

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 8, 2018**SUPREME COURT - CIVIL CASES****MANESS V. K & A ENTER. OF MISS., LLC****CIVIL - CONTRACT**

EVIDENCE - PRESERVATION ON APPEAL - PLAIN ERROR - Mississippi Rules of Evidence permit a court to ignore the requirement of preservation on appeal when a substantial right is affected

EVIDENCE - DISCOVERY - REQUEST FOR ADMISSION - Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission

CONTRACTS - PREVENTING FRAUD - EQUITABLE ESTOPPEL - Equitable estoppel may be enforced in those cases in which it would be substantially unfair to allow a party to deny what he has previously induced another to believe and take action on

CONTRACTS - INTERPRETATION - AMBIGUITY - When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written

CONTRACTS - REMEDIES - MONETARY DAMAGES - The court's purpose in establishing a measure of damages for a breach of contract is to put the injured party in the position where she would have been but for the breach

CIVIL PROCEDURE - RECONSIDERATION - NONFINAL ORDER - Under Rule 54(b), the trial court may always set aside a nonfinal decision for any reason it deems just

FACTS

Phyllis and James Maness entered into an option contract with K&A permitting K&A to purchase certain real estate in exchange for payments including periodic interest payments. The contract also provided that the Manesses had a duty to cure any title defects on the land. K&A exercised the option right and gave notice to the Manesses of cloud on the title caused by the inclusion of a piece of the property on a deed with an unrelated party. The Manesses filed suit against other parties to settle multiple issues with regard to title on the property. Later, a quitclaim deed was signed conveying part of the property to the Manesses, but the quitclaim deed did not resolve all issues regarding the cloud of title. K&A ceased paying periodic interest payments upon discovering that the quitclaim deed did not resolve all the issues regarding title on the land. The Manesses then terminated the agreement with K&A citing K&A's failure to make payments. K&A filed suit against the Manesses for unilaterally terminating the contract and for failure to provide merchantable title. K&A demanded damages of \$479,941.04, the amount paid by K&A over the life of the contract. The Manesses filed a counterclaim for declaratory relief. The trial court awarded K&A partial summary judgment on liability, awarded partial summary judgment on damages, denied the Manesses' motions for reconsideration, and dismissed the Manesses' counterclaim. Manesses appealed.

ISSUES

Whether (1) the Option Contract and July 2005 Contract were ambiguous; (2) the quitclaim deed cured the title issues; (3) the Manesses' need to cure the title issues had a deadline; (4) the course of conduct of the parties can be considered; (5) K&A failed to meet its burden on proving liability at summary judgment; (6) K&A successfully illustrated the absence of a genuine issue of material fact as to damages; (7) the trial court abused its discretion in failing to grant the motions for reconsideration; and (8) the Manesses' counterclaim was properly dismissed.

HOLDING

(1) Because the ambiguity of the contracts was not plain, clear, or obvious and the trial court did not commit plain error by not addressing the ambiguity of the contracts, the contracts are not ambiguous. (2) Because the Manesses admitted in a request for admission that the property at issue is not free or clear, and because the Manesses failed to contradict the expert reports showing that the title is unmerchantable, the quitclaim deed did not cure the title issues. (3) Because a cloud existed on the title when the Manesses terminated the Option Contract, whether the contract had a deadline is immaterial and moot, therefore the court did not address it. (4) Because the contracts were unambiguous, the court did not consider the course of conduct of the parties. (5) Because K&A showed that a contract existed and the Manesses materially breached that contract, K&A satisfied its burden on summary judgment with regard to liability and successfully illustrated the absence of a genuine issue of material fact as to liability. (6) Because the damages awarded by the trial court placed K&A in a position where it would have been but for the breach, and because the Manesses failed to uphold their burden of presenting any proof in response, K&A successfully illustrated the absence of a genuine issue of material fact as to damages. (7) Because the Manesses presented nothing that satisfied any of the grounds for the motions for reconsideration, the trial court did not abuse its discretion in failing to grant the motions. (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 argued that the trial judge could have reconsidered his interlocutory decision to grant partial summary judgment without requiring the Manesses to meet the more "exacting" standard of Rule 59(e). However, the Manesses' use of the Rule 59(e) standard to argue what was in reality a Rule 54(b) motion led to harmless procedural error.

Affirmed - 2017-CA-00173-SCT (Feb. 8, 2018)

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

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MCKINNEY V. HAMP

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - GROSS INCOME - Gross income is calculated from all potential sources that may reasonably be expected to be available to the absent parent

FAMILY LAW - CHILD SUPPORT - RETIREMENT CONTRIBUTIONS - Retirement and disability contributions, except any voluntary retirement and disability contributions, should be deducted from gross income

FAMILY LAW - CHILD SUPPORT - RETROACTIVE MODIFICATION - An upward retroactive modification may be ordered back to the date of the event justifying the upward modification

CIVIL PROCEDURE - SUPERSEDEAS BOND - CHILD SUPPORT - Miss. R. App. P. 8(a) supersedeas bonds are only applicable to definitive, one-time payments

FAMILY LAW - CHILD SUPPORT - CONTEMPT - In a contempt action for unpaid child-support, the payor must show, through clear and convincing evidence, an inability to pay or other defense to contempt

FACTS

Benardrick McKinney and Kasey Hamp had a son out of wedlock. McKinney was drafted into the National Football League which included a signing bonus. Hamp filed a claim against McKinney and the Mississippi Department of Human Services to increase McKinney's child-support payments. The chancery court considered the signing bonus as income and included it in the child-support calculation. The court also applied the signing bonus to payments

retroactively. After trial, McKinney continued to pay the original, unaltered child-support amount. Hamp filed a motion for contempt and attorney's fees. Afterwards, McKinney secured a supersedeas bond under Miss. R. App. P. 8(a) for the child-support payments, but the court found the bond ineffective to stay enforcement of the child-support payments. Additionally, the court found McKinney in contempt for not paying the altered child-support amount and awarded Hamp attorney's fees. McKinney appealed.

ISSUES

Whether (1) McKinney's signing bonus should be considered gross income; (2) McKinney's mandatory retirement contributions should be deducted from gross income; (3) the trial court erred in calculating the retroactive child-support payments; (4) the chancellor erred in not including written findings on whether the statutory child-support guidelines should apply; (5) the trial court erred in finding that McKinney and Hamp should alternate claiming their child as a dependent for tax purposes; (6) Hamp's financial disclosures were ex parte; (7) McKinney's retroactive child-support payment can be stayed by a clerk-approved Miss. R. App. P. 8(a) supersedeas bond; (8) McKinney's prospective child-support payment can be stayed by a clerk-approved Miss. R. App. P. 8(a) supersedeas bond; (9) McKinney's conduct was willful, deliberate, or contumacious to warrant attorney's fees; and (10) the attorney's fees were excessive.

HOLDING

(1) Because the signing bonus was a guaranteed payment upon signing the contract, a payment that had already been received, and a payment available for McKinney's use, the signing bonus was correctly considered part of his gross income. (2) Because McKinney's retirement contributions were mandatory, they should have been deducted from his gross income. (3) Because the chancery court awarded a retroactive child-support increase dating to the day Hamp filed her petition for child-support, the court did not abuse its discretion in the retroactive child-support calculation. (4) Because the chancellor did not deviate from the statutory guidelines, the chancellor did not need to make written findings under the criteria in Miss. Code Ann. § 43-19-103. (5) Because the chancellor did not perform any analysis on the allocation of the child dependency exemption, the chancellor's handling of the issue was lacking even though there is not a specific test. (6) Because McKinney did not raise the ex parte issue in chancery court, it could not be considered on appeal. (7) Because McKinney's retroactive child-support payment was a definitive, one-time payment, the supersedeas bond protected him on that payment. (8) Because McKinney's prospective child-support payments are recurring and not a definitive, one-time payment, the Miss. R. App. P. 8(a) supersedeas bond did not apply to them; (9) Because the court had never addressed whether a supersedeas bond would apply to child-support payments, McKinney's reliance on it was not contemptuous or disobedient. (10) Because the chancery court wrongfully found McKinney in contempt, the award of attorney's fees was reversed and rendered. Therefore, the Supreme Court affirmed in part; reversed and rendered in part; and reversed and remanded in part the judgment of the Tunica County Chancery Court.

PARTIAL CONCURRENCE/DISSENT

Justice Beam agreed with the majority except for the decision to reverse the chancery court's contempt ruling and attorney's fees. Although McKinney was following good-faith advice from his mother, financial advisor, and attorney, he was still willfully disobedient of the court order and therefore in contempt.

Affirmed in Part; Reversed & Rendered in Part; Reversed & Remanded in Part- 2016-CA-00844-SCT (Feb. 8, 2018)

Opinion by Justice Maxwell - Partial Concurrence/Dissent by Justice Beam

Hon. Watosa Marshall Sanders (Tunica County Chancery Court)

Tonya Yvette Powell for Appellant – Stephanie Nicole Morris & Erica Jean Wilson for Appellee

Consolidated With:

Affirmed in Part; Reversed and Rendered in Part; Reversed and Remanded in Part - 2016-CA-01299-SCT (Feb. 8, 2017)

Hon. Watosa Marshall Sanders (Tunica County Chancery Court)

Tonya Yvette Powell for Appellant - Stephanie Nicole Morris for Appellee

Briefed by [Tyler Alcorn](#)

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SUPREME COURT - CRIMINAL

CYRUS V. STATE

CRIMINAL - FELONY

EVIDENCE - WITNESSES - CREDIBILITY - It is well established that it is within the province of the jury to determine the credibility of witnesses; the jury may believe or disbelieve, accept or reject the utterances of any witness

EVIDENCE - CHAIN OF CUSTODY - TEST - The test regarding the chain of custody is whether an indication or reasonable inference exists of probable tampering with the evidence or substitution of the evidence

EVIDENCE - CHAIN OF CUSTODY - PRESUMPTION OF REGULARITY - A presumption of regularity applies to the actions of public officers, and the defendant bears the burden of producing evidence that the chain of custody has been broken

FACTS

On July 30, 2014, Eddrick Cyrus sold heroin to Joshua Kizziah, and the exchange was captured on video, which was time-stamped “2001/02/14.” Agent Benji Hensarling arranged this controlled buy between Cyrus and Kizziah, a confidential informant. Kizziah gave the heroin to Agent Hensarling, who then heat sealed it in a bag and locked the bag in a Metro Evidence locker. Commander Adams later retrieved the bag and transported it to the Mississippi Forensics Laboratory, where a drug analyst tested the substance and determined it was heroin and a non-controlled substance called diphenhydramine. Agent Hensarling then retrieved the bag from the lab and returned it to the police station. Despite the officers’ and analyst’s testimony regarding this process, the chain of custody form on the evidence bag only included Agent Hensarling’s initial placement of the bag in the locker on July 30. Cyrus was tried in December 2016, and the jury found him guilty of the sale of less than two grams of a controlled substance. Cyrus was sentenced to fourteen years without the possibility of parole. Cyrus appealed.

ISSUE

Whether the verdict was against the overwhelming weight of the evidence when the State failed to prove the chain of custody of the evidence.

HOLDING

Because Agent Hensarling and Kizziah testified that the video-taped buy occurred on July 30, 2014 and the evidence bag indicated that it was placed into the evidence locker on July 30, 2014, the verdict was not against the overwhelming weight of the evidence. Further, a presumption of regularity applies to the actions of public officers, and Cyrus failed to rebut that presumption by producing evidence that the chain of custody was broken. The testimony of the handlers of evidence was sufficient to prove chain of custody in this case. Therefore, the Supreme Court affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2017-KA-00178-SCT (Feb. 8, 2018)

Opinion by Justice King

Hon. Jon Mark Weathers (Forrest County Circuit Court)

Benjamin Allen Suber & George T. Holmes (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Allison A. Bruff](#)

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GARY V. STATE

CRIMINAL - FELONY

EVIDENCE - CONFESSION - MOTION TO SUPPRESS - The trial court judge is the fact-finder during a suppression hearing, and the decision of the judge can only be reversed on manifest error

CRIMINAL PROCEDURE - EVIDENCE - SUFFICIENCY - Evidence is weighed in the light most favorable to the verdict, and a verdict will only be disturbed if it is so contrary to the overwhelming weight of the evidence that to allow it to stand would be an unconscionable injustice

FACTS

Vizavian Darby's body was found nearby his abandoned vehicle, and Laquann Gary was brought in as a suspect. The detectives advised Gary of his *Miranda* rights, and he signed a waiver. Initially, Gary claimed that Darby had pulled a gun on him first; however, the detectives explained that Darby had been inside the vehicle when he was shot and that Gary's coconspirator's testimony did not match his own, which prompted Gary to tell the truth, that he did kill Darby. Gary was indicted for capital murder, with robbery as the underlying charge. Before trial, Gary filed a motion to suppress his video confession, arguing that he had only been seventeen at the time of his confession, too young to voluntarily waive his constitutional rights. The court was unable to get either of the detectives involved in the confession to testify, and the court admitted that Gary's motion to suppress had not been fully heard; however, the court denied Gary's motion to suppress. The jury found Gary guilty of capital murder. Gary appealed, and the appellate court considered only the issue of the motion to suppress and remanded the issue so that the motion to suppress could be fully heard. On remand, one of the detectives did testify, and the court determined that the confession was voluntary. Gary appealed.

ISSUES

Whether the trial court erred in (1) not suppressing the interrogation video; (2) relying on insufficient evidence to convict Gary of capital murder; (3) denying Gary's motion for a new trial because the verdict was against the overwhelming weight of the evidence; and (4) committing cumulative error that deprived Gary of his right to a fundamentally fair and impartial trial.

HOLDING

(1) Because the court allowed Gary to fully cross examine the detective about her mental health, a challenge claiming that the motion to suppress should be granted because Gary was not allowed to examine the mental fitness of the detective who conducted the video interrogation was invalid. Further, the judge considered the detective's testimony and the video confession; thus, the evidence supported the judge's denial of the motion to suppress. (2) Because Gary admitted in the video confession that his intention was to steal Darby's vehicle, all the elements of robbery were met and because a juror could have found that all elements of capital murder, including the underlying robbery, had been met, the court did not err in denying Gary's motion for a judgment notwithstanding the verdict. (3) Because the verdict was supported by the overwhelming weight of evidence, the court was within its discretion to deny Gary's motion for a new trial. (4) Because there was no error in any part, there could not have been cumulative error; thus, Gary was not entitled to a new trial. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2014-KA-01172-SCT (Feb. 8, 2018)

En Banc Opinion by Justice Maxwell

Hon. Jeff Weill Sr. (Hinds County Circuit Court)

Benjamin Allen Suber & George T. Holmes (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Zachary Harper](#)

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PATTON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY SELECTION - EXCUSED FOR CAUSE - Under Mississippi law, a mere acquaintance or even family relationships with parties or those related to parties is not sufficient to require that a juror be excused for cause

CRIMINAL PROCEDURE - JURY SELECTION - IMPARTIALITY - The trial judge whose duty is to see that a competent, fair, and impartial jury is empaneled, is empowered with broad discretion to determine whether a prospective juror can be fair and impartial—notwithstanding the juror’s admission under oath that he or she will be

FACTS

Joseph Patton was convicted of murdering his uncle following a jury trial in the Warren County Circuit Court. Patton appealed his conviction, claiming his trial was rendered fundamentally unfair by the trial court’s refusal to strike for cause two prospective jurors from the jury venire who said during voir dire examination they knew and worked with the decedent’s son.

ISSUE

Whether Patton’s trial was rendered unfair by the trial court’s refusal to strike for cause the statements of two prospective jurors.

HOLDING

Because the two jurors did not have a close enough personal relationship to the decedent’s son, the trial judge did not abuse his discretion by refusing to strike the jurors for cause. Therefore, the Supreme Court affirmed the judgment of the Warren County Circuit Court.

DISSENT

Presiding Justice Kitchens disagreed, arguing that because it was readily conceivable that coworkers would afford each other some degree of loyalty, a potential for bias against Patton existed. According to Presiding Justice Kitchens, the refusal to strike for cause was an abuse of discretion.

Affirmed - 2016-KA-01286-SCT (Feb. 8, 2018)

En Banc Opinion by Justice Beam - Dissent by Presiding Justice Kitchens

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

George T. Holmes (Pub. Def. Office) for Appellant - Scott Stuart (Att’y. Gen. Office) for Appellee

Briefed by [Luke Kelly](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 6, 2018

COURT OF APPEALS - CIVIL CASES

BARNES V. LFI FORT PIERCE, INC.

CIVIL - WORKERS’ COMPENSATION

WORKERS’ COMPENSATION - WORKERS’ COMPENSATION COMMISSION - APPEALS - In a Workers’ Compensation claim, the Commission is the fact-finder and judge of the credibility of the witness; the Commission’s ruling will only be reversed where findings of fact are unsupported by substantial evidence, matters of law are clearly erroneous, or the decision was arbitrary and capricious

WORKERS’ COMPENSATION - WORKERS’ COMPENSATION COMMISSION - PROCEDURAL RULES - Workers’ Compensation Commission Procedural Rule 9 provides that a motion to supplement shall state with particularity the nature of such evidence, the necessity therefor, and the reason it was not introduced at the evidentiary hearing

WORKERS' COMPENSATION - WORKERS' COMPENSATION ACT - EMPLOYERS' POLICIES -

Though the Mississippi Workers' Compensation Act requires that an employer receive actual notice of a compensable injury within thirty days of its occurrence, the provision does not constrict employers' policies regarding work-related injuries

FACTS

Michael Barnes fell and injured his back and tailbone in the course of his employment with LFI Fort Pierce, Inc. (Labor Finders). There were no witnesses to the fall, and Barnes failed to report the accident to anyone. After continuing to work for the rest of the day, Barnes signed an acknowledgement of payment that included a disclaimer stating that he had not experienced any work-related injuries that day. The following day, Barnes reported his injury to Labor Finders and was taken to a medical provider where he received a diagnosis of L4-5 arthritic changes. Following the diagnosis, Labor Finders began to pay Barnes temporary benefits for his injury, but it ceased payments upon discovering Barnes had failed to disclose a back surgery he had 20 years prior to the work injury. Barnes filed a petition to controvert with the Workers' Compensation Commission (Commission). Barnes's petition was dismissed by the administrative judge for failing to prove he had suffered a compensable injury. On appeal to the full Commission, Barnes filed a motion to supplement the record, requesting the Commission consider additional evidence. The motion was denied, and the administrative judge's dismissal was affirmed. Barnes appealed.

ISSUES

Whether (1) the Commission erred in finding Barnes did not suffer a compensable injury; (2) the Commission erred in denying Barnes's motion to supplement the record; and (3) the receipt-of-payment acknowledgment form violates public policy.

HOLDING

(1) Because Barnes's testimony and evidence did not corroborate his allegations and his actions were not commensurate with a serious injury, the argument was found to be without merit. (2) Because Barnes's motion to supplement failed to comply with Workers' Compensation Procedural Rules by offering no explanation for failing to introduce the evidence during the evidentiary hearing, the argument was found to be without merit. (3) Because Labor Finders's policies regarding work-related injuries are not constricted by the Workers' Compensation Act, the receipt of payment acknowledgement form does not violate public policy and was properly considered. Therefore, the Court of Appeals affirmed the judgment of the Commission.

Affirmed - 2017-WC-00341-COA (Feb. 6, 2018)

Opinion by Judge Westbrook

Mississippi Workers' Compensation Commission

Chadwick Lester Shook for Appellant - M. Reed Martz for Appellees

Briefed by [Marilyn Higdon](#)

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BROWN LAKELAND PROPS V. RENASANT BANK

CIVIL - REAL PROPERTY

FAIR MARKET VALUE - APPRAISALS - METHOD - Three standards are accepted in determining fair market value of real property: (1) the cost approach; (2) the income-capitalization approach; and (3) the market-data or comparative-sales approach

APPRAISALS - METHOD - DISCRETIONARY ALLOWANCE - An appraiser's estimate of fair market value is an opinion which is the product of a reconciliation of the indications yielded by the three approaches, not all of which need be employed for an appraisal to be valid

FORECLOSURES - INDIVIDUAL GUARANTORS - COMMERCIAL REASONABLENESS - Unlike suits where the lender sues the primary borrower, an individual guaranty does not require that a foreclosure price be commercially reasonable, and the guarantor is immediately liable upon the borrower's default

REAL PROPERTY - FAIR MARKET VALUE - PRIOR OFFERS - Evidence of mere offers or options to purchase property is not competent to establish a property's fair market value

FACTS

Brown Lakeland Properties LLC (BLP) executed two commercial promissory notes to Renasant Bank for the loan amounts of \$2,880,320.87 (Note One), and \$906,786.40 (Note Two). Note One was secured by two properties, a 635-acre parcel of land, and a 2.93-acre parcel with a bowling alley. Note Two was secured by a 6.75 acre parcel of land. Charles Brown executed and delivered multiple continuing guaranties relating to the notes, individually guaranteeing the indebtedness due on the notes. BLP defaulted on both loans and Renasant foreclosed on the properties pledged as security. After getting appraisals on the properties, Renasant bought out all three properties at the foreclosure sale and sold them to third party purchasers, applying the excess proceeds from the third party sales as a credit to the indebtedness due. BLP and Brown remained indebted under the notes and continuing guaranties for over \$1.3 million. Renasant filed a complaint against BLP and Brown, seeking payment for the remaining indebtedness. BLP filed a counterclaim, alleging that the foreclosure sales should be set aside for inadequate purchase prices, and negligence for failing to sell properties in commercially reasonable manner by failing to secure purchase prices that reflected the fair market value of the properties. Renasant moved for summary judgment, asserting it was entitled to relief under the terms of the notes and guaranties due to the default of BLP. Renasant also moved for summary judgment with regard to BLP's counterclaim, asserting that there was no genuine issue of material fact regarding the commercial reasonableness of the sale. The trial court granted Renasant's motion for summary judgment, holding BLP and Brown liable to pay the remaining indebtedness in addition to legal fees, pre- and post- judgment interest, and costs. Additionally, the trial court dismissed BLP's counterclaim with prejudice. BLP and Brown appealed.

ISSUES

Whether the trial court erred in granting summary judgment in favor of Renasant Bank, finding it was entitled to a deficiency judgment against BLP and Brown.

HOLDING

Despite the record supporting that Renasant had made demand on BLP and Brown to pay in full the principal and interest due, the terms of the loan agreement stated that Brown and BLP waived any requirement of demand for post-foreclosure deficiencies. Thus, it was without merit to argue that Renasant failed to show as a matter of record that they made demand for post-foreclosure deficiencies. As Renasant's third-party sales of the collateral properties constituted an exchange of property between a willing buyer and willing sellers, the properties sold for their fair market value. By applying the proceeds from the sales to the indebtedness, Renasant gave fair credit for the commercially reasonable value of the properties. As such, Renasant properly established that it was entitled to a deficiency judgment. As Renasant established that the appraisals utilized the accepted applicable methods, and BLP offered no proof or evidence to the contrary, there was no genuine dispute regarding the adequacy of Renasant's appraisal methods. With respect to Renasant's claim against Brown individually as a guarantor, since Renasant was not required to demonstrate that the foreclosure price was commercially reasonable, there was no dispute over Brown's individual liability for indebtedness due. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2016-CA-01448-COA (Feb. 6, 2018)

Opinion by Chief Judge Lee

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

Pamela L. Hancock & Jeffrey Bryan McGuire for Appellant - Scott R. Hendrix, L. Bradley Dillard & Robert Brannon Kahlstorf for Appellee

Briefed by [Hale Neilson](#)

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DIXON V. DIXON

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - MODIFICATION - Unclean hands regarding the representation of a party's financial standing in a child support dispute will result in the party paying the remaining portion of his arrearage

FAMILY LAW - EMANCIPATION - COHABITATION - Miss. Code Ann. § 93-11-65(8)(b) directs that a chancellor may determine that emancipation has occurred when cohabitation exists

FACTS

William Tracy Dixon (Tracy) and Sandra Michelle Dixon (Michelle) married in 1992 and had twin girls, Ashton and Amanda in 1996. Tracy and Michelle divorced in 2012, with Michelle holding physical custody of the girls with joint visitation and liberal visitation for Tracy. Tracy was to pay \$2,000 per month to Tracy, as well as private school tuition for the girls. In 2014, Tracy filed a complaint to modify his alimony and child support obligations, seeing that Amanda was cohabiting with her boyfriend, the girls had graduated from high school, and Michelle's income had risen enough for self-sustainment. In 2015 the court heard Tracy's petition, and Amanda testified that she, over both of her parents' objections, had moved into her boyfriend's home but still relied on her mother for support concerning clothing, meals, and gas money. Amanda and Tracy's relationship was rocky due to disagreements over Amanda's educational plans. Tracy had attempted to mend the relationship but had been ignored by Amanda. All of Tracy's petitions were denied. Tracy testified that he had a strong relationship with Ashton, however. Tracy was laid off work in 2015 and unilaterally reduced alimony payments and child support, eventually stopping payment altogether. Tracy did use \$49,276 from the closing of his retirement account to pay off loans on a Polaris Ranger and had been approved for a \$1,400,000 loan to enter into the poultry business. Tracy's income had drastically decreased, and his retirement accounts had been drained. Michelle then filed a petition to hold Tracy in contempt in January 26, 2016. The chancellor found him in contempt, and Tracy filed for a new trial, and the chancellor, on May 9, 2016, held that Tracy could purge himself of contempt by paying Michelle \$13,000 of his arrearage by May 20, 2016 – selling his Polaris Ranger and paying his attorney's fees. The court held that Tracy was not entitled to a modification because of his unclean hands concerning the misused \$49,276 from his retirement account. Tracy hired a new lawyer and filed a new motion challenging the revised holding. The court denied Tracy's motion on July 5, 2016. Tracy appealed.

ISSUES

Whether the chancery court erred by finding that (1) Amanda should not be emancipated; (2) Tracy's child support obligations should go unchanged; and (3) Tracy's alimony payments should continue.

HOLDING

(1) Because Amanda was a full-time student and the chancery court had broad discretion to determine her emancipation status, the chancery court did not err in holding that Amanda was not emancipated. (2) Because Tracy's financial situation had not substantially changed, he was aware of the "ups-and-downs" of the oil business, and he had unclean hands, the chancellor did not err in continuing Tracy's child support obligations. (3) Because precedent raised misinterpreted precedent and the court had broad discretionary authority to grant relief, the Chancellor's motion for a new trial was rightfully entered. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Chancery Court.

PARTIAL CONCURRENCE/DISSENT

Judge Greenlee argued that the court did not err regarding issues one and two. However, he dissented concerning issue three. He argued that Tracy's change in employment, the change in his financial standing regarding the retirement account, and the loan approved concerning the poultry business, all substantially modified his financial situation and that change should have been reflected in Tracy's child support and alimony payments.

Affirmed - 2016-CA-00997-COA (Feb. 6, 2018)

En Banc Opinion by Judge Wilson

Hon. David Clark II (Jasper County Chancery Court, First Judicial Dist.)

J. Edward Rainer for Appellant - Rance N. Ulmer for Appellee

ELKINS V. ELKINS

CIVIL - DOMESTIC RELATIONS

DIVORCE - EQUITABLE DISTRIBUTION - MARITAL MISCONDUCT - Chancellors should not view equitable distribution as a means to punish the offending spouse for marital misconduct; rather, marital misconduct is a viable factor entitled to be given weight by the chancellor when the misconduct places a burden on the stability and harmony of the marital and family relationship

DIVORCE - CHILD SUPPORT - STATUTORY REQUIREMENTS - A chancellor may not require a parent to pay tuition in child support over and above the statutory percentage without a written or specific finding as to why the deviation is needed

DIVORCE - EQUITABLE DISTRIBUTION - DISCRETION - The chancery court has authority, where equities so suggest, to order a fair division of property accumulated through the joint contributions and efforts of the parties, and the equitable division is left to the chancellor's discretion unless there is an abuse of discretion

FACTS

Robert and Kimberlana Elkins married in 1999 and had two children. Kimberlana filed a complaint for divorce against Robert, citing irreconcilable differences. The chancery court entered a temporary order, granting Kimberlana temporary custody of the children and exclusive use of the marital home. Robert was ordered to pay \$350 in child support, the children's medical expenses, plus the mortgage, maintenance, and expenses for the marital home. In response, Robert filed a motion to set aside the temporary order, asserting he was never notified of the court hearing. Shortly after, Kimberlana filed a motion for contempt of court, claiming Robert was in arrears for child support, mortgage, and home maintenance. The parties came to an agreement, but the proposed property settlement and child custody agreement were never executed or filed. Months later, Kimberlana filed a second motion for contempt, reasserting her initial arguments. A year later, Kimberlana filed an amended complaint for divorce, asserting claims of adultery; habitual cruel and inhuman treatment; willful, continued, and obstinate desertion for one year; or in the alternative, irreconcilable differences. She filed a second amended complaint a few weeks later, but Robert failed to respond to the complaints. Kimberlana then filed a motion for emergency relief, modification, and other relief, requesting an increase in child support and for Robert to pay additional household and medical expenses. Robert responded with a motion to set aside the temporary order, claiming he had not received notice of the hearing. The chancellor found Robert in contempt of the temporary order but granted an equitable lien on the marital home due to Robert's inability to pay the total arrearage. The chancellor also modified the child support. Years later, the chancery court entered a judgment of divorce, granting Kimberlana a divorce on the ground of adultery. The chancellor awarded joint legal custody to both and primary physical custody to Kimberlana. The chancellor also ordered Robert to pay \$381 per month and for the marital home to be sold to pay off the debts on the home. As to Kimberlana's motion for contempt, the chancellor determined Robert owed \$65,895 in arrearage and ordered Robert to pay \$250 per month for any arrearage due after the proceeds of the sale of the house had been applied. The chancellor denied Kimberlana's request for alimony and homeschooling expenses. Robert then filed a motion to reconsider the judgment of contempt and award of attorney's fees. The chancellor deemed the temporary order void ab initio and deducted \$42,604 from the arrearage owed by Robert based on the fact that Kimberlana did not request any child or spousal support in her initial complaint. However, the chancellor denied the motion with respect to the remaining arrearage and award of attorney's fees to Kimberlana. Kimberlana appealed.

ISSUES

Whether the chancellor erred in (1) failing to consider Robert's extramarital affairs in determining the distribution of assets; (2) calculating Robert's income for the purposes of child support; (3) decreasing the amount of child support in the final judgment from the temporary order; (4) not ordering Robert to pay tuition for the daughter's online schooling; (5) not awarding Kimberlana the marital residence; (6) not awarding Kimberlana alimony; (7) modifying the award of

contempt in its order on Robert's motion for reconsideration; (8) awarding Kimberlana the trailer from the couple's former business; and (9) not ordering Robert to acquire and maintain life-insurance policies for the children.

HOLDING

(1) Because chancellors should not view equitable distribution as a means to punish the offending spouse for marital misconduct, the chancellor did not err by not considering Robert's extramarital affairs in the distribution of the marital assets. (2) Because there was no evidence that Robert had any interest in his late father's estate, the chancellor did not err in calculating Robert's income. (3) Because there was no error in the calculation of Robert's income and the modification of child support was based on that calculation, the chancellor did not err in modifying the amount to be paid in the divorce judgment. (4) Because Kimberlana did not demonstrate a written or specific finding as to why Robert should pay educational expenses beyond what was included in child support, the chancellor did not err in not ordering Robert to pay his daughter's tuition. (5) Because neither party could afford to pay the expenses associated with the home, the chancellor did not err in denying Kimberlana complete ownership of the marital home. (6) Because Robert could not afford to pay Kimberlana alimony, the chancellor did not err by denying Kimberlana alimony. (7) Because child support was not included in Kimberlana's initial pleading, the chancellor did not err in adjusting the amount of arrearage owed to Kimberlana. (8) Because Kimberlana failed to cite authority for the claim that the chancellor miscalculated the value of the trailer, she was procedurally barred from asserting that argument on appeal. (9) Because there was no evidence that Robert had any interest in his parents' assets to use to pay for any life insurance policies, the chancellor did not err in failing to order Robert to acquire and maintain life insurance policies for the children. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Chancery Court.

Affirmed - 2015-CP-00444-COA (Feb. 6, 2018)

Opinion by Judge Barnes

Hon. James B. Persons (Hancock County Chancery Court)

Pro se for Appellant - Frank Philip Wittmann IV for Appellee

Briefed by [Sean Grady](#)

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FIPPS V. GREENWOOD LEFLORE HOSP.

CIVIL - MEDICAL MALPRACTICE

EVIDENCE - EXPERT TESTIMONY - REQUIREMENTS - Pursuant to Miss. R. Evid. 702, a witness may testify as an expert if the witness is qualified as an expert by knowledge, skill, experience, training, or education, and if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

EVIDENCE - EXPERT TESTIMONY - RELIABLE BASIS - The trial court has a gate-keeping responsibility to assure a proposed expert's opinion has a reliable basis in the knowledge and experience of the relative discipline

MEDICAL MALPRACTICE - EXPERT TESTIMONY - STANDARD OF CARE - There is no requirement that an expert in medical malpractice cases be a specialist in the same area as the doctor about whom the expert is testifying regarding the standard of care; however, the expert is required to have familiarity with the specialty of the defendant doctor and the standard of care owed to the plaintiff patient

FACTS

On June 12, 2012, Otis Fipps underwent an esophagogastroduodenoscopy ("EGD") procedure performed by Dr. Thomas Calvit. During the procedure, Dr. Calvit performed an esophageal dilatation to treat Fipps's dysphagia. After the procedure, Fipps claimed the procedure caused a perforation of his esophagus, leading to further medical complications including a neck abscess and two additional surgeries. Fipps brought suit for medical malpractice against the Greenwood Leflore Hospital ("the Hospital"). Fipps later designated Dr. Myron Stokes as an expert. When Dr. Stokes was deposed, the Hospital filed three pretrial motions in limine. All three motions were granted by the trial court,

which resulted in the exclusion of Dr. Stokes's deposition. Dr. Stokes deposition was to be his trial testimony. With no witnesses for Fipps to call, the Hospital moved for dismissal. Finding Fipps could not meet his burden without expert testimony, the trial court granted the Hospital's motion to dismiss. Fipps appealed.

ISSUES

Whether (1) Dr. Stokes was qualified to offer his opinion regarding the standard of care applicable to a gastroenterologist; (2) Dr. Stokes's opinion regarding informed consent was properly disclosed; and (3) the trial court erred in granting the Hospital's motion in limine to prevent Dr. Stokes's from testifying that he was a licensed physician.

HOLDING

(1) Because Dr. Stokes did not indicate sufficient familiarity with the standard of care to which a gastroenterologist is held, the trial court did not abuse its discretion in finding Dr. Stokes was not a qualified expert. (2) Because the trial court properly excluded Dr. Stokes's testimony, the Court of Appeals declined to address this issue. (3) Because Dr. Stokes's license was not suspended until after he gave his deposition testimony, the deposition testimony was accurate at the time, and the Court of Appeals declined to further address the issue of Dr. Stokes's present licensure status. Therefore, the Court of Appeals affirmed the judgment of the Leflore County Circuit Court.

Affirmed - 2016-CA-01141-COA (Feb. 6, 2018)

Opinion by Chief Judge Lee

Hon. Richard A. Smith (Leflore County Circuit Court)

Carlos Eugene Moore for Appellant - Tommie Gregory Williams Jr., Tommie G. Williams, & Harris Fredrick Powers II for Appellee

Briefed by [Charlotte Cooper](#)

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IN RE ESTATE OF FLOWERS

CIVIL - WILLS, TRUSTS, & ESTATES

ESTATE LAW - ACCOUNTING - STANDING - Once a person becomes a vested remainder beneficiary, they gain standing to petition for the accounting of an estate

CIVIL PROCEDURE - STANDING - TIMING - Standing is to be determined at the commencement of a lawsuit, not during the motion phase of litigation

ESTATE LAW - INTEREST - SHIFTING EXECUTORY INTEREST - A shifting executory interest occurs when ownership shifts from one transferee to another upon the occurrence of the subsequent event

FACTS

Richard and Brenda Flowers had three children: Knox, Claire, and Jane. In 2004, Claire gave birth to a son, "D.A." Claire's parents, Richard and Brenda, adopted D.A. in 2015. On April 15, 2006, Richard Flowers passed away. Subsequently, Brenda executed her last will and testament. A month after executing the will, Brenda passed away. The will established a trust that named D.A. and his descendants as income beneficiaries and named Knox the estate executor. The trust for D.A. would terminate upon D.A.'s thirtieth birthday or upon his death, with the assets to be divided evenly between Knox and D.A. In the event that D.A. and Knox passed away prior to the termination of the trust, Claire and Jane would become beneficiaries. Upon Brenda's death, Claire filed a motion for an accounting of the estate and petitioned for Knox's disqualification as estate executor. Claire alleged that Knox and others associated with the administration of the estate had mismanaged and misappropriated estate and trust assets. Jane joined in Claire's petition for a full accounting. Claire then filed a motion seeking leave under Miss. R. Civ. P. 15(a) to admit her amended petition for compensatory and punitive damages. However, Claire's failure to state a claim led to a dismissal under Miss. R. Civ. P. 12(b)(6). Additionally, Claire's petition for a full accounting of the estate and trust was denied because Claire was not a beneficiary. Claire and Jane appealed.

ISSUES

Whether (1) Claire and Jane had standing to request an accounting of their mother's estate; and (2) the chancellor erroneously denied the Rule 15(a) motion to amend the petition.

HOLDING

(1) Because Claire and Jane possessed a shifting executory interest in their mother's estate, they had standing to request an accounting of the estate. (2) Because Claire failed to meet her burden to sufficiently support an amendment of her petition, the chancellor did not err by denying the Rule 15(a) motion to amend. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Leflore County Chancery Court.

PARTIAL CONCURRENCE/DISSENT

Judge Tindell concurred with the majority regarding the chancellor's denial of Claire's Rule 15(a) motion to amend. He dissented in part, arguing the language of Brenda's will gave the sisters a purely executory interest that had not yet become precursory. He would have found that, where an executory interest remains a future interest and is non-vested, the appellants lack standing.

Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00800-COA (Feb. 6, 2018)

Opinion by Judge Carlton - Partial Concurrence/Dissent by Judge Tindell

Hon. Michael H. Ward (Leflore County Chancery Court)

David Neil McCarty for Appellants - Floyd M. Melton Jr. & Richard A. Oakes & Floyd M. Melton III for Appellees

Briefed by [Addison Watson](#)

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COURT OF APPEALS - CRIMINAL CASES

ALFORD V. STATE

CRIMINAL - FELONY

EVIDENCE - PRIOR BAD ACTS - ADMISSIBILITY - While evidence of prior bad acts is not admissible to prove the character of the defendant, such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

EVIDENCE - PRIOR BAD ACTS - PEDOPHILIC ACTIVITIES - Evidence should survive the Miss. R. Evid. 403 relevance/prejudice analysis if it demonstrates that the defendant's means of accomplishing pedophilic sexual activities on past occasions bear substantial resemblance to each other and with the present offense, which serves as proof of motive and a common plan or scheme

APPELLATE REVIEW - ISSUE PRESERVATION - CONTEMPORANEOUS OBJECTION - In order to preserve an issue for appeal, a party must make a contemporaneous objection at trial

FACTS

Spartacus Alford was convicted of two counts of sexual battery, one count of attempted sexual battery, and one count of touching a child for lustful purposes. The charges related to the sexual abuse of his six-year-old niece, Abby.¹ During trial, the circuit court admitted the accounts of three of Alford's other nieces and nephews, without an on-the-record weighing of the probative and prejudicial effects of such evidence. Each witness testified to the specific sexual abuse

¹ The Court of Appeals used fictitious names to protect the identities of the minors who are victims of sexual abuse. *See* Miss. R. App. P. 48A.

Alford committed against them, as well as the various means Alford used to discourage them from disclosing the abuse. The circuit court also allowed the prosecution's use of a screen that obstructed Alford's vision of the victim when she testified. Alford appealed.

ISSUES

Whether the circuit court abused its discretion by (1) admitting the accounts of the three witnesses, and (2) allowing the presence of a screen in the courtroom.

HOLDING

(1) Because the evidence of Alford's previous instances of sexual abuse bore a "substantial resemblance" to the present allegations and showed Alford's opportunity and absence of mistake, the circuit court did not err by admitting the witnesses accounts. (2) Because Alford made no contemporaneous objection to the use of the screen during trial, and thus waived the issue for appeal, the Court of Appeals declined to address the issue. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2016-KA-01534-COA (Feb. 6, 2018)

Opinion by Judge Fair

Hon. Kathy King Jackson (Jackson County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Daniel Tankersley](#)

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PICKETT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INDICTMENT - AMENDMENTS - A proper amendment to an indictment does not alter facts that are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case

CRIMINAL PROCEDURE - INDICTMENT - ELEMENTS - An indictment must contain (1) the essential elements of the crime charged, (2) sufficient facts to fairly inform the defendant of the charge which he must defend, and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - ATTEMPTED MURDER - When a defendant shoots at a victim with a firearm with the deliberate design to effect the victim's death, but shall fail or be prevented therein, the defendant is subject to jury instructions enumerating the same

CONSTITUTIONAL LAW - DUE PROCESS CLAUSE - STATUTORY ANALYSIS - A statute is unconstitutionally overbroad if it does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities protected by the First Amendment

FACTS

Walter Culpepper, James Taylor, and Decarlos Clark worked as garbage men in Meridian, Mississippi. On October 31, 2013, the men were assigned a route Clark had never worked. Culpepper drove the truck, while Taylor and Clark rode on the back, loading garbage into the truck. As they approached an area near Oakland Heights Elementary School, Clark told Taylor he had been in an altercation with someone in that area. Taylor then saw a tall, muscular man, who Clark recognized as Willie Pickett, running toward the truck with a pistol. According to Clark, Willie fired multiple shots at the garbage truck. Clark hid in the cab of the truck and exited when he thought Willie was gone. Clark testified that Jacarrus Pickett then fired approximately fifteen rounds at him. Clark ran up a hill and escaped uninjured. Jacarrus and Willie were convicted in the Lauderdale County Circuit Court of attempted first-degree murder. Jacarrus was sentenced to twenty-five years in the custody of the Mississippi Department of Corrections (MDOC), with ten years suspended,

and five years of post-release supervision. Willie was sentenced to thirty years in the custody of the MDOC, with ten years suspended, and five years of post-release supervision. Jacarrus and Willie appealed.

ISSUES

Whether (1) the indictment was improperly amended; (2) the indictment, as amended, was void; (3) the jury was improperly instructed on the elements of attempted murder; (4) Mississippi's attempted-murder statute is unconstitutional; and (5) the verdict was against the weight and sufficiency of the evidence.

HOLDING

(1) Because the amendment to the indictment reflected language used at trial, did not prejudice the defense, and did not change the nature of the charges, this issue of an improper amendment was without merit. (2) Because the indictment charged that the defendants "attempt[ed] to kill and murder" the plaintiff, there was no need for it to also specify that they failed or were prevented from completing the act. (3) Because "shooting at" the plaintiff "with a firearm" with the deliberate design to effect the plaintiff's death are acts, which, if accomplished, would constitute first-degree murder, the jury was properly instructed. (4) Because the State is under no obligation to prosecute under a statute with a lesser penalty, it may choose to prosecute under either, and so long as the choice is clear and unequivocal the defendant has no right to complain. (5) Because, when given all favorable inferences and viewing the evidence in the light most favorable to the verdicts, the verdicts were not against the weight or sufficiency of the evidence, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2016-KA-00932-COA (Feb. 6, 2017)

En Banc Opinion by Judge Greenlee

Hon. Lester F. Williamson Jr. (Lauderdale County Circuit Court)

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

Briefed by [Katie Berry](#)

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SMITH V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - TIME BAR - Miss. Code Ann. § 99-39-5(2) requires that all post-conviction relief motions be filed within three years of the date of a guilty plea; the three-year limit is excepted in cases in which the petitioner claims that his sentence has expired

FACTS

In 1986, Jerold Wayne Smith pled guilty to armed robbery and was sentenced to fifteen years in the custody of the Mississippi Department of Corrections, to be served either concurrently or consecutively with three prior sentences. In 2016, Smith filed a petition for post-conviction relief, claiming his fifteen-year sentence had expired. The court dismissed the petition, finding it without merit and untimely filed outside the applicable statute of limitations. Smith appealed.

ISSUE

Whether the trial court erred in dismissing the petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-5(2).

HOLDING

Because Smith's fifteen-year sentence is being served consecutively to a prior life sentence, he cannot successfully argue that his sentence is expired. Consequently, his motion is time-barred. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2017-CP-00259-COA (Feb. 6, 2018)

Opinion by Judge Fair
Hon. Robert B. Helfrich (Forrest County Circuit Court)
Pro se for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee
Briefed by [Mary-Katherine Black](#)

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