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Weekly Newsletter

Mississippi Cases Editor: Katie A. Humphries

MISSISSIPPI SUPREME COURT DECISIONS – MARCH 21, 2019

SUPREME COURT - CIVIL CASES

ARRINGTON V. MISS. BD. OF DENTAL EXAM'RS

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - DENTAL BOARD - TIMELY APPEAL - Under Miss. Code Ann. § 73-9-65, notice of appeal must be filed within thirty days for the chancery court to have appellate jurisdiction
AMINISTRATIVE LAW - DENTAL BOARD - APPELLATE JURISDICTION - A chancery court lacks appellate jurisdiction over an appeal that is not in full compliance with the statutory requirements

FACTS

Elijah Arrington had his dental license and Limited Enteral Conscious Sedation Permit revoked after a disciplinary hearing by the Mississippi State Board of Dental Examiners ("the Board"). Arrington was served with the Board's order on July 24, 2017. Arrington filed a notice of appeal on August 24, 2017, but he did not file a cost bond with the chancery court until August 31, 2017. The Hinds County Chancery Court held that since Arrington did not file the cost bond within thirty days of notice of the action of the Board, the court was deprived of appellate jurisdiction. The appeal was dismissed. Arrington appealed.

ISSUE

Whether failure to file a notice of appeal within thirty days of notice prevents the court from having jurisdiction.

HOLDING

Because Arrington filed a notice of appeal thirty-one days after July 24, 2017, and because the notice of appeal must be filed within thirty days in order to vest the chancery court with appellate jurisdiction, the appeal was not timely filed, and the chancery court lacked jurisdiction. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2017-CA-01647-SCT (Mar. 21, 2019)
Opinion by Presiding Justice King
Hon. J. Dewayne Thomas (Hinds County Chancery Court)
Terris Caton Harris & Dennis C. Sweet III for Appellant - Stanley T. Ingram, Onetta Whitley, & Robert Davis House (Att'y Gen. Office) for Appellee
Briefed by Zachary Flowers

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WAYNE JOHNSON ELEC. INC. V. ROBINSON ELEC. SUPPLY CO.

CIVIL - OTHER

CIVIL PROCEDURE - DISMISSAL - ADMINISTRATIVE DISSOLUTION - Corporations that have been administratively dissolved may not maintain any proceeding under Miss. Code Ann. § 79-4-14.21
CIVIL PROCEDURE - DISCOVERY - ACCOUNTING - Under Miss. R. Civ. P. 53(g)(2), courts accept a master's finding of fact unless manifestly wrong

CIVIL PROCEDURE - DISCOVERY - DISCRETION - Trial courts have broad discretion to stay discovery until a special master releases findings

FACTS

Wayne Johnson Electric Inc. ("Johnson") sued Robinson Electric Supply Co. ("Robinson") alleging breach of contract, fraud, and a variety of other torts. Robinson counterclaimed for balances due on Johnson's accounts. Both parties requested an accounting. The chancellor appointed a special master to hear the case due to its complexity and size in controversy. The chancellor stayed discovery until the special master released her findings but did require Robinson to release business records to Johnson. Before accounting was concluded, Johnson was administratively dissolved so the chancellor dismissed Johnson's claims. After, the special master released her recommendations in a special report and the chancellor adopted its findings. Johnson appealed.

ISSUES

Whether (1) the trial court erred in dismissing the dissolved Wayne Johnson Electric Inc.; (2) the chancellor's acceptance of the special master's report was an abuse of discretion; and (3) the chancellor erred by staying discovery until the special master released her findings.

HOLDING

(1) Because Johnson was administratively dissolved for failing to file an annual report, Johnson was not allowed to maintain the legal action under Miss. Code Ann. § 79-4-14.21. (2) Because the special master possessed the requisite skill and twice considered Johnson's objections to the report, the chancellor did not err in adopting the special master's report. (3) Because Johnson voluntarily dismissed his personal claims and the chancellor properly dismissed Johnson's corporate claims after dissolution, the chancellor did not err by staying discovery until the special master drafted her findings. Therefore, the Supreme Court affirmed the judgment of the Forrest County Chancery Court.

Affirmed - 2017-CA-00805-SCT (Mar. 21, 2019)
En Banc Opinion by Justice Ishee
Hon. Deborah J. Gambrell (Forrest County Chancery Court)
Paul Manion Anderson & Samuel S. McHard for Appellants - Lawrence Cary Gunn Jr., J. Richard Barry, & Joseph Randle Tullos for Appellees
Briefed by Nathaniel Snyder

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SUPREME COURT - CRIMINAL CASES

GREENLEAF V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - COUNSEL - INEFFECTIVE ASSISTANCE - A defendant in a criminal case has a constitutional right to effective assistance of counsel, but there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance

CRIMINAL LAW - COUNSEL - INEFFECTIVE ASSISTANCE - To succeed on a claim of ineffective assistance of counsel, the defendant must prove (1) that his attorney's performance was deficient and (2) that the deficient performance deprived the defendant of a fair trial; in other words, the benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result

FACTS

On April 29, 2016, Alondo Greenleaf asked to borrow Cecily Matthews's truck. When Matthews told Greenleaf her little brother, Dennis Smith, Jr., had the keys, Greenleaf asked Smith for the keys. Smith refused, citing that he had

overheard Greenleaf recently tell his own wife that he would "run her over." Several people were present at this encounter, including Smith, Greenleaf, a friend of Smith, Matthews, and one of Matthews's friends. Matthews and Smith testified that, shortly after everyone went inside, Greenleaf "bear hugged" Smith and stabbed him in the back with a knife. Greenleaf then allegedly told Smith's friend that he was "next" and chased him down the street. Greenleaf testified that Smith and Smith's friend shoved Greenleaf and, in an effort to catch his balance by grabbing onto Smith, Greenleaf accidentally stabbed Smith. Greenleaf did not tell this story to the police when he initially spoke to them after the altercation. Greenleaf wanted his attorney to proffer a jury instruction to the court based on Mississippi's excusable homicide statute, Miss. Code Ann. § 97-3-17, but his attorney did not do so. Greenleaf was found guilty of aggravated assault and sentenced to five years in prison. Greenleaf appealed.

ISSUE

Whether Greenleaf's counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

HOLDING

Because the jury instruction that Greenleaf sought was based on a homicide offense and not an assault offense, and because it would have required several additional elements in order to excuse a charge of aggravated assault that were likely to confuse a jury, Greenleaf's counsel was not ineffective by virtue of refusing to proffer the jury instruction that Greenleaf requested. Therefore, the Mississippi Supreme Court affirmed the Coahoma County Circuit Court.

Affirmed - 2017-KA-01216-SCT (Mar. 21, 2019)
En Banc Opinion by Justice Ishee
Hon. Linda F. Coleman (Coahoma County Circuit Court)
Mollie Marie McMillin (Pub. Def. Office) for Appellant **-** Lisa L. Blount (Att'y Gen. Office) for Appellee
Briefed by Corban Snider

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PAYTON V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - DEATH OF PARTY - SUBSTITUTION - If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the Supreme Court; if the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appropriate appellate court may direct

CRIMINAL LAW - INVESTIGATION & PROCEEDINGS – VICTIMS' RIGHTS - According to Miss. Const. art. 3, § 26A, victims of crime, as defined by law, shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process; and to be informed, to be present and to be heard, when authorized by law, during public hearings

CRIMINAL LAW - VICTIMS - BILL OF RIGHTS - Victims of crimes are formally recognized and accorded substantial rights, including, inter alia, the right to be provided information by law enforcement, the right to confer with the prosecuting attorney, the right to receive a transcript of the proceedings, the right to be present throughout all proceedings, and the right to participate during any entry of a plea of guilty, sentencing or restitution proceeding pursuant to Miss. Code Ann. §99-43-1

FACTS

On September 19, 2010, "Lil Dank" Payton kidnapped and raped N.B., a female sophomore at the University of Southern Mississippi. At trial, the State presented definitive scientific evidence of Payton's guilt, through the use of DNA testing. Payton was sentenced to a thirty-year term for kidnapping and three forty-year terms for each rape count. Payton appealed and trial court granted in forma pauperis status for his appeal. A few days before Payton's appeal brief

was due, Payton died. Payton's counsel, George T. Holmes, filed a suggestion of death and pleaded that Payton had no known personal representative. On Payton's behalf, Holmes then moved for abatement ab initio, requesting that the Court enter an order of abatement voiding the entire criminal proceeding against Payton from its inception, nullifying the petit jury's verdict and the circuit court's judgment of conviction and remanding the case back to the same trial court with instructions to dismiss the grand jury's indictment, all without notice to the victim.

ISSUE

Whether the court should grant Holmes's motion on behalf of Payton to abate Payton's conviction ab initio without notice to the victim.

HOLDING

Because the Mississippi Constitution balances the rights of the accused with the rights of the victim, Payton's appeal was dismissed as moot and his conviction remained intact. The Court expressly overruled *Gollot*, its abatement ab initio doctrine, and adopted Alaska's balanced approach in *Carlin*, which protects victims' rights. Therefore, the Supreme Court dismissed Payton's appeal.

PARTIAL CONCURRENCE/DISSENT

Presiding Justice King argued that while he agreed that dismissing the appeal in this case was appropriate, the majority based its decision on the abatement ab initio doctrine primarily on victims' rights, and he did not agree that those rights *always* mandate dismissing an appeal as moot when a defendant has died and no substitution has been made. He argued that the court should determine the appropriate course in the rare instance when a convicted defendant dies pending appeal and no substitution is made on a case-by-case basis. A case-by-case approach would strike the appropriate balance between the rights of victims and defendants, instead of automatically applying either abatement ab initio or dismissing the appeal as moot.

Dismissed - 2016-KA-00378-SCT (Mar. 21, 2019)
En Banc Opinion by Chief Justice Randolph - Partial Concurrence/Dissent by Presiding Justice King
Hon. Anthony Alan Mozingo (Lamar County Circuit Court)
George T. Holmes (Pub. Def. Office) for Appellant - Katy T. Gerber (Att'y Gen. Office) for Appellee
Briefed by Catherine Pettis

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MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 19, 2019

COURT OF APPEALS - CIVIL CASES

ANDERSON V. ANDERSON

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - CRUEL & INHUMAN TREATMENT - Pursuant to *Sproles*, for a Court to grant a divorce on cruel and inhuman treatment, "there must be ample proof that it was the husband's conduct that caused the dissolution of the marriage and that the wife was entitled to a divorce on the grounds of cruel and inhuman treatment"
FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - Equitable distribution is the division of marital property by a court in a divorce proceeding, under statutory guidelines that provide for a fair, but not necessarily equal, allocation of property between the spouses
FAMILY LAW - DIVORCE - MULTIPLE DIVORCES - Pursuant to *Garriga*, "there can be but one divorce granted; where each party has requested a divorce and offers proof sufficient to establish a basis for divorce, the chancellor must then determine which of the parties will be granted a divorce"

FACTS

In 2012, Emmarie Anderson ("Emmarie") filed for divorce against Stephen Anderson Sr. ("Stephen") on the grounds of habitual cruel and inhuman treatment and adultery. In May 2016, the Warren County Chancery Court Clerk informed Emmarie that the case was set to be dismissed without prejudice under Miss. R. Civ. P. 41(b). A few months later, Stephen filed for divorce against Emmarie on the grounds of habitual cruel and inhuman treatment and adultery. Emmarie then resurrected her 2012 case, amending her complaint but maintaining her grounds for divorce. The two cases were consolidated. After a trial, the chancellor found Stephen guilty of habitual cruel and inhuman treatment. The chancery court awarded Emmarie custody of their three children and Stephen visitation. Stephen was also ordered to pay child support. As part of the property division, the court awarded Emmarie use and possession of the marital home and ordered Stephen to continue paying the mortgage on the marital home, including the taxes and insurance. Stephen appealed.

ISSUES

Whether the circuit court erred in (1) granting a divorce for Emmarie on habitual cruel and inhuman treatment grounds and (2) ordering Stephen to continue pay the mortgage.

HOLDING

(1) Because the chancellor concluded that the marriage's breakdown was caused by physical abuse after he heard testimony from Emmarie, Emmarie's mother, and Emmarie and Stephen's son about Stephen's physical abuse upon Emmarie, the chancellor did not err in granting the divorce to Emmarie on the ground of habitual cruel and inhuman treatment. (2) Because Emmarie was the custodial parent, and because the children and Emmarie had already been living there and still needed a place to live, there was no abuse of discretion in the chancellor's decision regarding property division.

Affirmed - 2017-CA-00608-COA (Mar. 19, 2019)
Opinion by Presiding Judge Lawrence
Hon. Jane R. Weathersby (Warren County Chancery Court)
David Neil McCarty for Appellant **-** David M. Sessums for Appellee
Briefed by Whitney Jackson

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COLUMBUS LIGHT & WATER DEP'T V. MISS. DEP'T OF EMP'T SEC.

CIVIL - STATE BOARDS & AGENCIES

EMPLOYMENT LAW - UNEMPLOYMENT BENEFITS - DISQUALIFICATIONS - Miss. Code Ann. § 71-5-513(A)(1)(b) disqualifies a person from unemployment benefits if she was discharged for misconduct connected with her work, if so found by the Mississippi Department of Employment Security

EMPLOYMENT LAW - EMPLOYEE MISCONDUCT - The Mississippi Supreme Court has defined "misconduct" as conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee

FACTS

Teresa Darby was an employee of Columbus Light and Water ("Columbus LW") and was terminated for multiple company violations, including dishonesty, insubordination, unauthorized use of company records, and multiple violations of Columbus LW's internet-use policy. Columbus LW alleged that Darby was dishonest and insubordinate regarding her duties of loading payroll information. Columbus LW also contended that Darby improperly downloaded employee payroll information onto a flash drive and loaded the information onto her home computer in violation of company policy. Further, Columbus LW claimed that Darby's internet usage included improper personal use at work. Darby argued that she had not been dishonest in regard to her payroll duties, but rather misunderstood the comptroller's question regarding her progress on the payroll entry. Darby claimed that because of an earlier computer crash, she used a CD and later a flash drive to store company information as a backup and that her supervisor was aware of her use of

the flash drive. Darby defended her personal internet usage by arguing that while prohibited, personal internet usage was commonplace throughout the company. After her termination, Darby applied for unemployment benefits with the Mississippi Department of Employment Security ("MDES"), but an initial investigation by MDES concluded that Darby was discharged for actions and omissions considered to be misconduct under Miss. Code Ann. § 71-5-513(A)(1)(b) and denied her benefits. Darby appealed the decision and MDES held a telephone appeal in which Darby and Columbus LW participated. The administrative law judge reversed the decision and found Darby eligible to receive unemployment benefits. Columbus LW then appealed to the MDES Board of Review ("the Board"), and the Board adopted the findings and opinion entered by the administrative judge and affirmed the decision, which Columbus LW appealed to the circuit court. The circuit court reviewed the record and affirmed the Board's decision. Columbus LW appealed.

ISSUE

Whether the circuit court erred in finding that substantial evidence supported the Board's decision.

HOLDING

Because Darby testified that she was not intentionally dishonest, she entered payroll on her breaks and at home to complete the payroll in a timely manner, she brought home company information to protect her work, and that personal internet use was not unusual, there was substantial evidence to support the Board's decision. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - 2017-CC-01598-COA (Mar. 19, 2019)
En Banc Opinion by Judge Tindell
Hon. Lee J. Howard (Lowndes County Circuit Court)
Jeffrey Carter Smith & Courtney Bradford Smith for Appellant - Albert B. White & James Randall Bush for Appellee
Briefed by Ryan Overturf

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HALL V. HALL

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - MODIFICATION - REQUIREMENTS - Under Miss. R. of Civ. P. 60(b), modification of a prior judgment must not substitute for an appeal, must be sought in a reasonable time period, and must demonstrate extraordinary circumstances

FACTS

Gary and Carolyn Hall were married on December 21, 1995, in Hamilton, Alabama. In 2004, Carolyn filed for divorce against Gary in the Chancery Court of Lee County, Mississippi. The chancery court granted Carolyn a divorce, awarded her $1,500 per month in alimony, and divided the marital property. Neither party appealed. In 2007, Gary's employer froze his pension benefits. In 2016, Gary accepted early retirement but did not draw on the retirement funds. In 2017, Gary filed a petition for modification of a prior judgment and other relief under Miss. R. Civ. P. 60(b)(5) and (6), alleging that there had been a substantial and material change in circumstances. Gary argued that because his pension plan was frozen in 2007, it was not worth what it had been projected to be worth at the time of the divorce proceedings. He further asserted that a total elimination of any payment of his retirement benefits to Carolyn was necessary and proper. Carolyn filed a timely answer asserting that Gary's claim was barred by the doctrines of laches, judicial estoppel, and res judicata. A hearing on the merits was held, and the chancery court dismissed Gary's petition for modification by sustaining Carolyn's motion to dismiss. Gary appealed.

ISSUE

Whether the chancery court erred in dismissing Gary's petition for modification filed under Miss. R. Civ. P. 60(b)(5) and (6).

HOLDING

Because Gary filed his petition for modification nearly ten years after becoming aware of the change to his pension, and because he failed to demonstrate extraordinary circumstances, the chancery court did not err in dismissing Gary's petition for modification filed under Miss. R. Civ. P. 60(b)(5) and (6). Therefore, the Court of Appeals affirmed the judgment of the Lee County Chancery Court.

Affirmed - 2017-CA-01293-COA (Mar. 19, 2019)
Opinion by Judge McDonald
Hon. John Andrew Hatcher (Lee County Chancery Court)
Angela Sheree Brooks for Appellant - Christopher G. Evans for Appellee
Briefed by Jon-Paul Bushnell

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JACKSON V. JACKSON

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - MODIFICATION - In a custody modification proceeding, the non-custodial party must prove three distinct prerequisites: (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody
FAMILY LAW - CUSTODY - SPECIFIC FINDINGS OF FACT - The chancellor is not obligated to provide specific findings of fact unless a party requests that he or she do so

FACTS

Dotie and Lori Jackson divorced in 2012. The couple had two children, and Lori was awarded primary physical custody subject to a visitation schedule. In 2015, Lori filed a motion for emergency relief alleging that Dotie had abused one of the children and sought appointment of a guardian ad litem to represent the children's interests. Following an investigation, the Department of Human Services found no abuse on Dotie's part. In 2016, Dotie filed an amended petition requesting to take sole legal and physical custody of the children. Lori counterclaimed to modify Dotie's visitation schedule. During trial, the chancellor found that the children were happy, healthy, and doing well in school. The guardian ad litem testified that she did not observe any adverse impact on the children from the events. Dotie did not request specific findings of fact and, in her bench ruling, the chancellor concluded that there was no substantial material change in Lori's home that would warrant custody modification. Dotie appealed.

ISSUES

Whether (1) the chancellor erred by finding that Lori's abuse allegations did not create a material change in circumstances that warranted custody modification and (2) the matter should be reversed and remanded for the chancellor to make specific findings under the *Albright* factors.

HOLDING

(1) Because Dotie failed to show a material change in circumstances that adversely affected the children, the chancellor was within her discretion to deny the custody modification request. (2) Because there was no error in the chancellor's finding that there was no material change in circumstances that adversely affected the children, the chancellor was not required to make specific findings of fact under the *Albright* factors. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2017-CA-01077-COA (Mar. 19, 2019)
En Banc Opinion by Judge Greenlee
Hon. Denise Owens (Hinds County Chancery Court, First Judicial Dist.)

Marty Craig Robertson, Robert Marvin Peebles, & Matthew Stanley Easterling for Appellant - Amanda Jane Proctor & William R. Wright for Appellee
Briefed by Davis Pigg

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KEMPER CNTY. V. PARKS

CIVIL - OTHER

CIVIL PROCEDURE - APPELLATE PRACTICE - LIMITATIONS - Under Miss. Code Ann. § 99-35-103(b), the state may only appeal pure questions of law that result from an order "acquitting the defendant where the question of law has been decided adversely to the state or municipality"
CIVIL PROCEDURE - APPELLATE PRACTICE - MOOTNESS - The doctrine of mootness demands that a case must have an "actual controversy" that existed at the time of trial and at the time of review

FACTS

Cornelius Parks was convicted of a misdemeanor for domestic violence in 2011. In order to appeal his conviction, he filed a check for $449 along with his notice of appeal and a document entitled "Cost and Appearance Bond" with the circuit court. The appeal was dismissed because Parks did not file the cost and appearance bond simultaneously with his notice, as required in former Rule 12.02 of the Uniform Rules of Circuit and County Court Practice. On appeal, the court found that Parks met the requirements under Rule 12.02. Accordingly, the dismissal was reversed, and the case was remanded to the circuit court to determine whether Parks should be granted leave to amend his costs and appearance bond. On remand, the circuit court found that the $449 was only a "cost bond" and ordered the justice court to set an amount for the "appearance bond." After Parks paid the appearance bond, he was acquitted of the domestic violence charge. The State appealed.

ISSUE

Whether Parks initially followed the rule governing his appeal.

HOLDING

Because the court was presented with an interpretation of the facts as to whether or not Parks initially followed the rule governing his appeal, and because the court was not presented with a question of law only, the relief requested on appeal was moot. Therefore, the Court of Appeals affirmed the judgment of the Kemper County Circuit Court.

Affirmed - 2017-CA-01243-COA (Mar. 19, 2019)
Opinion by Judge Lawrence
Hon. Justin Miller Cobb (Kemper County Circuit Court)
Marvin E. Wiggins Jr. for Appellant - Stephen Paul Wilson for Appellee
Briefed by Drey Russell

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WARNER V. THOMAS

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - CHILD CUSTODY - MODIFICATION - When considering a modification of child custody, the proper approach is first to identify the specific change in circumstances, and if that exists, then analyze and apply the *Albright* factors in light of that change; to determine whether a material change of circumstances has occurred, a chancellor should look at the overall circumstances in which a child lives

DOMESTIC RELATIONS - CHILD CUSTODY - MODIFICATION - Miss. Code Ann. § 93-5-24(9)(a) defines a history of perpetuating family violence as either one incident of family violence that has resulted in serious bodily injury, or a pattern of family violence against a member of the household; the trial court must first make a finding that the parent in question has a history of perpetuating violence before the presumption arises

CIVIL PROCEDURE - APPEALS - MOTION FOR NEW TRIAL - A party may only obtain relief on a motion for new trial upon showing: (1) an intervening change in controlling law, (2) availability of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent manifest injustice

FACTS

Joni Warner and Larry Thomas were never married but are the parents of the minor child, L.J. After Warner and Thomas ended their relationship, the trial court applied the *Albright* factors and awarded the parties joint legal and physical custody of the child in January 2017. Neither party appealed that decision. On April 18, 2017, Warner filed a petition for modification claiming a material change in circumstances that adversely affected the best interest of the child. The material challenge alleged was an incident after one of the minor child's basketball games where Warner claimed Thomas attempted to assault her and ended up assaulting the minor child. The municipal court of Vicksburg entered a temporary domestic abuse protection order. Warner asked that she be given sole physical and legal custody of the child. Thomas answered, denying these allegations. On September 20, 2017, the trial court issued its order denying modification. The court pointed out that at the prior hearing there were no impartial witnesses to the basketball game incident and found no material change in circumstances adversely affecting the child. On September 25, 2017, Warner filed a motion to reconsider and motion for new trial. Warner argued that Miss. Code Ann. § 93-5-24(9)(a)(i) created a rebuttable presumption that it was not in the best interest of the child to be placed in joint custody with a parent who has a history of perpetrating family violence. Warner claimed she had a new witness to the basketball game incident. In October 2017, the trial court denied the motion to reconsider and found that there was no serious injury or showing of a pattern of family violence, so there was no presumption raised against Thomas. The trial court also denied the motion for a new trial, stating that Warner had ample time before the hearing to have subpoenaed or presented other witnesses to the incident. Warner appealed.

ISSUES

Whether the trial court erred in (1) denying the petition for modification; (2) finding that Thomas did not have a history of perpetuating family violence under Miss. Code Ann. § 93-5-24; and (3) denying the motion for reconsideration and/or motion for new trial.

HOLDING

(1) Because no material change in circumstances was found, there was no need for the trial court to undertake an *Albright* factor analysis. (2) Because the domestic abuse protective orders that Warner entered did not relate to anything but the post-basketball game incident, the facts of which the trial court found to be in dispute, there was no abuse of discretion by the trial court in concluding that the proof did not constitute a history of family violence. (3) Because there was no showing that the new evidence was substantive and no showing of why Warner was ignorant of it prior to the original hearing, the court properly denied Warner's post-trial motions. Therefore, the Court of Appeals affirmed the judgment of the Warren County Chancery Court.

Affirmed - 2017-CA-01591-COA (Mar. 19, 2019)
Opinion by Judge McDonald
Hon. Jane R. Weathersby (Warren County Chancery Court)
Kimberly Walker Nailor for Appellant - James L. Penley Jr. for Appellee
Briefed by Natalie McCarty

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WATTS V. JACKSON

CIVIL - REAL PROPERTY

REAL PROPERTY - PRESCRIPTIVE EASEMENT - HOSTILE - Use of another's land is not hostile for the purposes of a prescriptive easement if the use of the land was permitted by the land owner
REAL PROPERTY - PRESCRIPTIVE EASEMENT - CLAIM OF OWNERSHIP - One claiming a prescriptive easement is not using another's land under a claim of ownership when the land owner had granted permission to use the land
REAL PROPERTY - PRESCRIPTIVE EASEMENT - EXCLUSIVE USE - One claiming a prescriptive easement must show a right to use the land above other members of the general public

FACTS

For about seventeen years, Earl Jackson had accessed his land by using a private road on Roscoe and Terry Watts' land. When Roscoe and Terry died, their children, who inherited the land, decided to limit the use of the private road to family only. Daryl Watts then installed a locked gate on the road to deny access to anyone outside the family, including Jackson. Jackson then sought an injunction and damages against Daryl. The chancellor awarded the injunction, finding that Jackson had a prescriptive easement to the private road on the Watts' property. The chancellor also awarded Jackson attorney's fees. Daryl appealed.

ISSUES

Whether the chancellor erred in (1) granting Jackson a prescriptive easement and (2) awarding attorney's fees to Jackson.

HOLDING

(1) Because the Watts allowed others to use the private drive, Jackson's use of the land was not hostile for a continuous 10 years, Jackson did not use the land under a claim of ownership, and Jackson's use was not exclusive, the chancellor erred in granting Jackson a prescriptive easement. (2) Because the chancellor's decision to grant the prescriptive easement was reversible error, the award of attorney's fees was also reversible. Therefore, the Court of Appeals reversed and rendered the judgment of the Lamar County Chancery Court.

Reversed & Rendered - 2017-CA-01677-COA (Mar. 19, 2019)
En Banc Opinion by Judge Westbrooks
Hon. Johnny Lee Williams (Lamar County Chancery Court)
Joseph Paul Parker for Appellant - William L. Ducker for Appellee
Briefed by Yance Falkner

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VERMILLION V. PERKETT

CIVIL – DOMESTIC RELATIONS

CIVIL - DOMESTIC RELATIONS - GRANDPARENTS' RIGHTS - In order for grandparents to have a statutory right to visitation of grandchildren, they must first show they established a viable relationship with the child
CIVIL - DOMESTIC RELATIONS - GRANDPARENTS' RIGHTS - After showing a viable relationship with the child, grandparents must additionally show that the parent or custodian of the child unreasonably denied them visitation rights with the child
CIVIL - DOMESTIC RELATIONS – ATTORNEY'S FEES - Miss. Code Ann. §93-16-3(4) allows for parents to seek attorney's fees from the grandparents by motion except when there will be no financial hardship on the parents

FACTS

Angela Vermillion filed a complaint against her son, Douglas Vermillion, and daughter-in-law, Robyn Perkett, seeking grandparent visitation with her granddaughter, Chella Rose Vermillion. Angela met Chella Rose at birth, and again forty-nine days later, but has been denied visitation ever since. Robyn and Douglas claimed that they denied Angela visitation because their relationship was periodically hostile, and they expressed concerns about Chella Rose's safety. During the

trial, the parents moved for a directed verdict and attorney's fees which were granted by the Harrison County Chancery Court. Angela appealed.

ISSUES

Whether the trial court erred in (1) granting a directed verdict; (2) applying the wrong legal standard with respect to grandparent visitation when the chancery court refused to address the best interests of the child; (3) awarding attorney's fees to the parents; and (4) dismissing the complaint with prejudice.

HOLDING

(1) Because Angela failed to meet her burden of a viable relationship with Chella Rose, the directed verdict was proper. (2) Because the requirements of Miss. Code Ann. § 93-16-5 must be met before considering the best interests of a child, and because Angela failed to meet her burden of a viable relationship under Miss. Code Ann. § 93-16-5, the trial court utilized the correct standard. (3) Because Miss. Code Ann. § 93-16-5 allows the parents to seek attorney's fees unless they will not face financial hardship, and because the parents paid their attorney a significant portion of their income for the year, there was no abuse of discretion. (4) Because Angela attempted to object to the substance, but not the form of the directed verdict, the court finds no error in the dismissal with prejudice, but the dismissal does not bar Angela from filing future claims stemming from new facts or circumstances. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2018-CA-00023-COA (Mar. 19, 2019)
Opinion by Presiding Judge Carlton
Hon. Jennifer T. Schloegel (Harrison County Chancery Court, First Judicial Dist.)
G. Charles Bordis IV for Appellant - Derek R. Cusick & Kimber Renee Roten for Appellees
Briefed by Brandon H. Wilson

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COURT OF APPEALS - POST-CONVICTION RELIEF

DUNAWAY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - AMENDMENT OF INDICTMENT - HABITUAL-OFFENDER STATUS - Under *Gowdy*, the amendment of the indictment to include a habitual-offender status after conviction is illegal

POST-CONVICTION RELIEF - AMENDMENT OF INDICTMENT - HABITUAL-OFFENDER STATUS - The *Gowdy* rule does not apply retroactively to cases that were final before April 7, 2011

FACTS

Billy Ray Dunaway was driving while intoxicated, and Edward Hux was a passenger in his vehicle. After driving a short distance, Dunaway swerved into oncoming traffic. Hux's body was pinned beneath the wreckage, and soon after arrival at a hospital, Hux was pronounced dead. Dunaway was found guilty of vehicular homicide. The Pike County Circuit Court amended his indictment, sentencing him as a habitual offender to twenty-five years and ordering him to pay a $10,000 fine. During Dunaway's sentencing hearing, his attorney stated that he received the motion to amend the indictment the day before. The Court of Appeals affirmed Dunaway's conviction and sentence. The Supreme Court then dismissed Dunaway's petition for certiorari. The mandate issued in February 2006, finalizing Dunaway's direct appeal process. Later, Dunaway filed for leave to seek post-conviction relief, which the Supreme Court granted. However, the Pike County Circuit Court denied his motion for relief as meritless. Dunaway appealed.

ISSUES

Whether (1) Dunaway was denied due process because the circuit court amended his indictment after his conviction and (2) Dunaway's sentence was illegal because he did not receive notice of the amendment.

HOLDING

(1) Because the mandate in Dunaway's appeal issued in February 2006, and because the *Gowdy* rule does not apply retroactively, the amendment to Dunaway's indictment was permissible at the time of his trial and he was not denied due process. (2) Because the record indicated that Dunaway received notice the day before his sentencing hearing, and because he had the opportunity to cross-examine witnesses and to testify, his sentence was not illegal. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

Affirmed - 2017-CP-01692-COA (Mar. 19, 2019)
Opinion by Judge Greenlee
Hon. Michael M. Taylor (Pike County Circuit Court)
Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee
Briefed by Luke Phillips

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COURT OF APPEALS - CRIMINAL CASES

PEEL V. STATE

CRIMINAL - FELONY

EVIDENCE - ADMISSION - WAIVER - Under Miss. R. Evid. 103, a defendant's failure to object to the admission of evidence at trial waives the issue on appeal
CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - When evaluating the sufficiency of evidence to sustain a conviction, the court asks whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; the court will only disturb a jury verdict if it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice
CIVIL PROCEDURE - COLLATERAL ESTOPPEL - RE-LITIGATION - In a collateral estoppel case, the ultimate test is whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration in subsequent prosecution; in general, uncorroborated accomplice testimony is sufficient to convict a defendant as long as the testimony is not unreasonable, self-contradictory or substantially impeached

FACTS

After a report of a burglary with theft of property, Investigator Adrian Ready questioned a man named Pates caught on video using a stolen credit card. Pates implicated Fabiyonne Peel in the burglary. Investigator Ready then questioned Pates's girlfriend, who confirmed seeing Peel drive a group to a stolen car. With this information, Investigator Ready obtained an arrest warrant for Peel. During the arrest, Investigator Ready found the stolen iPad from the burglary. A jury found Peel guilty of burglary of a dwelling, conspiracy to commit burglary of a dwelling, and motor-vehicle theft. The circuit court sentenced Peel as a violent habitual offender to three concurrent terms of life imprisonment. Peel moved for a JNOV or a new trial, which the circuit court denied. Peel appealed.

ISSUES

Whether (1) the circuit court erred when it limited Peel's cross-examination of Investigator Ready; (2) there was not sufficient evidence to convict Peel of motor-vehicle theft; (3) Peel's motor-vehicle theft conviction violated the Double Jeopardy Clause; and (4) the guilty verdicts were contrary to the weight of the evidence.

HOLDING

(1) Because Peel did not bring the court's attention to the previous ruling in limine on the interrogation by Investigator Ready, and because Peel did not assert that the full statement should be admitted under Miss. R. Evid. 106, Peel waived the issue on appeal and is procedurally barred from asserting error at the circuit court level. (2) Because the State offered much testimonial evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, there was sufficient evidence to support Peel's motor-vehicle theft conviction. (3) Because conspiracy is a distinct crime from motor-vehicle theft, and because a rational jury could have found that Peel either agreed or did not agree to a conspiracy, there was no double jeopardy violation. (4) Because other evidence supported Pates's testimony, the verdicts were not so contrary to the overwhelming weight of the evidence that allowing the conviction to stand would sanction unconscionable injustice. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Judge Westbrooks did not contest that Peel was guilty of conspiracy to commit burglary of a dwelling, burglary of a dwelling, or that his double jeopardy rights were not violated. However, she dissented in part, arguing that there was not sufficient evidence to convict Peel of motor-vehicle theft.

Affirmed - 2017-KA-01051-COA (Mar. 19, 2019)
En Banc Opinion by Judge Greenlee **-** Partial Concurrence/Dissent by Judge Westbooks
Hon. William E. Chapman III (Madison County Circuit Court)
George T. Holmes (Pub. Def. Office) for Appellant **-** Abbie Eason Koonce (Att'y Gen. Office) for Appellee
Briefed by Katelin Davis

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