

MISSISSIPPI SUPREME COURT DECISIONS – APRIL 6, 2017

SUPREME COURT - CIVIL CASES

DILLON V. MYERS

CIVIL - ELECTION CONTEST

ELECTION CONTESTS - JUDICIAL REVIEW - JURISDICTION - Pursuant to § 247 of the Mississippi Constitution, the Legislature granted the Judiciary jurisdiction to hear all primary election contests
ELECTION CODE - CONTESTS OF PRIMARY ELECTIONS - Miss. Code Ann. § 23-15-931 requires the circuit clerk and election commissioners to participate during judicial review of an election contest

FACTS

Tasha Dillon and David Myers were candidates in the Democratic primary election for House District 98. The Pike County Election Commission certified Myers as the winner by a vote of 2,003 to 1,859. Dillon filed a petition of contest with the Mississippi Democratic Executive Committee and a petition for judicial review. The Pike County Board of Election Commissioners and the Pike County Circuit Clerk moved to intervene. The court dismissed for lack of subject-matter jurisdiction. Dillon appealed.

ISSUES

Whether the trial court erred in (1) dismissing for lack of subject-matter jurisdiction and (2) allowing the election officials to intervene.

HOLDING

(1) Because the Legislature endowed the judicial branch with full jurisdiction to review all primary election contests under Art. 12, § 247 of the Mississippi Constitution, the trial court had subject-matter jurisdiction. (2) Because the circuit clerk and the election commissioners are mandatory participants, it was error to allow the election officials to intervene as parties when the statute mandates contrary duties. Therefore, the Supreme Court reversed and remanded the judgment of the Pike County Circuit Court.

DISSENT

Justice Coleman argued that Art. 4, § 38 of the Mississippi Constitution mandates by its language that disputes regarding election to either house of the Mississippi Legislature should be decided in the appropriate house. Because § 38 is the narrower provision, he argued that it should control.

Reversed & Remanded - 2015-EC-01677-SCT (Apr. 6, 2017)

En Banc Opinion by Presiding Justice Randolph - Dissent by Justice Coleman

Hon. James D. Bell (Pike County Circuit Court)

Pieter John Teeuwissen & Anthony Renard Simon for Appellant - Brandon Currie Jones & David Wayne Baria for Appellee

Briefed by [Catherine Norton](#)

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ENLARGEMENT & EXTENSION OF MUN. BOUNDARIES OF TOWN OF TERRY V. TOWN OF TERRY

CIVIL - MUNICIPAL BOUNDARIES & ANNEXATION

MUNICIPAL LAW - ANNEXATION APPEAL - STANDARD FOR REVERSAL - An appellate court will not reverse a chancellor's finding of reasonableness unless that finding is manifestly wrong and/or not supported by substantial and credible evidence

MUNICIPAL LAW - ANNEXATION - INDICIA OF REASONABLENESS - To determine the reasonableness of an annexation, courts consider the following twelve indicia: (1) the municipality's need to expand; (2) whether the area sought to be annexed is reasonably within a path of growth of the city; (3) potential health hazards from sewage and waste disposal in the annexed area; (4) the municipality's financial ability to make the improvements and furnish municipal services promised; (5) need for zoning and overall planning in the area; (6) need for municipal services in the area sought to be annexed; (7) whether there are natural barriers between the city and the proposed annexation area; (8) past performance and time element involved in the city's provision of services to its present residents; (9) economic or other impact of the annexation upon those who live in or own property in the proposed annexation area; (10) impact of the annexation upon the voting strength of protected minority groups; (11) whether the property owners and other inhabitants of the areas sought to be annexed have in the past, and in the foreseeable future unless annexed will, because of their reasonable proximity to the corporate limits of the municipality, enjoy economic and social benefits of the municipality without paying their fair share of taxes; and (12) any other factors that may suggest reasonableness

FACTS

In May 2012, the Town of Terry passed an annexation ordinance to enlarge its corporate boundaries by adding five territories adjacent to Terry in un-incorporated Hinds County. As a result, the Town filed a petition with the Hinds County Chancery Court seeking approval, ratification, and confirmation of the proposed annexation. The Town served the cities of Byram and Florence with process and published notice in *The Clarion-Ledger*. Neither city filed objections or answers to the Town's petition. However, five objectors answered and objected to the petition through joint counsel. Following a trial, the chancellor found the annexation of Territories 1, 4, and 5 to be unreasonable. The chancellor granted the Town's petition in part and allowed a limited annexation of Territories 2 and 3. The objectors appealed.

ISSUE

Whether the chancellor's partial grant of the Town's annexation petition was reasonable and supported by substantial, credible evidence.

HOLDING

Because the chancellor limited the Town's annexation to Territories 2 and 3 only and expressly found annexation of Territories 1, 4, and 5 to be unreasonable due to the Town's inability to sustain such a massive annexation, the chancellor's decision was reasonable and supported by substantial, credible evidence. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2015-AN-01611-SCT (Apr. 6, 2017)

Opinion by Presiding Justice Randolph

Hon. J. Dewayne Thomas (Hinds County Chancery Court)

John Preston Scanlon & Jerry L. Mills for Appellants - Rajita Iyer Moss for Appellee

Briefed by [TreMarcus Rosemon](#)

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ESTATE OF LYONS V. LYONS

CIVIL - WILLS, TRUSTS, & ESTATES

PHYSICIAN-PATIENT PRIVILEGE - PERSONAL REPRESENTATIVE - Under Miss. R. Evid. 503(c), the personal representative of a deceased patient may claim the medical privilege of that patient

MEDICAL PRIVILEGE - PERSONAL REPRESENTATIVE - WAIVER OF PRIVILEGE - Under Miss. Code Ann. § 13-1-21(1), the personal representative or any of the legal heirs or any contestant or proponent of a will holds the medical privilege and may waive that privilege

PHYSICIAN-PATIENT PRIVILEGE - WAIVER OF PRIVILEGE - EX PARTE CONTACT - Under Miss. R. Evid. 503(f), a party whose pleadings place in issue any aspect of that party's physical, mental, or emotional condition waives the medical privilege; this exception does not authorize *ex parte* contact by an opposing party

FACTS

In 2005, Katherine Lyons (Katherine) executed a document purporting to be her last will and testament (2005 will). The 2005 will designated her nephew Anthony Lobred (Lobred) as executor and provided that all of her property would be devised to Lobred. In 2012, Katherine executed a document purporting to be her last will and testament (2012 will) which designated her brother Larry Lyons (Lyons) as executor. The 2012 will provided that all of Katherine's property would be devised to Lyons's son Kenneth Lyons. In 2014, Katherine passed away. Her death certificate identified her cause of death as cardiopulmonary arrest due to Alzheimer's Disease. Lyons disputed that Katherine died from complications of Alzheimer's Disease and denied that she had even suffered from Alzheimer's from 2012 until her death. After Katherine's death, Lobred filed a petition contesting the validity of the 2012 will, arguing that Katherine lacked testamentary capacity and that the 2012 will was invalid due to undue influence. In 2014, Lyons filed a petition contesting the validity of the 2005 will, arguing that the 2012 will revoked all wills previously made and that the 2005 will should be voided. During discovery, Katherine's medical records were provided to Lyons and Lobred by her physician Dr. Clement. Lobred filed a notice of deposition for Dr. Clement at his counsel's office. When Lyons's counsel arrived to the deposition, he saw Lobred's counsel and Dr. Clement enter the room together and asked whether they had been discussing Katherine's medical records. Lobred's counsel replied affirmatively. Dr. Clement testified that Katherine had been competent to execute the 2005 will but incompetent to execute the 2012 will. Lyons filed a motion to strike the testimony of Dr. Clement, arguing that it should be excluded due to unauthorized *ex parte* communication between Dr. Clement and Lobred's counsel. Lobred admitted to speaking with Dr. Clement outside the presence of Lyons's counsel and without his authorization. The trial court ordered that any of Dr. Clement's testimony not discernible from Katherine's medical records was inadmissible. Lobred appealed.

ISSUE

Whether the trial court erred by ordering that any testimony of Dr. Clement that was not discernible from Katherine's medical records was inadmissible in the will contest due to *ex parte* communication between Lobred's counsel and Dr. Clement.

HOLDING

Because both Lobred and Lyons were personal representatives of Katherine and held the medical privilege of her in a will contest, no prohibited *ex parte* contact occurred. Therefore, the Supreme Court reversed and remanded the order of the Warren County Chancery Court.

Reversed & Remanded - 2016-IA-00133-SCT (Apr. 6, 2017)

Opinion by Justice Coleman

Hon. Vicki R. Barnes (Warren County Chancery Court)

David M. Sessums for Appellant - Henry Dean Andrews Jr. for Appellee

Briefed by [Brittany Barbee](#)

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CIVIL - CONTRACT

CONTRACTS - REMEDIES - SPECIFIC PERFORMANCE - While specific performance is an appropriate remedy in matters relating to real property, it is not a matter of right in Mississippi, but is a matter of grace

CONTRACTS - SPECIFIC PERFORMANCE - CHANCERY COURT DISCRETION - An application for specific performance is left to the chancery court's sound discretion, controlled and regulated by established equitable principles, and is not governed by the same principles as suits at law for damages or suits in equity to set aside executed contracts

CONTRACTS - REPUDIATION OR BREACH - PERFORMANCE EXCUSAL - The materiality of the breach is a decisive factor, and repudiation of a material part of the contract excuses the other party, although a breach may be material without such repudiation, and if so, should excuse the injured party

CONTRACTS - REPUDIATION OR BREACH - PRIVILEGE - Repudiation of duty by one of the parties terminates the duty of the other, giving the latter the legal privilege of refusing to render the return performance

FACTS

In 2003, Derr Plantation, Inc. (DPI) advertised for sale a tract of farmland located in the Mississippi Delta. Thomas L. Swarek and Thomas A. Swarek, father and son, became interested in the property. After a series of purchase offers and rejections between the parties, DPI sent a letter to the Swareks indicating an interest of DPI to lease the property before selling it. Several more rounds of negotiations followed, eventually arriving at a lease agreement ("February 10th Letter"), and the Swareks offered to come to DPI's headquarters in Germany to execute a final agreement. An agreement ("February 14th Agreement") was typed but never executed. Upon returning to the United States, the Swareks informed DPI's lawyer that there were mistakes in the agreement, including closing dates and consideration. The Swareks called DPI offering to increase the consideration because of the mistakes, which DPI accepted. DPI sent another letter indicating it was willing to go through with the lease and sale of the land and attached another agreement, but the Swareks refused to sign due to the agreement not including language that it was "firm and binding." The Swareks made three more alternative proposals, but negotiations broke down between the parties. In March 2005, the Swareks filed a complaint and lis pendens notice against DPI, alleging breach of contract and seeking specific performance, including damages. After extensive testimony, the trial court ultimately held that the February 14th Agreement was executed when the parties had not agreed on all material provisions, and was not intended as a contract for the sale of the property; thus, it was incomplete and was not a binding and enforceable contract. The trial court denied the Swareks' request for specific performance and damages. The Swareks appealed.

ISSUE

Whether the trial court erred in finding there was no enforceable contract between the Swareks and DPI and denying the Swareks' request for specific performance.

HOLDING

Because the terms and conditions of the multiple agreements varied, a sufficient meeting of the minds never occurred between the parties. Consequently, the trial court did not err in finding there was no enforceable contract and denying the Swareks' equitable-relief request for specific performance. Therefore, the Supreme Court affirmed the judgment of the Issaquena County Chancery Court.

Affirmed - 2015-CA-00871-SCT (Apr. 6, 2017)

Opinion by Justice Beam

Hon. Vicki R. Barnes (Issaquena County Chancery Court)

Benjamin McRae Watson & John C. Henegan for Appellants - Kenneth B. Rector & Robert R. Bailless for Appellee

Briefed by [Patrick Huston](#)

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WEILL V. BAILEY

CIVIL - OTHER

LIABILITY - JUDICIAL IMMUNITY - PUBLIC POLICY - Public policy mandates that a judge should have the power to make decisions without having to worry about being held liable for his actions

LIABILITY - JUDICIAL IMMUNITY - JURISDICTION - Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority; for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible

LIABILITY - JUDICIAL IMMUNITY - MALICE - Judicial immunity may protect a circuit court judge even if he was motivated by malice

FACTS

Karen Bailey was Judge Weill's court administrator from January 2011 to November 2012, during which time she alleged the judge treated her with a pattern of purposefully disrespectful, abusive language intended to harm her career and reputation. Her primary claim for defamation stemmed from the language in a footnote in an Order from February 10, 2015. She filed a complaint alleging "libel, slander, [and] defamation of character." Judge Weill argued her complaint should have been dismissed for failure to state a claim upon which relief could be granted due to judicial immunity, but the trial court denied his motion. Weill filed an interlocutory appeal.

ISSUE

Whether the trial court erred in finding Judge Weill's conduct was not protected by judicial immunity and denying his motion to dismiss.

HOLDING

Because Judge Weill had subject matter jurisdiction over the criminal matters before his court for which he entered the February 2015 orders containing the disputed footnote, he qualified for judicial immunity, and his motion to dismiss should have been granted. Therefore, the Mississippi Supreme Court reversed and remanded the decision of the Hinds County Circuit Court.

CONCURRENCE

Justice King expressed concerns about the potential of the majority's opinion to implicitly condone gratuitous remarks in an opinion or order, because those statements will be protected by judicial immunity provided the judge had authority to promulgate the order in the first place.

Reversed & Remanded - 2015-IA-01379-SCT (Apr. 6, 2017)

Opinion by Justice Coleman - Concurrence by Justice King

Hon. Henry L. Lackey (Hinds County Circuit Court)

Diane Pradat Pumphrey & Nicholas Denson Garrard for Appellant - James Ashley Ogden & James W. Smith Jr. for Appellee

Briefed by [Meredith Pohl](#)

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SUPREME COURT - ORDERS

THE MISSISSIPPI BAR V. JOHNSON

COURT ORDER

STATE BAR - RULES OF DISCIPLINE - IRREVOCABLE RESIGNATION - Upon the tender of an irrevocable resignation from an attorney, the Court shall enter an order accepting the resignation, revoking the attorney's license, and barring the attorney's right to seek reinstatement in the future

FACTS

In September 2016, the Mississippi Bar filed a formal complaint seeking the disbarment of Ivan Johnson after he pled guilty to a felony charge in the United States District Court for the Southern District of Mississippi on July 29, 2016. On December 1, 2016, Johnson executed a proper Notice of Irrevocable Resignation pursuant to Rule 10.5 of the Rules of Discipline for the Mississippi Bar. Johnson indicated that he had no desire to defend his two outstanding disciplinary matters, and therefore requested permission to resign irrevocably and with prejudice from the Mississippi Bar.

ORDER

The Supreme Court granted the Mississippi Bar's Motion to Accept Johnson's Irrevocable Resignation. The Court ordered the: (1) acceptance of Johnson's resignation with prejudice; (2) revocation of Johnson's license; (3) prohibition on Johnson's reinstatement; (4) forwarding of a copy of the Order to Johnson and the Executive Director of the Bar; (5) notification of resignation to all of Johnson's clients and the disbursement of funds Johnson held in trust; (6) filing of an affidavit attesting to the clients' notification; (7) punishment for failure to comply with the Order; (8) forwarding of a copy of the Order to the Clerks of the United States District Courts for the Northern and Southern Districts of Mississippi, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States; and (9) assessment of costs of the formal complaint to Johnson.

Granted - 2016-BD-01383 (Apr. 3, 2017)

En Banc Order by Justice Coleman

Briefed by [Amber Kipfmiller](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – APRIL 4, 2017

COURT OF APPEALS - CIVIL CASES

BRADLEY V. MOTES

CIVIL - CUSTODY

FAMILY LAW - CIVIL PROCEDURE - RECUSAL - An order entered in by a recused chancellor is moot if the newly appointed chancellor revises the order

FAMILY LAW - CUSTODY - MODIFICATION - A modification of custody is warranted when the moving parent shows (1) that a material change of circumstances has occurred in the custodial home since the most recent custody decree, (2) that the change adversely affects the child, and (3) that modification is in the best interest of the child

FAMILY LAW - MODIFICATION OF CUSTODY - ALBRIGHT ANALYSIS - When substantial evidence supports a finding of a material change, it is proper for the chancellor to perform an *Albright* analysis to determine whether modification is in the best interest of the children

FACTS

Rita Bradley and John Donald Motes divorced in 2009. Subsequent to the divorce, Bradley received primary custody of both their children, JHM and LHM. Motes later filed a petition to modify child custody in September 2013. Following a two day trial in May and June 2014, the presiding chancellor recused herself on the request of Bradley, but not before entering a temporary order modifying custody of LHM to live with Motes for the remainder of that summer. A newly appointed chancellor entered a temporary order that revised the original chancellor's order, and declined to modify the temporary custody of LHM. At trial in September 2014, the chancellor modified custody and awarded physical custody of LHM to Motes. Bradley's motion to set aside or reconsider was denied. Bradley appealed.

ISSUES

Whether the chancellor erred in (1) modifying custody after recusal of the original chancellor, (2) separating the two children against their best interests, and (3) conducting an *Albright* analysis.

HOLDING

(1) Because the new chancellor revised the temporary order entered by the original chancellor, the recusal concerns were moot. (2) Because the chancellor's finding of an adverse material change was supported by substantial evidence under an *Albright* analysis, which used medical records and trial testimony, the chancellor did not err in separating the two children. (3) Because the chancellor's *Albright* analysis was proper and supported by substantial evidence and not erroneous or manifestly wrong, the chancellor did not err in conducting an *Albright* analysis. Therefore, the Court of Appeals affirmed the decision of the Forrest County Chancery Court.

Affirmed - 2011-CA-00465-COA (Apr. 4, 2017)

Opinion by Presiding Judge Griffis

Hon. Dawn H. Beam (Forrest County Chancery Court)

Brandon Larue Brooks for Appellant - Alexander Ignatiev for Appellee

Briefed by [Horacio Hernandez](#)

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CARTER V. DAVIS

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - CREDIT - A noncustodial parent may receive credit for having paid child support where, in fact, he paid the support directly to or for the benefit of the child, if the parent proves by a preponderance of the evidence that he has paid the support to the child under circumstances contemplated by the support order, such as shelter, food, clothing, and other necessities for the child

FAMILY LAW - CHILD SUPPORT - UNRESTRICTED PAYMENTS - Whether unrestricted child support payments made by a non-custodial parent should be given credit against his/her child support obligation is a matter left to the sound discretion of the chancellor

FAMILY LAW - DIVORCE - ATTORNEY'S FEES - Determining whether to award attorney's fees in a divorce action is a matter largely entrusted to the discretion of the chancellor

FACTS

Allen Davis and Deveaux Carter divorced on February 18, 1993, with all issues resolved in an agreement for custody, support, and property settlement. Davis was ordered to pay child support, medical expenses, extracurricular activity fees, college expenses, and medical insurance. After Carter filed for contempt against Davis 15 years after the divorce, the chancellor found that the amount paid totaled \$197,911, leaving an arrearage of \$3,276.66, for which a judgment was rendered in favor of Carter. Davis was also ordered to pay \$7,500 in attorney's fees and costs by the chancellor. Arguing she was entitled to more than she was awarded, Carter appealed. Arguing that—though adjudicated to be in contempt—he was determined by the chancellor not to be in “willful and intentional” contempt and thus not obligated to pay attorney's fees, Davis cross-appealed.

ISSUES

Whether (1) the chancellor erred in allowing Davis's mother's payments to be included in the paid child support total, (2) the chancellor erred in allowing Davis's direct payments to the children to be included in the total, (3) the chancellor erroneously ordered Davis to pay attorney's fees because the chancellor failed to find him in “willful” contempt, and (4) attorney's fees should be paid on appeal.

HOLDING

(1) Because the chancellor found that the grandparent's payments to the children were for unrestricted use, the chancellor did not err in including the payments toward Davis's child support obligation. (2) Because Davis made these payments directly to the children as child support, and because the chancellor found that Carter would be unjustly enriched if Davis were required to make payments directly to her, the chancellor did not err in including the payments in the total. (3) Because Davis was credited for payments made since 1998, he was not in willful contempt, and the chancellor erred in requiring him to pay Carter's attorney's fees. (4) Because the chancellor's award of attorney's fees was reversed, Carter's request for attorney's fees on appeal was denied. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Jackson County Chancery Court.

Affirmed in Part; Reversed & Rendered in Part - 2015-CA-00173-COA (Apr. 4, 2017)

Opinion by Judge Fair

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

Wendy Walker Borries for Appellant - David C. Frazier for Appellee

Briefed by [Daniel E. Smith IV](#)

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HOLMAN V. HOLMAN

CIVIL - DOMESTIC RELATIONS

DIVORCE PROCEEDINGS - PROPERTY DIVISION - FINANCIAL INFORMATION - Uniform Chancery Court Rule 8.05 requires each party in a domestic-relations case involving economic issues and/or property division to file a financial statement with the court

DIVORCE PROCEEDINGS - FINANCIAL DISCLOSURES - FRAUD - An intentional filing of a substantially false Rule 8.05 financial statement constitutes a fraud on the court, but mere non-disclosures do not rise to that level; instead, relief based on fraud upon the court is reserved for only the most egregious misconduct, and requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision

PROPERTY DIVISIONS - DOMESTIC RELATIONS - FAILURE TO CLASSIFY - A failure to classify property does not automatically result in reversible error if the division of property is fair, but a failure to classify a material asset is grounds for reversal on appeal

PARENTAL DISCIPLINE - PHYSICAL DISCIPLINE - ABUSE THRESHOLD - Pursuant to Miss. Code Ann. § 43-21-105(m), physical discipline, including spanking, performed on a child by a parent, guardian, or custodian in a reasonable manner shall not be deemed abuse

COURT JUDGMENTS - ATTORNEY'S FEES - GENERALLY - Attorney's fees may be properly awarded where one party's actions have caused the opposing party to incur additional legal fees

ATTORNEY COMPENSATION - FEES - GENERALLY - Fees should be fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary

FACTS

In 2013, Bridget Holman filed for divorce from her husband, Scott Holman, on the grounds of adultery, habitual cruel and inhuman treatment, and/or irreconcilable differences. Scott counterclaimed on the same grounds, with the exception of adultery. Trial began in June 2015, but was rescheduled after the chancellor appointed a guardian ad litem (GAL) based on construing Bridget's testimony on Scott's disciplining of their children as a child abuse allegation. The GAL ultimately found the allegations lacked merit. Trial resumed in October 2015. At trial, Scott submitted two financial statements, but did not disclose a retirement account. At the trial's conclusion, the chancellor awarded custody of the children and unpaid child support to Bridget, divided the marital property, and ordered Bridget to pay Scott's attorney's fees for the child abuse allegation. After the trial, Bridget's counsel obtained Scott's payroll records and filed a motion for reconsideration and/or a new trial. Scott filed a similar motion. Both motions were denied. Bridget appealed.

ISSUES

Whether the chancellor erred in (1) failing to find Scott intentionally submitted a materially false financial statement; (2) failing to classify Scott's retirement account; (3) construing Bridget's trial testimony as a child abuse allegation; (4) awarding attorney's fees to Scott; (5) determining the amount of attorney's fees attributable to the child abuse allegation; and (6) failing to account for child support arrearage.

HOLDING

(1) Because there was no evidence Scott had willfully withheld information or had any plan to perpetrate fraud on the court, and Scott had disclosed his retirement account as well as variations in his income, the court did not err in failing to find Scott intentionally submitted a materially false financial statement. (2) Because the retirement account was a material asset, it should have been classified and addressed. (3) Because Bridget's testimony detailed excessive spanking and other forms of discipline, the court did not err in construing the testimony as a child abuse allegation. (4) Because the child abuse allegation caused additional delay and costs, it was not improper to award attorney's fees. (5) Because Scott did not allocate the attorney's fees attributable to the allegation, the court did err in not determining the proper amount of attorney's fees attributable to the child abuse allegation. (6) Because Bridget failed to show a child support arrearage existed, it was not error for failing to account for it. Therefore, the judgment of the Desoto County Chancery Court was affirmed in part, and reversed and remanded in part.

Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00313-COA (Apr. 4, 2017)

Opinion by Presiding Judge Griffis

Hon. Percy L. Lynchard Jr. (Desoto County Chancery Court)

Jerry Wesley Hisaw for Appellant - John Stannard Farese for Appellee

Briefed by [Patrick Huston](#)

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RIGSBY V. AM. CREDIT COUNSELORS, INC.

CIVIL - CONTRACT

CONTRACTS - FORUM SELECTION CLAUSE - ENFORCEABILITY - Forum selection clauses are presumptively valid and enforceable, unless the resisting party can show: (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of its day in court; or (3) the enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought, declared by statute or decision

CONTRACTS - FORUM SELECTION CLAUSE - FRAUD - A forum selection clause is invalid if its incorporation into the contract was the result of fraud; however, fraud and overreaching must be specific to a forum selection clause in order to invalidate it

CONTRACTS - FORUM SELECTION CLAUSE - ENFORCEABILITY - Forum selection clauses are not enforceable where they are so gravely difficult and inconvenient to effectively deprive a plaintiff of their day in court

FACTS

Glory Rigsby, an elderly Gulfport resident on Social Security disability, alleged that she was the victim of a "debt relief scheme" perpetrated by American Credit Counselors Inc. (ACCI). Rigsby filed a complaint against ACCI in county court, and ACCI moved to dismiss based on a forum selection clause contained within the contract Rigsby signed. Rigsby challenged the forum selection clause, arguing it was unenforceable. The county court held a hearing where Rigsby testified it would be difficult or inconvenient for her to travel to Palm Beach County, Florida, the designated jurisdiction in the forum selection clause. Despite Rigsby's testimony, the county court dismissed Rigsby's complaint based on the forum selection clause. The Harrison County Circuit Court affirmed the county court's dismissal. Rigsby appealed.

ISSUE

Whether the forum selection clause is enforceable.

HOLDING

Because Rigsby did not have the means to travel to Palm Beach County, Florida to litigate her claim against ACCI, enforcing the forum selection clause would essentially deprive Rigsby of her day in court. Consequently, the trial court erred in dismissing Rigsby's complaint. Therefore, the Court of Appeals reversed the judgment of the Harrison County Circuit Court and remanded the case.

DISSENT

Judge Carlton dissented, arguing that Rigsby did not meet her burden of proof to show that the forum selection clause was so inconvenient as to shock the judicial conscience. Further, Judge Carlton argued that Mississippi law required a contracting party to read a contract before signing it, and Rigsby should have known of the forum selection clause's existence.

Reversed & Remanded - 2016-CA-00749-COA (Apr. 4, 2017)

En Banc Opinion by Judge Wilson - Dissent by Judge Carlton
Hon. Roger T. Clark (Harrison County Circuit Court, First Judicial District)
Jason Graeber for Appellant - Reginald Paul Harrion for Appellee
Briefed by [Josh Rhodes](#)

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SAMPSON V. MTD PRODUCTS

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - PERMANENT FUNCTIONAL IMPAIRMENT - FACTORS - The measure of compensation in a workers' compensation claim where the claimant suffers a permanent functional impairment to a scheduled member depends on two factors: (1) the degree of functional loss of use as demonstrated by the medical evidence, and (2) the impact that the loss of function of the particular scheduled member has on the worker's ability to perform the normal and customary duties associated with her usual employment

WORKERS' COMPENSATION - LOSS OF INDUSTRIAL USE - BURDEN OF PROOF - In order to prove a loss of industrial use, the claimant has the burden of proving that her job-related injury caused her to suffer a loss of wage-earning capacity above and beyond her impairment rating

FACTS

Sampson was injured on the job and claimed permanent disability. After the preliminary hearing, the administrative judge found that Sampson suffered a ten-percent industrial loss of use to her left lower extremity and would be entitled to proportional disability benefits. MTD Products appealed that decision and the full Commission reversed the administrative judge's decision and found Sampson only suffered a two-percent loss of use. Sampson appealed.

ISSUE

Whether Sampson sustained any industrial loss of use in excess of her medical impairment rating.

HOLDING

Because the evidence established that Sampson returned to work at full duty, did not receive any subsequent medical treatment, was not on any prescription medicine related to her injury and was earning a higher post-injury average weekly wage, the Commission did not err in determining Sampson suffered a two-percent loss of use. Therefore, the Court of Appeals affirmed the decision of the Mississippi Workers' Compensation Commission.

Affirmed - 2016-WC-00345-COA & 2016-WC-00346-COA (Apr. 4, 2017)

Opinion by Presiding Judge Irving

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THOMAS V. PURDY

CIVIL - MEDICAL MALPRACTICE

EVIDENCE - TREATING PHYSICIAN - TESTIMONY - A physician can testify without being accepted as an expert regarding the facts and circumstances surrounding the care and treatment of the patient, what his records about the patient reveal, and what conditions the patient was suffering from if the opinion was acquired during the care and treatment of the patient; a physician cannot testify about the significance of a patient's condition or industry standards without first being accepted as an expert

EVIDENCE - EXPERT TESTIMONY - DAUBERT STANDARD - Expert testimony should only be admitted if (1) the testimony is relevant—in other words, the testimony will assist the trier of fact in understanding or deciding a fact in issue—and (2) the testimony is reliable, which involves considering the following non-exhaustive factors: whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community

APPELLATE PROCEDURE - CONTINUANCE DENIAL - WITNESS UNAVAILABILITY - Where a litigant had ample time to locate a medical expert to assist with her claim, an appellate court will not reverse a trial court's refusal of a continuance on the basis that such a medical expert was unavailable

FACTS

Peggy Thomas sued Dr. James Purdy for medical practice when she experienced sciatic nerve pain following a routine bladder repair surgery. She was examined and treated by two other physicians, Drs. Ahmed and Malloy, who determined that her nerve pain was likely caused by a stretch injury rather than the surgery. Another physician, Dr. Tucker, offered an expert causation opinion based on the medical records. Thomas requested a continuance of the trial due to the unavailability of a material expert witness, which was denied. A jury found that Dr. Purdy was not liable for the complications. Thomas appealed.

ISSUES

Whether the trial court erred in (1) admitting expert causation opinions contained in the medical records of Thomas's treating physicians; (2) allowing Dr. Tucker to testify on behalf of Dr. Purdy; and (3) denying Thomas's motion for continuance due to the unavailability of a material expert witness.

HOLDING

(1) Because the opinions contained in Thomas's medical records were appropriate under the standard for treating physician testimony, the trial court did not err in admitting them. (2) Because Dr. Tucker's testimony was both relevant and reliable under the *Daubert* standard, the trial court did not err in permitting him to testify as an expert on Dr. Purdy's behalf. (3) Because Thomas had ample time to depose her witness, the trial court did not abuse its discretion in denying a continuance. Therefore, the Court of Appeals affirmed the decision of the Lauderdale County Circuit Court.

Affirmed - 2015-CA-00701-COA (Apr. 4, 2017)

Opinion by Presiding Judge Irving

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

David Earl Rozier Jr., J. Keith Pearson, Jenessa Jo Carter Hicks, & Sarah Lynn Dickey for Appellant - Gaye Nell Lott Currie & Dennis Jason Childress for Appellee

Briefed by [Brittany Bane](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

JOHNSTON V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - RE-CLASSIFICATION HEARING - STATUTORY RAPE - Pursuant to Miss. Code Ann. § 97-3-65, statutory rape is classified as a crime of violence, but this classification is rebuttable on hearing by a judge

CIVIL PROCEDURE - PLEADINGS - PRO SE LITIGANTS - Pleadings filed by pro se litigants are to be held to less stringent standards than formal pleadings drafted by lawyers; deference will be given to pro se litigants so as to prevent the loss of a meritorious claim due to inartful drafting

CONSTITUTIONAL LAW - STATUTORY INTERPRETATION - RETROACTIVITY - Statutes will not be construed as retroactive unless there is evidence of the legislature's manifest intent for the statute to have such effect

FACTS

Justin Johnston pled guilty to statutory rape on March 24, 2008. Johnston was sentenced to serve thirty years in prison. On January 21, 2016, Johnston filed a pro se "petition for re-classification hearing" and requested that his statutory rape charge be reclassified as a nonviolent offense. Johnston based his application on House Bill 585, which created Miss. Code Ann. § 97-3-65. This section classifies statutory rape as a crime of violence, but this classification is rebuttable on hearing by a judge. In this case, the circuit court found it was without authority to reclassify Johnston as nonviolent and dismissed the petition. Johnston appealed.

ISSUE

Whether the trial court erred in dismissing Johnston's petition for a reclassification hearing.

HOLDING

Because House Bill 585 did not take effect until July 1, 2014, none of the reclassification sections applied at the time Johnston pled guilty in 2008. Additionally, Johnston provided no authority to suggest the relief requested applied retroactively. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2016-CP-00282-COA (Apr. 4, 2017)

Opinion by Presiding Judge Griffis

Hon. William E. Chapman III (Rankin County Circuit Court)

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

Briefed by [Davis Vaughn](#)

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JONES V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - GUILTY PLEA - INDICTMENT - Although a voluntary guilty plea waives all other defects or insufficiencies in the indictment, a guilty plea does not waive an indictment's failure to charge an essential element of the crime

CRIMINAL PROCEDURE - INDICTMENT - REQUIRED ELEMENTS - An indictment must contain: (1) the essential elements of the offense charged; (2) sufficient facts to fairly inform the defendant of the charge against which he must defend; and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense

INDICTMENT - ELEMENTS - SUFFICIENCY - So long as from a fair reading of the indictment, taken as a whole, the nature and cause of the charge against the accused are clear, the indictment is legally sufficient

INDICTMENT - ELEMENTS - COCAINE CHARGE - The quantity of cocaine sold need not be specified in the indictment because the penalty is the same irrespective of the quantity sold

FACTS

Lonzell Jones pled guilty to one count of sale of cocaine on May 7, 2013. Jones signed a plea petition in which he confirmed that he offered his plea of guilty freely, voluntarily, of his own accord, and with a full understanding of all the matters set forth in the indictment. Jones was charged as a habitual offender and sentenced to thirty years in prison. On July 30, 2015, Jones filed a post-conviction relief (PCR) motion claiming that the indictment was defective because it did not specify who the cocaine was sold to or how much cocaine was sold. Additionally, Jones claimed that he received ineffective assistance of counsel when his attorney advised him to plead guilty under a defective indictment. The trial court summarily denied his motion. Jones appealed.

ISSUES

Whether the trial court erred in (1) finding that Jones's indictment was not defective and (2) dismissing Jones's claim for ineffective assistance of counsel.

HOLDING

(1) Because the indictment clearly indicated the nature and cause of the charge, the indictment was not defective. (2) Because the indictment was legally sufficient, Jones's counsel was not ineffective in failing to object to the indictment. Therefore, the Court of Appeals affirmed the decision of the Winston County Circuit Court.

Affirmed - 2016-CP-00768-COA (Apr. 4, 2017)

Opinion by Judge Carlton

Hon. Joseph H. Loper Jr. (Winston County Circuit Court)

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

Briefed by [Spencer H. Newman](#)

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PEGUES V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEEDINGS - DISMISSAL - The circuit court may summarily dismiss a PCR motion without an evidentiary hearing if 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

INDICTMENT - FORMAL REQUISITES - PEACE AND DIGNITY - All indictments shall conclude "against the peace and dignity of the state"

INDICTMENT - FORMAL DEFECT - WAIVER OF CLAIM - Any claim regarding whether an indictment is defective must be raised as a demurrer to the indictment and all such claims are waived by a valid guilty plea

FACTS

In April 2015, Bobby Pegues pled guilty to two counts of sale of a controlled substance. He was sentenced to eight years on each count, to be served consecutively, with one year suspended from the second sentence. Pegues subsequently filed a motion for post-conviction relief alleging, among other things, that his indictment was defective. Pegues argued his indictment was defective because it failed to conclude with the words “against the peace and dignity of the state.” However, Pegues’s indictment did conclude with those words. The Lafayette County Circuit Court dismissed the PCR motion without an evidentiary hearing. Pegues appealed.

ISSUE

Whether the circuit court properly dismissed Pegues’s PCR motion.

HOLDING

Because Pegues did not object to his indictment prior to pleading guilty and because his indictment included the words “against the peace and dignity of the state,” his PCR motion was properly dismissed. Therefore, the Court of Appeals affirmed the ruling of the Lafayette County Circuit Court.

Affirmed - 2016-CP-00673-COA (Apr. 4, 2017)

Opinion by Judge Fair

Hon. Andrew K. Howorth (Lafayette County Circuit Court)

Pro se for Appellant - Joseph Scott Hemleben (Att’y Gen. Office) for Appellee

Briefed by [J. Marc McMillian](#)

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COURT OF APPEALS - CRIMINAL CASES

HILL V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - APPELLATE COUNSEL - LINDSEY BRIEF - When appellate counsel determines the record shows no appealable issues, counsel must file and serve a brief in compliance with Miss. R. App. P. 28(a)(1)-(4), (7) certifying that there are no arguable issues supporting client’s appeal

APPELLATE PROCEDURE - APPELLATE BRIEFS - ASSIGNMENTS OF ERROR - Under Miss. R. App. P. 28(a)(7), assignments of error must be supported by the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on, and arguments that do not comply are procedurally barred

FACTS

Jeffrey Hill was convicted of possession of a firearm on educational property in 2012. Before the first trial, Hill filed a bar complaint against his court-appointed attorney, and that attorney was replaced by another attorney. Hill then filed bar complaints against the second attorney, and the attorney was granted a motion for withdrawal but was retained as standby counsel. Hill represented himself at his first trial, which ended in a mistrial because of a hung jury. Hill represented himself in the second trial as well, arguing that the apartment complex in which he possessed the firearm was not on the campus of Mississippi State University (MSU). On appeal, the Supreme Court reversed and remanded for a new trial, finding that the trial court deprived Hill of his right to conflict-free counsel. On remand, Hill was appointed a new attorney, against whom Hill filed various bar complaints. This attorney was allowed to withdraw, and Hill was once again appointed a new attorney. Hill filed various bar complaints against the new attorney as well, and she was allowed to withdraw. Finally, with a third attorney for the trial to serve as advisory counsel, Hill’s case proceeded in 2015. Hill was convicted of the same crime as before. Hill appealed.

ISSUES

Whether (1) the apartment complex was “educational property” for purposes of the criminal statute; (2) the posting requirement was an element of the crime; (3) the roommate should have appeared at trial; and (4) Hill’s Fourth Amendment rights were violated.

HOLDING

(1) Because the apartment complex was open only to MSU students and managed by MSU Department of Housing, the apartments were “other property...operated” by MSU under Miss. Code Ann. § 97-37-17(1)(a). (2) Because the posting requirement is not an element of the crime, the argument was without merit. (3) Because the roommate’s testimony would have been of little significance and the State had no obligation to call him to trial, the argument was without merit. (4) Because the roommate allowed the police to enter the apartment, and Hill admitted he had a firearm in his closet, there was no violation of Hill’s Fourth Amendment rights. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

Affirmed - 2015-KA-00918-COA (Apr. 4, 2017)

Opinion by Judge Wilson

Hon. Lee Sorrels Coleman (Oktibbeha County Circuit Court)

Erin E. Pridgen (Pub. Def. Office) for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Tony Sax](#)

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LEWIS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JUDGMENT NOTWITHSTANDING THE VERDICT - SUFFICIENCY OF EVIDENCE - When analyzing the sufficiency of evidence, the relevant question is whether after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

CRIMINAL PROCEDURE - ROLE OF JURY - EVALUATION OF EVIDENCE - The jury is the sole judge of the credibility of witnesses and the weight and worth of their testimony

CRIMINAL PROCEDURE - JURY VERDICT - INFORMAL OR DEFECTIVE - If a verdict is informal or defective, the court may direct it to be reformed at bar

FACTS

Damion Lewis was accused of attacking his wife, Rosa. A doctor testified that Rosa’s redness in her eyes and marks around her neck indicated she was strangled. Another doctor testified on behalf of Lewis, claiming that Rosa’s condition was not caused by strangulation. Lewis claimed that he did not strangle Rosa and he was defending himself from her having attacked him. The jury returned an initial verdict in a form that favored both felony and misdemeanor domestic assault. The trial judge instructed the jury to re-read the instructions and return the verdict properly. The jury found Lewis guilty of felony domestic aggravated assault. Lewis filed a motion for a judgment notwithstanding the verdict, which the Harrison County Circuit Court denied. Lewis appealed.

ISSUES

Whether the trial court erred in determining (1) there was sufficient evidence to convict Lewis, (2) the jury verdict was not contrary to the overwhelming weight of evidence, and (3) the jury instructions were not confusing.

HOLDING

(1) Because Rosa and Lewis were legally married at the time of the incident and testimony offered by medical professionals and law enforcement was consistent with Rosa’s account, the trial court did not err in finding that the evidence was sufficient to convict Lewis. (2) Because the expert witness testimony, photographic evidence, and other testimony by numerous witnesses were consistent with Rosa’s account, the jury verdict was not contrary to the

overwhelming weight of evidence. (3) Because the judge properly re-instructed the jury, the jury verdict was not confusing. Therefore, the Court of Appeals affirmed the judgment of Harrison County Circuit Court.

Affirmed - 2015-KA-01917-COA (Apr. 4, 2017)

Opinion by Presiding Judge Griffis

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

W. Daniel Hinchcliff & George T. Holmes (Pub. Def. Office) for Appellant - Joseph Scott Hemleben & Jason Davis (Att’y Gen. Office) for Appellee

Briefed by [Morgan L. Stringer](#)

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NELSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - The court only considers an ineffective assistance of counsel claim on direct appeal when: (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge

CRIMINAL PROCEDURE - INDICTMENT - NOTICE - Under *Eakes v. State*, notice of the specific date and time of the alleged offense is not required in a child sexual abuse case so long as the defendant is fully and fairly advised of the charge against him

EVIDENCE - HEARSAY - TENDER-YEARS EXCEPTION - Before admitting testimony under the tender-years hearsay exception, the trial judge must conduct a hearing outside the jury’s presence and make two findings: (1) the child was of tender years when she made the statement, and (2) the statement has substantial indicia of reliability

FACTS

Ten-year-old J.S. informed her mother on April 7, 2014, that she had been raped by her uncle, Dwight Nelson. J.S. testified that Nelson started sexually abusing her when she was six or seven years old and it continued until she was ten years old. J.S. described in detail the sexual acts performed by Nelson. J.S. stated the last time the sexual abuse occurred was a little before Thanksgiving break, in 2013, although the record shows the abuse could have also occurred between the Thanksgiving and Christmas breaks in 2013 at her grandmother’s house. Nelson was convicted of sexual battery and touching a child for lustful purposes. Nelson was sentenced to serve life in prison for sexual battery and ten years for gratification of lust. Nelson appealed.

ISSUES

Whether (1) Nelson’s counsel’s failure to make any contemporaneous objections at trial and failure to submit medical records rendered counsel’s assistance ineffective; (2) the trial court erred in denying Nelson’s motion for a new trial; (3) Nelson’s indictment provided him with sufficient notice of the date and time at which the alleged offense was committed; (4) the trial court erred by admitting statements of J.L. under the tender-years exception to the hearsay rule; (5) the trial court erred by allowing the jury to hear testimony of the State’s two expert witnesses; (6) the trial court erred in denying Nelson’s motion for a directed verdict; (7) the sentence imposed upon Nelson was excessive and violated his constitutional rights.

HOLDING

(1) Because Nelson’s counsel’s decisions fell within the ambit of trial strategy, the court found nothing in the record to show Nelson received ineffective assistance of counsel. (2) Because the verdict was not so contrary to the overwhelming weight of evidence against Nelson, the trial court did not err. (3) Because a specific date at which the alleged offense was committed is not required in an indictment in a child sexual abuse case, the lack of specificity in the indictment did not prejudice Nelson’s ability to establish his defense. (4) Because J.S.’s statements were consistent and described in

detail the sexual contact between Nelson and J.S., the trial court did not err in admitting J.S.'s testimony under the tender-years exception to the hearsay rule. (5) Because both State experts met the *Daubert* requirements, the trial court did not err in allowing the jury to hear the State's expert testimony. (6) Because the evidence presented by the State was legally sufficient to obtain a guilty verdict, the trial court did not err in denying Nelson's motion for a directed verdict. (7) Because Nelson did not raise an objection regarding an improper sentence at his sentencing hearing, Nelson was procedurally barred from raising the issue on appeal. Therefore, the Court of Appeals affirmed the judgment of the Simpson County Circuit Court.

Affirmed - 2015-KA-00818-COA (Apr. 4, 2017)

Opinion by Judge Westbrook

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

Warren Louis Martin Jr. for Appellant - Alicia Marie Ainsworth & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Zachary Roberson](#)

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ROSEBUR V. STATE

CRIMINAL - FELONY

CRIMINAL - DOUBLE JEOPARDY - APPEAL - The protection against double jeopardy is a fundamental right that may be raised for the first time on appeal or even years after the defendant's conviction is final
FIREARM ENHANCEMENT STATUTE - STATUTORY INTERPRETATION - CUMULATIVE PUNISHMENT - The legislature intended to authorize cumulative punishment by enacting the firearm enhancement statute, Miss. Code Ann. § 97-37-37; regardless of whether two statutes proscribe the same conduct, the prosecutor may seek and the trial court may impose cumulative punishment under the statutes in a single trial
JUDICIAL AUTHORITY - PRECEDENT - ADOPTED OPINION - An intermediate appellate court may not reconsider its own opinion once the Mississippi Supreme Court adopts the opinion, but is obligated to follow it as established precedent

FACTS

Brothers Richard and Jamie Rosebur were convicted of shooting into a dwelling, for which they were sentenced to ten years. Additionally, they were sentenced to five years under the firearm enhancement statute, which would run concurrently to the ten-year sentence. The Roseburs appealed.

ISSUE

Whether the imposition of an additional punishment for using a firearm during the commission of the crime violates the Double Jeopardy Clause of the State Constitution or Federal Constitution.

HOLDING

Because the legislature intended to authorize cumulative punishment by enacting the firearm enhancement statute, the trial court did not violate the Double Jeopardy Clause by imposing cumulative punishment under two statutes in a single trial. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2016-KA-00260-COA (Apr. 4, 2017)

Opinion by Judge Wilson

Hon. Charles E. Webster (Coahoma County Circuit Court)

Mollie M. McMillin (Pub. Def. Office) for Appellants - Kaylyn McClinton (Att'y Gen. Office) for Appellee

Briefed by [Jonathan Barnes](#)

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STRICKLAND V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - CRIMES OF VIOLENCE - STATUTORY RAPE - Pursuant to Miss. Code Ann. § 97-3-65(1)(a), statutory rape is committed when any person seventeen years of age or older has sexual intercourse with a child who (1) is at least fourteen but under sixteen years of age; (2) is thirty-six or more months younger than the person; and (3) is not the person's spouse

CRIMINAL LAW - DIRECTED VERDICT - SUFFICIENCY OF EVIDENCE - When reviewing the denial of a motion for a directed verdict, the court of appeals shall accept as true all the evidence favorable to the State, together with reasonable inferences arising therefrom, and disregard the evidence favorable to the defendant; if such evidence would support a verdict of guilty beyond a reasonable doubt, the trial court's denial of the motion must be affirmed

CRIMINAL LAW - PEREMPTORY INSTRUCTION - SUFFICIENCY OF EVIDENCE - Peremptory instructions should be refused if there is enough evidence to support a verdict

CRIMINAL LAW - MOTION FOR NEW TRIAL - WEIGHT OF EVIDENCE - A reviewing court must accept as true the evidence which supports the verdict and will reverse only when convinced that a circuit court has abused its discretion in failing to grant a new trial; a new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

FACTS

Stanley Ross Strickland engaged in sexual intercourse with his biological daughter, S.T., on more than one occasion. During the time the sexual intercourse took place, Strickland was thirty-eight, and S.T. was fifteen years old. Sometime later, S.T.'s mother discovered inappropriate text messages between Strickland and S.T. The mother took the text messages to the sheriff's department, and Strickland was arrested and indicted. At trial, evidence showed that the text messages were sent from Strickland's phone. There was testimony that S.T.'s sister had also reported sexual abuse by Strickland. Based on this evidence, the jury found Strickland guilty of two counts of statutory rape, and he was sentenced to sixty years in prison. Strickland's motion for directed verdict, request for a peremptory instruction, and motion for a new trial were all denied by the Neshoba County Circuit Court. Strickland appealed.

ISSUES

Whether the trial court erred in denying Strickland's (1) motion for directed verdict, (2) request for a peremptory instruction, and (3) motion for a new trial.

HOLDING

(1) Because evidence showed Strickland's other daughter had made allegations of sexual abuse against Strickland and the inappropriate text messages were sent from Strickland's phone, the State proved beyond a reasonable doubt that Strickland committed statutory rape, and the trial court did not err in denying Strickland's motion for a directed verdict. (2) Because the evidence substantiated S.T.'s claim of when the sexual intercourse took place, the trial court did not err in denying Strickland's request for a peremptory instruction. (3) Because the verdict was not so contrary to the weight of the evidence as to constitute an unconscionable injustice, the trial court did not abuse its discretion in denying Strickland's request for a new trial. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

Affirmed - 2015-KA-00625-COA (Apr. 4, 2017)

Opinion by Judge Westbrook

Hon. Vernon R. Cotten (Neshoba County Circuit Court)

Edmund J. Phillips Jr. & James Edwin Smith III for Appellant - Laura Hogan Tedder & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Kaitlyn McMellon](#)

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