

MISSISSIPPI SUPREME COURT DECISIONS – JUNE 30, 2016

SUPREME COURT - CIVIL CASES

GEORGIA PACIFIC CORP. v. COOK TIMBER CO., INC.

CIVIL - CONTRACT

COMMERCE - MONOPOLIES & TRADE REGULATION - UNILATERAL CONDUCT - Pursuant to Miss. Code Ann. § 75-21-3, in order for a business to attempt to “corner a market,” it must be a seller in that market

COMMERCE - REGULATION OF TRADE - CONSPIRACY - Pursuant to Miss. Code Ann. § 75-21-1, a threshold requirement to any violation of this statute is a “a combination, contract, understanding or agreement” to commit the prohibited practices

CONTRACTS - BREACH OF CONTRACT - TIMBER WEIGHTS & MEASURES - Pursuant to Miss. Code. Ann. § 75-27-113(4), failure to maintain scale tickets raises a rebuttable presumption that timber was not properly docked

FACTS

In 1983, Cook Timber entered into a contract with Georgia Pacific, and from then until 2000, Cook Timber worked exclusively with Georgia Pacific. Eighty to ninety percent of Cook Timber’s wood was hauled to the Taylorsville Plywood Plant and Bay Springs Sawmill, and the remainder was hauled to the Leaf River Pulp Mill. In March 2000, Georgia Pacific notified Cook Timber by letter that its Leaf River Pulp Mill would no longer receive any pine pulpwood deliveries from Cook Timber. Cook Timber filed suit claiming Georgia Pacific committed unilateral antitrust violations, conspiracy, and breach of contract. The Jasper County Circuit Court granted directed verdicts on Cook Timber’s conspiracy and breach of contract claims; however, the jury returned a verdict for actual and punitive damages against Georgia Pacific on the unilateral antitrust claim. Georgia Pacific appealed and Cook Timber cross-appealed.

ISSUES

Whether Cook Timber presented sufficient evidence to support its (1) unilateral antitrust claim; (2) conspiracy claim; and (3) breach of contract claim.

HOLDING

(1) Cook Timber failed to present sufficient evidence to prove its unilateral antitrust claim because Georgia Pacific was not a seller in that market. (2) Cook Timber failed to present sufficient evidence to prove its conspiracy claim because at most the evidence established conscious parallelism. (3) Because a reasonable juror could conclude that Georgia Pacific culled wood for other reasons—mainly to lower prices—and that this breached its contract with Cook Timber, the trial court erred by granting a directed verdict for the breach of contract claim. Therefore, the Supreme Court reversed the Jasper County Circuit Court and rendered judgment in Georgia Pacific’s favor on the unilateral antitrust claim, affirmed the Jasper County Circuit Court on the conspiracy claim, and reversed and remanded the breach of contract claim for a new trial.

CONCURRENCE

Justice Maxwell agreed that Cook Timber’s breach of contract claim should have been submitted to the jury, and also that Cook Timber’s evidence was insufficient to support its antitrust claim. Thus, the jury’s verdict and damages awards, both actual and punitive, must have been reversed. However, he wrote separately to emphasize that punitive

damages still may be recoverable on remand, if Cook Timber proved that the breach was the result of an intentional wrong or that Georgia Pacific acted maliciously or with reckless disregard of Cook Timber's rights.

DISSENT

Justice King argued that the majority misinterpreted the antitrust statutes. He disagreed with the majority's determination that Cook Timber failed to present sufficient evidence to support its antitrust claim, and he argued that punitive damages should have been affirmed.

On Direct Appeal: Reversed and Rendered. On Cross-Appeal: Affirmed in Part, Reversed in Part and Remanded - 2013-CA-01869-SCT (June 30, 2016)

En Banc Opinion by Presiding Justice Dickinson - Concurrence by Justice Maxwell - Dissent by Justice King
Hon. Samac S. Richardson (Jasper County Circuit Court)

Stephen Walker Burrow, James H. Heidelberg, & Joe Sam Owen for Appellant - Joseph E. Roberts Jr., Ann R. Chandler, Rance N. Ulmer, Eugene Coursey Tullos & Thomas L. Tullos for Appellee

Briefed by [TreMarcus Rosemon](#)

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SUPREME COURT - CRIMINAL CASES

AMBROSE V. STATE

CRIMINAL - RECORDS ORDER

FACTS

Abdur Rahim Ambrose requested access to certain sealed documents including Exhibit D-1, Ambrose's psychological evaluation, and juror cards for all venire members appearing at the trial. The State had no objection to Ambrose's request for access and copies of the sealed documents but argued that they should remain sealed thereafter. Ambrose also sought for the record to be supplemented with the guilty plea transcript of his co-indictee, Orlander Dedeaux.

ISSUES

Whether (1) the juror cards should be unsealed, (2) the defendant's psychological evaluation should be unsealed, and (3) the record should be supplemented with the defendant's co-indictee's guilty plea transcript.

ORDERED

The Supreme Court ordered that (1) in accordance with M.R.A.P. 48(d) the juror cards will be temporarily unsealed to allow access by counsel for the parties and such cards should remain confidential except what is required to assert specific errors in briefs or like documents, (2) Ambrose's psychological evaluation will be unsealed because it was conducted in the furtherance of his criminal proceeding, and (3) Ambrose's request for supplementation of the record was denied.

OBJECTIONS

Justice Kitchens objected in part, arguing that the record should be supplemented because it was inadvertently omitted from the record and at the time the co-indictee pled guilty the cause number was the same as the cases had not been severed.

Justice King argued that the jury cards should not be sealed. Justice King bases his argument on the fact that public records should be unsealed until there is a showing made that they should be sealed.

Ordered - 2015-DP-01159-SCT (June 28, 2016)

Order by Chief Justice Waller - Dissent by Justice Kitchens and Justice King

Briefed by [Jake Bradley](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 28, 2016

COURT OF APPEALS - CIVIL CASES

ADAMS V. RICE

CIVIL - DOMESTIC RELATIONS

CHILD CUSTODY - JUDICIAL DISCRETION - VISITATION - A chancellor is well within his or her discretion to make a determination of what is in the best interest of the child as it relates to visitation issues

CHILD CUSTODY - GUARDIAN AD LITEM - PROCEDURAL BAR - A party cannot raise an issue concerning guardian ad litem appointment for the first time on appeal

PRETRIAL PROCEDURE - MOTION TO DISMISS - FORUM NON CONVENIENS - A forum is considered the most convenient if the parties and witnesses live in the jurisdiction, and the action took place in the jurisdiction

FACTS

John Rice and Elle Adams began their romantic relationship in 2011. The two give conflicting reports on the status of their relationship; Rice claimed their relationship was consensual and he watched Adams' daughters from time to time, while Adams claimed she never actually dated Rice but he showed up intoxicated and uninvited frequently. Regardless, they had a son together in September of 2013. Adams claimed the son was born as a result of Rice raping her, while Rice claimed Adams threatened to "adopt the child out" in Mexico. On December 30, 2013, Rice filed a petition to establish paternity, custody, and support of their son. On September 3, 2014, Adams filed a counterclaim for custody, child support, and the medical costs incurred in the birth of the child. Rice called three witnesses at trial, all of which testified the relationship between Rice and Adams was legitimate. The testimony of these witnesses was found to be credible and relevant. Adams called three witnesses at trial, none of whom were found to be credible. The chancellor awarded both parties joint legal custody, with physical custody remaining with Adams. Rice received a visitation schedule, was ordered to pay for half of the aforementioned medical expenses, and was ordered to pay fifteen hundred dollars to Starkville Women's Clinic for services related to the birth. Adams appealed.

ISSUES

Whether the chancery court erred in (1) giving Rice unsupervised visitation and joint legal custody, (2) not appointing a guardian ad litem, and (3) denying Adams's motion to dismiss for forum non conveniens.

HOLDING

(1) It is within the chancellor's discretion to determine factual issues and rule based on those findings. The chancellor did not abuse her discretion, so this issue was without merit. (2) Rice was never accused of abusing their child, and neither party asked for the appointment of a guardian ad litem during the proceedings below, so this issue was procedurally barred. (3) All factors indicated that the chancellor had personal jurisdiction over both parties and Adams failed to provide any case law supporting her argument, so this issue was without merit. For these reasons, the Court of Appeals affirmed the chancery court's decision.

Affirmed - 2015-CP-00069-COA (June 28, 2016)

Opinion by Judge James

Hon. Dorothy Winston Colom (Oktibbeha County Chancery Court)

Pro se for Appellant - Mark G. Williamson for Appellee

Briefed by [Cody D. Samples](#)

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BOWEN V. AMORY HMA, LLC

CIVIL - MEDICAL MALPRACTICE

MEDICAL MALPRACTICE - STANDARD OF CARE - EXPERT TESTIMONY - Plaintiffs must offer expert medical testimony to establish a claim that a doctor breached a duty to a patient by failing to obtain informed consent

MEDICAL MALPRACTICE - STANDARD OF CARE - EXPERT TESTIMONY - Responses to interrogatories by a defendant doctor cannot supply the required expert medical testimony in a standard of care suit

FACTS

In 2007, Jerry Bowen underwent outpatient shoulder surgery at Gilmore Memorial Regional Medical Center (“Amory HMA”). Prior to surgery he signed a consent form acknowledging the risks of anesthesia, including consistent numbness, weakness, and residual pain. After the surgery, Bowen experienced continued numbness and weakness in his shoulder. Several subsequent doctors opined that Bowen’s symptoms were the result of an injury to brachial plexus nerve, likely due to an interscalene block administered by Dr. Patrick Murphree before surgery. Bowen sued Amory HMA and Dr. Murphree for his injury, claiming that it had affected his work, and that the hospital breached the standard of care by failing to obtain informed consent prior to administering the interscalene block. After discovery, the defendants filed a motion for summary judgment, arguing that Bowen did not produce evidence that Dr. Murphree or Amory HMA deviated from the standard of care. Because the evidence was insufficient and Bowen did not offer any expert medical testimony to support his claim, the Monroe County Circuit Court granted the defendant’s motion. Bowen appealed.

ISSUES

Whether the trial court erred in granting summary judgment for the defendants by determining Dr. Murphree did not breach his duty to Bowen by failing to obtain informed consent.

HOLDING

Because plaintiffs must produce expert testimony to establish that a doctor performed a procedure without first obtaining informed consent and because Dr. Murphree’s interrogatory responses cannot provide Bowen the missing testimony, the granting of summary judgment for the defendants was proper. Therefore, the Court of Appeals affirmed the judgment of the Monroe County Circuit Court.

Affirmed - 2015-CA-0184-COA (June 28, 2016)

Opinion by Judge Barnes

Hon. James Seth Andrew Pounds (Monroe County Circuit Court)

Ned McDonald III for Appellants - Louis G. Baine III, Mark P. Caraway, Stephen P. Kruger, & Kimberly Nelson Howland for Appellees

Briefed by [John G. Archer](#)

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COPE V. THRASHER CONSTRUCTION, INC.

CIVIL - CONTRACT

CONTRACTS - QUANTUM MERUIT - ELEMENTS FOR RECOVERY - The essential elements for recovery under quantum meruit are: (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used, and enjoyed by him; and (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff, in performing such services, . . . expected to be paid by the person sought to be charged

CONTRACTS - QUANTUM MERUIT - APPLICATION - To collect under the theory of quantum meruit, the claimant must show there is no legal contract

CONTRACTS - THIRD PARTY BENEFICIARY - ELEMENTS FOR RECOVERY - A party has third-party beneficiary status (1) when the terms of the contract are expressly broad enough to include the third party either by name or as one of a specified class, and (2) the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits, if (3) the promise had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract

FACTS

After Inn by the Sea was destroyed by Hurricane Katrina, its ownership passed to SeaInn, LLC. SeaInn, which consisted of Greg Stewart and Kenny Labelle, was formed to develop a new complex and rebuild. SeaInn hired Madison Homes as a General Contractor. Madison Homes subcontracted waterproofing Inn by the Sea to Thrasher Construction (“Thrasher”). Thrasher was to be paid \$106,600, but stopped work after completing sixty-five percent because it was not getting paid. As a result, Thrasher filed a notice of Construction Lien. Ike Thrash purchased Kenny Labelle’s fifty percent interest in SeaInn and conveyed part of his interest to Bruce and Mary Cope. After realizing that neither Stewart nor Madison Homes was paying Thrasher Construction, Thrash and Cope settled with Stewart to remove him. As part of the settlement with Stewart, Thrash and Cope agreed to pay the subcontractors to the extent that the invoices provided by Stewart were “true, valid[,], and correct.” Thrash and Cope paid the other subcontractors but sent four unsuccessful requests to Thrasher to verify its work. In 2009 Thrasher withdrew its lien and filed a lawsuit against Madison Homes as well as Cope and Thrash on a breach of contract as a third-party beneficiary theory. On directed verdict the trial court dismissed the third-party beneficiary claim but allowed the suit to proceed on a quantum meruit theory. The jury returned a verdict in favor of Thrasher in the full amount owed to them. Cope and Thrash filed for a motion for judgment notwithstanding the verdict (JNOV), which was denied. Cope and Thrash appealed; Thrasher Construction cross-appealed.

ISSUES

Whether the court erred in (1) allowing Thrasher Construction to proceed on the theory of quantum meruit, and (2) dismissing Thrasher Construction’s third-party beneficiary claim.

HOLDING

(1) Because there was an express legal contract between Madison Homes and Thrasher Construction, the court erred in allowing Thrasher Construction to proceed on the theory of quantum meruit. (2) Because the settlement agreement between Stewart and Cope and Thrash contemplated that Thrasher Construction would benefit as a direct result of its performance, and because Cope and Thrash agreed to pay the subcontractors as long as they did the work, the court erred in dismissing Thrasher Construction’s breach-of-contract claim. Therefore, the Court of Appeals reversed and rendered on direct appeal, and reversed and remanded the judgment of the Circuit Court of Harrison County on cross-appeal for further proceedings consistent with its opinion.

CONCURRENCE AND DISSENT

Judge Carlton concurred in part and dissented in part from the majority’s opinion because he argued that the trial court erred in dismissing Thrasher Construction’s third-party-beneficiary claim but would affirm the jury’s verdict awarding Thrasher under the alternate theory of quantum meruit.

Reversed, Rendered, and Remanded - 2014-CA-01474-COA (June 28, 2016)

En Banc Opinion by Presiding Judge Griffis - Concurrence and Dissent by Judge Carlton

Hon. Michael H. Ward (Harrison County Circuit Court)

Nicholas Van Wiser for Appellants - Samuel C. Kelly, Karen Elizabeth Howell, & Taylor Brantley McNeel for Appellee

Briefed by [Robert T. Noland](#)

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CIVIL – POST-CONVICTION RELIEF

CIVIL PROCEDURE – MOTION TO DISMISS – STANDARD OF REVIEW – Appellate courts apply a de novo standard of review when reviewing a trial court’s grant or denial of a motion to dismiss

CIVIL PROCEDURE – JURISDICTION – STANDARD OF REVIEW – Whether a chancery court had jurisdiction to hear a particular matter is a question of law that is reviewed de novo

CIVIL PROCEDURE – JURISDICTION – SUBJECT-MATTER JURISDICTION – Subject-matter jurisdiction is a threshold inquiry that must be resolved before a trial court adjudicates the merits of a case

CIVIL PROCEDURE – JURISDICTION – BURDEN OF PROOF – When a plaintiff’s jurisdictional allegations are questioned, the plaintiff bears the burden of proof to prove, by a preponderance of the evidence, that the court has jurisdiction to adjudicate the case

APPELLATE PROCEDURE – POST-CONVICTION RELIEF – MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT (UPCCRA) – The Mississippi UPCCRA is the exclusive procedure through which appellate courts collaterally review convictions and sentences. Any pleading that is cognizable under the UPCCRA will be construed as a motion for post-conviction relief—subject to the appropriate procedural rules, including jurisdiction—regardless of how the plaintiff has characterized or denominated such pleading

FACTS

Daniel Paul Copple was convicted of two counts of murder and one count of aggravated assault. The trial court sentenced him to two life sentences and fifteen years, respectively; the sentences were set to run consecutively. On Copple’s subsequent direct appeal, the trial court’s judgment was affirmed. Copple then filed a complaint for discovery in chancery court, noting that his counsel on appeal had withdrawn before the court reporter filed the trial transcript. Copple alleged that his counsel failed to communicate with him during the time in question to suggest alterations or corrections to the transcript. Copple further alleged in the chancery court complaint that upon reviewing the trial transcript, he noted inaccuracies and discrepancies between his “recollection” of the trial and the transcript; he argued that such inaccuracies “concealed or failed to preserve issues” that could have been raised on appeal if the transcript had been corrected before filing. Copple also requested the court reporter’s audio tapes of the trial so he could bolster his forthcoming ineffective assistance of counsel claim. The State moved to dismiss the complaint, arguing the complaint was actually a motion for post-conviction relief (PCR) and, thus, the chancery court did not have subject-matter jurisdiction over the matter. The chancery court granted the motion to dismiss. Copple appealed.

ISSUES

Whether the chancery court erred in (1) construing Copple’s complaint for discovery as a post-conviction relief motion; and (2) dismissing Copple’s complaint.

HOLDING

(1) Because of the nature of Copple’s claim (i.e., recovering evidence to use in a subsequent PCR motion), the relief sought, and his stated intent to eventually file a PCR motion, Copple’s complaint for discovery was subsumed by the UPCCRA, thus, the chancery court did not err in construing the complaint as a motion for post-conviction. (2) Because the chancery court was without subject-matter jurisdiction, and Copple had not sought the Supreme Court’s leave to file a PCR motion, the chancery court did not err in dismissing Copple’s complaint.

Affirmed - 2015-CA-00237-COA (June 28, 2016)

Opinion by Presiding Justice Irvin

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

Matthew Allen Baldrige & Benjamin Freeman Robinson for Appellant – Lee Davis Thames, Jr. (Att’y Gen. Office) for Appellee

Briefed by [J. Matthew Orr](#)

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GREEN V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL - POST-CONVICTION RELIEF - ENFORCEMENT OF PLEA AGREEMENT - Under *Garlotte v. State*, the court held when a plea rests in any significant degree on a promise or agreement of the prosecutor, the promise must be fulfilled

FACTS

In 2011, Willie Green pled guilty as a second drug offender to the sale of cocaine and also for possession of cocaine. According to Green, the plea agreement stated he would not be indicted for any outstanding, unindicted drug cases existing at that time. However, in 2012, Green was once again indicted for the sale of cocaine. Green eventually pled guilty to this charge and was sentenced to 30 years in prison. Green subsequently filed a post-conviction relief motion contending that his indictment in the latter case was illegal pursuant to his previous plea agreement. The trial court found there was no evidence of the plea agreement and therefore held there was no merit to Green's argument. Green appealed.

ISSUE

Whether the court erred in denying Green's PCR motion.

HOLDING

Because there was evidence from the trial court record that the plea agreement contained a provision that Green not be prosecuted for outstanding, unindicted cases that the State did not object to, Green detrimentally relied on the State's promise. Therefore, the judgment of the circuit court was reversed.

Reversed and Rendered - 2014-CP-00743-COA (June 29, 2016)

Opinion by Presiding Judge Irving

Hon. Marcus D. Gordon (Leake County Circuit Court)

Pro se for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Paul Wallace](#)

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KLEYLE V. DEOGRACIAS

CIVIL - CONTRACT

SUBLEASES - ANTI-ASSIGNMENT PROVISION - DEFENSE - The anti-assignment provision is for the benefit of the original landlord alone, and a subtenant who has already enjoyed use of the leased premises lacks standing to raise the provision as a defense to an obligation to pay rent under the sublease

CONTRACT ENFORCEMENT - STANDING - THIRD PARTY - A party may not enforce a contract to which it is neither a party nor a third-party beneficiary

ASSIGNMENT - STANDING - LESSOR - The invalidity of an assignment, on the ground that it has not been assented to by the lessor, can be raised only by the lessor

FACTS

Myrna and Philip Deogracias leased a space from Gordon Kleyle for their restaurant, The Railroad Café LLC. However, the prime lease for the space was between Alabama Great Southern Railroad Company ("AGS") and Kleyle., which prohibited subleasing without AGS's consent. Kleyle sued the Deograciases and The Railroad Café LLC for unpaid rent under the sublease. The Deograciases moved to dismiss, arguing that the claim was barred because it was an unlawful sublease. The circuit court granted the motion to dismiss. Kleyle appealed.

ISSUE

Whether the circuit court erred in granting the Deograsiases' motion to dismiss for failure to state a claim as the sublease upon which this action is based is void.

HOLDING

Because the anti-assignment provision can only benefit the original landlord, the Deograsiases lacked standing to raise this provision as a defense, and therefore the court erred in granting the motion to dismiss on that basis. Therefore, the Court of Appeals reversed and remanded the judgment of the Pearl River County Circuit Court.

Reversed & Remanded - 2014-CA-01673-COA (June 28, 2016)

En Banc Opinion by Judge Wilson

Hon. Prentiss Greene Harrell (Pearl River County Circuit Court)

Brian Randolph Bledsoe & F. Douglas Montague III for Appellant - Richard C. Fitzpatrick & T. Jackson Lyons for Appellees

Briefed by [Shayna Giles](#)

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MCCOY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - COLLATERAL REVIEW - EXCLUSIVE REMEDY - The Mississippi Uniform Post-Conviction Collateral Relief Act abolishes and replaces the common law writs relating to post-conviction collateral relief and provides an exclusive and uniform procedure for the collateral review of convictions and sentences

POST-CONVICTION RELIEF - FILING - ORIGINAL CIVIL ACTION - A post-conviction relief motion under the Mississippi Uniform Post-Conviction Collateral Relief Act shall be filed as an original civil action

FACTS

McCoy pled guilty to sexual battery in 2006 and received a ten-year sentence, with credit for six months already served pending trial and nine and one-half years to be served on post-release supervision. In 2010, McCoy was caught with six manhole covers that had recently been stolen from a construction site. McCoy was arrested and indicted for grand larceny and his suspended license was revoked. The grand larceny charge was subsequently dismissed. McCoy attempted to file numerous challenges to the revocation. McCoy filed a Petition for Habeas Corpus in 2014. McCoy sought a writ of mandamus to compel the trial court to rule on one of his petitions, the trial court entered an order finding that the 2014 petition was without merit and barred as a successive writ. McCoy appealed.

ISSUE

Whether the circuit court has jurisdiction to enter an order in McCoy's PCR proceeding.

HOLDING

Because the circuit court did not order that McCoy's petition be filed as an original civil action seeking post-conviction relief, the circuit court had no jurisdiction to enter an order adjudicating McCoy's right to post-conviction relief. Therefore, the judgment of the Franklin County Circuit Court was vacated.

Dismissed Motion for Post-Conviction Relief - 2015-CP-00474-COA (June 28, 2016)

Opinion by Judge Fair

Hon. Forrest A. Johnson Jr. (Franklin County Circuit Court)

Pro se for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [L. Morgan Eason](#)

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MAY V. ARTHURS

CIVIL - CUSTODY

FAMILY LAW - VISITATION RIGHTS - BEST INTEREST OF CHILD - When awarding child visitation, the chancellor must keep the best interest of the child as a paramount concern, but must also be attentive to the non-custodial parent's rights

FAMILY LAW- VISITATION RIGHTS - RESTRICTIONS - Any restriction on visitation rights must be supported by evidence that the particular restriction is necessary to avoid harm to the child

CIVIL PROCEDURE - TIMING OF REVIEW - MOOTNESS - Cases in which an actual controversy existed at trial but the controversy has expired at the time of review, become moot.

FACTS

On January 29, 2014, Mason Beau Arthurs-May was born out of wedlock to Derek May and Kira Arthurs. In April of 2014, May sought adjudication of a paternity test and reasonable visitation rights in Hancock County Chancery Court. The chancery court entered a temporary visitation order, but the court was still left to determine when regular weekend and summer visitation rights would begin for May. In October 2014, the court entered a judgment that May would receive visitation rights every other weekend from Saturday morning to Sunday afternoon, until Mason reached the age of eighteen months. May filed a motion in the chancery court asking it to reconsider its ruling and allow him to have regular visitation rights immediately. In February 2015, the chancery court denied May's request for immediate regular weekend visitation and modified the original judgment, allowing summer visitation only if the minor was weaned off breast milk. May appealed.

ISSUES

Whether the chancery court erred in restricting May's (1) weekend visitation rights and (2) summer visitation rights.

HOLDING

(1) Because Mason was two years old when the Court of Appeal heard the appeal, May's visitation rights are no longer restricted and his claim is moot. (2) Because the record fails to provide any evidence that the restriction on summer visitation was reasonable or necessary to prevent harm to Mason, the chancellor erred in restricting May's summer visitation rights. Therefore, the Court of Appeals affirmed in part & vacated and remanded in part the judgment of the Hancock County Chancery Court.

Affirmed in Part & Vacated and Remanded in Part - 2015-CA-00405-CA (June 28, 2016)

Opinion by Chief Judge Lee

Hon. Carter O. Bise (Hancock County Chancery Court)

Patrick Taylor Guild & Dean Holleman for Appellant - Mark Vincent Watts for Appellee

Briefed by [Nash Gilmore](#)

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MISSISSIPPI DEPT. OF WILDLIFE V. BRADSHAW

CIVIL - STATE BOARDS AND AGENCIES

DUE PROCESS – SUFFICIENT NOTICE – TECHNICAL ERRORS – Where a party maintains clear notice of the conduct and the nature of the charges against them, they have received notice sufficient to justify due process regardless of technical errors

WRONGFUL TERMINATION – EMPLOYEE MISCONDUCT – PATTERN OF MISCONDUCT – Where it is reasonably concluded that an employee's pattern of misconduct is inconsistent with his duties and impairs his reputation in the particular field, termination may be an appropriate action

MISSISSIPPI EMPLOYEE APPEALS BOARD – WRONGFUL TERMINATION – BURDEN OF PROOF – The Mississippi Employee Appeals Board is not authorized to reinstate the employee unless the employee carries his burdens of proof and persuasion that the reasons stated in the notice of dismissal are not true or are not sufficient grounds for the action taken

FACTS

In May 2013, The Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) received a complaint from a woman who had participated in an MDWFP hunter education course, resulting from her receiving harassing text messages from MDWFP employees. Corporal Ben McCurdy admitted that he and Master Sergeant Gaylon Bradshaw were responsible for sending the woman sexually suggestive text messages, after obtaining her phone number from a form that she completed for the hunter education course. As a result, Bradshaw received a Notice of Disciplinary Action, finding Bradshaw guilty of a Group III Number 14 offense. For the offense, Bradshaw received a written reprimand and a two-week suspension without pay. Bradshaw did not exercise his right to grieve the disciplinary action. Subsequently, an additional complaint was made with the MDWFP from a woman alleging that Bradshaw had sent her a lengthy series of harassing and sexually graphic text messages beginning in May 2013 and continuing into October 2013. Upon receiving this new complaint, MDWFP immediately suspended Bradshaw without pay based on “extraordinary circumstances.” Following a failed polygraph test, Bradshaw admitted to sending the subsequent messages. Consequentially, MDWFP terminated Bradshaw’s employment. Bradshaw appealed his termination to the EAB and requested reinstatement, and a hearing was held before an EAB hearing officer. The hearing officer entered an order finding that “Bradshaw did not receive due process” because he was terminated for a Group III Number 14 offense, but charged with a Group III Number 13 offense. The definitions of these offenses are identical except that the definition of a Number 13 offense includes the additional language “including, but not limited to, the arrest or conviction for a felony or misdemeanor.” The hearing officer ordered Bradshaw reinstated with back pay, due to his finding. MDWFP requested review of the hearing officer’s decision by the en banc EAB, who by a 2–1 vote, reversed the hearing officer’s order and upheld the agency’s decision to terminate Bradshaw finding that Bradshaw failed to show that his termination was improper. Bradshaw appealed the EAB’s decision to the Smith County Circuit Court, alleging that the MDWFP improperly terminated him for committing a Number 14 offense when he received notice of only a Number 13 offense. The circuit court entered a final judgment reversing the decision of the EAB. MDWFP appealed.

ISSUE

Whether (1) Bradshaw was denied due process, and (2) the EAB’s decision was supported by substantial evidence.

HOLDING

Because (1) Bradshaw had clear notice of the conduct and the nature of the charges for which he was subject to discipline, any technical error was harmless and the denial of due process argument was without merit. (2) Because considering the factual findings of MDWFP and the EAB, the EAB’s decision was supported by substantial evidence and was neither arbitrary nor capricious. Therefore the Court of Appeals reversed the decision of the Smith County Circuit Court.

Reversed - 2015-SA-00340-COA (June 28, 2016)

Opinion by Judge Wilson

Hon. Eddie H. Bowen (Smith County Circuit Court)

William Douglas Mann Jr. & Douglas Drew Malone for Appellant - L. Wesley Broadhead for Appellee

Briefed by [Alexandra Bruce](#)

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OSBORNE V. OSBORNE

CIVIL - DOMESTIC RELATIONS

FAMILY - DIVORCE - HABITUAL CRUEL AND INHUMAN TREATMENT - For a finding of habitual cruel and inhuman treatment, the conduct must consist of something more than unkindness or rudeness or mere incompatibility or want of attention

FACTS

Leslie and Lonnie Osborne were married in 1999 and had no children. The couple separated in January 2012. The chancellor held an evidentiary hearing concerning solely whether Lonnie had grounds for a habitual cruel and inhuman treatment divorce. Leslie did not file a counterclaim, and did not present any witnesses at the hearing. Lonnie asserted that during the marriage, Leslie was uncommunicative, controlling, and belittling. Trouble developed early when the two disagreed over how much time should be spent rebuilding a house destroyed by a hurricane. Then Leslie took a job that required him to travel away from home for four to six months out of the year. While he was gone, Lonnie was offended when Leslie would not take her phone calls for days at a time. Lonnie asserted that Leslie's controlling and belittling behaviors centered frequently around financial matters. The chancellor held that Lonnie had not proven habitual cruel and inhuman treatment by a preponderance of the evidence. Lonnie appealed.

ISSUE

Whether the chancellor's erred in dismissing the divorce action.

HOLDING

Because to have a finding of habitual cruel and inhuman treatment the conduct must consist of something more than unkindness or rudeness, the actions of Leslie did not rise to the level required to grant a divorce. Therefore, the trial court's judgment was affirmed.

Affirmed - 2014-CA-01517-COA (Jun. 28, 2016)

Opinion by Judge Greenlee

Hon. G. Charles Bordis IV (Jackson County Chancery Court)

Thomas Wright Teel for Appellant - Gary L. Robers for Appellee

Briefed by [Autumn T. Breeden](#)

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PATEL V. HILL-ROM CO., INC.

CIVIL - WRONGFUL DEATH

CIVIL PROCEDURE - MOTION TO DISMISS - CONVERSION TO MOTION FOR SUMMARY JUDGMENT - Where the court decides to convert a motion to dismiss into a motion for summary judgment, claimant is entitled to ten days' notice before the time fixed for the hearing

CIVIL PROCEDURE - MOTION TO DISMISS - ADEQUATE NOTICE - Claimants must be given adequate notice of a scheduled hearing on a motion to dismiss as well as adequate time to respond

CIVIL PROCEDURE - MOTION FOR LEAVE TO AMEND - WHEN JUSTICE REQUIRES - Courts shall grant a motion to amend a complaint after a Rule 12(b)(6) motion when justice so requires pursuant to Miss. R. Civ. P. 15(a)

CIVIL PROCEDURE - MOTION FOR LEAVE - DISCRETION - A trial court's decision will stand unless the discretion it used is found to be arbitrary and clearly erroneous

FACTS

In December 2007, Vijay Patel's father, Natwarlal Patel, was hospitalized for shortness of breath, weakness, and lethargy. On December 19, 2007, Natwarlal was found lying on the floor of his room, suffering head injuries. After surgery failed, Natwarlal died on January 5, 2008. Patel claimed that the VersaCare hospital bed manufactured by Hill-Rom was defective. Patel also claimed that Hill-Rom knowingly concealed the alleged design defects, which were not discovered until March 2012, when they were published in the Federal Register. Patel reasoned that the cause of action did not accrue until that time. In November 2013, Hill-Rom filed a motion to dismiss Patel's complaint arguing that the statute of limitations had elapsed and that Patel failed to adequately establish fraudulent concealment. The trial court agreed. Patel then filed a post-judgment motion to amend his complaint, which was denied. Patel appealed.

ISSUES

Whether (1) Patel was entitled to notice that the circuit court was converting Hill-Rom's motion to dismiss to a motion for summary judgment; (2) Patel received adequate notice of the hearing on Hill-Rom's motion to dismiss; and (3) the trial court erred in denying Patel's post-judgment motion to amend his complaint

HOLDING

(1) Because the trial court committed a harmless error in stating it granted a motion for summary judgment, the Court held that Patel's claim of improper conversion was meritless. (2) Because the record reflected that Patel's lawyer was aware of the hearing on the motion to dismiss, the Court held that Patel was given adequate notice of the hearing. (3) Because Patel failed to show how he would amend the complaint to further prove his wrongful death claim, the Court concluded that the trial court acted appropriately within its discretion in denying Patel's post-judgment motion to amend his complaint. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2015-CA-00371-COA (June 28, 2016)

Opinion by Presiding Judge Irving

Hon. Gerald W. Chatham Sr. (Desoto County Circuit Court)

Ralph Stewart Guernsey for Appellant - John Ramsey McCarroll III & Christopher R. Cashen for Appellee

Briefed by [Rachel Smith](#)

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SHANKLIN V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - PROBATION - REVOCATION - Probation may be revoked upon a showing that the defendant more likely than not violated the terms of probation

CRIMINAL PROCEDURE - PROBATION - REVOCATION - A willful refusal to pay fines can result in probation revocation and imprisonment, but a failure to pay after sufficient bona fide efforts would require the court to consider alternative measures of punishment

CRIMINAL PROCEDURE - ADMINISTRATIVE HEARINGS - RIGHT TO COUNSEL - The right to appointed counsel in administrative hearings is determined on a case-by-case basis; however, it is clear a probationer will have the right to counsel when the issues at the hearing are complex or otherwise difficult to develop

FACTS

Shanklin pled guilty to possession of cocaine with intent to distribute, and was sentenced to twenty years in the custody of the Mississippi Department of Corrections (MDOC), with all twenty years suspended, conditioned upon Shanklin's successful completion of five years' supervised probation and fifteen years' unsupervised probation. Shanklin was also ordered to pay various fines and court costs at a rate of \$50 dollars per month. Two years after this sentence, Shanklin's probation officer filed an affidavit stating that Shanklin had failed to report for almost a year and was behind several thousand dollars in unpaid supervision fees and court-ordered fees. Shanklin was then arrested and signed a waiver of the right to a preliminary probation-revocation hearing, acknowledging that he had the right to retain private counsel. The trial court later found that Shanklin had violated the terms of his probation, revoked his probation, and ordered him to serve the twenty years previously suspended in the custody of MDOC. Shanklin then filed a post-conviction relief (PCR) motion with the court claiming that there were certain material facts not heard by the court, he did not know that pleading guilty would result in revocation, and that he also did not know that he could have an attorney present at the revocation hearing. The trial court dismissed the motion. Shanklin appealed.

ISSUES

Whether (1) Shanklin's probation was improperly revoked and (2) his waivers of the right to a preliminary probation-revocation hearing and the right to counsel were knowing and voluntary.

HOLDING

(1) The court held the first issue raised by Shanklin was without merit. The court noted that Shanklin would apply the requirement of courts to inquire about the willfulness of defendants' failure to pay fines to not reporting to the probation officer. Furthermore, the court held that Shanklin has the burden of proof, not the State, in a PCR motion.

(2) The court held that nothing in the record provided proof that his waiver of the revocation hearing was not knowing and voluntary. Furthermore, the right to counsel in probation-revocation hearings is not automatic, but rather reserved only for cases that present complex or otherwise difficult issues to develop. Because the waiver was made knowingly and voluntarily, and the issues were neither complex nor difficult to develop, this argument was not persuasive. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

Affirmed - 2014-CA-01654-COA (June 28, 2016)

Opinion by Judge Barnes

Hon. W. Ashley Hines (Washington County Circuit Court)

Edward Blackmon for Appellant - Ladonna C. Holland for Appellee

Briefed by [Reginald R. Lewis](#)

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WAID V. WAID

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - DOMESTIC RELATIONS - STANDARD OF REVIEW - An appellate court will not disturb a trial court's opinion when supported by substantial evidence unless the court abused its discretion, was manifestly wrong or clearly erroneous, or applied an erroneous legal standard

FAMILY LAW - ADULTERY - EVIDENCE - To prove adultery by circumstantial evidence, the plaintiff must provide clear and convincing evidence supporting a finding of an adulterous inclination, and a reasonable opportunity to satisfy that inclination

FAMILY LAW - ADULTERY - EVIDENCE - Establishing adultery requires showing either an infatuation with a particular person or a general adulterous propensity

CIVIL PROCEDURE - JUDICIAL POWERS - CREDIBILITY- As the judge of credibility, a chancellor is entitled to choose between reasonable interpretations of the evidence and the inferences that may be drawn therefrom

FACTS

After being married to Herman Waid for seven years, Lila Waid was determined to be incompetent. A court appointed Patricia Abraham, Lila's daughter from a previous marriage, and Herman as co-conservators of Lila's person. Patricia filed a complaint for divorce against Herman on the ground of adultery after suspecting that Herman was having an affair. The court appointed a special conservator, W.S. Stuckey Jr, to evaluate Patricia's claims and file for divorce if necessary. After investigation, Stuckey filed an amended complaint for divorce on the grounds of adultery, habitual cruel and inhuman treatment, and, in the alternative, irreconcilable differences. The complaint also requested the court to remove Herman as co-conservator of Lila's person and to require Herman to pay for damages to the marital home. Herman admitted to having a close relationship with J.K. subsequent to Lila's health decline. Herman testified that he and J.K. slept in the same bed on occasion, but they never had sexual intercourse. J.K. similarly testified that they never had intercourse, although she wished their relationship was more than friendship. The trial court denied Lila's request for divorce. Lila appealed.

ISSUE

Whether the trial court was within its discretion after weighing all the evidence to deny Lila's motion of divorce based on adultery.

HOLDING

Because the trial court, which heard the testimony of the witnesses, determined their credibility, weighed that and other evidence, and made a decision within its discretion, the trial court did not abuse that discretion, was not

manifestly wrong, was not clearly erroneous, and applied the proper legal standard. Therefore, the Court of Appeals affirmed the judgment of the Humphreys County Chancery Court.

DISSENT

Because precedent establishes that, to prove adultery, it is sufficient for the plaintiff to show by clear and convincing evidence that an adulterous inclination or an infatuation with a particular person exists, as well as the opportunity to satisfy that inclination or infatuation, and the plaintiff showed such proof, Judge Carlton would reverse the judgment of the trial court.

Affirmed - 2014-CA-00633-COA (June 28, 2016)

Opinion by Judge Fair – Dissent by Judge Carlton

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

W.S. Stuckey Jr. for Appellant - Kinney M. Swain for Appellee

Briefed by [Daniel McDonald](#)

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WATKINS DEVELOPMENT, LLC v. HOSEMANN

CIVIL - STATE BOARDS AND AGENCIES

ADMINISTRATIVE LAW - ADMINISTRATIVE AGENCIES - JUDICIAL REVIEW - Judicial review of the action of an administrative agency determines only whether the order of the agency: 1) was supported by substantial evidence, 2) was arbitrary or capricious, 3) was beyond the power of the agency to make, or 4) violated some statutory or constitutional right of the complaining party

ADMINISTRATIVE LAW - ADMINISTRATIVE HEARINGS - DEFERENCE TO SECRETARY OF STATE'S FACTUAL FINDINGS - The findings of the Secretary of State as to the facts, if supported by competent material and substantial evidence, are conclusive

MISSISSIPPI SECURITIES ACT - FRAUD - OMISSION - Fraud constitutes an omission of a material fact under the Mississippi Securities Act

MISSISSIPPI SECURITIES ACT - VIOLATIONS - ENUMERATED - Pursuant to Section 75-71-501 of the Mississippi Securities Act: It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, (1) To employ any device, scheme or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person

FACTS

In 2010, Watkins Development, LLC (“Watkins Development”) began working as the master planner to redevelop areas in Meridian, Mississippi. Pursuant to this role, David Watkins testified that he purchased the Belk building in Jackson, Mississippi with the understanding that the city of Jackson would lease space in the building. Watkins formed Retro Metro, a limited liability company, to revitalize the Belk building. Watkins orchestrated a financing agreement, the “Development Agreement”, between Watkins Development and Retro Metro to finance the project. Watkins also negotiated a bond agreement with the Mississippi Business Finance Corporation (“MBFC”). Watkins failed to disclose the Development Agreement or the \$1.25 million in liabilities that Retro Metro owed to Watkins Development through the Development Agreement to MBFC. Through the bond issuance, Watkins received over \$5 million from MBFC and stated in the bond agreement documents that Retro Metro had not entered into any agreements that adversely affected its business interests. After the bond issuance, each of the members of Retro Metro received a partner distribution that was over forty times their initial investment in the company. Pursuant to the bond agreements, Watkins was required to request payments for construction costs. In three requests, Watkins represented that construction costs on the Belk building had cost \$3.05 million when, in reality, the construction costs had only totaled \$959,382.90. These bond issuances were issued to Retro Metro. At an administrative hearing in front of

Delbert Hosemann, the Secretary of State, Watkins failed to introduce into evidence any accounts receivable from Retro Metro. At the hearing, it was discovered that Retro Metro funds had been diverted away from construction on the Belk building and to accounts related to an unrelated project in Meridian. The administrative hearing also found that Retro Metro had diverted funds issued by bonds from MBFC to fund Meridian Law Enforcement Center, LLC's ("MLEC") redevelopment of a building in Meridian. The Secretary of State found that Watkins had engaged in conduct prohibited by the Mississippi Securities Act ("the Act"), including committing fraud and failing to disclose certain documents including liabilities incurred by Retro Metro. The administrative hearing ordered Watkins to make \$587,084.34 in restitution and \$75,000 in penalties. The Secretary of State issued a Final Order adopting the penalties and finding Watkins committed four violations of the Act. Watkins appealed to the Hinds County Chancery Court. The chancellor affirmed three of the four findings of the Secretary of State but reversed the Secretary of State's finding that Watkins failed to disclose the liabilities of Retro Metro in the bond agreement. Watkins appealed.

ISSUE

Whether the Secretary of State erred in affirming the Chancery court's finding that Watkins (1) failed to disclose the intentions to use the bond proceeds for any use besides the uses enunciated in the bond agreement, (2) misused of the bond proceeds was an act and course of business that operated to mislead or deceive, and (3) failed to disclose the bond proceeds would be used to fund the MLEC project.

HOLDING

(1) Because Watkins represented through the bond documents that the Retro Metro bond proceeds would be used solely to renovate the Belk building, Watkins made a materially false statement that violated the Act. (2) Because Watkins engaged in a pattern of misappropriating bond proceeds to the MLEC project, Watkins engaged in an act and course of business that operated to mislead or deceive. (3) Because substantial evidence existed to find that Watkins behaved fraudulently in failing to disclose the liabilities of Retro Metro in the Development Agreement, the court affirmed the chancellor's finding of three violations. The court reversed the chancellor's ruling regarding the fourth finding and found that the Secretary of State had the authority to penalize Watkins related to the failure to disclose Retro Metro's liabilities. Therefore, the Court of Appeals decision affirmed in part and reversed and rendered in part the judgment of the Hinds County Chancery Court.

DISSENT

Judge Wilson dissented with the majority for two reasons. First, Judge Wilson argued that the Secretary of State failed to appeal the chancellor's reversal of the findings and penalties related to Watkins's failure to disclose Retro Metro's liabilities on the Development Agreement. Second, Judge Wilson argued that Watkins was owed money related to development projects in Meridian and, as such, the divestment of bond funds from the Belk building redevelopment to payment for Watkins's work on the Meridian project did not constitute a violation of the Mississippi Securities Act.

Affirmed in Part, Reversed and Rendered in Part - 2014-CA-01657-COA (June 28, 2016)

Opinion by Judge Carlton - Dissent by Judge Wilson

Hon. Hollis McGehee (Hinds County Chancery Court)

J. Brad Pigott for Appellants - Douglas T. Miracle, Cheryn Netz Baker, Jessica Leigh Long, & Alison O'Neal McMinn (Att'y Gen. Office) for Appellee

Briefed by [Wes Bulgarella](#)

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WEATHERSBY V. MISS. BAPTIST HEALTH SYS. INC.

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - DISABILITY - PROOF - A claimant must show (1) actual physical injury and (2) loss of wage-earning capacity to prove disability justifying an award of compensation under Miss. Code Ann. § 71-3-7

WORKERS' COMPENSATION - PRESUMPTIONS - NO CHANGE IN WAGES - A rebuttable presumption of no loss of wage-earning capacity arises when the claimant's post-injury wages are equal to or exceed his pre-injury wage

WORKERS' COMPENSATION - PRESUMPTIONS - NO CHANGE IN WAGES - The claimant may rebut the presumption by showing that his or her post-injury earnings are unreliable, such as evidence that wages generally increased since the injury, that the claimant has worked additional hours for the same pay, or that he or she is being paid out of the employer's sympathy

FACTS

Patricia Weathersby worked as a claims collector and, later, as a financial analyst for Mississippi Baptist Health Systems ("Baptist"). In March 2011, Weathersby injured her back while within the scope of her employment. Baptist acknowledged that Weathersby had suffered a compensable injury and began paying workers' compensation benefits. Weathersby had back surgery in May 2011 and began working from home in June. Baptist admitted a compensable injury but denied that Weathersby had suffered any permanent disability or loss of wage-earning capacity. The administrative law judge ("ALJ") held a hearing to determine the date of maximum medical improvement and the existence and extent of any permanent disability. Weathersby testified that she had not lost any income as a result of her injury, that her job did not require her to lift anything heavier than a stack of documents, and that her injury had not prevented her from fulfilling any of her job duties. She also testified that to her knowledge, her supervisors were satisfied with her job performance. The ALJ found that Weathersby's date of maximum medical improvement was July 5, 2011 and that Weathersby had suffered a 10% loss of wage-earning capacity, awarding permanent partial disability benefits. Baptist petitioned the Commission for review. After the ALJ's hearing, Weathersby had surgery in November 2014. Her post-operation doctor determined that she had reached maximum medical improvement in March 2015. At Weathersby's request, he released her to work without restriction and assigned a 9% permanent partial impairment to the body. The Commission allowed Weathersby to introduce her medical records from her later surgery. After reviewing all the evidence, the Commission found that Weathersby had not proven that she had suffered a loss of wage-earning capacity and reversed the ALJ's decision. Weathersby appealed.

ISSUES

Whether the Commission erred (1) in determining that Weathersby suffered no loss of wage earning capacity, (2) in declining to remand the case to the ALJ after allowing Weathersby to introduce evidence not considered by the ALJ, and (3) in its findings of fact.

HOLDING

(1) Because Weathersby did not present any evidence showing that her post-injury wages were an unreliable indicator of her wage-earning capacity and Baptist presented evidence that her wages remained the same because she continued to fulfill the same job responsibility just as capably as she did prior to her injury, the Commission's determination that Weathersby failed to rebut the presumption against disability was not clearly erroneous. The Commission's determination that Weathersby could not show that her ability to perform the duties of her employment were impacted or resulted in a loss of wage-earning capacity was supported by substantial evidence since Weathersby only worked sedentary clerical positions and Weathersby did not present a vocational expert to suggest that she could not receive the same level of compensation in another job nor any evidence that she was in danger of termination. (2) Because Weathersby did not support her assertion that the Commission erred as a matter of law by declining to remand the case to the ALJ for additional findings regarding her most recent surgery and recovery in the argument section of either of her briefs, the issue was procedurally barred. Further, the issue was without merit since the Commission had discretion to admit evidence that the ALJ did not consider without remanding the case and the Commission did not abuse its discretion in doing so. (3) The Commission's incorrect statement of the year of Weathersby's injury was obviously a scrivener's error and not grounds to reverse. Since there was substantial evidence that Weathersby's injury did not impair her ability to earn wages, the omission of the additional comments in her doctors' notes in the Commission's summary of evidence did not undermine its findings. Therefore, the Court of Appeals affirmed the Mississippi Workers' Compensation Commission.

Affirmed - No. 2015-WC-01170-COA (June 28, 2016)

Opinion by Judge Wilson

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COURT OF APPEALS - CRIMINAL CASES

BROWN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER OFFENSE - If the record shows any evidence that can support a lesser offense, then the circuit court should give the lesser-offense jury instruction

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - ESSENTIAL ELEMENTS - Failure to instruct the jury as to an essential element of the crime is reversible error

CONSTITUTIONAL LAW - DOUBLE JEOPARDY - MISTRIAL - If a mistrial is granted upon the court's motion or upon the State's motion, a second trial is barred because of double jeopardy, unless taking into consideration all the circumstances there was a 'manifest necessity' for the mistrial

FACTS

On September 20, 2009 one woman was killed and four people were wounded in a shooting during a confrontation at a nightclub between Alvin Brown and another man. Brown was taken into custody on September 30, 2009, indicted on December 9, 2009, and his trial began on August 19, 2013 and ended three days later. At trial, Brown denied owning a gun or shooting anyone that night, claiming that it was the man he confronted. The other man claimed Brown was the shooter. One of the witnesses claimed that Brown had the gun, but was unsure who shot the weapon during the confrontation. A gunshot residue expert testified that Brown tested positive for gunshot residue on his right palm and the back of his left hand. The jury convicted Brown of manslaughter and four counts of aggravated assault. Brown appealed.

ISSUES

Whether the trial court erred in (1) giving an "imperfect" self-defense manslaughter jury instruction and (2) not properly instructing the jury on the aggravated assault charges; and whether (3) Brown was subjected to double jeopardy.

HOLDING

(1) Because the evidence could have supported a manslaughter offense and because circuit courts should give lesser-offense instructions if the evidence supports it, the trial court did not err in giving an imperfect self-defense manslaughter jury instruction. (2) Because the jury instructions did not contain the essential element of serious bodily injury and because failure to instruct on an essential element of the crime is reversible error, the trial court erred in not properly instructing the jury on the aggravated assault charge. (3) Because the mistrial was warranted to protect Brown's constitutional rights, thus constituting a manifest necessity, Brown was not subjected to double jeopardy. Therefore, the Court of Appeals affirmed in part, and reversed in part the judgment of the Hinds County Circuit Court and remanded the case for further proceedings.

Reversed & Remanded - 2014-KA-00331-COA (June 28, 2016)

Opinion by Judge Ishee

Hon. William A. Gowan Jr. (Hinds County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Andrew B. Lintner](#)

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CARTER V. STATE

CRIMINAL - FELONY

EVIDENCE - RELEVANCE - PAST CRIMES - While evidence of other crimes, wrongs, or acts are not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

FELONY - CHILD NEGLECT - BURDEN OF PROOF - To support a felony child neglect conviction, the State is required to prove the defendant willfully, unlawfully, and knowingly deprived the child of food, care, or supervision appropriate for the child's age, which resulted in substantial harm to the child's physical, mental, or emotional health

FELONY - INDICTMENT - CONSTRUCTIVE AMENDMENT - Not all variances between the indictment and jury instructions constitute a constructive amendment; the central question is whether the variance is such as to substantially alter the elements of proof necessary for a conviction

CRIMINAL PROCEDURE - CONFESSION - VOLUNTARY CONFESSION - For a confession to be admissible, it must have been given voluntarily, without threats, coercion, or offer of reward

FACTS

On Wednesday, January 26, 2011, a Hinds County sheriff's deputy discovered the bodies of Robert Lewis Carter Sr. (Robert) and his fiancée, Renita Lee Mark (Renita), at Robert's home. The victims had died from multiple gunshot wounds, and the couple's seven-month-old infant, Robert Carter Jr., was found on the floor of the home, hungry, crying, and in need of a diaper change. When interviewed by law enforcement, Carter initially requested an attorney when read his *Miranda* rights. Accordingly, the police stopped the interrogation pursuant to his request, however, Carter continued to ask the police questions and stated that he would talk with him. He signed an acknowledgement and waiver of his *Miranda* rights. Carter confessed to burglarizing his brother's home with codefendants Travaris Christian (Christian) and Alonzo Christian (Alonzo). He stated his role in the burglary was to get his brother to open the door so that Travaris could come in with the gun. He alleged that it was Travaris who actually pulled the trigger in the shootings, and acknowledged that he had heard the child crying in the house. The prosecution's testimony established that the murders took place either late Monday night, January 24, or early Tuesday morning, January 25. Robert and Renita's bodies and the infant were discovered Wednesday. The sheriff's deputy who found the bodies testified that the infant was found screaming on the floor in the fetal position with a lot of feces in his diaper. At trial, the defense objected to the conspiracy jury instruction, arguing that the language "or either of said persons" impermissibly altered the allegation of the indictment charging all three men with participation in the crime. The indictment, in pertinent part, stated, "[The three defendants] did willfully, unlawfully, and feloniously conspire and agree with the other to . . . burglarize the dwelling house of Robert Lewis Carter . . . being a felony in violation of Mississippi Code Annotated [section] 97-1-1 (1972), as amended. The jury instruction charged the jury to find Carter guilty if it found beyond a reasonable doubt that he, "Did willfully, unlawfully, and feloniously conspire and agree with Alonzo Christian and Travaris Richard Christian, or either of said persons, to . . . burglarize the dwelling house of Robert Lewis Carter . . ." The court denied Carter's motion to suppress his confession, finding that Carter voluntarily waived his *Miranda* rights and that his confession was admissible. Carter then appealed, arguing that the trial court erred in denying his motion to suppress his confession.

ISSUES

Whether (1) the trial court erred in allowing the State to introduce evidence regarding the defendant's prior bad-acts; (2) the evidence of felony child neglect was insufficient; (3) jury instruction S-7 constructively amended the indictment; and (4) the trial court abused its discretion when it denied Carter's motion to suppress his confession.

HOLDING

(1) Renata's testimony to the jury did not constitute reversible error as it was relevant to tell the complete story and to demonstrate Carter's motive and intent after Robert threw Carter out of Robert's house. (2) The evidence presented to the jury was sufficient to support a finding of felony child neglect. (3) The conspiracy jury instruction did not

constructively amend the indictment and was sufficient to inform Carter as to the factual basis of the conspiracy charge against him. (4) Carter voluntarily waived his *Miranda* rights, and therefore his confession was admissible. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2013-KA-01927-COA (June 16, 2016)

Opinion by Justice Greenlee

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

George T. Holmes & Andre De Gruy (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd & John R. Henry Jr. for (Att’y Gen. Office) for Appellee

Briefed by [Amber Kipfmiller](#)

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HENDERSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - WITNESS TESTIMONY - DEFENDANT INTERFERENCE - If there is evidence a defendant attempted to keep a witness from testifying, this evidence has probative value as an incriminating circumstance inconsistent with the defendant’s innocence and as tending to show a consciousness of guilt and that his cause lacked honesty and truth

FACTS

William Michael Jordan shot Aaron Coleman at a party. JaMichael Smith, Charlie Henderson, Bobby Baker, and Jordan did not call an ambulance despite Coleman still being alive. After Coleman died, the men disposed of Coleman’s body on the side of the interstate. Smith, Baker, and Henderson were charged with accessory after the fact to murder, while Jordan was charged with manslaughter and felon in possession of a firearm. Baker originally refused to give a statement, but eventually gave one that was consistent with the other statements given in the case. After Baker and Smith implicated Henderson, but before Henderson’s trial, Baker was alerted about a violent, profane rap video posted on YouTube. The video involved Henderson and another rapper, discussed the fact that their friends had implicated them, and threatened that they would kill the people that turned on them. Baker, who would be testifying for the prosecution in Henderson’s trial, found the video to threaten him personally. The trial court allowed the video into evidence and played it for the jury. The Lauderdale County Circuit Court found Henderson guilty of accessory after the fact to the murder of Coleman. Henderson appealed.

ISSUE

Whether the trial court erred in admitting a YouTube rap video into evidence.

HOLDING

Because the video did not show a crime similar to Coleman’s death and the probative value outweighed the prejudicial impact, the trial court did not err when it admitted it into evidence and playing it for the jury. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2015-KA-00164-COA (June 28, 2016)

Opinion by Judge Barnes

Hon. Robert Walter Bailey (Lauderdale County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee

Briefed by [Addie Clark](#)

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SIMS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - STANDARDS OF REVIEW - SUBSTANTIAL EVIDENCE - When reviewing challenges to the weight of the evidence, the court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction and unconscionable justice

CRIMINAL PROCEDURE - EQUAL PROTECTION CHALLENGES - *BATSON* - On appellate review, a trial court's determination under *Batson* are accorded great deference because they are largely based on credibility

CRIMINAL PROCEDURE - EFFECTIVE ASSISTANCE OF COUNSEL – INADEQUATE RECORD - Where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief

FACTS

Tyler Lefan testified that he was robbed at gunpoint in the parking lot of a Minit Mart in Hattiesburg Mississippi by Lonnie Sims and Jeremy Walker. Upon being arrested, Sims made unsolicited comments regarding the money that had been found on his person after the robbery. Lefan also identified Sims in a lineup. Sims took the stand in his defense, and denied having any involvement in the armed robbery. However, the jury returned a guilty verdict against Sims. Prior to the trial court's imposing its sentence at the hearing, Sims's trial attorney informed the trial court that Sims wished to have him dismissed as counsel. However, the trial court proceeded with sentencing, and then entered a final judgment of conviction and sentence. Sims filed a pro se motion for a new trial, or in the alternative a JNOV. The trial court entered an order denying Sims's motion. Sims appealed.

ISSUES

Whether (1) the verdict was contrary to the overwhelming weight of the evidence; (2) Lefan's testimony was "duplicious" and "impermissibly suggestive;" (3) Whether Sims was denied a fair and impartial jury because the State exercised four of its peremptory strikes in a racially discriminatory manner to exclude African-Americans from the jury; (4) Sims received ineffective assistance of counsel at trial; and (5) reversal is warranted considering the discovery of new evidence.

HOLDING

(1) Because the jury properly resolved the conflicting testimony, the verdict was not contrary to the overwhelming weight of the evidence. (2) Because the claim that Lefan's testimony was "duplicious" and "impermissibly suggestive" is not supported by the record, the issue was without merit. (3) Because the trial court did not abuse its discretion in accepting the State's race neutral reasons for striking the potential jurors, Sims was not denied his constitutional right to a fair and impartial jury under *Batson*. (4) Because Sims's ineffective-assistance of counsel claim involves information outside of the record, the issue cannot be fully addressed on direct appeal and should be resolved in a motion for post-conviction relief. (5) Because Sims failed to show how by due diligence Jeremy Walker's affidavit could not have been discovered prior to trial and could at best be used for impeachment purposes, the assignment of error was without merit. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2014-KA-01174-COA (June 28, 2016)

Opinion by Judge James

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

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

Briefed by [Madison Coburn](#)

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YOUNG V. STATE

CRIMINAL - FELONY

CIVIL PROCEDURE - JUROR REMOVAL - FOR CAUSE - Before a claim related to a denial of a challenge for cause may be valid, the defendant must have exhausted all of his peremptory challenges and an incompetent juror must be forced by the trial court's erroneous ruling to sit on the jury

EVIDENCE - CHARACTER EVIDENCE - ADMISSIBILITY - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but it may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

EVIDENCE - ADMISSIBILITY - PROBATIVE VALUE - If evidence is admissible for a permissible purpose, the court must also consider whether its probative value is substantially outweighed by the danger of unfair prejudice

EVIDENCE - TESTIMONY - ADMISSIBLE - Where substantially necessary to present to the jury the complete story of the crime, evidence or testimony may be given even though it may reveal or suggest other crimes

EVIDENCE - PROFFER - PRESERVATION OF ERROR FOR APPEAL - When testimony is not allowed at trial, a record of the proffered testimony must be made in order to preserve the point for appeal, and the burden to make the proffer is on the offering party

CONSTITUTIONAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - REVIEW ON DIRECT APPEAL - 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, and the Court of Appeals may address such claims only if (a) the issues are based on facts fully apparent from the record, or (b) the parties stipulate that the record is adequate, and we determine that additional findings of fact by a trial judge are not needed; if the record is not sufficient to address the claims on direct appeal, we dismiss the claims without prejudice, preserving the defendant's right to raise the claims later in a properly filed motion for post-conviction relief

FACTS

On July 28, 2012, Young was staying at the home of his uncle, Glenn Young ("Glenn"), and Glenn's wife, Kelly Young ("Kelly"). Sometime after midnight, Young, who was then thirty-six years old, entered the room of Kelly's eleven-year-old daughter, K.M. K.M. left her room briefly, and when she returned, Young was wearing only his boxers. Young threw K.M. onto her bed, lay on top of her, and put his hand over her mouth. Young pulled down K.M.'s pants and inserted his penis into her vagina. K.M. testified that Young was wearing a condom, which he must have put on while she was out of the room. K.M. tried to scream, but Young kept his hand over her mouth. When Young eventually stopped, K.M. tried to leave, but Young stopped her and then penetrated her anally. Young stopped again, and K.M. was finally able to leave the room. She went to the living room and cried, and Young followed her there and told her he was "sorry." K.M. then ran to Kelly's and Glenn's bedroom crying and screaming that Young touched her. Young ran into the room behind her and said, "K.M, tell the truth. Tell the truth. I got felonies." Kelly and Glenn then rushed K.M. to the hospital. At the hospital, K.M. and Kelly were both crying and very distraught. A nurse examined K.M., observed that she had suffered a recent vaginal tear, and collected a rape kit, which was sent to the State Crime Lab. There was blood on K.M.'s underwear and pajamas, her rectal swab and underwear tested positive for blood and seminal fluid, and her vaginal swab tested positive for blood. Analysts at the State Crime Lab attempted to compare the seminal fluid to a known sample of Young's DNA, but forensic biologist Alexandria Bradley testified that the results of the test were inconclusive because the fluid had been mixed with K.M.'s blood. Young, accompanied by his stepfather, turned himself in to the Adams County Sheriff's Department in the early hours of the morning. Captain Robert Brown interviewed Young after advising him of his rights. Young admitted that he penetrated K.M. vaginally. In a written statement, Young claimed that he fell asleep in K.M.'s bed and awoke to find her on top of him and having sex with him. Young claimed that when he first awoke he thought he was dreaming and that he made K.M. stop as soon as he realized what she was doing. Young also claimed that a condom that he kept in his wallet was missing and that he had no idea where it was. Young was arrested and indicted for sexual battery. His first trial ended in a hung jury and a mistrial. At his second trial, he testified and continued to maintain that he awoke to find K.M. on top of him. Young claimed that he did not know whether he penetrated K.M. He said that he told Captain Brown the same thing during his interview. He testified that he admitted to penetration only because Captain Brown was adamant that penetration had occurred. Young claimed that when he awoke, K.M. had begged him not to tell her mother what she had done. During voir dire, a prospective juror disclosed that her daughter had been sexually assaulted; however, she stated that she could be fair and impartial if chosen to serve on the jury. Young subsequently challenged the prospective juror for cause. The court denied the

challenge because the prospective juror had stated clearly that she could be fair. Young filed a pretrial motion in limine to exclude any mention of his prior convictions, but the court partially denied Young's motion. Therefore, Kelly was permitted to testify that Young blurted out, "K.M., tell the truth. Tell the truth. I got felonies." The jury was not told anything else about Young's prior crimes. At trial, Glenn testified that he was no longer angry with Young. Glen explained, that he thought about the situation and what happened. He testified that he knew times when K.M. had done stuff. Young's attorney then asked, "Like what?" The State objected on relevance grounds, and the trial judge ruled that he would sustain the objection at this point and directed Young's attorney to ask another question. Young's attorney subsequently asked Glenn whether he had ever known K.M. to be dishonest with him. The State again objected on relevance grounds, and the trial judge sustained the objection. Young's attorney did not make a proffer on the record after either objection was sustained. The jury convicted Young of sexual battery, and the court sentenced him to the statutory minimum of twenty years' imprisonment. Young subsequently filed a motion for a new trial or judgment notwithstanding the verdict, which was denied. Young appealed.

ISSUES

Whether the trial court erred by (1) refusing to excuse for cause a prospective juror whose daughter was sexually assaulted; (2) allowing Kathy to testify that Young said he had prior felony convictions; (3) refusing to allow Glenn to testify about K.M.'s past behavior or alleged dishonesty; (4) giving an instruction on the elements of the offense that did not require the jury to be unanimous; (5) Young's legal counsel was ineffective due to failing to proffer Glenn's testimony concerning K.M.'s past behavior.

HOLDING

(1) The record did not disclose whether Young exhausted his peremptory challenges, and the juror did not sit on the jury. Thus, this argument was without merit. (2) The judge did not abuse his discretion by allowing Kathy's testimony, because Young's statement could be interpreted as an attempt to keep K.M. from disclosing a criminal act or proof of knowledge or consciousness of guilt. (3) Young's attorney did not proffer Glenn's testimony, so it was not on record for appeal, making it procedurally barred. (4) Young did not object to the jury instruction at trial. Thus, this claim was procedurally barred. (5) Even if the Court of Appeals assumed that the failure to proffer Glenn's testimony was an error of constitutional significance, there was no way to determine on the record whether Young suffered any prejudice as a result. The Court of Appeals did not address the ineffective assistance of counsel claim. Therefore, the Court of Appeals affirmed the judgment of the Adams County Circuit Court.

Affirmed - 2015-KA-00116-COA (June 28, 2016)

Opinion by Judge Wilson

Hon. Forrest A. Johnson Jr. (Adams County Circuit Court)

Damon Ramon Stevenson for Appellant - Ladonna C. Holland (Att'y Gen. Office) for Appellee

Briefed by [Peter H. Liddell](#)

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