

MISSISSIPPI SUPREME COURT DECISIONS – JUNE 27, 2019**SUPREME COURT - CIVIL CASES****GARNER V. SMITH****CIVIL - OTHER**

CIVIL PROCEDURE - STANDING ORDER - LOCAL RULE - A standing order issued by another court that conflicts or varies from the local rule must be approved by each local court before use

CIVIL PROCEDURE - SANCTIONS - DISCRETION - A trial judge who finds a motion or pleading is either frivolous or filed to harass or delay may sanction the sponsoring party and their attorney; a claim is considered frivolous if the pleader or movant has no hope of success

MISSISSIPPI CIVIL PROCEDURE - SPECIAL SUMMONS - SPECIFIC - When a Rule 81(d) matter is pleaded the use of a special summons commands the defendant to appear at a specific time and place without any need to answer; the Rule 81(d) matter can be heard by any judge who is assigned to the court that day, even if it is not the judge who was originally assigned to that case

FACTS

Judge Percy Lynchard originally ordered H. R. Garner's client, April Garner, to pay \$8,742.50 in sanctions and attorney's fees to David Smith. When April did not pay, Smith filed a petition to cite April for contempt. Because the underlying litigation was over, Smith filed his contempt petition as a new action, and it was assigned to Judge Vicki Daniels. Because the petition was for contempt, Smith issued a Miss. R. Civ. P. 81(d) summons. This required Garner to appear at the Tate County Courthouse on July 25, 2018. By standing order, that time and date had been reserved for hearings before Judge Lynchard, not Judge Daniels. April's counselor, Garner, not wanting to appear before this judge again, filed a motion to dismiss the petition, arguing the summons was improper. Garner insisted Smith violated Uniform Chancery Code Rule 1.06(A) by setting a hearing before Judge Lynchard when the case was assigned to Judge Daniels. Judge Lynchard, however, was not able to hear the matter, and the case was continued for Judge Daniels to hear. Garner filed another motion to quash the petition. In it, he argued the summons violated Rule 1.06(A)'s restriction on judge shopping, that venue was improper, and service of process was insufficient. Judge Daniels stated that Garner knew of the standing order that was signed on September 13, 2017, which sets motion days in advance and assigns the particular judge who will preside that day. This standing order did not violate Rule 1.06(A), and it applied to Miss. R. Civ. P. 81(d)(2) matters. Judge Daniels dismissed the motion to quash. Smith made a motion for sanctions against April and Garner for filing a frivolous motion. Judge Daniels sanctioned them under Miss. R. Civ. P. 11 and the Litigation Accountability Act of 1988 and ordered them to pay \$1000 in attorney's fees and expenses. April was later released from these sanctions. Garner appealed.

ISSUES

Whether the chancery court erred in (1) ruling that Miss. R. Civ. P. 81(d) matters in the Third Chancery Court District do not have to be heard by the judge to whom the case is assigned; (2) ruling the standing order approved by Judge Lynchard was not a local rule that needed to be approved by this court; and (3) sanctioning Garner.

HOLDING

(1) Because the standing order set motion days in advance, Smith was not violating rule 1.06(A) against judge shopping by having his Rule 81(d) summons returnable to Judge Lynchard. (2) Because the only orders that must be approved by the court are ones that conflict or vary from Rule 1.06, and because the standing order implemented and did not conflict with Rule 1.06, it was not a local rule that needed to be approved by the court. (3) Because Garner's motion to quash

had no hope of success when it was filed, the court did not err in sanctioning Garner. Therefore, the Supreme Court affirmed the judgment of the Desoto County Chancery Court.

Affirmed - 2018-CA-01242-SCT (June 27, 2019)

Opinion by Presiding Justice Maxwell

Hon. Vicki B. Daniels (Desoto County Chancery Court)

Jerry Wesley Hisaw for Appellant - Gordon Charles Shaw Jr. for Appellee

Briefed by [Winston Hudson](#)

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KUEBLER V. MASON

CIVIL - OTHER

CONSTITUTIONAL LAW - SIXTH AMENDMENT - ASSISTANCE OF COUNSEL - The Constitution guarantees that all accused shall have the right to assistance of counsel for his defense

APPEALS - WRIT OF HABEAS CORPUS - REVERSAL - The judgment of a habeas corpus court will not be disturbed, unless it is manifest to the appellate court that the trial court either tried the cause upon an erroneous conception of the law, or that the judgment is erroneous upon the facts

FACTS

Charles L. Kuebler was convicted of murder, but his conviction was reversed and remanded, and he was being held at the Jackson Detention Center (“JDC”). While incarcerated, Kuebler had been actively preparing his appeal, but he claimed that throughout his time at the JDC, the staff attempted to interfere with his trial preparation materials and his attorney meetings. The first incident occurred during a search of Kuebler’s cell, where Lieutenant Gloria Petty and Sergeant Angela Robinson confiscated three unauthorized laundry bags filled with papers. The papers were placed in the property room and were picked up the following day by one of Kuebler’s attorneys. There was testimony at the hearing that none of the information in the papers had been read or discussed by detention center staff. Kuebler was also concerned for his privacy following a meeting with his attorney where a guard remained posted near the door. During these visits, the guards normally monitored from the guard tower. Additionally, Kuebler had legal papers confiscated from him by staff while attempting to bring the papers into attorney meetings. Once staff determined the papers were legal documents, they were returned to him. Kuebler filed a petition for a writ of habeas corpus, alleging his constitutional rights had been violated. After a hearing, the Hinds County Circuit Court denied Kuebler’s petition. Kuebler appealed.

ISSUE

Whether the circuit court erred in denying Kuebler’s petition for a writ of habeas corpus.

HOLDING

Because there was no evidence that Kuebler faced interference during his attorney visits or that his personal legal information had been compromised, his constitutional rights were not violated, and the circuit court did not err in denying Kuebler’s petition for a writ of habeas corpus. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

CONCURRENCE

Presiding Justice Kitchens argued that the majority went beyond the boundaries of habeas corpus because Kuebler did not challenge the validity of his detention in the petition. Rather, his petition was essentially an application for bail. Since Kuebler was not alleging wrongful detention, Kitchens agreed with the denial of the writ but believed habeas corpus was the improper avenue for Kuebler’s allegations concerning the staff, and therefore the analysis by the majority was unnecessary.

Affirmed - 2018-CA-00397-SCT (June 27, 2019)

Opinion by Justice Griffis - Concurrence by Presiding Justice Kitchens
Hon. Winston L. Kidd (Hinds County Circuit Court)
Ronnie Musgrove & Michael S. Smith II for Appellant - Claire Barker for Appellee
Briefed by [Allison Middleton](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 25, 2019
COURT OF APPEALS - CIVIL CASES

BISSETTE V. UNIV. OF MISS. MED. CTR.

CIVIL - CONTRACT

CONTRACTS - BREACH - VICARIOUS LIABILITY - Where an employee is merely a third-party beneficiary and not a party to the contract, an employer is only vicariously liable for the employee's actions if (1) the employee was acting in the scope of his employment and in furtherance of his employer's business at the time the acts were committed, or (2) the employee was acting as an agent, standing in place for his employer by authority from that employer

MISS. TORT CLAIMS ACT - GOVERNMENTAL ENTITY - IMMUNITY - Under Miss. Code Ann. § 11-46-5, torts constituting fraud, malice, libel, slander, and defamation, fall outside the scope of the MTCA's waiver of immunity; any legal action against a governmental employee for these intentional torts must necessarily proceed against him or her as an individual

TORTS - NEGLIGENT MISREPRESENTATION - ELEMENTS - In order to prove negligent misrepresentation, a party must show by a preponderance of the evidence: (1) a misrepresentation or omission of a fact; (2) that the representation or omission is material or significant; (3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities; (4) that the plaintiff reasonably relied upon the misrepresentation or omission and (5) that the plaintiff suffered damages as a direct and proximate result of such reasonable reliance

TORTS - SLANDER - LIMITATIONS - The action of slander is not a "personal action" under Miss. Code Ann. § 91-7-233 and therefore does not survive the death of either the wrongdoer or the person injured

FACTS

Professor Garth Bissette sued the University of Mississippi Medical Center ("UMMC") and several of his former colleagues for breach of separation agreement, false representation, and civil conspiracy. Bissette was awarded tenure by UMMC in 2002. In the following years, Bissette received three unsatisfactory performance ratings from his department director which triggered UMMC's Post Tenure Review procedure. The procedure involved a review by a three-member committee, two of whom were chosen by the department chair, and one chosen by Bissette. After conducting the review, the committee voted unanimously to recommend dismissal. Instead of continuing the post-tenure review process, Bissette reached an agreement with UMMC to remain employed through November 2011 and then resign. The terms were memorialized in a Separation Agreement and Release ("Separation Agreement"), which included confidential terms and an agreement not to disparage each other. Thereafter, Bissette worked through November 2011 and then resigned. In 2012, William Woolverton, one of Bissette's three review committee members, attended a conference sponsored by the National Institute of Health. At the conference, Woolverton allegedly told other attendees that Bissette had been terminated because of three unsatisfactory reviews. Additionally, Woolverton allegedly made other negative comments concerning Bissette's professional career. After learning of Woolverton's comments, Bissette filed suit against UMMC, Woolverton, and several other doctors individually (the "doctors"), alleging slander, fraud, misrepresentation, civil conspiracy, and breach of contract. Woolverton died shortly after answers were filed in 2013. All of the defendants submitted motions for summary judgment. In granting the defendants' motions, the circuit court held that Bissette had not put forth sufficient proof to create a dispute of fact on any of the claims. Bissette appealed.

ISSUES

Whether the trial court erred in (1) granting summary judgment in favor of UMMC and the doctors on the breach of contract claim; (2) granting summary judgment in favor of UMMC and the doctors on Bissette's intentional tort claims of misrepresentation and civil conspiracy; and (3) dismissing Bissette's slander claim against Woolverton.

HOLDING

(1) Because Woolverton was not a party to the contract, and because there was no evidence that he acted in the course and scope of his employment or as an agent of UMMC, the trial court did not err in holding that any disparaging comments Woolverton made did not constitute a breach by UMMC of the Separation Agreement. (2) Because UMMC was immune from the intentional tort claims raised by Bissette, and because Bissette provided no evidence that UMMC or the doctors misrepresented any material fact to him and cited no authority to support his argument that the facts constituted a colorable conspiracy claim, the trial court did not err in granting summary judgment on the intentional tort claims. (3) Because Woolverton died prior to adjudication, the trial court did not err in dismissing Bissette's slander claim. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2018-CA-00658-COA (June 25, 2019)

Opinion by Judge McDonald

Hon. William A. Gowan, Jr. (Hinds County Circuit Court, First Judicial Dist.)

William Matthew Burch, Yancy B. Burns, & Jonathon Garth Bissette for Appellant - John T. Kitchens, R. E. Parker Jr., Minor F. Buchanan, Robert V. Greenlee, Thomas Eugene Whitfield Jr., & Penny B. Lawson for Appellees

Briefed by [Harrison Smith](#)

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DENNIS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - TIME BAR - DUE PROCESS EXCEPTION - Three years is the time limit to file a PCR motion, except in matters affecting fundamental constitutional rights, such as due process, which are not subject to the PCR procedural bars

POST-CONVICTION RELIEF - GUILTY PLEA - INVOLUNTARY - A statement under oath regarding understanding a plea and its implications carries a strong presumption of veracity and will not be challenged unless there is evidence to the contrary

APPELLATE PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - STANDARD OF PROOF - If the record does not indicate ineffectiveness then it is not proper for appellate review

FACTS

A grand jury returned a five-count indictment against Darius Dennis for armed robbery, conspiracy, and three counts of aggravated assault in May 2004. The previous year, Dennis, along with his co-defendant, robbed a bookstore. After the robbery, an altercation ensued with a friend, who was shot and killed. In October 2004, after a continuance was granted to give him time to discuss the plea with his family and confirm his understanding, Dennis pled guilty to armed robbery, aggravated assault, and manslaughter. Dennis claimed someone else killed the individual but pled guilty to protect himself from potentially receiving a life-sentence at trial. Dennis was sentenced to twenty-five years for armed robbery, twenty years for aggravated assault, and twenty years for manslaughter with all sentences running concurrently. In April 2017, over twelve years later, Dennis filed a PCR motion claiming ineffective assistance of counsel and judicial misconduct due to refusal by his attorney and the court to require a competency exam. He brought forth evidence in the form of a letter stating he was once a special education student. The trial court found the motion was excepted from the three-year time limit because he claimed due process rights were violated. However, when reviewed on the merits, the PCR motion was denied because the court found no evidence of incompetency at the time of the plea and, therefore, no ineffective counsel. Dennis appealed.

ISSUES

Whether (1) Dennis's due process rights were violated because he did not receive a competency hearing and (2) counsel provided ineffective assistance because they knew of his mental incompetence and coerced him into pleading guilty.

HOLDING

(1) Because the court is under no duty to consider meaningless arguments that do not cite pertinent support, and because Dennis did not provide meaningful arguments or authority, his claims were considered waived but would have been meritless notwithstanding the waiver due to his statement that he understood the plea, a continuance for the purpose of discussing the plea deal, and no evidence of incompetence in the record save for the letter. (2) Because the court waived all claims and found no evidence of incompetence when Dennis pled guilty, there was no ineffective assistance by counsel. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

Affirmed - 2017-CP-01721-COA (June 25, 2019)

Opinion by Chief Judge Barnes

Hon. W. Ashley Hines (Washington County Circuit Court, Fourth Judicial Dist.)

Pro se for Appellant - Alicia Maria Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Kaitlin Bethay](#)

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DIXON V. TIMBER RIDGE, LLC.

CIVIL - CONTRACTS

CONTRACTS - BREACH – ELEMENTS - In a breach of contract claim, the plaintiff must prove (1) that there exists a valid and binding contract, (2) that the defendant has breached the contract, and (3) that the defendant has been damaged monetarily by the breach

CONTRACTS - MODIFICATION - SUBSEQUENT AGREEMENT - Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties; in order for such a subsequent agreement to effect modification, it must meet the requirements for a valid contract; a valid contract requires an offer and acceptance, but failure to communicate acceptance of an offer is fatal to the creation of a valid contract

CONTRACTS - BREACH - REPUDIATION - Repudiation occurs when a contracting party's words or actions indicate an intention not to perform the contract in the future; repudiation of a contractual duty before the time of performance gives the injured party an immediate right to damages for breach

FACTS

Tremayne and Tyrease Dixon sought to purchase a house in Olive Branch. They made an offer through their realtor, Brenda McRae, on a home under construction in the Miller Farms subdivision. The owner/builder of the home Timber Ridge, LLC, made a counteroffer through its realtor, Shelly Bookwalter. Following the counteroffer, the Dixons and both realtors exchanged messages in which the Dixons sought to upgrade the floors on the first level to hardwood. Timber Ridge's realtor told them it would be no problem. The Dixons and Timber Ridge entered into a contract for the house which provided that the contract could not be changed without the written mutual assent of the parties. Though the Dixons requested and seemingly agreed with Bookwalter on installing hardwood floors, the contract was not amended to include hardwood floors. The Dixons and Timber Ridge also signed a Home Inspection Addendum, which provided for a home inspection to be done after completion of the house in which the Dixons could provide a written list of any deficiencies not exceeding \$1000 in value. Timber Ridge could consent in writing to fix any deficiencies and proceed to closing. The Dixons toured a home similar to the one under construction that they had purchased, and Bookwalter made it seem as if most of the features would be the same. However, the home that the Dixons agreed to buy was a "spec home" and not custom designed or built, and any design changes needed to have been proposed prior to signing the contract. The Dixons did not receive several additional upgrades which they thought had been agreed upon with Bookwalter and did not close on the house as specified in the contract. Timber Ridge elected not to push back the closing date, and the Dixons filed suit seeking specific performance of the contract. The Chancery Court of

DeSoto County found that Timber Ridge and the Dixons had both repudiated the contract, ordered Timber Ridge to refund the Dixons' earnest money, and denied all other relief to the parties. The Dixons appealed.

ISSUES

Whether the trial court erred by (1) finding that Timber Ridge only repudiated the contract and did not breach it; (2) finding that the Dixons breached the contract when they failed to appear at the closing; (3) denying the Dixons' request for specific performance, damages, and attorney's fees.

HOLDING

(1) Because the contract provided that neither party would be bound by provisions not contained within the writing of the contract, and because Bookwalter's precontract representations were not contained within the writing of the contract, the trial court did not err in finding that Timber Ridge only repudiated the contract and did not breach it. (2) Because the trial court allowed the Dixons to exercise their right not to close, despite finding they had breached the contract when they failed to appear at home, the trial court did not commit a reversible error by finding that the Dixons breached the contract when they failed to appear at the closing. (3) Because the Dixons needed to establish a breach of the contract in order to be awarded specific performance, damages, and attorney's fees, and because the Dixons failed to establish a breach of the contract, the trial court did not err by denying the Dixons' request for specific performance, damages, and attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Chancery Court.

Affirmed - 2017-CA-01638-COA (June 25, 2019)

En Banc Opinion by Presiding Judge J. Wilson

Hon. Mitchell M. Lundy Jr. (DeSoto County Chancery Court)

Patrick Vance Daly & Brett Clanton Pickle for Appellants - William P. Myers for Appellee

Briefed by [David Boydston](#)

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JONES V. MISS. BAPTIST HEALTH SYS. INC.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - ESTABLISHING A CLAIM - BURDEN OF PROOF - To establish a claim under workers' compensation law, a claimant must prove by a preponderance of the evidence that (1) there was an accidental injury, (2) arising out of an in the course of employment, and (3) there is a causal connection between the injury and the claimed disability

WORKERS' COMPENSATION - ACCIDENTAL ON-THE-JOB INJURY - PROXIMATE CAUSE - A worker has sustained an accidental, on-the-job injury if, when looking through the eyes of the worker, there is harm to the worker from work-connected activity that either: (a) was from an unexpected event; or (b) was an unexpected result

WORKERS' COMPENSATION - PRE-EXISTING DISEASE OR CONDITION - RELEVANCE - A pre-existing disease or condition does not prevent an injury from arising out of employment if the work-related injury aggravated, accelerated, or combined with a disease to produce a disability for purpose of workers' compensation

FACTS

Angela Jones worked as a registered nurse for Baptist Hospital ("Baptist") and claimed that on March 21, 2015, she was pushing a medicine cart during her shift when she felt a "pop" in her right lower back. She also felt a burning sensation in her right thigh after the pop. Jones then asked the only witness to the alleged injury, Theresa Blanton, if she had also heard the pop, to which Blanton said she did not. Blanton did, however, testify that Jones's behavior changed and that she was visibly limping afterwards. Jones sought treatment two days later from Dr. Larry Sivils, and on the patient information sheet she circled "no" when asked whether the visit was work related. When asked about the date and cause of the injury, Jones put down a question mark. Dr. Sivils denied direct injury in his documents. Jones then sought treatment from Dr. Eric Amundson, and on the patient history form, circled "no" and added a question mark when

asked whether she sustained an injury and whether the problem was due to an on-the-job injury. Jones then saw Dr. Edwin Dodd and she wrote on her forms “at work, not an accident,” “pain just began, I can’t relate it to anything,” and “progressive for years.” She responded in the negative to whether the injury was a workers’ compensation case. Dr. Dodd’s notes document that Jones described a five-to-six-year history of lower back pain. Jones then consulted with Dr. James Woodall and again marked “no” when asked whether her condition was a work injury. Five months after the injury, Baptist approved Jones’s request for FMLA leave, and two months after the approval, Jones emailed a Baptist representative indicating that her injuries were related to pushing the medicine cart during her nursing shift. Baptist then initiated the process for investigating a workers’ compensation claim. An evidentiary hearing was held before an administrative judge (“AJ”) to determine whether Jones sustained a compensable, work-related injury, and the AJ found that a preponderance of the evidence supported a finding that she sustained a compensable, work-related injury. Baptist appealed the decision to the Mississippi Workers’ Compensation Commission (“the Commission”), which reversed the AJ. Jones appealed.

ISSUE

Whether the Commission correctly applied the law when it disregarded Jones’s testimony in determining that she did not sustain a compensable and work-related injury during her nursing shift at Baptist.

HOLDING

Because the evidence presented did not contradict Jones’s testimony concerning the mechanism of injury, the Commission erred by disregarding Jones’s evidence. Therefore, the Court of Appeals reversed the judgment of the Commission.

DISSENT

Presiding Judge Wilson argued that the Commission’s decision was supported by substantial and competent evidence from multiple sources and that the majority opinion was based on a clear misstatement of current law. Therefore, he would have affirmed the Commission’s decision.

Reversed & Remanded - 2018-WC-00930-COA (June 25, 2018)

En Banc Opinion by Judge McCarty - Dissent by Presiding Judge J. Wilson

Mississippi Workers’ Compensation Commission

Gilson Davis Peterson for Appellant - Andrew D. Sweat & Jennifer Hughes Scott for Appellees

Briefed by [Jack Byrd](#)

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KOPITSKIE V. H&K DRYWALL

CIVIL - WORKERS’ COMPENSATION

CIVIL PROCEDURE - STANDARD OF REVIEW - SUBSTANTIAL EVIDENCE - The reviewing court will overturn the Workers’ Compensation Commission decision only for an error of law or an unsupported finding of fact; reversal is proper only when a Commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of law

CIVIL PROCEDURE - APPEALS - INTERLOCUTORY ORDERS - Interlocutory orders by the Workers’ Compensation Commission are not appealable; an appeal may not be taken unless the Commission’s order is final

FACTS

Winnie Kopitskie alleged she suffered a work-related injury and consequently filed a workers’ compensation claim. Kopitskie filed a petition to controvert with the Mississippi Worker’s Compensation Commission (“the Commission”). Kopitskie asserted that she proposed requests for admission to H&K Drywall and Amfed

National Insurance Company (“Amfed”) and moved to have them admitted. She proposed a second set of requests for admissions attached to a copy of the first set; however, the documents were returned unsent. H&K Drywall and Amfed claim they never received the notices of the requests. Both companies eventually responded to the requests for admissions, but Kopitskie moved to strike those responses and filed a motion to deem the requests admitted. The Administrative Judge (“AJ”) denied her motion to strike. As a result, Kopitskie sought review from the full Commission. Upon review from the Commission, an order was issued dismissing Kopitskie’s petition for review. The Commission stated that the order was interlocutory in nature because it failed to dispose of all the issues pending before the AJ. As a result, the Commission remanded the case to the AJ to dispose of the remaining issues. Kopitskie appealed.

ISSUE

Whether the Commission erred by dismissing Kopitskie’s petition for review.

HOLDING

Because the Commission’s order was interlocutory in nature, it was not appealable. Further, due to the order not being finalized, an appeal could not be taken, resulting in a lack of jurisdiction for the court. As such, the Commission did not err by dismissing Kopitskie’s petition for review. Therefore, the Court of Appeals dismissed the judgment of the Mississippi Workers’ Compensation Commission.

Appeal Dismissed - 2018-WC-00792-COA (June 25, 2019)

Opinion by Judge Westbrook

Mississippi Workers’ Compensation Commission

Joseph Rodney Franks for Appellant - Jared Hamilton Hawkins for Appellees

Briefed by [Brittany Brewer](#)

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PATRIOT PROD. GRP. V. LIVINGSTON OPERATING CO.

CIVIL - OTHER

APPELLATE PROCEDURE - BARS TO REVIEW - FINAL JUDGMENT - Appeals are proper only if from a final judgment that adjudicates the merits of the controversy and settles all issues between the parties

APPELLATE PROCEDURE - BARS TO REVIEW - DENIAL - A denial of default judgment is not a final, appealable judgment

APPELLATE PROCEDURE - MOTION FOR RECUSAL - TIMING - A party may appeal a denial of a motion for recusal only if they seek review within the time permitted by Miss. R. App. P. 48(b)

FACTS

In 2015, a judgment was entered in favor of Patriot Production Group LLC (“Patriot”) against Livingston Operating Company LLC (“Livingston”) and Kouga Energy Group LLC (“Kouga”). In an effort to collect on its unpaid judgment, Patriot filed for writs of garnishment against Aegis Operating Co., Inc. (“Aegis”) and BPS Operating Services LLC (“BPS”), whom Patriot alleged were indebted to Livingston and Kouga. Patriot also filed a motion to compel the Mississippi Department of Revenue (“MDOR”) to produce income tax records for Arne Greaves and Sebastian Greaves, whom Patriot alleged were members of Livingston and Kouga. After receiving no answer from Aegis or BPS, Patriot filed motions for default judgment and noticed a hearing on its motions for default and its motion to compel MDOR to produce records. BPS, Livingston, Kouga, and Arne Greaves pro se filed a motion to dismiss each of Patriot’s motions. All parties alleged they had not received proper service of the motions for default judgment or of Patriot’s notice of a hearing on the outstanding motions. Before the court entered an order addressing Patriot’s motions, Patriot filed a motion for recusal of the trial judge after the thirty-day deadline outlined in Miss. R. App. P. 48(b) had passed.

The Hinds County Circuit Court entered an order denying Patriot's motions for default judgments, its motion for tax records, and its motion for recusal. Patriot appealed.

ISSUES

Whether Patriot may appeal from an order of the circuit court denying (1) two motions for default judgments; (2) a motion for an order directing the MDOR to produce tax records; and (3) a motion for recusal of the circuit judge.

HOLDING

(1) Because the denial of a motion for a default judgment is not a final judgment, an attempt to appeal therefrom must be dismissed. (2) Because the denial of Patriot's motion for tax records also was not a final judgment, Patriot could not appeal that ruling. (3) Because Patriot's attempt to appeal the denial of its recusal motion was both untimely and procedurally improper under Miss. R. App. P. 48(b), Patriot could not appeal. Therefore, the Court of Appeals lacked appellate jurisdiction and dismissed the appeal.

Appeal Dismissed - 2018-CA-00305-COA (June 25, 2019)

En Banc Opinion by Presiding Judge J. Wilson
Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)
Donald W. Boykin for Appellant - Harvey Hutchins for Appellees
Briefed by [Melissa Fenwick](#)

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SEALE V. THOMPSON

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - CHILD CUSTODY - NATURAL-PARENT PRESUMPTION - In a child-custody determination between a natural parent and a third party the law presumes that it is in the best interest of the child for the natural parent to have custody

DOMESTIC RELATIONS - CHILD CUSTODY - THIRD PARTY - To be awarded custody, a third party must clearly rebut the natural-parent presumption or preference; if it is successfully rebutted, the chancellor must then examine the *Albright* factors and determine that third-party custody serves the best interest of the child

DOMESTIC RELATIONS - NATURAL-PARENT PRESUMPTION - REBUTTAL - Grandparents who stand in loco parentis have no right to the custody of a grandchild, as against a natural parent, unless the natural-parent presumption is first overcome by a showing of abandonment, desertion, detrimental immorality, or unfitness on the part of the natural parent

FACTS

After having two children, Jarrod and Haley Seale separated in early 2010. Haley and the children went to live with her father, Grady Thompson, and Jarrod's visitation with his sons was limited and supervised because of his ongoing drug addiction. Haley died of cancer in 2013, and her father was awarded custody of the boys while Jarrod was given visitation rights. Jarrod was absent for most of his sons' lives because of multiple incarcerations but was ordered to pay child support in 2014. During this time, he began exercising his visitation rights and claimed he was now sober and self-employed as an electrician. Jarrod brought a claim for custody of his two children in 2016. Grady was awarded custody, and Jarrod was given visitation rights. Jarrod appealed

ISSUE

Whether the trial court erred in denying Jarrod custody of his sons because it failed to consider his changed circumstances since the 2014 order.

HOLDING

Because the trial court found that Jarrod's past behavior made him unfit to have custody of his children, it was correct in rebutting his natural parent presumption. The court was also correct in including Jarrod's past actions in the moral

fitness factor of its *Albright* analysis because these actions played a meaningful role in the lives of the entire family. This was so, even if he had changed his behavior, because the court accounted for his rehabilitation by awarding him liberal visitation rights. Therefore, the Court of Appeals affirmed the decision of the Kemper County Chancery Court.

Affirmed - 2017-CA-01631-COA (June 25, 2019)

Opinion by Judge McCarty

Hon. Edward C. Fenwick (Kemper County Chancery Court)

Kenneth Dustin Markham for Appellant - Carrie A. Jourdan for Appellee

Briefed by [Reid Hudson](#)

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AUSTIN V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - HEARSAY - TENDER-YEARS-EXCEPTION - Under the tender-years hearsay exception, a statement by a child of tender years describing any act of sexual contact with or by another is admissible if the court determines (1) that the declarant is a child of tender years and (2) that the statement's time, content, and circumstances provide substantial indicia of reliability

CRIMINAL LAW - EVIDENCE SUFFICIENCY - JUDGMENT NOTWITHSTANDING THE VERDICT - A JNOV motion challenges the legal sufficiency of the evidence which must be considered in a light most favorable to the state

FACTS

Jerome Mack Austin was charged of two counts of sexual battery against his daughter, Amy. Tuesday Austin, Amy's mom, read Amy's diary which revealed descriptions of Amy being molested by a man who she later identified as her father. Prior to trial, a tender-years hearing was conducted to determine if out-of-court-statements made by Amy to Tuesday and Erin Malak, a social worker, were admissible under the tender-years hearsay exception. During trial, Amy testified to the molestation when saying she once woke up to Austin putting pressure on her vagina with his penis, despite it not being inside of her. Amy also testified she woke up to Austin fingering her several times and noted that Austin used a blue glove with Olay lotion on it. Malak testified as an expert in the field of forensic interviewing, and stated Amy's disclosure from 2011 was consistent with a child who had been sexually abused. Additionally, a detective testified that her investigation against Austin revealed Austin had chlamydia the year prior to Amy contracting chlamydia, and an inspection of where Amy stayed revealed a box of blue surgical gloves as well as Olay lotion. Finally, the State put on evidence that transmission of chlamydia was very unlikely through finger penetration and that full penetration of the penis was not necessary, only exposure to the vaginal tissue. After the State rested, Austin moved for directed verdict, but the trial court found it was a question for the jury and denied the motion. The jury unanimously found Austin guilty on both counts of sexual battery and Austin subsequently moved for a JNOV, which was denied. Austin appealed.

ISSUES

Whether the trial judge erred in (1) admitting out-of-court statements under the tender-years exception to the hearsay rule and (2) denying Austin's motion for a JNOV because there was insufficient evidence to support Austin's Count I sexual battery conviction.

HOLDING

(1) Because the weight of the evidence against Austin on both counts outweighed any harm done by allowing the admission of the hearsay statements by Tuesday and Malak, the trial court's admission of the statements without a tender-years determination was harmless error. (2) Because a reasonable jury could find beyond a reasonable doubt that Austin's contact with Amy included some slight penetration of the labia, which is all that is required to sustain the

conviction of sexual battery, the trial judge did not err in denying Austin's JNOV. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2018-KA-00369-COA (June 25, 2019)

Opinion by Presiding Judge Carlton

Hon. Kathy King Jackson (Jackson County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Nicole Broussard](#)

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GILES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - NEW ISSUE ON APPEAL - PLAIN ERROR - A party that fails to make a contemporaneous objection at trial must rely on plain error to raise the issue on appeal

CRIMINAL PROCEDURE - CHALLENGING ADMITTED TESTIMONY - PLAIN ERROR - Plain error occurs when the trial court: (1) deviates from a legal rule; (2) the error is plain, clear, and obvious; and (3) the error has prejudiced the outcome of the trial

CRIMINAL PROCEDURE - CHALLENGING JURY SELECTION METHOD - PLAIN ERROR - To succeed under the plain error standard, when challenging jury selection methods, the appellant must show (1) an error at the trial level, and (2) that such error resulted in a manifest miscarriage of justice

FACTS

The Coahoma County Circuit court found Calvin "Rev" Giles guilty of fondling. In 2015, Giles lived down the street from eight-year-old "Mia" and her mother, "Sandra." At the time, Giles sold candy, snacks, and cigarettes out of his home. On July 18, 2015, Mia went to Giles' house with her friend "Gail" to buy snacks. While there, Giles kissed Mia, touched her private areas, and exposed his penis to her. Later that evening, Mia told her mother what Giles had done. In response, Sandra called Mia's father, "Mike." Mike and Sandra went to Giles' home, but despite being home, he refused to answer the door. The parents then contacted the Clarksdale Police Department. Investigator Nicholas Turner scheduled Mia's forensic interview with Meredith Rawl of the Family Crisis Services Center of Northwest Mississippi. At a pre-trial hearing, Rawl testified that Mia told her she asked Giles for a quarter, and he asked for a hug, after which he proceeded to kiss her face and touch her body all over, on top of her clothing, including her buttocks and vaginal area. When she told him to stop, he said "Shhh." Additionally, she testified that Mia said he showed her his penis on more than one occasion, with the first time being when she was seven and the last time when she was eight. During the hearing, the court noted the part of the testimony referring to incidents other than on the day of indictment might be inadmissible and cautioned the State to direct its witness to testify only to the events of the day of the indictment. However, at trial, Rawl testified in the exact same fashion. No objection was made at trial, and the court did not interrupt her testimony to address the issue. Mia testified saying Giles touched her "coo-coo"—her vagina—and on her booty. Giles also testified, denying the allegations but admitting being in prison previously. Based on the testimony, the jury convicted Giles. The trial court also denied Giles's post-trial motion for JNOV. Giles appealed.

ISSUES

Whether (1) Giles could assign error to the trial court, despite not having made an objection to such testimony or jury selection method neither at trial nor in his post-trial JNOV motion; (2) the trial court abused its discretion in admitting the portion of Rawl's testimony including reports of prior bad acts; or, in the alternative, if the court abused its discretion by not giving a limiting jury instruction; and (3) the trial court's method of selecting alternate jurors constituted reversible error.

HOLDING

(1) Because Giles failed to object to Rawl's testimony at trial or in his post-trial JNOV motion, he was precluded from challenging it on appeal, and the Court of Appeals properly used the plain error standard when reviewing the issue on appeal. (2) Because the trial court's deviation from Miss. R. Evid. 105 did not seriously affect the fairness, integrity or public reputation of the proceedings, the court found no reversible error with respect to the handling of Rawl's testimony. (3) Because the court found no proof the error was prejudicial to Giles, the conviction and denial of the JNOV was proper. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2018-KA-01222-COA (June 25, 2019)

Opinion by Judge McDonald

Hon. Charles E. Webster (Coahoma County Circuit Court)

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

Briefed by [Charles Ellzey](#)

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GREEN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - NEW TRIAL - DENIAL OF MOTION - The trial court must weigh the evidence in the light most favorable to the jury's verdict and only order a new trial if the verdict is so contradictory to the overwhelming weight of the evidence that failure to set the verdict aside would constitute an unconscionable injustice

CRIMINAL PROCEDURE - JURY SELECTION - VOIR DIRE - When a juror withholds substantial information and a full and complete response would permit a peremptory challenge, the trial court may inquire into the nature of the withheld information and use its discretion to determine that it did not cause a presumption of prejudice and deny a motion for a new trial

FACTS

D.D., a minor and the daughter of Willie and Loran, alleged that Rickie Green, an adult over the age of eighteen, sexually abused her during a four-wheeler ride by touching her vagina underneath her clothes. After arriving home, D.D. was visibly shaken by the incident and immediately told her father what had occurred. At trial, D.D.'s allegation was supported by her own testimony, as well as testimony from her father, from a police officer who responded to the scene, and from a forensic interviewer who interviewed D.D. Although Green admitted to touching D.D., he claimed that he only did so to prevent her from falling off of the four-wheeler, rather than for sexual pleasure. During voir dire, juror Megan Taylor admitted to being the cousin of Bridgett Davis, a potential witness who did not ultimately testify. Although it was later revealed that Davis was Willie's cousin, Taylor admitted that she did not have a close relationship with Willie or any of the parties in the case. The trial court found Green guilty of fondling by an authority figure pursuant to Miss. Code Ann. § 97-5-23(2). Green appealed.

ISSUES

Whether the trial court erred in (1) denying Green's motion for a new trial and (2) failing to conduct an investigation into whether juror misconduct resulted in an unfair trial.

HOLDING

(1) Because the trial court viewed the evidence, including D.D. and her father's uncontradicted testimony, in the light most favorable to the verdict, and because the verdict was not contrary to the overwhelming weight of the evidence, the trial court did not err in denying Green's motion for a new trial. (2) Because Green failed to further question Taylor during voir dire regarding the extent of her relationships with the parties, and because the trial court found that the information Taylor withheld regarding these relationships did not establish a presumption of prejudice, the trial court did not err in failing to conduct an investigation into whether juror misconduct resulted in an unfair trial. Therefore, the Court of Appeals affirmed the judgment of the Tunica County Circuit Court.

Affirmed - 2017-KA-01758-COA (June 25, 2019)

Opinion by Judge Westbrook

Hon. Linda F. Coleman (Tunica County Circuit Court)

Philip Carey Hearn for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [Anna McLemore](#)

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HOLLOWAY V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SEARCHES & SEIZURES - EXPECTATION OF PRIVACY - A person has Fourth Amendment standing to seek relief for an unconstitutional search if he has legitimate expectations of privacy in the place searched

CRIMINAL PROCEDURE - SEARCHES & SEIZURES - STANDING TO OBJECT - A mere passenger in a vehicle—including a person who has access to parts of the vehicle not ordinarily accessible to a regular passenger—does not have a legitimate expectation of privacy and hence lacks standing to object to the vehicle’s search

CRIMINAL PROCEDURE - SEARCH WARRANTS - PROBABLE CAUSE - Information from anonymous sources corroborated by the personal observations of police officers involved in the case can establish probable cause

CRIMINAL PROCEDURE - EXCLUSIONARY RULE - GOOD FAITH EXCEPTION - Under the “good faith exception,” if police officers relied on a facially valid search warrant issued by a neutral and detached magistrate, and the officers’ reliance on the warrant was objectively reasonable, then a later finding that the warrant was invalid will not require exclusion of the evidence obtained as a result of the search

FACTS

The Gulfport Police Department received an anonymous tip that, at a specified house, DeCarlos Holloway was selling marijuana and crack cocaine, and officers immediately undertook surveillance of the house. Holloway’s white Jaguar was in the driveway when Jermaine Ratcliff arrived in his Tahoe. Later, both Ratcliff and Holloway vacated the house and stepped into Ratcliff’s Tahoe. Detectives King and Brennan tried to pull over the Tahoe, which stopped and then accelerated away. The Tahoe stopped a second time, and both King and Brennan smelled marijuana as they approached during which Holloway continued chewing marijuana in his mouth. Brennan arrested Holloway after not complying with orders, and officers began to search the Tahoe. The search revealed crack cocaine “cookies” hidden in a space behind the glove compartment on the passenger side, marijuana residue, and a handgun. After obtaining a search warrant for the house, officers found 46.87 grams of cocaine hidden behind an air vent. Before trial, Holloway moved to suppress the evidence obtained during both the search of the Tahoe and the house. The Harrison County Circuit Court denied the motion, holding that Holloway lacked standing to object to the search of Ratcliff’s Tahoe and found that there was probable cause for the house’s search warrant. Holloway was convicted and sentenced to forty years as a nonviolent habitual offender. Holloway appealed.

ISSUES

Whether the trial judge erred in (1) holding that Holloway lacked standing to object to the search of the Tahoe and (2) finding that there was probable cause for the house’s search.

HOLDING

(1) Because Holloway was a mere passenger in Ratcliff’s Tahoe—despite having access to the area behind the glove compartment—Holloway lacked a legitimate expectation of privacy in the Tahoe and therefore had no standing to challenge its search. (2) Because the police officers’ observations were sufficient to corroborate the anonymous tips received about Holloway selling drugs out of the house, there was substantial evidence to support the trial court’s finding of probable cause for a search warrant, and because the officers reasonably relied on a facially valid warrant, the trial court’s holding would still be affirmed even if probable cause did not exist. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2018-KA-00148-COA (June 25, 2019)

Opinion by Presiding Judge J. Wilson

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

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Haley Nutt](#)

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ROBINSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTION - FAILURE TO OBJECT - A defendant’s failure to object the refusal to grant a jury instruction does not bar him or her from raising the issue on appeal

CRIMINAL PROCEDURE - JURY INSTRUCTION - CIRCUMSTANTIAL EVIDENCE - A circumstantial-evidence instruction should not be given if direct evidence exists

CRIMINAL PROCEDURE - EVIDENCE - EYEWITNESS - Direct evidence includes eyewitness testimony

FACTS

Sasha Robinson and Kevin White lived in a camper next to Sasha’s brother, Lampton Robinson. One morning, Sasha attempted to enter Lampton’s house and approached Lampton’s window when she discovered the door was locked. According to Sasha, Lampton opened the door and fired a gun into the air. After hearing the shots, White exited the camper, and Lampton fired three or four shots toward him. An investigator testified that he found shells from a gun where Lampton was standing that night. Jonathan Charleston was living with Lampton at the time and testified that he awoke after the first shot and saw White shooting at Lampton when he went outside. Charleston stated that he did not see Lampton holding a gun and had never seen him with a gun while living with him for three years. Lampton testified that he did not own a gun, that he did not possess a gun that night, and that White shot him in the back while Lampton ran away. Lampton was convicted of possession of a weapon by a felon and sentenced to serve three years in the custody of the Mississippi Department of Corrections. Lampton appealed.

ISSUE

Whether the trial court erred in refusing to grant a circumstantial-evidence jury instruction.

HOLDING

Because Sasha and White provided direct evidence that they both saw Lampton holding a gun, a circumstantial-evidence instruction was not required. Therefore, the Court of Appeals affirmed the judgment of the Amite County Circuit Court.

Affirmed - 2018-KA-00311-COA (June 25, 2019)

Opinion by Judge McCarty

Hon. Forrest A. Johnson Jr. (Amite County Circuit Court)

Walter Fred Beesley for Appellant - Kaylyn Havrilla McClinton (Att’y Gen. Office) for Appellee

Briefed by [Luke Seymour](#)

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