit Court.

**CONCURRENCE**

Justice Beam argued that the Supreme Court must stay within its authority in order to maintain the integrity of the judicial process regardless of the delay in justice that results from backlog and administrative problems at the county court level which Hinds County must resolve for itself.

**Dismissed & Remanded - 2017-CA-01269-SCT (June 13, 2019)**

Opinion by Justice Griffis - Concurrence by Justice Beam

Hon. William Louis Skinner, II (Hinds County County Court)

Pieter John Teeuwissen & Anthony Renard Simon for Appellant - Sorie S. Tarawally for Appellees

Briefed by [Jack Schultz](#)

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**MAR-JAC POULTRY MS, LLC V. LOVE****CIVIL - WRONGFUL DEATH**

**TORTS - LIABILITY - RESPONDEAT SUPERIOR** - The employer has the right to supervise and direct the performance of the work by his employee in all its details, and this right carries with it the correlative obligation to see to it that no torts shall be committed by the employee in the course of the performance of the character of work which the employee was appointed to do

**SUMMARY JUDGMENT - EVIDENCE - ADMISSIBILITY** - Evidence that would not be admissible at trial are incompetent to support or oppose summary judgment

**RESPONDEAT SUPERIOR - GOING-AND-COMING RULE - EXCEPTION** - When the employee is on a special mission or errand for his employer, it is an exception to the going-and-coming rule

### **FACTS**

Senah Carter worked at Mar-Jac Poultry MS, LLC (“Mar-Jac”) as a jack driver. Carter asked his supervisor if he had any job openings for two of his friends, Lishanay Wilks and Keannie Love. The supervisor responded that he did have two jobs available and asked if they could show up the next day. Carter responded that he would bring them to work. Carter brought them to work the next day and continued to do so for several weeks. On the way to work one morning, Carter ran into the back of a school bus, and Wilks and Love were killed. Their families sued Mar-Jac under the theory of respondeat superior claiming that Carter was driving the women within the scope of his employment. The trial court refused to grant summary judgment for Mar-Jac who claimed Carter was not acting within the scope of his employment. Mar-Jac appealed.

### **ISSUE**

Whether Carter was acting within the scope of his employment when he was driving the women to work.

### **HOLDING**

Because the testimony of both Carter and his supervisor made it clear that the supervisor had not instructed him to bring the women to work every day, and because he was not compensated for driving them or expected to do so, he was not acting within his scope of employment during the fatal crash. Therefore, the Supreme Court reversed and rendered the judgment of the Covington County Circuit Court.

### **DISSENT**

Presiding Justice King argued that the plaintiffs had provided enough evidence to withstand summary judgment and that the issue should be decided by a jury, not the Supreme Court. He believed that the deposition testimony and affidavits presented enough issues of material fact to try the case through an argument that the nature of the actions undertaken is what determines whether it is within the scope of employment.

### **Reversed & Rendered - 2017-IA-01522-SCT (June 13, 2019)**

Opinion by Chief Justice Randolph - Dissent by Presiding Justice King

Hon. Eddie H. Bowen (Covington County Circuit Court)

David M. Ott & Kris A. Powell for Appellant - P. Manion Anderson, Samuel S. McHard & Rance N. Ulmer for Appellees

Briefed by [Andie Szabo](#)

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## ***SUPREME COURT - CRIMINAL CASES***

### **MORROW V. STATE**

#### **CRIMINAL - FELONY**

**RECEPTION OF EVIDENCE - RIGHT OF ACCUSED TO CONFRONT WITNESSES - USE OF DOCUMENTARY EVIDENCE** - An error does not result in a manifest miscarriage of justice if the evidence admitted in violation of the Confrontation Clause relates to uncontested matters upon which the parties agree

**EVIDENCE - WEIGHT & SUFFICIENCY - CREDIBILITY OF WITNESSES** - The jury has the prerogative to accept or reject, in whole or in part, the testimony of any witness, expert or lay; therefore, the jury may draw its own conclusions from the verbal statements and nonverbal reactions of the witness on the stand

**COUNSEL - ADEQUACY OF REPRESENTATION - STANDARD OF EFFECTIVE ASSISTANCE** - The Court will find that counsel's performance was deficient only when a reasonable probability exists that, but for the attorney's errors, the outcome would have been different

### **FACTS**

Richard Morrow lived with his sister Carlie who was visited often by her daughter Laura and Laura's three-year-old son Ben. One day when Carlie was not present at the house, Laura walked into the kitchen to find Ben standing on the table facing Morrow and saw Morrow quickly pull up Ben's underwear. Laura took Ben to the bathroom where he told her that Morrow had put his mouth on Ben's penis. At trial, Ben testified that Morrow put his mouth on Ben's "middle spot," which Ben explained was what he used to go to the bathroom. Reggie Anderson, a former criminal investigator with the Alcorn County Sheriff's Department, testified that Ben was sent to the hospital for a sexual assault examination kit that was sent to the Mississippi Crime Lab and that the lab also took a DNA sample from Morrow for analysis. Anderson testified that the DNA results came back as a male contributor, but Anderson did not identify Morrow as the male contributor, only that Morrow was the only accused male. Morrow, on the other hand, claimed that Ben had been playing with his dentures and that Ben put the dentures down his underwear. Morrow also testified that he freely gave DNA samples because he did not touch Ben. Morrow was found guilty of fondling. His attorneys did not file any post-trial motions or appeal his conviction, but Morrow was granted a request to file an out of time appeal in which his trial counsel was allowed to withdraw, and appellate counsel was appointed for Morrow.

### **ISSUES**

Whether (1) the hearsay testimony about the DNA evidence was improperly admitted and violated Morrow's Sixth Amendment right to confront witnesses against him; (2) Ben's nonverbal responses were ambiguous and thus insufficient to support the verdict; (3) Morrow received ineffective assistance of counsel; and (4) the cumulative effect of the errors required reversal.

### **HOLDING**

(1) Because Morrow's testimony was in accord with the State's evidence as to the DNA results, and because nothing in the record indicated that Morrow's case was affected by the absence of the witness who prepared the report, the Confrontation Clause violation did not result in a manifest miscarriage of justice, thus, no plain error existed. (2) Because the jury could accept or reject Ben's testimony, and Ben's nonverbal responses did not affect the fairness, integrity, or public reputation of judicial proceedings as the jury was also free to accept Laura's testimony, which mirrored Ben's testimony, the issue was without merit. (3) Because Morrow's trial counsel conceivably welcomed the DNA evidence as part of his trial strategy, and because Morrow failed to show prejudice resulting from either his counsel's failure to object to the testimony about the DNA results or the failure to file a post trial motion, and because Morrow was allowed to file an out of time appeal with new appellate counsel, this issue was also without merit. (4) Because no cumulative harmless errors required reversal, the cumulative error doctrine was inapplicable. Therefore, the Supreme Court affirmed the judgment of the Alcorn County Circuit Court.

### **DISSENT**

Presiding Justice King argued that because the testimony about the DNA results went to the ultimate issue and was given through a surrogate witness with no connection to the DNA analysis or report, the violation of Morrow's constitutional right to confront witnesses against him amounted to plain error requiring reversal, especially since there was no match found between the DNA analyzed at the crime lab and the DNA from Ben's sexual assault kit. He further argued that because there was insufficient information in the record to determine whether ineffective assistance of counsel occurred, the Supreme Court should have denied relief while preserving Morrow's right to make this argument through a petition for post-conviction relief.

**Affirmed - 2018-KA-00166-SCT (June 13, 2019)**

En Banc Opinion by Justice Coleman - Dissent by Presiding Justice King  
Hon. James Lamar Roberts, Jr. (Alcorn County Circuit Court)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 11, 2019

### COURT OF APPEALS - CIVIL CASES

#### CHILDERS V. ILL. CENT. R.R. CO.

#### CIVIL - PERSONAL INJURY

**TORTS - CAUSATION - FELA CLAIM** - In order to prevail in a FELA claim, the plaintiff must prove the same elements as he would in a common-law negligence case, but on the element of causation, plaintiffs have a more relaxed burden of proof and are tasked with providing far less evidence than in ordinary negligence cases

**EVIDENCE - EXPERT TESTIMONY - ADMISSIBILITY** - Miss. R. Evid. 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) their testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

**EVIDENCE - EXPERT TESTIMONY - DAUBERT STANDARD** - In evaluating the reliability of an expert’s theory, the Court considers (1) whether the theory has been the subject of peer review and publication; (2) the known or potential rate of the error of the technique or theory when applied; (3) the existence of standards to control the technique’s operation; and (4) the general acceptance the theory has garnered in the relevant expert community

#### FACTS

Geraldine Childers filed a Federal Employers’ Liability Act (FELA) claim against the Illinois Central Railroad Company (“Illinois Central”) on behalf of her deceased husband Phillip Childers, a former employee of Illinois Central. Childers alleged that her husband’s brain cancer resulted from exposure to toxins while working at Illinois Central, and that he was never provided with proper protective equipment to prevent the exposure. Childers designated Dr. White as the sole expert for medical causation. Dr. White wrote a report stating that Phillip’s brain cancer stemmed from exposure to diesel exhaust and other degreasing agents during his time at Illinois Central. Illinois Central filed a motion to exclude Dr. White’s testimony and for summary judgment. The circuit court granted the motion to exclude, finding that Dr. White’s opinions did not meet the *Daubert* standard and granted the motion for summary judgment, finding that Childers could not prove causation without Dr. White’s testimony. Childers appealed.

#### ISSUES

Whether (1) medical testimony was appropriate to establish causation in the FELA claim; (2) the circuit court erred in excluding Dr. White’s expert medical causation testimony; and (3) the circuit court erred in granting summary judgment.

#### HOLDING

(1) Because expert testimony is required to properly break down the issues in a case where the evidence is beyond the understanding of a lay juror, testimony from a medical expert was the appropriate means to establish causation. (2) Because the studies cited by Dr. White contradict his conclusions, were unreliable, or fail to concretely support his theory of causation, and because Dr. White failed to factor Phillip Childers’s smoking into his analysis, the circuit court did not err in excluding Dr. White’s expert testimony. (3) Because Dr. White’s excluded testimony was the only basis for the theory of causation in the FELA claim, the circuit court did not err in granting summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Tishomingo County Circuit Court.

## CONCURRENCE

Judge McCarty argued that it is the duty of the jury, not the court, to evaluate the credibility of an expert, even when an expert's theory is cutting edge. As a result, Judge McCarty argued that the court's focus should remain on whether the expert's opinion would assist the jury to understand the evidence or facts in dispute.

### **Affirmed - 2017-CA-01568-COA (June 11, 2019)**

En Banc Opinion by Judge Tindell - Special Concurrence by Judge McCarty

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

Patrick Steven O'Brien & C.E. Sorey II for Appellant - Stephanie Camille Reifers, Thomas R. Peters, Brooks E. Kostakis, & John Jennings Bennett for Appellee

Briefed by [Ryan Overturf](#)

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## **COAST PLAZA LLC V. RCH CAPITAL LLC**

### **CIVIL - REAL PROPERTY**

**MISSISSIPPI LIMITED LIABILITY ACT - PERSONAL REPRESENTATIVE - DECEASED MEMBER** - Personal representative means, as to an individual, the executor, administrator, guardian, conservator or other legal representative thereof or the successor of such executor, administrator, guardian, conservator or legal representative

**MISSISSIPPI LIMITED LIABILITY ACT - PERSONAL REPRESENTATIVE - RIGHTS** - If a member who is an individual dies, a personal representative of the member's estate may exercise all rights for the purpose of settling the estate, including the governance rights that were held by such member at the time of the member's death and any power under an operating agreement of an assignee to become a member

**APPELLATE PROCEDURE - NEW CLAIM - PROCEDURAL BAR** - Failure to raise an issue in a trial court causes the operation of a procedural bar on appeal

### FACTS

Michael Thompson and Milton Gagnon shared equal ownership of Coast Plaza LLC ("Coast Plaza"). Milton Gagnon died testate in July 2016, leaving James Gagnon as the administrator of his estate (the "Gagnon Estate"). On November 4, 2016, RCH, the holder of a promissory note secured by a deed of trust on Coast Plaza LLC's only asset, issued a notice of default to Coast Plaza LLC for deficiency under the note. On November 29, 2016, RCH sought a deed in lieu of foreclosure from Coast Plaza LLC provided there are no liens or other debt on the property. Coast Plaza accepted the next day and requested that RCH acknowledge its receipt of its acceptance. RCH responded that it would accept a deed in lieu of foreclosure if the property is clear of other liens and if Coast Plaza fulfills other requirements. RCH discovered a title issue a few days later which Coast Plaza remedied the next day. However, Coast Plaza failed to meet the other requirement RCH laid out and informed RCH that it would take seven years to fulfill its request. RCH retracted its offer to accept a deed in lieu of foreclosure on December 18, 2016. On December 21, 2016, Coast Plaza filed a complaint to enforce the settlement agreement. Six days before trial, Coast Plaza offered an affidavit of James Gagnon asserting that he authorized Michael Thompson to serve as Milton Gagnon's personal representative. At trial, the court found that no settlement agreement was reached by or among the parties. Coast Plaza LLC appealed.

### ISSUES

Whether the trial court erred (1) in failing to find a settlement agreement was reached by or among the parties and (2) by failing to award punitive damages and attorney's fees.

## **HOLDING**

(1) Because the Gagnon Estate neither voted to accept RCH's offer, consented in writing to accept RCH's offer, nor timely authorized Thompson to vote as its proxy, Coast Plaza lacked approval of both Thompson and the Gagnon Estate to agree to dispose of its sole asset via a deed in lieu of foreclosure to RCH. (2) Because Coast Plaza failed to assert that RCH's repudiation of the parties' settlement agreement was a breach of the implied covenant of good faith and fair dealing, which entitles it to punitive damages and attorney's fees at trial and seeking "all other general and equitable relief to which [it was] entitled" is not sufficient to preserve the issue, Coast Plaza was barred from asserting the claim on appeal. Therefore, the judgment of the Hancock County Chancery Court was affirmed.

**Affirmed - 2017-CA-01036-COA (June 11, 2019)**

Opinion by Judge C. Wilson

Hon. Sanford R. Steckler (Hancock County Chancery Court)

Michael James Thompson Jr. & *Pro se* for Appellants - Michael Andrew McDonald for Appellee

Briefed by [Drey Russell](#)

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## **HARBOUR V. TUPELO SCH. DIST.**

### **CIVIL - OTHER**

**CIVIL PROCEDURE - APPEALS - APPEALABLE JUDGMENT-** A decision by the first level appellate court that the agency was definitely wrong in one of its final decisions, even if the court remands for the agency to conduct further proceedings based on that reversal, is a final judgment that is appealable

**CIVIL PROCEDURE - APPEALS - ISSUE NOT RAISED AT TRIAL -** A party is not entitled to relief merely because he is unhappy with the judgment and an appellate court will not entertain on appeal a new theory of unconstitutionality which could have been raised, but was not advanced, before the trial court until a post-judgment motion

### **FACTS**

Meloney Harbour's minor child, T.D.H., was reported as allegedly passing marijuana to another student at Tupelo Middle School. Soon after, the school held a hearing to collect evidence, hear testimony, and determine T.D.H.'s punishment, if any. T.D.H.'s lawyer was not allowed at the hearing per school policy. T.D.H. was ordered to 180 days in alternative school. After unsuccessful appeals to the superintendent and the board of trustees, Harbour appealed to the Lee County Chancery Court. The chancery court reversed and remanded the decision, holding that the school district had violated T.D.H.'s due process rights by not allowing his attorney in the meeting. The school district filed a Rule 59 Motion, and the court sent the issue back to the school district to have another meeting with T.D.H.'s lawyer present. After all of these rulings and motions had been entered, Harbour then filed a Rule 60(b) Motion claiming that the school's "substantial evidence" standard was unconstitutional. That motion was denied. Harbour appealed.

### **ISSUES**

Whether (1) the chancery court's denial of Harbour's 60(b) Motion was a final, appealable judgment and (2) the chancery court erred in denying Harbour's 60(b) Motion.

### **HOLDING**

(1) Because a first-level appellate court's decision that an agency was wrong in one of its final decisions is a final, appealable judgment, and because the chancery court did determine that the school district's initial decision was procedurally incorrect, the chancery court's denial of Harbour's 60(b) motion was an appealable judgment. (2) Because an appellate court will not entertain a new theory of unconstitutionality that was not raised at the trial level, and because

Harbour did not raise the unconstitutionality issue until after the trial stages, the chancery court did not err in denying Harbour's 60(b) motion. Therefore, the Mississippi Supreme Court affirmed the Lee County Chancery Court.

**Affirmed - 2018-CA-00219-SCT (June 13, 2019)**

Opinion by Justice Chamberlin

Hon. T.K. Moffett (Lee County Chancery Court)

Julian D. Miller & Debra M. Giles for Appellant - Otis R. Tims & Martha Bost Stegall (Att'y Gen. Office) for Appellee

Briefed by [Corban Snider](#)

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## KAISER V. KAISER

### CIVIL - CUSTODY

**FAMILY LAW - CUSTODY - BEST INTEREST OF CHILD** - The polestar consideration in a child custody case is the best interest of the child

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - The factors to be considered when determining custody of a minor child include: (1) age, health, and sex of the child; (2) continuity of care prior to separation; (3) parenting skills of each parent; (4) willingness and capacity to provide primary childcare; (5) employment and employment responsibilities of each parent; (6) physical and mental health and age of parents; (7) emotional ties between parent and child; (8) moral fitness of parents; (9) home, school, and community record of child; (10) preference of a child twelve years old or older; (11) stability of home environment; (12) other relevant factors in the parent-child relationship

**FAMILY LAW - GUARDIAN AD LITEM - DISCRETION** - Under Miss. Code Ann. § 93-5-23, a court must appoint a guardian ad litem for a child when a charge of abuse or neglect arises in a custody action regarding the child; when there is not a charge of abuse or neglect, a court may still appoint a guardian ad litem for investigative assistance; outside of Miss. Code Ann. § 83-5-23, the scope of a guardian ad litem's assignment is within the court's discretion

### FACTS

Al and Melanie Kaiser married in 2010 and had two minor children. When Al and Melanie separated in March 2015, Al remained in Mississippi, but Melanie moved to Louisiana. Al filed for divorce in Mississippi, and Melanie filed for divorce in Louisiana. The Louisiana court ultimately retained jurisdiction over the divorce, while the Mississippi court retained jurisdiction over the custody of the two children. In June 2015, Melanie's then-boyfriend John Pullen was arrested for simple assault/domestic violence and for resisting arrest, and in December 2015, Al sought and received temporary relief barring Melanie from allowing any contact between Pullen and the children. During that time, Melanie frequently sought contact with her children, which Al thwarted by hiding them at casinos and withdrawing them from school. At one point in time, Al emailed Melanie offering her a visitation schedule with the children in return for payment. In May 2016, Melanie asked that a guardian ad litem be appointed to assess allegations made by Al, a motion that Al neither joined nor to which he otherwise responded. The guardian ad litem completed a report in November 2016 and offered testimony at trial consistent with her report, but she did not complete her testimony nor offer a final recommendation to the chancellor. She instead filed a motion to withdraw, which the chancellor granted. In January 2018, the chancellor entered a final judgment awarding custody of the two minor children to Melanie and regular visitation to Al. Al appealed.

### ISSUES

Whether the chancellor erred in (1) failing to find that it was in the best interests of the minor children to be kept in the custody of Al from August to November 2015; (2) finding that the appointment of the guardian ad litem was discretionary and therefore allowing the guardian ad litem to withdraw during trial without making a final recommendation; (3) awarding physical custody of the two minor children to Melanie; and (4) failing to continue the trial after Al had retained new counsel.

### HOLDING

(1) Because the chancellor's finding of facts will not be disturbed on appeal unless the chancellor was manifestly wrong, clearly erroneous, or applied an erroneous standard of law, and because the record contained substantial evidence to support the chancellor's finding, the chancellor did not err in failing to find that it was in the best interests of the minor children to be kept in the custody of AI from August to November 2015. (2) Because a guardian ad litem is only mandatory when a charge of abuse or neglect arises in a custody action, and because the guardian ad litem was appointed upon motion by Melanie and not on the basis of a charge of abuse or neglect, the chancellor did not err in finding that the appointment of the guardian ad litem was discretionary and therefore allowing the guardian ad litem to withdraw during trial without making a final recommendation. (3) Because in all child-custody cases the polestar consideration is the best interest and welfare of the child, clarified by the *Albright* factors, and because the chancellor considered all of these factors and found that all but one were either neutral or in favor of Melanie, a finding which AI offered no evidence to rebut, the chancellor did not err in awarding physical custody of the two minor children to Melanie. (4) Because the grant or denial of a continuance is within the discretion of the trial court and will only be overturned when denial of a continuance results in a manifest injustice, and because AI's previous counsel had concluded his case-in-chief and AI therefore suffered no prejudice to his case, the chancellor did not err in failing to continue the trial after AI had retained new counsel. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Chancery Court.

**Affirmed - 2018-CA-00278-COA (June 11, 2019)**

Opinion by Judge C. Wilson

Hon. Jennifer T. Schloegel (Hancock County Chancery Court)

George W. Healy IV for Appellant - Patrick T. Guild for Appellee

Briefed by [Jon-Paul Bushnell](#)

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## THOMAS V. THOMAS

### CIVIL - DOMESTIC RELATIONS

**FAMILY LAW - CUSTODY - BEST INTERESTS OF THE CHILD** - The polestar consideration in child custody cases is the best interest and welfare of the child

**FAMILY LAW - DIVORCE - EQUITABLE DIVISION** - The goals of equitable distribution are a fair division of marital property based on the facts of each case and termination of the legal relationship in a manner in which each party may realize self-sufficiency

**FAMILY LAW - DIVORCE - ATTORNEY'S FEES** - Determining whether to award attorney's fees in a divorce action is a matter largely entrusted to the discretion of the chancellor

### FACTS

Randy and Brandie Thomas were married on June 21, 1997. The couple have three children: Ashlyn, Anna, and Allyson. On February 2014, Randy was arrested for domestic violence after an incident at home. In October 2014, Brandie filed a complaint for divorce. Randy and Brandie consented to an irreconcilable differences divorce and agreed that the chancery court would determine custody of their three minor children, set visitation, award child support, equitably divide the marital estate, and decide their claims for attorney's fees. Ashlyn and Anna testified that they would prefer to live with Randy. Allyson did not state a preference to custody. The chancery court resolved all of the stipulated issues in a final judgment and subsequent order addressing the parties' post-trial motions. Randy appealed, and Brandie cross-appealed. Randy alleges that the chancellor committed six errors, while Brandie raises several additional issues. Randy and Brandie appealed.

### ISSUES

Whether the chancery court erred in (1) awarding custody of the children to Brandie; (2) in allowing an extra weekend of visitation to Randy; (3) in awarding the proper amount of child support; (4) in the equitable division of property; (5) in allowing the parties to alternate the reception of the income tax dependency exemption for the children; and (6) not awarding increased attorney's fees to Brandie.



## **HOLDING**

(1) Because the chancellor addressed all *Albright* factors and determined on the totality of the circumstances that it was in the best interest of the children to be in the custody of Brandie, there was no error. (2) Because visitation is within the chancellor's sound discretion and visitation with the noncustodial parent should be liberal, there is no error in the chancellor's decision to award Randy extra visitation days. (3) Because Randy was not entitled to full credit against his arrearage for a lump sum payment, the case is remanded for proper allocation and disposition of the lump sum payment. (4) Because the chancellor erred in properly allocating the value of two vehicles, the court modified the judgment to give Brandie a Rhino ATV and Randy his motorcycle. (5) Because the chancellor did not make a specific finding of fact relating to the income tax dependency exemption, the chancellor did not clearly err or abuse her discretion in evenly dividing the exemption between the parties. (6) Because there was no proof of the amount of attorney's fees that Brandie incurred as a result of Randy's alleged fraud, the chancellor did not abuse her discretion by denying Brandie's request for fees. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Pontotoc County Chancery Court.

**On Direct Appeal: Affirmed as Modified. On Cross-Appeal: Affirmed in Part, Reversed & Remanded in Part - 2017-CA-00175-COA (June 11, 2019)**

Opinion by Presiding Judge Wilson

Hon. Jacqueline Estes Mask (Pontotoc County Chancery Court)

Richard Shane McLaughlin for Appellant - Jak McGee Smith for Appellee

Briefed by [Zachary Flowers](#)

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## **WHITE V. TAYLOR**

### **CIVIL - OTHER**

**FOREIGN JUDGMENT - ENFORCEMENT - STATUTE OF LIMITATIONS** - Under Miss. Code Ann. § 15-1-45, the statute of limitations for enforcing foreign judgments is not reset by post-judgment proceedings

**FOREIGN JUDGMENT - ENFORCEMENT - STATUTE OF LIMITATIONS** - Foreign judgments that act as a renewal of a judgment or a separate judgment reset the statute of limitations for enforcing foreign judgments under Miss. Code Ann. § 15-1-45

### **FACTS**

In January 2002, Penny White and John Taylor, both residents of Florida, had their marriage dissolved in Florida court. In the division of assets, White was ordered to pay Taylor \$7,000. After not receiving payment for twelve years, Taylor filed a petition for relief in Florida in 2014. The court ruled for Taylor and found that, with the interest accrued, White now owed Taylor \$19,043.57. Although White and Taylor were both still residents of Florida, White owned property in Lowndes County, Mississippi. In 2017, Taylor filed a notice of a foreign judgment in Lowndes County and filed a writ of execution requesting that the Lowndes County Sheriff's Department seize White's property to satisfy the judgment. White filed a motion to set aside the foreign judgment because the statute of limitations had run. Miss. Code Ann. § 15-1-45 provides for a seven-year statute of limitations for enrolling a foreign judgment against a nonresident in Mississippi courts. The Lowndes County Circuit Court denied White's motion, ruling that the 2014 judgment constituted a renewed judgment that reset the seven-year statute of limitations. White appealed.

### **ISSUE**

Whether the circuit court erred in denying the motion to set aside the foreign judgment.

### **HOLDING**

Because the 2014 judgment was a continuation of the 2002 judgment, and not a separate judgment, the statute of limitations had run. Therefore, the Court of Appeals reversed and rendered the judgment of the Lowndes County Circuit Court.

**Reversed & Rendered - 2018-CA-00035-COA (June 11, 2019)**

Opinion by Judge Westbrook

Hon. Lee J. Howard (Lowndes County Circuit Court)

Wilbur O. Colom for Appellant - J. Hale Freeland & D. Beth Smith for Appellee

Briefed by [Yance Falkner](#)

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## BUTLER SNOW LLP V. MAYFIELD

### CIVIL - OTHER

**CIVIL PROCEDURE - APPEALS - LIVE CONTROVERSY** - Without a live controversy, an appeal will be dismissed as moot

**CIVIL PROCEDURE - INTERVENTION - RULE 24 FACTORS** - A party seeking intervention must show that : (1) it made a timely application; (2) it had an interest in the subject matter of the action; (3) it was so situated that disposition of the action may as a practical matter impair or impede its ability to protect its interest; and (4) its interest was not already adequately represented by existing parties

**CIVIL PROCEDURE - SEALED RECORDS - BALANCING TEST** - In analyzing whether to seal the record, a trial court must balance the public's right to access versus the parties' interest in confidentiality

### FACTS

During the 2014 Senate election, Mark Mayfield and others attempted to ruin the campaign of Thad Cochran by insinuating that he strayed from his marriage. Mayfield and others obtained video of a bedridden Mrs. Cochran and released it, but the plan backfired. Cochran's counsel convinced the Madison mayor to investigate on the grounds of possible exploitation of a vulnerable adult. Mayfield was arrested, but a month later, he committed suicide. Mayfield's family utilized two bills of discovery to seek information about what happened leading up to the arrest of the men involved in the alleged crime. The family used the voluminous information from the bills to file a federal lawsuit against Butler Snow, a partner at the firm, the Madison mayor and others. Additionally, the family had the bill of discovery from Hinds County sealed. When Butler Snow tried to intervene in the Hinds County Chancery Court proceedings and have the case unsealed, the chancery court denied both requests. Butler Snow appealed.

### ISSUES

Whether (1) the appeal was moot; (2) Butler Snow may intervene in the state court proceedings; and (3) the chancery court properly sealed the record.

### HOLDING

(1) Because not all parties were dismissed from the federal lawsuit, and because Mayfield's family emphatically insisted that they would appeal the district court's decision to the Fifth Circuit Court of Appeals, there remained a live controversy, and the case was therefore not moot. (2) Because Butler Snow sought to intervene immediately after they learned of the bills of discovery, because they had an interest in the discovery information related to the cause of action, because they were impaired from protecting their interest, and because they had no one protecting their interest currently, it was proper for Butler Snow to intervene in the state case. (3) Because there was no evidence that the chancery court used a balancing test when deciding whether to seal the record, the seal over the record was dissolved. Therefore, the Court of Appeals reversed, rendered and remanded the judgment of the Hinds County Chancery Court.

**Reversed, Rendered & Remanded - 2018-CA-00591-COA (June 11, 2019)**

Opinion by Judge McCarty

Hon. Patricia D. Wise (Hinds County Chancery Court, First Judicial Dist.)

Alan W. Perry, Stephen L. Thomas, & Simon Turner Bailey for Appellants - Dorsey R. Carson Jr. & Julie Skipper Noone for Appellees

Briefed by [Brandon H. Wilson](#)

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## ***COURT OF APPEALS - POST-CONVICTION RELIEF***

### **ALLEN V. STATE**

#### **CIVIL - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - APPEAL - JURISDICTION** - Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion for post-conviction relief shall not be filed in the circuit court until the motion shall have first been presented to a quorum of the Justices of the Supreme Court of Mississippi and an order granted allowing the filing of such motion in the circuit court

#### **FACTS**

Joshua Allen was convicted of one count of armed robbery and one count of conspiracy to commit armed robbery. The Rankin County Circuit Court sentenced Allen to thirty-five years for the armed robbery conviction and five years for the conspiracy conviction, to be served concurrently in the custody of the Mississippi Department of Corrections (“MDOC”). Allen subsequently appealed his conviction and sentence to the Mississippi Supreme Court. The Court of Appeals affirmed Allen’s convictions and sentences. Allen filed a motion for post-conviction relief and requested a new trial. The circuit court found that Allen’s motion was not well taken and denied the motion. Allen appealed, and the State subsequently filed a motion to dismiss for a lack of jurisdiction.

#### **ISSUE**

Whether the circuit court lacked jurisdiction over Allen’s motion for post-conviction relief.

#### **HOLDING**

Because Allen failed to obtain permission from the Supreme Court to file a motion for post-conviction relief in the circuit court, the circuit court erred in failing to dismiss the case for a lack of jurisdiction. Therefore, the Court of Appeals vacated the judgment of the Rankin County Circuit Court.

**Vacated - 2018-CA-00494-COA (June 11, 2019)**

Opinion by Judge Wilson

Hon. William E. Chapman III (Rankin County Circuit Court)

Lanesha L. Sims for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [Natalie McCarty](#)

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

### **BROWN V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSE** - Evidence supports an instruction of a lesser-included offense if, when viewed in the light most favorable to the party requesting the instruction, a reasonable juror could not exclude the lesser-included offense beyond a reasonable doubt

**CRIMINAL LAW - AGGRAVATED DOMESTIC ASSAULT - ELEMENTS** - A person is guilty of aggravated domestic violence when they strangle, or attempt to strangle, a person with whom they are in a current or former dating relationship

**CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER** - Where the record reveals without a doubt that the sentence imposed was based solely upon defendant's prior convictions, the trial court's sentencing discretion will not be disturbed

**CONSTITUTIONAL LAW - RIGHT TO SPEEDY TRIAL - STATUTORY PROTECTION** - Under Miss. Code Ann. § 99-17-1, unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than 270 days after the accused has been arraigned

**CONSTITUTIONAL LAW - RIGHT TO SPEEDY TRIAL - BALANCING TEST** - The Supreme Court in *Barker* set forth a balancing test to analyze the right to a speedy trial; it weighs the following factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the defendant was prejudiced by the delay

### **FACTS**

James Devon Brown lived with his girlfriend, Lamonica Bodie, at her home. When Bodie told Brown she wanted to end their relationship and asked him to move out, Brown grabbed her from behind and slid his forearm around her neck. Bodie testified that Brown's grip became progressively tighter until Bodie could not breathe, and they collapsed on the floor. At that point, Bodie was able to calm Brown and the struggle ended. After Brown left the house, Bodie called 911, and Brown was arrested. Police noticed and photographed extensive bruising on Bodie's neck and burst blood vessels in both eyes. A doctor concluded that Bodie's injuries were consistent with someone who had been strangled. At trial, Brown testified that he never put a hand on Bodie. Brown requested that the jury be given a lesser-included offense instruction on simple domestic violence. The Jackson County Circuit Court denied Brown's request. Brown was convicted of aggravated domestic violence with habitual offender status. He was sentenced to life in prison without eligibility for parole. Brown appealed.

### **ISSUES**

Whether (1) the trial court erred by refusing the lesser-included jury instruction; (2) the indictment was insufficient; (3) the sentence imposed by the trial court was improper; and (4) Brown was denied his right to a speedy trial.

### **HOLDING**

(1) Because a reasonable jury could not have found Brown guilty on simple domestic violence, the trial court did not err by refusing the lesser-included jury instruction. (2) Because the State was not required to include the length of incarceration at the time, and because all of the other elements were satisfied, the indictment was sufficient. (3) Because Brown's previous convictions made him applicable for habitual-offender status, and because there was no evidence in the record that Brown was punished for rejecting a plea deal, the sentence imposed by the trial court was not improper. (4) Because the delays attributable to the State before trial totaled 226 days, and because all of the *Barker* factors besides the length of delay weighed against Brown and in favor of the State, Brown was not denied his right to a speedy trial. Therefore, the Court of Appeals affirmed the Jackson County Circuit Court.

### **DISSENT**

Presiding Judge Carlton argued that there was no evidence of any deadly weapon used and that, based on the evidence presented, especially by the victim, the jury could have found Brown guilty of simple domestic violence. She also noted that criminal defendants have a right to put forth even inconsistent theories of defense and therefore concluded that the trial court erred in failing to give Brown's requested lesser included-offense jury instruction for simple domestic violence.

#### **Affirmed - 2018-KA-00011-COA (June 11, 2019)**

Opinion by Judge McCarty - Dissent by Presiding Judge Carlton

Hon. Kathy King Jackson (Jackson County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Luke Phillips](#)

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## BYRD V. STATE

### CRIMINAL - FELONY

**EVIDENCE - ADMISSIBILITY - PRIOR BAD ACTS** - Evidence of prior bad acts is admissible if the offense being tried and the prior act are so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences

**CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - PREJUDICIAL EFFECT** - Prosecutors have broad leeway in forming arguments but are restricted from employing tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - TRIAL TACTICS** - Trial counsel's decision to not request a jury instruction falls under the category of trial tactics, which are not subject to review

### FACTS

Angelia Byrd, a fifty-year-old nurse, shot and killed her thirty-three-year-old live-in boyfriend, Aaron Harper, following an argument in Byrd's home. The couple lived together for about a year, and Byrd paid all living expenses and bought them both matching cars. According to detectives, Byrd tried to evict Harper. Harper picked up a knife and said he was going to get his gun. Byrd retrieved her gun and shot Harper, killing him. After the shooting, Byrd told police that Harper had threatened to report her to the nursing board for HIPAA violations. At trial, the prosecution attempted to introduce evidence that Byrd had prior issues with the nursing board, as well as a prior drug problem. The Hinds County Circuit Court made conflicting rulings on the evidence's admissibility, but the jury eventually heard the evidence. During opening and closing arguments, the State made several references to Byrd being a "killer cougar," because Byrd shot her ex-husband several years prior. Defense counsel objected but was overruled. Finally, defense counsel revised a Castle Doctrine jury instruction to conform to the language of a different section of the justifiable homicide statute. The jury found Byrd guilty of murder. Byrd appealed.

### ISSUES

Whether (1) Byrd's trial was unfair due to the entry of evidence of other bad acts; (2) Byrd's trial was unfair due to prosecutorial misconduct; and (3) Byrd's trial attorney provided ineffective assistance by failing to request a Castle Doctrine instruction.

### HOLDING

(1) Because the evidence was relevant to show Byrd's motive and tended to show who the aggressor was in the shooting, the trial court did not err in allowing the evidence. (2) Because the prosecutor's statements did not rise to the level of prejudicial, there was no prosecutorial misconduct, but the Court of Appeals warned that the prosecutor's characterization of Byrd as a "killer cougar" with a nature to shoot ex-lovers came dangerously close to prejudicial. (3) Because the facts developed at trial did not warrant a Castle Doctrine instruction, there was no valid ineffective assistance of counsel claim. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

### CONCURRENCE IN PART/DISSENT IN PART

Judge McCarty agreed with the majority that the prior bad act evidence was admissible, and the prosecutor did not prejudice the trial. However, he argued that because the record did not clearly establish the trial counsel's strategy, he would have dismissed the ineffective assistance of counsel claim without prejudice so it could be developed in a petition for post-conviction relief.

#### **Affirmed - 2018-KA-00681-COA (June 11, 2019)**

Opinion by Judge McDonald - Concurrence in Part/Dissent in Part by Judge McCarty  
Hon. Winston L. Kidd (Hinds County Circuit Court, First Judicial Dist.)

George T. Holmes (Pub. Def. Office) for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Davis Pigg](#)

## SULLIVAN V. STATE

### CRIMINAL - FELONY

**EVIDENCE - ADMISSABILITY- ALTERNATIVE PURPOSE** - Evidence of a defendant's other acts may be admissible if the prosecutor clearly articulates an alternative purpose for the evidence under Miss. R. Evid. 404(b) and the probative value of the evidence is not substantially outweighed by its prejudicial effect

**CRIMINAL PROCEDURE - APPEALS - PRESERVING OBJECTION** - Failure to make a contemporaneous objection waives an issue for appeal purposes

**CONSTITUTIONAL LAW - RIGHT TO SPEEDY TRIAL - BALANCING TEST** - Under *Barker*, the Supreme Court set form a balancing test to determine whether a defendant's right to a speedy trial has been violated; the test considers the length of the delay, the reason for the delay, a defendant's assertion of his right, and prejudice to the defendant

### FACTS

On March 16, 2016, R.L., a sixteen-year-old, was assaulted in her home by an unknown male who came in through her bedroom window. R.L.'s friend, Brianna Pruitt, called the police and told them that her cousin heard Dreshawn Sullivan at a party saying he assaulted R.L. Police arranged a photo lineup with R.L., and R.L. identified Sullivan as her assailant. After his arrest, detectives testified Sullivan waived his *Miranda* rights. At trial, K.L., another victim, testified Sullivan also tried to kidnap her from her bedroom window. R.M., another underage witness, also testified at trial that Sullivan asked about the location of R.M.'s window. Sullivan was convicted of breaking and entering, attempted kidnapping, and felony child abuse. Sullivan appealed.

### ISSUES

Whether (1) the circuit court abused its discretion in admitting evidence of Sullivan's other bad acts; (2) the circuit court erred in allowing hearsay testimony of Brianna Pruitt; (3) there was sufficient evidence to sustain Sullivan's attempted kidnapping conviction or, in the alternative, whether the jury's verdict was against the overwhelming weight of the evidence; (4) Sullivan's constitutional right to a speedy trial was violated; (5) the weight of the evidence supported the jury's verdicts for burglary and child abuse; (6) the prosecutor erred by charging Sullivan with burglary of a dwelling, attempted kidnapping, and felony child abuse; (7) the trial court erred in admitting Sullivan's post-*Miranda* statement; (8) the trial court erred by allowing Detective Smith to testify; (9) whether the trial court erred by refusing proposed jury instructions D-2 and D-8; (10) the trial judge engaged in judicial misconduct; (11) the prosecutor engaged in prosecutorial misconduct; and (12) Sullivan received ineffective assistance of counsel.

### HOLDING

(1) Because the admission of the testimonies of K.L. and R.M. were entered for an alternative purpose under Miss. R. Evid. 404(b), and because their probative value outweighed the prejudicial effect to Sullivan, the circuit court did not abuse its discretion by allowing in evidence of Sullivan's other bad acts. (2) Because the defense withdrew its objection to Pruitt's testimony at trial and failure to make a contemporaneous objection waives the issue on appeal, the circuit court did not err in allowing in Pruitt's testimony. (3) Because a rational trier of fact could have found the essential elements of attempted kidnapping beyond a reasonable doubt, the attempted kidnapping count was not contrary to the weight of the evidence. (4) Because the circuit court correctly examined the reasons for the 865-day delay under the *Barker* analysis, Sullivan's right to a speedy trial was not violated. (5) Because a rational juror could find Sullivan guilty beyond a reasonable doubt on the burglary and felony child abuse claims, there was sufficient evidence to support the jury's verdict. (6) Because Sullivan did not raise the issue of whether the prosecutor erred by charging Sullivan with burglary, attempted kidnapping, or felony child abuse to the circuit court, the court did not address this issue. (7) Because Sullivan did not object at trial or in his post-trial motion to the post-*Miranda* statements, the circuit court did not err in admitting Sullivan's post-*Miranda* statements. (8) Because there was no proffer of what Smith would have said concerning any investigation of misconduct while employed by the Hattiesburg Police Department, it was impossible to find error in the circuit court's ruling. (9) Because the court previously upheld similar instructions to D-2 in prior

cases, and because there was no evidence or testimony that anyone other than Sullivan may have committed the crime for D-8, the trial court did not err in refusing jury instructions for D-2 and D-8. (10) Because there was no evidence that the circuit court showed bias or pre-judgment intent, the trial judge did not engage in judicial misconduct. (11) Because Sullivan failed to cite any legal authority for his prosecutorial misconduct claim, the claim is procedurally barred, and no part of the record supports a prosecutorial misconduct claim. (12) Because an ineffective assistance of counsel claim is more appropriately brought during post-conviction proceedings, the ineffective assistance of counsel claim was dismissed without prejudice. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2018-KA-00221-COA (June 11, 2019)**

Opinion by Judge McDonald

Hon. Jon Mark Weathers (Forrest County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Katy T. Gerber, Kaylyn Havrilla McClinton, & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Katelin Davis](#)

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