

**MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 25, 2016**

**SUPREME COURT - CIVIL CASES**

**DARNELL V. DARNELL**

**CIVIL - CUSTODY**

**CIVIL PROCEDURE - THRESHOLD ISSUE - LACK OF JURISDICTION** - Whether raised by the parties or not, the Court is required to note its own lack of jurisdiction

**APPELLATE PROCEDURE - PENDING MOTION - INEFFECTIVE TIME FOR APPEAL** - The time for appeal for all parties runs from the entry of the order disposing of the last outstanding motion

**FACTS**

The Court previously reversed and remanded this case with a final judgment that required the chancellor to reconsider certain evidence, and suggested that he perform a new *Albright* analysis. On remand, the chancellor entered an amended final judgment of divorce. Eight days later, Carla Speights Darnell filed a Rule 59 motion to alter or amend the judgment, or alternatively, for a new trial. While the motion was still pending, Carla filed her notice of appeal, and three days later, Carla's ex-husband, William Duff Darnell, cross-appealed.

**ISSUE**

Whether there could be an appealable judgment before the chancellor disposed of Carla's Rule 59 motion.

**HOLDING**

Carla's Rule 59 motion to alter or amend the judgment, or for a new trial was still pending in chancery court at the time she filed her subsequent notice of appeal. Where an undisposed Rule 59 motion remains pending in chancery court, there is no final appealable judgment. Therefore, the Court dismissed the appeal and cross-appeal for lack of appellate jurisdiction.

**Appeal & Cross-Appeal Dismissed - 2015-CA-00764-SCT (Aug. 25, 2016)**

Opinion by Justice Maxwell

Hon. David Shoemake (Jefferson Davis County Chancery Court)

Mark A. Chinn & W. Terrell Stubbs for Appellant – S. Christopher Farris for Appellee

Briefed by [Amber Kipfmiller](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 23, 2016**

**COURT OF APPEALS - CIVIL CASES**

**BELL V. CERTAIN UNDERWRITERS AT LLOYD'S LONDON**

**CIVIL - TORTS - OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE**

**APPELLATE PROCEDURE - NOTICE OF APPEAL - TIMING** - The time for taking an appeal begins to run on the date of a proper certification of a final judgment under M.R.C.P. 54(b)

**APPELLATE PROCEDURE - NOTICE OF APPEAL - TIMING** - Under M.R.A.P. 4(a), a notice of appeal must be filed with the trial court clerk within 30 days after the date of entry of the judgment or order appealed from

**CONTRACTS - INSURANCE - POLICY INTERPRETATION** - Because insurance policies are creatures of contract, if the language is clear and unambiguous, the language must be interpreted as written

**CONTRACTS - INSURANCE - DUTY TO READ** - An insured is charged with the knowledge of the terms of the policy upon which he or she relies for protection

### **FACTS**

After John and Emma Bell bought a property on which two buildings were located—a metal building and a wood-framed barn—John sought to obtain insurance for the property. John contacted an agent from SouthGroup Insurance and Financial Services, LLC (“SouthGroup”), which prepared an application that Emma signed covering the metal building. SouthGroup obtained coverage for the metal building through TAPCO Underwriters, Inc. (“TAPCO”), under a policy issued by Certain Underwriters at Lloyd’s London (“Underwriters”). The barn later collapsed, and Emma made a claim under the policy, which was denied. In response, John and Emma filed suit against SouthGroup, TAPCO, and Underwriters alleging fraud, tortious breach of contract, bad faith, and negligence. During a subsequent deposition, Emma admitted that she had never read the policy. TAPCO and Underwriters filed a motion for summary judgment, which the Claiborne County Circuit Court granted pertaining to TAPCO and Underwriters, but failed to specify if the order applied to SouthGroup. As a result, the Claiborne County Circuit Court entered another order clarifying its decision that its grant of summary judgment applied to SouthGroup as well. John and Emma Bell appealed.

### **ISSUES**

Whether (1) the Bells failed to file a timely notice of appeal and (2) the lower court correctly entered summary judgment in favor of all defendants.

### **HOLDING**

(1) Because the Claiborne County Circuit Court Rule 54(b) judgment was not properly certified, and because the defendants confused the date on which the judgment was signed with the date on which it was entered, the Bells’ appeal was timely filed. (2) Because the plain language of Emma’s policy did not provide coverage for the barn, the summary judgment as to all the defendants was proper. Therefore, the Court of Appeals affirmed the judgment of the Claiborne County Circuit Court.

**Affirmed - 2014-CA-01477-COA (Aug. 23, 2016)**

Opinion by Judge Wilson

Hon. Lamar Pickard (Claiborne County Circuit Court)

Alton Earl Peterson & Larry Stamps for Appellants - Jason Brooks Purvis, David A. Barfield, & Lara A. Coleman for Appellees

Briefed by [Bethany Poppelreiter](#)

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## **CREPPEL V. STATE**

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

**CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER** - A guilty plea given knowingly and voluntarily waives particular constitutional rights, including the privilege against self-incrimination, the right to have the State prove each element of the offense beyond a reasonable doubt, and all non-jurisdictional defects or insufficiencies in the indictment

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

**POST-CONVICTION RELIEF - BAR TO APPEAL - STATUTE OF LIMITATIONS** - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction unless there is an exception, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

### **FACTS**

In October 2003, Vincent Creppel and his wife Melissa Creppel went to the home of Darrell Davis in Jackson County to retrieve money from Davis. While at Davis's home, Vincent testified that he drank alcohol and consumed prescription and illegal drugs. Melissa then informed Vincent that she had engaged in a sexual relationship with Davis in exchange for drugs on multiple previous occasions. In response, Vincent stated he began drinking heavily. Later on, when Vincent and Melissa were about to leave Davis's home, Vincent grabbed a knife from Davis and stabbed Davis forty-two times. The injuries Davis sustained left him wheelchair-bound. In July 2005, the grand jury indicted Vincent for armed robbery and aggravated assault. In August 2005, Vincent pleaded guilty in the Jackson County Circuit Court to both charges. He filed no direct appeal after the entry of judgments. In November 2010, over five years after entering his guilty pleas, Vincent filed a post-conviction relief (PCR) motion. The trial court denied the motion as time-barred because it was filed after the three-year statute of limitations without any evidence of meeting an exception. Vincent appealed. The Supreme Court affirmed the trial court's decision. In August 2015, Vincent filed a second PCR motion. The trial court again denied the motion as time-barred. Vincent appealed.

### **ISSUES**

Whether the trial court erred in (1) finding Vincent's PCR motion lacked merit and (2) denying it as time-barred.

### **HOLDING**

(1) Because the record was void of any mistake that would cause the trial court to revisit this conviction or sentence, the trial court had no need to address the issues Vincent raised. (2) Because Vincent failed to assert any statutory exemption to the three-year statute of limitations for filing a PCR motion, the trial court properly denied the motion as time-barred. The Supreme Court declined to address Vincent's claims on the merits. Therefore, the Supreme Court affirmed the judgment of the Jackson County Circuit Court.

**Affirmed - 2015-CP-01188-COA (Aug. 23, 2016)**

Opinion by Judge Carlton

Hon. Robert P. Krebs (Jackson County Circuit Court)

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

Briefed by [Brittany Barbee](#)

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## **HARVEY V. FED. NAT'L MORTG. ASSOC.**

### **CIVIL - REAL PROPERTY**

**CIVIL PROCEDURE - APPEALS - FAILURE TO CITE AUTHORITY** - The failure to cite relevant authority obviates the appellate court's obligation to review such issues, because the appellant possesses the duty to provide authority for the issues he presents

**CIVIL PROCEDURE - APPEALS - PRO SE PARTIES** - On appeal, pro se parties should be held to the same rules of procedure and substantive law as represented parties

**CIVIL PROCEDURE - APPEALS - BURDEN OF PROOF** - Appellants bear the burden of demonstrating reversible error to the Court on appeal

### **FACTS**

Federal National Mortgage Association ("Federal") held a foreclosure sale on Henry and Lillie Harvey's property after they defaulted on their loan payments. Federal sent the Harveys a "Notice of Foreclosure and Tenants Rights," instructing them to vacate the premises. Subsequently, Federal filed a complaint of wrongful detainer in Grenada County

Justice Court, alleging the Harveys were wrongfully occupying the premises after the foreclosure sale. The Court entered a Judgment of Eviction against the Harveys, and the Harveys appealed. Upon hearing testimony, the Grenada County Circuit Court entered an order for the removal of the Harveys. The Harveys appealed.

### ISSUES

Whether the Harveys (1) were procedurally barred due to the failure to allege any error by the trial court and (2) did not have a meritorious claim for their appeal.

### HOLDING

(1) Because the Mississippi Supreme Court has held that the failure to cite relevant authority precludes the Court of Appeals from reviewing the appealed issues, the Harveys claim was procedurally barred from being reviewed. (2) Further, because the Harveys failed to present any argument or evidence to overcome the presumption that the trial court's decision was correct, they did not have a meritorious claim for their appeal. Therefore, the Court of Appeals affirmed the judgment of the Grenada County Circuit Court.

**Affirmed - 2015-CP-00134-COA (Aug. 23, 2016)**

Opinion by Judge Carlton

Hon. Joseph H. Loper, Jr. (Grenada County Circuit Court)

*Pro se* for Appellants - Michael Alan Jedynak & Sean Albert Southern for Appellee

Briefed by [Patrick Huston](#)

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## IN RE MASSINGALE

### CIVIL - WILLS, TRUSTS, AND ESTATES

**WILLS & ESTATES - NON-HOLOGRAPHIC WILL - VALIDITY** - No matter the testator's intent, a non-holographic will or codicil remains invalid if the document fails to comply with the requirements of the Miss. Code Ann. § 91-5-1 and is not attested by two or more witnesses in the presence of the testator

**WILLS & ESTATES - NON-HOLOGRAPHIC WILL - INCORPORATION BY REFERENCE** - A writing that is not valid as a will but is in existence when a will is executed may be incorporated by reference into the will if the will manifests an intent to incorporate the writing and the writing to be incorporated is identified with reasonable certainty

### FACTS

Executor Haruhiko Murakami filed a petition to probate Johanna Massingale's last will and testament after her death. The purported will consisted of nine pages and named Murakami the executor of Massingale's estate. The parties do not contest the validity of the first eight pages of Massingale's purported will. At issue is the ninth page, which possessed a different title and date than the rest of the will and was not attested by witnesses. Janice Young, Massingale's sibling, filed a petition to set aside the ninth page of the will as invalid. Then, Young filed a motion for summary judgment. The Chancellor granted Young's motion for summary judgment. Murakami appealed.

### ISSUE

Whether the trial court erred in granting summary judgment in favor of Young.

### HOLDING

Because the ninth page of Massingale's will possessed a different title and date than the rest of will, was typed in a different font style and size than the rest of the will, and contained its own separate signature line, there was no genuine issue of material fact that the ninth page constituted a separate document from the rest of the probated will. Because the ninth page did not have attesting signatures of at least two credible witnesses, the ninth page also failed to meet the statutory requirements for a non-holographic will. Because the first eight pages of the probated will failed to reference

the ninth page, the first eight pages failed to incorporate by reference the ninth page. Therefore, The Court of Appeals affirmed the judgment of the Clarke County Chancery Court.

**Affirmed - 2015-CA-00768-COA (Aug. 23, 2016)**

Opinion by Judge Carlton

Hon. Lawrence Primeaux (Clarke County Chancery Court)

John E. Howell for Appellant - Stephen B. Jackson for Appellee

Briefed by [Lora Wuerdeman](#)

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## K.T. v. KLEIN ROAD CHURCH OF GOD

### CIVIL - PERSONAL INJURY

**PREMISES LIABILITY - STATUS - INVITEE** - An invitee is a person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage

**PREMISES LIABILITY - STATUS - LICENSEE** - A licensee is defined as a person who enters upon the premises of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the owner

#### FACTS

K.T. was four years old when she fell off a swing set at Klein Road Church of God. K.T. sued the Church on premises-liability grounds, claiming she was an invitee. The Circuit Court granted summary judgment in favor of the Church. K.T. appealed.

#### ISSUE

Whether K.T. was an invitee.

#### HOLDING

Because the Church gained no economic advantage conferring invitee status to K.T., K.T. was not a member of the Church, K.T. was not attending a church-related function and the Church did not charge a fee to use the premises, the trial court did not err in characterizing K.T. as a licensee. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2015-CA-00880-COA (Aug. 23, 2016)**

Opinion by Judge Fair

Hon. Roger T. Clark (Harrison County Circuit Court)

David Paul Pitre for Appellant - John A. Banahan & Calen James Wills for Appellee

Briefed by [Ally Heine](#)

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## MISS. VALLEY SILICA CO., INC. v. BARNETT

### CIVIL - PERSONAL INJURY

**CIVIL PROCEDURE - SUBSTITUTION OF PARTY - REAL-PARTY-IN-INTEREST** - Mississippi Rule of Civil Procedure 17(a) states that “no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest”

**CIVIL PROCEDURE - REAL-PARTY-IN-INTEREST - OBJECTION** - The objection may not be held in reserve in a way that “hinders the goal of judicial efficiency or manifests the defendant’s intention to lay behind the log in ambush;” thus the objection ordinarily will be deemed waived if it is raised for the first time shortly before or during trial

**CIVIL PROCEDURE - STATUTE OF LIMITATIONS - LATENT DISEASE** - For a latent disease, the limitations period begins to run when the plaintiff discovers or by reasonable diligence should have discovered their injury; which is a fact question that must be resolved by a jury

**CIVIL PROCEDURE - SUMMARY JUDGMENT - APPEAL PRECLUSION** - When a circuit court determines that a genuine factual dispute concerning the application of the discovery rule precludes summary judgment, such ruling is rendered moot and cannot be reviewed on appeal once the case proceeds to trial on its merits

**CIVIL PROCEDURE - AWARDS - ATTORNEY’S FEES**- A trial court’s determination of reasonable attorney’s fees must “consider the eight factors enumerated in Rule 1.5 of the Rules of Professional Conduct”

## **FACTS**

Howard Barnett worked for Mississippi Steel and Iron Company (MSIC) approximately forty to sixty-five feet away from sandblasting operations that made his work conditions extremely dusty. Mississippi Valley Silica Company supplied the sand, and eventually Barnett was diagnosed with silicosis. He filed suit against Mississippi Valley Silica Company alleging that his disease was caused by his exposure to silica at MSIC. Barnett passed away after he filed suit, and his wife, Dorothy Barnett was substituted as the plaintiff in her individual capacity and on behalf of all of Howard Barnett’s wrongful death heirs. The jury returned a verdict in favor of Dorothy, and the Hinds County Circuit Court entered a judgment awarding economic, noneconomic, and punitive damages. After judgment was entered on the verdict, the trial court also awarded Dorothy attorneys’ fees. Mississippi Valley Silica Company appealed.

## **ISSUES**

Whether the judgment must be reversed and rendered because (1) Dorothy never opened an estate and lacks “standing” to recover “survival damages” in her individual capacity or as a wrongful death heir; (2) Howard’s/Dorothy’s claim was barred by the applicable statute of limitations; (3) the trial court erred by instructing the jury that Valley had a duty to provide warnings to persons who might reasonably be expected to be in the vicinity of the product’s probable use and to be endangered by it if defective; (4) Valley is entitled to judgment notwithstanding the verdict (JNOV) or a new trial because Dorothy failed to prove that Howard was exposed to Valley sand or harmful levels of silica or that Valley breached its duty to warn; (5) the trial court erred by submitting the issue of punitive damages to the jury; (6) the statutory cap on punitive damages required the trial court to remit punitive damages to \$0; (7) the trial court misapplied the apportionment statute and the statutory cap on noneconomic damages; and (8) the trial court’s award of attorneys’ fees was an abuse of discretion.

## **HOLDING**

(1) The absence of an estate did not require reversal, and Dorothy had standing to sue because Mississippi Valley Silica waived any objection that she was not the real party in interest. (2) Mississippi Valley Silica was not entitled to judgment as a matter of law regarding the statute of limitations because the applicable limitations period was an issue for determination by the jury. (3) The trial court’s instruction on Mississippi Valley Silica’s duty was consistent with Mississippi Supreme Court precedent. (4) Mississippi Valley Silica is not entitled to JNOV or a new trial because Dorothy Barnett presented sufficient evidence that Howard Barnett was exposed to Mississippi Valley Silica’s sand and that Mississippi Valley Silica breached its duty to provide adequate warnings. (5) The trial court did not err by submitting the issue of punitive damages to the jury because a reasonable trier of fact could have found that Mississippi Valley Silica’s conduct evidenced a reckless disregard for the safety of others. (6) The trial court was not required to remit the award of punitive damages to \$0, even though Mississippi Valley Silica had a net worth of zero. (7) The trial court correctly applied the apportionment statute and the noneconomic damages cap. (8) The award of attorneys’ fees must be vacated and remanded for a determination based on appropriate findings of fact and conclusions of law. Therefore, the Court of Appeals affirmed in part and vacated and remanded in part the judgment of the Hinds County Circuit Court.

## **DISSENT**

Judge Ishee argued that Dorothy lacked standing to receive survival damages because an estate was never opened for Howard Barnett. Judge Ishee argued further that the jury only awarded survival damages, and since an estate was never opened for Howard Barnett, there was not a party to the action with standing to recover the survival damages award. Therefore, this court lacked authority to dispose of this case in any way but to reverse and render the judgment as void.

**Affirmed In Part & Vacated & Remanded In Part - 2013-CA-01296-COA (Aug. 23, 2016)**

En Banc Opinion by Judge Wilson - Dissent by Judge Ishee

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

John D. Cosmich, Michael D. Simmons & Lakeysha Greer Isaac for Appellant - Patrick Malouf, Robert Allen Smith Jr., Timothy W. Porter, John Timothy Givens & David Neil McCarty for Appellee

Briefed by [TreMarcus Rosemon](#)

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## TURNAGE V. BROOKS

### CIVIL - DOMESTIC RELATIONS

**CIVIL PROCEDURE - SANCTIONS - PROCEDURAL BAR** - Issues of sanctions are procedurally barred on appeal if not placed squarely before the trial court for decision

**CHILD SUPPORT - COLLEGE EXPENSES - UNDUE BURDEN** - College support can be forfeited by a child whose behavior toward and relationship with the father makes the child unworthy of the additional effort and financial burden that will be placed on the father

**CHILD SUPPORT - NON-CUSTODIAL PARENT - CREDIT** - Non-custodial parents who take de facto custody while still subject to an existing support order may claim credits against their obligations to avoid unjustly enriching the custodial parent

**CHILD SUPPORT - ADDITIONAL SUPPORT - SEPARATE AWARDS** - The court may authorize separate awards for housing, transportation, medical care or insurance, college or private school expenses, and the like, as support in addition to monthly cash payments

### FACTS

Ellis Turnage and Mary Brooks had two children out of wedlock. In 2009, the Bolivar County Chancery Court ordered Turnage to pay child support and college expenses to his two minor children. Turnage appealed.

### ISSUES

Whether the chancellor erred in (1) not dismissing the claim for child support based on what Turnage contends are perjured statements made by the minor children's mother in her deposition, where she denied receiving child support payments from the appellant; (2) awarding college expenses for Turnage's younger son because of the lack of relationship between them; and (3) failing to give Turnage credit for support given to the children in kind.

### HOLDING

The Court of Appeals affirmed the trial court's award because (1) Turnage's claim of sanctions for the minor children's mother's alleged perjury was procedurally barred because it was not raised until appeal; (2) there was insufficient evidence that the relationships between Turnage and either of his children had degenerated enough for them to have forfeited college support or that the chancellor applied an incorrect legal standard in awarding college support; and (3) there was no existing support order for Turnage to seek credits from, nor does the law support his assumption that additional support provided by him to the children would be deducted from his cash payments. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Chancery Court.

**Affirmed - 2014-CA-00966-COA (Aug. 23, 2016)**

Opinion by Judge Fair

Hon. Edward C. Prisock (Bolivar County Chancery Court)

William O. Lockett Jr. & Tamekia Rochelle Holiday for Appellant - Terrence Ladwayne High for Appellees

Briefed by [Brittany Bane](#)

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## WARE V. ADAMS COUNTY

### CIVIL – PERSONAL INJURY

**TORTS - GOVERNMENTAL IMMUNITY - MISSISSIPPI TORT CLAIMS ACT** - Under the Mississippi Tort Claims Act, a governmental entity is immune from claims arising out of the acts of its employees engaged in the performance of police protection duties unless the employee acted with reckless disregard for the safety and well-being of others not engaged in criminal activity at the time of injury

**APPEALS - NECESSITY OF PRESENTATION - PROCEDURAL BAR** - Generally, a party may not raise a claim for the first time on appeal if the claim was not asserted in the trial court

### FACTS

On August 11, 2010, LaDonna Ware went to the Adams County Correctional Center in Natchez, Mississippi, to deliver several items to her ex-husband, an inmate. For security purposes, the Correctional Center required each individual bringing items to take them to a small room with closing electronic gates on either end, and place them into a drawer for inspection. Once the packaged items were inspected, an officer would flip a control switch on the gate, allowing the individual to exit the room. After Ware delivered her items, an officer triggered the switch, but before Ware had completely exited, the gate malfunctioned, partially closing on her lower leg. On November 10, 2011, Ware filed a complaint alleging that Sheriff Charles Mayfield and Adams County were responsible for her personal injury because they had a duty (1) of ordinary care not to create a dangerous condition in operating the gate with negligence and recklessness, and (2) to properly train their employees to prevent such dangerous conditions. Adams County filed a motion for summary judgment, arguing that Ware’s claims were barred by the Mississippi Tort Claims Act. The circuit court granted the County’s motion. Ware appealed.

### ISSUE

Whether the trial court erred in granting Adams County’s motion for summary judgment.

### HOLDING

Because Ware presented no evidence showing that the Correctional Center officer had acted with “reckless disregard” toward her safety in operating the gate such as would create an exception to governmental immunity, her claim was barred by the Mississippi Tort Claims Act. Moreover, because Ware failed to assert a “failure to warn” exception in the trial court, she was procedurally barred from raising the claim on appeal. Therefore, the Court of Appeals affirmed the Adams County Circuit Court’s grant of summary judgment.

**Affirmed - 2015-CP-00112-COA (Aug. 23, 2016)**

Opinion by Judge James

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

*Pro se* for Appellant – William Robert Allen & John Chadwick Williams for Appellees

Briefed by [James Kelly](#)

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## WHTTAKER V. STATE

### CIVIL - POST-CONVICTION RELIEF



**CRIMINAL PROCEDURE - APPEAL - APPEAL DEADLINE SUSPENSION** - Rule 2(c) of the Mississippi Rules of Appellate Procedure permits an appellate court to suspend the thirty-day deadline found in Mississippi Rule of Appellate Procedure 4(a) for good cause shown

**CRIMINAL PROCEDURE – APPEAL - OUT-OF-TIME APPEAL** - An out-of-time appeal is granted by the appellate court where a person is convicted of a crime and through no fault of his own is effectively denied his right to perfect his appeal within the time prescribed by law by the acts of his attorney or the trial court

**CRIMINAL APPEALS - EVIDENTIARY HEARING - ATTORNEY RESPONSE** - An evidentiary hearing is necessary when a record contains no indication that an attorney responded to his client’s request to appeal

**CRIMINAL APPEALS - INDIGENT DEFENDANT - FORMA PAUPERIS** - A defendant has the right to be advised that if he has become indigent and cannot pay the court costs or his retained trial lawyer, he can file a pauper’s affidavit and proceed with the appeal in forma pauperis

## **FACTS**

A jury convicted Tremaine A. Whittaker of statutory rape, sexual battery, and gratification of lust. Whittaker was not informed by the trial court of his right to appeal within thirty days of the entry of judgment or that if he was indigent he could be appointed an attorney on appeal. Whittaker told his attorney that he wanted to appeal the judgment before the sentencing hearing, and he understood that the attorney would represent him in his appeal until he received a letter stating that he could file the appeal himself or hire the attorney’s office to do so for him two weeks before the deadline to appeal. Whittaker filed a post-conviction motion in the trial court requesting an out-of-time appeal. The trial court dismissed the motion because of the court’s lack of jurisdiction due to the appeal being filed over 180 days after the entry of the conviction judgment. The trial court granted Whittaker’s motion for indigency status to appeal the denial of the motion for post-conviction relief. Whittaker appealed.

## **ISSUE**

Whether an out-of-rime appeal could be granted to Whittaker.

## **HOLDING**

Because evidence showed Whittaker was not informed of his potential right to court-appointed counsel, Whittaker operated under the assumption that his trial counsel would represent him on appeal until Whittaker was informed otherwise two weeks before the appeal deadline, and counsel only informed him of options involving hiring an attorney, the confluence of circumstances may support that Whittaker’s failure to appeal was due to no fault of his own and he should be granted leave to file an out-of-time appeal. Therefore, the Court of Appeals reversed and remanded the case to the Hinds County Circuit Court.

**Reversed & Remanded for Evidentiary Hearing - 2014-CP-00336-COA (Aug. 23, 2016)**

Opinion by Judge Greenlee

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

*Pro se* for Appellant - Scott Stuart & Jason L. Davis (Att’y Gen. Office) for Appellees

Briefed by [Morgan L. Stringer](#)

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## ***COURT OF APPEALS - CRIMINAL CASES***

**BILLIE V. STATE**

**CRIMINAL - FELONY**

**EVIDENCE - ADMISSION OF CONFESSION - STANDARD OF REVIEW** - Appellate courts will reverse a trial court’s admission of a confession only if the trial court was manifestly wrong in admitting the confession

**EVIDENCE - ADMISSIBILITY - DEFERENCE** - When the trial court admits a statement into evidence based on conflicting evidence, appellate courts must generally affirm the trial court’s judgment

**CRIMINAL PROCEDURE - ADMISSION OF CONFESSION - “FRUIT OF POISONOUS TREE” DOCTRINE** - The Mississippi Supreme Court has rejected the argument that an illegally obtained confession necessarily requires the exclusion of a subsequent voluntary confession; coerced confessions must be excluded from evidence, but subsequent proper confessions are admissible as evidence

### FACTS

Sherman Billie was arrested based upon a minor’s allegations of sexual molestation. Immediately prior to his arrest, Billie ingested four sleeping pills. Soon thereafter, Billie waived his *Miranda* rights and made an oral confession. Officers did not secure a written confession from Billie until the following morning when he signed a form waiving his *Miranda* rights and provided a written confession. After a suppression hearing, without jury present, the trial court deemed Billie’s confessions valid and admissible into evidence. Billie was convicted of sexual battery and sentenced to fifteen years in prison. Billie appealed.

### ISSUES

Whether (1) the trial court erred by deeming Billie’s confessions admissible, and (2) an invalid oral confession renders a subsequent written confession inadmissible.

### HOLDING

(1) Because trial judges are awarded deference in deeming admissibility of a confession and will be reversed only if they are manifestly wrong, the trial judge did not abuse his discretion in admitting Billie’s confessions. (2) Because an illegally obtained confession does not necessarily require the exclusion of a subsequent voluntary confession and the “fruit of the poisonous tree” doctrine is defeated when the confession is judged admissible, Billie’s written confession was properly admitted. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

**Affirmed - 2014-KA-01098-COA (Aug. 23, 2016)**

Opinion by Judge Carlton

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

James Edwin Smith III for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Joshua Rhodes](#)

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## LARRY V. STATE

### CRIMINAL - FELONY

**JURY SELECTION - PEREMPTORY STRIKES - BATSON CHALLENGE** - Once a defendant has made a prima facie case of purposeful discrimination, the party exercising the challenge has the burden to offer a race-neutral explanation for striking the potential juror

**PLAIN-ERROR - STANDARD OF REVIEW - CONFRONTATION CLAUSE** - Courts will only recognize plain-error review of a Confrontation Clause violation when the error resulted in a “manifest miscarriage of justice”

**CIVIL PROCEDURE - STANDARD OF REVIEW - WEIGHT OF THE EVIDENCE** - When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, courts will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

**CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - STRICKLAND** -To prove ineffective assistance of counsel, the defendant bears the burden to demonstrate both that the attorney’s performance fell below an objective standard of reasonableness and that, but for counsel’s unprofessional errors, the result of the proceeding would have been different

### FACTS

Xavier Larry was convicted of house burglary. Police officer Michael Martin recovered several stolen items from the trunk of the car that Larry and another man, William Jones, were driving. During his testimony at trial, Officer Martin

recounted a conversation he had with Jones during the investigation. Prior to trial, Larry objected to the State's use of three of four peremptory strikes on African Americans. At voir dire, the State conceded that the case it would be making was circumstantial, but Larry's attorney did not request a circumstantial-evidence jury instruction. The trial court found Larry guilty. Larry appealed.

### ISSUES

Whether (1) the trial court erred in denying Larry's *Batson* challenge; (2) Officer Martin's testimony violated Larry's right to confrontation; (3) the State failed to present sufficient evidence to support Larry's guilt, or in the alternative, the verdict was against the weight of the evidence; (4) Larry received ineffective assistance of counsel due to his trial attorney's failure to request a circumstantial-evidence jury instruction.

### HOLDING

(1) Because all members of the jury had higher than a high-school education, an African-American was seated on the jury, and the State did not use all of its available peremptory strikes, the trial court did not abuse its discretion in denying Larry's *Batson* challenge. (2) Because Larry failed to object to Officer Martin's statements at trial and Officer Martin's statements did not result in a manifest miscarriage of justice warranting plain-error review, the testimony did not violate Larry's right to confrontation. (3) Because a rational juror could have found beyond a reasonable doubt that the essential elements of the crime existed, there was sufficient evidence to support Larry's guilt, and because the verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice, the verdict was not against the weight of the evidence. (4) Because Larry did not meet his burden to demonstrate that his attorney's deficiency prejudiced his defense so that the result of the proceeding would have been different, his claim of ineffective assistance of counsel was without merit. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2014-KA-00201-COA (Aug. 23, 2016)**

En Banc Opinion by Judge Greenlee

Hon. John Huey Emfinger (Madison County Circuit Court)

Damon Ramon Stevenson & L. Abraham Rowe Jr. for Appellant - Billy L. Gore & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Catherine Norton](#)

## NATIONS V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - INDICTMENT - AMENDMENT** - All indictments may be amended as to form but not as to substance of the offense charged

**CRIMINAL PROCEDURE - INDICTMENT - SURPLUSAGE AMENDMENT** - An indictment may be amended to remove surplusage where: (1) the removal of the surplusage does not change the substance of the offense charged; (2) the defendant is afforded a fair opportunity to present a defense and is not be unfairly surprised; (3) the removal of the surplusage does not materially alter the essential facts of the offense; and (4) the removal of the surplusage does not alter a defense under the original indictment

**FELONY - GRAND LARCENY - AGGREGATION OF PROPERTY** - The total value of property taken and carried away by the person from a single victim shall be aggregated in determining the gravity of the offense

**CRIMINAL PROCEDURE - SENTENCING - DETERMINATION** - Pursuant to Miss. Code Ann. § 99-19-1, the trial court is required to sentence an offender under the applicable sentencing statute in place at the time of the crime

**CRIMINAL PROCEDURE - PLEA NEGOTIATION - REQUIREMENTS & RIGHTS** - There is no requirement that a plea agreement be entered into by the defendant, nor is there any constitutional right to a plea bargain

### FACTS

Justine Nations was indicted for stealing jewelry from her employer. The State aggregated the value of the jewelry to establish the \$500 statutory grand larceny threshold. The State successfully moved to amend the indictment to charge Nations as a habitual offender and to strike and change the description of certain items identified as stolen. The jury found Nations guilty of grand larceny. The trial court also found that Nations was a habitual offender and sentenced Nations to serve ten years' imprisonment. Nations appealed.

### ISSUES

Whether (1) the trial court erred by allowing the State to amend the indictment to include her habitual offender status; (2) the trial court erred by allowing the State to amend the indictment to remove or alter the descriptions of items allegedly stolen; (3) the trial court erred by permitting the State to aggregate the value of the allegedly stolen items; (4) the trial court erred by sentencing her to ten years' imprisonment; and (5) the State violated her rights by offering plea deals that exceeded the statutory maximum sentence at the time of her conviction.

### HOLDING

(1) Because the State provided Nations with ample notice of its intent to charge her as a habitual offender and afforded her a fair opportunity to present any defenses to the charge, the trial court did not err by permitting the State to amend the indictment. (2) Because the stolen items removed from the indictment did not change the substance of the offense, the amendments were not material or prejudicial, and Nations was afforded a fair opportunity to defend herself, the trial court did not err in permitting the State to amend the indictment. (3) Because Nations's theft was a single continuous design and transaction, the trial court did not err by allowing the State to aggregate the stolen items. (4) Because the trial court is required to sentence an offender under the sentencing statute in place at the time of the crime, the trial court did not err by sentencing Nations to ten years' imprisonment. (5) Because a plea agreement is not required and is not a constitutional right, the State did not violate Nations's rights by the plea deal offer. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2015-KA-00770-COA (Aug. 23, 2016)**

Opinion by Judge Wilson

Hon. John Huey Emfinger (Rankin County Circuit Court)

Kevin D. Camp & Joel C. Reynolds Jr. for Appellant - Barbara Byrd (Att'y Gen. Office) for Appellee

Briefed by [Kaylee Beauchamp](#)

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## SMITH V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR** - If jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found.

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - THEORY OF CASE** - A Defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in another instruction, or is without foundation in the evidence.

### FACTS

On March 19, 2013, Jason Parker drove to Willie Smith Jr.'s home after being thrown out of his girlfriend's house. Smith got into Parker's car. Parker was deeply upset and expressed suicidal thoughts. Parker had with him an unloaded .380 pistol. Smith calmed Parker down and advised Parker to go stay for a while with Parker's brother in Memphis, Tennessee. Parker did not have any money to travel; so, they decided to pawn the gun. Parker's wallet and driver's license were still at his girlfriend's house; so, Smith took the pistol into the pawn shop and sold it. Parker testified that Smith gave him the money Smith received for the gun and that Smith did not keep any of the money. A local law-enforcement officer recognized Smith's name when looking through local pawn receipts during an unrelated burglary

investigation. Smith, who had previously pleaded guilty to felony possession of a controlled substance and to a separate incident of felony shoplifting, was tried and convicted for being a felon in possession of a firearm. He was sentenced to ten years as a habitual offender. The trial court gave the State's proposed jury instruction on the defense of necessity, which, after outlining the three elements of necessity, stated: "If the State has failed to prove the essential elements of the crime beyond a reasonable doubt or the Defendant's action of possession of a firearm was the result of necessity, then you should find the Defendant not guilty." The trial court denied Smith's requested jury instruction on the defense of necessity, which, after listing the three elements of necessity, stated: "If the State has failed to prove from the evidence in this case beyond a reasonable doubt that the Defendant's action of possession of a firearm was not the result of a necessity as defined above, then you should find the Defendant Not Guilty." The court denied Smith's motion for a new trial. Smith appealed.

### **ISSUE**

Whether the trial court erred in refusing to give a jury instruction placing the burden on the State to disprove Smith's defense of necessity beyond a reasonable doubt.

### **HOLDING**

Because the Court determined that Smith received a jury instruction on the defense of necessity that correctly stated the law, it was not a violation of the Due Process Clause. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2015-KA-00661-COA (Aug. 23, 2016)**

Opinion by Judge Greenlee

Hon. Christopher Louis Schmidt (Harrison County Circuit Court)

Daniel Hinchcliff, Phillip Broadhead & Jim L. Davis III (Pub. Def. Office) for Appellant - Scott Stuart & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Davis Vaughn](#)

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