

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 4, 2018**SUPREME COURT - CIVIL CASES****FRESENIUS MEDICAL CARE HOLDINGS, INC. V. HOOD****CIVIL - OTHER**

CIVIL PROCEDURE - DISCOVERY - PRIVILEGED DOCUMENTS - Documents that are prepared for patient safety purposes and not for the purpose of obtaining legal advice are not protected by attorney client privilege

CIVIL PROCEDURE - DISCOVERY - PRIVILEGED DOCUMENTS - Before submitting an order on documents claiming privilege, the court must analyze each item and each claim of privilege

CIVIL PROCEDURE - DISCOVERY - SPECIAL MASTER - An alleged violation of Miss. R. Civ. P. 53 will be rendered moot if the underlying order is withdrawn or set aside by the court

FACTS

The State filed a civil action against Fresenius Medical Care Holdings, Inc. (“Fresenius”) under the Mississippi Consumer Protection Act, alleging that one of Fresenius’s products, GranuFlo, was defective. During discovery, Fresenius withheld documents that it thought were privileged, including what it called attorney notifications and public relations documents, but did not provide a privilege log for these documents. The State filed a motion to compel, and alternatively asked the chancery court to impose sanctions under Miss. R. Civ. P. 37 for gross indifference to discovery obligations or by ordering Fresenius to pay attorney’s fees and to produce their privilege log within fourteen days. Fresenius then provided a privilege log to the State, but the State filed a reply stating that Fresenius had produced a privilege log with largely irrelevant materials. The chancery court ordered that Fresenius produce all documents which were responsive to the State’s request, and that all public relations documents and attorney notifications were to be submitted for in camera review. The chancery court also appointed a special master to hear the discovery issues and recommend a ruling to the chancery court, and special master recommended that the attorney notifications and public relations documents were not privileged. The chancery court then entered an order accepting the recommendation. Fresenius objected, alleging a violation of Miss. R. Civ. P. 53(g). After a hearing on the matter, the chancery court granted the State’s motion to compel, and ruled that the attorney notifications and public relations documents were not privileged. Fresenius sought interlocutory review of the chancery court’s order.

ISSUES

Whether the chancery court (1) erred in ordering the production of responsive emails and email attachments not separately logged and not previously produced; (2) erred by ordering Fresenius to produce attorney notifications; (3) erred in ordering Fresenius to produce public relations documents; and (4) properly followed Miss. R. Civ. P. 53.

HOLDING

(1) Because the chancery court properly exercised its discretion in determining that every email communication and attachment should have been logged so that the State could ascertain whether a privilege existed, the chancery court did not err in ordering production of emails not separately logged or previously produced. Further, the chancery court had authority under Miss. R. Civ. P. 37 to impose sanctions based on Fresenius’s gross indifference to discovery violations. (2) Because the attorney notifications were prepared for patient safety purposes and not for the purpose of obtaining legal advice, they were not protected by attorney-client privilege. Further, because the attorney notifications were prepared by nurses and sent to medical personnel in the ordinary course of medical business, they were not protected by work-product privilege. (3) Because the chancery court ordered the public relations documents to be produced as a

whole without sufficiently analyzing each item and each claim of privilege, the chancery court erred in ordering Fresenius to produce public relations documents. (4) Because the chancery court set aside its order to accept the special master's recommendation and held an entirely new hearing to consider the same issue that had been presented to the special master, any violation of Miss. R. Civ. P. 53 was rendered moot. Therefore, the Supreme Court affirmed in part and reversed and remanded in part the judgment of the DeSoto County Chancery Court.

Affirmed & Remanded - 2016-IA-01385-SCT (Oct. 4, 2018)

En Banc Opinion by Justice Coleman

Hon. Percy L. Lynchard, Jr. (DeSoto County Chancery Court)

Roy D. Campbell, III, W. Wayne Drinkwater, Jr., Margaret Oertling Cupples, Simon Turner Bailey, Edward L. Dowd, Jr., James Forrest Bennett, Megan Susan Heinsz, Gabriel E. Gore, Lisa S. Hoppenjans, Kelly J.H. Murrie, Leigh Anne Hodge, Kevin Christopher Newsom, & Maria Durant for Appellants - Jacqueline H. Ray, George W. Neville, Donald L. Kilgore, Robert A. Malouf, Richard T. Phillips, Russell W. Budd, J. Burton LeBlanc, IV, Laura J. Baughman, S. Ann Saucer, & Jesse Mitchell, III (Att'y Gen. Office) for Appellee

Consolidated with:

Affirmed in Part, Reversed & Remanded in Part - 2017-IA-00443-SCT (Oct. 4, 2018)

En Banc Opinion by Justice Coleman

Hon. Percy L. Lynchard, Jr. (DeSoto County Chancery Court)

Roy D. Campbell, III, W. Wayne Drinkwater, Jr., Margaret Oertling Cupples, Simon Turner Bailey, Edward L. Dowd, Jr., James Forrest Bennett, Megan Susan Heinsz, Gabriel E. Gore, Lisa S. Hoppenjans, Kelly J.H. Murrie, Leigh Anne Hodge, Kevin Christopher Newsom, & Maria Durant for Appellants - Jacqueline H. Ray, George W. Neville, Donald L. Kilgore, Robert A. Malouf, Richard T. Phillips, Russell W. Budd, J. Burton LeBlanc, IV, Laura J. Baughman, S. Ann Saucer, & Jesse Mitchell, III

Briefed by [Yance Falkner](#) & [Zach Flowers](#)

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NEWSOME V. PEOPLES BANCSHARES

CIVIL - OTHER

CIVIL PROCEDURE - MOTION PRACTICE - SUMMARY JUDGMENT - Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and the evidence must be viewed in the light most favorable to the non-moving party

CIVIL PROCEDURE - EQUITY - STATUTE OF REPOSE - As contemplated by the Mississippi statute of repose, a funds transfer requires a bank-to-bank transfer for the benefit of the beneficiary of the originator's payment order

APPELLATE PROCEDURE - PRESERVATION - SPECIFIC - An argument is precluded from being raised on appeal if it is not raised in some form, in brief, at trial, or otherwise, at the trial level

FACTS

Victoria Newsome received a significant settlement as a result of a medical malpractice suit. The trial court in that suit appointed her mother, Marilyn Newsome as conservator for the settlement. Keely McNulty was designated as the attorney to arrange the conservatorship. The court ordered a home be built using the funds in the conservatorship, which were deposited at People's Bank (the "Bank"). Chris Dunn helped Newsome open the account, which designated Newsome as the only authorized signor. McNulty drafted court orders to provide for the release of funds from the account, though the orders did not include specific guidance on the method of disbursement. McNulty specifically requested cashier's checks to obtain the money. Following McNulty's requests, the bank disbursed money from the account through bank-issued cashier's checks that Dunn signed. The withdrawals were shown on Newsome's statements as miscellaneous debits, but Newsome did not receive regular statements reflecting the status of the account.

Newsome filed suit, alleging conspiracy, fraud, breach of contract, breach of the duty of good faith and fair dealing, negligence per se, gross negligence, and intentional infliction of emotional distress against the Bank, Dunn, and others. The Bank and Dunn filed motions for summary judgment arguing that Newsome's claims were barred by the statute of repose, and that the Bank and Dunn were not at fault because McNulty had authority to act on Newsome's behalf. Newsome argued that she was entitled to summary judgment for liability and actual damages. The trial court denied Newsome's motion and the Bank and Dunn's motions on the statute of repose issue. The trial court granted the Bank and Dunn's motions as to McNulty's authority, effectively dismissing them from the suit. Newsome appealed and the Bank and Dunn cross-appealed.

ISSUES

Whether (1) the trial court erred by failing to grant the Bank and Dunn's motion for summary judgment under the statute of repose; (2) the trial court erred in granting summary judgment to the Bank and Dunn due to McNulty's actual, implied, or apparent authority; (3) the duty to review statements contained in the deposit agreement warranted summary judgment; (4) the Uniform Commercial Code displaces Newsome's common-law claims; (5) the Bank risked contempt of court if it refused to comply with the trial court's orders; and (6) Dunn was entitled to summary judgment as to claims against him in his individual capacity.

HOLDING

(1) Because the cashier's checks do not qualify as funds transfers under Miss. Code Ann. § 75-4A-104, the statute of repose did not apply, and the denial of summary judgment was affirmed. (2) Because the implied and apparent authority questions are issues of conflicting material facts, a jury question existed regarding these issues, and summary judgment was inappropriate. (3) Because the deposit agreement required an analysis under Miss. Code Ann. § 75-4-103, the duty to review statements clause of the agreement did not bar the liability of the Bank and Dunn, and summary judgment was not proper. (4) Because Newsome's common law claims were not barred by the Uniform Commercial Code, this issue was without merit. (5) Because the Bank and Dunn were entitled to notice and an opportunity to be heard before being held in contempt of court, their argument that their actions were an attempt to avoid contempt were without merit. (6) Because Newsome's argument that Dunn was liable had no supporting authority, summary judgment was appropriate. Therefore, the Supreme Court affirmed in part, reversed and remanded in part, and affirmed on cross-appeal the judgment of the Simpson County Chancery Court.

Affirmed in Part, Reversed & Remanded in Part; Affirmed on Cross-Appeal - 2017-CA-00375-SCT (Oct. 4, 2018)

Opinion by Justice Chamberlin

Hon. James D. Bell (Simpson County Chancery Court)

W. Terrell Stubbs for Appellant - Lindsey O. Watson, William C. Brabec, & Timothy J. Anzenberger for Appellees

Briefed by [David Wellen](#)

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SUPREME COURT - ORDERS

COOPER V. STATE

COURT ORDER

PAROLE RECOMMENDATION - DENIAL OF REQUEST - APPEALS - The decision to recommend or not to recommend parole is purely a discretionary power and fails to implicate an appealable judgment unless exercised for constitutionally impermissible reasons, such as race or gender

FACTS

On April 4, 2018, Nathaniel Cooper filed a fourth motion seeking a parole recommendation in the Rankin County Circuit Court. When that motion was denied, Cooper then filed an appeal with the Mississippi Supreme Court on May

3, 2018. The Clerk then issued a show cause notice to Cooper, asking him to state why his appeal should not be dismissed for lack of an appealable judgment.

ORDER

Cooper's response stated no satisfactory reason as to why his appeal implicated an appealable judgment. The parole board's decision not to recommend parole is a discretionary decision and only implicates an appealable judgment if the decision is based on constitutionally impermissible grounds, such as race or gender. Cooper's submission to the Mississippi Supreme Court did not allege a factual basis implicating either race or gender in the decision to deny his parole. Therefore, the Mississippi Supreme Court dismissed his appeal for lack of an appealable judgment.

SPECIAL CONCURRENCE

Justice King specially concurred to set out the appropriate law for the decision of the Mississippi Supreme Court. Whereas the order itself merely stated that the circuit court order failed to state an appealable judgment, Justice King provided the applicable rule, stated above, to clarify the law that made dismissal of the appeal the correct decision.

Dismissed - 2018-TS-00659 (Oct. 3, 2018)

En Banc Order by Justice Maxwell II - Special Concurrence by Justice King
Briefed by [Corban Snider](#)

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HIGGINBOTHAM V. STATE

COURT ORDER

CRIMINAL PROCEDURE - SENTENCING - PAROLE ELIGIBILITY - The denial of parole recommendation does not implicate an appealable judgment and is not subject to appellate review

FACTS

James Higginbotham filed a motion seeking a parole recommendation. On March 30, 2018 the circuit court denied the motion. This Court issued a Show Cause Notice to Higginbotham on April 2, 2018 seeking a response as to why the appeal should not be dismissed for lack of appealable judgment.

ORDER

The Supreme Court concluded the circuit order failed to implicate an appealable judgment. Accordingly, this Court dismissed this appeal.

SPECIAL CONCURRENCE

Justice King specially concurred to provide more information than the majority as to why he thought the appeal should be dismissed. He argued that the decision to recommend parole is a discretionary power and is not subject to appellate review unless exercised for constitutionally impermissible reasons, such as race or gender. Because this submission does not suggest the order was predicated on a constitutionally impermissible reason, he would find that the Supreme Court should dismiss the appeal.

Dismissed - 2018-TS-00483 (Oct. 3, 2018)

En Banc Opinion by Justice Maxwell - Special Concurrence by Justice King
Briefed by [Nathaniel Snyder](#)

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IN RE COOLEY

COURT ORDER

CIVIL PROCEDURE - PRO SE - PETITION FOR GUARDIANSHIP - Petitioner may proceed pro se for a petition for guardianship

FACTS

The Chancery Clerk denied Petitioner, Andre Cooley, petition for guardianship without representation by legal counsel when petition filed pro se. Petitioner petitioned for writ of mandamus ordering respondent to allow petitioner to proceed pro se chancery court.

ORDER

The Supreme Court granted petition for writ of mandamus ordering respondent to allow petitioner to proceed pro se in the chancery court.

OBJECTION

Justice Coleman objected, asserting that this matter was not properly before the court because the Mississippi Constitution gives the Legislature explicit authority to set circuit court appellate jurisdiction.

Granted - 2017-M-00758 (Oct. 4, 2018)

En Banc Order by Justice King - Objection by Justice Coleman

Briefed by [Catherine Pettis](#)

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JONES V. STATE

COURT ORDER

CRIMINAL LAW - PAROLE RECOMMENDATION - APPEALABLE ISSUES - The decision to recommend or not to recommend parole is purely a discretionary power and is not subject to appellate review unless exercised for constitutionally impermissible reasons, such as race or gender

FACTS

Jessie Jones filed a motion seeking a parole recommendation in the Circuit Court of Tate County. The circuit court denied the motion. Jones appealed.

ORDER

This en banc order by the Mississippi Supreme Court, made in consideration of the Court's own motion to dismiss, Jones's response, and the facts of the case, found that the circuit court's order failed to implicate an appealable judgment, and ordered the appeal be dismissed. The order also taxed to Jones the costs of the appeal.

SPECIAL CONCURRENCE

Justice King argued that the decision to recommend or not to recommend parole is purely a discretionary power and is not subject to appellate review unless exercised for constitutionally impermissible reasons, such as race or gender, and the present submission provided no factual basis to suggest the decision was predicated on a constitutionally impermissible reason.

Dismissed - 2018-TS-00773 (Oct. 3, 2018)

En Banc Order by Justice Maxwell - Special Concurrence Justice King

Briefed by [Chadwick Lamar](#)

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SUPREME COURT - CRIMINAL

BLAKE V. STATE

CRIMINAL - FELONY

EVIDENCE - RELEVANCE - EXCLUSION - Miss. R. Evid. 403 provides that relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice

EVIDENCE - HEARSAY - TENDER AGE RULE - Under Miss. R. Evid. 803(25), a statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if (1) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability, and (2) the child either testifies at the proceedings, or is unavailable as a witness

EVIDENCE - IMPEACHMENT - INCONSISTENT TESTIMONY - The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity

FACTS

While attending a barbeque, Charles Blake was accused of inserting his finger into the buttocks of a seven-year-old boy, Robert. Upon hearing of the incident, Robert's mother charged at Blake and he fled the barbeque, leaving his bag at the house. When Blake was questioned by the police about the incident, he requested that his bag be returned to him from the house. When the bag was retrieved by police and brought to the station, Sergeant Starks opened the bag and removed items including lubricant and rubber gloves in front of Blake. Blake made no objection to Starks's examination of the bag and contents, which were photographed and returned to Blake. Blake was charged with sexually penetrating Robert. Shortly before his trial, Blake moved for a continuance in order to locate the emergency room physician who examined Robert. The trial court denied Blake's motion. At trial, Starks testified and introduced, over Blake's objection, pictures of Blake's bag and its contents. Robert's sisters also testified under the tender-years exception about Robert's statements immediately following the assault. Blake's counsel attempted to recall Starks to the stand to impeach Robert's mother, but the State objected. Blake's counsel introduced medical records from Robert's emergency room visit but the trial court struck the emergency-room doctor's diagnosis of fondling because the description of fondling may have been misleading. The jury found Blake guilty of sexual battery. Blake appealed.

ISSUES

Whether the trial court (1) violated Blake's Sixth Amendment right to present a complete defense by denying Blake's request to recall Starks, denying Blake's request for a continuance, and redacting the doctor's diagnosis; (2) whether erred in admitting the tender years testimony; and (3) erred in admitting into evidence the contents of Blake's bag.

HOLDING

(1) Because the evidence Blake sought to introduce was not an inconsistent statement, the evidence was not proper for impeachment. Further, because Blake failed to show due diligence in attempting to locate the emergency room physician, the trial court was within its discretion to deny Blake's motion for a continuance. Finally, because the diagnosis gave no indication to the legal criteria of the statutory crime of fondling, the trial court did not abuse its discretion in excluding the medical diagnosis for being misleading. (2) Because the trial court made thorough on-the-record findings as to why Robert's statements had substantial indicia of reliability, it did not abuse its discretion in allowing other witnesses to testify. (3) Because Blake asked for police assistance in retrieving his bag and Starks had a legitimate purpose in conducting an inventory search, the search was not unreasonable. Additionally, the contents of the bag had enough probative value to be admitted and the evidence was not unfairly prejudicial. Therefore, the Supreme Court affirmed the judgment of the Coahoma County Chancery Court.

DISSENT

Justice King argued that because none of the bag's contents were used in the crime and no evidence from the bag was in the room where the crime took place, the evidence recovered from the bag was negligible. He further argued that, while the gel lubricant and gloves found in the bag may be relevant evidence, it was more prejudicial than probative. Therefore, he would find the trial court abused its discretion by admitting the contents of the bag into evidence.

Affirmed - 2015-KA-00434-SCT (Oct. 4, 2018)

En Banc Opinion by Justice Maxwell - Dissent by Justice King

Hon. Kenneth L. Thomas (Coahoma County Circuit Court)

Hunter Nolan Aikens & George T. Holmes (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Ryan Overturf](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 2, 2018

COURT OF APPEALS - CIVIL CASES

BOURGEOIS V. CITY OF BAY ST. LOUIS CIVIL SERV. COMM'N

CIVIL - STATE BOARDS & AGENCIES

CIVIL - ADMINISTRATIVE HEARINGS - RULINGS - There is a presumption that the officers of an administrative hearing acted honestly and fairly in the decision-making process and the process is presumed correct absent some showing of personal or financial interest or misconduct evidence

CIVIL - ORDINANCE PROCEDURES - MINOR DEVIATIONS EXCEPTION - A Bay St. Louis local ordinance states that "inadvertent and minor deviations from established procedures which do not substantively impair an employee's rights shall not be the basis for overturning a job action"

ADMINISTRATIVE AGENCIES - TERMINATION PROCEDURES - APPEALS - So long as substantial evidence exists, an agency's finding must be allowed to stand even though there might be room for disagreement on that issue

FACTS

Louis Bourgeois was fired from being a fire inspector when he requested that a police officer run a license plate number belonging to the current boyfriend of Bourgeois's former girlfriend. The City of Bay St. Louis' Civil Service Commission and the Hancock County Circuit Court affirmed his dismissal. Bourgeois appealed.

ISSUES

Whether (1) the circuit court utilized the correct governing law; (2) the denial to review the commissioners' non-recusal was proper; (3) the correct procedure for termination was followed; (4) the circuit court erred in disallowing testimony of potential criminal backgrounds of other employees; and (5) the facts and merits of the termination were sufficient.

HOLDING

(1) Because the City of Bay St. Louis does not fit into the category of a municipality under Miss Code Ann. § 21-31-1(2), the controlling authority was House Bill 1367. (2) Because the commissioners were lawfully appointed and there was no evidence of personal or financial interest or misconduct, the commissioners' refusal to disqualify themselves was not reversible error. (3) Because Bourgeois's complaints about the procedure were minor and did not substantially impact his firing, there was no reversible error. (4) Because the criminal backgrounds of other employees has little to do with Bourgeois's termination, the issue was without merit. (5) Because there was substantial evidence supporting Bourgeois's termination, the commission's findings were upheld despite the presence of some contradictory evidence. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Circuit Court.

Affirmed - 2017-CC-00492-COA (Oct. 2, 2018)

Opinion by Judge Fair

Hon. Lawrence Paul Bourgeois Jr. (Hancock County Circuit Court)

William Alex Brady II & Michelle Elizabeth Luber for Appellant - Jennifer Hughes Scott for Appellee

Briefed by [Brandon H. Wilson](#)

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BURGESS V. WILLIAMSON

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - PERSONAL JURISDICTION - WAIVER - A party who appears before a court and litigates an issue on the merits waives any objections to the court's personal jurisdiction over the party

CIVIL PROCEDURE - SUBJECT-MATTER JURISDICTION - CHILD SUPPORT - A court which has legitimately awarded child support retains subject matter jurisdiction to enforce its own order

FAMILY LAW - CHILD SUPPORT - AWARD - Under Miss. Code Ann. § 43-19-101(1), child support should be set at fourteen percent of the non-custodial parent's adjusted gross income

FACTS

Laquita Burgess and McKinley Williamson had a daughter, Elizabeth, in 1999. In 2015, Williamson petitioned the Jones County Chancery Court to determine custody and support. The court awarded physical custody to Williamson, visitation to Burgess, joint legal custody, and ordered Burgess to pay \$847 per month in child support to Williamson. In 2016, Williamson filed a petition for contempt against Burgess, alleging that she had not met her support obligations. Burgess answered and counterclaimed for modification of child support. Burgess filed a motion to dismiss for lack of jurisdiction on the grounds that neither she, nor Elizabeth, had ever been residents of Mississippi and that both were now residents of Germany. The trial court held that Burgess had waived any objection to personal jurisdiction and that it retained subject-matter jurisdiction to hear the case. The trial court then entered a judgment of contempt against Burgess for child support arrearage and attorney's fees. Burgess appealed.

ISSUES

Whether the trial court erred in finding (1) Burgess had waived the issue of personal jurisdiction; (2) the trial court retained subject-matter jurisdiction to hear the present case; and (3) Burgess was in contempt of the trial court's award of child support to Williamson.

HOLDING

(1) Because a party waives its objections to personal jurisdiction by appearing and defending a case on the merits, and because Burgess had previously filed a substantively responsive document to the trial court in her defense of the present case, the trial court did not err in finding that Burgess had waived the issue of personal jurisdiction. (2) Because a trial court retains subject matter jurisdiction over its own legitimate awards of child support, and because the trial court had already entered a final judgment against Burgess awarding child support to Williamson in a previous case, the trial court did not err in finding that it retained subject matter jurisdiction to hear the present case. (3) Because statutory guidelines set child support at fourteen percent of the non-custodial parent's adjusted gross income, and because the trial court had set Burgess's child support obligation at fourteen percent of her adjusted gross income, which she had failed to pay in full to Williamson, the trial court did not err in finding that Burgess was in contempt. Therefore, the Court of Appeals affirmed the judgment of the Jones County Chancery Court.

Affirmed - 2017-CA-00788-COA (Oct. 2, 2018)

Opinion by Presiding Judge Wilson

Hon. Franklin C. McKenzie Jr. (Jones County Chancery Court, Second Judicial Dist.)

Gay L. Polk-Payton for Appellant - Michael Clayton Barefield for Appellee

Briefed by [Jon-Paul Bushnell](#)

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IN RE KAYE V. KAYE

CIVIL - WILLS, TRUSTS, & ESTATES

WILLS & ESTATES - CONFIDENTIAL RELATIONSHIP - FACTORS - In order to determine whether such a relationship is present, a court should look to the following factors, determining whether: (1) one person has to be taken care of by others, (2) one person maintains a close relationship with another, (3) one person is provided transportation and has her medical care provided for by another, (4) one person maintains joint accounts with another, (5) one is physically or mentally weak, (6) one is of advanced age or poor health, and (7) there exists a power of attorney between the one and another

WILLS & ESTATES - UNDUE INFLUENCE - LANGSTON RULE - Pursuant to *Langston*, undue influence will be found when a spouse has used undue methods for the purpose of overcoming the free and unrestrained will of the other spouse

WILLS & ESTATES - UNDUE INFLUENCE - BURDEN OF PROOF - Pursuant to *In re Caspelich*, if a contestant challenges the validity of a will alleging a spousal undue influence, it is the contestant's burden to show that the surviving spouse exercised undue influence

FACTS

John Kaye, Jr. ("Jack") and Patricia Kaye ("Pat") married in 1987. In 2006, after suffering a serious injury, Jack decided to create a will. In his will, Jack left his son, John, John's three sons, and Pat each one-fifth of his estate. After creating the will, Jack created a joint account with Pat that included rights of survivorship. The joint account gave Pat the right to make decisions and jointly access the funds. Shortly afterwards, Jack died. After Jack's death in 2012, his will was admitted to probate, and it was discovered that minimal funds remained in the account. John brought an action against Pat claiming wrongful conversion. John decided not to contest the will or the Power of Attorney, however, he requested the chancery court to deny Pat's assignment from the will: her fifth of the estate and the marital home. He also requested that the court require Pat to return the joint account to the amount of \$1,210,371.91. The chancellor found that Pat committed no wrongdoing. John appealed.

ISSUES

Whether the chancellor erred in failing (1) to find that a close relationship existed; (2) to find that when a close relationship exists in an inter vivos transfer the presumption of undue influence is established; (3) to shift the burden to the inter vivos grantee/beneficiary to prove by clear and convincing evidence the transfer was valid; and (4) to apply the correct legal standard regarding the presumption of undue influence.

HOLDING

(1) Because there was a close relationship, that did not negate John's responsibility of proving undue influence. (2) Because a confidential relationship between spouses does not create a presumption that one spouse used undue influence over the other to obtain an inter vivos gift, the chancellor did not err in finding that there was no presumption of undue influence. (3) Because Jack was contesting the transfer, he had the burden to prove that Pat used undue influence in Jack's creation of the joint account. (4) Because the chancellor considered the testimonies of many witnesses including John, Jack's friends, USB representatives, the notary public, along with physical evidence, the trial court used the correct legal standard. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Chancery Court.

Affirmed - 2017-CA-00511-COA (Oct. 2, 2018)

Opinion by Judge Westbrook

Hon. H. J. Davidson Jr. (Lowndes County Chancery Court)

Dewitt T. Hicks Jr. for Appellant - Hal H. H. McClanahan III for Appellee

Briefed by [Whitney Jackson](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

SKINNER V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - EVIDENTIARY HEARING - PRIMA FACIE CASE - There is no automatic right to an evidentiary hearing under the Mississippi Uniform Post-Conviction Collateral Relief Act; once a prima facie case is established, the trial court may still summarily deny a petitioner's motion if, after the answer has been filed and discovery completed, it appears that no evidentiary hearing is warranted

POST-CONVICTION RELIEF - EVIDENTIARY HEARING - PRIMA FACIE CASE - The Supreme Court's grant of a post-conviction relief request for leave to proceed in the circuit court constitutes a finding of a prima facie case; the circuit court should examine the motion under Miss. Code Ann. § 99-39-19, along with the filed answer and any completed discovery, to determine if an evidentiary hearing should be required

FACTS

After his conviction as a habitual offender, James Christopher Skinner sought leave from the Supreme Court for permission to file a post-conviction relief motion in the circuit court. The Supreme Court granted Skinner leave to file his motion. The State never responded to Skinner's motion, and the circuit court did not conduct an evidentiary hearing. The circuit court ultimately denied and dismissed Skinner's post-conviction relief motion. Skinner appealed.

ISSUE

Whether the trial court erred by dismissing Skinner's post-conviction relief motion after the Supreme Court granted him leave to proceed in the circuit court.

HOLDING

Because the Supreme Court granted Skinner's post-conviction relief motion and that grant constituted a finding of a prima facie case, the circuit court failed to follow the procedures of Miss. Code Ann. § 99-39-19 in determining whether an evidentiary hearing was required when the circuit court dismissed Skinner's post-conviction relief motion before the State filed an answer and before discovery. Therefore, the Court of Appeals reversed and remanded the judgment of the Rankin County Circuit Court.

Reversed & Remanded - 2017-CA-01185-COA (Oct. 2, 2018)

Opinion by Judge Carlton

Hon. John Huey Emfinger (Rankin County Circuit Court)

Jacob Wayne Howard for Appellant - Katy Taylor Gerber (Att'y Gen. Office) for Appellee

Briefed by [Davis Pigg](#)

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WHARTON V. STATE

CIVIL - POST-CONVICTION RELIEF

SENTENCING - JUVENILE OFFENDERS - COLLATERAL REVIEW - The United States Supreme Court's decision in *Miller* explicitly foreclosed the imposition of a mandatory sentence of life without parole on juvenile offenders and applies retroactively to cases on collateral review

POST-CONVICTION RELIEF - SENTENCING - JURY DETERMINATION - Under Miss. Code Ann. § 99-19-101, the Mississippi Legislature vested sentencing authority solely in the jury; a sentencing proceeding can only be conducted before a trial judge without a jury if the right to a jury was waived or the defendant pleaded guilty

FACTS

In 1994, Darren Wharton was convicted of one count of capital murder when he robbed a convenience store and, in the course of the robbery, shot and killed the store clerk. Wharton was seventeen years and eighty days old at the time of the crime. He was convicted of capital murder and the jury sentenced Wharton to life imprisonment without the eligibility of parole. In 2016, Wharton received a new sentencing hearing pursuant to *Miller*, in which the United States Supreme Court held that juvenile offenders could not be sentenced to life imprisonment without parole. The trial court resentenced Wharton to life in prison without parole, despite Wharton’s request to be resentenced by a jury. Wharton appealed.

ISSUE

Whether the trial court erred in submitting Wharton’s *Miller* resentencing to a judge instead of a jury.

HOLDING

Because Wharton was convicted and sentenced under Miss. Code Ann. § 99-19-101 which prescribes sentencing authority solely to a jury, Wharton’s *Miller* resentencing should have been undertaken by a jury, not the trial judge. Therefore, the Court of Appeals reversed and remanded the judgment of the Harrison County Circuit Court for resentencing by a jury.

Reversed & Remanded - 2017-CA-00441-COA (Oct. 2, 2018)

Opinion by Judge Carlton

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

Michael W. Crosby for Appellant - Kaylyn Havrilla McClinton (Att’y Gen. Office) for Appellee

Briefed by [Katelin Davis](#)

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COURT OF APPEALS - CRIMINAL

GRAHAM V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - HEARSAY - CONTEMPORANEOUS OBJECTION RULE - In order for the issue to be preserved on appeal, a contemporaneous objection to the alleged hearsay must be made at trial

EVIDENCE - HEARSAY - PLAIN ERROR - There can be no plain error in regard to hearsay evidence because no legal rule requires a trial judge to exclude hearsay in the absence of an objection and trial judges are not expected to strike or exclude hearsay sua sponte

APPELLATE PROCEDURE - DIRECT APPEAL - INEFFECTIVE ASSISTANCE OF COUNSEL - Because an appellate court is limited to the trial record on direct appeal, issues of ineffective assistance of counsel are more appropriate in a motion for post-conviction relief

FACTS

Betty, a thirteen-year-old, asserted that her father, James Graham, came into her bedroom and sexually abused her one night. Graham was prosecuted for one count each of sexual battery and gratification of lust. At trial, Graham denied ever going into Betty’s bedroom that night. The jury found Graham not guilty of sexual battery, but it convicted him of gratification of lust. Graham appealed.

ISSUES

Whether (1) the trial court erred in admitting out of court statements made by Betty after the incident without holding a hearing to determine if she was of tender years; and (2) Graham received ineffective assistance of counsel.

HOLDING

(1) Because no contemporaneous objection was made and there was no plain error in the unopposed admission of hearsay statements, the trial court did not err in admitting Betty's statements without holding a hearing to determine if she was of tender years. (2) Because Graham's claims of ineffective assistance of counsel were better suited for a motion for post-conviction relief, this claim was denied on direct appeal without prejudice to file a future motion for post-conviction relief. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2017-KA-00336-COA (Oct. 2, 2018)

Opinion by Judge Fair

Hon. Dal Williamson (Jones County Circuit Court, Second Judicial Dist.)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Luke Phillips](#)

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PARKER V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - RIGHT TO COUNSEL - LINDSEY BRIEF - In order to file a *Lindsey* brief, appellate counsel for an indigent criminal defendant must certify that he or she has thoroughly searched the record and found no arguable issues for appeal

APPELLATE PROCEDURE - RIGHT TO COUNSEL - LINDSEY BRIEF - The appellate court must conduct an independent and thorough review of the record for issues that warrant reversal

APPELLATE PROCEDURE - RIGHT TO COUNSEL - LINDSEY BRIEF - Appellate counsel must send his client a copy of the filed *Lindsey* brief and advise that he or she can file a pro se brief

FACTS

On December 14, 2014, Jyntre Williamson, a game warden for the Mississippi Department of Wildlife, Fisheries, and Parks, received a call reporting a suspected trespasser on Bill McCrary's land in Forrest County. Williamson arrived at McCrary's property, where Richard Parker was standing next to a red Toyota truck. After Williamson approached, Parker said he was there to hunt. Williamson noticed a rifle in the front seat of the Toyota and took a photo of Parker and the rifle on his iPhone. Parker was arrested for trespassing, and indicted for unlawful possession of a firearm by a convicted felon. At trial, the State introduced evidence of Parker's prior felony conviction. The State called Williamson and a deputy sheriff to testify. Parker did not testify or call any witnesses. The jury found Parker guilty, and the circuit court sentenced him to ten years in the custody of the Mississippi Department of Corrections, with five years to serve, five years suspended, and five years of post-release supervision. Parker appealed.

ISSUE

Whether, upon appellate counsel's filing of a *Lindsey* brief, there were any arguable issues for appeal after the appellate court conducted an independent and thorough review.

HOLDING

Because there was sufficient evidence to support the jury's verdict finding Parker guilty of unlawful possession of a firearm by a prior convicted felon, there were no issues that warrant reversal, agreeing with Parker's appellate counsel's *Lindsey* brief. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2017-CA-01097-COA (Oct. 2, 2018)

Opinion by Judge Wilson

Hon. Jon Mark Weathers (Forrest County Circuit Court)
George T. Holmes (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss (Att’y Gen. Office) for Appellee
Briefed by [Natalie McCarty](#)

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SCARBROUGH V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - REVERSAL - WEIGHT OF EVIDENCE - A new trial will not be ordered due unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would sanction an unconscionable injustice

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - If, with respect to one or more elements of the offense, the evidence viewed in the light most favorable to the State would not allow reasonable jurors to find the essential element of the crime beyond a reasonable doubt, then the trial court’s decision may be reversed

CRIMINAL LAW - SEXUAL BATTERY - PERSON IN A POSITION OF TRUST - Miss. Code. Ann. § 97-3-95(1) states that a person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child; such a position is determined by looking to all the evidence presented and the totality of the circumstances

FACTS

Owen Scarbrough was indicted on three counts of sexual misconduct against his step-granddaughter, Mary. At trial, Mary detailed three specific occasions where Scarbrough assaulted her. Scarbrough was convicted for (Count I) fondling, (Count II) sexual battery of a child between fourteen and sixteen years of age, and (Count III) sexual battery of a child under eighteen years of age where the person is in a position of trust or authority. Scarbrough appealed.

ISSUES

Whether (1) the weight of the evidence supported Scarbrough’s Count I and Count II guilty verdict; and (2) the evidence was insufficient to show that Scarbrough held a position of trust or authority.

HOLDING

(1) Because Mary’s testimony itself was sufficient to convict Scarbrough, and Scarbrough did not present any evidence or testimony to discredit or contradict the allegations, Count I and Count II were not contrary to the overwhelming weight of the evidence. (2) Because a rational trier of fact could find, under the totality of the circumstances, that Scarbrough did in fact hold a position of trust or authority over Mary, the evidence was sufficient to support Scarbrough’s conviction.

Affirmed - 2016-KA-01667-COA (Oct. 2, 2018)

Opinion by Judge Greenlee

Hon. Albert B. Smith III (Bolivar County Circuit Court, Second Judicial Dist.)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att’y Gen. Office) for Appellee

Briefed by [Drey Russell](#)

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