

**MISSISSIPPI SUPREME COURT DECISIONS – JUNE 9, 2016**

***SUPREME COURT - CIVIL CASES***

**COMM’N ON JUDICIAL PERFORMANCE V. CLINKSCALES**

**CIVIL - JUDICIAL PERFORMANCE**

**JUDICIAL CONDUCT - CANON 5 - ENDORSING CANDIDATES FOR PUBLIC OFFICE** - A judge or candidate for election to judicial office shall not make speeches for a political organization or publicly endorse a candidate for public office

**JUDICIAL CONDUCT - CANON 1 - IMPARTIALITY** - A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved

**JUDICIAL CONDUCT - CANON 3 - DISQUALIFICATION** - Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law

**JUDICIAL CONDUCT - CANON 4 - IMPARTIALITY** - A judge shall conduct all of the judge’s extra-judicial activities so that they do not cast reasonable doubt on the judge’s capacity to act impartially as a judge or demean the judicial office

**JUDICIAL CONDUCT - SANCTIONS - PURPOSE OF SANCTIONS** - The primary purpose of sanction is to restore and maintain the dignity and honor of the judicial office and to protect the public against future excesses, rather than punishment of the individual

**JUDICIAL CONDUCT - SANCTIONS - FACTORS** - The court traditionally has considered the following factors: (1) the length and character of the judge’s public service; (2) whether there is any prior caselaw; (3) the magnitude of the offense and harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of conduct; (5) whether the conduct was willful and the extent to which the conduct exploited the judge’s position to satisfy her or her personal desires or was intended to deprive the public of assets or finds rightfully belonging to it; and (6) the presence or absence of mitigating or aggravating circumstances

**FACTS**

Latisha Nicole Clinkscales served as Municipal Court Judge for the City of Columbus. On June 9, 2014 the Commission for Judicial Performance filed a formal complaint alleging Clinkscales had engaged in judicial misconduct involving her statements on social media, her operation of the Drug Court program, her statements in a newspaper interview, and her conduct in the courtroom. The Commission filed a recommendation that Clinkscales be publicly reprimanded and assessed the cost of the proceeding. The Commission and Clinkscales filed a joint motion for approval of recommendation filed by the Commission.

**ISSUES**

Whether (1) Clinkscales committed misconduct and (2) the Commission’s recommended sanctions are appropriate.

**HOLDING**

(1) Because Clinkscales publicly endorsed a candidate for office, misused her authority as a Drug Court judge by forcing participants into the program and by presiding over a family member’s case, admitted to giving misleading statements about her prior arrest and admitted to repeatedly failing to conduct herself in a courteous manner before litigants in her court, she has committed judicial misconduct. (2) Because the court has previously utilized public reprimand for similar

acts of judicial misconduct, the punishment is appropriate. Therefore, the Supreme Court granted the motion for approval of recommendation filed by the Commission.

**Public Reprimand - 2015-JP-01281 (June 9, 2016)**

En Banc Opinion by Chief Justice Waller

Hon. H. David Clark II (Mississippi Commission on Judicial Performance)

Darlene D. Ballard, Rachel Michel & Meagan C. Brittain for Appellant - Bennie L. Richard for Appellee

Briefed by [Sean Doran](#)

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## HANDY V. MADISON COUNTY NURSING HOME

### CIVIL - WRONGFUL DEATH - MEDICAL NEGLIGENCE

**CIVIL PROCEDURE - SUMMARY JUDGMENT - WHEN APPROPRIATE** - The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law

**TORTS - MEDICAL NEGLIGENCE - EXPERT TESTIMONY** - Expert testimony is necessary to prove the elements of a medical negligence action

**CIVIL PROCEDURE - MOTION TO RECONSIDER - MOVANT'S BURDEN** - A movant for a motion to reconsider must show (1) an intervening change in controlling law, (2) availability of new evidence not previously available, or (3) need to correct a clear error of law or to prevent manifest injustice

### FACTS

Tomeka Handy filed a complaint for the wrongful death of her mother, Willie Handy, a resident of Madison County Nursing Home. Handy alleged that the nursing home breached the applicable standard of care by failing to prevent or detect a bowel obstruction, which proximately caused Willie Handy's death. After a third discovery extension, counsel for Handy had still not filed the expert designation of Handy's nursing expert, Eulanda Armstrong, nor had a deposition date been set for Handy's medical expert, Dr. Benjamin Hudson. Because of the delay of the designation of experts, counsel for the nursing home informed Handy's counsel that the scheduling deadlines were going to have to be pushed back farther. On April 30, 2014, without designating any experts, Handy's counsel sent an email stating that his client would not agree to any further extensions. On May 6, 2014, the nursing home filed a motion for summary judgment arguing that because Handy had failed to designate any expert witnesses in support of her medical negligence claims, the nursing home was entitled to summary judgment. Handy filed the expert designation of Armstrong on May 27, 2014 and of Dr. Hudson on June 6, 2014. These expert designations contained no affidavits or sworn testimony in any form by the experts and were signed by Handy's counsel alone. The circuit court granted the summary judgment to the nursing home because Handy had filed no expert affidavits to create a genuine issue of material fact. Handy appealed.

### ISSUES

Whether the circuit court erred by (1) granting the nursing home's motion for summary judgment and (2) denying Handy's motion for reconsideration.

### HOLDING

(1) Because expert testimony was required to prove the elements of Handy's medical negligence action and because Handy failed to produce sworn statements from experts, the circuit court correctly granted summary judgment in favor of the nursing home. (2) Because Handy failed to show a change in controlling law, the availability of new evidence, or any injustice, the circuit court correctly denied the motion to reconsider. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2015-CA-00413-SCT (June 9, 2016)**

Opinion by Justice Kitchens

Hon. John Huey Emfinger (Madison County Circuit Court)  
W. Eric Stracener, Jr., Walter Andrew Neely for Appellant - George Clanton Gunn, IV & W. Davis Frye for Appellee  
Briefed by Wes Bulgarella

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## HEITER V. HEITER

### CIVIL - DOMESTIC RELATIONS

**DIVORCE - ALIMONY - COHABITATION** - Cohabitation will raise a presumption of a material change in circumstances, but cohabitation alone does not require an automatic reduction or termination of alimony

#### FACTS

Patrick Heiter and Lindalyn Heiter divorced on August 22, 2001. As part of the divorce, Patrick agreed to pay Lindalyn alimony of \$650 each month. Due to her diminished mental capacity, both an attorney and a guardian ad litem represented Lindalyn during the divorce. On June 27, 2011, Patrick filed a Complaint to Modify Alimony and Other Relief. In his Complaint, Patrick alleged that Lindalyn was cohabiting with another man and receiving Social Security Disability benefits in addition to alimony. He alleged that a material change in circumstances not foreseen by the parties at the time of the divorce had occurred and asked that the Court terminate his alimony obligations to Lindalyn. Lindalyn admitted that she had a roommate who was male, but denied that they were cohabiting. She also denied that she was receiving Social Security Disability benefits. Lindalyn also pled a material change in circumstances warranting an increase in alimony. At trial, the chancellor denied Patrick's request to terminate his alimony obligation, and denied Lindalyn's request to increase Patrick's alimony obligation. Patrick appealed.

#### ISSUE

Whether the chancellor erred in finding that Patrick failed to prove a material change in circumstances since his divorce from Lindalyn that would justify termination or modification of alimony.

#### HOLDING

Because the chancellor detailed sufficient evidence that Lindalyn's needs were not altered by the support provided by cohabitating and because cohabitation alone does not require an automatic reduction or termination of alimony, the chancellor did not err in finding that Patrick failed to prove a material change in circumstances. Therefore, the Supreme Court affirmed the judgment of Jackson County Chancery Court.

**Affirmed - 2014-CA-01227-SCT (June 9, 2016)**

En Banc Opinion by Justice Randolph

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

Matthew Paul Pavlov for Appellant - Wendy C. Hollingsworth for Appellee

Briefed by [Andrew B. Lintner](#)

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## *SUPREME COURT - CRIMINAL CASES*

## HURST V. STATE

### CRIMINAL - FELONY

**CRIMINAL APPEALS - SIXTH AMENDMENT - SPEEDY TRIAL** - The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a speedy trial

**CRIMINAL APPEALS - SIXTH AMENDMENT - SPEEDY TRIAL** - In determining whether a defendant's right to a speedy trial has been violated, courts must analyze four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant

**CRIMINAL APPEALS - STATUTORY RIGHT - SPEEDY TRIAL** - Miss. Code Ann. § 99-17-1 states that good cause must be shown to grant a continuance

**CRIMINAL APPEALS - MISTRIAL - EVIDENCE** - The admission or exclusion of evidence constitutes reversible error only where a party can show prejudice or harm

## **FACTS**

Joshua Hurst was convicted on two counts of murder, two counts of aggravated assault, and one count of being a felon in possession of a firearm for the events that took place on March 7, 2013 during a dice game. Hurst was arrested two days later and indicted on July 12, 2013. He was arraigned on September 24, 2013, and trial was set for April 7, 2014. On October 24, 2013, Hurst moved to demand a speedy trial, although he never objected to the original trial date set. On April 10, 2014, Hurst's trial was moved to June 9, 2014 after a Continuance Order was entered. The trial court reasoned that the overcrowded docket prevented Hurst's case from being tried. On June 11, 2014, the trial court ordered another continuance, again stating that the docket was too crowded to hear Hurst's case. On August 4, 2014, Hurst moved to dismiss the case for violation of his Sixth Amendment Right to a Speedy Trial. He noted that this was his first assertion to this right, and that his defense was prejudiced by the delay noting his pretrial detention caused him to live away from his family and miss the birth of his child. Further, Hurst claimed certain witnesses he intended to present at trial in his defense were no longer able to be found. At the hearing on this motion to dismiss, the State noted that Hurst was unable to bond out of his pretrial detention because he was under indictment for two other crimes. While the defense argued that a particular witness, Julian, could not be located do to the delay of trial, there was no indication on the record that defense counsel ever spoke with Julian and was merely going off of what Hurst believed Julian's testimony would be. Hurst's motion to dismiss was denied that day, and trial began on August 12, 2014. The State offered the witness LaMarcus Murray, who testified that he lied in previous statements to the police because Hurst called him and told him to lie. Hurst immediately moved for a mistrial, arguing that these statements by the defendant were not disclosed in discovery. The State argued that they did not anticipate this answer or attempt to elicit this response from Murray, and withdrew any effort to explore the matter further. The trial court, under Uniform R. Circuit & County Court Prac. 9.04, believed this to be an inadvertent discovery violation and granted the defense a reasonable opportunity to interview the witness. The defense cross-examined Murray. On August 13, 2014, the jury found Hurst guilty on all counts. Hurst moved for a new trial, which was denied. Hurst appealed.

## **ISSUES**

Whether the trial court (1) violated Hurst's right to a speedy trial, and (2) erred in denying Hurst's motion for a mistrial after Murray's statement about a phone call when that statement had not been disclosed in discovery.

## **HOLDING**

(1) Because Hurst failed to satisfy the *Barker* factors, the Court concluded that his right to a speedy trial was not violated. The Court concluded after weighing the *Barker* factors that the State had good cause to delay the trial, and Hurst's right to a speedy trial was not violated. The Court also held that Hurst's statutory right to a speedy trial was not violated under Miss. Code Ann. § 99-17-1 that states that good cause must be shown to grant a continuance. (2) Because Hurst presented no evidence that his defense was prejudiced by the fact Murray's statement was not disclosed in discovery, the Court held that the trial court did not abuse its discretion in denying Hurst's motion for a mistrial. Hurst never argued that the testimony was inadmissible, but rather that it was a discovery violation. The trial court appropriately afforded Hurst the opportunity to cross-examine the witness after the supposed discovery violation, and he presented no evidence that his defense would have changed had he received information about this discovery earlier. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

## **CONCURRENCE**

Justice Dickinson concurred in part and in result but explained that he could not join in full because of the Court's analysis of the statute requiring "good cause" to be shown before granting a continuance. Justice Dickinson argued that the statute does not require a showing of prejudice towards the defendant, but merely good cause for the delay. He

argued that the Court has erroneously supported precedent that came from an unsupported dissenting opinion, and the Court should interpret and apply statutes as written by the Legislature.

**Affirmed - 2014-KA-01454-SCT (June 9, 2016)**

Opinion by Justice King - Concurrence by Justice Dickinson

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

Mollie Marie McMillin & George T. Holmes (Public Def. Off.) for Appellant - LaDonna C. Holland (Atty. Gen. Off.) for Appellee

Briefed by [Rachel Smith](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 7, 2016

### COURT OF APPEALS - CIVIL CASES

#### ASHWELL V. STATE

##### CIVIL - POST-CONVICTION RELIEF

**CIVIL PROCEDURE - PLEAS - BILL OF INFORMATION-** When a defendant pleads guilty as if bills of information were filed, the pleas are enforceable even if the bills were not timely filed

##### FACTS

William Ashwell pled guilty to burglary and escape in 2006. Ashwell's sentence was for 15 years, but the court would suspend 13 of those years if Ashwell successfully completed 5 years of post-release supervision. In 2010, Ashwell was accused of violating his post-release supervision terms for testing positive for marijuana and possessing precursors with intent to manufacture methamphetamine. Ashwell's post-release supervision was revoked, and he filed a post-conviction relief (PCR) motion in 2013. In this motion, Ashwell argued the underlying criminal dockets from his 2006 plea did not reflect the existence of bills of information. The circuit court discovered that the bills of information were not properly filed, but did exist at the time of Ashwell's plea. Accordingly, the circuit court denied Ashwell's (PCR) motion. Ashwell appealed.

##### ISSUE

Whether the circuit court erred in denying Ashwell's PCR motion.

##### HOLDING

When Ashwell pleaded guilty, he clearly proceeded as though a bill of information existed at that time. Further, there is no evidence Ashwell was prejudiced by the improper filing; the misfiling was simply harmless error. Therefore, the Court of Appeals affirmed the judgment of the Lawrence County Circuit Court's.

**Affirmed - 2015-CA-00023-COA (June 7, 2016)**

Opinion by Judge Irving

Hon. Prentiss Greene Harrell (Lawrence County Circuit Court)

Timothy Kevin Byrne for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Cody D. Samples](#)

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#### BOLIVAR V. WALTMAN

##### CIVIL - DOMESTIC RELATIONS

**FAMILY LAW - VISITATION - GRANDPARENT VISITATION** - Miss. Code Ann. § 93-16-3(2) provides that a grandparent may petition for visitation “when a grandparent has shown (1) that a ‘viable relationship’ with his or her grandchild has been established, (2) that visitation has been unreasonably denied by the grandchild’s parent, and (3) that visitation is in the best interest of the grandchild

**FAMILY LAW - GRANDPARENT VISITATION - VIABLE RELATIONSHIP** - Under Miss. Code Ann. § 93-16-3(3), a viable relationship is a relationship in which the grandparent has voluntarily and in good faith supported the child financially in whole or in part for a period of not less than six months before filing a petition for visitation rights or the grandparent has had frequent visitation including occasional overnight visitation with said child for a period of not less than one year

**FAMILY LAW - GRANDPARENT VISITATION - MARTIN FACTORS** - To determine if grandparent visitation is in a child’s best interest, the court must consider the *Martin* factors: (1) the amount of disruption that extensive visitation will have on the child’s life, (2) the suitability of the grandparent’s home with respect to the amount of supervision received by the child, (3) the age of the child, (4) the age, and physical and mental health of the grandparent, (5) the emotional tie between the grandparent and the grandchild, (6) the moral fitness of the grandparent, (7) the distance of the grandparent’s home from the child’s home, (8) any undermining of the parent’s general discipline of the child, (9) employment of the grandparent and the responsibilities associated with that employment, and (10) the willingness of the grandparent to accept that the rearing of the child is the responsibility of the parent, and that the parent’s manner of child rearing is not to be interfered with by the grandparent.

**FAMILY LAW - VISITATION - EXTENT OF GRANDPARENT VISITATION** - Visitation granted to grandparents should not be equivalent to that which would be granted to a non-custodial parent unless the circumstances overwhelmingly dictate that it should be

## **FACTS**

In 2008, a court appointed Stanley and Cindy Bolivar to be their grandchildren’s co-guardians. The children’s natural parents, Jason Waltman and Karen Clark, had a history of prolonged substance abuse and consented to the appointment. Initially, the Bolivars allowed Joyce visitation in accordance with the visitation awarded to Jason in the couple’s divorce decree. In 2010, the Bolivars began limiting Joyce’s visitation, decreasing it from every other weekend to every other Saturday from 8 A.M. to 5 P.M. Joyce and Jason filed a petition for visitation privileges in response. At a hearing, Joyce testified that she would buy the children games, clothes, and food when they visited. She also testified that she paid Jason’s child support until 2010, which the Bolivars disputed. They did admit that Joyce may have given them some money. The Bolivars testified that Joyce only procured the visitation she had because she erroneously represented to them that she was entitled to it under the law. The Bolivars acknowledged that they tried to cut back the children’s contact with Joyce, but stated it was due to the fact that Joyce occasionally failed to take the children to church on Sundays, she was not home Friday nights, and Joyce had directed the children to lie to the Bolivars. Joyce noted that she had to file an action to get visitation and that the Bolivars sometimes did not answer the phone or return her calls. The Bolivars argued that visitation with Joyce disrupted the children’s schedule since Joyce did not always take them to church and they had to cancel the children’s doctor appointment once in the summer to accommodate Joyce’s visitation. The chancellor noted that at the time of the hearing Joyce was fifty-seven years old and had no physical or mental issues or any criminal history. Joyce testified that she lived in a two-bedroom mobile home. Although Joyce did smoke, she testified that she tried not to when the children were visiting. She also testified that she did not drink alcohol. She testified that her home is located only seventeen miles away from the Bolivars’ home. The court noted that while Joyce worked five to six days a week, she was able to schedule her work and vacation around her visitation. Stanley testified that he knew the children were lying to him after visiting Joyce, but could only say “I can look at their eyes and kinda tell” to support that claim. The Bolivars also testified that Joyce allowed the children to have contact with Jason, although that was not prohibited by a court. Joyce admitted that she let Jason stay at the home once, but that she would not allow it in the future. She also acknowledged that she did not abide by Stanley’s direction to not allow one of the children to play video games as a punishment, but she stated that she generally complied with what Stanley said. The chancellor awarded Joyce visitation of the second weekend of every month; Thanksgiving weekend; a week during Christmas break, and a week during the summer. The Bolivars appealed.

## **ISSUES**



Whether (1) the chancery court erroneously shifted the burden of proof to the Bolivars to prove why they opposed Joyce's visitation demands, (2) the chancery court's award of visitation to Joyce was excessive, and (3) the chancery court should have given deference to the Bolivars to exercise their discretion as to how much visitation Joyce should be allowed to have.

### **HOLDING**

(1) Because Joyce bought the children clothes, food, and games when they visited, she paid the Bolivars some money, it did not matter whether the financial contribution was for child support, and Joyce had frequent visitation spanning over a year no matter how she obtained it, the chancellor did not abuse its discretion in finding that Joyce met the requirement of showing she had a viable relationship with the children. Because it was apparent that Stanley restricted visitation simply because he felt it disrupted the family's schedule and he disliked that Joyce failed to take the children to church every Sunday she had them, Joyce had to file an action to get visitation, and Joyce testified that the Bolivars occasionally would not take her calls, the evidence supported a finding that the Bolivars unreasonably denied visitation to Joyce. Because the court considered that the Bolivars could only point to Joyce's occasional failure to take the children to her church when she had them and a cancelled doctor's appointment to accommodate Joyce's summer visitation, which were minor disruptions, Joyce's age and lack of physical, mental or criminal issues, her suitable accommodations at her home, Joyce's testimony that she tried not to smoke when the children were visiting and that she did not drink alcohol, that her home was only seventeen miles from the Bolivars' home, the flexibility her job allowed, the Bolivars' failure to substantiate their claims that Joyce encouraged the children to lie to them, Joyce's assurances to the court that she would not let the children see their parents again and that she generally abided by what Stanley required, and that it would be impossible for Joyce to meet all of the Bolivars' requirements since Stanley had very high expectation and micro-managed Joyce and the grandchildren, the chancellor appropriately considered the *Martin* factors and did not abuse his discretion in determining that visitation was in the grandchildren's best interest. (2) Because Joyce had the same visitation as Jason up until 2010, she maintained a very close relationship with the grandchildren, and the children had minimal contact with their natural parents, there was no abuse of discretion in the amount of visitation the chancellor awarded to Joyce. (3) Because the Bolivars were only the children's court-appointed guardians and neither of the natural parents' rights had been terminated, the chancellor did not err in refusing to give deference to the Bolivars. Therefore, the Court of Appeals affirmed the Jones County Chancery Court.

**Affirmed - No. 2015-CA-00352-COA (June 7, 2016)**

Opinion by Judge Barnes

Hon. Franklin C. McKenzie Jr. (Jones County Chancery Court)

Debra Lynn Allen for Appellants - Samuel S. Creel Jr. for Appellee

Briefed by [Abby Abide](#)

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## **GRAY V. DIMITRIADES**

### **CIVIL - MEDICAL MALPRACTICE**

**TORTS - MEDICAL MALPRACTICE - ELEMENTS OF MEDICAL MALPRACTICE** - In a medical malpractice case, it is the plaintiff's burden to prove the following elements: (1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard; and (3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant

**TORTS - MEDICAL MALPRACTICE - PROOF OF CAUSATION** - On the critical causation question, recovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition

### **FACTS**

A biopsy of Carol Gray's spine showed that she had multiple myeloma, a form of bone cancer. The results were sent to Dr. Eric Graham, the orthopedic surgeon who performed the biopsy, but Dr. Graham failed to communicate the results to Gray. Over one year later, another doctor discovered the biopsy results in Gray's medical records and shared with Gray, for the first time, that she had bone cancer. Gray alleged that she suffered additional fractures and bone lesions as a result of her doctors' failures to diagnose her with multiple myeloma. Gray filed complaints against Dr. Dimitrios Dimitriades, her former doctor, a family medical practitioner, Dr. Dimitriades' employer, Memorial Hospital Gulfport, and Dr. Todd Frieze, an endocrinologist. Gray presented no evidence that either Dr. Dimitriades or Dr. Frieze knew of the biopsy, or of the underlying condition of cancer. Gray relied solely on the record of doctor's visits and lab reports as well as the expert affidavit testimony of Dr. Bruce Avery. Dr. Dimitriades and Dr. Frieze filed separate motions for summary judgment, which the circuit court granted. Gray appealed.

## **ISSUES**

Whether the circuit court properly granted summary judgment in favor of (1) Dr. Frieze and (2) Dr. Dimitriades.

## **HOLDING**

(1) Because Gray presented nothing more than a conclusory expert affidavit that Dr. Frieze should have done further testing that would have led to further studies that would confirm a diagnosis of Myeloma, the circuit court properly granted summary judgment in favor of Dr. Frieze. (2) Because Gray presented no evidence that Dr. Dimitriades knew or was on notice of the biopsy results, the circuit court properly granted summary judgment in favor of Dr. Frieze. Therefore, the judgment of the Harrison County Circuit Court was affirmed.

**Affirmed - 2014-CA-01106-COA (June 7, 2016)**

Opinion by Judge Wilson

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

Jonathan B. Fairbank, John F. Hawkins, & Edward Gibson for Appellant - Roland F. Samson III, Stephen Walker Burrow, & James H. Heidelberg for Appellees

Briefed by [Robert T. Noland](#)

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## **HARRIS V. MICHAEL**

### **CIVIL - PERSONAL INJURY**

**CIVIL PROCEDURE - DIRECTED VERDICT - STANDARD** - The trial court may direct a verdict for the defendant at the close of the plaintiff's case under Mississippi Rule of Civil Procedure 50(a) if it finds the plaintiff has failed to present credible evidence to establish the necessary elements of his claim

**TORTS - NEGLIGENCE - CONFLICTING EVIDENCE** - Where there is a conflict in evidence, the question of negligence is for the jury

**CIVIL PROCEDURE - MOTION IN LIMINE - STANDARD** - To grant a party's motion in limine, the court must find that the material or evidence in question would be inadmissible at a trial under the rules of evidence and the mere offer, reference, or statements made during trial concerning the material would tend to prejudice the jury

**EVIDENCE - INFERENCE INSTRUCTION - SUPPRESSION OR SPOILIATION OF EVIDENCE** - A negative inference is only proper when a defendant intentionally or through gross negligence discards evidence that is the subject of litigation

**APPEAL - DIRECTED VERDICT - STANDARD** - If there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the court cannot affirm the grant of a directed verdict

## **FACTS**

On June 10, 2010, Harris was riding with Robert Madden picking up limbs as part of their job for the Lamar County Road Department. Madden was driving eastbound on Shears Road in Hattiesburg, Mississippi and Michael was driving southbound on Weathersby Road in a BellSouth company truck with a trailer attached. At the four-way stop at the



intersection, Madden made a right turn and his truck struck the end of Michael's trailer. Harris claimed he suffered back injuries from the accident and that Michael's negligence was the sole and proximate cause of his injuries. Michael stated in his deposition that he took photos of the damaged vehicles after the accident and submitted the photos to BellSouth. Michael also completed a "safety procedure report" from the "redbook," as required under BellSouth's company policy. Harris requested the photos and report during the discovery but the defendants stated that the information had been lost by a third party courier. Harris requests a spoliation instruction on the basis of missing information. The defendants filed a supplemental motion in limine, requesting the court to prohibit the plaintiff from mentioning, implying, or eliciting testimony from the photos taken from the accident, the "red book," and the "safety procedure report." The court partially granted the defendant's motion, stating that Harris could only ask Michael about his personal knowledge of the photos and the report. At trial, Harris and Madden testified that Madden made a complete stop at the intersection then turned. They also said there were no other vehicles in sight when Madden turned at the intersection. Michael testified Madden ran the stop sign and caused the accident. The defendants moved for a directed verdict at the close of Harris's case. The court granted the motion, stating the evidence showed "nothing more than speculation," since neither Harris nor Madden testified that Michael caused the accident. Harris appealed.

### **ISSUES**

Whether the court erred in (1) granting the defendants' motion for a directed verdict and (2) partially granting the defendants' motion in limine.

### **HOLDING**

(1) Because the facts and inferences created a question of fact from which reasonable minds could differ, the trial court should not have granted a directed verdict but instead should have submitted the matter to the jury. (2) Because the record lacks any evidence supporting that the defendants intentionally or recklessly discarded the missing information, the trial court was within its discretion to partially grant the defendants' motion in limine. Therefore, the judgment of the Lamar County Circuit Court was affirmed in part and reversed and remanded in part.

### **CONCURRENCE IN PART AND DISSENT IN PART**

Judge Barnes argued that the evidence was insufficient to establish any liability on the part of the defendants and that the majority erred in finding that reasonable minds could differ as to what caused the accident in question. Judge Barnes concurred with the majority that the court was within its discretion to grant the defendants' motion in limine in part.

#### **Affirmed in Part and Reversed and Remanded in Part - 2014-CA-01613-COA (June 7, 2016)**

En Banc Opinion by Judge Fair - Concurrence in Part and Dissent in Part by Judge Barnes

Hon. Anthony Alan Mozingo (Lamar County Circuit Court)

Chase Ford Morgan & Leonard Brown Melvin III for Appellant - Robert D. Gholson & Katherine Bisnette Sumrall for Appellees  
Briefed by [L. Morgan Eason](#)

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## **HIGGINS V. STATE**

### **CIVIL - OTHER**

**CIVIL PROCEDURE - BENCH TRIALS - STANDARD OF REVIEW** - When reviewing a judgment from a bench trial, the appellate court employs the substantial evidence/manifest error rule

**CIVIL PROCEDURE - BASIS OF RECOVERY - BURDEN OF PROOF** - If a claimant establishes a claim under wrongful conviction and imprisonment, he must meet the burden of proof under Miss. Code Ann. Section 11-44-7(1)

**TRIALS - EXAMINATION - CREDIBILITY** - It is the function of the fact-finder to pass upon the credibility of the evidence

### **FACTS**

While serving as president of Delta Glass Repair, Inc., Patrick Higgins placed an order with Southern Lock. Higgins' order came via three separate deliveries and required three separate payments. Higgins sent Southern Lock three

separate checks, all of which were bad. Southern Lock then proceeded with criminal charges against Higgins, who was eventually found guilty of three counts of issuing and delivering bad checks. Higgins was sentenced to three years per offense to run concurrently. After serving four years and two months, however, Higgins was released, as the Mississippi Court of Appeals reversed and rendered his convictions. Higgins then filed a complaint against the State for compensation, alleging that he was wrongfully convicted and imprisoned by the State. Higgins filed a motion for partial summary judgment on the issue of his innocence. The trial court denied the motion, finding that the Court of Appeals' reversal was due to insufficient evidence in the criminal trial, which is not the same as proving Higgin's innocence in a civil trial. After a trial on the issue, the trial court entered a judgment in favor of the State, finding that Higgins had not established by a preponderance of the evidence that he did not commit the felonies. Higgins appealed.

## **ISSUES**

Whether the trial court erred by (1) applying the statutory presumption of guilt; (2) considering highly prejudicial evidence when weighing his credibility; (3) misquoting the amount of money that Delta Glass received prior to Higgins writing the three checks; (4) determining his credibility by citing a letter not admitted into evidence.

## **HOLDING**

(1) Because this case is a civil matter and the burden of proof resides with Higgins, Higgins failed to prove his innocence and the issue was without merit. (2) Because the trial court did not abuse its discretion by allowing the State to introduce evidence regarding another conviction separate from the conviction at issue in this case, the issue was without merit. (3) Because the misstatement of \$20,000 instead of \$10,000 was a harmless error, the issue was without merit; (4) Because the trial court's statement alone regarding information available only in the letter was not enough to establish that the trial court solely relied on the letter in determining Higgins' credibility, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

**Affirmed - 2014-CA00251-COA (June 7, 2016)**

Opinion by Judge Irving

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

David Neil McCary & Graham Patrick Carner for Appellant - Alison O'Neal McMinn for Appellee

Briefed by [Madison Coburn](#)

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## **JACKSON V. STATE**

### **CIVIL - POST-CONVICTION RELIEF**

**CRIMINAL PROCEDURE - CONTENTS OF THE INDICTMENT - QUANTITY OF COCAINE** - An indictment is not defective for failing to list a quantity of cocaine in the context of a sale of cocaine charge, or a charge of possession of cocaine with intent to distribute

**ADJUDICATION - CREDIBILITY OF TESTIMONY - JUDICIAL DISCRETION** - The circuit judge, sitting as the trier of fact, is tasked with resolving all credibility issues that arise in a PCR hearing

## **FACTS**

On Apr. 1, 2009, John Patrick Jackson pled guilty to the possession of cocaine with intent to distribute, with the charge being enhanced for possession of a firearm. That same day, Jackson also pled guilty to the sale of cocaine. The circuit court accepted the prosecution's recommendation pursuant to a plea agreement. On March 9, 2012, Jackson filed a motion for post-conviction relief arguing that his guilty plea was involuntary and that he had received ineffective assistance of counsel. The circuit court summarily dismissed Jackson's PCR motion without an evidentiary hearing. On appeal, the Court of Appeals held that Jackson had met the evidentiary burden required to obtain an evidentiary hearing, and remanded that case to the circuit court for an evidentiary hearing. On Jan. 15, 2015, the circuit court held an evidentiary hearing on Jackson's PCR motion. On Feb. 17, 2015, the circuit court denied Jackson's PCR motion, determining that Jackson's proof did not rise to the standard necessary for granting PCR. Jackson appealed.

## ISSUES

Whether Jackson was (1) fully informed of the charges in the criminal informations filed against him, (2) fully informed that his charges excluded the possibility of parole, and (3) was denied effective assistance of counsel.

## HOLDING

(1)(2) Because there is no requirement that the quantity of cocaine be specified in an indictment for the sale of cocaine, or possession of cocaine with intent to distribute, the Court of Appeals found Jackson's argument that he was not fully informed of the charges against him to be without merit. (3) The Court further refused to disturb the circuit court's credibility assessments of Jackson, Jackson's wife, and Dukes, Jackson's lawyer, as those determinations were not clearly erroneous. For these reasons, the Court of Appeals determined that Jackson's ineffective assistance of counsel claim must fail. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2015-CA-00403-COA (June 7, 2016)**

Opinion by Judge James

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

William L. Ducker for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [William H. Holley](#)

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## MASON V. STATE

### CIVIL – POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - DISMISSAL - STANDARD OF REVIEW** - A circuit court may summarily dismiss a PCR motion where it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case that the movant is not entitled to any relief

**POST-CONVICTION RELIEF - APPELLATE COURT - STANDARD OF REVIEW**- An appeals court will affirm the summary dismissal of a PCR motion if the movant fails to demonstrate a claim procedurally alive substantially showing the denial of a state or federal right

**POST-CONVICTION RELIEF - ILLEGAL SENTENCE - TIME BAR** - The right to be free from an illegal sentence is a fundamental right that is not subject to the time-bar

## FACTS

Ronald Mason was indicted on one count of sexual battery in violation of Miss. Code Ann. § 97-3-95 (Rev. 2014), and one count of fondling in violation of Miss. Code Ann. § 97-5-23 (Supp. 2015). Mason pled guilty to fondling and the sexual-battery charge was retired to the files. On December 16, 2010, the circuit court sentenced Mason to fifteen years, with nine years to serve in the custody of the Mississippi Department of Corrections (MDOC), six years suspended, and five years of post-release supervision. His nine-year sentence was ordered to be served day-for-day. Mason was also ordered to register as a sex offender upon release and to pay a fine and court costs. Mason filed a PCR motion arguing that his sentence was illegal. Mason claimed that his sentence exceeded the statutory limit under § 97-5-23(1). The circuit court dismissed Mason's PCR motion, finding that his sentence was within the statutory maximum of fifteen years allowed by § 97-5-23(1) and that under Miss. Code Ann. § 47-7-34(1) (Rev. 2015), a court may impose a term of post-release supervision. However, the total number of years of incarceration plus the total number of years of post-release supervision shall not exceed the maximum sentence authorized to be imposed by law for the felony committed. As a result, the circuit court held that Mason's sentence of nine years of incarceration plus five years of post-release supervision was within the statutory maximum sentence. Mason appealed.

## ISSUE

Whether Mason's sentence exceeded the statutory maximum of fifteen years and became illegal.

## HOLDING

Mason was sentenced to a term of fifteen years, but six years were suspended. As a result, the nine years remaining on his sentence along with the five years of supervision were within the permissible statutory maximum sentence of fifteen years for fondling. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

**Affirmed - 2015-CP-00594-COA (June 7, 2016)**

Opinion by Judge James

Hon. James Seth Andrews Pounds (Alcorn County Circuit Court)

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

Briefed by [Peter H. Liddell](#)

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## **McMULLEN-ANTHONY V. TECUMSEH PROD. CO.**

### **CIVIL - WORKERS' COMPENSATION**

**WORKERS' COMPENSATION - APPEAL - STANDARD** - A Commission decision that is absent an error of law will be affirmed by the appellate court if there is substantial evidence to support the Commission's decision

**WORKERS' COMPENSATION - DISABILITY - BURDEN OF PROOF** - To establish a prima facie case of disability, the claimant bears the initial burden of showing by a preponderance of the evidence that (1) an accidental injury occurred, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the claimed disability

**WORKERS' COMPENSATION - DISABILITY - CAUSAL CONNECTION** - Unless common knowledge suffices, the claimant must prove a causal connection between the employment and the injury with medical evidence through expert testimony that supports, but does not have to prove, a finding of disability

### **FACTS**

Doris McMullen-Anthony began working for Tecumseh Products Company ("Tecumseh") in 1994, where her first position was in housing transfer. In 2004, after suffering from shoulder pains, McMullen-Anthony was transferred to a light-duty position within Tecumseh. In 2009, McMullen-Anthony was in a car accident and three months after the accident, had surgery on her left shoulder. After recovering from surgery, McMullen returned to Tecumseh in two different positions, both light duty. McMullen then complained of neck pain and was referred to Dr. Timothy Bassett for a cervical evaluation. In 2011, McMullen-Anthony filed a claim against Tecumseh alleging that the 2010 injuries were caused by her work. After a hearing, the administrative judge ("AJ") found that the housing transfer position was the only position that could arguably coincide with Dr. Bassett's work history report and that the Dr. Bassett's opinion was flawed. Thus, the AJ held that McMullen-Anthony failed to meet her burden of proof. McMullen-Anthony appealed.

### **ISSUE**

Whether the administrative judge's findings of fact that were used by the Commission were supported by substantial evidence.

### **HOLDING**

Because Dr. Bassett mistakenly believed that McMullen-Anthony had worked at the same housing transfer position for seventeen years, he did not have a clear understanding of McMullen-Anthony's work history and could not offer a valid opinion on a casual connection between McMullen-Anthony's neck complaint and her work. Therefore, the Court of Appeals affirmed the judgment of the Miss. Workers' Compensation Commission.

**Affirmed - 2015-WC-00052-COA (June 7, 2016)**

Opinion by Judge James

Mississippi Workers' Compensation Commission

Lawrence J. Hakim for Appellant - Jeffrey Dean Leathers for Appellees

Briefed by [Nash Gilmore](#)

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## PITTMAN V. STATE

### CIVIL - POST-CONVICTION RELIEF

**CIVIL PROCEDURE - POST-CONVICTION RELIEF - STANDARD OF REVIEW** - An appellate court will only disturb the trial court’s decision if it is clearly erroneous when reviewing a trial court’s denial of a post-conviction relief motion

**CIVIL PROCEDURE - POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL** - In order to succeed on a claim of ineffective assistance of counsel, the defendant must prove that counsel’s performance was deficient and that the deficient performance prejudiced the defense

**POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - STATUTE OF LIMITATIONS** - A motion for relief must be made within three years after entry of the judgment of conviction

### FACTS

In 2006, Nedra Pittman pled guilty to one count of embezzlement and one count of uttering a forgery. She was ordered to serve identical sentences concurrently. In 2014, Pittman’s probation was revoked, and she was ordered to serve two years and ten months in the custody of the Mississippi Department of Corrections. She filed a motion for post-conviction relief (“PCR”), alleging ineffective assistance of counsel. The trial court denied Pittman’s PCR motion. Pittman appealed.

### ISSUE

Whether the trial court erred in denying Pittman’s motion for post-conviction relief.

### HOLDING

Because Pittman’s PCR motion was filed over three years after the entry of the judgment, the motion was time-barred. Further, because she cannot prove that were it not for her counsel’s errors she would not have pled guilty and would have gone to trial, the claim was without merit. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

**Affirmed - 2015-CA-00502-COA (June 7, 2016)**

Opinion by Chief Judge Lee

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

Ernest Tucker Gore for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Daniel McDonald](#)

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## S&M TRUCKING, LLC V. ROGERS OIL COMPANY OF COLUMBIA, INC.

### CIVIL - CONTRACT

**CIVIL PROCEDURE - SERVICE OF PROCESS - REASONABLE DILIGENCE** - Pursuant to Miss. Code. Ann. Section 79-35-13(b), a plaintiff must establish that the governors of the entity cannot be served through reasonable diligence before service of process is properly served against the entity by serving the Secretary of State in accordance with the Mississippi Rules of Civil Procedure

**DEFAULT JUDGMENTS - MOTION TO SET ASIDE – STATUTE OF LIMITATIONS** - There can be no time limitation for relief from a void judgment therefore there is no effective time limit for seeking relief from a void judgment under Rule 60(b)(4)

**CIVIL PROCEDURE - APPEARANCE - JURISDICTIONAL QUESTIONS** - A defendant appearing and filing an answer or otherwise proceeding to defend the case on the merits in some way—such as participating in hearings or

discover—may not subsequently attempt to assert jurisdictional questions based on claims of defects in service of process

### **FACTS**

Rogers Oil Company of Columbia Inc. (Rogers Oil) filed suit against S&M Trucking LLC (S&M) in circuit court to collect a debt allegedly owed. After Roger Oil was unable to serve S&M's agent or its members, Rogers Oil attempted service through the Secretary of State pursuant to Mississippi Code Annotated section 79-35-13(b) (Rev. 2013). S&M did not answer within thirty days, and Rogers Oil then obtained a default judgment. When S&M learned of the default judgment, it moved to set it aside, arguing that it was void due to improper service of process. The circuit court denied S&M's motion. S&M appealed.

### **ISSUES**

Whether the trial court erred in (1) finding that S&M was adequately and properly served with process according to Mississippi Code Annotated section 79-35-13(b), (2) denying S&M's Rule 60(b) motion and (3) finding that S&M waived its right to contest sufficiency of service.

### **HOLDING**

(1) Because the record is inconclusive as to whether Rogers Oil met its burden of proving "reasonable diligence" to serve the S&M's members, service through the Secretary of State was improper. (2) Because there can be no time limitation for relief from a void judgment there is no time limit for seeking relief from a void judgment under Rule 60(b)(4). (3) Because S&M's participation in the judgment debtor exam was not defending the case on the merits the right to contest was not waived. Therefore, the Court of Appeals reversed and remanded the judgment of the Marion County Circuit Court.

#### **Reversed and Remanded - 2015-CA-00526-COA (Jun. 7, 2016)**

Opinion by Judge Wilson

Hon. Prentiss Greene Harrell (Marion County Circuit Court)

Daniel Myers Waide for Appellant - Benjamin Alan Snow for Appellee

Briefed by [Rod Hickman](#)

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## **VIVANS V. BAPTIST HEALTHPLEX**

### **CIVIL - PERSONAL INJURY**

**PERSONAL INJURY – PREMISE LIABILITY – SUMMARY JUDGEMENT** - To survive summary judgment in a premises liability case, a plaintiff must present sufficient evidence to prove that the defendant created an unreasonably dangerous condition

**PREMISE LIABILITY – UNREASONABLY DANGEROUS CONDITION – EXPERT TESTIMONY**

Expert testimony is not required to determine whether or not an unreasonably dangerous condition existed

**PREMISE LIABILITY – DUTY OWED TO INVITEE – REASONABLY SAFE CONDITIONS – A**

business owner owes to invitees the duty to keep the premises reasonably safe, and when not reasonably safe, to warn only where there is hidden danger or peril that is not in plain and open view

### **FACTS**

Timothy Vivans suffered a torn rotator cuff when he slipped and fell backward upon entering Baptist's therapy pool. Vrieland and Wilson, Baptist employees, were allegedly in the pool when Vivans fell and assisted Vivans after the fall. Vivans was receiving no formal or scheduled physical therapy at the time of his fall. He maintained that the Defendants had a duty of reasonable care to warn of the danger of his being left unattended in the pool, to keep its premises in a safe condition, and to prevent the injury he suffered from occurring. Defendants were granted a motion for summary judgment. Vivans's claims were dismissed with prejudice. Vivans filed a motion to reconsider, which was denied. Vivans appealed.



## ISSUE

Whether (1) the trial court erred in finding no genuine issue of material fact existed regarding the dangerous condition of the pool; (2) expert testimony was required to prove a dangerous condition existed; (3) Baptist employees, Vrieland and Wilson, had a duty to take notice of Vivians's physical condition and advise him of the availability of the handicap pool chair and how to operate it.

## HOLDING

(1) Because Vivians failed to produce sufficient evidence to convey a genuine issue of material fact exists as to whether the pool steps constituted a dangerous condition or that Baptist maintained knowledge of any dangerous conditions at the pool, the issue was meritless. (2) Because a plaintiff must show that the defendant created an unreasonably dangerous condition to survive summary judgement, Vivans failure to present evidence either through expert testimony or otherwise foreclosed the issue. (3) Because Vrieland and Wilson were not attending to Vivians as his therapists and were unaware of any dangerous condition in the pool, they owed Vivans no legal duty. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2014-CA-01828-COA (June 07, 2016)**

Opinion by Judge Barnes

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

Howard Brown & Merrida Coxwell for Appellant - Wade G. Manor & James Leroy Banks IV for Appellee

Briefed by [Alexandra Bruce](#)

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