

MISSISSIPPI SUPREME COURT DECISIONS – MARCH 23, 2017

SUPREME COURT - CIVIL CASES

PIONEER COMMUNITY HOSPITAL V. ROBERTS

CIVIL - WRONGFUL DEATH

STATUTE OF LIMITATIONS - SAVINGS CLAUSES - MINORS - Miss. Code Ann. § 15-1-59 contains a savings clause for minors, and provides that if any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law

WRONGFUL-DEATH ACTIONS - MULTIPLE PLAINTIFFS - CONFLICTS - Miss. Code Ann. §§ 11-7-13 & 15-1-59 are at irreconcilable odds with one another where there exists a person qualified under the wrongful-death statute to bring suit

WRONGFUL-DEATH ACTIONS - STANDING - GENERALLY - The wrongful-death statute authorizes a broad category of persons to bring an action—the personal representative on behalf of the estate, one of the listed relatives, and all interested parties

COURT APPOINTMENTS - GUARDIANSHIPS - STATUTE OF LIMITATIONS - Where a guardian or conservator has been court appointed for a ward, there is no logical or equitable reason to prevent the running of the statute of limitations inasmuch as that guardian or conservator is fully authorized to employ attorneys and bring actions on their behalf

FACTS

In 2010, Tina Roberts passed away after being discharged from Pioneer Community Hospital of Newton. At the time of her death, she was survived by her two minor children. Two years later, a lawyer sent notice-of-claim letters to Pioneer and the emergency room physician, Dr. Boka, indicating that Roberts’s sister would be serving as the minor children’s guardian. Thereafter, the sister filed a petition for guardianship for the children; this action was dismissed eight months later due to not filing the required documentation with the court. Two years later, Roberts’s eldest daughter, then twenty-one years old, filed notice-of-claim letters with Pioneer and Boka. Six months after, she filed a complaint against Pioneer and Boka. Pioneer and Boka filed a motion to dismiss, or in the alternative, summary judgment, because the two-year statute of limitations for filing the wrongful-death action had run. The circuit court denied the motion. Pioneer and Boka petitioned the Supreme Court for interlocutory appeal, which was granted.

ISSUE

Whether the minors savings clause applied to the wrongful-death action against Pioneer and Boka.

HOLDING

Because the Mississippi Supreme Court case, *Thiroux ex rel. Cruz v. Austin ex rel. Arceneaux* was the controlling case, Roberts’s two minor children could rely on the application of the minors savings clause to toll the running of the two-year statute of limitations. Further, because Roberts’s sister had neither been appointed nor authorized by the court to bring an action on behalf of the children, the statute of limitations did not begin to run when the first notice-of-claim letter was sent to Pioneer and Boka. Therefore, the Supreme Court affirmed the order of the Newton County Circuit Court.

Affirmed & Remanded - 2015-IA-01874-SCT (Mar. 23, 2017)

Opinion by Justice Maxwell
Hon. Marcus D. Gordon (Newton County Circuit Court)
Gaye Nell Currie for Appellants - Alan D. Lancaster & Jonathan Ryan Taylor for Appellees
Briefed by [Patrick Huston](#)

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SUPREME COURT - CRIMINAL CASES

WILCHER V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - OBSTRUCTION OF JUSTICE - RETALIATION AGAINST A PUBLIC SERVANT -

Under Miss Code. Ann. § 97-9-127, a person commits retaliation against a public servant if he intentionally or knowingly harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of public servant

CONSTITUTIONAL LAW - CONSTITUTIONALITY OF STATUTE - The court will not strike down a statute on constitutional grounds unless it appears beyond all reasonable doubt the statute violates the Constitution; it is the court's duty to uphold the statute, if possible, by placing a reasonable construction on it which would render it constitutional

CONSTITUTIONAL LAW - DUE PROCESS - VAGUENESS - All due process requires is that the law give sufficient warning that people may conform their conduct so as to avoid that which is forbidden; a statute that either forbids or requires the doing of an act in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application or a statute that is so indefinite that it encourages arbitrary and erratic arrests and convictions is void for vagueness

CRIMINAL LAW - RETALIATION - HARM - Under Miss. Code Ann. § 97-9-101(d), "harm" means loss, disadvantage, or injury, or anything so regarded by the person affected including loss, disadvantage, or injury to any other person or entity in whose welfare he is interested; implicit in this definition is a "reasonableness" requirement

APPELLATE REVIEW - JURY TRIAL - SUFFICIENCY OF EVIDENCE - In deciding whether sufficient evidence was presented in support of a jury's guilty verdict, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found the State proved the required elements of the crime charged beyond a reasonable doubt

FACTS

After being arrested for "possession of paraphernalia" and "failure to yield to blue lights," Janice Wilcher accused her arresting officer, Deputy Michael Townsend of rape. While in jail, she also claimed that she was pregnant by Deputy Townsend for a month and a half and that she was miscarrying. After she was bonded out of jail, Wilcher drove to the hospital and reported that she had been raped. Wilcher spoke to Investigator Simpson, who sent all the clothes Wilcher was wearing during the arrest and alleged rape to the state crime lab. Deputy Townsend voluntarily submitted a blood sample. The results of the crime lab analysis were negative for Deputy Townsend's DNA and seminal fluid on any of Wilcher's clothing. Wilcher also called WLBT News and reported that a Scott County sheriff's deputy named Michael Townsend had raped her. Wilcher later dropped the charges. Wilcher was indicted for retaliation against a public servant. While in custody, Wilcher waived her rights and signed a statement recanting her allegation of rape against Deputy Townsend. At trial, Wilcher testified that she had only recanted because she had been in a cell for five months, and she would not be let out of jail unless she did so. The jury found Wilcher guilty of retaliation against a public servant. Wilcher appealed.

ISSUES

Whether (1) Miss. Code Ann. § 97-9-127 is unconstitutionally vague and (2) the State failed to prove that Deputy Townsend suffered actual harm.

HOLDING

(1) Because Wilcher failed to demonstrate that there were a number of instances where Miss. Code Ann. § 97-9-127 could not be applied constitutionally, the Supreme Court declined to address her First Amendment overbreadth claim. Because the term “harm” in Miss. Code Ann. § 97-9-127 is defined in Miss Code Ann. § 97-9-101(d) and is readily understandable to any reasonable person of ordinary intelligence, the statute as a whole is not vague or too overly broad or indefinite so as to encourage arbitrary and erratic arrests and convictions. (2) Because Wilcher’s accusation of rape was known throughout the community where Deputy Townsend lived due to Wilcher’s notifying WLBT News of the alleged rape, and Deputy Townsend believed his professional reputation had been harmed as a result of the investigation, there was sufficient evidence for the jury to conclude that Deputy Townsend did suffer actual harm to his reputation as a result of Wilcher’s knowingly false accusation of rape, and the issue was without merit. Therefore, the Supreme Court affirmed the judgment of the Scott County Circuit Court.

CONCURRENCE

Presiding Justice Dickinson agreed that Miss. Code Ann. § 97-9-101 is not unconstitutionally vague insofar as it includes a purely subjective standard in its definition of harm, but he did not agree that the case was about subjective harm. He agreed with the majority that Miss. Code Ann. § 97-9-101 and Miss. Code Ann. § 97-9-127 include reputational harm and that sufficient evidence was produced to support the jury’s verdict on that basis.

DISSENT

Justice King agreed that, under certain circumstances, the “harm” contemplated by Miss. Code Ann. § 97-9-127 may include reputational harm. He argued, however, that the statute is unconstitutionally vague and that the State failed to present sufficient evidence to prove the element of “harm” in this case. Therefore, Justice King would have reversed Wilcher’s conviction.

Affirmed - 2015-KA-01008-SCT (Mar. 23, 2017)

En Banc Opinion by Justice Beam - Concurrence by Presiding Justice Dickinson - Dissent by Justice King

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

Jerry L. Bustin & Richard Poole Noel III for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Mallory Bland](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 21, 2017

COURT OF APPEALS - CIVIL CASES

FRANKLIN V. TURNER

CIVIL - PERSONAL INJURY

PERSONAL INJURY - LIABILITY - SCOPE OF EMPLOYMENT - A master is not liable for an employee’s actions if the employee abandoned his employment and went about some purpose of his own not incidental to his employment

CIVIL PROCEDURE - SUMMARY JUDGMENT - UNSUPPORTED ALLEGATIONS - Unsupported speculation and allegations are not sufficient to defeat a motion for summary judgment

PERSONAL INJURY - SCOPE OF EMPLOYMENT - RATIFICATION OF CONDUCT - Mere retention of the offending servant in the master’s employment will not constitute ratification to render the master liable for the unauthorized act; however, the fact that a master retained the offending servant after such an act may be admitted in evidence as bearing upon the question of ratification

FACTS

Brenda Franklin, a tenant of Golden Age Apartments, claimed that Robert Swinney, a caretaker and employee of Golden Age, was liable for assault and battery because he sexually assaulted her. Franklin also sued Cornelius Turner, doing business as Golden Age, for breaching a duty to protect residents from his employee's actions and for failure to monitor and maintain safe premises. Franklin sued the parties for false imprisonment, gross negligence, and intentional/negligent infliction of emotional distress. Turner filed a motion for summary judgment or a partial motion for summary judgment, claiming that Swinney was not his employee at the time of the alleged assault and that Swinney did not assault Franklin. Turner also submitted an alternative argument that—even if Swinney was his employee—Swinney was not acting within the scope of his employment at the time of the alleged assault. The circuit court granted the motion, finding that Swinney was not an employee acting within the scope of his employment during the alleged attack and that Turner had no knowledge that Swinney had or may have had a violent nature. The circuit court denied Franklin's motion to extend deadlines because the issue was moot due to the summary judgment. Franklin appealed.

ISSUES

Whether the circuit court erred in (1) granting Turner's motion for summary judgment and (2) denying Franklin's motion to extend deadlines.

HOLDING

(1) Because Swinney was outside the scope of his employment when he allegedly sexually assaulted Turner, the testimony that Turner knew about Swinney's violent propensities was contested, so this evidence was not enough to defeat summary judgment. Further, mere retention of Swinney as an employee was not sufficient evidence that Turner ratified Swinney's tortious act, so summary judgment was properly granted. (2) Because summary judgment was properly granted, the denial of Franklin's motion to extend deadlines was rendered moot. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2014-CA-01006-COA (Mar. 21, 2017)

En Banc Opinion by Judge Barnes

Hon. John Huey Emfinger (Rankin County Circuit Court)

Brent Hazzard, Sorie S. Tarawally, & Kelly Gunter Williams for Appellant - Frances R. Shields & Katrina Sandifer Brown for Appellees

Briefed by [Morgan L. Stringer](#)

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JEFFERS V. SAGET

CIVIL - WILLS, TRUSTS, AND ESTATES

CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT - A final, appealable judgment is one that adjudicates the merits of the controversy which settles all issues as to all the parties and requires no further action by the chancery court

CIVIL PROCEDURE - APPEALS - INTERLOCUTORY - Without a Rule 54(b) certification, an interlocutory order is only appealable if the Mississippi Supreme Court grants permission under Rule 5 of the Miss. R. App. P.

APPEAL - FINAL JUDGMENT - TRIAL COURT - For a judgment adjudicating fewer than all of the claims to be made final and appealable under Rule 54(b), the trial court must make an expressed direction for the entry of final judgment and an expressed determination that there is no just reason for delay

FACTS

Kappi Saget Jeffers contested the validity of her late mother's will and the conveyance of assets related to investment fund accounts. Before a jury, the will contest ended in a mistrial, but the chancellor, as the finder of fact, entered a

“Final Judgment” and denied Jeffers’s petition and counterclaim to recover assets, specifically the investment accounts. The order noted that the issue of the will’s validity was still pending. Jeffers appealed.

ISSUE

Whether the chancellor entered a final, appealable judgment.

HOLDING

Because the trial court did not make an expressed determination that there was no just reason for the delay, the chancellor’s entry of judgment regarding the investment accounts was not a final, appealable judgment under Miss. R. Civ. P. 54(b). Therefore, the Court of Appeals dismissed the appeal for lack of jurisdiction.

Dismissed - 2015-CA-01280-COA (Mar. 21, 2017)

Opinion by Judge Barnes

Hon. Marie Wilson (Warren County Chancery Court)

David M. Sessums for Appellant - Wren Carroll Way for Appellee

Briefed by [J. Marc McMillian](#)

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KING V. KING

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - SUMMARY JUDGMENT - The movant is entitled to summary judgment if there is no genuine issue of material fact after the evidence is viewed in the light most favorable to the non-moving party; the non-moving party may not rest upon mere allegations or denials in the pleadings but must set forth specific facts showing that there are genuine issues for trial

CIVIL PROCEDURE - SUMMARY JUDGMENT - IMMATERIAL FACTS - Numerous, immaterial facts may be controverted, but only those that affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment

TORTS - PREMISES LIABILITY - ELEMENTS - To prevail in a premises liability case, a plaintiff must prove the elements of duty, breach of duty, damages, and proximate causation

TORTS - PREMISES LIABILITY - DUTY TO INVITEE - A landowner owes the highest duty to an invitee, but even so the landowner is not an insurer of the invitee’s safety; rather, the landowner owes a duty to the invitee to keep the premises reasonably safe and, when not reasonably safe, to warn only of hidden dangers not in plain and open view

FACTS

Delois King was injured when the tractor she was driving turned over on her. Delois sued her 101-year-old mother, Willie King, under the theory of premises liability because the incident happened on Willie’s property. The circuit court granted summary judgment for Willie because Delois failed to present any evidence that Willie’s property or tractor was unsafe or that Willie breached any duty to warn or duty of care. Delois appealed.

ISSUE

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

HOLDING

Because Delois solely relied upon conclusory allegations and failed to offer any evidence that the property was unsafe, the trial court did not err in granting summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Kemper County Circuit Court.

Affirmed - 2015-CA-01395-COA (Mar. 21, 2017)

Opinion by Judge Wilson
Hon. Lester F. Williamson Jr. (Kemper County Circuit Court)
William T. May & K. Dustin Markham for Appellant - Joe S. Deaton III & R. Jason Canterbury for Appellee
Briefed by [Jonathan Barnes](#)

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MONAGHAN V. AUTRY

CIVIL - OTHER

LITIGATION ACCOUNTABILITY ACT - ATTORNEY'S FEES - VOLUNTARY DISMISSAL - Pursuant to Miss. Code Ann. § 11-55-5(2), no attorney's fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim, or defense within a reasonable time after the attorney or party who filed the action, claim, or defense knew or reasonably should have known that it would not prevail on the action, claim or defense

LITIGATION ACCOUNTABILITY ACT - CLAIMS - FRIVOLOUS - A claim is frivolous only when, objectively speaking, the pleader or movant has no hope of success; thus, though a case may be weak or light-headed, that is not sufficient to label it frivolous

FACTS

Dr. Monaghan sued Robert Autry seeking payment for medical services provided to Autry plus legal fees and costs incurred as a result of Autry's failure to pay. Monaghan mistakenly made collection calls and filed service on the wrong "Robert Autry" (Autry Jr.). Monaghan filed a motion to dismiss the case without prejudice. Autry Jr. filed a motion for attorney's fees and expenses incurred as a result of defending the matter. The trial court entered an order awarding Autry Jr. a judgment against Monaghan and his attorney in the amount Autry Jr. incurred to defend against the suit. Monaghan appealed.

ISSUE

Whether the trial court erred in awarding Autry Jr. attorney's fees and expenses under Miss. Code Ann. § 11-55-5.

HOLDING

Because Autry Jr. incurred unnecessary expenses as the result of the case filed against him, the trial court did not err in awarding attorney's fees and expenses. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

DISSENT

Judge Wilson dissented as to the issue of standing. Judge Wilson would have found that there was no final judgment from which to appeal.

Affirmed - 2015-CA-01772-COA (Mar. 21, 2017)

En Banc Opinion by Judge Carlton - Dissent by Judge Wilson
Hon. Joseph H. Loper Jr. (Attala County Circuit Court)
Michael Alfred Jacob II for Appellant - John E. Shaw for Appellee
Briefed by [Sean P. Doran](#)

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O'HARA V. CITY OF HATTIESBURG

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - SERVICE OF PROCESS - 120-DAY RULE - Miss. R. Civ. P. 4(h) requires a plaintiff to serve the summons and complaint on a defendant within 120 days of filing a complaint; otherwise the judge must dismiss the action without prejudice

CIVIL PROCEDURE - SERVICE OF NOTICE - NOTICE TO A MUNICIPALITY - The Mississippi Tort Claims Act requires that, prior to filing suit against a municipality, a claimant must serve a notice of claim on the city clerk that must: (1) be in writing; (2) be delivered in person or by registered US mail; and, (3) contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought, and the residence of the person making the claim at the time of the injury and at the time of filing the notice

APPELLATE PROCEDURE - PROPER RECORD - QUESTIONS ON APPEAL - It is an appellant's duty to justify his arguments of error with a proper record or the trial court will be considered correct

FACTS

In February 2014, Shawn O'Hara was walking in Hattiesburg when the street suddenly caved in and his left leg went under the street to his knee. Almost a year later, O'Hara filed suit against the City of Hattiesburg, alleging \$300,000 in actual damages, \$280,000 in lost earnings, and demanding \$24,700,000 in punitive damages. O'Hara served the wrong agents with process before the trial but corrected his mistake 83 days after he filed suit, which is within the 120-day timeframe set out in Miss. R. Civ. P. 4(d)(7). O'Hara failed to follow the statutory rules for the contents of the notice to the City, and the trial court dismissed the complaint without prejudice for failure to provide proper pre-suit notice under the Mississippi Tort Claims Act (MTCA). O'Hara appealed.

ISSUES

Whether the trial court erred in (1) dismissing the complaint for insufficient service of process and (2) ruling there was insufficient pre-suit notice.

HOLDING

(1) Because O'Hara properly served the correct agents with process within the 120-day period, the court's order dismissing the case on that ground was premature. (2) Because O'Hara's notice to the City was neither submitted into evidence nor was in the record, the trial court did not err in ruling that O'Hara failed to comply with MTCA's pre-suit notice requirement. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2015-CP-00911-COA (Mar. 21, 2017)

Opinion by Judge Wilson

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

Pro se for Appellant - R. Lane Dossett & L. Clark Hicks Jr. for Appellee

Briefed by [Tony Sax](#)

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ROBINSON V. MISS. DEP'T. OF CORR.

CIVIL - STATE BOARDS AND AGENCIES

CIVIL PROCEDURE - DISMISSAL - MERITLESS COMPLAINT - Trial courts have inherent authority to dismiss frivolous complaints, sua sponte, even prior to service of process on the defendants

CIVIL PROCEDURE - DISMISSAL - BASELESS CLAIM - A trial court has not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless

FACTS

Paul Robinson was sentenced to life in prison after being convicted of murder. In 2013, while serving his sentence at the Walnut Grove Correctional Facility, Robinson overdrew the balance of his inmate account. Later, when Robinson's account had sufficient funds to cover the previous overdrawn charges, the Mississippi Department of Corrections (MDOC) automatically withdrew the amount necessary to cover the previous overdraft. Robinson disputed the withdrawal and filed a complaint through MDOC's Administrative Remedies Program (ARP). After the MDOC rejected his claim, Robinson did not appeal the decision. However, in 2014, Robinson again overdrew his account, which again resulted in the MDOC automatically withdrawing funds necessary to cover the overdraft when Robinson's account had a sufficient balance to cover the previous charges. Robinson again filed a complaint under the ARP, and when MDOC rejected his claim, he filed a complaint seeking reimbursement for both the 2013 and 2014 withdrawals. Despite Robinson disputing the MDOC's decisions to reject his claims, he failed to both name the MDOC as a party and serve it with process. Instead, Robinson named Walnut Grove as the defendant. The trial court summarily dismissed Robinson's claims. Robinson timely appealed. Walnut Grove subsequently filed a motion to dismiss because it was not a legal entity subject to suit and had no involvement in handling Robinson's account. The Court of Appeals dismissed Walnut Grove as a party and substituted the MDOC in its place on appeal.

ISSUE

Whether the trial court erred in dismissing Robinson's claim for lack of merit.

HOLDING

Because Robinson's inmate account statement proved that—at the time of his expenditures—his account lacked sufficient funds to cover his charges, the trial court did not err in dismissing the suit as frivolous. Therefore, the Court of Appeals affirmed the judgment of the Leake County Circuit Court.

DISSENT

Judge Ishee argued that the proper party was never served with process. Therefore, he believed the circuit court's dismissal should be vacated and remanded for proceedings in accordance with Miss. R. Civ. P. 4.

Affirmed - 2015-CP-00681-COA (Mar. 21, 2017)

En Banc Opinion by Judge Barnes - Dissent by Judge Ishee

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

Pro se for Appellant - Anthony Louis Schmidt Jr. & Darrell Clayton Baughn (Att'y. Gen. Office) for Appellee

Briefed by [Bethany Poppelreiter](#)

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STEVENS V. GRISSOM

CIVIL - OTHER

PROPERTY LAW - REPLEVIN - BURDEN OF PROOF - To maintain an action of replevin, a proponent of the claim must establish (1) a description of the personal property, (2) the value of the property, (3) entitlement to immediate possession of the property, (4) that the property was in another's possession, and (5) the other individual wrongfully detained such property

CIVIL PROCEDURE - CREDIBILITY OF WITNESS - When a trial judge, rather than a jury, is the finder of fact, he has the full authority to determine the credibility of witnesses, just as is the jury's duty in a jury trial

FACTS

Upon the divorce of Michael Stevens and Ginger Grissom, Mary Stevens, Michael's mother, filed a complaint for replevin in Lauderdale County County Court, claiming that Grissom wrongfully possessed certain property initially gifted to Grissom prior to the divorce. The county court dismissed the action, claiming Stevens failed to meet her burden of proof. On appeal to the Lauderdale County Circuit Court, the dismissal was affirmed. Stevens appealed.

ISSUE

Whether the circuit court erred in affirming the dismissal of Smith's replevin action

HOLDING

Because the property was in fact agreed upon in a property settlement agreement, substantial evidence existed to support the circuit court's dismissal of the action. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2016-CA-00315-COA (Mar. 21, 2017)

Opinion by Chief Judge Lee

Hon. Justin Miller Cobb (Lauderdale County Circuit Court)

Glenn S. Swartzfager for Appellant - Robert D. Jones for Appellee

Briefed by [Horacio Hernandez](#)

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STEVENS V. WADE

CIVIL - TORTS - OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE

CIVIL PROCEDURE - RELIEF FROM JUDGMENT - ACCIDENT OR MISTAKE - Under Miss. R. Civ. P. 60(b)(2), which allows relief from judgments obtained through accident or mistake, extraordinary relief may be granted only upon an adequate showing of exceptional circumstances, and neither ignorance nor carelessness on the part of an attorney will provide grounds for relief

CIVIL PROCEDURE - RELIEF FROM JUDGMENT - DENIAL - The appeal from a denial of a Rule 60(b) motion brings up for review only the order of denial itself and not the underlying judgment

FACTS

Michael Stevens sued Wesley House Community Center and its employees and director—including Derrick Wade, Andy Hodges, and Ginger Grissom Stevens—for malicious prosecution, abuse of process, and intentional and negligent infliction of emotional distress. Stevens's complaint was dismissed after he failed to answer discovery for nearly two years. Stevens then filed a motion for relief from a judgment of dismissal, arguing that his attorney had been unreachable because of his attorney's repeated hospitalization for drug treatment and the relocation of his attorney's office. The circuit court denied Stevens's motion for relief, rejecting Stevens's attorney's argument that Stevens was unaware of the reason for the delay. Stevens appealed.

ISSUE

Whether the circuit court erred in denying Stevens's motion for relief from a judgment of dismissal.

HOLDING

Because Stevens and his attorney repeatedly failed to comply with discovery requests and disregarded the procedural directives of the court, the delay in answering discovery was not an accident or mistake, and the circuit court did not err in denying relief. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2015-CA-01309-COA (Mar. 21, 2017)

En Banc Opinion by Judge Barnes

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

Glenn S. Swartzfager for Appellant - Wade G. Manor, James Leroy Banks IV, William E. Ready Jr. & Henry P. Pate III for Appellees

Briefed by [Brittany Bane](#)

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SULLIVAN V. SULLIVAN

CIVIL - DOMESTIC RELATIONS

CIVIL - DOMESTIC RELATIONS - EQUITABLE DIVISION - When attempting to effect equitable division of marital property, chancery courts must consider the guidelines set forth by the Mississippi Supreme Court in *Ferguson v. Ferguson*

CIVIL - DOMESTIC RELATIONS - REVERSIBLE ERROR - Failing to mention *Ferguson* or apply its guidelines in a final divorce decree is a reversible error

CIVIL - DOMESTIC RELATIONS - FERGUSON FACTORS - Failing to make an explicit factor-by-factor *Ferguson* analysis does not require reversal where the chancellor still considered the relevant facts

FACTS

Janice Sullivan filed a complaint for divorce in 2014 against her husband, James Sullivan. The parties consented to an irreconcilable-differences divorce and submitted the issues of equitable distribution, alimony, and attorney's fees to the chancellor. The chancellor granted the divorce and awarded the marital home to Janice, divided the savings account, divided the marital assets, and also awarded Janice \$1,360 per month from James's retirement account for up to twelve years. The chancellor, however, did not mention *Ferguson v. Ferguson* or reference its guidelines for effecting equitable division of marital property. Janice appealed.

ISSUE

Whether the chancellor failed to make specific findings of facts and conclusions of law as required by *Ferguson v. Ferguson*.

HOLDING

Because the record does not show that the chancellor ever adequately considered or applied the *Ferguson* factors, the trial court committed reversible error. Therefore, the Court of Appeals reversed and remanded the judgment of the Lee County Chancery Court.

Reversed & Remanded - 2015-CA-01513 (Mar. 21, 2017)

Opinion by Chief Judge Lee

Hon. Jacqueline Estes Mask (Lee County Chancery Court)

Michael Lee Dulaney for Appellant - Jason D. Herring & Michael Spencer Chapman for Appellee

Briefed by [Spencer H. Newman](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

KLECKNER V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SUMMARY DISMISSAL - Pursuant to Miss. Code Ann. § 99-39-11(2), a motion for PCR may be summarily dismissed if it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case that the movant is not entitled to any relief

INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland v. Washington*, a claimant of ineffective assistance of counsel bears the burden of proof to show that (1) counsel's performance was deficient, and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

INEFFECTIVE ASSISTANCE OF COUNSEL - PRESUMPTION OF REASONABLENESS - A strong but rebuttable presumption exists that counsel's performance was within the wide range of reasonable professional assistance

INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL STRATEGY - Counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy and does not give rise to an ineffective assistance of counsel claim

FACTS

Jeffrey Kleckner was convicted for one count of touching a child for lustful purposes and three counts of sexual battery. The Union County Circuit Court sentenced him to fifteen years on the fondling charge and life on the three counts of sexual battery. On September 17, 2014, the Supreme Court granted Kleckner leave to file for post-conviction relief (PCR) on the issue of his trial counsel's alleged ineffectiveness for offering or failing to object to certain exhibits. The PCR motion was denied. Kleckner appealed.

ISSUE

Whether the circuit court erred in dismissing Kleckner's motion for post-conviction relief based on a claim for ineffective assistance of counsel.

HOLDING

Because Kleckner failed to show that his counsel's performance was deficient or that he was prejudiced by his attorney's actions, the circuit court did not err in dismissing the ineffective-assistance-of-counsel claim. Therefore, the Court of Appeals affirmed the judgment of the Union County Circuit Court.

Affirmed - 2016-CP-00499-COA (Mar. 21, 2017)

Opinion by Judge Fair

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

Pro se for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

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

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COURT OF APPEALS - CRIMINAL CASES

BROWN V. STATE

CRIMINAL - POST-CONVICTION RELIEF

CRIMINAL - POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - Inmates may challenge computation of parole in court before exhausting their administrative remedies

CRIMINAL - PAROLE - COMPUTATION OF ELIGIBILITY - Pursuant to Miss. Code Ann. § 99-19-21(2), when a person is sentenced to imprisonment for a felony committed while that person was on parole, the imprisonment shall commence at the termination of the imprisonment for the preceding conviction; the term of imprisonment for a felony committed during parole shall not run concurrently with any preceding term of imprisonment

CRIMINAL - SENTENCING - CONCURRENT SENTENCES - Concurrent sentences do not necessarily begin and end at the same time; they simply run together during the time they overlap

FACTS

Davarius Brown pled guilty to one count of felony shoplifting in 2012 and an additional count of felony shoplifting in 2013. Brown was sentenced to ten years, with five years to serve followed by five years of post-release supervision; however, he served his sentence under house arrest, and was forced to wear an ankle monitor. In 2015, while still under house arrest, Brown was again arrested for felony shoplifting. While being processed in booking, Brown escaped. Police tracked him through his ankle monitor and apprehended him. Brown pled guilty to felony shoplifting and escape, and he was sentenced to a total of fifteen years for the 2015 offenses. The 2015 sentences were silent as to how those sentences should run in relation to the 2012 and 2013 sentences. The Mississippi Department of Corrections (MDOC) calculated his parole-eligibility date to be January 21, 2020. MDOC calculated this date by measuring twenty-five percent of his 2012 and 2013 sentences, followed consecutively by twenty-five percent of his 2015 sentences. Brown contested the computation of his parole-eligibility date, arguing that his 2012 and 2015 sentences should be treated as concurrent for the purposes of parole eligibility. The circuit court dismissed the claim. Brown appealed.

ISSUE

Whether an inmate's prior sentences should be treated as concurrent, rather than consecutive, when the more recent sentence is silent as to how it runs with other sentences.

HOLDING

Because Brown committed a felony while on parole, Miss. Code Ann. § 99-19-21(2) prevents his sentences from running concurrently. Further, even if Brown's sentences should have run concurrently, his 2015 sentence would not date back to the 2012 sentence. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2016-CP-00006-COA (Mar. 21, 2017)

En Banc Opinion by Judge Greenlee

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

Pro se for Appellant - Darrell Clayton Baughn & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Josh Rhodes](#)

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THOMPSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - REBUTTAL TESTIMONY - The decision whether to allow rebuttal testimony is committed to the discretion of the trial judge and will only be reversed for an abuse of discretion

CRIMINAL PROCEDURE - EVIDENCE - PRESENTING REBUTTAL TESTIMONY - The State is entitled to present rebuttal testimony to explain, repel, counteract, or disprove evidence offered by the defense

CRIMINAL PROCEDURE - EVIDENCE - PRESENTING REBUTTAL TESTIMONY - The court should resolve any doubt in favor of the reception in rebuttal if (1) its reception will not consume so much additional time as to give an undue weight in practical probative force to the evidence so received in rebuttal; (2) the opposite party would be substantially as well-prepared to meet it by surrebuttal as if the testimony had been offered in chief; and (3) the opposite party upon request therefore is given the opportunity to reply by surrebuttal

CRIMINAL PROCEDURE - TRIAL - JURY INSTRUCTIONS - Jury instructions must fairly announce the law of the case and cannot create an injustice against the defendant

FACTS

Dennis Thompson was found guilty of murder and three counts of aggravated assault following a jury trial. At trial the State called Landon Stamps, a former Starkville Police Department detective, to introduce a recorded interview with Thompson in order to rebut testimony. The defense objected, claiming the State should have introduced this evidence in its case-in-chief. The trial court, however, ruled that because Thompson suggested that he did not have a gun at the time of the crime, the video evidence presenting rebuttal testimony would be allowed. The trial court judge denied all fifteen instructions put forth by the defense. Thompson appealed.

ISSUES

Whether the trial court erred by (1) allowing the State to introduce rebuttal testimony and (2) refusing all of Thompson's proposed jury instructions.

HOLDING

(1) Because the State is allowed to present rebuttal testimony, and the court properly considered the factors of admissibility, the trial court judge did not abuse his discretion by allowing the rebuttal testimony. (2) Because, when read as a whole, the jury instructions at Thompson's trial were proper, the trial court judge did not abuse his discretion by refusing the proposed instructions. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

DISSENT

Judge Carlton argued that the trial court abused its discretion by refusing one of Thompson's proposed jury instructions. Additionally, he argued that the circuit court abused its discretion by failing to provide supplemental instructions when the jury requested additional instruction as to the lack or insufficiency of proof.

Affirmed - 2015-KA-00623-COA (Mar. 21, 2017)

En Banc Opinion by Judge Wilson - Dissent by Judge Carlton

Hon. Lee Sorrels Coleman (Oktibbeha County Circuit Court)

Chokwe Antar Lumumba & Charles Edward Lawrence III for Appellant - Joseph Scott Hemleben (Att'y Gen. Office) for Appellee

Briefed by [Davis Vaughn](#)

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