

MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 9, 2018***SUPREME COURT - CIVIL CASES*****MANESS V. K & A ENTER. OF MISS., LLC****CIVIL - CONTRACT**

CONTRACTS - BREACH OF CONTRACT - COURSE OF CONDUCT - Only when the language of a contract is ambiguous will the court look beyond the language of the contract itself and consider the conduct of the parties

CONTRACTS - INTERPRETATION - AMBIGUITY - The court will only consider a contract's term to be ambiguous if the terms are subject to more than one interpretation or the language is not plain, clear, or obvious

CIVIL PROCEDURE - SUMMARY JUDGMENT - BURDEN OF PROOF - In a motion for summary judgment, the non-moving party must not rely solely on a denial of the pleadings, but must present evidence to show a genuine issue of material facts. Otherwise, summary judgment may be properly granted

FACTS

K & A Enterprises of Mississippi, LLC ("K & A") entered into an option contract with Phyllis and James Maness in 2004. K & A had one year to exercise its option to purchase four lots owned by the Manesses for \$1 million, including interest. The option contract included a provision that would require the Manesses to make all good-faith efforts to cure any title defects if discovered. In 2005, K & A exercised its option and notified the Manesses of title defects on the property. First, the Manesses' property had not been excluded when the neighboring property owner, Dynasty, Inc., deeded the property to another property. Second, a roadway included in the property surveys had been dedicated to Hancock County, but the dedication had not been completed. After being notified of the defects, the Manesses and K & A modified the option contract so that K & A would stop making interest payments. In 2007, the Manesses and Dynasty partially resolved their dispute through a quitclaim deed. However, the quitclaim deed did not address the second issue of the Walker Avenue dedication, and the Manesses continued to litigate against Dynasty. After the quitclaim deed, K & A resumed interest payments until 2009. When K & A discovered the title defects had not been fully addressed, K & A stopped payments. The Manesses terminated the option contract in 2009, and K & A sued the Manesses for breach of contract in 2010. The Manesses counterclaimed for declaratory judgment that the option contract had been terminated by K & A, not the Manesses. K & A filed a partial motion for summary judgment on liability, a partial motion for summary judgment on damages, and a motion to dismiss the counterclaim. The trial court granted all three motions by K & A and dismissed the Manesses' motions for reconsideration. The Manesses appealed.

ISSUES

Whether (1) the trial court erred by failing to address whether option contract and modification were ambiguous; (2) the trial court erred by considering the Maness "Motion to Strike the Order Granting Plaintiff's Motion for Summary Judgment" as a Rule 59(e) motion instead of a 54(b) motion for reconsideration; (3) the quitclaim deed cured the title defects; (4) the Manesses' need to cure had a deadline; (5) the parties' course-of-conduct precluded summary judgment; (6) K & A failed in its burden of proof and production for partial summary judgment on liability; (7) K & A failed to show an absence of a genuine issue of material fact as to the damages; and (8) the Manesses presented no set of facts that would entitle them to relief under their counterclaim.

HOLDING

(1) Because the Manesses had a clear, unambiguous duty to provide clear title, the trial court did not err by failing to address the ambiguity in the contracts. (2) Because the Manesses never brought up the issue at trial, the issue must be

reviewed under plain error, and there was no plain error. (3) Because the Manesses admitted to continuing title defects and failed to provide any evidence to challenge K & A expert title reports, the defects were not cured. (4) Because the court determined that the Manesses had breached the agreement, the timeliness of the need to cure was moot. (5) Because the course-of-conduct preclusion from summary judgment only applies to ambiguous contracts, summary judgment was not precluded. (6) Because K & A showed no genuine issue of material fact regarding the elements of a breach of contract claim, partial summary judgment was proper. (7) Because K & A's claim for damages was deemed admitted after the Manesses failed to respond to a request for admission regarding the amount K & A had paid under the contract, partial summary judgment on the matter was proper. (8) Because K&A was not a party to the purported agreements upon which the Manesses' counterclaim was based and because the declaratory judgment sought under such counterclaim is rendered moot by the summary judgments, the court properly dismissed the Manesses' counterclaim. Therefore, the Supreme Court affirmed the judgment of the Hancock County Chancery Court.

CONCURRENCE

Justice Maxwell agreed with the Supreme Court's analysis and judgment. He wrote separately to address the Manesses' motions for reconsideration and the difficulty faced by trial judges to determine under which rule of the Mississippi Rules of Civil Procedure to consider these motions. He counseled that lawyers should take care to label these types of motions more carefully according to the standards set out by the Mississippi Rules of Civil Procedure.

Affirmed - 2017-CA-00173-SCT (Aug. 9, 2018)

Opinion by Justice Chamberlin - Special Concurrence by Justice Maxwell
Hon. Carter O. Bise (Hancock County Chancery Court)
John H. Dunbar for Appellants - Nicholas Van Wiser for Appellee
Briefed by [Michael Lambert](#)

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STATE V. WALGREEN CO.

CIVIL - OTHER

CIVIL PROCEDURE - VENUE - POWER OF COURT TO ADJUDICATE - The Attorney General may obtain an injunction under Miss. Code Ann. § 75-24-9 in circuit court when the original court or the transferring court considers it appropriate under the circumstances

CIVIL PROCEDURE - JUDGMENTS AND ORDERS - MOTION FOR RECONSIDERATION - Under Miss. R. Civ. P. 60, the party making a motion for reconsideration must make clear that any disputed order contains either clerical mistakes to be corrected by the court, or other inadvertent mistakes, newly discovered evidence, fraud, or other specifically outlined errors

FACTS

The State filed a lawsuit in the DeSoto County Chancery Court against defendant pharmacies alleging deceptive trade practices and fraudulent reporting of inflated prices in the defendants' reimbursement requests to the Department of Medicaid. The State requested a combination of equitable and legal relief, including injunctive relief, a constructive trust, and actual and punitive damages. Chancellor Lundy of the DeSoto County Circuit Court granted the defendants' motion to transfer the suits to circuit court. The State subsequently filed a motion for reconsideration and the request was deemed denied when the chancery court failed to rule after thirty days. The State sought interlocutory review of the chancery court's transfer and the additional issue of the Attorney General's authority to seek an injunction in chancery court. The Supreme Court granted interlocutory review and stayed further proceedings of the circuit court.

ISSUES

Whether (1) the chancellor's decision to transfer the State's case to the circuit court conflicted with the statutory requirement of Miss. Code Ann. § 75-24-9 and the Supreme Court's ruling that the Attorney General shall seek

injunctive relief under the Mississippi Consumer Protection Act in chancery court; and (2) the DeSoto Chancery Court's failure to grant the State's motion for reconsideration constituted an abuse of discretion.

HOLDING

(1) Because most of the State's claims were legal in nature and the State could fully and fairly pursue all of its claims in circuit court, transfer to circuit court was appropriate and any conflict with the chancellor's decision to transfer and Miss. Code Ann. § 75-24-9 was inconsequential. (2) Because the State's motion for reconsideration did not make the disputed error clear as required by Miss. R. Civ. P. 60 and was largely a regurgitation of the claims made in its complaint, the DeSoto Chancery Court's failure to grant the State's motion for reconsideration was not an abuse of discretion. Therefore, the Supreme Court affirmed and remanded the judgment of the Desoto County Chancery Court.

Affirmed & Remanded - 2017-IA-00535-SCT (Aug. 9, 2018)

En Banc Opinion by Justice Beam

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

George W. Neville, Jacqueline H. Ray, Donald L. Kilgore (Att'y Gen. Office), D. Ronald Musgrove, Michael Shelton Smith II, Wilson Daniel "Dee" Miles III, H. Clay Barnett, Allison Douillard Hawthorne & Jesse Mitchell III for Appellant - David F. Maron, Barry K. Cockrell, Bradley Clayton Moody, & Samuel Deucalion Gregory for Appellees

Consolidated With:

Affirmed & Remanded - 2017-IA-00536-SCT (Aug. 9, 2018)

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

George W. Neville, Jacqueline H. Ray, Donald L. Kilgore (Att'y Gen. Office), D. Ronald Musgrove, Michael Shelton Smith II, Wilson Daniel "Dee" Miles III, H. Clay Barnett, Allison Douillard Hawthorne & Jesse Mitchell III for Appellant - J. Cal Mayo, Sarah Katherine Embry, Enu Mainigi, Craig D. Singer & Ashley W. Hardin for Appellees

Consolidated With:

Affirmed & Remanded - 2017-IA-00539-SCT (Aug. 9, 2018)

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

George W. Neville, Jacqueline H. Ray, Donald L. Kilgore (Att'y Gen. Office), D. Ronald Musgrove, Michael Shelton Smith II, Wilson Daniel "Dee" Miles III, H. Clay Barnett, Allison Douillard Hawthorne, & Jesse Mitchell III for Appellant - Jeffrey Scott Newton, Robert F. Walker & D. Sterling Kidd for Appellees

Briefed by [Baxter Geddie](#)

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SUPREME COURT - CRIMINAL CASES

SMITH V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - APPEAL - SUFFICIENCY OF THE EVIDENCE - When a defendant challenges the sufficiency of the evidence on appeal, the court considers each element of the offense and reviews all of the evidence in the light most favorable to the verdict

CRIMINAL LAW - ARMED ROBBERY - INDICTMENT - The elements of armed robbery are such that an armed robbery indictment need not list the specific item that is the subject of the armed robbery

CRIMINAL LAW - ARMED ROBBERY - ELEMENTS - The elements of armed robbery are: (1) a felonious taking or attempt to take; (2) from the person or from the presence; (3) the personal property of another; (4) against his will; (5) by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon

FACTS

Rickie Smith was indicted for armed robbery after allegedly breaking into the home of Jessica Turner and taking several items. Evidence at trial showed that Smith took personal property from Turner even though two items listed in the armed robbery indictment, a wallet and a purse, were not specifically referenced during trial. The jury found Smith guilty of armed robbery, and Smith was convicted. Smith filed a motion for judgment notwithstanding the verdict, which the Claiborne County Circuit Court denied. Smith appealed.

ISSUE

Whether the evidence was insufficient to sustain the jury's verdict for armed robbery.

HOLDING

Because an armed robbery indictment does not need to list specific personal property allegedly taken during the offense, and because the jury found sufficient evidence that Smith committed armed robbery notwithstanding that some items in the indictment were not specifically proven to be taken, the evidence was sufficient to sustain the jury's verdict for armed robbery. Therefore, the Supreme Court affirmed the judgment of the Claiborne County Circuit Court.

Affirmed - 2017-KA-00934-SCT (Aug. 9, 2018)

Opinion by Justice Coleman

Hon. Lamar Pickard (Claiborne County Circuit Court)

Mollie M. McMillin & George T. Holmes (Pub. Def. Office) for Appellant - Alicia Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Tucker Hood](#)

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SUPREME COURT - POST-CONVICTION RELIEF

CHAPMAN V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - APPEAL - COLLATERAL RELIEF - There are two primary ways a criminal defendant may challenge a trial court proceeding: (1) a direct appeal from conviction under Miss. Code Ann. § 99-35-101 or (2) a proceeding under the Mississippi Uniform Post-Conviction Relief Act

CRIMINAL PROCEDURE - CLOSING ARGUMENTS - PRESERVING OBJECTION - To preserve an objection to alleged improper remarks by counsel during closing argument, the complaining party must not only make a contemporaneous and specific objection to the remarks, but must also obtain a definitive ruling from the trial court on his objection and must request corrective action

CRIMINAL PROCEDURE - INDICTMENT - REQUIRED CONTENT - Unif. R. Cir. & Cty. Ct. 7.06 states that an indictment shall include the following: (1) the name of the accused, (2) the date on which the indictment was filed in court, (3) a statement that the prosecution is brought in the name and by the authority of the State of Mississippi, (4) the county and judicial district in which the indictment is brought, (5) the date and, if applicable, the time at which the offense was alleged to have been committed, and failure to state the correct date shall not render the indictment insufficient, (6) the signature of the foreman of the grand jury issuing it, and (7) the words "against the peace and dignity of the state"

FACTS

In 1982, Richard Chapman was convicted of rape and received a life sentence. The Hinds County Circuit Court granted Chapman's motion for post-conviction relief after the Mississippi Supreme Court ordered the trial court to conduct an evidentiary hearing to determine if the record and transcript from the jury trial still existed, and if not, whether something

equivalent could be reconstructed. The trial court granted Chapman leave to file an out-of-time appeal from his conviction and sentence. Chapman appealed.

ISSUES

Whether (1) the trial court erred in holding that Chapman was entitled to an out-of-time appeal; (2) the reconstructed record was inadequate for appeal to show alleged sentencing errors; (3) the reconstructed record was inadequate for appeal to show if there was discriminatory jury selection; (4) the trial court order to destroy evidence after trial violated Chapman's due process rights; (5) Chapman's indictment was defective; (6) the jury was properly sworn; (7) the State failed to comply with discovery; (8) Chapman's trial counsel was ineffective; (9) the State's closing argument was improper; and (10) a life sentence imposed upon a sixteen-year-old for a crime, not a homicide, was excessive and constituted cruel and unusual punishment.

HOLDING

(1) Because Chapman was made aware that he could file an appeal after his conviction but before the UPCCRA was enacted, and he had three years to file an appeal, the trial court erred in holding that Chapman was entitled to an untimely appeal. (2) Because the reconstructed record illustrated that arguments for and against life imprisonment were presented to the jury during closing arguments, the record was adequate. (3) Because neither Chapman nor his trial counsel raised a claim of discriminatory jury selection, and *Batson* is not retroactive, this issue was without merit. (4) Because no rule existed in 1985 requiring the State to preserve biological evidence used in trial, the destruction of DNA evidence did not constitute bad faith. (5) Because the indictment was adequate to inform Chapman of the nature and cause of the accusation against him, the indictment was legally sufficient. (6) Because there is a presumption that the trial judge properly performed his duties, Chapman's assertion that the jury was not properly sworn was insufficient to overcome the presumption. (7) Because Chapman's claim of discovery violations related to the destruction of evidence, this issue was meritless. (8) Because Chapman had notice that his trial counsel did not file a direct appeal, this issue was meritless. (9) Because Chapman did not object to the State's comments during closing argument, this issue was without merit. (10) Because the sentence was not mandatory and there was a possibility of parole, Chapman's sentence does not violate the Eighth Amendment. Therefore, the Supreme Court reversed the judgment of the Hinds County Circuit Court.

CONCURRENCE

Justice Coleman agreed with the reasoning and holding of the majority. He wrote separately to reiterate that the majority's reference to the three-year statute of limitations applicable for post-conviction relief as a procedural bar is a mischaracterization of statutory bars as procedural ones.

DISSENT

Presiding Justice Kitchens argued that neither Chapman nor the State raised the circuit court's granting of an out-of-time appeal as an issue. Thus, he would not have disturbed the circuit court's finding that Chapman is entitled to an out-of-time appeal. He also argued that because the facts of the case did not change materially after remand, the court should follow *Chapman IV* and reverse and remand for a new trial.

Reversed & Rendered - 2016-CA-01655-SCT (Aug. 9, 2018)

En Banc Opinion by Justice Beam - Special Concurrence by Justice Coleman - Dissent by Presiding Justice Kitchens
Hon. Jeff Weill, Sr. (Hinds County Circuit Court)

W. Daniel Hinchcliff & George T. Holmes (Pub. Def. Office) for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee
Briefed by [Thomas Schultz & Katie Humphries](#)

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SUPREME COURT - ORDERS

GOOGLE, INC. V. STATE

COURT ORDER

FACTS

Attorney General Jim Hood brought an action against Google, Inc. (“Google”) under the Mississippi Consumer Protection Act for unfair methods of competition. The State’s action was brought in Lowndes County Chancery Court and sought to enjoin Google from its practices. Google filed a motion to dismiss for improper venue on the grounds that it did not locate its principal place of business in Lowndes County, which the chancery court denied. Google then petitioned for interlocutory appeal and moved to stay the chancery court, which was also denied by the Court of Appeals. Google filed a motion for reconsideration of its petition for interlocutory appeal.

ORDER

After considering the matter en banc, the Mississippi Supreme Court denied Google’s motion for reconsideration.

DISSENT

Justice Waller argued that the motion for reconsideration should be granted and the motion for interlocutory appeal should be granted because Miss. Code Ann. § 75-24-9 is the controlling venue clause under the Mississippi Consumer Protection Act and instructs that any action brought under the statute must be brought in the court of the county in which the defendant locates its principal place of business. He further argued that because Google met the threshold requirement for a motion for reconsideration, under Miss. R. App. P. 27(h) by identifying a specific error of law by the trial court, the Supreme Court should grant Google’s motions.

Denied - 2017-M-01450-SCT (Aug. 8, 2018)

En Banc Order by Justice Maxwell - Dissent by Justice Waller

Briefed by [D. Kirkwood Palmer](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 7, 2018

COURT OF APPEALS - CIVIL CASES

BRIDGEMAN V. SBC INTERNET SERVS., INC.

CIVIL - WORKERS’ COMPENSATION

WORKERS’ COMPENSATION - INDUSTRIAL LOSS OF USE - REBUTTABLE PRESUMPTION -

Presumption of total loss of use can be rebutted by evidence that the worker has the ability to earn the same wages as the worker earned at the time of the injury

WORKERS’ COMPENSATION - INDUSTRIAL LOSS OF USE - COMPENSATION - In a scheduled-member case, a worker is always entitled to compensation for the medical or functional loss of his body part, regardless of whether the functional loss impacts his wage-earning capacity, but when the industrial loss is greater than the medical loss, the claimant’s industrial or occupational disability or loss of wage-earning capacity controls his degree of disability

FACTS

Craig Bridgeman injured his right arm and shoulder while working for SBC Internet Services, Inc (“SBC”). A physician opined that Bridgeman could not return to his pre-injury position. After Bridgeman reached maximum medical improvement, he was found to have permanent work restrictions and was terminated by SBC. Bridgeman then filed for workers’ compensation. The administrative judge found that Bridgeman had a seven percent medical impairment to his arm, but a fifty percent industrial loss of use, and was owed permanent partial disability benefits equivalent to two-thirds of his average weekly wage for 100 weeks. Bridgeman appealed to the commission, which upheld the administrative judge’s ruling. Bridgeman appealed.

ISSUE

Whether SBC adequately rebutted the presumption of total loss of use that arose because Bridgeman could not return to his pre-injury employment.

HOLDING

Because Bridgeman was still able to perform medium to heavy work, had a bachelor's degree in computer science, and had previously worked as a teacher, SBC showed that Bridgeman had the ability to earn the same wages that he was earning at the time of injury and successfully rebutted the presumption of 100% industrial loss. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

Affirmed - 2016-WC-00714-COA (Aug. 7, 2018)

En Banc Opinion by Judge Greenlee

Mississippi Workers' Compensation Commission

Pro se for Appellant - Thomas Lynn Carpenter Jr. for Appellees

Briefed by [James Adamoli](#)

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CULPEPPER ENTERS., INC. V. PARKER

CIVIL - CONTRACT

CIVIL PROCEDURE - PRETRIAL MATTERS - CONTINUANCE - The decision to grant or deny a motion for continuance is within the sound discretion of the trial court and will not be reversed unless the decision results in manifest injustice

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - FRAUDULANT CONCEALMENT - To toll the statute of limitations by establishing fraudulent concealment, there must be some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim

CONTRACTS - DAMAGES - EMOTIONAL DISTRESS - To receive damages for emotional distress based on a contract a plaintiff must show (1) the emotional distress was a foreseeable consequence of the particular breach-of-contract and (2) that he or she actually suffered emotion distress; plaintiffs need not prove any physical manifestation

FACTS

In July 2016, Joseph Parker and Cheri Clancy filed suit against Culpepper Enterprises, its chief executive officer, Kathy Culpepper, and its chief operating officer, Brannon White (the "Culpepper defendants") alleging that all three failed to compensate them pursuant to their oral employment contracts. Parker and Clancy amended their complaint to include alleged FLSA violations and restated that the Culpepper defendants failed to compensate them starting in the middle of 2015. Parker and Clancy filed a second amended complaint seeking unpaid salaries for 2013, 2014, and 2015, increasing their demand for unpaid salaries. Parker and Clancy filed a third amended complaint seeking damages based on quantum merit, breach of implied contract, and unjust enrichment. The second and third amended complaints were struck when the judge ruled that the one-year statute of limitations limited damages to those accrued after June 22, 2015. Before trial, Kathy filed for a motion of continuance for medical reasons, but the trial court denied the motion. At trial, evidence of Parker's and Clancy's 2014-2016 gross missing payroll was admitted. The jury awarded Parker and Clancy \$48,000 and \$40,960, respectively, in unpaid salaries against Culpepper Enterprises, and \$25,000 each for emotional distress against all three defendants. The Culpepper defendants appealed.

ISSUES

Whether (1) the trial court erred in denying the defendant's motion for a directed verdict because Parker and Clancy's oral contracts do not fall under the statute of frauds, and the one year statute of limitations precludes recovery for damages prior to June 22, 2015; (2) the trial court erred in denying the Culpepper defendant's motion for a continuance; (3) the trial court erroneously allowed testimony concerning damages prior to June 22, 2015; (4) there was insufficient

evidence to support an award of damages for emotional distress; and (5) the evidence failed to create a jury question as to Kathy and White's individual liability.

HOLDING

(1) Because Parker and Clancy's contracts do not fall under the statute of frauds, and they failed to establish that they were entitled to tolling, the jury verdict should not have contained damages for unpaid salaries outside the one-year statute of limitations, and the trial court erred in denying the motion for a directed verdict. (2) Because the trial court did not abuse its discretion in refusing to grant the continuance, this issue was without merit. (3) Because the one-year statute of limitations applies, this issue was without merit. (4) Because Parker's and Clancy's testimonies were insufficient to support an instruction or award of damages for emotional distress, the court erred in awarding damages for emotional distress. (5) Because an agent enters into a contract on behalf of the principal, the agent is not a party to the contract and is not responsible for the breach, and, therefore, a reasonable jury could not have determined that Kathy and White were individually liable. Therefore, the Court of Appeals reversed and rendered in part and remanded in part the judgment of the Covington County Circuit Court.

CONCURRENCE

Judge Tindell concurred in result with the majority's opinion. However, he disagreed with the trial court's denial of Culpepper's motion for a continuance because there were several significant legal motions and an unexpected personal incident during the ninety days between the complaint being filed and the start of the trial.

Reversed & Rendered in Part; Remanded in Part - 2016-CA-01771-COA (Aug. 7, 2018)

Opinion by Judge Greenlee - Concurrence by Judge Tindell

Hon Eddie H. Bowen (Covington County Circuit Court)

S. Wayne Easterling for Appellants - Cory Nathan Ferraez & Samuel Steven McHard for Appellees

Briefed by [Catherine Pettis](#)

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ENGLISH V. DAVENPORT

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CONTEMPT - STANDARD OF REVIEW - A chancellor has substantial discretion in deciding whether a party is in contempt as the chancellor sits in a unique position to observe the parties and their demeanor, the evidence, and the testimony, and, further, an appellate court will not reverse a chancellor's finding where it is supported by substantial evidence

FAMILY LAW - CONTEMPT - INABILITY TO PAY - A defendant may rebut a prima facie contempt case related to nonpayment of alimony by proving their inability to pay by a preponderance of the evidence and with particularity, not just in general terms

FAMILY LAW - CONTEMPT - INCARCERATION - The constitutional prohibition against imprisonment for debt does not prevent a commitment to prison for civil contempt for nonpayment of alimony and inability to pay alimony is a continuing defense as imprisonment does not accomplish the purpose of a civil contempt decree

FACTS

Tammy English was ordered to pay Richard Davenport \$8,400 in lump-sum alimony for 180 months from their 2012 divorce. The award was intended to avoid dividing a number of companies that the former couple owned. English was found in contempt several times over the next several years as English and Davenport were in practically constant litigation related to English's lump-sum alimony obligation. Davenport filed a contempt petition in March 2015 as English had not satisfied a previous judgment. English then filed an emergency motion to stay an arrest warrant and to modify her alimony obligation. The chancellor found no merit to English's request to modify her alimony obligation. Finding that that English was again in contempt, the chancellor awarded Davenport a judgment of approximately

\$114,000 due in three payments and held that English would be jailed if she failed to make any of the scheduled payments. English filed her notice of appeal with the chancery court. English filed an emergency motion to stay her incarceration on the grounds of inability to pay. The chancellor denied English's motion on the grounds that the chancellor did not have jurisdiction to modify an order entered once an appeal is pending. English then filed an emergency petition with the Supreme Court to vacate the judgment, which a three-judge panel dismissed. English did not renew her motion to request a hearing with the chancery court, leaving only her pending appeal. English appealed.

ISSUES

Whether the chancellor erred in (1) finding that English was in contempt despite that she was unable to satisfy her alimony obligation; and (2) ordering that English would be incarcerated for failure to pay the contempt award for \$114,000.

HOLDING

(1) Because a defendant averring inability to pay alimony must demonstrate that she earned all she could, that she lived economically, and paid all surplus money above a living on the alimony decreed to her husband, and because the evidence presented at the contempt hearing demonstrated English did not live within her means, the chancellor did not err by finding English was in contempt for failure to make alimony payments. (2) Because a petitioner is barred from raising an issue on appeal that he did not raise before the chancery court, and because English did not renew her motion to stay her incarceration in order to schedule a hearing on her inability-to-pay defense, the chancellor did not err in ordering that English would be incarcerated for failure to pay the contempt award. Therefore, the Court of Appeals affirmed the judgment of the Warren County Chancery Court.

CONCURRENCE

Judge Tindall argued that English should not be imprisoned for failure to pay alimony because the payments that English owed were more akin to business debt meant to divest Davenport of the parties' businesses and assets, and the property-division payments were obligations within the meaning of debt used in the Mississippi constitution. He further argued that other states have long recognized property-division obligations as a debt that falls within the meaning of their constitutional prohibitions against imprisonment and, thus, unenforceable through contempt proceedings.

Affirmed - 2016-CA-00419-COA (Aug. 9, 2018)

Opinion by Judge Greenlee - Concurrence by Judge Tindall

Hon. Jane R. Weathersby (Warren County Chancery Court)

B. Blake Teller & George Philip Schrader IV for Appellant - David M. Sessums, Penny B. Lawson, & J. Mack Varner for Appellee

Briefed by [Carson Phillips](#)

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THE COMMERCIAL BANK V. SMITH SHELLNUT WILSON, LLC

CIVIL - CONTRACT

CONTRACTS - STATUTE OF LIMITATIONS - MISREPRESENTATION/MATERIAL OMISSION - Under Miss. Code Ann. § 15-1-49, Mississippi's three-year statute of limitations applies to misrepresentation/material omission claims

CONTRACTS - STATUTE OF LIMITATIONS - BREACH OF FIDUCIARY DUTY - Under Miss. Code Ann. § 15-1-49, there is a three-year statute of limitations for breach of fiduciary duty claims

CONTRACTS - STATUTE OF LIMITATIONS - DISCOVERY RULE - To determine the point at which the limitations period commences, the court must determine the point at which a party knew or should have known or should have made an inquiry, based on the information available to it

FACTS

The Commercial Bank of DeKalb (“the Bank”) purchased \$1,850,000 in securities (“the Soloso securities”) from third-party securities dealers based on the recommendations of the Bank’s investment advisor, Smith Shellnut Wilson LLC (“SSW”). Under an investment-management agreement, SSW was to provide the Bank with investment advice and management services. In a 2014 email from SSW, the Bank learned that it was not qualified to purchase the Soloso securities. The Bank alleged that SSW negligently or intentionally misrepresented or omitted material facts when SSW advised the Bank to buy the securities and breached its fiduciary duty to the Bank. The Bank also claimed that SSW violated the Mississippi Securities Act in recommending these securities. The Bank sought rescission of the transactions, or alternatively, damages for its alleged losses from the transaction. The trial court granted summary judgment for SSW, finding that the Bank’s claims were time-barred and that the Bank failed to offer competent summary judgment evidence to prove one or more essential elements on each of its claims. The Bank appealed.

ISSUES

Whether the circuit court erred in finding (1) the Bank's claims were time-barred by the applicable statutes of limitations and repose when applying the discovery rule, considering the FDIC's policy, the Bank's own investment policy, and the Bank’s obligation to reasonable due diligence, and considering considering the parties' investment-management agreement in relation to the Bank’s obligation of reasonable due diligence; (2) the fraudulent-concealment doctrine did not toll the statute of limitations; (3) the continuing tort doctrine did not toll the statute of limitations; and (4) the Bank's Mississippi Securities Act Claim did not extend the statute of limitations.

HOLDING

(1) Because the Bank's misrepresentation/material omission and breach of fiduciary claims fell outside of the three-year statute of limitations in Miss. Code Ann. § 15-1-29 and the Bank did not sufficiently prove that the statute of limitations should be tolled based on the discovery rule allowed for in Miss. Code Ann. §15-1-49(2), the Bank’s claims were time-barred. Additionally, the parties' investment-management agreement contained no express warranty that the advice SSW provided would be accurate or that the assets managed in the contract would increase or retain their value. (2) Because the record reflected no evidence of affirmative acts of concealment and SSW provided the offering circulars containing the federally required notice and purchasing restrictions, the Bank failed to prove the elements of the fraudulent concealment doctrine. (3) Because the Bank provided no evidence of a continuing tort, the statute of limitations was not tolled. (4) Because the Mississippi Securities Act contains a two-year statute of limitations and a five-years statute of repose, the Bank's claim fell outside of the time frame allowed by the Act and was barred. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

PARTIAL CONCURRENCE

Judge Wilson agreed that the circuit court’s order granting summary judgment was appropriate because the Bank did not show that it was unlawful for the Bank to purchase or hold the Soloso securities, and the issuer’s alleged violation of the Investment Company Act impaired the value of the securities to the bank. He did not join with the majority’s discussion of the statutes of limitations.

DISSENT

Presiding Judge Griffis argued that there is a genuine issue of material fact in dispute as to when the statute of limitations began to run. He argued that factual dispute as to when the Bank learned or should have learned of SSW’s wrongful conduct is an issue of fact that must be determined by a jury.

Affirmed - 2017-CA-00670-COA (Aug. 7, 2018)

Opinion by Judge Carlton - Partial Concurrence by Judge Wilson - Dissent by Presiding Judge Griffis

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

William C. Hammack, Stephen H. Kupperman, Laurence D. LeSueur, & Matthew Richard Watson for Appellant - Mark Daniel Griffin & Lori H. Patterson for Appellee

Briefed by [Chadwick Lamar & Andie Szabo](#)

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WALKER V. STATE

CIVIL - OTHER

EXPUNGEMENT - GUILTY PLEA - FELONY-DRUG CONVICTION - Miss. Code Ann. § 41-29-150 states that if any person who was not previously convicted of violating laws related to controlled substance is found guilty after trial or by a guilty plea, then the court may defer further proceedings and place him on probation, and he may then apply to the court for an order to expunge from all official records

EXPUNGEMENT - GUILTY PLEA - DEFERRED SENTENCE - Miss. Code Ann. § 99-15-26 states that a trial court may expunge a felony conviction after a guilty plea under certain conditions

FACTS

Koninedou Walker was indicted on two counts of possession of a controlled substance with intent to distribute while on parole for both a robbery conviction and a burglary conviction. Walker's parole was subsequently revoked, and he was ordered to serve ten years in the custody of the Miss. Dept. of Corrections. Walker's possession-with-intent-to-distribute charges were passed to file and signed by the Harrison County Circuit Court trial judge. Walker filed a motion for expungement of the two possession-with-intent-to-distribute charges. The Harrison County Circuit Court denied the motion, finding that Walker failed to establish that any of the statutory conditions regarding expungement applied to the charges in question. Walker appealed.

ISSUE

Whether the trial court erred in denying Walker's motion to expunge his record.

HOLDING

Because Walker was not convicted of charges by a jury or guilty plea, did not receive deferred proceedings or probation, did not have conditionally dismissed charges, was never released after his arrest, did not have his case dismissed, dropped, or reach a final disposition, and was not convicted of a misdemeanor or felony, his motion to expunge his record was properly denied. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2017-CP-00740-COA (Aug. 7, 2018)

Opinion by Chief Judge Lee

Hon. Roger T. Clark (Harrison County Circuit Court (First Judicial Dist.)

Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Lauren Rogers](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

BAILEY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SENTENCING - REDUCTION - A motion to reduce or reconsider a criminal sentence after the expiration of the sentencing term will be treated as a motion for post-conviction relief

CRIMINAL PROCEDURE - SENTENCING - EXPIRATION - A reduction or reconsideration of a sentence by a judge must occur prior to the expiration of the sentencing term; after the expiration of the sentencing term, the power to reduce the sentence is vested in the legislature

APPELLATE PROCEDURE - SCOPE OF REVIEW - ISSUES - A petitioner is barred from raising an issue on appeal that he did not raise before the circuit court

FACTS

Victor Bailey was sentenced to fifteen years in prison after being convicted of two counts of armed robbery in 2007. Bailey was sentenced to fifteen years on each count to run concurrently. Eight years later, Bailey filed a motion for reconsideration of his sentence based on his exemplary behavior while incarcerated. The Warren County Circuit Court treated his request as a motion for post-conviction relief and found it time-barred. Furthermore, the circuit court determined that it did not have jurisdiction to reduce Bailey's sentence because the sentencing term had expired. The circuit court, therefore, denied Bailey's request. Bailey appealed.

ISSUES

Whether (1) the circuit court erred in finding that it did not have jurisdiction to reduce or reconsider Bailey's sentence; (2) Brown is entitled to be released on the grounds of parole eligibility.

HOLDING

(1) Because the power to reduce a criminal sentence after the expiration of the sentencing term no longer rests with the judge, but with the legislation, and because Bailey filed his request eight years after he was sentenced, the circuit court did not err in finding that it did not have jurisdiction to reduce Bailey's sentence. (2) Because a petitioner is barred from raising an issue on appeal that he did not raise before the circuit court, and because the statute Bailey relied on only entitles defendants convicted of armed robbery through 1994 to parole eligibility, Bailey is not entitled to be released on the grounds of parole eligibility. Therefore, the Court of Appeals affirmed the Warren County Circuit Court.

Affirmed - 2017-CP-00757-COA (Aug. 7, 2018)

Opinion by Judge Fair

Hon. M. James Chaney Jr. (Warren County Circuit Court)

Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Corban Snider](#)

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LOVETT V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - DISCOVERY - INEFFECTIVE ASSISTANCE OF COUNSEL - Pursuant to *Strickland*, an ineffective assistance of counsel claim must show that counsel's performance was deficient, and the deficient performance affected the result of the proceeding

POST-CONVICTION RELIEF - DISMISSAL - EVIDENTIARY HEARING - Miss. Code Ann. § 99-39-11(2) provides that a court may dismiss a post-conviction relief motion without an evidentiary hearing if it plainly appears the movant is not entitled to any relief

FACTS

Clarence Lovett pled guilty to two counts of sexual battery after impregnating a 14 year-old-victim. Lovett alleged he received ineffective assistance of counsel when his attorney "forced" him to plead guilty and did not make a discovery request. The trial court dismissed the motion for post-conviction relief without an evidentiary hearing. Lovett appealed.

ISSUES

Whether the trial court erred in (1) holding that Lovett failed to bring a prima facie case of ineffective assistance of counsel; and (2) dismissing Lovett's post-conviction relief motion without an evidentiary hearing.

HOLDING

(1) Because Lovett did not identify any particular evidence his attorney would have discovered if he had filed the discovery motion, Lovett failed the *Strickland* test for ineffective assistance of counsel. (2) Because Lovett’s claim rested solely on his own affidavit, the pleading requirements of Miss. Code Ann. § 99-39-11(2) were not satisfied. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

Affirmed - 2017-CP-00430-COA (Aug. 7, 2018)

Opinion by Judge Fair
Hon. David H. Strong Jr. (Pike County Circuit Court)
Pro se for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee
Briefed by [Nathaniel Snyder](#)

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COURT OF APPEALS - CRIMINAL CASES

CAGLE V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - POSSESSION OF A CONTROLLED SUBSTANCE - MENS REA - Miss. Code Ann. § 47-5-198(1), which governs possession of controlled substances in correctional facilities, does not contain a mens rea element

CRIMINAL PROCEDURE - JURY VERDICT - WITNESS CREDIBILITY - The jury is the final arbiter of a witness’s credibility

CRIMINAL PROCEDURE - SUFFICIENCY OF THE EVIDENCE - CONFLICTING TESTIMONY - An appellate court will not reverse the judgment of a trial court merely because of contested issues of fact, as the duty rests solely on the jury to resolve factual conflicts

FACTS

Corey Cagle delivered a bag containing marijuana to the Attala County Jail. A deputy smelled marijuana when Cagle walked past him while entering the jail. Cagle said he did not know marijuana was in the bag. Cagle was convicted on one count of possession of a controlled substance within a jail facility. Cagle appealed.

ISSUE

Whether there was insufficient evidence to sustain Cagle’s conviction because the State did not establish Cagle knowingly possessed the marijuana.

HOLDING

Because Miss. Code Ann. § 47-5-198(1) does not require the defendant to “knowingly” possess a controlled substance, and it is the role of the jury to determine witness credibility, the trial court did not err in sustaining the jury verdict. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

Affirmed - 2017-KA-00448-COA (Aug. 7, 2018)

Opinion by Judge Westbrook
Hon. Joseph H. Lopez Jr. (Attala County Circuit Court)
Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Joseph Scott Hemleben (Att’y Gen. Office) for Appellee
Briefed by [Zachary Flowers](#)

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