

**MISSISSIPPI SUPREME COURT DECISIONS – APRIL 26, 2018*****SUPREME COURT - CIVIL CASES*****THOMPSON V. BAPTIST MEMORIAL HOSPITAL- DE SOTO, INC.****CIVIL - MEDICAL MALPRACTICE**

**CIRCUMSTANTIAL EVIDENCE - RES IPSA LOQUITUR - INFERENCE** - Res ipsa loquitur is a rule of circumstantial evidence from which the jury is entitled to draw a permissible inference of the defendant's negligence; the jury is not bound to infer negligence even when there is no rebutting evidence

**RES IPSA LOQUITUR - ELEMENTS - SHARED CONTROL** - The doctrine of res ipsa loquitur's requirement of exclusive control of the damaging instrumentality does not limit res ipsa loquitur to a single defendant; the doctrine is applicable where the authority is shared concerning the instrumentality in question

**MEDICAL MALPRACTICE - FOREIGN OBJECTS - DUTY OF REMOVAL** - The surgeon's duty to remove all foreign objects from the patient's body is nondelegable; however, the hospital may not escape liability for its independent negligence in failing to devise adequate procedures or carry out such procedures through its employee-nurses

**FACTS**

Dr. James Fortune performed a cholecystectomy on Doretha Thompson at Baptist Memorial Hospital - DeSoto ("BMH-D") in June 2004. Due to complications during the surgery, the procedure was converted to an open operation. Thompson developed an abscess in her abdomen shortly after surgery. Out of concern, Dr. Fortune issued a CT scan of the abdomen. A scan was conducted and as a result of the findings, a radiologist drained and cultured the fluid. Thompson testified that for years after the procedure she suffered intense abdominal pain. In 2011, a four-by-four inch "ray-tec" surgical sponge was discovered in Thompson's abdomen by mistake as a result of the 2004 surgery. In November 2011, Dr. Fortune performed another open operation on Thompson to retrieve and remove the sponge. Dr. Fortune contended that this treatment successfully healed Thompson's injury. Thompson presented evidence that she reported to the emergency room eight times between 2012 and 2014. In June 2014, she was diagnosed with duodenitis. At trial, Thompson presented an expert who testified that Dr. Fortune had deviated from the applicable standard of care and was responsible for the surgical sponge being left in Thompson's abdomen. A circulating nurse testified to the general responsibilities for all administrative procedures of surgery. She testified that as common practice, the nurse and scrub technician would have been responsible for the sponge count conducted prior to surgery. She also testified that it was not common practice to keep the actual sponge count sheets on the record. Dr. Fortune did not dispute that the injury located in the 2011 surgery was a result of the sponge being left in Thompson's abdomen. Both Dr. Fortune and BMH-D presented expert testimony from general surgeons who testified that the standard of care practiced by members of the medical profession allows for the operating surgeon to rely on accurate sponge counts from others assisting in the operation. The trial court refused jury instructions presented by Thompson based on arguments made by Dr. Fortune and BMH-D that both constituted, or were related to, res ipsa loquitur instructions. The jury rendered a verdict in favor of BMH-D. Thompson appealed.

**ISSUE**

Whether the jury was not properly instructed as a result of the trial court refusing Thompson's jury instructions.

**HOLDING**

Because the doctrine of *res ipsa loquitur* is a rule of circumstantial evidence from which the jury is entitled to draw an inference of the defendant's negligence, Thompson's jury instructions were not improper. Further, the surgeon's duty to remove all sponges and other foreign objects from the patient's body is nondelegable, but the hospital may not escape from liability for its independent negligence in failing to devise adequate sponge-accounting procedures or negligently carrying out such procedures through its employee-nurses. Because Dr. Fortune had a nondelegable duty to remove all the sponges, and BMH-D had an independent duty to account for the sponges, the failure of either entity to carry out its respective duties is negligence. Because Thompson's proposed jury instructions were proper in regard to Dr. Fortune's duties, the DeSoto County Circuit Court erred in refusing them. However, these jury instructions did not properly ascribe the duties of BMH-D. Therefore, the Supreme Court reversed and remanded for a new trial the judgment of the DeSoto County Circuit Court.

**Reversed & Remanded - 2016-CA-00063-SCT (Apr. 26, 2018)**

Opinion by Justice Beam

Hon. Gerald W. Chatham, Sr. (DeSoto County Circuit Court)

Brandon Isaac Dorsey for Appellant - Walter Alan Davis, Kevin O'Neal Baskette, & Albert C. Harvey for Appellees

Briefed by [Caroline Loveless](#)

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## ***SUPREME COURT – CRIMINAL CASES***

### **LOFTON V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - PRO SE REPRESENTATION - HYBRID DEFENSE** - Hybrid representation consist of the participation by an attorney in the conduct of the trial when the defendant is proceeding *pro se*

**CRIMINAL PROCEDURE - JURY INSTRUCTION - CAUTIONARY INSTRUCTION** - The United States Supreme Court in *Lakeside* recognized that it may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection, but the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments

**CRIMINAL PROCEDURE - EVIDENCE - BRADY** - *Brady* claims involve discovery after trial of information which had been known to the prosecution but unknown to the defense; however, evidence is not deemed suppressed if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence

#### **FACTS**

Edroy James Ballard Jr. was shot and killed on June 3, 2014, in Horn Lake, Mississippi. A DeSoto County grand jury charged Jerry Lofton with Ballard's murder. Lofton was deemed indigent, and Adam Emerson was appointed to represent him. Emerson later filed a motion to reconsider Lofton's indigent status as Lofton refused to meet with him and wished to hire private counsel. Lofton never acquired private counsel and instead requested in February 2016 to represent himself. The judge warned Lofton that his murder charge was serious and refused to let him represent himself. Later, Lofton requested a hybrid defense. The hybrid defense he requested was to be the lead decision maker and representative in his trial, with court appointed counsel available for assistance. The judge, after warning Lofton of the dangers of this arrangement, allowed Lofton to represent himself in a hybrid defense manner. Lofton subsequently requested a new attorney. Emerson was dismissed and Stacey Spriggs was appointed to his hybrid defense. Lofton, with the help of Spriggs, conducted his defense at trial. The jury found Lofton guilty of Ballard's murder. Lofton appealed.

#### **ISSUES**

Whether (1) the trial court erred in Lofton’s representation as allowing him to proceed *pro se* in a hybrid defense and not warning him as if he were wholly *pro se*; (2) Lofton received ineffective assistance of counsel; (3) the trial judge improperly instructed the jury not to draw unfavorable inferences; (4) the trial court erred in not allowing Lofton to present a self-defense theory; (5) the state improperly withheld exculpatory evidence in violation of *Brady*; (6) the state committed a discovery violation for failure to list Daphne Patterson as a witness; (7) striking all of the African-American jurors was a *Batson* violation and; (8) the trial court improperly sentenced Lofton as a habitual offender.

### **HOLDING**

(1) Because Lofton essentially received assistance of counsel and the ability to represent himself, he was never truly *pro se*, and because the trial court was not required to insure he properly waived counsel or warn him as though he were wholly *pro se*, the trial court did not err in allowing Lofton to proceed in a hybrid defense. (2) Because the record is insufficient to address a *Strickland* claim, the defendant’s right to raise this issue through post-conviction relief was reserved. (3) Because a proper cautionary instruction concerning a defendant’s failure to testify is not itself prejudicial error, there was no prejudice, injustice, or reversible error. (4) Because Lofton never presented any form of self-defense theory, nor did he ever make a request to the trial judge, the trial judge did not deny Lofton the right to present witnesses or evidence for a self-defense theory. (5) Because Lofton was aware of the essential facts he now claims were withheld, and the evidence did not qualify as *Brady* evidence, there was no improper *Brady* suppression. (6) Because Lofton did not object or in any way claim unfair surprise at trial, he failed to preserve a discovery-violation-based claim. (7) Because Lofton instructed Spriggs to strike all of the potential African-American jurors, there was no error. (8) Because Lofton gave no viable reason why he was improperly sentenced, and because he had ample notice and opportunity to prepare a defense against an enhanced sentence and simply failed to do so, there was no error. Therefore, the Supreme Court affirmed the judgment of the DeSoto County Circuit Court.

**Affirmed - 2016-KA-00990-SCT (Apr. 26, 2018)**

Opinion by Justice Maxwell

Hon. Gerald W. Chatham, Sr. (DeSoto County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee

Briefed by [D. Hunter V. Robertson](#)

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## **MISSISSIPPI COURT OF APPEALS DECISIONS – APRIL 24, 2018**

### **COURT OF APPEALS - CIVIL CASES**

#### **AL-KHIDHR V. KING**

##### **CIVIL - STATE BOARDS & AGENCIES**

**CONSTITUTIONAL LAW - JUSTICIABILITY - MOOTNESS** - As an exception to the mootness doctrine, the court may address appeals considered moot where the matter is capable of repetition yet evading review

**CRIMINAL PROCEDURE - SENTENCING - TIME-SERVED CREDIT** - A defendant cannot receive time-served credit twice for the same pre-sentence jail-time served for multiple offenses

#### **FACTS**

Only Al-Khidhr pled guilty to unlawful possession of a firearm by a convicted felon and possession of a controlled substance. The Harrison County Circuit Court sentenced him to five years and four years on charges to run consecutively. For time spent in jail awaiting trial, Al-Khidhr was credited six-hundred and thirteen days against his sentences. Al-Khidhr filed an Administrative Remedy Program appeal with the Mississippi Department of Corrections (MDOC) requesting that the credit for pre-trial confinement be doubled and applied separately to each sentence.

MDOC denied his appeal, and Al-Khidhr appealed to the Rankin County Circuit Court. The circuit court dismissed his petition for review and his subsequent motion for reconsideration. Al-Khidhr appealed.

### ISSUE

Whether the trial court erred in dismissing Al-Khidhr's appeal alleging that the Mississippi Department of Corrections improperly computed Al-Khidhr's prison sentence.

### HOLDING

Because a defendant cannot receive credit twice for the same pre-sentence jail-time served for multiple offenses, and because Al-Khidhr was indicted and pled guilty to two separate charges during the same period spent in jail, the trial court did not err in dismissing Al-Khidhr's appeal. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

#### **Affirmed - 2016-CP-01499-COA (Apr. 24, 2018)**

Opinion by Presiding Judge Irving

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

*Pro se* for Appellant - Anthony Louis Schmidt Jr. & Darrell Clayton Baughn (Att'y Gen. Office) for Appellee

Briefed by [D. Kirkwood Palmer](#)

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## **HUEY V. RGIS INVENTORY SPECIALISTS**

### **CIVIL - WORKERS' COMPENSATION**

**CIVIL - WORKERS' COMPENSATION - REOPENING A CASE** - It is discretionary with the Commission whether or not to reopen a case

**WORKERS' COMPENSATION - STATUTE OF LIMITATIONS - BAD-FAITH CLAIM** - The statute of limitations for a bad-faith claim against an employer or insurance company for failure to pay workers' compensation benefits begins to run when the Commission renders final judgment

**WORKERS' COMPENSATION - MISTAKE - SECOND ATTEMPT** - An allegation of mistake should not be allowed to become a backdoor route to retrying a case because one party thinks he can make a better showing on the second attempt

### FACTS

George Huey was injured in a car wreck while traveling through Alabama for work. When Huey attempted to change lanes, his van nearly collided with another car. The other motorist pursued Huey, passed him, moved into his lane, and then slowed down and forced Huey to stop his van. The Commission found Huey had parked his van in the right-hand lane of the interstate. Huey stated he was looking for the button to activate his flashers when an eighteen-wheeler truck hit him from behind. An Alabama state trooper testified that both Huey and the other motorist admitted to him that they had been driving aggressively. Huey's employer, RGIS Inventory Specialists, denied benefits because Huey had deviated from the course and scope of his employment when he engaged in a road-rage incident with the other motorist. The Commission ultimately denied Huey's claim for benefits, the Court of Appeals affirmed that decision, and the Mississippi Supreme Court denied Huey's petition for a writ of certiorari. Nearly one year after the appellate mandate was issued in *Huey I*, Huey filed a motion to reopen his claim. Huey alleged his denial of benefits was based on a mistake and that new evidence showed prior testimony about the wreck to be unreliable. An expert testified that data from the black box in Huey's van indicated he was traveling seventeen miles an hour when he was hit from behind. The administrative judge found that Huey's case should be reopened. However, on appeal to the full Commission, the Commission reversed and denied Huey's motion to reopen. Huey appealed.

### ISSUES

Whether the Mississippi Workers' Compensation Commission erred (1) in finding the motion untimely filed; and (2) in determining there was no mistake of fact.

### **HOLDING**

(1) Because the statute of limitations does not begin to run until a final mandate has issued from the appeals process, Huey's motion to reopen was timely filed. (2) Because the new evidence submitted did not disprove Huey deviated from the course and scope of his work or change the outcome of the case, the Commission did not abuse its discretion in determining there was no mistake of fact. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

**Affirmed - 2017-WC-00524-COA (consolidated with 2013-CT-00310-COA) (Apr. 24, 2018)**

Opinion by Judge Wilson

Mississippi Workers' Compensation Commission

T. Jackson Lyons for Appellant - Jeffrey Stephen Moffett & Christopher Michael Graves for Appellees

Briefed by [Sarah Raben](#)

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## **MAYS V. SHOEMAKER PROP. MGMT., LLC. & CAROLINE DEV., LLC.**

### **CIVIL - WRONGFUL DEATH**

**TORTS - IMPLIED WARRANTY OF HABITABILITY - SAFE PREMISES** - The standard for implied warranty of habitability "require[s] a landlord to provide reasonably safe premises at the inception of a lease, and to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless expressly waived by the tenant

**LICENSEES - DUTY OF CARE - WILLFUL OR WANTON INJURY** - One who enters upon another's premises "as a guest of the owner or occupant, or to receive a gratuitous favor, is usually regarded as a licensee and a landowner owes a licensee and a trespasser the duty to refrain from willfully or wantonly injuring them

### **FACTS**

In November of 2012, a fire broke out in the apartment of Alfreda Miles, sister to Rosalyn Packer. At the time of the fire, the only person in the apartment was Packer, who succumbed to her injuries. Takie Mays, as Packer's daughter and estate representative, brought a wrongful death suit against the apartment companies on the theories of premises liability and implied warranty of habitability stemming from Miles's maintenance work order history and alleged faulty wiring. During the course of litigation, two of Mays's expert witnesses who planned to testify as to the cause of the fire were excluded. On November 3, 2016, the circuit court entered an order denying Mays's motion to substitute electrical expert witness and granted Shoemaker and Caroline's motion for summary judgment regarding Mays's remaining claim. Mays appealed.

### **ISSUES**

Whether the circuit erred in (1) denying Mays's motion to substitute electrical expert witness; and (2) granting Shoemaker and Caroline's motion for summary judgment.

### **HOLDING**

(1) Because the circuit court gave Mays multiple opportunities to designate expert witnesses, warned Mays that she would be able to defeat a future summary judgment motion with only certain expert testimony, and Mays "did not demonstrate good cause for allowing a substitution," Mays's motion was appropriately denied. (2) Because Mays held the burden of proof to show duty, breach, causation, and damages, as well as proving the proximate cause of Packer's death was the "natural and continuous" result of Shoemaker and Caroline's breach of duty, and because she did not meet those burdens, there was no error. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2016-CA-01666-COA (Apr. 24, 2018)**

Opinion by Judge Westbrook

Hon. Robert B. Helfrich (Forrest County Circuit Court)

Carlos Eugene Moore for Appellant - Patrick H. Zachary & Jack W. Land for Appellees

Briefed by [Nikki Breeland](#)

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

### **BURKE V. STATE**

#### **CRIMINAL - MISDEMEANOR**

**CRIMINAL - CONFRONTATION CLAUSE - NONTESTIMONIAL STATEMENTS** - Nontestimonial statements are statements that were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; nontestimonial statements do not violate the Confrontation Clause

**CRIMINAL - CONFRONTATION CLAUSE - TESTIMONIAL STATEMENTS** - Testimonial statements, statements given to the police or individuals working in connection with the police for the purpose of prosecuting the accused, must be filtered through the Confrontation Clause

#### **FACTS**

On October 4, 2011, James Burke was involved in a single-car accident with the car becoming engulfed in flames. Burke passed out inside the car. Two drivers and two police officers conducted a rescue of Burke in the vehicle. One officer observed that Burke exhibited signs of intoxication. Burke was not submitted to a field-sobriety test, and Burke did not consent to a blood test at the hospital when being treated for injuries. Rather, Burke told an officer he had relapsed from substance abuse. The officer concluded Burke was driving under the influence of alcohol, so Burke was arrested and charged with DUI. Burke pled no contest in municipal court, and he appealed to county court for de novo proceedings. Burke was found guilty after a trial in county court. The testimony securing a conviction against Burke came from a responding officer who testified that in his experience as a law enforcement officer, he believed Burke was intoxicated. The two civilians who attempted to rescue Burke testified that they noticed him weaving on the highway in front of them, and the next time they saw his truck again it was toppled and on fire. Burke tendered Dr. Jimmie Valentine as an expert in pharmacology and toxicology, as well as an expert in concussions. The trial court refused to admit Dr. Valentine's expert opinion on concussions after the State's objection. Burke appealed to the circuit court, which affirmed the trial court's ruling. Burke appealed.

#### **ISSUES**

Whether (1) improper hearsay testimony was admitted; (2) the bystanders' statements violated the Confrontation Clause; (3) Dr. Valentine was improperly excluded as an expert; (4) improper lay opinion was admitted; and (5) the conviction was against the overwhelming weight of the evidence.

#### **HOLDING**

(1) Because the statements by the two civilians to the officer were made under the stress of rescuing Burke from the single-car accident, there was no error in finding the statements fell under the excited utterance hearsay exception. (2) Because bystanders' statements to an officer on the scene were nontestimonial as they were made in the course of police interrogation, and because the circumstances objectively indicated that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency, there was no violation of the Confrontation Clause and no error. (3) Because Dr. Valentine was not a medical doctor and could not prescribe medicine, and because he conceded that diagnosing concussions was beyond his purview, there was no error in the trial court excluding him as an expert on concussions and their similarities to alcohol impairment. (4) Because Burke does not indicate which officer's

testimony was improper, this issue was without merit. (5) Because Burke admitted to leaving a bar when the accident occurred, having a pungent smell of alcohol on his person, had a drinking problem, appeared heavily intoxicated, had slurred speech and inability to stand upright without swaying, and to having relapsed on the night of the accident, the verdict was not contrary to the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2017-KM-00109-COA (April 24, 2018)**

Opinion by Judge Westbrook

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

V.W. Carmody Jr. for Appellant - David Ringer for Appellee

Briefed by [Michael Farese](#)

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## JONES V. STATE

### CRIMINAL - FELONY

**CRIMINAL LAW - CONSTRUCTIVE POSSESSION - SUFFICIENT FACTS** - A theory of constructive possession requires the State present sufficient facts to warrant a finding that the defendant was aware of the presence and character of the particular item and was intentionally and consciously in possession of it

**EVIDENCE - CONFLICTING EVIDENCE - WITNESS CREDIBILITY** - The jury has sole responsibility of resolving questions of conflicting evidence and witness credibility

**EVIDENCE - CONFLICTING EVIDENCE - WITNESS CREDIBILITY** - Conflicting testimony does not evince overwhelming evidence

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LIMITING INSTRUCTION** - Denial of a limiting instruction is harmless error unless the decision deprives the defendant of a fair trial

### FACTS

In 2013, Meridian Police officers, responding to a call about a large crowd gathered at a local apartment complex, noticed a car with a large-caliber firearm on top of a backpack in the driver's seat. The car belonged to Darius Jones. Upon consent from Jones, an officer obtained the firearm and searched the car. The search produced a digital scale and two plastic bags containing methamphetamine. Officers seized the contraband and arrested Jones. A Lauderdale County grand jury indicted Darius Jones on two felony counts. Count I charged Jones with possession of methamphetamine while in possession of a firearm. Count II charged Jones with possession of a firearm as a convicted felon. At trial, a Lauderdale County jury acquitted Jones of Count I but convicted him of Count II. Jones received a sentence of ten years as a habitual offender without eligibility of probation, parole, or early release. Jones appealed.

### ISSUES

Whether (1) insufficient evidence supported Jones's conviction for possession of a firearm; (2) the verdict was against the overwhelming weight of the evidence; (3) the arresting officer illegally searched Jones's car and illegally seized the fire-arm; and (4) the circuit court improperly instructed the jury on Jones's stipulation that he was a convicted felon.

### HOLDING

(1) Because a theory of constructive possession required the State present sufficient facts to warrant a finding that the defendant was aware of the presence and character of the firearm and was intentionally and consciously in possession of it, because the jury has sole responsibility of resolving questions of conflicting evidence and witness credibility, and because reasonable fair-minded jurors could have found the State proved the essential elements of constructive possession beyond a reasonable doubt, sufficient evidence supported Jones's conviction for possession of a firearm. (2) Because the standard of review for disturbing a verdict based on being contrary to the overwhelming weight of the evidence is that doing so would sanction an unconscionable justice, the verdict was not in error. (3) Because conflicting testimony was given at trial regarding Jones's consent to search his car, and because the trial court is the principal

evaluator of credibility when the testimony on the issue is conflicting, the determination that the arresting officer's search of Jones's car and seizure of this firearm was legal was not in error. (4) Because the State and Jones explicitly stipulated to Jones's prior conviction and agreed to have the trial court announce the stipulation to the jury after opening statements, and neither party at trial requested a limiting instruction, the trial court's instruction to the jury was proper. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

**Affirmed - 2017-KA-002480-COA (Apr. 24, 2018)**

Opinion by Judge Tindell

Hon. Justin Miller Cobb (Lauderdale County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [William L. Moorer](#)

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