

MISSISSIPPI SUPREME COURT DECISIONS - JANUARY 21, 2016

SUPREME COURT - CIVIL CASES

BATISTE V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - DEATH PENALTY - STANDARD OF REVIEW - In death penalty cases, the Court employs a heightened standard of review where all doubts are to be resolved in favor of the accused

POST-CONVICTION RELIEF - DEATH PENALTY - FUNDAMENTAL RIGHTS - Errors affecting fundamental constitutional rights are excepted from procedural bars of the Uniform Post Conviction Relief Act; a petitioner is entitled to an in-court opportunity to prove his claims if the claims are procedurally alive substantially showing denial of a state or federal right

CONSTITUTIONAL LAW - SIXTH AMENDMENT - IMPARTIAL JURY - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury

FACTS

Bobby Batiste was convicted of capital murder and felony robbery in the Oktibbeha County Circuit Court and was sentenced to death. Following the Supreme Court's affirming his conviction and sentence in 2013, Batiste sought leave to file a Petition for Post-Conviction Relief, raising sixteen separate issues, and the Supreme Court chose to address one: whether certain statements, allegedly made by bailiffs to jurors, violated Batiste's constitutional right to an impartial jury. Batiste presented a proposed petition with two affidavits from jury members. One juror stated that she and others had concerns because the jury was all white, but "one of the bailiffs explained that blacks and whites are different in their opinion about the death penalty." Another juror related in the affidavit a similar experience stating, "[the jury] did not include any blacks, which at first bothered me. Someone, though, I can't remember who exactly, explained that you have to be comfortable with the death penalty, and blacks don't feel as comfortable with it." Batiste claimed that these statements by the bailiffs violated his Sixth Amendment right to a fair trial by an impartial jury. The State responded that Batiste's claim was procedurally barred because it was capable of determination at trial and/or direct appeal.

ISSUE

Whether Batiste's Sixth Amendment right to a fair trial by an impartial jury was violated by the conduct of the bailiffs at his trial

HOLDING

Because Batiste made a substantial showing of a denial of state or federal right, the Court granted Batiste's motion for leave to file his petition for post-conviction relief in the Oktibbeha County Circuit Court. Applying the heightened standard of review for death penalty cases, the Court found that the bailiff's conduct, if accurately reported, was presumptively prejudicial. Further, after examining multiple precedent cases similar to Batiste's situation, the Court could not say that such remarks to the jurors, if made by the bailiff, did not impact Batiste's fundamental constitutional right to a fair trial by an impartial jury. In regard to the State's response that Batiste's claim was procedurally barred, the Court stated that Batiste's claim was not ascertainable at trial or on direct appeal because Batiste's trial and appellate attorney had no reason to know that the jury had been influenced unduly by the bailiffs. Additionally, Batiste's claim is excepted from procedural bars because it concerned an error affecting his fundamental

constitutional right. Therefore, the Supreme Court granted Batiste's motion for leave to file his petition for post-conviction relief in the Circuit Court of Oktibbeha County.

DISSENT

Justice Pierce argued that Batiste's motion for leave should have been denied because Batiste failed to make a showing that the bailiff's comments did, or may have, tainted the jury in any way. Thus, Batiste could not make a prima facie showing that he could overcome the presumption of jury impartiality in this instance.

Leave to Seek Post-Conviction Relief Granted - 2013-DR-01624-SCT (Jan. 21, 2016)

En Banc Opinion by Justice Kitchens - Dissent by Justice Pierce

Hon. James T. Kitchens Jr. (Oktibbeha County Circuit Court)

Dellwyn K. Smith, Lowlynn Vanzetta Williams & Scott A. Johnson (Capital Post-Conviction Counsel Office) for Petitioner - Jason L. Davis, Cameron L. Benton & Brad A. Smith (Att'y Gen. Office) for Respondent

Briefed by [Rachel Smith](#)

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BRADLEY V. JORDAN

CIVIL - LEGAL MALPRACTICE

LEGAL MALPRACTICE - STATUTE OF LIMITATIONS - THREE-YEAR PERIOD - The three-year statute of limitations for legal malpractice begins to run at the time the client discovered or through the use of reasonable diligence should have discovered his counsel's negligence

LEGAL MALPRACTICE - STATUTE OF LIMITATIONS - WHEN TOLLED - The three-year statute of limitations for legal malpractice is not tolled when the suit is not based on Section 1983 or malicious prosecution

FACTS

Billy Ray Bradley was indicted as a habitual offender on the charge of possession of a firearm by a convicted felon. Earl P. Jordan, Jr. was appointed counsel for Bradley. Bradley informed Jordan that he had not served a year on one of the sentences referenced in the indictment. Bradley was convicted on June 15, 2004 and was sentenced to a term of life imprisonment. On Feb. 5, 2014, the Miss. Supreme Court granted Bradley leave to seek post-conviction relief (PCR) on this issue of whether he had served one year or more for a burglary conviction which was used to support the State's allegation that Bradley was a habitual offender, such that he could be sentenced to life imprisonment. On Apr. 30, 2014, the trial court entered an order vacating Bradley's sentence, finding that Bradley had not served at least one year of imprisonment on the burglary conviction. Bradley filed a complaint against Jordan on June 9, 2014, alleging that Jordan had been negligent in his representation of Bradley by failing to investigate whether Bradley had served one year or more on the two sentences used to support Bradley's habitual offender status and in failing to raise this defense at the sentencing hearing. Jordan filed a motion for summary judgment, alleging that Bradley's suit was time-barred because of Bradley's discovery of Jordan's negligence, which occurred more than three years prior to Bradley's filing suit. Jordan referenced Bradley's complaint, which specifically alleged that Bradley had informed Jordan that he had not served at least one year on one of the sentences relied upon in the indictment. In response, Bradley argued that his complaint against Jordan could not be time-barred because the statute of limitations could not begin to run until his request for PCR was granted and his sentence vacated. The trial court held that Bradley's complaint was time-barred. Bradley appealed.

ISSUE

Whether Bradley's suit was time-barred due to Bradley's knowledge of Jordan's negligence at least three years before the filing of the complaint.

HOLDING

Because the suit is not based on malicious prosecution or Section 1983 and because Bradley informed Jordan of his knowledge that he had not served at least one year on one of the sentences relied upon to support the habitual

offender conviction and did not file suit within three years, Bradley's suit was time-barred. Therefore, the Supreme Court affirmed the judgment of the Lauderdale County Circuit Court.

DISSENT

Justice Kitchens argued that a genuine issue of material fact exists regarding the point in time at which Bradley discovered, or by reasonable diligence should have discovered, Jordan's negligence. Therefore, Justice Kitchens argued that majority was incorrect in affirming the trial court's grant of summary judgment.

Affirmed - 2014-CA-01710-SCT (Jan. 21, 2016)

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

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

Donald W. Boykin for Appellant - Christopher Michael Falgout for Appellee

Briefed by [Wes Bulgarella](#)

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KELLEY V. CORINTH PUB. UTILS. COMM'N

CIVIL - PROPERTY DAMAGE

TORTS - MUNICIPAL CORPORATIONS - IMMUNITY - An organization defined as a political subdivision is entitled to protections and immunities created by the Mississippi Tort Claims Act

TORTS - CLAIM LIMITATIONS - STATUTE OF FRAUDS - Actions under the Miss. Tort Claims Act must be commenced within one year of the date of the tortious conduct on which the action is based

CONTRACTS - MUNICIPAL CORPORATIONS - NEGLIGENCE - A claim of contract breach due to negligence cannot replace a tort claim for the purpose of avoiding the Miss. Tort Claims Act

PUBLIC CONTRACTS - EMINENT DOMAIN - INVERSE CONDEMNATION - Inverse condemnation is appropriate only when private property is taken or damaged in respect to public use

PRETRIAL PROCEDURE - ABUSE OF DISCRETION - STAYING DISCOVERY - When issues on governmental immunity can be resolved without discovery, trial courts may address immunity issues prior to delving further into the litigation process

FACTS

In July 2007, William Kelley accepted a bid from the Corinth Gas and Water Department (the "Department") to install water and gas lines at a new subdivision that he was developing. The Department finished work and submitted a final invoice to Kelley in January of 2008. In response to the request for final payment, architect William Lambert inspected the site on behalf of Kelley's lender. Lambert estimated that a minimum of \$250,000 of damage was done to the property. Lambert shared this information with Kelley and Kelley's engineer. On Lambert's request, Kelley's lender withheld the payment owed the department. Kelley claims to have been aware of the property damage while the lines were being installed, but was repeatedly assured that the Department would restore the land to its original condition after completing work. Kelley met with the Department's construction superintendent, Chris Latch, on February 19th and February 25th/26th. Latch told Kelley he would have to discuss restoring the property with Department officials first. At a meeting in late March or early April of 2008, the Department told Kelley they would be doing no additional work on the property. The Department advised Kelley to pay the final invoice and file suit for damages for defective work. The Department filed a construction lien when Kelley did not pay. Kelley presented his claim to Corinth Public Utilities Commission (the "Commission") on July 14th, but their position did not change. On February 15, 2009, Kelley served the City, the Commission, and the Department (the "defendants"). The defendants moved for summary judgment and a motion to stay discovery pending a ruling on summary judgment prior to discovery, both of which were granted on April 24, 2013. Kelley appealed.

ISSUES

Whether the trial court erred in (1) determining that the Department was a "political subdivision" under the Miss. Tort Claims Act, (2) barring Kelley's tort claims based on the Miss. Tort Claims Act's one-year statute of limitations,

(3) holding that Kelley’s contract claim failed as a matter of law, (4) granting summary judgment to the defendants on Kelley’s inverse condemnation claim, and (5) abusing its discretion by staying discovery.

HOLDING

(1) The City of Corinth created the Commission to govern all Water and Gas Departments in Corinth in 1954, so the Department is considered a political subdivision that is protected by the Miss. Tort Claims Act (“MTCA”). That the Department was acting as a private entity was irrelevant, since the MTCA applies to political subdivisions engaged in both governmental and proprietary activities. (2) There was a genuine issue of fact regarding the date when the claim accrued, so the defendants are not entitled to summary judgment based on the MTCA’s statute of limitations. (3) Kelley did not allege that the Department breached an express term of any written contract, there was no valid oral contract, and the Department did not breach an implied contractual duty not to commit negligence. Therefore, Kelley’s contract claim failed as a matter of law. (4) The inverse condemnation claim failed because it contained no plausible allegation that the damage to the property was for any “public use.” (5) The trial court did not abuse its discretion by staying discovery since no additional discovery was needed to address the defendants’ motions for summary judgment on those issues on which the circuit judge ruled. Therefore, the Court of Appeals affirmed in part, and reversed and remanded in part, the judgment of the Alcorn County Circuit Court.

CONCURRENCES/DISSENTS

Presiding Judge Griffis concurred with each holding other than the statute of limitations ruling, arguing that there was no material issue of fact and Kelley’s tort claims were barred. Judge James, on the other hand, concurred with the statute of limitations holding, but dissented from the other parts of the majority’s holding, opining that the Department was not a political subdivision under the circumstances of this case, a valid contract existed and was breached, Kelley’s denial of discovery harmed his case, and the lines installed would ultimately be used for public use, making Kelley’s inverse condemnation claim valid.

Affirmed in Part; Reversed & Remanded in Part - 2013-CA-00923-COA (Jan. 19, 2016)

En Banc Opinion by Judge Wilson - Concurrences/Dissents by Presiding Judge Griffis & Judge James
Hon. James Lamar Roberts Jr. (Alcorn County Circuit Court)

David L. Calder & Cory Richard Gangle for Appellant - Robert Glenn Krohn & William Hull Davis Jr. for Appellees

Briefed by [Cody D. Samples](#)

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NORMAN V. STATE

CIVIL - POST-CONVICTION RELIEF

FACTS

Timothy Norman was convicted of first offense DUI and speeding. Norman appealed to the County Court of Madison County and the Circuit Court of Madison County. Both courts affirmed his conviction. Norman appealed.

HOLDING

Because the prosecution failed to file a timely brief—even after the clerk issued a show-cause notice—and because the prosecution confessed Norman’s brief, Norman’s Motion to Grant Relief Sought and Reverse Conviction for Lack of Prosecution was granted. Therefore, the Supreme Court reversed and rendered the judgment of the Madison County Circuit Court.

Reversed & Rendered - 2014-KM-01789-SCT (Jan. 20, 2016)

En Banc Opinion by Chief Justice Waller

Briefed by [Andrew B. Lintner](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS - JANUARY 19, 2016
COURT OF APPEALS - CIVIL CASES

BLOUNT V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - THREE YEARS - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - WAIVER - Miss. Code Ann. § 99-39-5 provides that a prisoner has three years to request post-conviction relief the Court has recognized that the statute of limitation is waived when a fundamental constitutional right is implicated, and the right to be free from an illegal sentence is a fundamental right

CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER - Miss. Code Ann. § 99-19-83 provides that every person convicted in Mississippi of a felony who shall have been convicted twice previously of any felony . . . upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one year or more in any state and/or federal penal institution . . . and where any one of such felonies shall have been a crime of violence shall be sentenced to life imprisonment

CRIMINAL PROCEDURE - HABITUAL OFFENDER - PRIOR OFFENSES - Separate convictions based upon different crimes, even if the crimes of which a defendant is convicted occurred on the same day, may serve as prior offenses to be considered in sentencing a defendant as a habitual offender

FACTS

In 1993, Blount pled guilty in circuit court to three separate felonies. While in prison, Blount was convicted of cocaine possession. In 2011, Blount was found guilty of motor-vehicle theft, which resulted in his fifth conviction. Blount was sentenced to a mandatory term of life imprisonment due to his status as a habitual offender. Blount appealed his 2011 sentencing and was unsuccessful in his appeal. Blount then filed a Post-conviction Relief (“PCR”) motion concerning his 1996 cocaine-possession charge; the court dismissed his motion as time-barred. Blount appealed.

ISSUE

Whether the trial court erred in dismissing Blount’s PRC motion as time barred.

HOLDING

Blount failed to provide the court with sufficient evidence that his fundamental rights were violated, thus the motion was properly dismissed as time barred. Therefore, the Court of Appeals affirmed the decision of the Hinds County Circuit Court.

Affirmed - 2013-CP-01710-COA (Jan. 19, 2016)

Opinion by Judge Ishee

Hon. Winston (Hinds County Circuit Court)

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

Briefed by [Rod Hickman](#)

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BRADY V. HOLLINS

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - APPELLATE REVIEW - STANDARD OF REVIEW - An appellate court will examine an appeal to determine whether the order of the administrative agency (1) was unsupported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the aggrieved party

ADMINISTRATIVE LAW - REBUTTABLE PRESUMPTION - BURDEN OF PROOF - A rebuttable presumption exists in favor of the action of the agency, and the burden of proof is on the party challenging an agency's action

CONSTITUTIONAL LAW - DUE PROCESS - BURDEN OF PROOF - In order to have a valid procedural or substantive due-process claim, the claimant must show that he has been deprived by the government of a liberty or property interest; otherwise, no right to due process can accrue

CONSTITUTIONAL LAW - DUE PROCESS - PRIVILEGE - A prisoner's temporary loss of privileges is merely a change in the condition of his confinement and does not implicate due process concerns

FACTS

In Jan. 2012, James Brady was convicted of cocaine possession and received a two-year sentence. In Sept. 2012, Brady was convicted of sale of a controlled substance, with an enhanced penalty, for which he received a total sentence of twenty years. The circuit court ordered that the sentences run consecutively. Brady was found guilty by the Mississippi Department of Corrections ("MDOC") on May 1, 2014, of a rule violation for fighting with another inmate who was confined to a wheelchair. Brady appealed the MDOC's decision to the circuit court, which affirmed. Brady appealed.

ISSUES

Whether (1) Brady was afforded due process, and (2) MDOC's actions were arbitrary or capricious.

HOLDING

(1) Because Brady's loss of privileges did not constitute a constitutional violation of due process, the issue lacked merit. (2) Since Brady failed to offer any evidence that MDOC's actions were arbitrary or capricious, that issue was also without merit. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2014-CP-01630-COA (Jan. 19, 2016)

Opinion by Presiding Judge Ishee

Hon. John Huey Emfinger (Rankin County Circuit Court)

Pro se for Appellant - Anthony Louis Schmidt Jr. & James M. Norris (Att'y Gen. Office) for Appellees

Briefed by [Peter H. Liddell](#)

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BROWN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BARS - SUBSEQUENT WRIT - According to Miss. Code Ann. § 99-39-23(6), the denial of a Post-conviction Relief ("PCR") petition is a bar to a second or subsequent petition, unless a statutory exception applies

POST-CONVICTION RELIEF - PROCEDURAL BARS - EXCEPTIONS - The petitioner bears the burden of proving he has satisfied at least one exception, and has a duty to make more than mere assertions

POST-CONVICTION RELIEF - PROCEEDINGS - PETITION OR MOTION - According to Miss. Code Ann. § 99-39-9(2), the petitioner must file a separate PCR petition for each cause number or conviction, even when multiple convictions are imposed in the same plea hearing and sentencing order

FACTS

On May 20, 2013, Paul Brown pled guilty to two counts of sexual battery, and two counts of fondling. He was sentenced to twenty-fives years in the custody of the Mississippi Department of Corrections for each count of sexual battery, along with five years of post-release supervision for both counts of fondling. In a separate cause order, Brown pled guilty to an additional count of sexual battery, and was sentenced to another twenty-five years, to run concurrently with the first sentence. Soon after, Brown filed his first PCR petition alleging ineffective assistance of counsel and an involuntary plea, which the circuit court denied; the record was unclear as to when his first petition was filed. Brown filed his second petition on May 8, 2014, alleging the same facts. The circuit court found that the petition was procedurally barred by the statutory prohibition against successive writs. Brown appealed.

ISSUE

Whether the circuit court erred in finding Brown's second PCR petition was barred by the statutory prohibition against successive writs.

HOLDING

Although Brown pointed to multiple statutory exceptions listed in Miss. Code Ann. § 99-39-23(6), he identified no evidence, and provided no support for his assertions. Further, Brown collaterally attacked two judgments and a total of five counts in his single petition. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

Affirmed - 2014-CP-01235-COA (Jan. 19, 2016)

En Banc Opinion by Judge James

Hon. Richard A. Smith (Washington County Circuit Court)

Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Catherine Rodgers](#)

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CARLSON V. BRABHAM

CIVIL - CONTRACT

CORPORATIONS - PARTNERSHIPS - FORMATION - The three main questions that are considered in partnership determination are (1) the intent of the parties, (2) the control question, and (3) profit sharing

CORPORATIONS - JOINT VENTURES - TRANSACTIONS - If money, loaned to another for use in the enterprise, is to be repaid by the borrower, whether the venture succeeds or fails, the contract is ordinarily construed as one of lending and borrowing and not of a joint adventure

CONTRACTS - UNJUST ENRICHMENT - APPLICATION - Unjust enrichment applies when there is no legal contract and the defendant is in possession of property, which in good conscience and justice he should not retain but should deliver to another

CONTRACTS - FORMATION OF TRUSTS - CONSTRUCTIVE TRUST - The elements of a constructive trust are: (1) a confidential or fiduciary relationship which must normally be shown; (2) a promise by defendant; and (3) transfer by plaintiff to defendant in reliance on defendant's promise (4) under circumstances that constitute unjust enrichment

CONTRACTS - EQUITABLE DISTRIBUTION - SWEAT EQUITY - Miss. courts have not recognized claims of sweat equity

FACTS

Linda Carlson and Larry Brabham began living together in 2004. At the time, Brabham worked in the logging industry, and Carlson worked full-time for Telepak Networks. Carlson and Brabham were married to others when they became romantically involved. Brabham divorced his wife shortly after his relationship with Carlson began, but Carlson remained married. Before their relationship, Brabham owned and operated Brabham Logging. Carlson, however, encouraged him to change the name to Longhorn Logging and incorporate the business. The incorporation

papers listed Brabham as the president of the business, and Carlson as the secretary, treasurer, and agent for service of process. After Longhorn Logging had operated for several years, the Mississippi Secretary of State administratively dissolved it for failing to file articles of incorporation and issue stock. In addition to Longhorn Logging, Brabham owned a parcel of land on Amazing Grace Lane in Amite County. Brabham received the parcel as part of the divorce settlement with his ex-wife. Brabham intended to build a house on the property and began construction a year after starting his relationship with Carlson. The construction funds came out of the Longhorn Logging checking account, which Brabham used as both his business and personal bank account. Brabham completed the majority of work himself. After two years at Amazing Grace Lane, Brabham's ex-wife offered to sell him their former home located on East Fork Road. Brabham sold the house on Amazing Grace Lane for \$385,916. He used the proceeds to pay off the remaining land note on the Amazing Grace Lane purchase and purchase the new home. Just as with the Amazing Grace Lane house, Brabham did not put Carlson's name on the deed to the house on East Fork Road. Though Carlson confronted Brabham about leaving her name off the deed, Brabham did not change the deed, but instead purchased a life-insurance policy worth \$250,000, which named Carlson as the beneficiary. When Carlson and Brabham ended their relationship, Carlson removed her personal property from the East Fork Road home. However, Carlson wanted a share of Longhorn Logging and East Fork Road property. Carlson filed her original complaint for an equitable distribution of the properties on May 12, 2011. Both parties filed motions for summary judgment, which the chancellor denied, and the case proceeded to trial. Brabham filed a motion for a directed verdict after Carlson presented her case-in-chief. The chancellor requested both parties submit proposed findings of fact and conclusions of law. After reviewing both parties' submissions, the chancellor adopted Brabham's findings of fact and conclusions of law in total and entered a judgment in favor of Brabham. Carlson appealed.

ISSUES

Whether (1) Carlson timely filed her complaint (2) Brabham and Carlson formed a partnership; (3) Brabham and Carlson formed a joint venture; (4) Brabham was unjustly enriched and the chancellor erred by declining to create a constructive trust for the East Fork Road house; and (5) Carlson was entitled to "sweat equity."

HOLDING

(1) Because Carlson failed to prove all the necessary elements of a partnership to extend the statutory period, Carlson's claims were barred by the statute of limitations. (2) Because the parties lacked the requisite intent, control, and profit sharing, a partnership was not formed. (3) Because the parties did not have the intent to form a joint venture, a joint venture did not exist. (4) Because Carlson failed to meet the necessary elements to compel a constructive trust, Brabham was not unjustly enriched. (5) Because Miss. courts have yet to allow a claim for sweat equity, and the facts of this case do not warrant such a finding, Carlson is not entitled to "sweat equity." Therefore, the Court of Appeals affirmed the judgment of the Amite County Chancery Court.

Affirmed - 2014-CA-00367-COA (Jan. 19, 2016)

Opinion by Presiding Judge Griffis

Hon. Ray Hillman Montgomery (Amite County Chancery Court)

James D. Shannon & Kathryn Lindsey White for Appellant - Edwin L. Bean Jr. for Appellee

Briefed by [Madison Coburn](#)

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IN RE B.A.H. AND K.M.B. V. JACKSON CNTY. DEP'T OF HUMAN SERVS.

CIVIL - DOMESTIC RELATIONS

JUDICIAL ETHICS - RECUSAL - BIAS - Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances

ETHICS - JUDGES - BURDEN OF PROOF - The court presumes that the trial judge is qualified, impartial, and unbiased, and the party arguing that recusal is required must rebut that presumption

EVIDENCE - WITNESSES - OPINION TESTIMONY ON ULTIMATE ISSUE - Social workers at dispositional hearings are allowed to give their opinions regarding the "best interest" of minors based upon their

investigations and personal observations and whether to allow such testimony is determined by the sound discretion of the judge or chancellor

STATUTORY CONSTRUCTION - GROUNDS FOR REMOVAL - INTERPRETATION OF DISJUNCTIVE - Miss. Code Ann. § 93-15-103-1 directs the youth court to determine whether there are grounds for termination of parental rights if either [1] the “child” has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or [2a] the parent is unable or unwilling to care for the child, [2b] relatives are not appropriate or are unavailable, and . . . [2c] adoption is in the best interest of the child

FACTS

Becky Hall was living in subsidized housing with her boyfriend and her three minor children: Kate Brown (6 wks), Ben Howard (22 mo.), and Hank (6 yrs). A city police officer warned Hall that he had information that Hall’s boyfriend, Clyde Brown, was cooking meth in the apartment and that she could lose her children and apartment if she didn’t put a stop to it. Shortly after Hall was arrested at her apartment after chemicals used to manufacture meth were found in her car. As a result, Hall was evicted from her apartment. Because of her arrest and the dangerous conditions inside the apartment the youth court removed Ben and Kate from her custody and placed them in the custody of the Jackson County Department of Human Services (“DHS”). DHS placed Ben with his paternal Uncle and Aunt and Kate with an unrelated foster family. Both foster families cared for the children well and expressed interest in adopting them. DHS and Hall entered into a service agreement with the goal of reunification. Hall was warned that she could not continue her relationship with Brown because Brown continued to use drugs and associating with him was in violation of her pretrial diversion program and posed a risk to her children. In May 2012 a Termination of Parental Rights (“TPR”) petition was filed. Hall filed an answer to the petition and a motion to recuse the youth court judge because the judge had ordered the children’s permanency plan changed from reunification to TPR in the absence of a recommendation to that effect by DHS or the guardian ad litem. The court denied Hall’s motion. In November 2013, the youth court entered a judgment terminating the parental rights of all three biological parents. Hall appealed.

ISSUES

Whether (1) the youth court abused its discretion by denying her motion to recuse; (2) the youth court abused its discretion by admitting certain documents over Hall’s objection that DHS failed to respond to her discovery requests; (3) the youth court abused its discretion by allowing a DHS caseworker to give an opinion on the “ultimate issue”; and (4) DHS failed to prove valid grounds for termination of parental rights by clear and convincing evidence.

HOLDING

(1) It was not a manifest abuse of discretion that the trial judge failed to recuse herself from the TPR petition because the youth court judge has the duty and authority to direct DHS to institute proceedings for the termination of parental rights and the TPR petition was not based on the judge’s personal involvement in the case. (2) The youth court did not abuse its discretion by admitting certain documents over Hall’s objection because Hall was unable to identify any documents that unfairly surprised or prejudiced her. (3) The youth court did not abuse its discretion in allowing a DHS caseworker to testify on the ultimate issue because the Mississippi Supreme Court has held that social workers should be allowed to testify concerning the “best interest” of minors and allowing the testimony is within the sound discretion of the youth court judge. (4) There was credible evidence to support the youth court’s findings that Hall failed to comply with her service agreement, that there had been a substantial erosion in the relationship between Hall and her children, and that Hall failed to eliminate behaviors that prevented the placement of Ben and Kate in Hall’s home. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Youth Court.

Parental Rights Terminated - 2013-CA-02047-COA (Jan. 19, 2016)

Opinion by Judge Wilson

Hon. Sharon Willis Sigalas (Jackson County Youth Court)

William Harvey Barton for Appellant - Tonya Michelle Blair & William Melvin Rosamund for Appellee

Briefed by [Robert T. Noland](#)

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KIRBY V. BANCORPSOUTH BANK

CIVIL - OTHER

CONTRACTS - GUARANTY - LIABILITY OF GUARANTORS - Unlike suits where a lender sues the primary borrower, an individual guarantor is immediately liable upon the borrower's default

APPELLATE PROCEDURE - REVIEW - VALUATION OF PROPERTY - An appellate court only looks to the applicable case law and language contained in the guaranty in completing a de novo review of the circuit court's grant of summary judgment

CIVIL PROCEDURE - DISMISSAL - FAILURE TO PROSECUTE - When analyzing whether dismissal under Miss. R. Civ. P. Rule 41(b) is appropriate, the Court of Appeals looks for whether (1) there is a record of dilatory or contumacious conduct by the plaintiff, and (2) a finding that lesser sanctions would not serve the interests of justice

FACTS

Michael Kirby and Michael T. Heimer were members of Mont St. Michel LLC—a residential real-estate development project in Madison County. In 2004, BancorpSouth provided the financing necessary for a \$738,187 loan allowing Mont St. Michel to develop 70 acres of land in two phases. Kirby and Heimer each executed unconditional and continuing guaranties ensuring the repayment of the debt. Chad Knight, the manager of Mont St. Michel, began development and contracted Hemphill Construction to provide the construction work.

The note executed by Mont St. Michel matured on Feb. 17, 2008. On March 10 of that year, counsel for Bancorp South wrote a letter informing the members of Mont St. Michel that the note was due in full. Mont St. Michel was unable to make its payments on the loan and deeded the Phase I portion of the property to Hemphill as payment for services rendered. BancorpSouth purchased Phase II of the development for \$400,000 in a foreclosure proceeding. At the time of foreclosure, the payoff balance on the note was \$789,829.94—leaving a deficiency after the foreclosure sale of \$390,931.94 plus interest.

BancorpSouth filed a lawsuit against Kirby and Heimer seeking repayment. The circuit court granted summary judgment for BancorpSouth, finding that Kirby and Heimer were jointly and severally liable for the amount of \$445.74 plus attorney's fees in the amount of \$54,197.27. Kirby and Heimer appealed.

ISSUES

Whether the circuit court erred in (1) issuing a final judgment awarding BancorpSouth \$518,643.01 plus interest, and (2) denying Kirby and Heimer's motion to strike the affidavit of a non-designated expert as well as their motion to dismiss for lack of prosecution.

HOLDING

Because both Kirby and Heimer executed a guaranty containing a no-contest provision, both Kirby and Heimer waived any and all defenses as to fair market valuation of the foreclosed property. As a result, both Kirby and Heimer were immediately liable for the full value of the note upon Mont. St. Michel's default. The Court of Appeals also could not find any indication from the record that the circuit court relied on the affidavit or the appraisal of the foreclosed property in granting summary judgment. Finally, because all parties participated in the litigation process at all times, the Court of Appeals could not find any record of dilatory or contumacious conduct by BancorpSouth. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2014-CA-01268-COA (Jan. 19, 2016)

Opinion by Judge David M. Ishee

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

Jeffery Dale Rawlings & Jon Jerdone Mims for Appellants - Kevin B. Smith for Appellee

Briefed by [William H. Holley](#)

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SMITH V. MISS. DEP'T OF EMP'T SEC.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE PROCEDURE - UNEMPLOYMENT COMPENSATION - APPEALS - Under Miss. Code Ann. §§ 71-5-529 and 71-5-531, a party has twenty days after notification of the Board of Review's decision to file an appeal to a circuit court

STATUTORY CONSTRUCTION - DEADLINES - Statutory deadlines must be strictly construed unless there is a showing of good cause, such as an event affecting a party's right through no fault of the party

STATUTORY CONSTRUCTION - DEADLINES - GOOD CAUSE - Unforeseen circumstances and failure to understand what is required to appeal do not constitute good cause

FACTS

Maxine Smith was terminated from her job and filed for unemployment benefits. The administrative law judge ("ALJ") denied her request for benefits. The Board of Review ("the Board") of the Miss. Department of Employment Security ("MDES") affirmed. The Board's decision was dated and mailed to Smith on Mar. 28, 2014. The letter stated that she could file an appeal to circuit court by Apr. 17, 2014, which was twenty calendar days from the date the letter was mailed. In July 2014, Smith wrote MDES inquiring about the status of her appeal to the Board. On July 29, MDES responded that the decision had been mailed to her in March and attached a copy of the letter. On Aug. 18, 2014, Smith filed her appeal to circuit court. She argued that her appeal was timely since it was within twenty days of the July 29 letter. The circuit court dismissed Smith's appeal as untimely. Smith appealed.

ISSUES

Whether the circuit court erred in dismissing Smith's appeal as untimely.

HOLDING

Because Smith was unable to offer any proof besides her own statements to show that the Board did not send its decision until she requested it in July 2014, and because the letter mailed by the Board, which was admissible under the business-records hearsay exception, stated that it was mailed Mar. 28, 2014, and that the deadline to appeal was Apr. 17, 2014, the circuit court properly dismissed Smith's appeal as untimely. Therefore, the Court of Appeals affirmed the dismissal of Smith's appeal as untimely by the Scott County Circuit Court.

Affirmed - 2014-CP-01510-COA (Jan. 19, 2016)

Opinion by Judge Barnes

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

Pro se for Appellant - Albert Bozeman White, Leanne Franklin Brady, & Anna Crain Clemmer for Appellee

Briefed by [Abby Abide](#)

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TANNER V. ROSEBURG FOREST PRODS. SOUTH, LLP

CIVIL - PERSONAL INJURY

TORTS - LIABILITY - INDEPENDENT CONTRACTORS - No owner, occupant, lessee or managing agent of property shall be liable for the death or injury of an independent contractor or the independent contractor's employees resulting from dangers of which the contractor knew or reasonably should have known

TORTS - STANDARD OF CARE - COMPANY POLICY - Evidence of company policy or routine practice is relevant when establishing the standard of care or a basis for liability

TORTS - EXCEPTION TO IMMUNITY - HOFFMAN STANDARD - In order to fall within the *Hoffman* exception, the landowner must be aware of the licensee's presence upon the premises, the landowner must engage in affirmative or active negligence in the operation or control of a business, the landowner's conduct in regards thereto

must subject the licensee or invitee to unusual danger, or increase the hazard to him, and the landowner's active or affirmative negligence must have proximately caused the plaintiff's injury

FACTS

In 2009, Howard Transportation ("Howard"), operator of a common-carrier truck line transporting commodities and industrial goods, and Roseburg Forest Products South, Limited Partnership ("Roseburg"), a privately owned wood-products company, entered into a written agreement where Howard agreed to transport wood product owned by Roseburg between plants owned by Roseburg. The contract provided that Howard was an independent contractor of Roseburg and that Howard's employees were not employees of Roseburg. On January 24, 2011, Bennie Tanner, a Howard employee, arrived at Roseburg's Oxford plant and began unloading wood products from his truck using a Hyster forklift provided by Roseburg for Howard employees. Tanner testified he had used this forklift numerous times before the accident and that the forklift had always had small leaks prior to the accident. That night, Tanner got off the forklift and hurt himself when he slipped and fell on a stairwell at the Roseburg loading dock. Tanner testified the steps were wet, dirty, and oily. Tanner alleged that he fell because of a combination of the water and dirt on the stairwell and the presence of hydraulic or other fluid that leaked on his shoe from the forklift he used. Roseburg denied that the forklift was in a state of disrepair before the accident. Roseburg employees testified that they had not seen any oil on the floor or steps the night of the incident and that they had no knowledge that the forklift had a hydraulic-fluid leak prior to the accident. Roseburg's lead mechanic testified that he did not find anything during his investigation that indicated the forklift had leaked on the date of the accident. On November 21, 2011, Tanner filed a negligence action against Roseburg and Tanner's wife, Kimberly, filed a derivative claim for loss of consortium in the same pleading. On April 1, 2014, Roseburg filed its motion for summary judgment. The trial court entered an order granting Roseburg's motion for summary judgment on September 24, 2014. The trial court found that Tanner "was aware prior to the accident of the hazards concerning the forklift and stairs at issue at the time of the alleged injury." The trial court as a matter of law concluded that Miss. Code section 11-1-66 provided statutory immunity for the Tanners' claims of negligence. The trial court entered an order denying the Tanners' motion to reconsider on October 14, 2014. The Tanners appealed.

ISSUES

Whether (1) competent evidence suggested Tanner knew or reasonably should have known about danger relating to the forklift, (2) Roseburg's violation of company policy constitutes negligence that caused or contributed to the incident, and (3) Roseburg's active negligence creates a question of negligence under the *Hoffman* exception.

HOLDING

(1) Because Tanner knew of the allegedly dangerous conditions or reasonably should have known of them, section 11-1-66 of the Miss. Code is applicable and does provide immunity. (2) Because Tanner was an independent contractor and not a Roseburg employee, Roseburg's company policy was irrelevant and Roseburg was relieved of any duty to Tanner. (3) Because Tanner was unable to demonstrate that he was exposed to unusual dangers or that the active negligence of Roseburg proximately caused injury to Tanner, Hoffman is not an exception to the immunity provided by Miss. Code section 11-1-66. Therefore, the judgment of the Lafayette County Circuit Court was affirmed.

Affirmed - 2014-CA-01506-COA (Jan. 19, 2016)

En Banc Opinion by Judge James

Hon. Robert William Elliot (Lafayette County Circuit Court)

Yancy B. Burns for Appellants - Kenneth Harold Coghlan for Appellee

Briefed by [L. Morgan Eason](#)

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COURT OF APPEALS - CRIMINAL CASES

MOORE V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - SIXTH AMENDMENT - CONFRONTATION - The testimony of a court-accepted expert in the relevant field, who participated in the analysis in some capacity, will not violate a defendant's Sixth Amendment rights

EVIDENCE - EXPERT TESTIMONY - COURT-ACCEPTED EXPERT - A court-accepted expert, within the relevant field, may testify to the results of particular testing where they are involved in some aspect of the analysis

EXPERT TESTIMONY - RIGHT TO CONFRONTATION - UNINVOLVED EXPERT - The testimony of an expert, who neither participated nor observed the analysis, will violated the Sixth Amendment rights of the defendant

FACTS

Kelcey Horton was shot in his left hand and right arm while stopped at a Clarksdale intersection. During the incident, Horton saw David Moore in the car next to him. Moore later consented to a search of his vehicle. Officers collected two bullets and evidence for testing the steering wheel, driver door, and passenger door for gunshot residue. Jacob Burchfield, a trace-evidence analyst, testified that gunshot residue was present on the driver's door handle of Moore's vehicle. Moore was convicted of a drive-by shooting and aggravated assault. Moore appealed.

ISSUE

Whether Moore's Sixth Amendment confrontation right was violated because Burchfield, the trace analyst who testified about the gunshot residue test, did not personally conduct the testing.

HOLDING

Because the testimony of a court-accepted expert in the relevant field, who participated in the analysis in some capacity, did not violate a defendant's Sixth Amendment rights, Burchfield's testimony did not violate Moore's Sixth Amendment rights. Therefore, the Court of Appeals affirmed the judgment Coahoma County Circuit Court.

Affirmed - 2014-KA-00533-COA (Jan. 15, 2014)

Opinion by Judge Barnes

Hon. Albert B. Smith III

George T. Holmes & Mollie Marie McMillin (State Pub. Defender Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Alexandra Bruce](#)

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