

MISSISSIPPI SUPREME COURT DECISIONS – MARCH 14, 2019**SUPREME COURT - CIVIL CASES****HENDERSON V. COPPER RIDGE HOMES, LLC****CIVIL - CONTRACT**

CREDITORS' REMEDIES - EXECUTION - CHOSE IN ACTION - Under *Maranatha Faith Ctr., Inc. v. Colonial Trust Co.*, a creditor who purchases the plaintiff's lender-liability causes of action against that creditor is subsequently substituted as a party of interest with rights to dismiss the case; thus, when the creditor levies execution on the plaintiff's choses in action against another company, the chose in action can be sold under execution

ASSIGNMENTS - CAUSE OF ACTION - REAL PARTY IN INTEREST - Under *Vaughn v. Dame Constr. Co.*, the cause of action is vested in the person who sustained the damage and that person is the real party in interest entitled to maintain the present action; the subsequent sale of real property does not automatically assign or transfer a cause of action to another party

APPEAL - WAIVER - MEANINGFUL ARGUMENT - Under *Randolph v. State*, when no meaningful argument is given in support of an issue on appeal, the issue is considered waived

FACTS

John and Cindy Henderson entered into a new-home construction contract with Copper Ridge Homes, LLC ("Copper Ridge") and a contract with First Bank to finance the construction. One contract provision stated that any changes to the scope of work had to be in writing. However, Copper Ridge sent two invoices to the Hendersons for overage charges. Consequently, the Hendersons argued that it was a fixed price contract, but Copper Ridge argued that it was a cost-plus contract. The Hendersons further argued that First Bank had paid Copper Ridge, leaving \$4,000 to complete the house under a fixed-price contract. John was asked to sign backdated draw disbursements for First Bank, and he later refused to sign the final one because the house was not near completion. The Hendersons filed a complaint, alleging breach-of-contract and tort claims against both parties and subsequently did not pay their promissory note payment. In response, First Bank counterclaimed for judicial foreclosure, and the Hendersons filed a motion for leave to amend their complaint in order to add wrongful foreclosure, fraud, and breach of the duty of good faith and fair dealing, to which the judge only allowed the latter two claims. The judge granted First Bank's motion at the summary judgment hearing, and the Hendersons again sought leave to amend to add wrongful foreclosure, which was denied. Copper Ridge and First Bank simultaneously sought dismissal of the Hendersons' claims altogether, which the court granted based on the findings that the claims of faulty construction traveled with title to the property and that the Hendersons lost their right to seek damages in view of the foreclosure. The Hendersons moved for leave to amend their complaint a third time, which was denied. The Hendersons appealed.

ISSUES

Whether the trial court erred in (1) granting First Bank's summary judgment motion for foreclosure; (2) granting Copper Ridge's and First Bank's post-foreclosure summary judgment motions and in dismissing the Hendersons' claims; and (3) denying the Hendersons' motion for leave of court to file its third amended complaint to add wrongful foreclosure.

HOLDING

(1) Because the Hendersons breached their contract with First Bank by failing to make payments as required by the promissory note and the deed of trust, the grant of judicial foreclosure was proper. (2) Because the deed of trust conveyed only the property identified in the deed of trust in the event of foreclosure, and the Hendersons' claims did not travel with the title of property upon foreclosure, the grant of summary judgment to both parties was reversed. (3)

Because the grant of summary judgment on the Hendersons' claims was in error, the Hendersons should have been allowed to amend their complaint and for the court to determine their claims. Therefore, the Supreme Court affirmed in part and reversed and remanded in part the judgment of the Pike County Circuit Court.

CONCURRENCE

Presiding Justice Kitchens argued that the Hendersons waived full consideration of the issue of whether the trial court erred in granting First Bank's summary judgment motion for foreclosure. Because the Hendersons (1) only cited to one authority, using it to define a material breach; (2) offered no argument or legal authorities to explain the reasons First Bank's breach was material; and (3) did not argue whether First Bank was given an opportunity to cure its alleged breach, Presiding Justice Kitchens argued it could not be determined from the record whether the contract was terminated before the Hendersons defaulted on their obligations under the promissory note.

Affirmed in Part; Reversed & Remanded in Part - 2017-CA-00959-SCT (Mar. 14, 2019)

Opinion by Justice Beam - Concurrence by Presiding Justice Kitchens

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

Macy Derald Hanson for Appellants - Dennis L. Horn, W. Brady Kellems, & Shirley Payne for Appellees

Briefed by [Lauren Rogers](#)

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SUPREME COURT – ORDERS

ALEXANDER V. STATE

COURT ORDER

POST-CONVICTION RELIEF - HABEAS CORPUS - RES JUDICATA - When a petitioner files a repeat petition for post-conviction relief, the petition is barred due to res judicata

ORDER

John Alexander was convicted of murder in the Hinds County Circuit Court and filed this petition seeking a hearing on the legality of his parole revocation. He had filed numerous previous petitions for post-conviction relief. The Court found Alexander's claim to be barred by res judicata because he had filed numerous prior petitions for post-conviction relief. Thus, the Court denied his Petition for Writ of Habeas Corpus.

OBJECTION

Presiding Justice King disagreed with the Court's finding that the application was frivolous and with the warning that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief in forma pauperis. He argued that the Court must not discourage defendants from exercising their right to appeal.

Denied - 2018-M-01650 (Mar. 12, 2019)

En Banc Order by Chief Justice Randolph - Objection by Presiding Justice King

Briefed by [Karen Lott](#)

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CHANDLER V. STATE

COURT ORDER

POST-CONVICTION RELIEF - FRIVOLOUS FILINGS - SANCTIONS - Frivolous petitions for post-conviction relief can result in monetary sanctions and restrict the ability to file future petitions for post-conviction relief

ORDER

This en banc order by the Mississippi Supreme Court denied Marcus Chandler's Application for Leave to Proceed in the trial court. It further restricted Chandler from filing subsequent petitions for post-conviction relief (or pleadings in that nature) related to his conviction and sentence in forma pauperis. Future filings deemed frivolous could result in sanctions including monetary sanctions.

OBJECTION IN PART

Justice King argued that the Court's imposition of monetary sanctions and restriction on future petitions for post-conviction relief violated both the United States and Mississippi Constitutions.

Denied - 2017-M-00731 (Mar. 12, 2019)

En Banc Opinion by Chief Justice Randolph - Objection in Part by Presiding Justice King

Briefed by [Baxter Geddie](#)

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COOK V. STATE

COURT ORDER

POST-CONVICTION RELIEF - FRIVOLOUS FILINGS - SANCTIONS - Frivolous petitions for post-conviction relief can result in monetary sanctions and restrict the ability to file future petitions for post-conviction relief

POST-CONVICTION RELIEF - TIME BAR - LIMITATIONS - A motion for post-conviction relief shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi

ORDER

The Court found Joseph Cook's application for leave to be barred by time and as a successive application. At least one of Cook's claims was previously raised and barred by res judicata. The Court found that Cook presented no arguable basis for his claims, notwithstanding the procedural bars, and should be denied. Further, because the filing of the application was frivolous, Cook was warned that future frivolous filings may result in monetary sanctions or restrictions on filing applications for post-conviction relief.

OBJECTION

Presiding Justice King agreed that Cook's application did not merit relief. However, he disagreed that Cook's filing was frivolous because Cook made reasonable arguments. He further disagreed with the warning that future frivolous filings may result in sanctions or restrictions because such sanctions cut off an indigent defendant's access to the court and violate a defendant's constitutional rights.

Denied - 2017-M-00455 (Mar. 12, 2019)

En Banc Order by Chief Justice Randolph - Objection by Presiding Justice King

Briefed by [Jack Schultz](#)

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EDWARDS V. STATE

COURT ORDER

CRIMINAL LAW - POST-CONVICTION RELIEF - PROCEDURAL BAR - A defendant will be barred from petitioning for post-conviction relief if either too much time has passed since the conviction or the defendant has made successive petitions in the case, and the instant petition does not qualify for an exemption from the procedural bars

ORDER

Donald Edwards filed a motion for post-conviction relief after being sentenced to life in prison on a drug possession conviction. Edwards alleged in his petition that the prosecution failed to prove he was a habitual offender, that he received ineffective assistance of counsel, and that his sentence was disproportional. The Court found that his petition was both time-barred and successive, given his two previous petitions for post-conviction relief in the same case. Further, the Court found that Edwards had failed to provide any arguable basis for his claims on the issues that were not procedurally barred. The Court denied the petition and barred Edwards from filing future petitions in the case.

OBJECTION

Presiding Justice King objected in part to the Court's order, arguing that the Court should have denied the petition without barring Edwards from filing future petitions in the case.

2014-M-01487 (Mar. 14, 2019)

En Banc Order by Justice Maxwell - Objection by Presiding Justice King
Briefed by [Michael Lambert](#)

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KIDD V. STATE

COURT ORDER

POST-CONVICTION RELIEF - APPLICATION FOR LEAVE - NEWLY DISCOVERED EVIDENCE -

Newly discovered evidence is an exception to the time, waiver, and successive-writ bars and must be evidence not reasonably discoverable at the time of trial that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence

ORDER

John Ray Kidd appealed his convictions for sexual battery and two counts of rape. The Court of Appeals affirmed his convictions. Kidd subsequently filed eight applications for leave to seek post-conviction relief over the next seventeen years. Kidd then applied for leave again, arguing newly discovered evidence from affidavits which purported to show his innocence. The Supreme Court found that the application should be denied because Kidd did not meet the newly discovered evidence standard. The Supreme Court also found the application frivolous and warned future frivolous filings could result in monetary sanctions or restrictions in his ability to file petitions for post-conviction collateral relief.

OBJECTION

Presiding Justice King agreed that the application for post-conviction relief should have been denied, but he disagreed with the Court's classification of the claim as frivolous and with its warning of future sanctions and restrictions.

Denied - 2017-M-01512 (Mar. 12, 2019)

En Banc Order by Chief Justice Randolph - Objection by Presiding Justice King
Briefed by [Carson Phillips](#)

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PAGE V. STATE

COURT ORDER

POST-CONVICTION RELIEF - FRIVOLOUS FILINGS - RESTRICTIONS - An appellant may be restricted by court order from filing in forma pauperis applications for post-conviction relief in matters related to a matter in which they have previously filed a frivolous application

ORDER

Tommie Page was convicted of aggravated assault and sentenced to life in prison as a habitual offender. Page appealed, and the Court of Appeals affirmed his conviction. Page has since entered multiple applications for leave to seek post-conviction relief, with this application being the seventh. Because Page's claim lacked an arguable basis, it did not warrant waiving the time, warrant, and successive-writ bars. Further, because this was Page's seventh filing of this type, it was deemed frivolous, and Page was restricted from making further filings of this nature in this matter. Therefore, the Supreme Court denied the order.

OBJECTION

Presiding Justice King argued that seven filings in fifteen years should not be deemed frivolous and that the Miss. Const. art. III § 26, does not allow defendants to be restricted from filing motions for post-conviction relief.

Denied - 2013-M-01645 (Mar. 12, 2019)

En Banc Order by Chief Justice Randolph - Objection by Presiding Justice King
Briefed by [James Adamoli](#)

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STRATTON V. STATE

COURT ORDER

POST-CONVICTION RELIEF - FRIVOLOUS FILINGS - SANCTIONS - Frivolous petitions for post-conviction relief can result in monetary sanctions and restrict the ability to file future petitions for post-conviction relief

ORDER

Timothy Stratton filed his second Application for Leave to Proceed in the Trial Court with Motion to Vacate Convictions. Because the Supreme Court will not consider venue questions raised for the first time in post-conviction proceedings, and because Stratton's argument that the jury instructions improperly omitted four essential elements of sexual battery did not meet any recognized exception to the procedural bars and lacked any arguable basis, the Court ordered the application be denied. Importantly, the omission of the word "forced" from the jury instructions was irrelevant because sexual battery of a child is a crime regardless of consent. Further, the omission of the date range for the charged crime in the elements instruction warranted relief only if unfair prejudice or surprise was shown. The Court also warned Stratton that future frivolous filings may result in monetary sanctions and restrictions on his ability to file post-conviction collateral relief in forma pauperis.

OBJECTION

Presiding Justice King disagreed with the Court's warning that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief in forma pauperis. He argued that the Court should simply deny or dismiss motions that lack merit because the Court should not discourage convicted defendants from exercising their right to appeal.

Denied - 2016-M-00217 (Mar. 14, 2019)

En Banc Order by Chief Justice Randolph - Objection by Presiding Justice King
Briefed by [Tucker Hood](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 12, 2019

COURT OF APPEALS - CIVIL CASES

BROWN V. HEWLETT

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - GUARDIAN AD LITEM - The appointment of a guardian ad litem is only mandatory if there is sufficient factual basis to support an allegation of abuse or neglect

CIVIL PROCEDURE - APPEARANCE - CONTEMPT - Inquiry in a contempt proceeding is limited by whether the court order was violated, whether it was possible to carry out the court order, and if it was possible, whether the violation was an intentional and willful refusal to abide by the court's order

CIVIL PROCEDURE - CONTEMPT - ATTORNEY'S FEES - When a party is held in contempt from violating a valid court judgment, the party that has been forced to seek the court's enforcement of its own judgment should be awarded attorney's fees

FACTS

Amber Brown and James Hewlett divorced and agreed that Brown would maintain physical custody of their child while Hewlett would have in-person and telephonic visitation. Brown, who had moved to Missouri prior to the divorce, later filed a competing custody motion in Missouri. Brown denied both telephonic visitation and in-person visitation to Hewlett. Hewlett filed a petition for contempt, and Brown failed to appear in court even though she was served with process. The court found Brown in contempt and ordered her to pay Hewlett \$5,000 in attorney's fees. Brown appealed.

ISSUES

Whether the trial court erred in (1) denying Brown's request for a continuance and discovery; (2) finding Brown in contempt; and (3) awarding attorney's fees to Hewlett for Brown's contempt.

HOLDING

(1) Because Brown never requested a guardian ad litem to be appointed at trial, failed to fully allege why she needed to conduct discovery, had the opportunity to appear at trial and failed, and failed to file a recusal motion at trial, her issues were without merit. (2) Because Brown's litigation filing in Missouri did not justify her refusal to comply with the existing divorce decree and custody order, and there was no dispute that Brown failed to comply with the visitation provisions of the judgment, the chancellor's findings were proper. (3) Because awarding attorney's fees is entrusted to the discretion of the chancellor and the court found that he did not abuse his discretion, the award of attorney's fees was proper. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Chancery Court.

SPECIAL CONCURRENCE

Judge McDonald argued that while the rule for granting attorney's fees to the winning party on appeal is well established, the one-half rule fails to properly recompense the party for the amount of time and energy spent on the appeal. She believes the analysis described in *McKee* should be employed instead when awarding attorney's fees upon appeal.

SPECIAL CONCURRENCE

Judge McCarty argued that the existing rule in place of allowing one-half of attorney's fees awarded by the trial court in an appeal should be eliminated because the practice does not reflect the "reasonable fee" required by the Mississippi Rules of Professional Conduct due to the variables that occur at each trial and appellate trial. He suggested those seeking fees should adhere to the facts set forth in *McKee* and demonstrate the reasonableness of the fee requested.

Affirmed - 2017-CA-01319 (Mar. 12, 2019)

En Banc Opinion by Presiding Judge Wilson - Special Concurrences by Judge McDonald & Judge McCarty
Hon. Johnny Lee Williams (Pearl River County Chancery Court)

Jerry Wesley Hisaw for Appellant - Renee M. Porter for Appellee
Briefed by [Andie Szabo](#)

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WILSON V. WILSON

CIVIL - OTHER

CIVIL PROCEDURE - SUMMARY JUDGMENT - GENUINE ISSUE OF MATERIAL FACT - Pursuant to Miss. R. Civ. P. 56(c), summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

CIVIL PROCEDURE - REMEDIES - ATTORNEY'S FEES - Whether to award monetary sanctions under the Litigation Accountability Act is left to the trial court's discretion and that decision is reviewed under an abuse of discretion standard

FACTS

On December 28, 2015, Kevin and Becky Wilson separated and divorced after a nineteen-year marriage. In 2016, Kevin purchased a new home in Natchez, Mississippi, where his girlfriend, Dana, also moved in. Kevin and Dana later married in November 2016. On May 9, 2017, Becky was parked in a public turnaround approximately 500 feet from Kevin and Dana's home and Dana, upon spotting Becky, angrily confronted her. The confrontation ultimately resulted in Becky calling her sister and the police, but no charges were filed. Later that same day, Becky's sister, Martha, went to Kevin and Dana's business to speak with Kevin but got in a physical altercation with Dana. Becky was not present. On June 21, 2017, the Wilsons filed a complaint with the Adams County Chancery Court for a temporary restraining order, preliminary injunction, and permanent injunction against both Becky and her sister, Martha. Becky filed a motion for summary judgment alleging that she had not been in any physical altercations with Kevin and Dana and, therefore, should not have these penalties levied against her. The chancery court granted Becky's motion for summary judgment and subsequently granted Becky's application for attorney's fees. The Wilsons appealed.

ISSUES

Whether the chancery court erred in (1) granting Becky's motion summary judgment and (2) awarding Becky attorney's fees, costs and expenses.

HOLDING

(1) Because summary judgment is appropriate when a party has shown that there is no genuine issue of material fact among the pleadings, depositions, admissions, etc., and because the trial court properly evaluated several factors and found that Becky had not acted in any way to warrant the relief sought by the Wilsons, the trial court did not err in granting Becky's motion for summary judgment.(2) Because the award of attorney's fees and costs are left in the trial court's discretion, and because the trial court is found to have exercised that discretion without abuse, the trial court did not err in awarding Becky attorney's fees and costs. Therefore, the Court of Appeals affirmed the judgment of the Adams County Chancery Court.

Affirmed - 2018-CA-00893-COA (Mar. 12, 2019)

Opinion by Chief Judge Barnes

Hon. E. Vincent Davis (Adams County Chancery Court)

Joseph Bilbo Moffett for Appellants - Walter Brown Jr. for Appellee

Briefed by [Corban Snider](#)

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MARION V. STATE

CRIMINAL - FELONY

EVIDENCE - HEARSAY - TENDER-YEARS EXCEPTION - Under Miss. R. Evid. 803(25), a statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability, and (b) the child either (1) testifies at the proceedings, or (2) is unavailable as a witness

EVIDENCE - ADMISSABILITY - CHARACTER EVIDENCE - Miss. R. Evid. 404 generally prohibits the admission of evidence of a person's character for the purpose of proving that he or she acted in conformity with that character on a particular occasion

FACTS

When Darnell Marion was evicted from his apartment in 2013, he began staying with a friend, Mariah. Mariah shared the apartment with her three children and a friend, Angelique, and her younger sister M.B. stayed at the apartment sometimes. Angelique found photographs and videos of M.B., who was seven years old at the time, on Marion's phone, so she called the police. Marion was arrested and M.B. was questioned about Marion. M.B. informed officials that Marion had tried to kiss her and remove his clothing while in the bed. After a jury trial, Marion was convicted of one count of touching M.B. for lustful purposes and was sentenced to fifteen years in the custody of the Mississippi Department of Corrections ("MDOC"), with six years to serve without parole, and the remainder on postrelease supervision. Marion filed a motion for a JNOV, or in the alternative, for a new trial. The trial court denied Marion's motion. Marion appealed.

ISSUES

Whether the trial court erred in (1) admitting M.B.'s testimony under the tender-years exception; and (2) admitting the video of M.B. sleeping recovered from Marion's phone.

HOLDING

(1) Because the trial court's order was an "on-the-record" factual determination under Miss. R. Evid. 803(25), and evidence within the record supported the trial court's finding that M.B.'s out-of-court statements provided a substantial indicia of reliability and was supported by corroborative evidence, the trial court did not err in admitting M.B.'s testimony under the tender-years exception. (2) Because the video was more probative than prejudicial, the trial court did not err in admitting the video of M.B. sleeping recovered from Marion's phone. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2017-KA-01672-COA (Mar. 12, 2019)

Opinion by Judge Westbrooks

Hon. Kathy King Jackson (Jackson County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Catherine Pettis](#)

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YOUNG V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - MISTRIAL - COURTROOM REMOVAL - Miss. R. Crim. P. 10.2 states a defendant may be removed from courtroom proceedings if engaged in "disruptive or disorderly conduct"

CRIMINAL PROCEDURE - MISTRIAL - PREJUDICIAL OCCURRENCES - Miss. R. Crim. P. 23.5 states a defendant may be granted mistrial if “substantial and irreparable prejudice” is suffered

FACTS

Derrick Young was indicted on one count of armed robbery and one count of possession of a firearm by a felon. During voir dire, Young was removed from the courtroom due to his outbursts and belligerent behavior. He moved for a mistrial on the grounds that the jury panel had witnessed his outbursts and heard an altercation between him and law enforcement officers when he was removed from the courtroom. The jury found him guilty of both counts. Young appealed.

ISSUES

Whether the trial court erred in (1) removing Young from the courtroom; and (2) denying Young’s motion for a mistrial.

HOLDING

(1) Because Miss. R. Crim. P. 10.2 provides that “a defendant who engages in disruptive or disorderly conduct may be removed” from courtroom proceedings, the trial court did not err by removing Young after he repeatedly shouted and refused to enter the courtroom with his public defender. (2) Because the jury panel witnessing Young’s outbursts did not amount to “substantial and irreparable prejudice” as required by Miss. R. Crim. P. 23.5, the trial court did not err in denying Young’s motion for a mistrial. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

Affirmed - 2017-KA-01339-COA (Mar. 12, 2019)

Opinion by Presiding Judge Carlton

Hon. George M. Mitchell Jr. (Attala County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att’y Gen. Office) for Appellee

Briefed by [Nathaniel Snyder](#)

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