

**MISSISSIPPI SUPREME COURT DECISIONS - JANUARY 7, 2016**

***SUPREME COURT - CIVIL CASES***

**JONES V. MISS. EMP'T SEC. COMM'N**

**CIVIL - STATE BOARDS AND AGENCIES**

**UNEMPLOYMENT COMPENSATION - BENIFITS - DISQUALIFICATIONS** - Under Miss. Code Ann. § 71-5-513, an individual shall be disqualified for benefits for the week, or fraction thereof, which immediately follows the day on which he was discharged for misconduct connected with his work

**CIVIL PROCEDURE - STANDARD OF REVIEW - ADMINISTRATIVE AGENCY** - The findings of an administrative agency as to the facts, if supported by evidence, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law

**ADMINISTRATIVE LAW - STANDARD OF REVIEW - SUBSTANTIAL EVIDENCE** Even if there is evidence which would have supported a different result, an appellate court will not disturb a decision of an agency that is supported by substantial evidence

**FACTS**

While working at T&L Specialty Company (T&L), Devin Jones left work without notifying his supervisor after learning his fiancé was having medical complications. Consistent with a policy in T&L's employee handbook, his supervisor concluded that by leaving work early without informing him within eight hours Jones had "voluntarily quit" his job. Jones unsuccessfully sought re-employment with T&L. He later filed a claim for unemployment benefits. Initially, a claims examiner concluded that Jones was ineligible to receive benefits because he had committed misconduct. Jones appealed this decision to the ALJ. After conducting a telephonic hearing, the ALJ issued a decision declaring Jones ineligible to receive unemployment benefits on the basis of "constructively voluntarily quitting" his employment without good cause. James appealed to the Board of Review, but, due to a technical glitch, the Board was under the impression that the ALJ had dismissed the claim and accordingly affirmed. Jones then appealed to the Circuit Court of Lee County. During the appeal process, the Board realized its mistake and request the circuit court remand the case to the Board to consider the case on the merits. The Board issued an order remanding the case to the ALJ for further hearing and a decision on the merits. Eventually, the Board affirmed the original opinion of the ALJ. Jones once again appealed the Board's decision to Lee County Circuit Court, and the court affirmed the Board's decision. Jones appealed.

**ISSUE**

Whether the circuit court erred in affirming the decision of the Board of Review and the ALJ that Jones was not entitled to receive unemployment benefits due to his having "constructively voluntarily quit" his employment.

**HOLDING**

Because the ALJ relied solely on an inapplicable provision from the employee handbook concluding that Jones voluntarily had quit his job, MDES's decision in denying Jones unemployment benefits was not supported by substantial evidence. Therefore the Supreme Court reversed and remanded the judgment of the Lee County Circuit Court.

**CONCURRENCE**

Justice Kitchens agreed with the Court's determination that Jones did not quit his job voluntarily. However, the plurality relied, he reasoned, upon a misrepresentation of the T&L employee handbook in reaching its conclusion. He argued by notifying his coworker that he was leaving work to car for his fiancé and by asking his coworker to explain the reason he left work to his supervisor, Jones substantially complied with the provisions of the employee handbook.

### **DISSENT**

Justice Pierce argued that based on the plain language of the employee handbook Jones could have been considered as to have voluntarily quit. Therefore there was sufficient evidence presented to support the Board's decision that Jones was ineligible for unemployment benefits.

### **Reversed & Remanded - 2014-CC-01142-SCT (Jan. 7, 2016)**

En Banc Opinion by Presiding Justice Dickinson - Concurrence by Justice Kitchens - Dissent by Justice Pierce

Hon. James Lamar Roberts (Lee County Circuit Court)

Alexander J. Simpson, III for Appellant - Albert B. White & Leanne F. Brady for Appellee

Briefed by [Daniel McDonald](#)

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## **PORTER V. GRAND CASINO OF MISS.**

### **CIVIL - INSURANCE**

**INSURANCE - CONTRACTS AND POLICIES - ENFORCEMENT AS WRITTEN** - If the words of an insurance policy are clear and unambiguous, they must be interpreted as written

**TORTS - NEGLIGENCE - DUTY OF CARE** - A defendant that meets his or her duty to take reasonable measures to prevent foreseeable injuries cannot be held liable for said injuries

**APPELLATE PROCEDURE - APPEAL & ERROR - SUMMARY JUDGMENT** - A trial court's grant or denial of summary judgment is reviewed de novo

### **FACTS**

Cherri Porter's beachfront vacation home in Biloxi was completely destroyed during Hurricane Katrina when a barge owned by Grand Casino of Miss. (the "Grand Casino") broke free of its moorings and allided with the home. Porter had an "all-risk" homeowner's insurance policy with State Farm. The policy excluded loss caused by wind or water damage, as well as loss that would not have occurred in the absence of an excluded event. Using these exclusions, State Farm denied Porter's insurance claim stemming from the incident. Porter sued State Farm and agent Max Mullins for bad-faith denial of coverage and negligence in issuing her policy. She also brought suit against Grand Casino for negligence in its design and maintenance of its barges mooring system. State Farm and Mullins succeeded in having the claims against them dismissed on summary judgment in 2009. The charges against Grand Casino were dismissed on summary judgment in 2012. The Court of Appeals denied Porter's motion for rehearing. Porter filed a petition for writ of certiorari.

### **ISSUES**

Whether the trial court erred in granting summary judgment to (1) State Farm, (2) Max Mullins, and (3) Grand Casino.

### **HOLDING**

(1) Porter's insurance policy explicitly excluded coverage for losses which would not have occurred in the absence of water damage. (2) On certiorari, Porter did not argue any error regarding the claim against Mullins, so this issue was considered abandoned. (3) The Grand Casino provided two experts that stated the casino had exceeded mooring regulations by mooring the barge to withstand seventeen-foot tidal surges, so the casino did not fail to meet its duty of care. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court and the Court of Appeals.

### **DISSENT**

Justice Kitchens dissented, arguing the allision by the barge was distinguishable from the water damage exception in Porter's insurance policy, and that even though the Grand Casino exceeded mooring regulations, a hurricane of Katrina's size was foreseeable. Justice Kitchens based her argument on *Corban v. United States*, which was distinguished from the present case by the majority.

**Affirmed - 2012-CT-01793-SCT (Jan. 7, 2016)**

En Banc Opinion by Justice King - Dissent by Justice Kitchens

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

James Eldred Renfroe & Roy J. Perilloux for Appellant - Vincent J. Castigliola Jr., John Patrick Kavanagh Jr. & Kasee Garnet

Sparks Heisterhagen for Appellees

Briefed by [Cody D. Samples](#)

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## QUALITY DIESEL SERV., INC. V. TIGER DRILLING CO.

### CIVIL - OTHER

**CIVIL PROCEDURE - MOTION TO DISMISS - STANDARD OF REVIEW** - The scope of review of a motion to dismiss is that the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim

**CIVIL PROCEDURE - STATUTE OF LIMITATIONS - GARNISHMENT** - A judgment or decree rendered in any court held in this state shall not be a lien on the property for a longer period than seven years from the rendition thereof, unless an action be brought thereon before the expiration of such time

**CIVIL PROCEDURE - GARNISHMENTS - JUDGMENTS AND EXECUTIONS** - All property in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall be bound by and subject to the lien of the judgment, decree or attachment on which the writ shall have been issued

### FACTS

On Jan. 5, 2004, Quality Diesel Service, Inc. ("Quality Diesel") obtained a judgment against Gulf South Drilling Company, LLC ("Gulf South"). After learning that Tiger Drilling Company, LLC ("Tiger Drilling") was indebted to Gulf South, Quality Diesel had writs of garnishment issued and served on Tiger Drilling. Tiger Drilling's answers were near identical, stating that Tiger Drilling was indebted to Gulf South but the debt was not yet due. On Nov. 29, 2006, Quality Diesel contested Tiger Drilling's responses by filing a Petition to Controvert Answers to Garnishments, specifically contesting Tiger Drilling's answer to the writ issued on Jan. 18, 2006. On Mar. 14, 2014, Tiger Drilling filed a motion to dismiss the garnishment proceeding. On Oct. 3, 2014, the Rankin County Circuit Court granted dismissal on the ground that the underlying judgment had expired while the case was pending. Quality Diesel appealed.

### ISSUE

Whether a garnishment proceeding can be maintained despite the fact that the underlying judgment has since lapsed.

### HOLDING

Where a party commences a garnishment proceeding at a time when the underlying judgment is still valid, the statute of limitations for actions on judgments is tolled as to that particular party as to funds—due to the judgment debtor—that actually were in the hands of the garnishee at the time the garnishment proceeding was initiated and at the time the underlying judgment was valid. A garnisher is not entitled to those funds, due to the judgment debtor, which came in the garnishee's hands only after the underlying judgment had lapsed. Therefore, the Supreme Court reversed the judgment of the Circuit Court of Rankin County and remanded for further proceedings.

### DISSENT

Justice Pierce argued that a party who receives a judgment in his or her favor must renew that judgment before the statute of limitations has expired. He argued where a party fails to re-enroll the judgment, and therefore allows the

judgment to lapse, the judgment is no longer properly enrolled and should not be a lien on the property of the defendant.

**Reversed & Remanded - 2014-CA-01587-SCT (Jan. 7, 2016)**

En Banc Opinion by Presiding Justice Dickinson - Dissent by Justice Pierce

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

Susan D. McNamara & Robert Neill Bryant for Appellant - C. Dale Shearer, Barry Douglas Hassell, & Ian Austin for Appellee

Briefed by [Morgan Eason](#)

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## WILSON V. DAVIS

### CIVIL - CUSTODY

**CHILD CUSTODY - PROCEEDINGS - NATURAL-PARENT PRESUMPTION** - The presumption in all cases is that the child's parents will love it most and care for it better than anyone else and it is in the best interest of the child to leave it in the custody of the parent

**CHILD CUSTODY - PROCEEDINGS - NATURAL-PARENT PRESUMPTION** - The presumption may be rebutted by clear and convincing evidence that (1) the parent has abandoned the child; (2) the parent has deserted the child; (3) the parent's conduct is so immoral as to be detrimental to the child; or (4) the parent is unfit, mentally or otherwise, to have custody

**CHILD CUSTODY - PROCEEDINGS - NATURAL-PARENT PRESUMPTION** - The presumption may be rebutted by clear and convincing evidence that actual or probable, serious physical or psychological harm or detriment will occur to the child if the child is placed with the natural parent; such harm must prevent probable harm to the child and not simply find that the third party can provide the child with different or arguably better things

### FACTS

This action began as a paternity and custody suit between Concetter Davis and James Wilson. James was adjudged to be Sha's natural father. Concetter was awarded custody, and James was awarded visitation. After Concetter's death in 2011, her relatives refused to return Sha to Wilson, and he sought sole legal and physical custody. The chancellor awarded physical custody of Sha to Pearlen Davis, Sha's maternal grandmother, while awarding Wilson liberal visitation. Wilson appealed and the Court of Appeals reversed and remanded the case instructing the chancellor to determine if the natural-parent presumption had been rebutted. On remand, the chancellor found that the natural-parent presumption had been rebutted because clear evidence convinced the court that Wilson was unfit to parent. The chancellor first found that Wilson had abandoned Sha. The chancellor then found that Wilson's conduct, including multiple marriages, adultery, and a history of dating younger women, constituted conduct so immoral as to be a detriment to Sha. Further, the chancellor found that Wilson's current wife had two sons with serious anger issues and had previously gotten into a physical altercation with Sha's mother in front of Sha. After determining that it was not in Sha's best interest to grant sole custody to Wilson, the chancellor applied an *Albright* analysis, and awarded primary physical custody to Davis. Wilson appealed. The Court of Appeals affirmed. Wilson then petitioned the Supreme Court for writ of certiorari.

### ISSUE

Whether the chancery court erred in finding clear and convincing evidence existed to rebut the natural-parent presumption.

### HOLDING

The chancery court erred because the facts were not sufficient to rebut the natural-parent presumption. No evidence existed that Wilson's extramarital relationships or his wife's physical altercation with Sha's mother had any detrimental effect on Sha. Further, no evidence existed that Sha had been injured or harmed by the wife's sons. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Chancery Court.

### DISSENT

While agreeing that the majority's decision to remand the case was appropriate, Presiding Justice Dickinson argued that it was in Sha's best interest to be in her father's custody until the court determined if the natural-parent presumption had been overcome.

**Reversed & Remanded - 2013-CT-01244-SCT (Jan. 7, 2016)**

En Banc Opinion by Justice King - Dissent in Part by Presiding Justice Dickinson

Hon. Patricia D. Wise (Hinds County Chancery Court)

Felecia Perkins and Jessica Nicole Ayers for Appellant - John R. Reeves and John Justin King for Appellee

Briefed by [Catherine R. Rodgers](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS - JANUARY 5, 2016**  
**COURT OF APPEALS - CIVIL CASES**

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**DARVILLE V. MEJIA**

**CIVIL - PERSONAL INJURY**

**CIVIL PROCEDURE - STATUTES OF LIMITATIONS - TOLLING** - Where a party demonstrates good cause for failure to serve, the statute of limitations may be tolled

**CIVIL PROCEDURE - EXTENSION - SERVICE OF PROCESS** - A motion for additional time is properly granted where a party provides substantial evidence conveying good cause existed for the failure to serve within the prescribed period

**CIVIL PROCEDURE - STANDING - FILING A MOTION ON BEHALF OF A PARTY** - Where counsel becomes aware of a complaint, through service of process to their client, it may be considered within their duty to defend

**FACTS**

Carole and Ashley Darville were sustained in a car accident. The collision occurred when Hector Mejia's vehicle struck the vehicle driven by Ashley Darville. Darville sued Mejia. Following four attempts to serve Mejia, Darville sought an extension. The court granted a second motion for extension, allowing Darville an additional 120 days to serve Mejia. The second motion stated a belief Mejia was evading service. Darville was unable to locate and serve Mejia. A third motion for extension was denied. A fourth motion for extension was filed. Darville then attempted to serve Mejia through his insurance company, United Automobile Insurance Company ("UAIC"). Mejia was considered a nonresident motorist. Darville submitted service of process to the Miss. Secretary of State's Office. The Secretary of State attempted to forward the summons to Mejia, but it was returned unclaimed. Counsel representing UAIC moved to dismiss on Mejia's behalf. The motion alleged Mejia was improperly served through UAIC and that the statute of limitations had expired prior to perfection of service. The circuit court granted UAIC's motion and dismissed Darville's complaint with prejudice. Darville appealed.

**ISSUE**

Whether (1) counsel had standing to bring the motion to dismiss on Mejia's behalf; (2) the circuit court's denial of Darville's third motion for an extension for service of process was an abuse of discretion; or (3) the trial court erred in granting the motion to dismiss.

**HOLDING**

(1) Because a motion to dismiss was filed on Mejia's behalf after UAIC was notified of the complaint through Darville's attempt to serve process, it was presumably under their duty to defend. It could not be conclusively held that counsel lacked standing to file a motion on Mejia's behalf. (2) Because Darville provided substantial evidence

good cause existed for the failure to serve process within the proscribed period, the circuit court abused its discretion in denying the motion for additional time. (3) Because Darville has shown good cause for her failure to serve process, the statute of limitations should have been tolled, and therefore, the motion to dismiss was improper. Therefore, the Court of Appeals reversed and remanded the judgment of the Holmes County Circuit Court.

**Reversed & Remanded - 2014-CA-00832-COA (Jan. 5, 2016)**

Opinion by Judge Barnes

Hon. Jannie M. Lewis (Holmes County Circuit Court)

Daniel Ellis Morris & Lindsey J. Scott for Appellant - Walker Reece Gibson & Bradley Smith Kelly for Appellee

Briefed by [Alexandra Bruce](#)

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## HOWARD INDUS., INC. v. SATCHER

### CIVIL - WORKERS' COMPENSATION

**WORKERS' COMPENSATION - PERMANENT TOTAL DISABILITY - PRIMA FACIE CASE** - To establish a prima facie case for permanent total disability, the claimant must show he has sought and been unable to find work in the same or other employment and that he took reasonable efforts to find other employment

**WORKERS' COMPENSATION - PERMANENT TOTAL DISABILITY - FAILURE TO REHIRE** - A claimant may also establish a prima facie case for total disability if, after reaching maximum medical improvement the claimant reports back to the employer for work and the employer refuses to reinstate or rehire him

**WORKERS' COMPENSATION - PERMANENT TOTAL DISABILITY - REASONABLENESS OF JOB SEARCH** - The factors to be examined in determining the reasonableness of a claimant's job search include job availability, economics of the community, the claimant's skills and background, and the nature of the disability

**WORKERS' COMPENSATION - PERMANENT TOTAL DISABILITY - WAGE EARNING CAPACITY** - In deciding wage-earning capacity, relevant factors include the amount of education and training that the claimant has had, inability to work, failure to be hired elsewhere, and the continuance of pain

**WORKERS' COMPENSATION - PERMANENT TOTAL DISABILITY - WAGE EARNING CAPACITY** - Under *Hill v. Mel Inc.*, the ability to earn post-injury wages, even if significantly diminished, defeats a claim of permanent total disability

### FACTS

Bennie Satcher, a 48-year-old welder living in Heidelberg, Miss. with an eleventh-grade education, injured his neck, shoulder, and arm while within the scope of his welding job at Howard Industries, Inc. ("Howard Industries"). After over two years of treatment, a doctor determined Satcher had reached maximum medical improvement (MMI) and assessed his permanent work restrictions in accordance with his function-capacity evaluation (FCE). The doctor determined that Satcher would be limited to rare lifting of no greater than forty pounds. Because of his neck pain, Satcher was medically restricted from working as a welder, and Howard Industries did not offer him other employment. Instead, Howard Industries hired Brawner & Associates ("Brawner"), a vocational-services company, to evaluate Satcher for post-injury employability and wage-earning capacity. Angela Malone, a Brawner vocational counselor and vocational rehabilitation expert, found Satcher employable based on his physical capabilities and FCE. Satcher applied for several of the twenty-six job opportunities Malone sent him, but Satcher was unsuccessful, as his job experience was limited to jobs that required him to lift more than forty pounds and other applicants had at least a high school diploma. Satcher applied for reemployment at Howard Industries, but Howard Industries rejected him on the grounds that it had a policy against hiring individuals convicted of certain violent crimes. Prior to his initial employment with Howard Industries, Satcher was convicted of aggravated assault. On his initial job application, Satcher disclosed that he had previously pled guilty to an unspecified crime, but Howard Industries did not investigate the issue, allowing Satcher to work there in violation of the company's policy for four years. As of trial, Satcher had not secured or maintained full-time employment since reaching MMI in 2013. In a hearing on the matter, the administrative law judge ("ALJ") found that Satcher had a total loss of wage-earning capacity due to his work



connected-injury and awarded him total disability benefits. The Miss. Workers' Compensation Commission (the "Commission") affirmed. Howard Industries appealed.

### ISSUES

Whether (1) the Commission erred in finding Satcher suffered a permanent and total disability and (2) the Commission's misconstrued *Hill v. Mel Inc.* in its wage earning capacity analysis.

### HOLDING

(1) Because Satcher returned to work after reaching MMI and was unable work as a welder because of his injury, and Howard Industries did not offer him employment while he was restricted from working as a welder until his termination, Satcher met his burden for a prima facie case for permanent disability. There was also substantial evidence to support the Commission's finding that Satcher's employment search was reasonable and diligent, despite Brawner's opinion that he could work, because Satcher applied to several of the jobs the Malone sent to him and Howard Industries did not ask vocational counselors to attempt to return Satcher to work at its company. Further, because the ALJ considered Satcher's age, education, permanent work restrictions, the testimony of the vocational expert, the FCE, the loss of access to the job market, Satcher's geographical location, his past work experience, his incapacity to return to past jobs, his reasonable but unsuccessful search for other work, and his lack of other experience, there was substantial evidence to support the Commission's ruling that Satcher should be awarded permanent and total disability benefits. (2) The Commission correctly distinguished *Hill* because the claimant in *Hill* actually found and performed several post-injury jobs, while there were no jobs available to Satcher in his area that were more sedentary than a welder, nor did he have any experience for the available jobs. Therefore, the Court of Appeals affirmed the judgment of the Commission.

**Affirmed - No. 2014-WC-01750-COA (Jan. 5, 2016)**

Opinion by Judge Barnes

Mississippi Workers' Compensation Commission

Mark R. Smith for Appellant - Floyd E. Doolittle for Appellee

Briefed by [Abby Abide](#)

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## WHITE V. NELSON

### CIVIL - LEGAL MALPRACTICE

**CIVIL PROCEDURE - JNOV - STANDARD OF REVIEW** - The trial court's denial of a JNOV is reviewed de novo and will be affirmed if, viewing the evidence in a light most favorable to the verdict, there is substantial evidence to support the verdict

**TORTS - LEGAL MALPRACTICE - BURDEN OF PROOF** - In order to recover for legal malpractice, a plaintiff must prove by preponderance of the evidence the existence of a lawyer-client relationship, negligence on the part of the lawyer in handling his client's affairs entrusted to him, and some injury proximately caused by the lawyer's negligence

**CIVIL PROCEDURE - NEW TRIAL - STANDARD** - Miss. R. Civ. P. 59 authorizes the trial court to set aside a jury verdict and grant a new trial whenever justice requires, but a verdict will only be overturned when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

**CIVIL PROCEDURE - JURY INSTRUCTION - DENIAL OF INSTRUCTION** - While a party is entitled to jury instructions that present his or her theory of the case, this entitlement is limited; the trial court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence

### FACTS

On Apr.14, 2008, Anita White, on behalf of the wrongful-death beneficiaries for Zelda Gardner, filed a complaint against Omar Nelson and Nelson PLLC (collectively "Nelson"). The complaint alleged legal malpractice based on

negligence and breach of fiduciary duty, fraudulent misrepresentation, gross negligence and reckless disregard, intentional conduct, and tortious interference with a business relationship. Gardner, Anita White's sister, died in May 2003 of thrombotic thrombocytopenic purpura ("TTP"), a rare but known side effect of the drug Plavix. The autopsy report stated that Gardner's death was consistent with accident secondary to Plavix administration producing TTP. In May 2004, White consulted the law offices of Sweet & Freese to seek legal representation for any potential claims the wrongful-death beneficiaries had arising out of Gardner's death. Omar Nelson, an associate at Sweet & Freese at the time, discussed the case with White. Nelson consulted with an expert, Dr. Charles Bennett, who informed him that he could not give any opinion against the treating physicians, because he felt they had acted in accordance with the standard of care. However, Dr. Bennett did state he would testify against the Plavix manufacturers. According to Nelson, because the law firm could not assert a claim against any Mississippi treating physician, Rich Freese, a managing partner, instructed Nelson to reject the case, as a federal case would be cost-prohibitive, and there was a risk of losing the case based on the content of the warning label. There is no evidence that the other partner, Dennis Sweet, was made aware of White's case at that time. Nelson informed White that Sweet & Freese could not take her case, and he recommended other attorneys, including Winston Thompson. White hired Thompson & Associates as counsel. On April 27, 2005, T. Murry Whalen, an attorney with the Thompson law firm, filed suit in the United States District Court for the Southern District of Mississippi on White's behalf against the makers of Plavix. The suit alleged that the defendant manufacturers, Bristol-Myers and Sanofi, failed to warn either Mrs. Gardner or the medical community of its propensity to induce TTP, leading to death. Additionally, on May 12, 2005, Thompson filed a medical-malpractice (med-mal) claim in the First Judicial District of Hinds County on White's behalf against Central Mississippi Medical Center and Gardner's treating physician. In July 2005, Nelson left Sweet & Freese to be a sole practitioner, and Thompson asked Nelson to assist Thompson with White's case. In January 2006, Nelson and Thompson participated in a meeting with counsel for Bristol-Myers regarding possible settlement of the federal case. On February 22, 2006, Nelson and Thompson traveled to Atlanta, Georgia, to participate in mediation with representatives of Bristol-Myers. After a full day of settlement negotiations, White accepted a settlement offer of \$280,000. As she was representing the minor children of Gardner, White was required to submit the settlement to the Hinds County Chancery Court for approval. White agreed in her testimony that considering the uncertainties of litigation, it was fair and reasonable to dismiss the suit, and she also affirmed that her attorneys had done a good job. Although White did express before the chancellor that she thought the value of the case would be higher, White executed a sworn petition to settle the case for \$280,000 on March 29, 2006, stating the proposed settlement was a fair and reasonable settlement and that acceptance of this settlement was in the best interest of the minors. The chancellor approved the settlement, and Bristol-Myers executed a check for \$280,000. The proceeds were placed in a trust for White's nephews. Attorney's fees were approved in the amount of \$112,000 for Thompson & Associates. Although Nelson requested a portion of the fee from Thompson, he never received any compensation for representing White. In 2007, while cleaning out files in his office, Sweet found some documentation regarding White's case, and he contacted her. After meeting with her, he referred her to an attorney, Gregory Johnston. White filed a complaint on April 14, 2008, against Nelson and other defendants for fraud and legal malpractice, alleging the defendants had knowingly diverted the case away from Sweet & Freese and settled the case for an unreasonably low amount, \$280,000. Nelson filed a motion to dismiss the complaint or, in the alternative, for summary judgment on August 14, 2009. The trial court granted partial summary judgment on November 30, 2009, dismissing with prejudice White's claim for tortious interference with a business relationship. White moved to amend her complaint in September 2010, seeking to reference the state med-mal case in her claims against Nelson. White averred that she had only recently been made aware of the state med-mal claim filed on her behalf and moved for a partial summary judgment, contending that the mishandling and dismissal of the medical malpractice claim without consulting her was legal malpractice and that she suffered damages as a result. On February 18, 2011, the trial court granted White's motion to amend the complaint, but denied the motion for partial summary judgment. On April 7, 2011, White filed an amended complaint, asserting fraudulent misrepresentation, legal malpractice based on a negligent breach of the duty of care, and gross negligence, reckless disregard, and intentional conduct and requesting at least \$10,000,000 in compensatory damages and an unspecified amount of punitive damages. She claimed that Nelson and the others had negligently handled the federal products-liability case, as well as the state med-mal claim. Nelson moved for summary judgment on February 13, 2012, arguing, in part, that because White had failed to provide required expert testimony that Gardner's treating physician breached a standard of care, she could not prove she would have prevailed in the underlying med-mal claim. On April 13, 2012, the trial court granted partial summary judgment on this issue stating



that for the Plaintiffs to recover for negligence-based legal malpractice or for legal malpractice based upon an allegation of breach of fiduciary duty, the Plaintiff must show that such action was the proximate cause of Plaintiff's injury. No affidavit from an expert had been presented to the court on the issue of medical malpractice for the breach of a standard of care as required to establish this claim. Therefore, the court found that the Plaintiffs had failed to meet their burden on this essential element of this particular claim. The trial court later granted Nelson's motion in limine to exclude discussion of the state med-mal suit at trial by White's legal expert witness, Freese. On April 16, 2013, White filed a motion to voluntarily dismiss with prejudice the negligence-based legal-malpractice claim. The trial court granted the motion, dismissing all negligence-based legal-malpractice claims against Nelson. A trial was held September 10-13, 2013, on the remaining claims of fraudulent misrepresentation and legal malpractice based on a breach of fiduciary duty. A jury verdict was rendered in favor of Nelson, and the trial court entered a final judgment in favor of Nelson on September 18, 2013. White filed a motion for a JNOV or, in the alternative, a new trial. The trial court denied White's motion. White appealed.

### **ISSUES**

Whether (1) the trial court erred in denying White's motion for a JNOV, (2) the granting of partial summary judgment regarding the med-mal case was improper and, alternatively, assuming summary judgment was properly granted, whether it was improper to exclude evidence of the med-mal case at trial, and (3) White's causes of action for gross negligence and reckless disregard were viable independent claims that should have been presented to the jury at trial.

### **HOLDING**

(1) There was substantial evidence to support the jury's verdict. White's only proof at trial of proximate cause of injury or damages was provided through a deposition by Freese, who merely opined that had the case been venued in Hinds County with competent lawyers, the settlement value would have dwarfed what this case settled for. Therefore, viewing the evidence in the light most favorable to the jury's verdict, the trial court did not err in denying the motion for JNOV. (2) The only injury alleged by White was that the claim would have been successful on the merits. As White failed to designate a medical expert witness for the med-mal claim, the trial court did not err by granting partial summary judgment on this issue. (3) There was no abuse of discretion in the trial court's ruling that the jury instruction on gross negligence should not have been presented as a separate cause of action. White's claim was meritless, since it alleged simply higher degrees of negligence and the negligence-based claims were dismissed. Thus, in order to establish a claim on these grounds, White would have to present her case within a case, which she did not do. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2013-CA-02084-COA (Jan. 5, 2016)**

Opinion by Judge Barnes

Hon. John Huey Emfinger (Madison County Circuit Court)

Gregory Moreau Johnston for Appellants - James William Manuel, Mary Clay Wadlington Morgan & Kathleen Shields O'Beirne for Appellees

Briefed by [Peter H. Liddell](#)

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## *COURT OF APPEALS - CRIMINAL CASES*

### **GOLDSMITH V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - TRIALS - MOTIONS FOR ACQUITTAL** - To preserve the issue of denial of a directed verdict, the defense must move for a directed verdict at the close of the State's case

**CRIMINAL LAW - TRIALS - MOTIONS FOR ACQUITTAL** - If a motion for a directed verdict is denied and the defendant introduces evidence on his own behalf, the defendant must renew his motion for a directed verdict at the close of all evidence

**CRIMINAL PROCEDURE - BURDENS OF PROOF - CIRCUMSTANTIAL EVIDENCE** - That the only evidence supporting a conviction is circumstantial does not mean the evidence is insufficient

**CRIMINAL PROCEDURE - BURDENS OF PROOF - CIRCUMSTANTIAL EVIDENCE** - The Mississippi Supreme Court has consistently held that the State may prove a crime solely by circumstantial evidence

**CRIMINAL LAW - SENTENCING - DISPROPORTIONATE SENTENCE** - The general rule is that sentence cannot be disturbed on appeal so long as it does not exceed the maximum term allowed by statute

#### **FACTS**

On Oct. 15, 2012, David Purvis, vice president of safety at Ergon Trucking in Flowood, noticed suspicious activity in the Ergon parking lot involving a man in a Chevrolet Trailblazer. Purvis reported the suspicious activity and the Trailblazer's license-plate number to the Flowood Police Department. On Oct. 19, 2012, at 8:15 a.m., Barton Lampton parked his truck in the parking lot at Ergon, where he worked. Lampton's bicycle was in the back of the truck. According to Lampton, this bicycle retailed for \$6,000 to \$6,500. Time stamped photographs taken from the surveillance camera at Ergon show that at 8:37 a.m., the same Trailblazer from October 19 drove through Ergon's smaller parking lot. At 8:40 a.m., the Trailblazer drove into Ergon's larger parking lot where Lampton's truck was parked. Ian Gallman, an employee at USA Pawn and Jewelry of Jackson identified the pawn receipt where Goldsmith pawned Lampton's bicycle. Gallman estimated that Goldsmith would have arrived at the pawn-shop between 9:00 a.m. and 9:10 a.m. The transaction was complete at 9:20 a.m. According to Gallman, the retail value of the bicycle is \$7,000. However, Gallman paid Goldsmith \$100 because that was the amount requested. At trial, Goldsmith denied stealing the bicycle and denied having been in the Ergon parking lot on Oct. 15 or 19. On direct examination, Goldsmith testified that he paid his stepson's friend \$45 for the bicycle, and was told to wait fifteen to twenty minutes. If he did not bring Goldsmith his money back, the friend stated that Goldsmith could see the bicycle. Goldsmith claims he waited then drove from the Citgo, where he claims the transaction was made, to the pawnshop. On cross-examination, however, his story changed about how he made it from the Citgo to the pawnshop. During a hearing on Goldsmith's prior convictions, it was established that he had a total of at least eleven prior felony convictions. At the conclusion of the State's case, Goldsmith moved for a directed verdict, which was denied. Goldsmith did not renew his motion at the close of all of the evidence. On Dec. 13, 2014, Goldsmith was convicted of grand larceny, and he was later sentenced as a violent habitual offender to life in prison. Goldsmith then filed a motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court denied the motion, and Goldsmith now appeals.

#### **ISSUES**

Whether the trial court erred in (1) denying Goldsmith's motion for a directed verdict, and (2) sentencing Goldsmith as a habitual offender to life without parole.

#### **HOLDING**

(1) Despite the procedural bar, because there was sufficient evidence for the jury to find Goldsmith guilty of grand larceny, Goldsmith's claim that the trial court erred in denying his motions for a directed verdict and a JNOV or new trial was without merit. (2) Because Goldsmith's sentence conformed to the requirements of a habitual-offender

statute, the issue that his sentence was disproportionate to the crime was without merit. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2014-KA-01321-COA (Jan. 5, 2016)**

Opinion by Chief Judge Lee

Hon. Samac S. Richardson (Rankin County Circuit Court)

Benjamin Allen Suber & George T. Holmes (State Pub. Defender Office) for Appellant - Lisa Blount (Att’y Gen. Office) for Appellee

Briefed by [Madison Coburn](#)

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