

MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 10, 2017**SUPREME COURT - CIVIL CASES****HATFIELD V. BD. OF SUPERVISORS OF MADISON COUNTY****CIVIL - STATE BOARDS & AGENCIES**

CIVIL PROCEDURE - COUNTY BOARDS - ZONING - A key function of a county board is to interpret its zoning ordinances because local boards are in the most advantageous position to apply them

CONSTITUTIONAL LAW - SEPARATION OF POWERS - DEFERENCE - The judiciary should give great weight to local authorities' application of local ordinances, but it will reverse a local board's interpretation of a local ordinance if it is "manifestly unreasonable"

FACTS

In July 2012, Arlin George Hatfield, III, purchased Lot 1 of the Deer Haven subdivision in Madison, Mississippi, and began raising chickens, guineafowl, and ducks on the property. In October 2013, the Deer Haven Owners Association (DHOA) sued Hatfield for violating subdivision covenants without DHOA approval. While this suit was pending, Scott Weeks, an administrator with the Madison County Planning and Zoning Department, inspected Hatfield's property. He concluded that Hatfield violated the "R-1 Residential District" section of the Madison County Zoning Ordinance by "keeping or raising poultry" within his R-1 zoned land. Weeks sent a letter to Hatfield, advising him to remove the fowl. Following two more inspections, Weeks sent another letter, informing Hatfield that the matter would be presented to the Madison County Board of Supervisors (Board). The Board determined that Hatfield violated R-1 zoning and denied his request to continue this use of his land. Hatfield filed an appeal and Bill of Exceptions with the circuit court. The circuit court judge affirmed the Board's decision. Hatfield appealed.

ISSUES

Whether the Board's decision was (1) "fairly debatable," supported by substantial evidence, or arbitrary or capricious, and (2) based on an unconstitutionally vague section of the county ordinance.

HOLDING

(1) Because Section 601 of the Madison County Ordinance does not list breeding, raising, and feeding chickens, ducks, or other fowl as a permitted land use in R-1 zoned land, the Board's conclusion was not arbitrary or capricious and was fairly debatable and supported by substantial evidence. (2) Because Section 601 gives examples of permitted "livestock," a list that does not include fowl, it is not an unconstitutionally vague section of the ordinance. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

CONCURRENCE

Justice Coleman concurred in part and result. However, he argued the interpretation of Section 601 of the Madison County Ordinance should be subject to a de novo standard of review because it is a question of law. Also, sharing the authority to interpret statutes and ordinances with other branches violates Art. 1, § 2 of the Miss. Const. of 1890.

Affirmed - 2016-CP-00616-SCT (Aug. 10, 2017)

Opinion by Justice Maxwell - Concurrence by Justice Coleman

Hon. Steve S. Ratcliff III (Madison County Circuit Court)

Pro se for Appellant - Katherine Bryant Snell for Appellee

Briefed by [Katherine Farese](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 8, 2017

COURT OF APPEALS - CIVIL CASES

HILL V. LEWIS

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

CIVIL PROCEDURE - SUMMARY JUDGMENT - STANDARD - Pursuant to Miss. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law

MISS. TORT CLAIMS ACT - IMMUNITY - RECKLESS DISREGARD - Law enforcement officers are entitled to immunity under Miss. Code Ann. § 11-46-9(1)(c) for official acts if: (1) the officers did not act with reckless disregard for the safety of others; and (2) the victim was engaged in criminal activity

CIVIL PROCEDURE - JUDGMENTS - WRITTEN DECISIONS - It is a longstanding rule in this state that a court's written decision trumps its oral one, and a trial court's written findings of fact and conclusions are its judgment as opposed to its oral findings announced in court

FACTS

Two deputies from the Hinds County Sheriff's Office were off-duty but working a private security detail. They were still in uniform and operated a county owned unmarked vehicle. Khavaris Hill passed the deputies' car at an intersection. The deputies attempted to stop Hill's car. Hill did not stop and continued on until he collided with another vehicle. After the collision, Hill refused to heed the deputies' commands to exit his vehicle and was ultimately pulled from the vehicle, placed face down on the ground, and handcuffed. Later, emergency medical services arrived and aided those in need of medical attention, including Hill who was ultimately taken to the hospital where he was diagnosed with a neck fracture. Hill was never charged with a crime. Hill filed his first lawsuit in federal court and alleged constitutional violations as well as state claims of negligence, gross negligence, and reckless disregard. That suit was dismissed by the federal court on a motion for summary judgment based upon qualified immunity, with the court's oral pronouncement interpreted as dismissing the claims against the deputies with prejudice and its written judgment that the matter was dismissed without prejudice. Hill refiled his claims in state court. The court granted summary judgment based upon two conclusions: the deputies were immune from Hill's claims under the Mississippi Torts Claims Act (MTCA), and res judicata barred Hill's claims against Deputy Coleman in his individual capacity. Hill appealed.

ISSUES

Whether the circuit court erred in granting summary judgment because (1) the deputies were immune from Hill's claims under the MTCA for their police-protection activities, and (2) res judicata barred Hill's claims against Deputy Coleman in his individual capacity.

HOLDING

(1) Because a genuine issue of material fact existed as to whether the deputies were pursuing Hill at the time of the collision and whether Hill was engaged in criminal activity, granting summary judgment was inappropriate. (2) Because the application of Mississippi law required that the federal judge's written judgment controlled over the conflicting oral pronouncement, the circuit court's reliance on res judicata was not applicable since the federal court's dismissal was without prejudice. Therefore, the Court of Appeals reversed and remanded the judgment of the Hinds County Circuit Court.

Reversed & Remanded - 2016-CA-00249-COA (Aug. 8, 2017)

Opinion by Judge Greenlee

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

Chuck McRae & Jhasmine Eunique Andrews for Appellant - Jason Edward Dare, Steven James Griffin, J. Lawson Hester, & Roy A. Smith Jr. for Appellees
Briefed by [Sarah Raben](#)

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HOWARD V. ROLIN ENTERS., LLC

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - FINAL JUDGMENT - CERTIFICATION - Miss. R. Civ. P. 54(b) states that if only some of the claims in a case are adjudicated, then the claims or parties still remaining are not terminated and the order is subject to revision at any time before adjudication of all claims

APPELLATE PROCEDURE - JURISDICTIONAL ISSUE - SUA SPONTE - Appellate courts must raise jurisdictional issues on their own initiative even if no party raises the issue on appeal

APPELLATE PROCEDURE - INTERLOCUTORY APPEAL - JURISDICTION - Under Miss. R. App. P. 5, an interlocutory order without Rule 54(b) certification is only appealable if the Mississippi Supreme Court grants express permission

CIVIL PROCEDURE - PARTY TO AN ACTION - SERVED WITH PROCESS - Miss. R. Civ. P. 4 states that an individual is not party to an action unless a summons is issued and both the complaint and summons is served on the defendant

FACTS

John Calvin Howard attended a party at the Claiborne County Convention Center following an Alcorn State football game on September 14, 2013. While attending the party, Howard was part of an altercation and was escorted from the premises by event security. While being escorted through the parking lot, Howard was jumped by the same group who he had an altercation with inside the party. Howard sustained lacerations to the neck, shoulder, and back and was taken to the hospital. Howard then sued the convention center management company Rolin Enterprises, LLC, its owner, the security services provider, and the event coordinator. The event coordinator was never served with process and the security services provider was served but never responded to any correspondence regarding the lawsuit. Rolin Enterprises and its owner were granted summary judgment by the Claiborne County Circuit Court without the judgment being certified pursuant to Rule 54(b). Howard appealed.

ISSUE

Whether the trial court erred in granting summary judgment in favor of Rolin Enterprises and its owner.

HOLDING

Because the Mississippi Supreme Court did not grant Howard permission to file an interlocutory appeal pursuant to Miss. R. App. P. 5, the Court of Appeals did not have jurisdiction to hear what amounted to an interlocutory appeal. Therefore, the Court of Appeals dismissed the appeal and did not address the judgment of the Claiborne County Circuit Court.

Dismissed - 2016-CA-00310-COA (Aug. 8, 2017)

Opinion by Presiding Judge Irving

Hon. Lamar Pickard (Claiborne County Circuit Court)

David M. Sessums, Kimberly Walker Nailor, & W. Richard Johnson for Appellant - Benjamin Lyle Robinson & Michael Madison Taylor Jr. for Appellees

Briefed by [Jacob Swatley](#)

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IN RE CONSERVATORSHIP OF SMITH

CIVIL - WILLS, TRUSTS, & ESTATES

CIVIL - CONTEMPT PETITION - TIMELY FILING - Miss. Code Ann. § 15-1-43 states that one has seven years to bring a contempt petition that is founded on a judgment or decree

CIVIL - LIMITATION OF ACTIONS - CATCH-ALL STATUTE - When no period of limitation is prescribed for a specific action, the period of limitation shall be governed by Miss. Code Ann. § 15-1-49, Mississippi's three-year "catch-all" statute of limitations

FACTS

Charles Vandevort was appointed as conservator over Margarett Smith and became executor of her estate. Vandevort was also named the sole beneficiary in Smith's will. Vandevort knew Smith, as he had been dating and living with Smith's daughter for ten years, Isabella Robinson, who predeceased Smith. Vandevort was Smith's caretaker. Smith's only descendant was her granddaughter Constance Fitzmaurice, Robinson's daughter. It was alleged by Vandevort's ex-wife that he neglected Smith, screamed at her, and drugged her, and that he wanted all of Smith's money. The conservatorship petition told of an unnamed granddaughter of Smith's whose location was unknown. Vandevort opened up a joint checking account with rights of survivorship with Smith. Vandevort filed an amended conservatorship petition, which failed to mention the joint checking account, and stated Smith had no descendant. Later, Vandevort transferred money from Smith's account. Vandevort also withdrew money from the joint checking account to buy a house, which was omitted from his final accounting as conservator. On July 14, 2011, Fitzmaurice filed a complaint to set aside Smith's will. On October 13, 2013, Fitzmaurice also filed a contempt petition in Smith's conservatorship and estate proceedings alleging Vandevort should be held in civil contempt for breaching his fiduciary duties to Smith and failing to comply with the chancellor's orders. Vandevort moved to dismiss both petitions. He alleged the contempt petition was untimely. The chancellor dismissed Fitzmaurice's contempt petition in the conservatorship proceeding and stayed the contempt petition regarding the will until the chancellor ruled on setting aside Smith's will. Fitzmaurice appealed both rulings, which were consolidated.

ISSUES

Whether the chancellor erred in (1) dismissing the contempt petition that Fitzmaurice filed in Smith's conservatorship matter, and (2) staying the contempt petition regarding the estate matter.

HOLDING

(1) Because Fitzmaurice filed her petition within seven years as governed by Miss. Code An. § 15-1-43, or within the "catch-all" three-year statute of limitations, and the petition stated a claim upon which relief can be granted, the chancellor erred by dismissing Fitzmaurice's contempt petition filed in Smith's conservatorship matter. (2) Because the chancellor's stay of Fitzmaurice's contempt petition filed regarding Smith's estate was not a final judgment, the Court of Appeals lacked jurisdiction to hear this portion of Fitzmaurice's appeal. Therefore, the Court of Appeals reversed and remanded the judgment of the Hinds County Chancery Court regarding only the conservatorship matter and dismissed the appeal regarding Smith's estate.

PARTIAL CONCURRENCE/DISSENT

Judge Wilson concurred with the majority that the Court of Appeals lacked jurisdiction to hear Fitzmaurice's contempt petition regarding Smith's estate. Judge Wilson asserted that, because Fitzmaurice was not the executor of Smith's estate, Fitzmaurice lacked standing to bring an action founded on a judgment in favor of the estate. He argued, however, that the contempt petition in Smith's conservatorship matter was filed after the two-year period to reopen a conservatorship to "surcharge and falsify" the conservator's final account. For that reason, Judge Wilson would have found affirmed the chancellor's dismissal of the contempt petition in the conservatorship matter.

Reversed & Remanded - 2015-CA-01798-COA (consolidated with 2016-CA-00504-COA) (Aug. 8, 2017)

Opinion by Judge Greenlee - Partial Concurrence/Dissent by Judge Wilson

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

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PATRICOLA V. IMPERIAL PALACE

CIVIL - PERSONAL INJURY

PERSONAL INJURY - PREMISES LIABILITY - ELEMENTS OF PROOF - In a personal injury suit, plaintiff must prove either: (1) her injury was caused by negligence of the defendant, (2) defendant had knowledge of the dangerous condition and failed to warn her, or (3) the condition existed for a sufficient amount of time so that the defendant should have had knowledge or notice of the condition

PERSONAL INJURY - PREMISES LIABILITY - REASONABLE PROBABILITY - When plaintiff has shown that the circumstances were such as to create a reasonable probability that the dangerous condition would occur, he need not also prove actual or constructive notice of the specific condition

PREMISES LIABILITY - BUSINESS INVITEE - DUTY OF CARE - The owner of a business owes a duty to an invitee to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition or to warn of dangerous conditions not readily apparent, of which the owner has actual or constructive notice

FACTS

Lanitia Patricola slipped and fell on a small puddle in the lobby of the Imperial Palace Casino. Patricola alleged the puddle was created by dripping condensation from an air conditioning vent overhead. Employees of the Imperial Palace admitted that condensation sometimes forms on the lobby vents, and one employee claimed to routinely clean condensation from the vents and floor below. The trial court granted summary judgment against her based on its conclusions that Patricola had failed to show condensation created the puddle or Imperial Palace had notice of the puddle's existence. Patricola died from unrelated causes during the pendency of her suit, and her estate was substituted as a party, with Peter Patricola serving as administrator. Patricola appealed.

ISSUES

Whether (1) the evidence of water on the floor is insufficient to amount to a genuine issue of material fact, and (2) there is a genuine issue of material fact that the water was on the floor long enough for Imperial Palace to have constructive notice of its existence.

HOLDING

(1) Because the evidence must be viewed in the light most favorable to Patricola, the evidence that the water on the floor came from the vent overhead was more than sufficient to create a genuine issue of material fact. (2) Because it is reasonable to infer that the puddle accumulated gradually, sufficient time elapsed to put Imperial Palace on constructive notice of its existence. Therefore, the Court of Appeals reversed the judgment of the Harrison County Circuit Court.

Reversed - 2016-CA-01043-COA (Aug. 8, 2017)

Opinion by Judge Fair

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

Catherine H. Jacobs for Appellant - Patrick R. Buchanan for Appellee

Briefed by [Caroline Loveless](#)

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TAYLOR MADE SMILES, PLLC V. FRANKLIN COLLECTION SERV., INC.

CIVIL - CONTRACT

CONTRACT LAW - BREACH OF CONTRACT - EQUITABLE REMEDIES - Equitable remedies do not apply in cases where a legal contract controls the matter giving rise to the cause of action, even when the contract is silent regarding the matter

CONTRACT LAW - BREACH OF CONTRACT - UNJUST ENRICHMENT - Unjust enrichment applies in situations where no contractual provision exists, and a party is in possession of money or property which, in good conscience and justice, he or she should not be permitted to retain

CONTRACT LAW - CONTRACTUAL PROVISIONS - AMBIGUITY - Where a contract is silent as to one of its terms, the court is not bound to adopt a construction outside of the contract's terms to which no man would reasonably agree

FACTS

Franklin Collection Service, Inc. was hired by Taylor Made Smiles, PLLC, a dental-service provider, to collect on delinquent patient accounts. The contract between the parties provided Franklin would collect debts in exchange for thirty-five percent of the debtors' payments. For one of the accounts assigned to Franklin for collection, the patient owed \$6,900. The patient paid Franklin two separate payments, which were later rejected by the patient's bank for insufficient funds. Prior to confirming its receipt of the patient's payment, Franklin submitted payment of \$6,315 to Taylor Made. Upon discovering that the patient's payment to Franklin was rejected by the patient's bank, Franklin petitioned Taylor Made to return the account payment mistakenly made by Franklin. Following Taylor Made's refusal to return the mistaken funds, Franklin brought suit against Taylor Made for breach of contract and unjust enrichment based on Franklin's mistake of fact in Lee County County Court. Taylor Made was instructed by the court to return the payment to Franklin with eight percent interest. Taylor Made appealed the verdict to the Lee County Circuit Court, which affirmed the order of the county court. Taylor Made appealed.

ISSUES

Whether (1) the circuit court erred by requiring Taylor Made to repay funds received from Franklin, and (2) Taylor Made breached the contract by retaining funds mistakenly paid to it.

HOLDING

(1) Because the circuit court found that no actual collection had occurred, Franklin was under no contract or obligation to pay Taylor Made the money that Franklin failed to collect (2) Because there was no indication that Franklin would have agreed to a contractual provision allowing for the non-return of mistakenly paid funds, Taylor Made breached the contract by retaining funds mistakenly paid to it. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

Affirmed - 2016-CA-00667-COA (Aug. 8, 2017)

Opinion by Judge Westbrook

Hon. Paul S. Funderburk (Lee County Circuit Court)

Mark Nolan Halbert & Stephen Joseph Cramblitt Jr. for Appellant - Martha Bost Stegall for Appellee

Briefed by [Kelsey Dismukes](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

COOK V. STATE

CIVIL - POST-CONVICTION RELIEF

CONSTITUTIONAL LAW - CRUEL & UNUSUAL PUNISHMENT - JUVENILE OFFENDERS - The Eighth Amendment prohibits sentencing a juvenile offender to life imprisonment without parole without consideration for the juvenile's immaturity, impetuosity, familial and home life, and other such mitigating factors

POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - JUVENILE OFFENDERS - In a post-conviction petition for parole eligibility, a juvenile offender carries the burden to prove that mitigating factors prohibit his life imprisonment without parole under the Eighth Amendment

POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - FINDING OF FACT - The Eighth Amendment does not require a court or jury to make any additional determination of facts during a juvenile offender's post-conviction petition to consider possible mitigating factors prohibiting the juvenile's life imprisonment without parole

POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - TRIAL BY JURY - Mississippi's capital murder sentencing scheme, Miss. Code Ann. § 99-19-101, does not grant a defendant the right to trial by jury in a post-conviction petition for parole eligibility

CONSTITUTIONAL LAW - SEPARATION OF POWERS - LEGISLATIVE POWERS - The authority to design sentencing schemes for criminal offenses is vested in the legislature, and the judiciary holds the authority to uphold or deny the constitutionality of sentencing schemes

FACTS

Jerrard Cook and two others planned to commit a robbery. With a handgun stolen from his uncle's home, Cook shot and killed Marvin Durr in order to obtain Durr's vehicle to carry out his plan. Cook was arrested and pled guilty to capital murder. Cook was a minor at the time of Durr's murder. Cook was sentenced to life imprisonment without parole. Years later, the United States Supreme Court in *Miller v. Alabama* declared that a sentencing scheme violates the Eighth Amendment to the Constitution if it requires life imprisonment without parole for juvenile offenders. The circuit court held a hearing to consider whether Cook's sentence violates the Eighth Amendment. After considering the relevant facts presented by Cook, the circuit court found Cook ineligible for parole. Cook appealed.

ISSUES

Whether the trial court erred in (1) failing to declare Cook eligible for parole, (2) sentencing Cook to life without parole without a jury determination of fact, and (3) sentencing Cook to life without parole in violation of the U.S. Constitution and Mississippi Constitution.

HOLDING

(1) Because a juvenile offender in a post-conviction petition for parole eligibility carries the burden to prove mitigating circumstances sufficiently, and because the judge considered all relevant evidence presented by Cook in his post-conviction petition, the trial court did not abuse its discretion in denying Cook parole eligibility. (2) Because the Eighth Amendment does not require the making of any additional determinations of fact to consider mitigating factors, and because Mississippi's capital murder sentencing scheme does not grant Cook the right to trial by jury in his post-conviction petition for parole eligibility, the trial court did not err by denying Cook parole eligibility without the aid of a jury. (3) Because the legislature has constitutional authority to design criminal sentencing schemes and because neither the U.S. Supreme Court nor Mississippi Supreme Court have found that all life without parole sentences for juvenile offenders are unconstitutional, Cook's sentence to life without parole did not violate either the U.S. Constitution nor the Mississippi Constitution. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Circuit Court.

Affirmed - 2016-CA-00687-COA (Aug. 8, 2017)

Opinion by Judge Wilson

Hon. David H. Strong Jr. (Lincoln County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [D. Kirkwood Palmer](#)

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COURT OF APPEALS - CRIMINAL CASES

CLARK V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - CULPABLE-NEGLIGENCE INSTRUCTION -

A defendant is entitled to have jury instructions which present his theory of culpable-negligence, however, the court may refuse if the entitlement is without foundation in the evidence

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER INCLUDED OFFENSE - A lesser included offense instruction may be given to the jury when there is evidentiary basis which supports the instruction

CRIMINAL PROCEDURE - NEW TRIAL - WEIGHT OF THE EVIDENCE - A challenge to the weight of the evidence will only succeed in granting a new trial when the verdict is so contrary to the weight of the evidence as to sanction an unconscionable injustice

FACTS

On May 11, 2014, James Clark and Jarvis Holder forced themselves into Patrick Snow's apartment with the intention to commit robbery. Clark shot Snow and his friend Matthew Campbell, who later died. Clark and Holder were later identified by Snow. Clark was convicted of second-degree murder and aggravated assault. The circuit court denied Clark's motion for a judgment notwithstanding the verdict, or in the alternative, a new trial. Clark appealed.

ISSUES

Whether (1) the record showed that Clark was given ineffective assistance of counsel, and (2) the weight of the evidence was contrary to the verdict so as to create an unconscionable injustice.

HOLDING

(1) Because there was no evidentiary basis for a culpable-negligence instruction and Clark failed to meet his burden of proof for either prong of *Strickland*, the claim for ineffective assistance of counsel was without merit. (2) Because it is the jury's prerogative to determine the credibility of witness testimony and there was ample evidence presented to show that Clark was guilty of murder and aggravated assault, the weight of the evidence was not contrary to the verdict. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2016-KA-01278-COA (Aug. 8, 2017)

Opinion by Judge Fair

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

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Katy Taylor Gerber (Att'y Gen Office) for Appellee

Briefed by [D. Hunter V. Robertson](#)

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FRISTON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - MISTRIAL - DOUBLE JEOPARDY - If a mistrial is granted upon the court's or the State's motion, double jeopardy bars a second trial, unless there is a manifest necessity for the mistrial

CRIMINAL PROCEDURE - WITNESS TESTIMONY - PRIOR STATEMENT - A prior statement can be used to impeach the witness's credibility, but it is not admissible as substantive evidence

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - FAILURE TO OBJECT - An offended party's failure to object to jury instructions at trial procedurally bars the issue on appeal

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - IMPROPER INSTRUCTIONS - Not all variances between the indictment and instructions constitute an amendment, and as long as the variance does not substantially alter the elements of proof necessary for a conviction the instructions are proper

FACTS

A Clarksdale police officer responded to an automobile accident where he saw a white Oldsmobile Alero against a brick wall. He then found Norman Williams and Valerie West on the ground beside the vehicle. West was dead, but Williams was conscious and able to identify Keith Friston as the driver of the vehicle. Friston was later located by a Clarksdale patrol officer and taken to the hospital where his blood was taken. He tested positive for marijuana and his blood alcohol level was .19. Friston was indicted as a habitual offender under Miss. Code Ann. § 99-19-81. Two days later, Friston admitted to investigators that he was the driver of the car. The case initially went to trial in 2014. Dr. Erin Barnhart, the forensic pathologist who performed West's autopsy, became ill and was unable to testify. The matter was retried in 2015. During trial, Lew Houston, Friston's boss was called to testify, but the circuit court excluded Houston's testimony. Friston was convicted on both counts and was sentenced to serve 25 years to serve in the custody of the Mississippi Department of Corrections and ordered to pay a \$5,000 fine. Friston appealed.

ISSUES

Whether the circuit court erred in (1) ordering a retrial because it violated Friston's right against double jeopardy, (2) excluding Houston's testimony, and (3) instructing the jury on the specific act of negligence, which as a result, constructively amended the indictment.

HOLDING

(1) Because the State was required to prove a causal connection between the car accident and the victim's death, Dr. Barnhart's testimony was a necessity, and the circuit court did not abuse its discretion or violate Friston's right against double jeopardy in declaring a mistrial. (2) Because the circuit court only denied the attempted use of Houston's former testimony for substantive purposes and did not exclude him as a witness, there was no abuse of discretion. (3) Because Friston failed to object to the jury instruction, the issue was procedurally barred. However, procedural bar notwithstanding, the State was not required to prove a specific act of negligence, and the jury instruction did not materially alter Friston's defense. Accordingly, the jury was properly instructed. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2015-KA-01467-COA (Aug. 8, 2017)

Opinion by Presiding Judge Griffis

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

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

Briefed by [Maggie Vinzant](#)

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