

**MISSISSIPPI SUPREME COURT DECISIONS – MAY 18, 2017*****SUPREME COURT - CIVIL CASES*****AMERICAN OPTICAL CORP. v. ESTATE OF RANKIN****CIVIL - PERSONAL INJURY**

**TORT LAW - DISCOVERY RULE - ACCRUAL** - Causes of action accrue upon discovery of the injury, not discovery of the injury and its cause, and knowledge of the cause of the injury is irrelevant to the analysis, but rather, the inquiry is when the plaintiff knew or should have known of an injury

**TORT LAW - DISCOVERY RULE - KNOWLEDGE** - In determining whether a plaintiff knew or reasonably should have known he had an injury, the court considers the actions taken by the plaintiff; seeking medical attention for side effects or symptoms may confirm that the plaintiff knew he was injured

**TORT LAW - DISCOVERY RULE - TOLLING** - The question of whether the statute of limitations is tolled by the discovery rule often turns on the factual determination of what the plaintiff knew and when; the question of whether the suit is barred by the statute of limitations may be taken away from the jury if reasonable minds could not differ as to the conclusion, as with other putative fact questions

**FACTS**

Robert Rankin worked in the construction industry where he would use respirators to prevent dust inhalation. One of the respirators used was manufactured by American Optical Corporation (AOC). Rankin's medical history was extensive, including diabetes, heart disease, and lung disease. His breathing problems began in 2000, but he was not diagnosed with chronic obstructive pulmonary disease (COPD) until 2007. In 2010, an x-ray of Rankin's lungs revealed lung scarring disease. In 2012, another x-ray revealed findings consistent with silicosis. Rankin filed suit against AOC in 2013, and a jury awarded Rankin damages. AOC moved for a judgment notwithstanding the verdict, or in the alternative, a new trial, which was denied. AOC appealed.

**ISSUE**

Whether Rankin's claim was time-barred by the three-year statute of limitations.

**HOLDING**

Because Rankin was aware of symptoms and was diagnosed for COPD in 2007, he had discovered his injuries more than three years before filing suit. Consequently, Rankin's claim was time-barred. Therefore, the Supreme Court reversed and rendered the judgment of the Jefferson County Circuit Court.

**DISSENT**

Justice Kitchens argued that a new trial should have been granted, because the case involved silicosis and not COPD, and a genuine issue of fact existed whether Rankin knew or should have known of the silicosis.

**Reversed & Rendered - 2015-CA-01066-SCT (May 18, 2017)**

En Banc Opinion by Justice Coleman - Dissent by Justice Kitchens

Hon. Lamar Pickard (Jefferson County Circuit Court)

Michael James Bentley, Simon Turner Bailey, W. Wayne Drinkwater Jr., Walter T. Johnson, Joseph George Baladi, Corey Donald Hinshaw, & John Burley Howell III for Appellant - David Neil McCarty, Robert Allen Smith Jr., Timothy W. Porter, Patrick Malouf, & John Timothy Givens for Appellee

Briefed by [Patrick Huston](#)

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## *SUPREME COURT - CRIMINAL CASES*

### **LENOIR V. STATE**

#### **CRIMINAL - FELONY**

**EVIDENCE - LAY OPINION - ADMISSIBILITY** - Lay opinion testimony must be (1) rationally based on a witness's perception, (2) helpful to clearly understanding other testimony or determining a fact in evidence, and (3) not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702

**EVIDENCE - IDENTIFICATION - ADMISSIBILITY** - When there is a genuine issue of fact as to who is actually portrayed in a photograph or videotape, lay opinion evidence can prove helpful to the jury within the meaning of Miss. R. Evid. 701

**GUILTY VERDICT - SUFFICIENCY OF EVIDENCE - JUDICIAL REVIEW** - When the court reviews the sufficiency of the evidence supporting a guilty verdict, the evidence is viewed in the light most favorable to the State to decide if rational jurors could have found the State proved each element of the crime; the court must refrain from deciding whether in fact the State actually proved every element

#### **FACTS**

Surveillance video showed two men robbing a Dollar General at gunpoint on September 7, 2013. The initial investigation, conducted by Captain Bryan Catchings, indicated Laterrence Lenoir was a person of interest. Catchings began surveilling Lenoir and, based on his observations, identified Lenoir as the first man in the video. At trial, the State called three witnesses who identified Lenoir as the first man in the video "based on the way he walked." Two defense witnesses and Lenoir himself testified he was not the man in the video. Lenoir was convicted on all three counts. Lenoir appealed.

#### **ISSUES**

Whether (1) the trial court erred in admitting lay opinion testimony identifying Lenoir as the man in the video, and (2) the weight of the evidence entitled Lenoir to a new trial.

#### **HOLDING**

(1) Because in this case the videotape was neither so unmistakably clear nor so distorted that no meaningful conclusions could be drawn, the trial court was within its discretion to admit lay opinion testimony from a witness who had greater familiarity with Lenoir's appearance than the jury could possess. (2) Because the jury chose to find the three prosecution witnesses more credible than the defense witnesses, the evidence did not weigh heavily enough against the jury's decision to entitle Lenoir to a new trial. Consequently, the trial judge did not abuse his discretion in denying the motion for a new trial. Therefore, the Supreme Court affirmed the decision of the Lincoln County Circuit Court.

#### **DISSENT**

Presiding Justice Dickinson admitted that Miss. R. Evid. 701 properly allows such lay opinion testimony as was provided by the State witnesses in this case. Nevertheless, he argued that under a plain-error analysis the evidence was insufficient to support the verdict, as no reasonable juror could find Lenoir guilty beyond a reasonable doubt based on the grainy quality of one video surveillance tape.

#### **Affirmed - 2016-KA-00226-SCT (May 18, 2017)**

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

Hon. Michael M. Taylor (Lincoln County Circuit Court)

Justin Taylor Cook & George T. Holmes (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Meredith Pohl](#)

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## MOUTON V. STATE

### CRIMINAL - FELONY

**CRIMINAL - UNIFORM RULES - UNDISCLOSED EVIDENCE** - Under Mississippi Uniform Rule of Circuit and County Court Practice (URCCC) 9.04(I), if the State tries to introduce previously undisclosed evidence, the defense may object and have an opportunity to examine the evidence

**CRIMINAL - *SHARPLIN* INSTRUCTION - PROPER USAGE** - A *Sharplin* instruction is appropriate when a jury says it cannot reach a unanimous verdict; however, a trial judge attempting to force a verdict by suggestive or coercive measures constitutes reversible error

**CRIMINAL - ISSUE PRESERVATION - CONTEMPORANEOUS OBJECTION** - Preservation of an issue for appeal requires contemporaneous objection at trial

**CRIMINAL - UNIFORM RULES VIOLATIONS - STANDARD OF REVIEW** - A trial judge's handling of a claimed URCCC 9.04 violation will not be reversed unless it affirmatively appears from the record that the violation caused a miscarriage of justice

### FACTS

Jesse Frank Mouton lived with his brother and his brother's girlfriend in a trailer park in Woolmarket, Mississippi. Mouton's brother's girlfriend often babysat Toni Carpenter's children, and the children stayed in the trailer on June 16, 2012. On June 17, 2012, Carpenter noticed her three-year-old son acted with discomfort. After she asked him what was wrong, he replied, "his butt was hurting," and claimed that Mouton "had been playing with his butt and weiner." Carpenter took the child to the hospital where Susan Auge performed a sexual-assault examination. Auge, a Sexual Assault Nurse Examiner, found four injuries to the child's anus and concluded they were consistent with sexual abuse. Mouton was indicted on two counts of sexual battery and two counts of touching a child for lustful purposes. At trial, Auge testified as an expert witness. She stated the anal tears were consistent with sexual assault. Mouton objected, claiming the State failed to disclose Auge's opinion on the significance of a "V-shaped" tear and argued the State had violated discovery practices. The State also called Carpenter as a witness, and inconsistencies arose concerning her initial statement to police and her trial testimony. Originally, she stated that Mouton's ex-wife told her of other sexual-assault allegations involving Mouton and children. At trial, Carpenter claimed no knowledge of the prior allegations. Mouton called his ex-wife in response, who testified that Mouton had been cleared of those allegations after investigation by the Mississippi Department of Human Services. However, during cross-examination Mouton's ex-wife did testify that Mouton only had supervised visitation rights to visit his children. During deliberations, the jury sent a note to the judge explaining they could not reach a unanimous decision and requested guidance. The judge read a *Sharplin* instruction to the jury, and they came back with a guilty verdict on one count of sexual battery, and not-guilty verdicts on the remaining three counts. Mouton appealed.

### ISSUES

Whether (1) the State violated discovery rules by failing to disclose Auge's expert opinion regarding the child's injuries; (2) the trial court gave an improper *Sharplin* instruction; and (3) the State committed prosecutorial misconduct during Carpenter's and Mouton's ex-wife's testimony.

### HOLDING

(1) Because the trial court granted a recess after defense counsel objected to the previously undisclosed evidence, and allowed defense counsel to further interview Auge regarding her testimony, the trial court did not abuse its discretion in admitting Auge's testimony. (2) Because the trial court's *Sharplin* instruction matched the court's approved language nearly verbatim, it was not error to give the instruction to the jury. (3) Because defense counsel did not object at trial to the State's cross-examination of Mouton's ex-wife regarding his supervised visitation rights, the argument was waived on appeal. Further, defense counsel exhaustively impeached Carpenter through her prior inconsistent statement, so there was no reversible error. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

## DISSENTS

Justice Kitchens dissented, arguing that qualified nurses should always be allowed to testify as to causation, regardless of whether it is a criminal or civil trial. Further, he argued that all precedent that says otherwise should be overruled.

Justice King dissented, arguing the State should have disclosed Auge's testimony regarding the shape and location of the child's anal tears. He argued the State's failure to disclose that the expert would testify about specific details of the anal tears violated URCCC 9.04 because the details were all highly prejudicial to the defense.

### **Affirmed - 2015-KA-01062-SCT (May 18, 2017)**

En Banc Opinion by Justice Maxwell - Dissents by Justice Kitchens & Justice King

Hon. Lisa P. Dodson (Harrison County Circuit Court)

Michael W. Crosby, Benjamin Allen Suber, & George T. Holmes (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Josh Rhodes](#)

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## **SWANAGAN V. STATE**

### **CRIMINAL - FELONY**

**FELONY - SUFFICIENCY OF EVIDENCE - APPELLATE REVIEW** - On appeal, a court must ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

**MURDER - DEPRAVED HEART - DEFINITION** - Depaved-heart murder encompasses a reckless and eminently dangerous act directed toward a single individual

**FELONY - EVIDENCE - CONFLICTING TESTIMONY** - Conflicting testimony does not evince overwhelming evidence; where the verdict turns on the credibility of conflicting testimony and the credibility of witnesses, it is the jury's duty to resolve the conflict

**TRIAL - JURY INSTRUCTIONS - OBJECTIONS** - When a party fails to make a contemporaneous objection to jury instructions, the appellate court is under no obligation to review the assignment of error

**INEFFECTIVE ASSISTANCE OF COUNSEL - ELEMENTS - BURDEN OF PROOF** - To prevail on a claim of ineffective assistance of counsel, a defendant must prove that (1) his attorney's performance was deficient, and (2) that the deficiency was so substantial as to deprive the defendant of a fair trial

### **FACTS**

Derrick Sims worked with Vincent Hill. Sims arrived at the home of Victoria Swanagan, Hill's girlfriend, to pick Hill up for work. Sims testified that Swanagan and Hill were arguing, and he heard a "ruckus" inside the house. Hill came rushing out of the house with Swanagan following and hitting him. The two tussled and continued to argue until they both ended up in Sims's car. The parties' testimonies conflicted on how and why they both ended up in the car and regarding the instigation of the fighting. While Sims was driving, Swanagan bit Hill and caused him to scream and lash out, at which point Sims stopped the car. Sims opened the car door and both Hill and Swanagan fell out onto the pavement, with Swanagan continuing to strike and claw at Hill. Hill's gun fell out onto the pavement, and Swanagan rolled on top of it. After failing to retrieve the gun, Hill began reaching into the back of the truck. Swanagan testified that she feared he was reaching for Sims's gun that may be in the truck, so she fired off a "warning shot" from Hill's gun. After Hill and Sims ran to get back in the truck, Swanagan fired several more shots in Hill's direction, striking him on the right side of his chest and killing him. Swanagan argued that she acted in self-defense, but the jury convicted her of depraved-heart murder. Swanagan appealed.

### **ISSUES**

Whether (1) the evidence was insufficient to support the verdict, (2) the verdict was against the overwhelming weight of the evidence, (3) the trial court erred in its supplemental instruction in response to the jury's question as to the definition of depraved heart, and (4) Swanagan received ineffective assistance of counsel.

### **HOLDING**

(1) Because a reasonable trier of fact could have found that the essential elements of the crime were met, the evidence was not insufficient to support the verdict, and (2) the verdict was not against the overwhelming weight of the evidence. (3) Because the Swanagan did not object to the court's instruction to the jury regarding the definition of depraved-heart murder and the court included the option of self-defense, the trial court did not err in its supplemental instruction in response to the jury's question as to the definition of depraved heart. (4) Because Swanagan admitted to firing shots in Hill's direction, she could not show that her counsel was ineffective in defending her under the theory of self-defense or second-degree murder. Therefore, the Supreme Court affirmed the decision of the Hinds County Circuit Court.

**Affirmed - 2016-KA-00289-SCT (May 18, 2017)**

Opinion by Presiding Justice Randolph

Hon. William A. Gowan Jr. (Hinds County Circuit Court)

Hunter Nolan Aikens & George T. Holmes (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Spencer H. Newman](#)

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## ***SUPREME COURT - ORDERS***

### **IN RE: MISSISSIPPI RULES OF EVIDENCE**

#### **COURT ORDER**

#### **ORDER**

In a December 2016 order, the Mississippi Supreme Court adopted the Mississippi Rules of Criminal Procedure and stated that the new body of rules shall govern the procedure in all criminal proceedings in the circuit, county, justice, and municipal courts of Mississippi. The Supreme Court acknowledged these Rules of Criminal Procedure may have the effect of altering, duplicating, supplementing, and/or replacing existing provisions of the Mississippi Rules of Evidence. To the extent that the new Rules of Criminal Procedure affect the Rules of Evidence, this en banc Order adjudicates that the Rules of Evidence should be amended accordingly. Such amendments to the Rules of Evidence will take effect on July 1, 2017, the same effective date of the new Rules of Criminal Procedure.

[Exhibit A](#), referenced and attached to the Order, indicates the substantive modifications and changes in format to the Mississippi Rules of Evidence as a result of the adoption of the Mississippi Rules of Criminal Procedure.

**Granted - 89-R-99002-SCT (May 15, 2017)**

En Banc Order by Justice Kitchens

Briefed by [Allison A. Bruff](#)

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## IN RE: UNIFORM RULES OF PROCEDURE FOR JUSTICE COURT

### COURT ORDER

#### ORDER

In a December 2016 order, the Mississippi Supreme Court adopted the Mississippi Rules of Criminal Procedure and stated that the new body of rules shall govern the procedure in all criminal proceedings in the circuit, county, justice, and municipal courts of Mississippi. The Supreme Court acknowledged these Rules of Criminal Procedure may have the effect of altering, duplicating, supplementing, and/or replacing existing provisions of the Mississippi Uniform Rules of Procedure for Justice Court. To the extent that the new Rules of Criminal Procedure affect the Uniform Rules of Procedure for Justice Court, this en banc Order adjudicates that the Uniform Rules of Procedure for Justice Court should be amended accordingly. Such amendments to the Uniform Rules of Procedure for Justice Court will take effect on July 1, 2017, the same effective date of the new Rules of Criminal Procedure.

[Exhibit A](#), referenced and attached to the Order, indicates the substantive modifications and changes in format to the Mississippi Uniform Rules of Procedure for Justice Court as a result of the adoption of the Mississippi Rules of Criminal Procedure.

**Granted - 89-R-99024 (May 15, 2017)**

En Banc Order by Justice Kitchens

Briefed by [Allison A. Bruff](#)

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## IN RE: UNIFORM RULES OF CIRCUIT & COUNTY COURT PRACTICE

### COURT ORDER

#### ORDER

In a December 2016 order, the Mississippi Supreme Court adopted the Mississippi Rules of Criminal Procedure and stated that the new body of rules shall govern the procedure in all criminal proceedings in the circuit, county, justice, and municipal courts of Mississippi. The Supreme Court acknowledged these Rules of Criminal Procedure may have the effect of altering, duplicating, supplementing, and/or replacing existing provisions of the Mississippi Uniform Rules of Circuit and County Court Practice. To the extent that the new Rules of Criminal Procedure affect the Uniform Rules of Circuit and County Court Practice, this en banc Order adjudicates that the Uniform Rules of Circuit and County Court Practice should be amended accordingly. Such amendments to the Uniform Rules of Circuit and County Court Practice will take effect on July 1, 2017, the same effective date of the new Rules of Criminal Procedure.

[Exhibit A](#), referenced and attached to the Order, indicates the substantive modifications and changes in format to the Mississippi Uniform Rules of Circuit and County Court Practice as a result of the adoption of the Mississippi Rules of Criminal Procedure.

**Granted - 89-R-99025 (May 15, 2017)**

En Banc Order by Justice Kitchens

Briefed by [Allison A. Bruff](#)

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## IN RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE

### COURT ORDER

#### ORDER

In a December 2016 order, the Mississippi Supreme Court adopted the Mississippi Rules of Criminal Procedure and stated that the new body of rules shall govern the procedure in all criminal proceedings in the circuit, county, justice, and municipal courts of Mississippi. The Supreme Court acknowledged these Rules of Criminal Procedure may have the effect of altering, duplicating, supplementing, and/or replacing existing provisions of the Mississippi Rules of Appellate Procedure. To the extent that the new Rules of Criminal Procedure affect the Rules of Appellate Procedure, this en banc Order adjudicates that the Rules of Appellate Procedure should be amended accordingly. Such amendments to the Rules of Appellate Procedure will take effect on July 1, 2017, the same effective date of the new Rules of Criminal Procedure.

[Exhibit A](#), referenced and attached to the Order, indicates the substantive modifications and changes in format to the Mississippi Rules of Appellate Procedure as a result of the adoption of the Mississippi Rules of Criminal Procedure.

**Granted - 89-R-99027 (May 15, 2017)**

En Banc Order by Justice Kitchens

Briefed by [Allison A. Bruff](#)

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## IN RE: MISSISSIPPI RULES OF CRIMINAL PROCEDURE

### COURT ORDER

#### ORDER

In a December 2016 order, the Mississippi Supreme Court adopted the Mississippi Rules of Criminal Procedure and stated that the new body of rules shall govern the procedure in all criminal proceedings in the circuit, county, justice, and municipal courts of Mississippi. In this en banc Order, the Supreme Court stated that “[a]fter due consideration” and “in the interest of promoting the fair and efficient administration of justice,” the new Rules of Criminal Procedure should be amended.

[Exhibit A](#), referenced and attached to the Order, indicates the amended portions of the new Mississippi Rules of Criminal Procedure are found in Rules 8.7 and 17.5.

**Granted - 89-R-99038 (May 15, 2017)**

En Banc Order by Justice Kitchens

Briefed by [Allison A. Bruff](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 16, 2017**

***COURT OF APPEALS - CIVIL CASES***

## BORRIES V. GOSHEN MORTGAGE, LLC

### CIVIL - REAL PROPERTY

**PROPERTY - PRIORITY OF INSTRUMENTS - NOTICE OF PRIOR ENCUMBRANCES** - When actual notice of prior encumbrances is not available, the priority of instruments is based on a first to file rule

**PROPERTY - RECORDING REQUIREMENTS - BENEFICIARY** - Pursuant to Miss. Code Ann. § 89-5-37, the chancery clerk and deputies are not to record any mortgage or deed of trust in which the beneficiary is not disclosed; however, if an instrument without a beneficiary is recorded, it does not impart notice to anyone

**PROPERTY - DEED OF TRUST - LACK OF NAMED BENEFICIARY** - A deed of trust without a named beneficiary is not void, but is merely subordinate to a subsequent lien

### FACTS

In May 2014, Goshen Mortgage, LLC filed suit in the Jackson County Chancery Court seeking a declaratory judgment that Goshen had first priority over a deed of trust for an 8.9-acre tract of land that was executed to its predecessor-in-interest, First Choice Funding, Inc., on March 21, 2007. In 2008, Kenneth Borries was named as the beneficiary on a deed of trust from 2005, which was previously without a named beneficiary. A trustee's deed was recorded, conveying 2.17 acres within the 8.9-acre tract to Borries after he won a bid on the property. The trial court issued an order granting Goshen's motion for summary judgment, finding that Goshen held a first-priority deed of trust on the property. Borries appealed.

### ISSUE

Whether the trial court erred in granting summary judgment to Goshen.

### HOLDING

Because there was no material issue of fact that Goshen had actual knowledge of the defective deed of trust or Borries's lien, the trial court did not err in granting summary judgment to Goshen. The beneficiary on the deed of trust was not named, so actual notice was not imparted on anyone. Even though Borries corrected the blank beneficiary deed of trust, it was still subordinate to the deed of trust executed to First Choice Funding because of the first-to-file rule. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

**Affirmed - 2015-CA-01487-COA (May 16, 2017)**

Opinion by Judge Barnes

Hon. Jaye A. Bradley (Jackson County Chancery Court)

Matthew Ward McDade, David Elias Kihyet, Donald Alan Windham, & Matthew Earl Perkins for Appellants - Gene D. Berry for Appellee

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

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## CAROTHERS V. CITY OF WATER VALLEY

### CIVIL - PERSONAL INJURY

**TORT LAW - MISSISSIPPI TORT CLAIMS ACT - DEGREE OF CARE** - Pursuant to Miss. Code Ann. § 11-46-9(1)(c), a municipality is immune to tort actions under the Mississippi Tort Claims Act unless the conduct of the government employee in question rises to level of reckless disregard

**TORT LAW - VICARIOUS LIABILITY - ADMISSION OF LIABILITY** - A municipality cannot be held liable unless the municipal employee acted with reckless disregard during police-protection activities, even if the city admitted vicarious liability



**GOVERNMENT IMMUNITY - WAIVER - REQUIREMENTS** - In order for a municipality to waive governmental immunity from suit, the employee in question must be found to have acted with reckless disregard for the safety and well-being of any person not engaged in criminal activity at the time of the injury

### **FACTS**

Arlene Carothers and a police officer for the City of Water Valley were involved in a car accident in September 2012. Testimony revealed that the officer, Marshal Jackson, collided with the back-end of Carothers's vehicle when reaching for his cellphone. After filing a claim for damages stemming from the crash against both Jackson and the City of Water Valley, the trial court dismissed the direct liability claim against the City and ruled against Carothers on the vicarious-liability claim. The trial court equated the accident with that of a fender bender and a simple-negligence case. Carothers appealed.

### **ISSUES**

Whether (1) the MTCA governs a claim of liability against a governmental entity when the employee commits a traffic offense and (2) the trial court erred by dismissing the direct-liability claims against the City.

### **HOLDING**

(1) Because the claimant must show more than simple negligence to meet the requisite reckless disregard requirement under the MTCA, the MTCA did not govern the government employee's simple traffic offense. (2) Because the City could not be held liable unless the employee acted with reckless disregard as the claim arose out of police-protection activities, the court did not err in dismissing the direct-liability claim. Therefore, the Court of Appeals affirmed the judgment of the Yalobusha County Circuit Court.

**Affirmed - 2015-CA-01808-COA (May 16, 2017)**

Opinion by Presiding Judge Griffis

Hon. James McClure III (Yalobusha County Circuit Court, Second Judicial District)

Drayton D. Berkley for Appellant - Mitchell Orvis Driskell III for Appellee

Briefed by [Horacio Hernandez](#)

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## **DAVIDSON V. PUB. EMPLOYEES' RET. SYS.**

### **CIVIL - STATE BOARDS & AGENCIES**

**ADMINISTRATIVE LAW - DISABILITY BENEFITS - JUDICIAL REVIEW** - The standard of review on appeal from an administrative decision of the Public Employees' Retirement System (PERS) Board of Trustees is limited to a determination of whether the Board's decision: (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the authority of the Board to make, or (4) violated a statutory or constitutional right of the claimant

**ADMINISTRATIVE LAW - DISABILITY BENEFITS - JUDICIAL REVIEW** - A rebuttable presumption exists in favor of the PERS's decision, and the claimant is left with the burden of proving the contrary

**ADMINISTRATIVE LAW - DISABILITY BENEFITS - MEDICAL EXAMINATIONS** - Pursuant to Miss. Code Ann. § 25-11-113(3) and (6), a disability retiree is required to submit to periodic medical reexaminations, and to continue to receive disability benefits, a claimant must show that she remains physically or mentally unable to return to the employment from which she is retired

**ADMINISTRATIVE LAW - DISABILITY BENEFITS - TERMINATION OF BENEFITS** - Pursuant to Miss. Code Ann. § 25-11-113(6), if after a medical reexamination, the PERS medical board finds and certifies that the disability retiree is physically and mentally able to return to the employment, the Board shall, after a reasonable period of time, terminate the disability allowance, whether or not the retiree is reemployed or seeks reemployment

### **FACTS**

In 2013, Rebecca Davidson applied for and was granted non-duty-related disability benefits from the Public Employees' Retirement System of Mississippi (PERS). In 2014, PERS reexamined Davidson's claim, and the PERS medical board recommended that her benefits should be terminated because she was physically and mentally capable of returning to her employment. Davidson appealed to the PERS disability appeals committee (DAC), and the DAC also found that she was capable of returning to work and that her benefits should be terminated. The PERS Board of Trustees adopted the proposed opinion and recommendation of the DAC and denied Davidson's request for continued benefits. Davidson then appealed to the Hinds County Circuit Court, which affirmed the decision of the PERS Board. Davidson appealed.

### ISSUE

Whether the trial court erred in denying Davidson's request for continued disability benefits.

### HOLDING

Because Davidson's doctors found no compelling clinical evidence that she would be unable to handle the stresses and demands of employment and certified that she was at maximum medical improvement with no impairments or restrictions, there was substantial evidence to support PERS's finding that Davidson was capable of returning to work and was no longer disabled. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

#### **Affirmed - 2016-SA-00189-COA (May 16, 2017)**

Opinion by Judge Wilson

Hon. Tomie T. Green (Hinds County Circuit Court, First Judicial Dist.)

John T. Ball for Appellant - Jane L. Mapp (Att'y Gen. Office) for Appellee

Briefed by [Kaitlyn McMellon](#)

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## **DHEALTHCARE CONSULTANTS, INC. v. JEFFERSON CTY. HOSP.**

### **CIVIL - CONTRACT**

**CONTRACT - PUBLIC BOARDS - MINUTES REQUIREMENT** - It is well established that public boards speak only through their minutes and their actions are evidenced solely by entries on the minutes; where a public board enters into business with another entity, a contract must be recorded on the official minutes of the board and stated in express terms

**CONTRACT - PUBLIC BOARDS - TERMS & CONDITIONS** - A contract with a public board, though not spread on the minutes in its entirety, may still be enforced where enough of the terms and conditions of the contract are contained in the minutes for determination of the liabilities and obligations of the contracting parties without the necessity of resorting to other evidence

**CONTRACT - PUBLIC BOARDS - BURDEN ON NON-BOARD ENTITY** - It is the responsibility of the non-board contracting entity to ensure that the contract is sufficiently spread upon the minutes of a public board

**CONTRACT - PUBLIC BOARDS - EQUITABLE ESTOPPEL** - It is longstanding policy that there is no estoppel against a public body unless a valid contract is duly entered upon the minutes, which binds that public body

### FACTS

Jefferson County Hospital (JCH) is a community hospital owned by Jefferson County and governed by a Board of Trustees (Board). The Board authorized Jerry Kennedy, then the hospital administrator, to execute agreements with Dhealthcare for consultation services in August 2008, and again in January 2009. On March 20, 2012, the Board voted to terminate JCH's contracts with Dhealthcare. On May 22, 2012, Dhealthcare filed a breach-of-contract claim against JCH. Bench trials were held on October 7, 2014, and February 9, 2015. The Jefferson County Circuit Court found that neither contract was valid nor enforceable because there were no terms or conditions of either contract contained within the minutes of the Board. Dhealthcare appealed.

## ISSUES

Whether (1) a contract was sufficiently evidenced on the Board's minutes and (2) equitable estoppel applied.

## HOLDING

(1) Because the alleged contracts were not attached to the minutes and because the minutes did not contain a single term or condition establishing any liabilities or obligations of either party, any amount to be paid, or any actual services to be performed, the trial court did not err in finding that neither contract was legally enforceable. (2) Because JCH is a public body and there was no writing upon the minutes binding the Board to Dhealthcare, the Board could not be estopped. Therefore, the Court of Appeals affirmed the judgment of the Jefferson County Circuit Court.

### **Affirmed - 2015-CA-01440-COA (May 16, 2017)**

Opinion by Judge Greenlee

Hon. Lamar Pickard (Jefferson County Circuit Court)

Suzanne Griggins Keys, Crystal Wise Martin, Nakesha McQuirter Watkins, Ratoya Janae Gilmer, Sherry Muriel Flowers, & Martin D. Perkins for Appellant - Carroll Rhodes & Deborah McDonald for Appellee

Briefed by [Joseph Rychlak](#)

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## ESTATE OF CHANEY V. CHANEY

### CIVIL - WILLS, TRUSTS, & ESTATES

**WILLS & ESTATES - SUBJECT MATTER JURISDICTION - DISCRETION** - A chancellor has discretion to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings

**WILLS & ESTATES - REVOCATION - DIVORCE** - A divorce with a property settlement agreement does not operate to impliedly revoke a will unless the settlement evidenced the testator's intent to revoke the will

**WILLS & ESTATES - INTENT TO REVOKE - *RASCO* FACTORS** - A chancellor should question whether the testator intended the settlement to operate as an ademption of a prior-created will and release the former spouse of all rights to the decedent's estate and look for clear and unequivocal evidence of an intention to revoke the will

## FACTS

In 1962, James Chaney executed his last will and testament, leaving his Tennessee farmland to his wife, Lillian. In 1969, James and Lillian divorced and executed a joint-property settlement agreement in which they agreed that Lillian would relinquish any right or claim to the farm in Tennessee. In 1971, James married Josephine, and they remained married until his death in 2011. Upon James's death, Lillian attempted to probate the 1962 will in the Chancery Court of DeSoto County, Mississippi, the parties' place of residence. Josephine, wishing to remove the farm from the testate estate, contested the validity of the will and argued that the will was revoked by the property-settlement agreement executed in 1969. The chancellor ruled that the will was revoked by implication and therefore invalid. Lillian appealed.

## ISSUES

Whether the trial court (1) had subject matter jurisdiction over the out-of-state real property and (2) erred in finding that the will was revoked by implication.

## HOLDING

(1) Because the decedent was a resident of DeSoto County, Mississippi and a hearing was held on the merits, a challenge to subject matter jurisdiction was not sufficient to constitute reversible error. (2) Because application of the *Rasco* factors indicated an intent to revoke the will, the trial court did not err in its finding. Therefore, the Court of Appeals affirmed the decision of the DeSoto County Chancery Court.

### **Affirmed - 2015-CA-01613-COA (May 16, 2017)**

Opinion by Presiding Judge Griffis  
Hon. Mitchell M. Lundy Jr. (DeSoto County Chancery Court)  
J. Walker Sims & Fred M. Ridolphi Jr. for Appellants - Daniel Owen Lofton for Appellee  
Briefed by [Spencer H. Newman](#)

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## EUBANKS V. WADE

### CIVIL - CONTRACT

**CIVIL PROCEDURE - AFFIRMATIVE DEFENSE - RES JUDICATA** - Res judicata is an affirmative defense requiring both pleading and proof, which may not be raised on a motion to dismiss under Miss. R. Civ. P. 12(b)(6) unless allegations of a prior pleading in the case demonstrates its existence

**EVIDENCE - JUDICIAL NOTICE - PRIOR PROCEEDING** - A trial court is not authorized to take judicial notice of cases pending or previously disposed of in the same court but outside the record in the case before it

### FACTS

In July 2009, John Eubanks and Kim Wade entered into an exclusive authorization and right to sell listing agreement. After a potential sale fell through, Eubanks contacted a buyer directly and initiated a lease/purchase agreement. Wade placed a lien against Eubanks's property for commission for the sale. Eubanks filed a claim against Wade with the Mississippi Real Estate Commission, which found in July 2010 that Wade committed several violations. Wade then filed a complaint against Eubanks in the circuit court alleging that Eubanks breached their agreement for the sale of Eubanks's property. No answer was filed, and a default judgment was entered against Eubanks in August 2010. Eubanks claimed that he was never served with the complaint and filed a motion to set aside the default judgment. In August 2011, Eubanks filed a lawsuit against Wade with several claims stemming from the sale of the property. Wade filed an answer, raising several affirmative defenses but did not mention the default judgment. In 2013, Wade filed a motion to dismiss, which was granted on April 6, 2015. Eubanks appealed.

### ISSUE

Whether the trial court erred in granting Wade's motion to dismiss.

### HOLDING

Because the prior judgment Wade obtained against Eubanks was a matter outside the complaint that should not have been considered in the motion to dismiss, the trial court erred in granting Wade's motion to dismiss. Therefore, the Court of Appeals reversed and remanded the judgment of the Hinds County Circuit Court.

### CONCURRENCE

Judge Westbrook agreed with the majority's approach but wrote separately to discuss whether there was a hearing on Wade's motion to dismiss and whether the trial court erred in converting Wade's motion to dismiss to a motion for summary judgment.

### **Reversed & Remanded - 2015-CA-00811-COA (May 16, 2017)**

En Banc Opinion by Judge Griffis - Concurrence by Judge Westbrook  
Hon. Winston L. Kidd (Hinds County Circuit Court, First Judicial District)  
Renee M. Porter for Appellant - Joe S. Deaton III, John Richard May Jr., & David Ford Berry IV for Appellee  
Briefed by [Davis Vaughn](#)

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## GRIFFIN V. ABN AMRO MORTGAGE GROUP, INC.

### CIVIL - OTHER

**APPEAL - RES JUDICATA - JUDGMENT ON MERITS** - To qualify as res judicata, the prior judgment must have been a final judgment on the merits

**DISMISSAL - FAILURE TO PROSECUTE - PREJUDICE** - Under both Miss. R. Civ. P. 41(b) and Fed. R. Civ. P. 41(b), dismissal for failure to prosecute operates as a final judgment, and the dismissal is with prejudice

**COMPLAINT BARRING - RES JUDICATA - IDENTITIES** - The doctrine of res judicata has four identities that must be assessed: (1) identity of the subject matter of the cause of action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality of character of a person against whom the claim is made

### FACTS

Annie and Frederick Griffin sued their mortgage carrier, ABN, alleging fraud under state law as well as violations of federal law under the Fair Debt Collection Practices Act and the Truth in Lending Act. The case was removed to federal court, and the district court dismissed the action for failure to prosecute. After the case was dismissed, the Griffins brought a substantially identical lawsuit in the DeSoto County Chancery Court, which was dismissed on the ground of res judicata. The Griffins appeal.

### ISSUE

Whether dismissing the Griffins' second complaint on the ground of res judicata was appropriate.

### HOLDING

Because the first dismissal was a final judgment and because the allegations in the second complaint were copied almost verbatim from the first complaint, dismissal on the ground of res judicata was appropriate. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Chancery Court.

**Affirmed - 2015-CP-01237-COA (May 16, 2017)**

Opinion by Judge Greenlee

Hon. Mitchell M. Lundy Jr. (Desoto County Chancery Court)

*Pro se* for Appellants - Bradley Barron Vance, Richard Carlton Keller & Michael Alan Jedynak for Appellees

Briefed by [Desire'e Martinelli](#)

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## HARRIS V. HARRIS

### CIVIL - DOMESTIC RELATIONS

**ALIMONY - OBLIGATION - MODIFICATION** - A payor spouse's alimony obligation may be modified or even terminated if the spouse is able to show a material change of circumstances has occurred since the original divorce decree

**ALIMONY - CREDIT - DERIVATIVE SOCIAL SECURITY** - Having previously held that Social Security payments derivative from a child support payor should be credited against the child support, the Supreme Court of Mississippi held in *Spalding* that it could not "fathom any valid reason or reasonable logic" as to why the rule of law would be any different with respect to periodic alimony rather than child support

**ALIMONY - SOURCE - CLARIFICATION** - No showing of a material change of circumstances is required to clarify the source of income used to satisfy payments for alimony

### FACTS

Leon Harris filed a complaint against his former spouse, Susan Harris, alleging a material change in circumstances since their judgment of divorce in which he agreed to pay alimony in the property-settlement agreement. The Newton County Chancery Court credited Susan's Social Security benefits that were derivative of Leon's Social Security earning credits against Leon's monthly alimony obligation rather than reducing or terminating the obligation. Susan appealed.

### ISSUE

Whether the chancellor erred in modifying the agreement before requiring Leon to show a material change in circumstances.

### HOLDING

Because there is precedent for crediting derivative Social Security payments to alimony obligations and the chancellor only clarified the source of income used to satisfy the alimony payment rather than modifying it, no showing of a material change in circumstances was required. Therefore, the Court of Appeals affirmed the judgment of the Newton County Chancery Court.

#### **Affirmed - 2016-CA-00532-COA (May 16, 2017)**

En Banc Opinion by Presiding Judge Irving

Hon. H. David Clark II (Newton County Chancery Court)

Thomas L. Tullos for Appellant - William B. Jacob, Joseph A. Kieronski Jr., & Daniel P. Self Jr. for Appellee

Briefed by [Brittany Bane](#)

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## **MOORE V. ROUSE'S ENTERS., LLC**

### **CIVIL - PERSONAL INJURY**

**PREMISES LIABILITY - DUTY OF CARE - INVITEES** - A landowner owes a business invitee a duty of reasonable care for the invitee's safety

**PREMISES LIABILITY - SLIP & FALL - BURDEN OF PROOF** - In order for an invitee to recover in a slip-and-fall case, the invitee must show that (1) some negligent act of the defendant caused his injury; (2) the defendant had actual knowledge of a dangerous condition and failed to warn the plaintiff; or (3) the dangerous condition existed for a sufficient amount of time to impute constructive knowledge to the defendant, in that the defendant should have known of the dangerous condition

### FACTS

On September 10, 2010, Marzettia Moore was shopping at Rouse's market when, while walking close to a coffin freezer she fell into a split-leg position causing her to leave the store in an ambulance and suffer soft tissue injuries. Moore filed a negligence action against Rouse's. At trial, the trial court granted Rouse's motion for a directed verdict, finding Moore had failed to satisfy her burden of proof for the premises liability claim by not providing record evidence that Rouse's knew or should have known that water was present on the floor at the time of her fall, or that a dangerous condition existed for a sufficient time that Rouse's should have had constructive knowledge of the condition. Moore appealed.

### ISSUE

Whether the trial court erred in granting Rouse's motion for a directed verdict.

### HOLDING

Because Moore failed to satisfy her burden of proof for the premises liability claim, the trial court did not err in granting Rouse's motion for a directed verdict. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

#### **Affirmed - 2016-CA-00241-COA (May 16, 2017)**

Opinion by Judge Barnes  
Hon. Christopher Louis Schmidt (Harrison County Circuit Court, First Judicial District)  
Carol L. Henderson for Appellant - Bradley Adam Hays & Christopher Owen Massenburg for Appellee.  
Briefed by [J. Marc McMillian](#)

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## ROBERTS V. MISS. DEP'T CORR.

### CIVIL - OTHER

**CIVIL PROCEDURE - VENUE - WAIVER** - A trial court will not be put in error on appeal for improper venue if not raised as an objection, affirmative defense, or issue before the trial court

**ADVISORY GUIDELINES - DISCIPLINARY PROCEDURE - DUE PROCESS** - The Mississippi Department of Corrections disciplinary procedures explain that established time frames and procedural requirements listed in the standard operating procedures are advisory guidelines and do not constitute a due process right to the offender, and failure to abide by the time frames and procedural requirements are not a basis for dismissal of a rule violation report

**CIVIL PROCEDURE - AGENCY DECISION - REBUTTABLE PRESUMPTION** - The challenging party has the burden of rebutting the presumption that favors the agency decision by showing the decision was unsupported by substantial evidence, arbitrary or capricious, beyond the agency's scope or powers, or violated the constitutional or statutory rights of the aggrieved party

### FACTS

Timmy Roberts was convicted of two counts of aggravated assault involving a firearm and was sentenced to twenty-four years in MDOC's custody. While incarcerated, Roberts received a rule violation report for being found in possession of a cell phone. After an investigation and hearing on the matter, MDOC found him guilty of the violation. He appealed through MDOC's Administrative Remedy Program (ARP) but was denied. He then appealed to the Hinds County Circuit Court, which affirmed MDOC's ARP judgment. Roberts appealed.

### ISSUES

Whether (1) Roberts filed his appeal in the proper venue, (2) MDOC violated Roberts's right to due process by not conducting a hearing within seven working days of the rule violation, (3) the investigator failed to investigate the rule violation, and (4) MDOC's decision lacked evidentiary support.

### HOLDING

(1) Because neither party raised issue of improper venue, the issue was waived. (2) Because MDOC's disciplinary procedures are purely advisory guidelines and do not constitute due process rights or basis for dismissal, MDOC's failure to strictly adhere to its own timeline procedures had no merit on appeal. (3) & (4) Because the investigator's typed statement was sufficient evidence of the rule violation, Roberts failed to rebut the presumption favoring MDOC's decision. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

### **Affirmed - 2016-CP-00126-COA (May 16, 2017)**

Opinion by Judge Carlton  
Hon. William A. Gowan Jr. (Hinds County Circuit Court, First Judicial District)  
*Pro se* Appellant - Anthony Louis Schmidt Jr., James M. Norris, & Darrell Clayton Baughn for Appellee  
Briefed by [Jonathan M. Barnes](#)

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## SHANNON ENG'G & CONSTR. CO. V. PERKINS

### CIVIL - WORKERS' COMPENSATION

**WORKERS' COMPENSATION - WAGE-EARNING PRESUMPTION** - Where an injured employee returns to work and receives the same or greater earnings as those prior to his injury, there is created a rebuttable presumption that he has suffered no loss in his wage-earning capacity

**WORKERS' COMPENSATION - WAGE-EARNING PRESUMPTION** - When the Mississippi Workers' Compensation Commission fails to recognize and directly address the wage-earning presumption, it is reversible error on appeal

#### FACTS

Willie Perkins injured his back while sorting pipe-laying materials for Shannon Engineering and Construction Company. Perkins continued working for Shannon Engineering for almost two years after the injury and received the same compensation. The Mississippi Workers' Compensation Commission awarded Perkins permanent partial disability benefits, but neither it nor the administrative judge recognized that where an injured employee returns to work and receives the same or greater earnings as those prior to his injury, there is a rebuttable presumption that he has suffered no loss in his wage-earning capacity. Shannon Engineering appealed.

#### ISSUE

Whether the Mississippi Workers' Compensation Commission properly rendered a judgment in favor of Perkins.

#### HOLDING

Because failing to recognize and directly address the wage-earning presumption is reversible error, the Commission erred in ruling for Perkins. Therefore, the Court of Appeals reversed and remanded the judgment of the Mississippi Workers' Compensation Commission.

#### **Reversed & Remanded - 2016-WC-00842-COA (May 16, 2017)**

Opinion by Judge Fair

Mississippi Workers' Compensation Commission

Jefferson Pinckney W. Skelton, Pamela S. Ratliff, & Andy Lowry for Appellant - Darryl Moses Gibbs, Rogen K. Chhabra, Caroline Jane Scott, & Amanda Grace Hill for Appellee

Briefed by [Tony Sax](#)

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## THOMPSON V. LUCAS

### CIVIL - PERSONAL INJURY

**PERSONAL INJURY - PREMISES LIABILITY - INVITATION** - An invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct which justifies others in believing that the possessor is willing to allow them to enter, if they desire to do so

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

**PERSONAL INJURY - PREMISES LIABILITY - DUTY TO LICENSEE** - A landowner owes a licensee a duty to refrain from willfully or wantonly injuring him

**CIVIL PROCEDURE - FACTUAL FINDINGS - STATUS OF VISITOR** - Where there are no factual disputes surrounding a visitor's purpose on the property, then the circuit court determines the status of the visitor

#### FACTS



While at a casino, Gloria Thompson loaned money to Mildred Lucas. The next day, Thompson drove to Lucas's residence to collect on the loan. As Thompson was leaving, she fell in Lucas's driveway. Thompson claimed that her injuries were proximately caused by Lucas's negligence under premises liability because Thompson was an invitee. Following discovery, Lucas moved for summary judgment. The trial court found that Thompson was a licensee and that Lucas had not breached the applicable duty owed to Thompson. Therefore, the trial court granted Lucas's motion for summary judgment and dismissed the case with prejudice. Thompson appealed.

### ISSUES

Whether the trial court erred in (1) granting summary judgment based on Thompson's status as a licensee, and (2) determining that no genuine issues of material fact existed as to Thompson's status.

### HOLDING

(1) Because Thompson entered the property for her own convenience or benefit pursuant to the permission of Lucas and because Lucas did not willfully or wantonly cause Thompson's injuries, the trial court did not err in granting summary judgment based on Thompson's status as a licensee. (2) Because Thompson's purpose for visiting Lucas's premises was undisputedly to collect on money previously loaned, Thompson's status was a question of law, and the trial court did not err in determining no genuine issues of material fact existed as to Thompson's status. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

#### **Affirmed - 2016-CA-00196-COA (May 16, 2017)**

Opinion by Presiding Judge Griffis

Hon. Johnnie E. Walls Jr. (Bolivar County Circuit Court, Second Judicial Dist.)

Ellis Turnage for Appellant - C. Paige Herring for Appellee

Briefed by [Morgan L. Stringer](#)

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## **WILLIAMS V. STATE**

### **CIVIL - OTHER**

**IMPRISONMENT - WRONGFUL CONVICTION - INNOCENCE** - Pursuant to Miss. Code Ann. § 11-44-7, a claimant must prove by a preponderance of evidence that he did not commit the felony for which he was sentenced and which is grounds for the complaint

**WRONGFUL CONVICTION - PAYMENT - AMOUNT** - Pursuant to Miss. Code Ann. § 11-44-7, if the claimant meets his burden, he is entitled to \$50,000 for each year of incarceration regardless of the number of felonies for which he was convicted and reasonable attorney fees

### FACTS

In 2009, Kevin Williams pled guilty to one count of sexual battery and was required to register as a sex offender. When Williams registered, he listed his primary address in Crystal Springs, Mississippi. Williams's probation officer went to the address provided, but Williams was not there. Sheriff Tommy Roberts later went to the address and determined that Williams did not live there after speaking with Williams's brother. In 2013, Kevin Williams was found guilty of failing to register as a sex offender. The Mississippi Court of Appeals later reversed his conviction based on insufficient process. Williams then requested compensation under the Mississippi Wrongful Conviction Act. The trial court found that Williams had failed to meet the statute's requirements. Williams appealed.

### ISSUE

Whether the trial court erred in finding that Williams failed to prove by a preponderance of the evidence that he did not commit the crime of failing to register as a sex offender.

### HOLDING

Because there was substantial evidence to support his conviction, it was not error to find that Williams failed to show by a preponderance of the evidence that he was wrongfully convicted. Therefore, Court of Appeals affirmed the judgment of the Covich County Circuit Court.

**Affirmed - 2016-CA-00762-COA (May 16, 2017)**

Opinion by Judge Fair

Hon. Lamar Pickard (Covich County Circuit Court)

Robert Fred Lingold Jr. & Hadley Elizabeth Gable for Appellant - William Douglas Minor (Att'y Gen. Office) for Appellee

Briefed by [Zachary Roberson](#)

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## **COURT OF APPEALS - POST-CONVICTION RELIEF**

### **CLAY V. STATE**

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

**CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - MOTION** - A prisoner must file a post-conviction relief motion if he claims that his conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory, or other writ, motion, petition, proceeding, or remedy

**CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - LEAVE TO FILE** - A prisoner whose conviction has been affirmed on direct appeal, must fulfill his obligation to obtain leave from the Mississippi Supreme Court before filing a post-conviction relief motion

**CRIMINAL PROCEDURE - EXPUNGEMENT** - Pursuant to Miss. Code Ann. § 41-29-150, expungement is provided for certain offenses only if there has not been an adjudication of guilty

**CRIMINAL PROCEDURE - EXPUNGEMENT - GUILTY PLEA** - Miss. Code Ann. § 99-15-57 provides that expunction of certain offenses is allowed following a guilty plea but only if the plea occurred within six months prior to March 31, 1983

**CRIMINAL PROCEDURE - EXPUNGEMENT - MINORS** - Miss. Code Ann. § 99-19-71(2)(b) states that someone who was younger than twenty-one years old when he committed a felony may request expungement of a single conviction after a time

#### **FACTS**

In 1979, Louis J. Clay, Jr. pled guilty to three separate charges of selling marijuana. For each conviction, the circuit court sentenced Clay to three years in the custody of the Mississippi Department of Corrections (MDOC), with six months to serve, followed by five years of post-release supervision. In 1984, after Clay completed his five-year probationary sentence, MDOC filed a petition to terminate Clay's probation. On that same day, the circuit court entered a discharge order related to all three of the 1979 convictions. In 1996, Clay was indicted for aggravated assault. He was charged and later convicted and sentenced as a nonviolent habitual offender based on the 1979 convictions. After the Court of Appeals affirmed the circuit court's judgment, Clay filed numerous applications for leave to file a motion for post-conviction relief (PCR) arguing that he was not a habitual offender because his three 1979 convictions should have been considered as one conviction. In 2014, the Mississippi Supreme Court entered an order denying what it described as Clay's seventh application, and sanctioned Clay for filing frivolous applications. In 2015, Clay filed a writ of error coram nobis in the Wilkinson County Chancery Court, asking the chancellor to command the circuit court to examine the record regarding a number of PCR claims or send the record to an appellate court so it could do so (*Clay I*). Treating Clay's petition as a PCR motion, the chancery court found that it lacked subject-matter jurisdiction. Furthermore, because Clay had not obtained the Mississippi Supreme Court's leave to file a PCR motion, the chancery court held that it could not transfer the petition. Consequently, the chancellor dismissed the PCR motion. One month later, Clay filed a motion for automatic expunction in the circuit court seeking to expunge his three 1979 convictions and again arguing

that the three convictions should count as one, and since that conviction was his first, the circuit court should expunge it (*Clay II*). The circuit court denied the motion. Clay appealed the decisions of the chancery court and circuit court.

### **ISSUES**

Whether the (1) chancery court erred in dismissing Clay's petition for writ of error coram nobis in *Clay I*; (2) circuit erred in denying Clay's petition to expunge his three 1979 convictions in *Clay II*; and (3) circuit court judge erred in failing to recuse himself from the aggravated-assault trial.

### **HOLDING**

(1) Because Clay's aggravated-assault conviction had been affirmed on direct appeal, and he had not fulfilled his obligation to obtain leave from the Mississippi Supreme Court to file a PCR motion, the petition could not be transferred. Consequently, the chancery court did not err in dismissing the petition in *Clay I*. (2) Because Clay had been adjudicated guilty, his guilty pleas did not occur within six months prior to March 31, 1983, and he was twenty-seven years old when he entered the guilty pleas, the circuit court did not err in denying Clay's petition to expunge his three 1979 convictions in *Clay II*. (3) Because Clay never obtained leave to file a PCR and the issue of recusal was never presented to the circuit court, the issue of recusal was procedurally barred. Therefore, the Court of Appeals affirmed the judgments of the Wilkinson County Chancery and Circuit Courts.

#### **Affirmed - 2015-CP-01843-COA (May 16, 2017)**

En Banc Opinion by Presiding Judge Irving  
Hon. Forrest A. Johnson Jr. (Wilkinson County Circuit Court)  
*Pro se* for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

#### **Consolidated with:**

#### **Affirmed - 2016-CP-00020-COA (May 16, 2017)**

Hon. George Ward. (Wilkinson County Chancery Court)  
*Pro se* for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee  
Briefed by [Bethany Poppelreiter](#)

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