

MISSISSIPPI SUPREME COURT DECISIONS – MARCH 1, 2018***SUPREME COURT - CIVIL CASES*****BIEL REO, LLC V. CRESTVIEW, LLC****CIVIL - CONTRACT**

CIVIL - PLEADING - NOTICE - Pleadings need only provide sufficient notice to the defendant of the claims and grounds upon which relief is sought, based on direct or inferential fact allegations

CONTRACTS - INTEREST - PREJUDGMENT - Mississippi acknowledges the judicial authority to award the prevailing party prejudgment interest in breach of contract suits

CIVIL - ATTORNEYS FEES - REASONABLENESS - A lawyer's fee shall be reasonable, the time and labor required, the likelihood the particular employment will preclude other employment by the lawyer, and the fee customarily charged in the locality for similar legal services are all factors to be considered

FACTS

On March 14th, 2007, LFK Crestview executed and delivered a Commercial Note (numbered 4449) with Whitney National Bank in which it agreed to pay \$4,100,000, plus interest. This note was secured by approximately 287 acres of real estate property in Okaloosa County Florida. On the same day, Lee Kennedy executed and delivered to Whitney Bank a Guaranty Agreement entitled "Continuing Guaranty," also number 4449, in which Kennedy promised to repay all outstanding indebtedness of LFK Crestview. On November 27th, 2007, LFK Crestview executed and delivered a Promissory Note, numbered 5726, with Whitney Bank, in which it agreed to pay \$500,000, plus interest. This promissory note carried the same interest and repayment terms as the commercial note. On January 24, 2011, Whitney Bank assigned the commercial note, promissory note, and continuing guaranty to Biel Loan Co., LLC. Biel Loan Co. filed suit in Harrison County Circuit Court, alleging that both notes were in default and that Kennedy was individually liable for both. While this action was pending, Biel Loan Co. filed for judicial foreclosure on the collateral property in Okaloosa County Florida. The trial court in Florida entered a Final Deficiency Judgment against LFK Crestview in the amount of \$5,965,485.24. The trial court in Mississippi found that by Florida law, the Commercial note was canceled at the time that the foreclosure was allowed in Florida and that it no longer existed. As for the promissory note, the Mississippi trial court found that the "Continuing Guaranty" applied to the promissory note and that Kennedy was liable individually. Biel Reo appealed and Kennedy cross-appealed.

ISSUES

Whether (1) the trial court erred in its finding that the Florida judgments were not sufficient evidence of Kennedy's financial obligation under the Guaranty Agreement; (2) Biel Reo was required to amend its pleadings to include the Florida judgments to recover on the Guaranty Agreement; (3) the promissory note was assigned properly to Biel Reo; (4) the trial court erred in holding Lee Kennedy personally liable under the promissory note; (5) the trial abused its discretion in awarding Biel Reo eighteen percent pre- and post-judgment interest; and (6) the trial court erred in its discretion in its decision to award attorney's fees.

HOLDING

(1) Because Biel Reo was not attempting to proceed directly upon the Florida judgments against LFK, the Florida judgments were sufficient evidence of Kennedy's financial obligation. (2) Because Biel Reo alleged in its initial complaint that Kennedy was individually liable under the Guaranty Agreement, Kennedy was properly put on notice of Biel Reo's intentions to recover under the agreement. (3) Because Kennedy failed to submit testimony or evidence in support of his argument that the documents had not be assigned properly to Biel Reo, this issue has no merit. (4)

Because Kennedy signed the Continuing Guaranty agreement that clearly encompassed the promissory note and did not terminate the agreement before the promissory note was executed, he is personally liable for the debt. (5) Because the trial court imposed the eighteen percent interest rate pursuant to the terms of the document that LFK Crestview willingly signed, the trial court did not abuse its discretion. (6) Because the attorney's fees awarded were reasonable and less than that of most collection cases, the trial court was not manifestly wrong. Therefore, the Mississippi Supreme Court reversed and remanded the judgment of the Lowndes County Circuit Court on direct appeal, and affirmed its judgment on cross-appeal.

On Direct Appeal: Reversed and Remanded. On Cross-Appeal: Affirmed – 2016-CP-00381-COA (Mar. 1, 2018)

Opinion by Justice King

Hon. Christopher Louis Schmidt (Lowndes County Circuit Court)

Marlon K. Jackson (*Pro Se*) for Appellant – Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [Jay Michael Patterson](#)

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SMITH V. HOOD

CIVIL - OTHER

CONSTITUTIONAL LAW - CONSTITUTIONAL OFFICERS - ATTORNEY GENERAL - Despite the Attorney General being listed under Art. 6 of the Mississippi Constitution, the section regarding the Judiciary, the position is part of the executive branch

CONSTITUTIONAL LAW - INTERPRETATION - GOVERNMENT BRANCHES - An office's location within the text of the Mississippi Constitution does not necessarily determine its branch of government

CONSTITUTIONAL LAW - JUDICIAL BRANCH - PROSECUTORIAL DUTIES - Members of the judicial branch of Mississippi are constitutionally prohibited from discharging law enforcement and prosecutorial duties

FACTS

In 2012, Ralph Smith was arrested and indicted in Leflore County for capital murder, conspiracy, and burglary. Smith then filed a civil action against Mississippi Attorney General Jim Hood, among other lawsuits against law enforcement entities. All of Smith's causes of actions turned on the legal theory that the Attorney General of Mississippi was a judicial officer and thus was precluded from carrying out any law enforcement or prosecutorial duties that are reserved for the executive branch. The Hinds County Circuit Court granted summary judgment in favor of the Attorney General. Smith appealed.

ISSUES

Whether the trial court erred when it found that the Office of the Attorney General is within the executive branch of state government as a matter of law.

HOLDING

Because the Court has consistently found that the Attorney General is an officer of the executive branch despite being listed under Article 6 of the Mississippi Constitution labeled "Judiciary," the trial court correctly granted summary judgment. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2016-CT-01438-SCT (Mar. 1, 2018)

Opinion by Justice Ishee

Hon. Winston L. Kidd (Hinds County Circuit Court)

William Charles Bell for Appellant - Harold Edward Pizzetta III (Att’y Gen. Office) for Appellee

Briefed by [Jacob Swatley](#)

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IN RE ESTATE OF WARE

CIVIL - OTHER

CIVIL PROCEDURE - JURISDICTION - STANDING - Standing is a jurisdictional issue and may be raised by the court sua sponte or by any party at any time

CORPORATIONS - INJURIES - ACTIONS BY SHAREHOLDERS - An action to redress injuries to a corporation cannot be maintained by a shareholder in his own name, but must be brought by the corporation because the individual shareholders' rights are merely derivative; the rule applies even though the complaining stockholder owns all or substantially all of the stock of the corporation

CORPORATIONS - INJURIES - DERIVATIVE CLAIMS - An action is derivative if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual shareholders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets

FACTS

Frankie Ware's will directed his shares of stock in three closely held corporations be distributed to a testamentary trust. Frankie, his wife Carolyn, and his son Richard were the sole shareholders of the three corporations. Richard was the majority shareholder in each. The corporations' bylaws required any outstanding shares be offered to the corporation prior to transfer. Carolyn, executrix of Frankie's estate, filed a petition to close the estate and distribute the shares to the trust. Richard, a trustee of the estate, filed an objection at the closing of the estate, asserting the corporations' bylaws precluded the distribution of shares. Carolyn argued that Richard lacked standing to object. The chancellor found for Richard, requiring Carolyn to offer the shares back to each corporation. Carolyn appealed.

ISSUE

Whether Richard had standing to object to the closing of the estate on behalf of the corporation.

HOLDING

Because the injury for which relief was sought pertained to the corporations only, and Richard failed to assert a derivative claim, Richard lacked standing to object to closing on behalf of the corporations. Therefore, the Supreme Court reversed the judgment of the Chickasaw County Chancery Court.

Reversed - 2016-CA-00288-SCT (consolidated with 2016-CA-01589-SCT) (Mar. 1, 2018)

Opinion by Presiding Justice Randolph

Hon. Kenneth M. Burns (Chickasaw County Chancery Court)

Rhett R. Russell & Thomas A. Wicker for Appellant - Casey Langston Lott & Dustin Colt Childers for Appellee

Briefed by [Marilyn Higdon](#)

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SUPREME COURT - CRIMINAL CASES

WOODS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - DIRECTED VERDICT - PRESERVATION FOR APPEAL - In order for a defendant to preserve challenges to the sufficiency of the evidence for appeal, defendant must motion for a directed verdict at the close of the State's case-in-chief and renew the motion at the close of all evidence

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - JURY INSTRUCTIONS -

When claiming ineffective assistance of counsel because of jury instructions, appellant must (1) overcome the presumption that trial counsel's decisions were part of the trial strategy, and (2) show prejudice, pointing to record evidence that a reasonable jury could have found appellant guilty of the lesser-included offense

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - POST-TRIAL MOTIONS -

When claiming ineffective assistance of counsel based on trial counsel's failure to file post-trial motions, appellant must show (1) that trial counsel's failure amounted to deficient performance; and (2) that a reasonable probability exists that the court would have granted the motion had one been filed

TORTS - SELF-DEFENSE - THE CASTLE DOCTRINE - Under Miss. Code Ann. § 97-3-15, (1) if a defendant is in a place he had the right to be, was not the initial aggressor, and was not engaged in unlawful activity, he has no duty to retreat; and (2) if aggressor unlawfully entered a dwelling, defendant is entitled to a presumption that he feared imminent bodily harm

FACTS

Doris Tenner and Pierre Tenner were married and lived in Natchez. Their relationship eventually deteriorated, and shortly after the couple separated, Doris began dating Casey Woods. In early May 2015, Pierre came home from work to find Woods's truck parked in the front. Pierre angrily kicked in the front door of the house, holding a twelve-gauge shotgun. When Doris retreated to her bedroom, Pierre fired a shot through the bedroom door. Doris came out, and the two tussled over the gun before Pierre eventually left. As a result of this incident, Pierre was arrested and charged with domestic violence. As part of his bond, he was to have no contact with Doris, and Doris was to have exclusive residence of the house to the exclusion of Pierre. Three weeks later, Pierre called Doris while Doris was grocery shopping. Pierre told Doris he was coming to the house, and Doris told him he did not need to be there. Pierre arrived and parked at a house across the street from Doris's. After only a few minutes, Pierre and Woods began arguing from opposite sides of the street. The argument escalated, and Pierre began to cross the street toward Doris's house. Doris saw Pierre reach into his truck, grab something before crossing the street, and put his hand behind his back, while saying, "I missed you the first time but I won't miss you this time." Doris went to the edge of the yard to stop Pierre, but Pierre grabbed her and threw her to the ground. While Pierre was approaching, witnesses saw Woods go back into the house through a door under the carport and return with a shotgun. From under the carport, Woods shot Pierre, who was halfway up the driveway, in the leg. Witnesses put Pierre in a truck and took him to the hospital, where he was pronounced dead on arrival. Pierre's blood alcohol content was .242. At Woods's trial, the court instructed the jury on first- and second-degree murder, heat of passion manslaughter, self-defense, and the Castle Doctrine. Woods was found guilty of second-degree murder and sentenced as a habitual offender to life without parole. Woods's trial counsel failed to file any post-trial motions. With new appellate counsel, Woods appealed.

ISSUES

Whether (1) the evidence presented at trial was insufficient to overcome the presumption afforded by the Castle Doctrine; (2) trial counsel's failure to request jury instructions for culpable negligence manslaughter or imperfect self-defense amounted to ineffective assistance of counsel; and (3) whether trial counsel's failure to file any post-trial motions challenging the weight of the evidence amounted to ineffective assistance of counsel.

HOLDING

(1) Because Woods failed to renew his motion for directed verdict at the close of all evidence, he waived his ability to challenge to the sufficiency of the State's evidence on appeal. (2) Because the jury instructions of culpable negligence manslaughter and imperfect self-defense did not fit within defense counsel's theory of justifiable homicide, it is conceivable that they did not request these instructions as part of the trial strategy, and Woods failed to overcome the presumption that the decisions made were strategic. (3) Because no strategic reason existed for trial counsel not to file a motion for a new trial challenging the weight of the evidence, this failure amounted to deficient performance, and because the Castle Doctrine afforded Woods a presumption that he feared imminent danger as a result of Pierre's unlawful entry of the residence, a reasonable probability exists that the trial court would have found the verdict was contrary to the overwhelming weight of the evidence, and would have granted a new trial motion. Therefore, the Supreme Court reversed the judgment of the Adams County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Justice Chamberlain argued that while trial counsel's failure to file any post-trial motions was deficient performance, Woods was unable to prove that the deficient performance prejudiced him. Because Woods failed to present any evidence to overcome the presumption that jurors follow the instructions given to them, and because the applicability of the Castle Doctrine was a factual question for the jury, the evidence at trial was legally sufficient to support the verdict, and therefore no reasonable probability existed that the trial court would have granted the motion for a new trial. Thus, Woods was not prejudiced by his trial counsel's deficient performance.

Reversed - 2016-KA-01734-SCT (Mar. 1, 2018)

En Banc Opinion by Justice Coleman - Partial Concurrence/Dissent by Justice Chamberlain

Hon. Lillie Blackmon Sanders (Adams County Circuit Court)

Mollie Marie McMillin & George T. Homes (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Daniel Tankersley](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 27, 2018

COURT OF APPEALS - CIVIL CASES

EDMONDSON V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SENTENCE REVOCATION - TECHNICAL VIOLATION - Pursuant to Miss. Code Ann. § 47-7-37(5)(a), if the court revokes probation for a technical violation, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first technical violation and not to exceed one hundred twenty (120) days for the second technical violation; for the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence; and for the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence

CONSTITUTIONAL LAW - WRIT OF HABEAS CORPUS - HEARING - A writ of habeas corpus is intended to give a person restrained of his liberty an immediate hearing so that it can be determined whether that person is being deprived of constitutional rights, such as the right to due process of law

CONSTITUTIONAL LAW - WRIT OF HABEAS CORPUS - RELIEF - In order to receive relief from a habeas petition, the petitioner or someone on his behalf must file a sworn petition, in writing, describing the circumstances and facts of the alleged illegal restraint or detention and state the grounds for relief and should be filed in the county where the person is illegally restrained or detained

EVIDENCE - PRODUCTION - TRIAL RECORDS - It is the duty of the appellant to see that the record of trial proceedings wherein error is claimed is brought before the court

FACTS

In May 2006, Edmonson pled guilty to two counts of uttering a forgery. He was sentenced to five years in the custody of the Mississippi Department of Corrections (MDOC) for both counts, followed by five years of post-release supervision (PRS). The sentences were ordered to run consecutively, for a total of ten years of incarceration, followed by ten years of PRS. In September 2015, Edmonson's PRS was revoked due to several violations: he was arrested and charged with grand larceny, he had tested positive for illegal drugs, he had failed to pay required supervision fees to MDOC, and he had failed to pay court-ordered restitution and fines. The circuit court then ordered him to serve the remainder of his two sentences, ten years in total, with credit for time served awaiting revocation. In October 2016, Edmonson filed a post-conviction relief (PCR) motion. Edmonson argued that the circuit court lacked the authority to impose a period of imprisonment greater than ninety days for his first technical violation of his PRS, and that he

was unconstitutionally held in excess of the statutory time period to conduct a revocation hearing, and, further, that a discrepancy existed between his written revocation sentence and the sentence orally imposed at his revocation hearing. The circuit court dismissed Edmondson's PCR motion. Edmondson appealed.

ISSUE

Whether (1) the circuit court lacked the authority to impose a period of imprisonment greater than ninety days for his first technical violation; (2) appellant was unconstitutionally held in custody for sixty-seven days; and (3) the written order revoking Edmondson's sentence, which imposed a ten-year term of imprisonment, was invalid because it contradicted the circuit court's verbal five-year sentence.

HOLDING

(1) Because Edmondson committed at least three separate technical violations under Miss. Code Ann. § 47-7-37(5)(a), he was appropriately sentenced to serve out the remainder of his suspended sentence, and his argument that he was improperly sentenced was without merit. (2) Because Edmondson never filed a habeas corpus petition requesting an immediate hearing on the constitutionality of his detention, the issue was never presented to the circuit court and, therefore, was procedurally barred. (3) Because Edmondson did not provide the evidence in the record to support his allegation that there was a discrepancy in sentence, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - 2016-CP-01806-COA (Feb. 27, 2018)

Opinion by Judge Greenlee

Hon. Lee J. Howard (Lowndes County Circuit Court)

Pro se for Appellant - Billy L. Gore (Office of Att'y Gen.) for Appellee

Briefed by [Nikki Breeland](#)

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IRWIN-GILES V. PANOLA COUNTY

CIVIL - PERSONAL INJURY

MISS. TORT CLAIMS ACT - IMMUNITY - RECKLESS DISREGARD - A governmental entity shall not be liable for any claim that arises out of any act or omission of an employee engaged in the performance or execution of duties unless the employee acted in reckless disregard

MISS. TORTS CLAIMS ACT - RECKLESS DISREGARD - STANDARD - Reckless disregard is a higher standard than simple or gross negligence but less than an intentional act

MISS. TORT CLAIMS ACT - IMMUNITY - CRIMINAL ACTIVITY - The provision affords a governmental entity immunity if the decedent was engaged in criminal activity or if the employee did not act with reckless disregard

FACTS

Terry Smith, a deputy with the Panola County Sheriff's Department was involved in a two-car accident with Lynda and William Irwin. The Irwins died as a result of their injuries from the crash. Their daughter Beverly Irwin-Giles filed a suit under the Miss. Tort Claims Act (MTCA). The county moved for summary judgment, arguing that Deputy Smith was immune from liability because he had not acted in reckless disregard of the Irwins safety and because Lynda was engaged in criminal activity, speeding, at the time of the injury. Smith testified he had come to a stop at the stop sign and again at the median, waiting for westbound traffic to clear. An analysis of the black box data, however, showed evidence that Smith did not stop or slow down before proceeding onto Highway 6 and directly into the path of the Irwins' car. The circuit court found the evidence did not establish any causal nexus between Lynda's speeding and her injuries, and her speeding was not imputed to William. However, the court granted the county's motion for summary judgment because Irwin-Giles failed to create a genuine issue of material fact as to whether Smith had acted in reckless disregard. Irwin-Giles appealed.

ISSUES

Whether (1) no genuine issue of material fact existed as to Deputy Smith's reckless disregard of the Irwins' safety; and (2) the claims were barred because Lynda was engaged in criminal activity, speeding, at the time of her injuries.

HOLDING

(1) Because there were no obstructions to Smith's vision and the evidence from the black box data showed he did not stop or slow down, a fact-finder could have reasonably inferred Smith did not look for oncoming traffic. (2) Because there was no evidence in the record that Lynda could have avoided the crash if she had not been speeding and since Lynda's speeding could not be imputed to William, the county was not entitled to summary judgment. Therefore, the Court of Appeals reversed and remanded the judgment of the Panola County Circuit Court.

Reversed and Remanded - 2016-CA-01637-COA (Feb. 27, 2018)

Opinion by Judge Wilson

Hon. Smith Murphey (Panola County Circuit Court, Second Judicial Dist.)

Ralph Edwin Chapman, Sara Bailey Russo, Larry O. Lewis, & Dana J. Swan for Appellant – David D. O'Donnell & Sidney Ray Hill III for Appellee

Briefed by [Sarah Raben](#)

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O'BRIEN V. ALFONSO

CIVIL - LEGAL MALPRACTICE

CIVIL - LEGAL MALPRACTICE - TYPES OF CLAIMS - The Mississippi Supreme Court has distinguished between two types of legal-malpractice claims: (1) those based on negligence (breach of standard of care) and (2) those based on breach of fiduciary duty (breach of the standard of conduct)

CIVIL - LEGAL MALPRACTICE - NEGLIGENCE - To prove legal malpractice based on an allegation of negligence, or breach of the standard of care, the plaintiff must establish the following by preponderance of the evidence: (1) an attorney-client relationship; (2) the attorney's negligence in handling the client's affairs; and (3) proximate cause of the injury

CIVIL - LEGAL MALPRACTICE - FIDUCIARY DUTY - To prove legal malpractice based on an allegation of breach of fiduciary duty, the plaintiff must establish the following: (1) the existence of an attorney-client relationship; (2) the acts constituting a violation of the attorney's fiduciary duty; (3) that the breach proximately caused the injury; and (4) the fact and extent of the injury

CIVIL - FIDUCIARY DUTY - PARTICULARITY OF FACTS - If a complaint is intended to allege a breach of fiduciary duty, it is necessary to state with particularity the facts which purportedly created the duty that was breached

FACTS

Keith O'Brien and his then wife, Cheryl, purchased 8.9 acres in Jackson County and constructed a house on the property. Seven years later they listed it, along with 2.3 of the acres that surrounded it, with Shirley Willard of Coldwell Banker Alfonso Realty Inc. (Alfonso Realty) for \$198,000. After listing the property, Keith had the entire 8.9 acres surveyed and divided into three parcels. The O'Briens then conveyed 1.23 acres of land, the middle parcel, to their daughter and son-in-law, Khristina and Scott Storm, via quitclaim deed, which was filed in the land records. The O'Briens intended to keep the remaining 5 acres. About a month later, the O'Briens accepted an offer from Willard for the sale of their house and 2.3 acres of land. The buyers were Willard's niece, Mary Ann Rogers, and her husband, Michael. Upon the recommendation of Alfonso Realty, Keith retained Andy Alfonso to prepare the real-estate contract and deed and execute the loan closing on the property. Keith signed the papers provided to him, including the warranty deed conveying the property to the Rogerses. About a year after the conveyance, the Rogers family discovered that due to a mistake in the deed, they were paying property taxes for the entire 8.9 acres of property. When Keith learned of the mistake, he contacted Alfonso Realty and the attorney, Alfonso, about the error. They

assured Keith that they would correct the deed. Once the Rogers learned that they owned the entire property, however, they obtained a second mortgage encumbering the entire 8.9 acres. Keith filed a complaint to confirm and quiet title, set aside the deed, or, in the alternative, reform the deed, in addition to damages in the Jackson County Chancery Court. The chancellor denied Keith's claims for relief and held that Keith presented insufficient evidence to sustain his burden of proving that Alfonso committed legal malpractice. Keith appealed.

ISSUES

Whether the trial court erred in finding that Keith failed to meet the burden of proving his attorney committed legal malpractice.

HOLDING

Because the record contained substantial, credible evidence showing that an attorney-client relationship existed, Alfonso was negligent in preparing the deed containing an erroneous legal description of the property to be sold, and because Alfonso's negligence proximately caused Keith to incur damages, the trial court erred in finding that Keith failed to meet the burden of proving Alfonso committed legal malpractice. Therefore, the Court of Appeals reversed and remanded the judgment of the Jackson County Chancery Court.

DISSENT

Judge Wilson argued that because Keith's failure to read the deed before signing was the proximate cause of his own damage, the chancellor's finding that Keith failed to sustain his burden of proof was not erroneous.

Reversed and Remanded - 2016-CA-01787-COA (Feb. 27, 2018)

En Banc Opinion by Judge Carlton, J. - Dissent by Judge Wilson

Hon. Jaye A. Bradley (Jackson County Chancery Court)

Courtney Parker Wilson for Appellant - *Pro se* for Appellee

Briefed by [Maggie Vinzant](#)

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SHOWS V. CROSS

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - MODIFICATION - Before custody is modified and a change occurs, the court must consider the totality of the circumstances in determining whether a material change in circumstances that adversely affects the child has occurred

CIVIL PROCEDURE - GUARDIAN AD LITEM - FEES - Guardian ad litem fees are treated as court costs to be awarded against the non-prevailing party

FACTS

Greg Shows and Hope Shows were married in July 2005. They divorced in February 2007 based on irreconcilable differences. Hope Shows was awarded physical custody of the couple's only child, S.S., who was born in March 2006. Greg was granted visitation, including alternating weekends, four weeks in the summer, spring break, and certain holidays. Greg was also instructed to pay monthly child support in the amount of \$200 and one-half of daycare per month or \$135.00, whichever was more. Greg filed a petition to modify custody in December 2011 seeking primary physical custody of S.S., alleging that Hope's new husband and children by a previous marriage were emotionally and verbally abusive to S.S. and that Hope verbally abused S.S. Greg's petition requested a guardian ad litem (GAL). Hope answered Greg's petition, and filed a petition for contempt and a counter-complaint to modify or clarify the visitation provisions of the parties' agreement alleging that Greg had violated the agreements child support and visitation provisions. The chancellor subsequently appointed a GAL for S.S. A hearing on the petition was held over four days in October 30, 2012, July 16, 2015, and February 17 and 24, 2016. Chancellor Littlejohn heard the case for the first two days of the hearing, but he passed away, and the case was reassigned to Chancellor T.K. Moffett, who presided

over the final two days. During the hearing, Greg testified that Hope had refused to allow him to have scheduled weekend visitation with S.S. three times between 2008 and 2010; that he had to have the sheriff's department to accompany him seven to ten times to pick S.S. because Hope's new husband "would kick Greg's ass;" that Hope interfered with his phone calls to S.S. requiring to S.S. to talk on speaker and eaves-dropping on their conversations; that Greg heard cursing and threats in the background; that S.S. was "withdrawn" when Greg picked him up; that S.S.'s demeanor improved while he was with Greg, that S.S. became upset and cried when he had to go back to Hope's house; and two incidents at S.S.'s baseball games. Greg had taken S.S. to a licensed professional counselor, but the counselor found no evidence of physical abuse and determined that some incidents constituted emotional maltreatment rather than emotional abuse. The Department of Human Services (DHS) also found no evidence of physical abuse. On July 31, 2013, Greg filed an emergency motion for temporary custody alleging that S.S.'s counselor advised that S.S. not return into Hope's custody and that S.S. had been diagnosed with ulcers resulting from the fear of returning to Hope. Hope denied these allegations and filed a contempt petition for Greg's failure to return S.S. to Hope. The GAL recommended and the chancellor found that S.S. returning to Hope's custody pending a final hearing on the merits would not result in any irreparable harm to S.S. S.S. was allowed to testify after the chancellor conducted a *Jethrow* examination, and S.S. was ruled competent to testify although he was still too young for the chancellor to consider his preference regarding custody. S.S. testified that he made all A's except a B in math; that he heard profanity from both of his parents' homes, but more often at Hope's home; that an incident occurred where one individual pointed a shotgun at the other without shots being fired; that Greg was disparaged by Hope and her husband and that they said they would like to kill Greg even though he knew they were not actually going to kill Greg; that S.S. was allowed to taste a beer and saw his sixteen-year-old half-sister drink half a beer; that he had seen his parents and step-parents drink but had never seen them drunk; that Hope lost her temper and he was afraid when that happened, but that she helps him with his homework and teaches his Wednesday night class at church; and that both his parents were responsible and that he got along with both of them. The GAL reported S.S. was not in any danger with either Hope or Greg, and that there had not been any material change in circumstances since the divorce that adversely affected S.S, so the GAL did not recommend a modification of custody. Hope testified that she had used profanity in front of S.S., but that she did not know he had sipped a beer. She also testified she acted in self-defense at one of the baseball games, that she had not interfered with Greg's relationship with S.S., and she denied that S.S. had stomach ulcers. The chancellor dismissed Greg's petition after a finding that he failed to meet his burden of proving a material change in circumstances that adversely affected S.S. The chancellor also ruled that the parties' original custody and property settlement agreement required Greg to pay minimum child support of \$335 per month and not \$200, and that Greg's child support obligation would be modified prospectively based on Greg's current adjusted gross income. Greg was also ordered to pay the remaining balance of the GAL's fees, and Greg was found in contempt for failing to return S.S. following visitation in July 2013. Hope was not found to be in contempt for denying Greg visitation in November 2015. The chancellor denied both parties' requests for attorney's fees and modified Greg's visitation schedule to grant significant additional summer visitation. The chancellor entered a final judgment based on his bench rulings. Greg was allowed 120 days to pay his child support arrearage and to pay the GAL's final bill. The judgment modified child support prospectively to \$326 per month. Greg was also sentenced to seven days in jail for contempt but the chancellor suspended the sentence conditioned upon Greg's compliance with future court orders. Both parties' requests for attorney's fees were denied again. Greg appealed.

ISSUES

Whether the chancellor erred (1) by dismissing Greg's petition to modify custody; (2) in finding that the original divorce decree required Greg to pay minimum child support of \$335 per month; (3) in modifying child support prospectively; (4) in finding Greg in contempt; (5) in not finding Hope in contempt; and (6) by requiring Greg to pay the fees of the GAL.

HOLDING

(1) Because Hope did not know S.S. was given beer, and there is no evidence that this single incident had any adverse effect on S.S., along with the fact that Hope's temper, profanity, and incidents at the baseball games were not material changes in circumstances that adversely affected S.S., there was no error in the chancellor's dismissal of Greg's petition to modify custody based on material change in circumstances. (2) Because the chancellor correctly interpreted the parties' agreement on child support that Greg was to pay \$200 per month along with a minimum of \$135 per

month even if no daycare expenses were incurred, and the chancellor actually reduced Greg's support obligation, there was no error in the chancellor finding that the original divorce decree required Greg to pay a minimum of \$335 per month in child support. (3) Because Greg was not aggrieved by the child support reduction, he lacks standing to raise this issue on appeal. (4) Because Greg failed to return S.S. from summer visitation in July 2013, which Greg did not deny, and there was no merit in Greg's claim that S.S. would be harmed if he was returned to Hope's custody, the chancellor did not err in finding that Greg violated the custody provisions of the divorce decree and was in contempt. (5) Because Hope testified she thought Greg's Thanksgiving holiday visitation superseded his regular weekend visitation and Chancellor Littlejohn previously had ordered the parties to confer and make adjustments to their holiday visitation schedules leaving the issues somewhat unsettled, the Court of Appeals could not say that Chancellor Moffett clearly erred or abused his discretion. (6) Because the facts do not show the chancellor's ruling was a manifest injustice after a GAL was appointed at the request of Greg, the GAL finding that there was no evidence of abuse, and Greg's failure to meet his burden of proving a material change in circumstances, the chancellor did not abuse his discretion by requiring Greg to pay the GAL's final bill. Therefore, the Court of Appeals affirmed the judgment of the Monroe County Chancery Court.

Affirmed - 2016-CA-01235-COA (Feb. 27, 2018)

Opinion by Judge Wilson

Hon. T.K. Moffett (Monroe County Chancery Court)

Kurt August Mord for Appellant - *Pro se* for Appellee

Briefed by [Michael Farese](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

CULBERT V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - MOTION FOR RELIEF - Under the Uniform Post-Conviction Collateral Relief Act, a motion for relief following a guilty plea is untimely unless filed within three years after entry of the judgment of conviction

POST-CONVICTION RELIEF - SUCCESSIVE WRITS - PROCEDURAL BAR - Under the Uniform Post-Conviction Collateral Relief Act, a motion for relief is barred from review if the movant has filed a previous motion

POST-CONVICTION RELIEF - CONSTITUTIONAL ISSUE - PROCEDURAL BAR - Errors affecting fundamental constitutional rights are excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act

FACTS

In 1997, Jimmy Culbert pled guilty to kidnapping and sexual battery. He was sentenced to six years for the kidnapping charge and thirty years for the sexual battery charge. During the hearing, Culbert testified that his pleas were free and voluntary and that he fully understood and was aware of his rights. In 1999, Culbert began filing petitions for post-conviction relief (PCR). In his fifth PCR motion, Culbert petitioned for relief on the grounds that his sentence was illegal because he did not benefit from the amended statute that followed his crime but preceded his sentence. The trial court summarily dismissed the motion on the grounds that the legal standard requiring courts to impose a lesser penalty from an amended statute was overturned by the Mississippi Supreme Court in 2016. Culbert appealed.

ISSUES

Whether the trial court erred in dismissing Culbert's petition for post-conviction relief.

HOLDING

Because petitions for post-conviction relief are only exempted from procedural bars when the movant can demonstrate a fundamental constitutional issue, and because Culbert did not demonstrate the basis for his claim, the trial court did not err in summarily dismissing his motion. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2017-CP-00602-COA (Feb. 27, 2018)

Opinion by Judge Fair

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

Pro se for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [D. Kirkwood Palmer](#)

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COURT OF APPEALS - CRIMINAL CASES

BRYANT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INDICTMENT - ELEMENTS - An indictment must contain: (1) the essential elements of the offense charged, (2) sufficient facts to fairly inform the defendant of the charge against 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 - INDICTMENT - LEGALLY SUFFICIENT - So long as from a fair reading of the indictment, taken as a whole, the nature and cause of the charge against the accused is clear, the indictment is legally sufficient

CRIMINAL PROCEDURE - INDICTMENT - DISMISSAL - Pursuant to Miss. Code Ann. § 99-15-53, prosecutors must seek leave of court before an indictment or a count in an indictment may be dismissed

CRIMINAL PROCEDURE - PLEA DEALS - JUDICIAL DISCRETION - The decision to accept or reject a plea agreement is purely within the trial judge’s discretion; trial judges need only provide a reasonable basis to grant or deny a prosecutor leave to dismiss or nolle pros an indictment

FACTS

In 2012, Freda Austin testified as a State’s witness in the trial of Cortez Washington. The following day, Ashley Bryant (Washington’s aunt) and Cortaia (Washington’s sister) went to Austin’s place of work. The three engaged in a verbal and physical altercation. Bryant and Cortaia were charged with intimidating a witness. Prior to Bryant’s trial, the State and Bryant moved the circuit court to enter an order of nolle prosequi in the case. The circuit court denied the motion, rejecting the State’s plea recommendation. At trial, a jury found Bryant guilty of intimidating a witness. The circuit court sentenced Bryant to serve two years’ imprisonment. Bryant appealed.

ISSUE

Whether (1) Bryant’s indictment was fatally flawed; and (2) the trial court improperly involved itself in Bryant’s attempted plea deal.

HOLDING

(1) Because a reading of the indictment as a whole found as to the nature and cause of the charge against Bryant were clear, and because the indictment contained the necessary elements of the crime charged, Bryant’s indictment was not fatally flawed. (2) Because the trial court need only provide a reasonable basis to deny a prosecutor leave to dismiss or nolle pros an indictment, and because the trial court provided a reasonable basis for its decision to deny Bryant’s plea agreement, the trial court’s involvement in Bryant’s attempted plea deal was proper. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2015-KA-01649-COA (Feb. 27, 2018)

Opinion by Judge Greenlee

Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)

David Neil McCarty for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

Briefed by [William L. Moorer](#)

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CASEY V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - MOTION FOR CONTINUANCE - DISCRETION - The granting of a continuance is within the sound discretion of the trial court, and a judgment will not be reversed because the continuance is refused unless there has been an abuse of sound discretion

CRIMINAL PROCEDURE - SUBPOENA INSTANTER - RIGHT TO COMPULSORY PROCESS - No Mississippi case required the trial court to issue subpoenas instanter to preserve the defendant’s Sixth Amendment right to compulsory process

FACTS

On February 5, 2013, a Harrison County Sheriff’s deputy encountered an injured Johnny Ray Holmes, who had been shot and robbed of prescription drugs during an altercation in a vehicle driven by Jonathan Young. Holmes could not identify who shot him because they were hiding in Young’s backseat. Young later identified Kendrick Casey as that person. Young claimed he and Holmes arranged a meeting to purchase prescription drugs for his friend Jessica Orr and her boyfriend Casey. Casey and Young were indicted on December 23, 2013 for one count of aggravated assault and one count of armed robbery. Young testified against Casey in exchange for pleading guilty to accessory after the fact to aggravated assault and having the armed robbery charge passed to the files. On July 7, 2015, Casey’s new defense counsel filed a notice of alibi, asserting Casey was with his girlfriend, Orr, at the time of the crime. Furthermore, on July 9, 2015, supplement to the notice of alibi stated that Orr’s mother, Annette Newsome, would testify she saw Orr and Casey at her home late that evening. On July 13, 2015, defense counsel moved for a fourth continuance, stating more time was needed to subpoena Orr and Newsome. On September 15, defense counsel moved for a fifth continuance and requested the court to issue an “instanter warrant” for Orr and Newsome. The trial judge denied the motion for continuance noting that he had already granted a lengthy continuance, and further denied the “instanter warrant” based on the reasoning that prior to today there had been nothing brought before the court to ask for assistance in serving the alleged witnesses. Casey was convicted of aggravated assault and armed robbery. Casey appealed.

ISSUE

Whether the trial court erred in (1) denying the motion for continuance and (2) denying the requested “instanter warrant.”

HOLDING

(1) Because the granting of continuance is largely within the sound discretion of the trial court, and the four prior continuances were granted, there was no abuse of discretion. (2) Because reversal of the trial court’s decision is only required when a manifest injustice has been demonstrated, and the trial court reasoned that this issue should have been addressed previously at the fourth continuance instead of the day the jury was to be selected, no manifest injustice was demonstrated. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

DISSENT

Judge Barnes argued that while he agreed the trial court did not err in denying Casey’s motion for continuance, the court’s denial of his request to issue subpoena instanter for two witnesses constituted a reversible error. Further,

Judge Barnes found that Casey articulated a “colorable need” for witness testimonies, and the record reflects they had “relevant and material knowledge” of the events of the evening. Due to Casey’s diligent yet unsuccessful effort to obtain witnesses, and his Sixth Amendment right to compulsory process, the denial of the subpoena request was an abuse of discretion. Judge Barnes would, therefore, reverse and remand for new trial.

Affirmed - 2016-KA-01112-COA (Feb. 27, 2018)

En Banc Opinion by Presiding Judge Griffis - Dissent by Judge Barnes

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

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee

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

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PAGE V. STATE

CRIMINAL - FELONY

INVESTIGATORY STOP - REASONABLE SUSPICION - STANDARD - Police officers may conduct a brief investigatory stop when they have reasonable suspicion, grounded in specific and articulable facts that allow the officers to conclude that the suspect is wanted in connection with criminal behavior

CONFRONTATION CLAUSE RIGHTS - WITNESS - TESTIMONY - A supervisor, reviewer, or other analyst may testify in lieu of the primary analyst where the surrogate witness was actively involved in the production of the report and had intimate knowledge of the analyses even though he did not perform the tests first hand

FACTS

On August 2015, Vanessa Page was arrested for driving under the influence. A tipster, identified by first and last name, called 911 and reported Page. The tipster called 911 shortly after the tipster and Page left the same Alcoholics Anonymous (AA) meeting. The tipster expressed concern for Page’s driving, and included specific details about Page’s identity, vehicle, and destination. Biloxi Police Officer, McKeithen, received the call from dispatch and noticed Page’s vehicle. He followed her for roughly forty-five seconds before he stopped her. McKeithen later testified that the driver matched the description originally provided in the tip, and that he did not observe any traffic offenses while he followed Page. Following the arrival of a second police officer, Page failed the first sobriety test. Once she was taken into the station, she agreed to an intoxilyzer test and subsequently failed. She was taken to Merit Health Hospital, where she gave consent in the presence of an officer and the phlebotomist, who proceeded to draw her blood. The blood samples were sent to the crime lab for testing, and the results indicated that Page had a blood-alcohol concentration of 0.19 percent. A crime lab analyst conducted the test and prepared the report, which was then reviewed by the lab’s technical reviewer. At trial, the technical reviewer testified regarding the crime lab’s analyst. The prosecution never entered the report into evidence. The prosecution submitted evidence that Page had two previous DUI convictions within five years of the present case. The circuit court found Page guilty of felony DUI and sentenced her to five years in the custody of the Mississippi Department of Correction, with three years suspended and two to serve, followed by three years post-release supervision. Page appealed.

ISSUES

Whether (1) there was reasonable suspicion for an investigatory stop based off an informant’s tip; and (2) the admission of blood-alcohol testing violated Page’s Confrontation Clause rights.

HOLDING

(1) Because the tipster identified herself by name, provided specific facts regarding Page’s car, physical appearance, and destination, and had personally witnessed Page’s behavior, the quantity and quality of the information considered with the totality of the circumstances established reasonable suspicion. (2) Because the technical and administrative reviewer was actively involved in the production of the report and had intimate knowledge of the tests that were performed and the process that was used to confirm the findings, he was qualified to testify as a surrogate witness in

lieu of the primary analyst, who was unavailable to testify. Additionally, the technical and administrative reviewer reviewed work to ensure that the conclusions were correct and accurate. As such, Page's constitutional right to confront witnesses against her was not violated. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-KA-01456-COA (Feb. 27, 2018)

Opinion by Presiding Judge Griffis

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

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

Briefed by [Caroline Loveless](#)

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