

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 25, 2018**SUPREME COURT - CIVIL CASES****FAIRLEY V. TOTAL TRANSP. OF MISS., LLC****CIVIL - PERSONAL INJURY**

TORTS - NEGLIGENCE - DUTY - Under Louisiana law, even though a far greater duty and responsibility to avoid a collision is placed on the motorist than the pedestrian, the motorist must still be at fault in order to be held liable

APPELLATE PROCEDURE - STANDARD OF REVIEW - JURY VERDICTS - Appellate courts show great deference to the jury verdict by resolving all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor

APPELLATE PROCEDURE - STANDARD OF REVIEW - VOIR DIRE - An appellant fails to show the necessary prejudice to warrant a mistrial where the venire members have made general declarations that they could set aside their prejudices and reach a decision based on the evidence

FACTS

In 2013, James Owens left his work shift without clocking out and wandered at night onto an unlit highway in St. Tamany Parish, Louisiana, where he was struck by an eighteen-wheeler driven by Will Gates. Owens's conservator, Charles Fairley, sued Gates and his employer in a negligence suit in Humphreys County. Trial testimony revealed that Owens had a history of drug abuse and was feeling ill when he left work, likely due to a heroin withdrawal. The evidence showed that the truck driven by Gates never left the road, but there remained questions of fact regarding Gates's cellphone usage and alertness and whether Owens was wearing a non-reflective orange work vest. During voir dire, it was revealed that Gates's cousin, Abraham Gates, a judge in Humphreys County, was attending trial and acting as a jury consultant for the defense. The venire panel assured the trial judge that their knowledge of this would not impact its ability to be impartial. Owens later moved for a mistrial claiming jury impartiality, which the court denied. The jury applied Louisiana law and found zero liability for the defendants. Owens moved for a new trial, which was denied. Owens appealed.

ISSUES

Whether the trial court erred in (1) applying Louisiana tort law in determining that Gates was not negligent; (2) denying Owens's motion to alter the verdict or declare a mistrial based on the overwhelming weight of the evidence; (3) admitting evidence of Owens's past drug abuse which allegedly prejudiced the jury; and (4) not declaring a mistrial on impartial-jury grounds because defendant's cousin, who was a justice court judge, served as a jury consultant and attended trial.

HOLDING

(1) Because Louisiana law provides that while a motorist has a higher duty of care than a pedestrian in avoiding a collision, a motorist must still be found at fault in order to be liable, and because Owens was wearing dark clothing while walking with his back to oncoming traffic in the lane of travel at night on an unlit highway, the jury's verdict was consistent with Louisiana law. (2) Because appellate courts show great deference to the jury verdict by resolving conflicting evidence and permissible inferences in the appellee's favor, and because the jury weighed the conflicting evidence of Gates's cellphone usage and alertness along with evidence that Owens was wearing a non-reflective orange vest when he was hit by Gates, the trial court did not err. (3) Because Owens did not make an objection to the defense witness's testimony regarding Owens's past drug abuse, and because Owens himself later admitted this into evidence, the issue was not preserved on appeal. (4) Because part-time justice court judges are allowed to practice law or any other profession, and because the venire members collectively affirmed their impartiality despite Judge Gates's presence at

trial, the trial court did not abuse its discretion in denying Owens’s motion for mistrial. Therefore, the Supreme Court affirmed the judgment of the Humphreys County Circuit Court.

SPECIAL CONCURRENCE

Presiding Justice Randolph specially concurred, stating that whether Judge Gates’s conduct as a jury consultant during trial violated the Code of Judicial Conduct as claimed by Owens should be determined by the Mississippi Commission on Judicial Performance pursuant to Miss. Const. art. 6, § 177A.

Affirmed - 2016-CA-01293-SCT (Oct. 25, 2018)

Opinion by Justice Maxwell - Special Concurrence by Presiding Justice Randolph

Hon. Jannie M. Lewis (Humphreys County Circuit Court)

Henry Cooper Ellenberg, II, Thomas S. Moore, Edward Blackmon, Jr., & Oby Thomas Rogers for Appellant - Charles Corbett Wimberly, III, Robert L. Gibbs, & Guy D. Perrier for Appellees

Briefed by [Tucker Hood](#)

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KPMG, LLP V. SINGING RIVER HEALTH SYSTEM

CIVIL - OTHER

CONTRACTS - PUBLIC BOARDS - MINUTES - Miss. Code Ann. § 41-13-35(3) provides that where a public board engages in business with another entity, no contract can be implied or presumed, it must be stated in express terms and recorded on the official minutes and the action of the board, and it may be enforced where enough of the terms and conditions of the contract are contained in the minutes for determination of the liabilities and obligations of the parties

CONTRACTS - PUBLIC BOARDS - BURDEN OF RECORDATION - It is the responsibility of the entity contracting with the Board, not the responsibility of the Board itself, to ensure that the contract is legal and properly recorded on the minutes of the Board

CONTRACTS - DIRECT-BENEFIT ESTOPPEL - NON-SIGNATORIES - Direct-benefit estoppel involves non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status, but then, during litigation, attempt to repudiate the arbitration clause in the contract

FACTS

In fiscal years 2008 through 2012, Singing River Health System’s (“Singing River”) former Chief Financial Officer signed engagement letters issued by KPMG, LLP (“KPMG”) regarding proposed auditing services. In fiscal years 2008 through 2012, the Singing River Audit and Compliance Committee (“Committee”) met, discussed, and approved KPMG’s proposals. Each year, the Committee’s minutes reflected the Committee’s approval of the proposals but were silent as to the relevant terms and conditions of the proposals, and the proposals were neither attached nor included in the minutes. The Singing River Board of Trustees (“Board”) met, discussed, and approved the Committee’s minutes both years. The Board’s minutes reflected the Board’s approval of the Committee’s minutes, including the Committee’s approval of the proposals, but the Board’s minutes were also silent as to the relevant terms and conditions of the proposals, and the proposals were neither attached nor included in the minutes. The Board failed to take any action concerning KPMG’s proposals in fiscal years 2010, 2011, and 2012. The Board’s minutes were devoid of any evidence that Singing River contracted with KPMG to perform services for those years. In fiscal year 2013, Singing River hired Horne, LLP (“Horne”), to conduct its annual audit. Horne informed Singing River that KPMG’s prior audits had resulted in an \$88 million overstatement of accounts receivable. On October 29, 2015, Singing River filed suit against KPMG. The Hinds County Circuit Court denied KPMG’s motion to compel arbitration and to stay the proceedings pending arbitration. KPMG appealed.

ISSUES

Whether the trial court erred in (1) applying Mississippi’s minutes rule in a way that singles out arbitration agreements for disfavored treatment and, therefore, in a manner preempted by the Federal Arbitration Act; (2) finding the terms of the contracts were not sufficiently spread across the minutes; (3) declining to give effect to the delegation provision in the parties’ contracts; (4) failing to give collateral estoppel effect to *Jones*, which found that Singing River and KPMG entered into a valid arbitration agreement; and (5) failing to address KPMG’s argument under Mississippi’s doctrine of direct-benefit estoppel.

HOLDING

(1) Because the trial court applied the minutes rule to KPMG’s letters in their entirety, and the Board’s minutes failed to include enough terms and conditions of KPMG’s letters, the trial court did not apply the minutes rule in a manner preempted by the Federal Arbitration Act. (2) Because KPMG did not meet their burden of ensuring the letters were legally and properly recorded in the Board’s minutes, and because the Board’s minutes failed to include any terms and conditions of KPMG’s 2008 and 2009 letters and failed to mention KPMG’s 2010, 2011, and 2012 letters, the terms and conditions of KPMG’s letters were not sufficiently spread across the Board’s minutes. (3) Because the letters were unenforceable in their entirety pursuant to the minutes rule, the trial court did not err by failing to give effect to the delegation clause attached to the letters. (4) Because the court in *Jones* did not consider whether the letters were spread across the Board’s minutes, no element of collateral estoppel was met. (5) Because the doctrine of direct-benefit estoppel applies to non-signatories and KPMG’s letters were signed by Singing River’s CFO at the time, and because a public board may not be bound by estoppel unless the agreement at issue is duly and lawfully entered upon its minutes, the doctrine of direct-benefit estoppel did not apply. Therefore, the Supreme Court affirmed and remanded the judgment of the Hinds County Circuit Court.

Affirmed & Remanded - 2017-CA-01047 (Oct. 25, 2018)

Opinion by Presiding Justice Randolph

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

R. David Kaufman, Amelia Toy Rudolph, Patricia Anna Gorham, & Taylor Brantley McNeel for Appellant - Edward C. Taylor & Kristi Rogers Brown for Appellee

Briefed by [Baxter Geddie](#)

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MORGAN V. XLK INT’L, LLC

CIVIL - OTHER

CIVIL PROCEDURE - MOTION PRACTICE - INTERVENTION - Pursuant to Miss. R. Civ. P. 24(c), a motion to intervene shall state the grounds and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought

CIVIL PROCEDURE - PUBLIC RECORDS - DISCLOSURE - Miss. Code Ann. § 25-61-9(7) requires all procurement contracts awarded by state agencies, the provisions of which contain the commodities purchased or the personal or professional services provided, the unit prices contained within the procurement contracts, the overall price to be paid, and the term of the contract be available for examination

FACTS

The Mississippi Department of Mental Health published a request for proposal (RFP), and eventually awarded the contract for insurance plan administration to one respondent, XLK International, LLC (“XLK”). John Morgan submitted a public records request for a copy of XLK’s successful proposal, and XLK then filed a Petition for a Protective Order to prevent the disclosure of its proposal, which contained confidential trade secrets. The chancery court entered the Protective Order. Morgan filed a Motion to Intervene, with a Motion to Set Aside Protective Order attached. After a pair of hearings, the chancery court granted Morgan’s Motion to Intervene and later ruled on his Motion to Set Aside Protective Order, determining that the Agreement between XLK and the Mississippi Department

of Mental Health could be disclosed, but the other documents submitted by XLK in its proposal remained protected. Morgan appealed.

ISSUES

Whether (1) the appeal should be dismissed because Morgan failed to refile his Motion to Set Aside Protective Order after the chancery court had granted his Motion to Intervene; (2) documents submitted by XLK in response to the RFP were subject to disclosure.

HOLDING

(1) Because failure to file pleadings separately after a Motion to Intervene is granted is not grounds for dismissal and the chancery court explicitly stated that the Motion to Set Aside Protective Order had been ordered filed, there were no grounds for dismissal of the appeal. (2) Because XLK's RFP response contained trade secrets and confidential commercial and financial information, including insurance quotes, charts showing employee cost savings, and other marketing materials designed solely to win the contract, and there was no contract with a state agency in itself, the RFP was not subject to disclosure. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2016-CA-01477-SCT (Oct. 25, 2018)

Opinion by Presiding Justice Kitchens

Hon. J. Dewayne Thomas (Hinds County Chancery Court, First Judicial Dist.)

Gene W. Gardner & Robert Moak for Appellant - John David Sanford & Brett R. Koehn for Appellee

Briefed by [Jack Schultz](#)

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SUPREME COURT - ORDERS

IN RE MEC ADMINISTRATIVE PROCEDURES

COURT ORDER

ORDER

This en banc Order by the Mississippi Supreme Court adopted proposed amendments to Sections 1.D. and 5.D. of the Administrative Procedures for Mississippi Electronic Courts, submitted by Nathan Evans, Director of the Mississippi Electronic Courts (MEC). These amendments went into effect upon entry of the Order on October 17, 2018.

[Exhibit A](#), referenced in and attached to the Order, shows the amendments adopted to the Administrative Procedures for Mississippi Electronic Courts.

Ordered - 89-R-99040-SCT (Oct. 17, 2018)

En Banc Order by Justice Coleman

Briefed by [Whitney Jackson](#)

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IN RE MISSISSIPPI RULES OF APPELLATE PROCEDURE

COURT ORDER

ORDER

This en banc Order by the Mississippi Supreme Court, made in consideration of F.M. Turner III's letter motion, amended Rules 1, 25, 27, 28, 30, 31, 32, and 40 of the Mississippi Rules of Appellate Procedure to conform with electronic filing. This amendment to the Rules became effective upon entry of the Order on October 17, 2018.

[Exhibit A](#), referenced in and attached to the Order, shows that Rules 1, 25, 27, 28, 30, 31, 32, and 40 are amended to conform with electronic filing.

Ordered - 89-R-99027-SCT (Oct. 17, 2018)

En Banc Order by Justice Coleman

Briefed by [Karen Lott](#)

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SUPREME COURT - CRIMINAL CASES

COLEMAN V. STATE

CRIMINAL - MISDEMEANOR

APPELLATE PROCEDURE - STANDARD OF REVIEW - EVIDENCE - The admittance of prejudicial evidence that fails to link the defendant to the crime alleged constitutes an abuse of discretion; and, although the abuse-of-discretion standard affords great discretion to the trial judge, the court will not hesitate to order a new trial where it considers the jury's determination of guilt to be based on extremely weak or tenuous evidence

FACTS

In March 2014, Zacharias Blanchard was shot in the head on the grounds of Club Rock, located in Oktibbeha County outside of Starkville, Mississippi. Blanchard was taken to the Oktibbeha County Hospital and subsequently transferred by Helicopter to the University of Mississippi Medical Center in Jackson, Mississippi. Upon returning to Starkville, Blanchard identified Tobias Coleman as the individual who shot him on March 30. A grand jury charged Coleman with aggravated assault and Coleman was tried in January 2017 in the Oktibbeha County Circuit Court. At trial, after the State rested, the defense called Marcus Johnson, an individual who had witnessed the shooting. During cross-examination, the State submitted a photograph of Coleman holding a hand-gun that was retrieved from Facebook. The photograph was grainy, un-dated, and taken while Coleman was in high school. The trial judge admitted the photograph noting that it was relevant because it showed Coleman with a gun "in his life." The jury found Coleman guilty of aggravated assault and the judge sentenced Coleman to twenty years in prison, with five years suspended. The trial court denied Coleman's motion for a new trial. Coleman appealed.

ISSUE

Whether the trial court erred by admitting a grainy, undated photo from Coleman's Facebook page as impeachment evidence of a witness.

HOLDING

Because admittance of prejudicial evidence at trial that does not link the defendant to the crime alleged is an abuse of discretion, and because the photograph was taken years before the alleged crime, through the testimony of a witness who denied ever seeing Coleman's Facebook page or the photograph in question, the trial court erred in admitting the photograph. Therefore, the Supreme Court reversed and remanded the judgment of the Oktibbeha County Circuit Court.

CONCURRENCE

Justice Maxwell argued that the problem at trial was not the nature of the photograph itself, but instead the manner in which the photograph was introduced as impeachment evidence. Maxwell argued that because Johnson did not testify about anything for which the photograph could be used to impeach him, that the photograph from Coleman’s Facebook page was not proper extrinsic impeachment evidence, and, as such, Coleman’s objection should have been sustained.

Reversed & Remanded - 2017-KA-00342-SCT (Oct. 25, 2018)

En Banc Opinion by Chief Justice Waller - Concurrence by Justice Maxwell

Hon. James T. Kitchens Jr. (Oktibbeha County Circuit Court)

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

Briefed by [Carson Phillips](#)

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HAWKINS V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - SIMPLE ASSAULT - ELEMENTS - One is guilty of simple assault under Miss. Code Ann. § 97-3-7 who attempts to cause and purposely, knowingly, or recklessly causes bodily injury to another

CRIMINAL LAW - SIMPLE ASSAULT - EMERGENCY MEDICAL PERSONNEL - Under Miss. Code Ann. §97-3-7(1)(b), assault upon emergency medical personnel is an aggravating circumstance; a person convicted of simple assault on emergency medical personnel shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than five years, or both

CRIMINAL PROCEDURE - INDICTMENT - SUFFICIENCY - Under *Thomas*, an indictment which fails to allege all essential elements of a crime is void; if the facts alleged in the indictment do not constitute an offense within the terms and meaning of the law or laws on which the accusation is based, the indictment is insufficient

FACTS

Julian Hawkins was charged with two counts of simple assault on “medical personnel” under Miss. Code Ann. §97-3-7(C) after he attacked a nurse and struggled against others at Pine Grove Behavioral Center. After Hawkins’s grandfather found him banging on a neighbor’s door in his underwear, an ambulance took Hawkins to Forrest General Emergency Room. The ER performed a drug test based on Hawkin’s erratic behavior, and he tested positive for cannabinoids. Forrest General transferred Hawkins to Pine Grove after placing him on psychiatric hold. On the night of the transfer, Hawkins attacked a nurse and struggled against workers who held him down after the attack. Hawkins was indicted for two counts of simple assault on medical personnel under Miss. Code Ann. § 97-3-7(C), using the general term of assault on “medical personnel.” At trial, the defense argued that the state could not prove the intent element of the statute because Hawkins was either not in his right mind or because his state of mind was caused by the drugs involuntarily given to him in the ER. The defense did not call an expert witness to testify to those claims. The State emphasized at trial that Hawkins was voluntarily intoxicated on the night of the assault and that the defense had not raised an insanity defense. A jury instruction was given that voluntary intoxication was not a defense to the crimes. The jury convicted him on one of the charges and acquitted him on the second. The court sentenced Hawkins under Miss. Code Ann. § 97-3-7(1)(b), which specifies assault on “emergency medical personnel.” Hawkins appealed.

ISSUES

Whether Hawkins (1) was insufficiently indicted; and (2) received ineffective assistance of trial counsel for failure to call an expert witness to assist with the defenses of insanity and involuntary intoxication.

HOLDING

(1) Because Hawkins was indicted under a non-existent Miss. Code Ann. § 97-3-7(C) for assault on medical personnel but sentenced under Miss. Code Ann. § 97-3-7(1)(b) which defines assault on emergency medical personnel and carries an increased sentence, the court failed to charge Hawkins with an essential element of the crime, and the sentence was improper. (2) Because it was clear from the record that Hawkins’s mental state was at issue and the court could not know without an expert witness whether there was a deficiency or prejudice in assistance of counsel, the issue was

inappropriate to address on direct appeal. Therefore, the Supreme Court affirmed Hawkins's simple assault conviction, vacated his sentence, and remanded the judgment of the Forrest County Circuit Court for resentencing.

Affirmed in Part, Vacated in Part, & Remanded - 2017-KA-00883-SCT (Oct. 25, 2018)

Opinion by Justice King

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

Hunter Nolan Aikens & George T. Holmes (Pub. Def. Office) for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Katelin Davis](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 23, 2018

COURT OF APPEALS - CIVIL CASES

AL-KHIDHR V. KING

CIVIL - STATE BOARDS & AGENCIES

SENTENCING - PROCEDURE - CREDIT FOR JAIL TIME SERVED - Miss. Code Ann. § 99-19-23 states that a prisoner shall be credited with any jail time served while awaiting trial

STATE AGENCIES - PROCEDURE - PRISONER APPEAL - Under *Roberts*, a prisoner's appeal of an MDOC decision or policy must be made in the circuit court of the county where the prisoner resides

APPEAL - REVIEW OF CONTROVERSY - MOOT CASE - Under *J.E.W.*, cases in which an actual controversy exists but the controversy has expired at the time of review become moot

FACTS

Only Al-Khidhr pled guilty to unlawful possession of a firearm by a convicted felon and possession of a controlled substance and was sentenced to a total of nine years in the custody of the Mississippi Department of Corrections (MDOC). Al-Khidhr qualified as a habitual offender, so his drug-possession sentence was enhanced. His sentencing order also stated that he would be given credit for any and all time served on the charges, and he had served 613 days before pleading guilty. Al-Khidhr filed an appeal, disputing the calculation of his parole date and credit for pre-conviction jail time. He further disputed the administrative decision that his parole date was correct and filed a petition for judicial review. He later filed a motion for reconsideration. While his appeal was pending, the Court of Appeals affirmed the dismissal of Al-Khidhr's first motion. The Court of Appeals also affirmed the denial of Al-Khidhr's request for double-credit of pre-trial imprisonment and held that credit for time served only applied to one of the prisoner's sentences, not both consecutive sentences. Al-Khidhr appealed.

ISSUE

Whether MDOC should have applied Al-Khidhr's pre-trial time of 613 days to both of his sentences.

HOLDING

Because Al-Khidhr's second appeal was filed in the incorrect venue and he had already been released from prison, his appeal was moot. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2017-CP-00269-COA (Oct. 23, 2018)

Opinion by Judge Barnes

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, Second Judicial Dist.)

Pro se for Appellant - Darrell Clayton Baughn (Att'y Gen. Office) for Appellees

Briefed by [Lauren Rogers](#)

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BAPTIST MEM’L HOSP.-N. MISSISSIPPI INC. V. MISSISSIPPI STATE DEP’T OF HEALTH

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - JUDICIAL REVIEW - BURDEN OF PROOF - The burden of proof in a dispute over an administrative agency’s decision in an adjudication rests on the challenging party

ADMINISTRATIVE LAW - CERTIFICATE OF NEED - REQUIREMENTS - In order to meet the State Health Plan’s Need Criterion to offer services, the petitioner must show that they would perform the requisite threshold procedures

FACTS

On August 27, 2015, Oxford Pre-Op & Imaging Center LLC (“OPIC”) filed a notice of intent to apply for a certificate of need with the Mississippi State Department of Health (“MSDH”). OPIC wanted to acquire MRI equipment, in addition to the imaging diagnostic services the company already offered, and begin providing MRI services in Oxford and Lafayette County. After the notice, OPIC filed a certificate-of-need application with MSDH on February 22, 2016. At the time of the application, Baptist Memorial Hospital-North Mississippi Inc. (“Baptist”) was the sole provider of MRI imaging services in Oxford and Lafayette County and, as early as 2014, had engaged in active plans to expand its MRI imaging services—including acquiring a temporary MRI unit. On May 16, 2016, MSDH published its recommendation that OPIC’s application for a certificate of need be approved. Baptist requested a public hearing, held from October 24 to 26, 2016, at which Baptist opposed the recommendation. Baptist argued that OPIC’s application failed to adhere to the requirements of the 2015 State Health Plan. On April 10, 2017, MSDH approved OPIC’s application for a certificate of need. Baptist appealed MSDH’s decision to the Hinds County Chancery Court. The chancery court affirmed. Baptist appealed.

ISSUES

Whether (1) OPIC’s certificate-of-need application met the State Health Plan’s need criterion; (2) OPIC’s application aligned with the State Health Plan’s policy on using existing MRI units; and (3) OPIC’s application did not comply with MSDH’s general review criterion on economic viability.

HOLDING

(1) Because OPIC’s physician affidavits and population-based statistical projections provided substantial evidence on which to support a decision, the hearing officer’s decision that OPIC satisfied the need criterion was upheld. (2) Because the hearing officer found OPIC’s expert testimony more credible than Baptist’s experts, and because the hearing officer considered the statistical projections in rendering his decision, the Court of Appeals concluded that the hearing officer based his decision on substantial evidence. (3) Because the hearing officer considered OPIC’s expert testimony when determining OPIC’s economic viability, the Court of Appeals found the hearing officer’s conclusion based on substantial evidence. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2017-SA-01252-COA (Oct. 23, 2018)

Opinion by Chief Judge Lee

Hon. William H. Singletary (Hinds County Chancery Court, First Judicial Dist.)

Barry K. Cockrell for Appellants - Jeffrey Scott Moore & Steven Blake Adams for Appellees

Briefed by [Michael Lambert](#)

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BROWN-HOWLE V. CMTY. BANK

CIVIL - TORTS OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

CIVIL - STATUTE OF LIMITATIONS - FAILURE TO PROSECUTE - Dismissal due to a lack of a conservator and lack of approval from the chancery court in cases where a mentally incompetent person is a party qualifies as dismissal for failure to prosecute

CIVIL - STATUTE OF LIMITATIONS - SAVINGS STATUTE - Miss. Code Ann. § 15-1-69 does not apply when the filing of a complaint does not toll the statute of limitations if the complaint is later dismissed without prejudice for want of prosecution

CIVIL - TORTS - CONTINUING TORTS - A continuing tort is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action; continued ill effects without continued wrongful conduct does not qualify as a continuing tort

FACTS

On July 28, 2008, Elaine Brown secured a mortgage loan using her residential property in Meridian, Mississippi as collateral. The funds from the loan went to Brown's account with Community Bank, then to another account, this one held by both Brown and her neighbor, Mike Holmes. CitiMortgage was assigned the mortgage, and when Brown failed to make mortgage payments, CitiMortgage initiated foreclosure proceedings, with the property ultimately being sold on October 14, 2016. On November 2, 2009, Brown filed a complaint against Community Bank, CitiMortgage, Mike and Angela Holmes, and Southern Waste as Mike Holmes' employer. In it, Brown claimed to be mentally incompetent. Four years later, Brown's daughter filed for conservatorship over Brown. That filing was dismissed for failure to meet the requirements to establish a conservatorship. Brown's complaint against CitiMortgage was dismissed without prejudice on January 29, 2015, and Brown could refile once she had a conservator and the lawsuit was approved by the chancery court. Brown's daughter petitioned for conservatorship once more, and was appointed conservator on June 22, 2015. CitiMortgage, Community Bank, and Southern Waste filed motions for summary judgment against Brown's complaint, citing the three-year statute of limitations. The court granted these motions. Brown appealed.

ISSUES

Whether (1) the circuit court erred in finding that its order dismissing Brown's complaint against CitiMortgage was a dismissal for failure to prosecute; (2) Miss. Code Ann. §§ 15-1-59 and 15-1-69 operated to toll the statute of limitations; and (3) both CitiMortgage's and Community Bank's actions constituted a continuing tort.

HOLDING

(1) Because of the time between the original filing of the complaint and of the petitions for conservatorship and the initial lack of approval from the chancery court, Brown was found to have repeatedly disregarded procedural directives of the court, and thus the ruling of a dismissal for failure to prosecute was proper. (2) Because the testimony as to Brown's mental incompetence at the time the action accrued amounted to one doctor who interviewed Brown two years later, Brown failed to create a genuine issue of material fact and Miss. Code Ann. § 15-1-59 did not apply. Further, because dismissal for failure to prosecute is not a matter of form, Miss. Code Ann. § 15-1-69 did not apply. (4) Because the action giving rise to the claims took place on the day Brown obtained the loan, it was not a continuing tort despite the continued ill effects. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2017-CA-00628-COA (Oct. 23, 2018)

Opinion by Chief Judge Lee

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

Wayne E. Ferrell Jr. & Bradley S. Clanton for Appellant - J. Richard Barry, Reed Cochran Darsey, Reid Stephens Manley, James Cornelius Griffin, Matthew Richard Watson, & Christopher Daniel Meyer for Appellees

Briefed by [James Adamoli](#)

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HOFFMAN V. HOFFMAN

CIVIL - DOMESTIC RELATIONS

DIVORCE - GROUNDS - CRUEL TREATMENT - Habitual cruel and inhuman treatment is conduct that either: (1) endangers life, limb, or health, or creates a reasonable apprehension of such danger and renders the relationship unsafe for the party seeking relief, or (2) is so unnatural and infamous as to render the marriage revolting to the non-offending spouse, making it impossible to carry out the duties of the marriage, therefore destroying the basis for its continuance

APPELLATE PROCEDURE - RULINGS - FACTS OUTSIDE THE RECORD - The parties, not the courts, are responsible for producing evidence sufficient to support their contentions; appellate courts may decline to search for information that neither party presents

APPELLATE PROCEDURE - REVIEW - ISSUES NOT RAISED - It is well-settled that issues presented for the first time on appeal are procedurally barred from consideration

APPELLATE PROCEDURE - REMEDIES - ATTORNEY'S FEES - Generally, on appeal this Court awards attorney's fees of one-half of what was awarded in the trial court; however, allowing attorney fees on appeal in an amount equal to one-half of the fees allowed by the trial court may not be fair and equitable in all cases

FACTS

Brooke Hoffman requested a divorce from her husband, Mike Hoffman, alleging both habitual cruel and inhumane treatment and also constructive desertion. Brooke claimed that, in an altercation with Mike, he stabbed her in the back with a pencil. The police report noted that the officer did not see signs of physical abuse. Brooke left the marital home in October 2012. She claimed that Mike threw out her belongings and vandalized her new home, but Brooke did not provide any proof of her assertion. Additionally, Brooke implied, but did not explicitly allege, that Mike was having an affair with one of Brooke's relatives. She also did not provide any evidence for this assertion. In 2014, Mike filed for bankruptcy and failed to disclose a debt in his bankruptcy proceeding. In September 2014, the chancery court found that Brooke was not entitled to a divorce and held her in contempt for denying Mike's visitation with his children. At a later hearing, Mike was awarded attorney's fees related to the hearings. Brooke appealed.

ISSUES

Whether (1) the trial court erred in finding that Brooke failed to prove the grounds for her divorce; (2) the trial court erred in awarding Mike attorney's fees because the doctrine of judicial estoppel barred him from doing so since he failed to disclose a debt in the bankruptcy proceedings or, alternatively the debt was discharged in the bankruptcy proceedings; and (3) Mike was entitled to appellate attorney's fees.

HOLDING

(1) Because Brooke only alleged one instance of physical violence with a handful of other specific instances of some form of abuse, and because Brooke's allegations were undermined by both a police report and a lack of evidence, the trial court did not clearly err in finding that she was not entitled to a divorce. (2) Because Brooke did not raise the issue of judicial estoppel at the chancery court, and because Brooke did not submit any evidence that Mike actually discharged his debt to his attorneys in his bankruptcy proceedings, the court did not err in awarding Mike attorney's fees because issues raised for the first time on appeal are procedurally barred, and the parties were responsible for submitting evidence sufficient to support their contentions. (3) Because the initial fees awarded by the chancery court totaled over \$43,000, and because allowing an additional recovery of half of the fees awarded by the trial court is not equitable in all cases, the appellate court denied Mike's request for appellate attorney's fees subject to a future motion outlining the actual costs of Mike's appeal.

Affirmed - 2017-CA-00469-COA (Oct. 23, 2018)

Opinion by Judge Wilson

Hon. William H. Singletary (Hinds County Chancery Court, First Judicial Dist.)

Pamela L. Hancock & Jeffrey Bryan McGuire for Appellant - J. Peyton Randolph II & Rick D. Patt for Appellee

Briefed by [Corban Snider](#)

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CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - DIVORCE - DIVISION OF ASSETS - A court does not abuse its discretion in awarding one party to a divorce proceeding with assets and debts with a greater net value than the other party

DOMESTIC RELATIONS - DIVORCE - UNSUPERVISED VISITATION - Unsupervised visitation granted to a parent with past and present drug usage who has never passed a drug test is sufficient grounds for reversal and remand to determine whether unsupervised visitation is in the best interest of the child

DOMESTIC RELATIONS - APPEAL - PRESERVATION OF ISSUE - Any issue presented for the first time on appeal is procedurally barred from consideration

FACTS

Christina Leblanc filed for a divorce from Billy Leblanc after twenty-three years of marriage on the grounds of habitual cruel and inhuman treatment, habitual use of illegal drugs, and adultery or, in the alternative, irreconcilable differences. At trial, the Leblancs consented to an irreconcilable differences divorce and agreed that the chancery court would decide issues related to custody and support of their children, equitable division of the marital estate, and alimony. The court granted Christina physical custody of the three minor children, with joint legal custody and visitation for Billy. The court also divided the marital estate and ordered Billy to pay rehabilitative alimony of \$250 per month for eighteen months and child support of \$1,040 per month. Christina appealed.

ISSUES

Whether the chancery court (1) miscalculated Billy's child support obligation; (2) committed multiple errors in the equitable division of the marital estate; (3) awarded inadequate alimony; (4) erred by awarding Billy unsupervised visitation despite his history of drug use; (5) erred by not holding Billy in contempt for failing to pay the mortgage on the marital home; and (6) erred by allowing Billy to answer the complaint for divorce more than a year after he was served.

HOLDING

(1) Because Billy was obligated to pay twenty-two percent of his adjusted gross income, but the chancery court awarded only twenty percent, the chancery court miscalculated Billy's child support. (2) Because Christina received assets and debts with a greater net value than Billy, the chancery court did not abuse its discretion by assigning Christina more debt than Billy. (3) Because Christina's alimony award was unjust in comparison to Billy's gross income, the chancery court awarded inadequate alimony. (4) Because the chancery court must keep the best interest of the child as the court's paramount concern, and Billy continued to test positive for methamphetamine, the chancery court erred in awarding Billy unsupervised visitation without providing any explanation as to why supervision was not necessary. (5) Because the parties did not list contempt among the issues to be decided by the court and failed to obtain a ruling, Christina waived the issue of contempt on appeal. (6) Because Christina never raised the issue of Billy's untimely answer, this issue was procedurally barred from consideration on appeal. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Forrest County Chancery Court.

Affirmed in Part; Reversed & Remanded in Part - 2017-CA-00600-COA (Oct. 23, 2018)

Opinion by Judge Wilson

Hon. Deborah J. Gambrell (Forrest County Chancery Court)

Carol Ann Estes Bustin for Appellant - Nancy Steen for Appellee

Briefed by [Chadwick Lamar](#)

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PETTERSEN V. PETTERSEN

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - CHILD SUPPORT - The chancery court maintains discretion on whether or not to award child support

FAMILY LAW - DOMESTIC RELATIONS - DATE OF DEMARCATION - The date of demarcation can be the date of separation at the earliest and the date of divorce at the latest, and it is within the chancellor's discretion to discern the actual date of demarcation

FAMILY LAW - PROPERTY DIVISION - MARITAL PROPERTY - The court considers all facts and circumstances, including noneconomic contributions, when determining how marital property should be divided at the dissolution of the marriage

FACTS

Frederick and Audrey Pettersen filed for divorce based on irreconcilable differences. They agreed to let the court resolve the equitable distribution of marital assets and child custody. The court did not award child support, determined the date of demarcation as the date of the temporary hearing, divided the couples' retirement accounts, and determined the classification of miscellaneous and real property as marital or nonmarital. Frederick appealed.

ISSUES

Whether the court abused its discretion (1) in failing to award Frederick child support; (2) in determining the date of demarcation; (3) in the equitable division of the couples' retirement accounts; (4) by classifying miscellaneous and real property assets as marital property; and (5) in how it classified other assets as non-marital.

HOLDING

(1) Because the couple's youngest child turned twenty-one two months after the judgement, lived away from both parents at college, and the chancellor maintains discretion on whether to award child support, the court found no merit in this claim. (2) Because the couple attempted several reconciliations until a few months before filing for divorce, and agreed that the date of the temporary hearing was the date of demarcation, the court found no merit in this claim. (3) Because the couple comingled Frederick's IRA disbursements with their personal accounts and managed the accounts together throughout the marriage, the court found the division of the accounts to not be within the bounds of the chancellor's discretion. (4) Because Frederick was awarded the rental properties in the divorce, the court found no abuse of discretion in determining Frederick to be responsible for the management expenses connected to those properties. (5) Because the court had already determined the chancellor did not abuse his discretion regarding Audrey's IRA accounts, and Frederick was awarded sole ownership of the rental properties and rental proceeds, there was no abuse of discretion regarding the miscellaneous assets. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2017-CA-00089-COA

Opinion by Judge Barnes

Hon. Michael L. Fondren (Jackson County Chancery Court)

G. Charles Bordis IV for Appellant - Ross Jonathan Franco for Appellee

Briefed by [Andie Szabo](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

VAN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FAILURE TO FILE - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FUNDAMENTAL-RIGHT EXCEPTION - A motion for post-conviction relief of an unlawful sentence must appear to have at least "some basis for the truth of the claim" to implicate the fundamental-right exception and waive procedural bars

FACTS

In 2012, Jerome Van Jr. pled guilty to armed carjacking, armed robbery, and kidnapping. Van filed his first PCR motion in October 2013, and it was denied. He filed his second PCR motion in September 2015, and it was also denied. He filed his third PCR motion in April 2017, and it was denied. Van appealed.

ISSUES

Whether the Uniform Post-Conviction Collateral Relief Act procedurally barred (1) an ineffective assistance of counsel claim brought after the three-year statute of limitations; (2) a fundamental-right claim alleging an unlawful sentence.

HOLDING

(1) Because Van indicated during the plea hearing that he was satisfied with his attorney and acknowledged his participation in the crime, his ineffective assistance of counsel claim was procedurally barred. (2) Because Van merely asserted he received an unlawful sentence, his claim was insufficient to implicate the fundamental-right exception. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2017-CP-00931-COA (Oct. 23, 2018)

Opinion by Judge Greenlee

Hon. John Huey Emfinger (Madison Country Circuit Court)

Pro se for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee

Briefed by [Nathaniel Snyder](#)

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COURT OF APPEALS - CRIMINAL

ARMSTRONG V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - APPEAL - LINDSEY BRIEF - On appeal, where the appellant’s counsel does not find arguable issues for review, counsel must file a *Lindsey* brief certifying there are no arguable issues

CRIMINAL PROCEDURE - APPEAL - LINDSEY BRIEF - Appellant’s counsel must send the appellant a copy of the *Lindsey* brief and inform him that he has the right to file a pro se supplemental brief

CRIMINAL PROCEDURE - APPEAL - LINDSEY BRIEF - Should the defendant raise any arguable issues or should the appellate court discover any arguable issues, the court must require appellate counsel to submit supplemental briefing; the appellate court must then consider the case on its merits and render a decision

FACTS

Byron Armstrong admitted to killing James Hartfield but claimed he did so in self-defense. Hartfield came to Armstrong’s house to discuss a prior drug deal. A witness testified that Hartfield drew a gun on Armstrong, Armstrong took the gun from Hartsfield, and then Armstrong shot Hartsfield three times, killing him. At trial, Armstrong was convicted of murder and possession of a weapon by a convicted felon. Upon reviewing the record, Armstrong’s counsel filed a *Lindsey* brief. Armstrong did not file a pro se supplemental brief. Armstrong appealed.

ISSUE

Whether any arguable issues existed to support an appeal.

HOLDING

Because Armstrong’s counsel complied with the requirements set forth in *Lindsey*, and there were no arguable issues for appeal, the conviction and sentence were upheld. Therefore, the Court of Appeals affirmed the judgment of the Perry County Circuit Court.

Affirmed - 2017-KA-00547-COA (Oct. 23, 2018)

Opinion by Judge Greenlee

Hon. Jon Mark Weathers (Perry County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Katy Taylor Gerber (Att’y Gen. Office) for Appellee

Briefed by [Zachary Flowers](#)

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HATHORNE V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - INDICTMENT - SUFFICIENCY - An indictment is generally sufficient if it tracks the language of the relevant criminal statute

CRIMINAL LAW - TRAFFICKING - CONTROLLED SUBSTANCE - In order to prove trafficking, the prosecution must show that the defendant (1) possessed the controlled substance as set forth in Miss. Code Ann. § 41-29-139(c), and (2) the weight of the drugs was over thirty grams to warrant the greater punishment under Miss. Code Ann. § 41-29- 139(f)(1)

CRIMINAL LAW - CONSTRUCTIVE POSSESSION - PROXIMITY - Constructive possession may be shown by establishing that the drugs involved were subject to the defendant’s dominion or control; proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances

FACTS

In November 2015, Kelton Hathorne was arrested after speeding away from an officer during a traffic stop. The officer ultimately caught up with Hathorne, and Hathorne proceeded to flee the scene. Hathorne was arrested. After removing Hathorne from the patrol car at the police station, the officer found a Crown Royal bag containing marijuana, Xanax, counterfeit money, and ethylone. The bag had been stuffed under the back seat, and the officer testified that he routinely checks this area of his car and that it was not in the vehicle before the arrest of Hathorne. The circuit court sentenced Hathorne to thirty years in the custody of the Mississippi Department of Corrections, with ten years suspended, twenty years to serve, and five years of post-release supervision. Hathorne filed post-trial motions, which the trial court denied. Hathorne appealed.

ISSUES

Whether the trial court (1) issued a defective indictment; and (2) whether Hathorne’s conviction was legally sufficient or against the overwhelming weight of evidence.

HOLDING

(1) Because the indictment reflected the required language of the statute, the indictment was not defective. (2) Because Hathorne had constructive possession over thirty grams of the controlled substance ethylone, the officer’s patrol car was clean of any drugs before Hathorne was arrested, and the drugs were found immediately after Hathorne was removed from the car, the weight of the evidence supported the guilty verdict. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2017-KA-00811-COA (Oct. 23, 2018)

Opinion by Judge Greenlee

Hon. Jon Mark Weathers (Forrest County Circuit Court)

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

Briefed by [Catherine Pettis](#)

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