

**MISSISSIPPI SUPREME COURT DECISIONS – MAY 25, 2017****SUPREME COURT - CIVIL CASES****BALLARD V. BALLARD****CIVIL - DOMESTIC RELATIONS**

**CHILD CUSTODY - ALBRIGHT FACTORS - ON-THE-RECORD ANALYSIS** - If the court finds one of the factors that rebuts the natural parent presumption has been proven, then the presumption vanishes, and the court must go further to determine custody based on the best interests of the child through an on-the-record analysis of the *Albright* factors

**MARITAL ESTATE - EQUITABLE DISTRIBUTION - REQUIREMENTS** - *Ferguson* requires consideration of the eight factors, or a finding of inapplicability

**MARITAL ESTATE - EQUITABLE DISTRIBUTION - FAILURE TO CONSIDER FACTORS** - The failure to consider all applicable *Ferguson* factors is error and mandates reversal

**DIVORCE - ATTORNEY'S FEES - DISCRETION OF TRIAL COURT** - An award of attorney's fees in divorce cases is largely a matter entrusted to the sound discretion of the trial court

**FACTS**

On June 10, 2006, Candice and Marshall Ballard Married in Ashland, Mississippi. Three children were born during the marriage. On January 5, 2015, Marshall filed for divorce, and Candice filed an answer and counter complaint. The chancery court appointed a guardian ad litem (GAL) and directed the GAL to investigate allegations of neglect surrounding the children and prepare a report of her investigation. The GAL's interviews uncovered multiple anecdotes that detailed domestic violence within the home. The GAL recommended the parties share joint legal custody of the children. The case went before chancery court on February 16, 2016. The chancery court overruled Candice's objections and allowed the GAL to present evidence from her reports. The parties put on evidence regarding the division of marital property. Candice also testified about her request for her attorney's fees where she stated that she would be paying her mother back for the attorney's fees that she provided. The chancery court never reached an *Albright* analysis in its opinion or order but still vested custody of the children with the Mississippi Department of Human Services and placed the children in the care of Marshall's parents. As to the equitable division of marital property, the chancellor determined that each party was entitled to half of all of the marital property. The chancery court further explained that parties might receive additional insurance proceeds from the marital home that was destroyed in a fire. The chancery court declined to award attorney's fees because both parties were employed and were likely to receive more proceeds from insurance payouts. On March 11, 2016, Candice filed a motion for reconsideration and, or in the alternative, a new trial. The chancery court denied the motion. Candice appealed.

**ISSUES**

Whether the chancery court erred in (1) denying Candice custody of her minor children by relying on GAL hearsay testimony in order to find Candice unfit and apply the presumption against custody to a parent with a history of family violence; (2) dividing the marital estate due to the chancellor's failure to make factor findings under *Ferguson* on the record; (3) failing to award attorney's fees to Candice because her parents paid her fees, and she must repay them; and (4) failing to decree possession of the lot upon which the marital home formerly had been situated before it burned.

**HOLDING**

(1) Because the GAL hearsay was not within one of the enumerated exceptions as substantive evidence, the chancery court erred by permitting and relying on this evidence. (2) Because the chancery court failed to perform an on-the-

record analysis of the *Ferguson* factors in its distribution of the marital estate, the chancery court erred in dividing the marital estate. (3) Because Candice said she could pay back her parents, the chancery court did not err in failing to award attorney's fees. (4) Because neither the opinion nor the order addressed the disposition of the lot, the chancery court erred by failing to address the parties' lot and properly provide for its distribution. Therefore, the Supreme Court affirmed in part and reversed in part the judgment of the DeSoto County Chancery Court.

**Affirmed in Part; Reversed in Part - 2016-CA-00615-SCT (May 25, 2017)**

Opinion by Justice Coleman

Hon. Percy L. Lynchard Jr. (DeSoto County Chancery Court)

John Wesley Hisaw & H.R. Garner for Appellant - A.E. (Rusty) Harlow Jr. & Kathi Crestman Wilson for Appellees

Briefed by [J. Marc McMillian](#)

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## BARLOW V. STATE BD. OF CHIROPRACTIC EXAM'RS

### CIVIL - STATE BOARDS & AGENCIES

**AGENCY DECISIONS - APPELLATE REVIEW - DEFERENCE** - Although the appeal from state boards and agencies is de novo under statute, the issues are to be tried within the confines of the deference given to agency decisions  
**CONSTITUTIONAL LAW - FIRST AMENDMENT - COMMERCIAL SPEECH** - The government may proscribe commercial speech that is misleading or related to unlawful activity

**BOARDS & AGENCIES - INVESTIGATION - COSTS** - The legislature must specifically provide that a professional governing body can recoup investigatory costs before the state board or agency may assess these costs

#### FACTS

Dr. Andy Barlow was disciplined by the Mississippi State Board of Chiropractic Examiners for advertising in violation of the statutes governing chiropractors. Barlow appealed.

#### ISSUES

Whether (1) the circuit court erred in failing to act as factfinder when Dr. Barlow was entitled to de novo appeal; (2) Miss. Code Ann. § 73-6-25(1)(a) was amended or repealed by implication by § 41-121-1; (3) § 733-6-25(1)(a) impermissibly infringes on Dr. Barlow's First Amendment right to free speech; and (4) the Board's decision regarding costs assessed was unsupported by substantial evidence, was arbitrary and capricious, was beyond the scope or power granted the agency by the Legislature, and violated Barlow's statutory and constitutional rights.

#### HOLDING

(1) Because the issues to be tried de novo on appeal are limited by deference granted to the agency, the issue of whether the circuit court should have acted as the factfinder was without merit. (2) Because the duty of chiropractors to inform patients of their actual training and qualifications does not permit additional advertising, the issue of § 73-5-25(1)(a) being repealed by implication was without merit. (3) Because the advertisements at issue were misleading, Dr. Barlow has no claim to First Amendment protections. (4) Because the Legislature did not specifically authorize the Board of Chiropractic Examiners to assess costs associated with investigations, the Board had no authority to assess Dr. Barlow the costs of its investigation. Therefore, the Supreme Court affirmed in part and reversed and rendered in part the decision of the Hinds County Circuit Court.

#### CONCURRENCE

Presiding Justice Dickinson wrote separately to emphasize that the prohibition in § 73-6-25 will be invalid under the First Amendment in some circumstances, but not under the facts of this case.

**Affirmed in Part; Reversed & Rendered in Part - 2016-SA-00110-SCT (May 25, 2017)**

Opinion by Justice King - Concurrence by Presiding Justice Dickinson

Hon. Tomie T. Green (Hinds County Circuit Court)  
John H. Ott & Todd Brentley Ott for Appellant - Leyser Q. Hayes, William Jeffrey Jernigan, & David K. Scott (Att’y Gen. Office) for Appellee  
Briefed by [Allyson Heine](#)

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## MCINTOSH V. MISS. REAL ESTATE COMM’N

### CIVIL - STATE BOARDS & AGENCIES

#### STATE BOARDS & AGENCIES - AUTHORITY - REVOCATION OR SUSPENSION OF LICENSE -

Pursuant to Miss. Code Ann. § 73-35-21, the Commission has the authority to revoke or suspend the license of a broker; however, this authority should be used judiciously and cautiously since the right given to the Commission also takes from the licensee the right to do business and make a living in the practice of his or her profession

**STATE BOARDS & AGENCIES - REAL ESTATE AGENT - IMPROPER DEALING -** Pursuant to Miss. Code Ann. § 73-35-21(1)(n), simple contact and/or communication with any mortgage broker or lender by a real estate licensee about any professional—including an appraiser—shall not constitute improper dealing

**STATE BOARDS & AGENCIES - AUTHORITY TO PROMULGATE RULES & REGULATIONS -** Pursuant to Miss. Code Ann. § 73-35-35, the Commission has the authority to adopt rules and regulations necessary for the conduct of its business; however, it must do so with adequate specificity and notice to its licensees that comports with due process

#### FACTS

Rita McIntosh holds a Mississippi real estate broker’s license. In 2013, McIntosh listed a home located in Pearl, Mississippi. A prospective buyer, through its real estate agent Deborah Hines, made an offer on the listing. During the course of the transaction, McIntosh contacted the buyer’s lender and requested that Logan Long not be assigned as the appraiser. The lender informed McIntosh that it did not select the appraiser, but rather the Federal Housing Administration Appraisal Management company did. Long was ultimately selected as the appraiser, and McIntosh ignored Long’s request for access to the property. McIntosh further expressed her displeasure about Long to Hines and the buyer’s lender. Later, Long filed a complaint with the Mississippi Real Estate Commission claiming that McIntosh had violated provisions of the Dodd-Frank Act and Mississippi law by attempting to have the appraisal steered from him. After its own investigation, the Commission proceeded on its own complaint against McIntosh, alleging she had engaged in improper dealing in violation of the Mississippi Real Estate Brokers License Act, and ultimately offered a thirty-day suspension to McIntosh during negotiations in lieu of a formal hearing. McIntosh rejected the offer and elected to have a formal hearing. After the hearing, the Commission imposed a ninety-day suspension, plus a thirty-day suspension, eight months’ probation, and continuing education courses. McIntosh appealed to the Rankin County Circuit Court, which affirmed the Commission’s order. McIntosh appealed.

#### ISSUE

Whether the trial court erred in finding that McIntosh’s conduct constituted improper dealing.

#### HOLDING

Because the Commission’s rules and regulations failed to provide adequate specificity and notice to its licensees, as required by due process, McIntosh’s conduct did not constitute improper dealing. Therefore, the Supreme Court reversed and rendered the judgment of the Rankin County Circuit Court.

#### DISSENT

Justice King argued that, because the facts illustrated a “close case,” the Court should give deference to the agency’s decision and affirm the lower court’s decision to uphold the Commission’s findings.

**Reversed & Rendered - 2015-SA-01086-SCT (May 25, 2017)**

En Banc Opinion by Justice Beam Dissent by Justice King  
Hon. John Huey Emfinger (Rankin County Circuit Court)  
K.F. Boackle, Joe S. Deaton III, & Richard Jason Canterbury for Appellant - William Holcomb Hussey & John L. Maxey II for Appellee  
Briefed by [Bethany Poppelreiter](#)

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## SHUMAKE V. SHUMAKE

### CIVIL - DOMESTIC RELATIONS

**FAMILY LAW - ALIMONY - EQUITABLE LIENS** - A chancellor can impose any relief to which a party is entitled to by the proof and which is within the jurisdiction of the court to grant

**FAMILY LAW - ALIMONY - MATERIAL CHANGE IN CIRCUMSTANCE** - A chancellor may find no material change in circumstance if the financial disparity between the parties is not substantially different than it had been at the time of divorce

**FAMILY LAW - ATTORNEY'S FEES - AWARD FOR MODIFICATION ACTION** - In an alimony modification action, where a party is financially able to pay her attorney's fees, an award of attorney's fees is not appropriate

**FAMILY LAW - BANKRUPTCY - PAYMENT OF ARREARAGE** - A bankruptcy discharge does not discharge a husband's obligation to his wife, only to his lender

### FACTS

Leslie Shumake and Katarina Shumake obtained a divorce in February 2009. After an initial order of alimony payments and subsequent complaints by Katarina of non-payment, hearings were conducted following Leslie's bankruptcy filing. The chancellor adjusted the alimony payments and ordered Leslie to pay an arrearage of \$58,550 in \$1,500 monthly alimony payments. The Court of Appeals overturned the latter order. The Mississippi Supreme Court reversed, ultimately upholding the chancellor's decision. Katarina would again file a complaint in 2014, citing Leslie's failure to maintain payments, as well as a failure to not pay the arrearage on the first mortgage of the marital domicile, as ordered in the original judgment. The chancellor ultimately entered judgment against Leslie, awarding the alimony payment and mortgage payment as well as interest and attorney's fees to Katarina. The judgment also included an equitable lien against Leslie's law practice for future income. Leslie appealed.

### ISSUES

Whether the chancery court erred in (1) imposing an equitable lien against Leslie's law firm; (2) denying Leslie's motion to modify the amount of alimony obligation; (3) calculating the amount of attorney's fees awarded to Katarina; and (4) awarding Katarina the unpaid balance of the arrearage owed on the former first marriage.

### HOLDING

(1) Because Katarina's prayer for general relief was sufficient to have placed Leslie on notice, the chancellor was empowered to impose an equitable lien, as such was within the jurisdiction of the court to grant. (2) Because the financial disparity between the parties was not substantially different than it had been at the time of the divorce, the chancellor did not abuse his discretion in finding that no material change in circumstances occurred and thus that modification of alimony was unwarranted. (3) Because Katarina was not entitled to attorney's fees for defending the modification action absent a finding of inability to pay, the chancellor erred in failing to subtract the fees attributable to such a modification action. (4) Because the chancellor originally ordered Leslie to pay the first mortgage arrearage immediately following divorce, and Leslie's bankruptcy only discharged his obligation to the lender, not his former wife, the chancellor did not err in ordering Leslie to pay the mortgage arrearage debt owed to his former wife. Therefore, the Supreme Court affirmed in part and reversed in part the judgment of the Desoto County Chancery Court.

**Affirmed in Part, Reversed & Remanded in Part - 2015-CA-01622-SCT (May 25, 2017)**

Opinion by Justice Kitchens  
Hon. Robert L. Lancaster (DeSoto County Chancery Court)  
*Pro Se* for Appellant - T. Jackson Lyons for Appellee  
Briefed by [Horacio Hernandez](#)

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## SMITH V. WEBSTER

### CIVIL - ELECTION CONTEST

**ELECTION LAW - EXAMINING BALLOT BOX** - Miss. Code Ann. §25-15-911(1) does allow a candidate to examine the contents of a ballot box within 12 days after the election commission has fully canvassed the contents, but it does not allow a candidate to make copies or scans of the contents

**ELECTION LAW - REVIEWING - ELECTION RESULTS** - No genuine issue of material fact exists when discounting allegedly illegally-counted votes does not change the original election results

**CIVIL PROCEDURE - SUMMARY JUDGMENT - DISMISSING OUTSTANDING MOTIONS** - A trial court's grant of summary judgment will dismiss as moot all other outstanding motions; this dismissal does not require the judge to enter a separate order disposing of another outstanding motion

### FACTS

In November 2014, the general election for the circuit judge seat in Mississippi's eleventh circuit was held, with the result being Charles Webster beating Chaka Smith by 3,255 votes to 2,369 votes, a margin of 886 votes. Of the total votes cast, 390 were absentee ballot voters; Webster received 296 of these votes. After the election results were finalized, Smith argued that the election was unfair because 600 people allegedly improperly casted their votes or were unable to cast their votes due to misassignment. Smith examined the ballot boxes and requested to scan or photocopy the contents, to which she was denied. After contesting the election results in trial court, the judge gave Smith fifteen days to submit a list of specific documents from the ballot box that she wanted to copy, but Smith did not comply with this order. The trial court granted Webster's motion for summary judgment, finding that even if the court discounted the allegedly illegal votes, Webster still would have won the election by a margin of 84 votes. Smith appealed.

### ISSUES

Whether the trial court (1) erred denying Smith the ability to photocopy the contents of the ballot box, (2) denied Smith discovery by refusing to allow her to reexamine the contents of the ballot box after she filed her lawsuit, (3) committed reversible error by granting summary judgment to Webster in the presence of genuine issue of material fact, and (4) abused its discretion by not ruling on Smith's Miss. R. Civ. P. 54(b) motion for reconsideration.

### HOLDING

(1) Because § 23-15-911(1) unambiguously does not create a right to copy or scan materials from the ballot box, the Court found the argument to be without merit. (2) Because Smith did not comply with the special judge's order to request documents pertaining to specific voters that she would like to copy, this issue was also without merit. (3) Because Webster would have still won the vote even if the allegedly illegal votes were removed from the results, no genuine issue of material fact existed concerning the absentee ballots. (4) Because the trial court found "all other outstanding motions to be dismissed as moot," Smith's R. 54(b) motion was dismissed without error.

### Affirmed - 2015-EC-01562-SCT (May 25, 2017)

Opinion by Justice Chamberlin  
Hon. M. James Chaney Jr. (Quitman County Circuit Court)  
Ellis Turnage for Appellant - *Pro se* for Appellee  
Briefed by [Daniel E. Smith IV](#)

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## SUPREME COURT - CRIMINAL CASES

### COZART V. STATE

#### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - SENTENCING - EX-POST FACTO VIOLATION** - An ex-post facto law is one which creates a new offense or changes the punishment to the detriment of the accused, after the commission of the crime, and is therefore unconstitutional

**CRIMINAL PROCEDURE - SENTENCING - STATUTORY GUIDELINES** - With the exception of limited circumstances, defendants are sentenced under the version of the statute that was in place at the time the crime was committed

**CRIMINAL PROCEDURE - SENTENCING - REVIEW** - When an error impacts a fundamental right of the defendant, procedural rules give way to prevent a miscarriage of justice, requiring the Court to address issues on plain-error review and correct any fundamental violations

#### FACTS

Following a three-day jury trial in Desoto County, defendant Zachary Cozart was found guilty of manslaughter and sentenced to thirty years in the custody of the Mississippi Department of Corrections, pursuant to Miss. Code Ann. § 97-3-25(b). Cozart argued that when he was indicted in 2010, the punishment for manslaughter was imprisonment in the penitentiary for “not less than two years, not more than twenty years.” However, when sentenced, the trial judge applied the law’s 2013 update, which expanded on the original law by including a provision for child homicide and increased sentence “not to exceed thirty (30) years.” Cozart appealed and argued error in violation of the State’s Ex Post Facto Clause. The Court of Appeals determined that, while Cozart was sentenced under a statute not in effect at the time of his offense, his failure to object to the potential sentence prior to the jury’s instructions effectively waived his right to assert an ex post facto violation. Cozart appealed.

#### ISSUE

Whether the trial court erred in sentencing Cozart to a thirty-year sentence.

#### HOLDING

Because the application of the revised penalty for manslaughter constituted an ex post facto violation affecting Cozart’s substantial right, and this violation amounted to plain error, the thirty-year sentence was improper. Therefore, the Supreme Court reversed and remanded the judgment of the Desoto County Circuit Court.

#### **Reversed & Remanded - 2014-CT-01741-SCT (May 25, 2017)**

En Banc Opinion by Justice Beam

Hon. Gerald W. Chatham, Sr. (Desoto County Circuit Court)

Ralph Stewart Guernsey for Appellant - Katy Taylor Gerber & Jeffrey A. Klingfuss (Att’y Gen. Office) for Appellee

Briefed by [Davis Vaughn](#)

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## SUPREME COURT - ORDERS

### KELLER V. STATE

#### COURT ORDER

#### FACTS

Jason Lee Keller was convicted of capital murder and sentenced to death in Harrison County. His conviction and death sentence were affirmed by the Mississippi Supreme Court. Keller filed for leave to proceed in the trial court with a PCR petition, raising several issues.

### **ORDER**

The Mississippi Supreme Court held that Keller's issue of ineffective assistance of counsel was meritorious because Keller's trial counsel failed to investigate, collect, and present mitigation evidence to the jury. Keller presented numerous affidavits detailing the mitigating evidence that should have been presented at the sentencing phase of Keller's trial. After the Supreme Court examined what was presented at trial in support of mitigation with the mitigating evidence that was then presented, the Supreme Court found that Keller made a substantial showing that he received ineffective assistance of counsel. The Supreme Court granted Keller leave to pursue this issue in the Harrison County Circuit Court. The remaining issues that Keller argued were denied. Therefore, the Mississippi Supreme Court ordered that the motion to pursue post-conviction relief by Keller should be granted regarding the issue of ineffective assistance of trial counsel for failure to investigate and discover significant mitigating evidence.

### **OBJECTION**

Justice Kitchens objected, arguing that the petition should have also granted leave to proceed on the issue of ineffective counsel at trial because in the sentencing phase, Keller's lawyer failed to object to the use of a non-final armed robbery conviction as a statutory aggravating circumstance.

**Granted - 2014-DR-00808-SCT (May 23, 2017)**

En Banc Order by Justice Coleman - Objection by Justice Kitchens

Briefed by [Morgan L. Stringer](#)

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## **LODEN V. STATE**

### **COURT ORDER**

### **ISSUE**

Whether the State's use of midazolam as part of the three-drug, lethal-injection protocol violates Miss. Code Ann. § 99-19-51 because it is not an "ultra-short acting barbiturate or other similar drug."

### **ORDER**

Because the Legislature has amended Miss. Code Ann. § 99-19-51 to require an "appropriate anesthetic or sedative," Loden's issue is moot. Therefore, the Supreme Court ordered Loden's Successive Petition for Post-Conviction Relief dismissed as moot.

### **AGREEMENT**

Presiding Justice Dickinson clarified that the petition was dismissed because it was based on a portion of § 99-19-51 that was amended. The dismissal did not address whether midazolam is permissible under the new statute.

### **OBJECTION**

Justice Kitchens argued that supplemental briefing should have been ordered to allow the parties to present arguments based on the new statutory requirements.

**Ordered - 2016-DR-00962-SCT (May 25, 2017)**

En Banc Order by Presiding Justice Randolph - Agreement by Presiding Justice Dickinson - Objection by Justice Kitchens

Briefed by [Brittany Bane](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – MAY 23, 2017

### COURT OF APPEALS - CIVIL CASES

#### COMPETITION MARINE OF MS, INC. v. WHITNEY BANK

##### CIVIL - CONTRACT

**CONTRACT - DEBT COLLECTION - REMEDIES** - A lender has multiple remedies upon default, and may sue upon the note before foreclosing on collateral

**CONTRACT - DEBT COLLECTION - GOOD FAITH & FAIR DEALING** - Taking actions expressly authorized by the contract cannot breach the implied covenant of good faith and fair dealing

**APPELLATE REVIEW - STARE DECISIS - COURT OF APPEALS** - The Court of Appeals is not at liberty to overturn Mississippi Supreme Court precedent, regardless of any possible public-policy benefits or principles of equity

##### FACTS

Competition Marine of MS, Inc. executed two promissory notes in favor of Whitney Bank. Gina Nadeau, president of Competition Marine, executed a commercial guaranty for the loan, personally guaranteeing full repayment for Competition Marine's debt to the bank. These promissory notes were secured by deeds of trusts in real property located in Gulfport. On July 15, 2014, counsel for Whitney Bank sent two letters to Nadeau demanding payment on the loans as they were in default. When payment was not made, Whitney Bank brought suit against Comp. Marine and Nadeau for monetary damages. Competition Marine and Nadeau in turn filed a counterclaim against Whitney Bank on the grounds the bank intentionally misled them into believing the loans were current in order to add fees and interest to the debt. Competition Marine also claimed that Whitney Bank was deliberately bringing financial harm to them by suing on collection of the debt rather than invoking rights under the deeds of trust and that the bank should be required to foreclose on the underlying collateral before seeking monetary damages, as a foreclosure sale would reduce Nadeau's liability. The Harrison County Circuit Court granted summary judgment in favor of Whitney Bank. Competition Marine and Nadeau appealed.

##### ISSUE

Whether (1) Whitney Bank acted reasonably in choosing to proceed with a collection action against Competition Marine before pursuing foreclosure proceedings on the real-estate collateral used to secure the loan, and (2) public policy is better served by changing the law in this area to require lenders to pursue foreclosure before a collection action.

##### HOLDING

(1) Because a lender has many remedies available upon default and such a collection action was expressly authorized by the contract, the court did not err in granting summary judgment in favor of Whitney Bank. (2) Because the Court of Appeals is bound to uphold all precedent handed down from the Supreme Court, the Court of Appeals does not have the power to change the law and thus could not overturn the Harrison County Circuit Court's decision on these grounds. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

##### **Affirmed - 2016-CA-00007-COA (May 23, 2017)**

Opinion by Judge Barnes

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, First Judicial Dist.)

William B. Weatherly & Richard Clarence Smith for Appellants - Michael Anthony Shaw & Benjamin Harte Harris III for Appellee

Briefed by [Joseph Rychlak](#)

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## GULFPORT PARTNERS V. HARRISON COUNTY BD. OF SUPERVISORS

### CIVIL - OTHER

**STATUTORY INTERPRETATION - LEGISLATIVE INTENT - PLAIN MEANING** - If the words of a statute are clear and unambiguous, we apply the plain meaning of the statute, which if is not defined in the statute, derives from the term's common and generally accepted meaning

**CIVIL PROCEDURE - COSTS ASSESSED - APPEAL BONDS** - Pursuant to Miss. R. Civ. P. 36(c), where a statute requires the appellant to post a bond in order to appeal, the bond premiums constitute an official expense that a court will assess against a litigant

**CIVIL PROCEDURE - COSTS ASSESSED - PREJUDGMENT INTEREST** - The party requesting prejudgment interest is required to make a demand for prejudgment interest in its complaint

### FACTS

While Gulfport Partners's appeal of its 2011 ad valorem county tax assessment was pending, the Mississippi Supreme Court handed down a decision binding on it and several other pending cases. The cases were consolidated and all agreed to an amount of the assessment for each property, which was entered as an agreed final judgment. The agreed order left continuing jurisdiction to consider costs and/or interests. Gulfport filed a motion to tax costs and prejudgment interest of premiums paid for bonds to reserve rights pending appeal and the prejudgment interest from the date of overpayment of taxes until the date of refund. The trial court denied the motion. Gulfport Partners appealed.

### ISSUES

Whether the circuit court erred when it denied Gulfport Partners's motion for (1) the cost of bond premiums required by statute to perfect the appeal and (2) prejudgment interest on the liquidated amount of tax in dispute required to be paid by the statute.

### HOLDING

(1) Because the plain language of the statute, in conjunction with the meaning of costs in Miss. R. Civ. P. 36(c) illustrates that costs include bond premiums necessitated by the statute, Gulfport Partner's bond premiums were assessable to official costs. (2) Because Gulfport Partners failed to make a demand as required for prejudgment interests in its pleadings, it could not recover those costs. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Harrison County Circuit Court.

### DISSENT

Judge Carlton dissented, arguing that the Mississippi Rules of Appellate Procedure should apply to proceedings in circuit court when the court sits as an appellate court.

#### **Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00062-COA (May 23, 2017)**

Opinion by Chief Judge Lee - Dissent by Judge Carlton

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

John G. Corlew, Kathy K. Smith, & Lynn Chain Wall for Appellants - Tim C. Holleman & Patrick Taylor Guild for Appellees

#### **Consolidated with:**

#### **Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00087-COA (May 23, 2017)**

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

John G. Corlew, Kathy K. Smith, & Lynn Chain Wall for Appellants - Tim C. Holleman & Patrick Taylor Guild for Appellees

#### **Consolidated with:**

#### **Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00090-COA (May 23, 2017)**

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

John G. Corlew, Kathy K. Smith, & Lynn Chain Wall for Appellants - Tim C. Holleman & Patrick Taylor Guild for Appellees

#### **Consolidated with:**

#### **Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00091-COA (May 23, 2017)**

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

John G. Corlew, Kathy K. Smith, & Lynn Chain Wall for Appellants - Tim C. Holleman & Patrick Taylor Guild for Appellees

Briefed by [Jonathan M. Barnes](#)

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## LANE V. MISS. DEP'T TRANSP.

### CIVIL - PERSONAL INJURY

**MISS. TORT CLAIMS ACT - NOTICE - REQUIREMENTS** - Pursuant to Miss. Code Ann. § 11-46-11, at least ninety days prior to filing suit against a governmental entity, a plaintiff must file a notice of claim with the chief executive officer of the governmental entity; notice must (1) be in writing, (2) be delivered in person or by registered or certified United States mail, and (3) contain a short and plain statement of the facts upon which the claim is based

**MISS. TORT CLAIMS ACT - NOTICE - CONTENTS** - Miss. Code Ann. § 11-46-11(2) expressly identifies seven required categories of information which must be included in the notice of claim: (1) the circumstances which brought about the injury; (2) the extent of the injury; (3) the time and place the injury occurred; (4) the names of all persons known to be involved; (5) the amount of money damages sought; (6) the residence of the person making the claim at the time of the injury; and (7) the claimant's residence at the time of filing the notice

**MISS. TORT CLAIMS ACT - NOTICE - SUBSTANTIAL COMPLIANCE** - The Supreme Court requires substantial compliance with the MTCA notice provisions, and while substantial compliance with the notice provisions is sufficient, substantial compliance is not the same as, nor a substitute for, non-compliance

**MISS. TORT CLAIMS ACT - SUBSTANTIAL COMPLIANCE - DETERMINATION** - The determination of substantial compliance is a legal, though fact-sensitive, question, and a defendant is entitled to summary judgment if the plaintiff fails to comply with the MTCA's pre-suit notice provisions

### FACTS

On October 2, 2015, Harry Lane filed a notice of claim with the Mississippi Department of Transportation (MDOT), which stated that Lane was driving his motorcycle when he hit a damaged area in the road causing Lane to lose control of his motorcycle. Additionally, the notice of claim stated MDOT had acted negligently for failure to properly inspect and maintain the roadway, MDOT acted with reckless disregard to the members of the public who may have been operating their vehicles southbound of the ramp of MS 67, and Lane suffered and continued to suffer damages in excess of \$28,983.53 in personal and property damages. Lane next filed suit against MDOT in the Harrison County Circuit Court. MDOT answered and filed a motion for summary judgment arguing that the content of Lane's pre-suit notice of claim failed to satisfy the requirements of Miss. Code Ann. § 11-46-11, which the trial court granted. Lane appealed.

### ISSUE

Whether the trial court erred in finding that Lane's pre-suit notice of claim was insufficient to satisfy the requirements of the Mississippi Tort Claims Act (MTCA), specifically Miss. Code Ann. § 11-46-11(2).

### HOLDING

Because Lane's notice of claim provided no information to satisfy three requirements of Miss. Code Ann. § 11-46-11(2)—the extent of the injury, his residence at the time of the injury, and his residence at the time of the claim—the trial court did not err in finding that Lane's notice of claim was insufficient to satisfy the requirements of the MTCA. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2016-SA-00974-COA (May 23, 2017)**

Opinion by Judge Wilson

Hon. Roger T. Clark (Harrison County Circuit Court, First Judicial Dist.)

Michael Duane Mitchell & Samuel S. Creel Jr. for Appellant - Trace D. McRaney for Appellee

Briefed by [Victoria Jones](#)

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## REEL V. WARREN

### CIVIL - PERSONAL INJURY

**EVIDENCE - WITNESSES - CREDIBILITY** - It is well established that it is within the province of the jury to determine the credibility of witnesses; the jury may believe or disbelieve, accept or reject the utterances of any witnesses

**CIVIL PROCEDURE - AWARDS - AMOUNT OF DAMAGES** - The amount of damages awarded is a jury question; because a jury award is not merely advisory, it generally will not be set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount, and outrageous

**CIVIL PROCEDURE - AWARDS - ADDITUR** - Additurs represent a judicial incursion into the traditional habitat of the jury and therefore should never be employed without great caution

**CIVIL PROCEDURE - JUDGMENT NOTWITHSTANDING THE VERDICT** - When appealing the denial of a motion for judgment notwithstanding the verdict (JNOV) as error, appellant must provide contentions with respect to the issues presented, and the reasons for those contentions, with citation to authorities, statutes, and parts of the record relied on; if appellant does not provide such, then the argument is procedurally barred for lack of relevant authority

### FACTS

Sanford Warren rear-ended a vehicle operated by Joe Reel's brother, in which Reel was a passenger. Warren admitted negligence, and the case proceeded to trial on the issue of damages. Reel submitted evidence of medical expenses totaling \$10,914.12 and claimed neck and back pain that necessitated medical treatment as a result of the accident. At trial, Warren submitted photographs of Reel's vehicle, an accident report form from the police department that made no mention of injuries sustained at the scene, and admissions from Reel that he proceeded from the scene to another location for his job and never went to the emergency room. On direct examination Reel and his wife both denied that Reel complained of neck pain prior to the accident. However, on cross-examination it was demonstrated that Reel complained of neck pain prior to the accident and had undergone magnetic resonance imaging because of said pain. Also, pre-accident medical records showed that Reel suffered from cervical-degenerative-disc disease. Warren's medical expert testified that based on comparisons of Reel's pre- and post-accident testing, the accident did not change the condition of Reel's neck. The jury found for Reel in the amount of \$2,480.12. Reel moved for a new trial or, alternatively, for additur or a judgment notwithstanding the verdict. The trial court denied Reel's motion. Reel appealed.

### ISSUE

Whether the trial court erred in denying Reel's post-trial motions.

### HOLDING

Because the jury had ample evidentiary support to return its verdict, which was not against the overwhelming weight of evidence and in no way evinced bias or prejudice, the trial court did not abuse its discretion in denying Reel's post-trial motions. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2016-CA-00745-COA (May 23, 2017)**

Opinion by Judge Greenlee

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

John Hunter Stevens for Appellant - Jeremy Tristan Hutto for Appellee

Briefed by [Brittany Barbee](#)

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## SCHMIDT V. TRUE

## CIVIL - WILLS, TRUSTS, & ESTATES

**WILLS - PROBATE - NECESSARY PARTIES** - In any proceeding to contest the validity of a will, those whose direct, pecuniary interests will be either detrimentally or advantageously affected by a probate of the will, ordinarily including a decedent's heirs at law, shall be made parties

**WILLS - NONJOINER - PLEADINGS** - A judgment entered in a will contest absent joinder of all necessary parties is void and must be set aside, and may be raised for the first time on appeal, even by a party who participated below and failed to join the missing parties

### FACTS

Dorothy True died on February 18, 2014, at the age of 100. Dorothy was survived by her four children, Patricia "Ann" Schmidt, Mary Hedgewood, John True, and James "Jim" True. On September 24, 2014, Jim filed a petition to probate an eight-page holographic will signed by Dorothy. The will, notarized on one page and signed by two neighbors as witnesses on another page, named John and Jim as executors. John passed away on August 24, 2014, and was survived by his son Jody. The will contained a no-contest clause, bequests of money and personal property, and instructions for Dorothy's funeral. Bequests were made to all four then-living children and to Jim's son, Jamie. While the pages of the document were numbered, it was unclear when the page numbers were added, as the chancellor concluded they did not appear logical. Words had also been scratched out and added in various parts of the document. On March 26, 2015, Ann and Mary filed a petition to contest and set aside the will, asserting that the document did not satisfy the requirements of a valid holographic or non-holographic will. The petition also stated that another daughter, Frances Davis, who had two living daughters, predeceased Dorothy. At a hearing held on April 12, 2016, Ann and Mary testified that most of the will was in their mother's handwriting but expressed doubt as to certain words that were added where other words were scratched out. Ann testified that she did not believe the document's page numbers were in Dorothy's handwriting. At the conclusion of the hearing, the chancellor ruled that the document was a valid holographic will. The chancellor found that although someone else added the page numbers after the fact, the will was not invalid, and reordered the pages to have Dorothy's signature appear on the final page of the will, with no material provisions after it. Therefore, the chancellor denied Ann and Mary's petition to contest the will. Ann and Mary appealed.

### ISSUE

Whether the chancery court lacked jurisdiction because necessary parties were not joined.

### HOLDING

Because John's estate, Jamie, and Frances' two daughters were entitled to inherit under the contested will and the law of intestate succession, all necessary parties were not joined pursuant to Miss. Code Ann. § 91-7-25, and this statutory requirement cannot be waived. Therefore, the Court of Appeals reversed and remanded the judgment of the Yalobusha County Chancery Court.

#### **Reversed & Remanded - 2016-CA-00718-COA (May 23, 2017)**

Opinion by Judge Wilson

Hon. Vicki B. Daniels (Yalobusha County Chancery Court, Second Judicial Dist.)

Darrin Jay Westfaul for Appellants - Kirkland Caldwell Willingham for Appellee

Briefed by [Amber Kipfmiller](#)

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## SHORTIE V. GEORGE

### CIVIL - WRONGFUL DEATH

**WRONGFUL DEATH - CHOICE OF LAW - CENTER OF GRAVITY DOCTRINE** - In conflict of law cases, Mississippi applies the law of the place which has the most significant relationship to the event and parties, or which,

because of the relationship or contact with the event and parties, has the greatest concern with the specific issues with respect to the liabilities and rights of the parties to the litigation

**CHOICE OF LAW - CENTER OF GRAVITY DOCTRINE - FACTORS** - When determining what law to apply, Mississippi considers the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation, place of business of the parties, and the place where the relationship, if any, between the parties is centered

**CHOICE OF LAW - AFFIRMATIVE DEFENSE - WAIVER** - A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver

**WRONGFUL DEATH - CHOICE OF LAW - WHEN TO RAISE** - The duty to identify beneficiaries includes a duty to identify the percentages that the beneficiaries would be entitled to take, we find that choice-of-issues should be brought early in the proceedings

## **FACTS**

Charles and Oner Shortie were married residents of South Carolina. Oner had five adult children from a previous marriage, one being Rochelle George. On March 26, 2014, Charles and Oner were involved in an accident in Sunflower County, Mississippi. Oner died as a result of the injuries she sustained. After Rochelle filed a complaint in Mississippi and Charles filed a complaint in South Carolina, the two parties consolidated their cases and successfully mediated their disputes. On April 20, 2015, Rochelle filed a motion asserting that Mississippi law governed the distribution. Charles responded with a motion arguing that South Carolina law governed the distribution. The trial court held that Mississippi had the most significant relationship with the occurrence and with the parties. Charles appealed.

## **ISSUES**

Whether the trial court erred in (1) failing to apply a proper choice-of-law analysis when it determined Mississippi law and not South Carolina law applied to the distribution of wrongful-death proceeds; and (2) finding that Charles Shortie waived his right to raise the conflict-of-law issue.

## **HOLDING**

(1) Because Mississippi's sole relationship with the occurrence was the purely adventitious circumstance that the accident happened in Mississippi, the choice of law analysis required that the law of South Carolina apply to the distribution of the wrongful death proceeds. (2) Because Charles failed to raise the choice-of-law issue early in the proceedings, Charles waived his right to raise the conflict-of-law issue on appeal. Therefore, Court of Appeals affirmed the decision of the Sunflower County Circuit Court.

**Affirmed - 2015-CA-00944-COA (May 23, 2017)**

Opinion by Presiding Judge Griffis

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

William R. Striebeck & Robert A. Biggs III for Appellant - James Byrnes Grenfell for Appellee

Briefed by [Zachary Roberson](#)

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## **TAYLOR V. RELIANCE WELL SERV., INC.**

### **WORKERS' COMPENSATION**

**WORKERS' COMPENSATION - SETTLEMENT - DISCRETION TO REOPEN A CASE** - Pursuant to Miss. Code Ann. § 71-3-51, the Commission clearly has discretion to reopen a case in which it previously approved a settlement, if its prior order approving the settlement was based on a mistake of fact

**WORKERS' COMPENSATION - JURISDICTION - REFUSAL TO APPROVE SETTLEMENT** - Pursuant to Miss. Code Ann. § 71-3-53, the Commission is authorized to refuse to approve the settlement only if it determines that settlement was not in the best interest of the injured worker or his dependents

### FACTS

In 2014, Thomas Taylor was in the scope and course of his employment at Reliance Well Service, Inc. when a pipe fell and struck him in the head and neck. On May 3, 2016, Taylor and Reliance Well agreed to settle Taylor's claim for a total sum of \$71,659.43. On May 6, counsel for Reliance Well sent Taylor's attorney the signed settlement documents, including an application to the Commission for approval of the settlement. Taylor countersigned the application, and it was delivered to the Commission on May 13. On May 16, Taylor died. On May 18, the Commission approved the settlement, unaware that Taylor had passed away. On May 20, counsel for Reliance Well emailed the Commission to inquire whether the settlement had been approved. On June 6, 2016, Reliance Well filed a motion to vacate the Commission's order approving the settlement. On July 15, 2016, pursuant to Miss. Code Ann. § 71-3-53, the Commission entered an order setting aside its prior order approving the settlement arguing that the order was based on a mistake of fact—that the claimant was still alive—and should be set aside. Taylor appealed.

### ISSUE

Whether (1) Reliance Well had a right to back out of its agreement to settle Taylor's claim because he died before the settlement was approved by the Commission; and (2) Taylor's death was a valid reason for the Commission to set aside its prior order approving the settlement.

### HOLDING

(1) Because Reliance Well did not show how Taylor's death, after the settlement was already signed by the parties and submitted to the Commission, had any bearing on this issue, Reliance Well did not have a right to back out its agreement to settle Taylor's claim because he died. (2) Because an injured worker's non-work-related death, after a settlement agreement has already been signed and presented to the Commission for approval, does not implicate the statutory basis for disapproving a settlement, there was no material mistake of fact that justified setting aside the Commission's prior order approving the settlement. Therefore, the Court of Appeals reversed and remanded the judgment of the Mississippi Workers' Compensation Commission.

#### **Reversed & Remanded - 2016-WC-01165-COA (May 23, 2017)**

Opinion by Judge Wilson

Mississippi Workers' Compensation Commission

Lampton O'Neal Williams Jr. & Cory Morris Williams for Appellants - Ginger Moore Robey for Appellees

Briefed by [Lora Wuerdeman](#)

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## VINCENT V. RICKMAN

### CIVIL - DOMESTIC RELATIONS

**COURT ORDERS - COMPLIANCE - CONTEMPT** Failure to comply with a court order is prima facie evidence of contempt

**JUDGMENT - FAILURE TO COMPLY - CONTEMPT** - A contempt citation is appropriate only when the contemner has willfully and deliberately ignored the order of the court

**AWARDS - ATTORNEY'S FEES - INTENTIONAL MISCONDUCT** - Where a party's intentional misconduct causes the opposing party to expend time and money needlessly, attorney's fees should be awarded to the wronged party

### FACTS

In 1997, David Vincent and Joan Rickman were granted a divorce and Vincent was ordered to pay child support, pay one-half of his children's college expenses, and to implement an income-withholding order. Vincent refused to pay for

college expenses for one of his emancipated children and to implement the income-withholding, leading to a child support payment delinquency. Vincent was found in contempt for failure to pay his child-support obligations, and Rickman was awarded attorney's fees. Vincent appealed.

### **ISSUES**

Whether the chancellor erred in (1) finding Vincent in contempt for failure to implement an order for income withholding, (2) finding him in contempt for failure to abide by his obligation to pay for his children's college expenses, (3) finding him in contempt for failure to pay his child support, and (4) awarding attorney's fees.

### **HOLDING**

(1) Because the income-withholding order was neither vague nor ambiguous and Vincent took affirmative steps to be noncompliant, the issue was without merit. (2) Because Vincent made late child-support payments in violation of the previous order, the chancellor's finding of contempt for failure to pay was not manifestly wrong. (3) Because the obligation to pay for college expenses did not end once the children turned twenty-one, there was substantial evidence supporting the chancellor's finding. (4) Because Vincent intentionally failed to comply with his child-support requirements, which caused Rickman to expend time and money needlessly, the chancellor did not err in awarding attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Chancery Court.

**Affirmed - 2016-CA-00457-COA (May 23, 2017)**

Opinion by Judge Ishee

Hon. Vicki B. Daniels (Desoto County Chancery Court)

Byron Russell Mobley for Appellant - A.E. (Rusty) Harlow Jr. & Kathi Crestman Wilson for Appellee

Briefed by [Desire'e Martinelli](#)

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## **WEEKS V. CITY OF BILOXI**

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

**ADMINISTRATIVE LAW - APPELLATE REVIEW - FACTORS** - An agency's conclusions must remain undisturbed unless the agency's order (1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional rights

**ADMINISTRATIVE LAW - EMPLOYMENT LAW - MENTAL FITNESS** - An appointing authority may require any member in the classified service to meet the requirements of a satisfactory health exam when there are reasonable grounds to question said employee regarding the individual's mental suitability for employment

### **FACTS**

Ronald Weeks was found to be unfit to serve as a police officer for the city of Biloxi in 2007. After the Mayor requested psychological tests to be conducted, the Mayor found that Weeks's mental state was not suitable for that of a police officer, and he was terminated from employment in October 2007. Weeks timely appealed the City's decision to terminate him with the Biloxi Civil Service Commission. After many continuances, the hearing was held in 2013. The Commission found that the City had good cause to terminate Weeks's employment. Weeks filed an appeal with the circuit court, which affirmed the Commission's decision. Weeks appealed.

### **ISSUES**

Whether (1) the Commission had substantial evidence to find that there needed to be a fitness-for-duty exam; (2) the Commission erred in determining that Weeks received due process; (3) the Commission erred in determining that Weeks's termination was supported by psychological evidence; and (4) the Commission erred in admitting irrelevant evidence.

### **HOLDING**

(1) Because there was substantial evidence to support the finding, the Commission did not err. (2) Because the Commission found that the City complied with due process, the Commission did not err. (3) Because psychological test results gave cause for termination, the Commission did not err in determining the City acted in good faith. (4) Because the Commission correctly considered the psychological reports, the Commission did not err in considering irrelevant evidence. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

**Affirmed - 2016-CC-00050-COA (May 23, 2017)**

Opinion by Presiding Judge Griffis

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, Second Judicial Dist.)

Andrew Austin Clark & Russell S. Gill for Appellant - Gerald Henry Blessey & Tere R. Steel for Appellees

Briefed by [Tony Sax](#)

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

### **SHANKS V. STATE**

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

**POST-CONVICTION RELIEF - PROCEDURAL BAR - SUCCESSIVE MOTION** - An order denying a motion for post-conviction relief is considered a final judgment and a bar to a second or successive motion

**POST-CONVICTION RELIEF - PROCEDURAL BAR - STATUTE OF LIMITATIONS** - A defendant who pleads guilty has three years from the date of his judgment of conviction to file his motion for post-conviction relief

**POST-CONVICTION RELIEF - PROCEDURAL BAR - FUNDAMENTAL RIGHTS EXCEPTION** - Errors affecting fundamental constitutional rights are exceptions to procedural bars on motions for postconviction relief, but mere assertions of constitutional rights violations do not suffice to overcome the procedural bars

**CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS** - A valid guilty plea is one entered voluntarily and intelligently, meaning the defendant was advised concerning the nature of the charge against him and the consequences of the plea

**SENTENCING - MANDATORY SENTENCE - DELIBERATE DESIGN MURDER** - Miss. Code Ann. § 97-3-21 provides for a mandatory sentence of life imprisonment for defendants convicted of deliberate-design murder

#### **FACTS**

In 2003, Travis Shanks pled guilty to deliberate-design murder and received a sentence of life imprisonment. In 2006, Shanks filed his first motion for post-conviction relief (PCR), claiming his plea was involuntary, which the trial court denied, finding it barred by the three-year time limit. In 2015, Shanks filed his second PCR motion, which the trial court summarily dismissed. Shanks appealed.

#### **ISSUES**

Whether the trial court erred in finding (1) the PCR motion was procedurally barred; (2) Shanks was informed of the elements of the crime charged against him; (3) he entered his guilty plea knowingly, intelligently, and voluntarily; (4) finding he did not receive ineffective assistance of counsel; (5) Shanks was competent at the time of his guilty plea; and (6) finding Shanks's sentence was not illegal.

#### **HOLDING**

(1) Because Shanks' motion was a successive writ filed outside the statute of limitations and because he failed to show an exception applied, his motion was procedurally barred. (2) Because Shanks pled guilty to and was sentenced for first-degree murder, and because the Court of Appeals previously determined he was sufficiently informed of the elements of the crime, he was not denied due process. (3) Because the Court of Appeals previously found that he entered his plea agreement voluntarily and knowingly, his guilty plea was knowingly, intelligently, and voluntarily made. (4) Because he



relied solely on his own affidavit and because he swore under oath he was satisfied with his counsel in his guilty plea, Shanks did not receive ineffective assistance of counsel. (5) Because Shanks swore under oath in his guilty plea that he was mentally competent, and because he did not produce evidence beyond his own assertions, the trial court did not err in failing to conduct a competency hearing. (6) Because Shanks's sentence of life imprisonment was the mandatory sentence for deliberate-design murder, his sentence was not illegal. Therefore, the Court of Appeals affirmed the judgment of the Claiborne County Circuit Court.

**Affirmed - 2016-CP-00787-COA (May 23, 2017)**

Opinion by Judge Carlton

Hon. Lamar Pickard (Claiborne County Circuit Court)

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

Briefed by [Alison Guider](#)

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## SIMMONS V. STATE

### CIVIL - POST-CONVICTION RELIEF

**CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - NEWLY DISCOVERED EVIDENCE** - To succeed on a PCR claim based on newly discovered evidence, the petitioner must show: (1) the new evidence was discovered after the trial; (2) it could not, by due diligence, have been discovered prior to trial; (3) it is material to the issue and not merely cumulative or impeaching; and (4) the new evidence will probably produce a different result or verdict in the new trial

**CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS** - Post-conviction relief motions shall be made within three years after entry of the judgment of conviction in cases involving guilty pleas

**CRIMINAL PROCEDURE - POST-RELEASE SUPERVISION - REVOCATION** - A probationer does not have to be convicted of a crime to be in violation of his probation; rather, probation may be revoked when it is more likely than not that a violation has occurred

### FACTS

On January 8, 2010, Sharone Simmons was sentenced to ten years in MDOC custody, with eight years suspended and three years of post-release supervision (PRS), for uttering a forgery in violation of Miss. Code Ann. § 97-21-59. Simmons subsequently was arrested and made an appearance in court for the sale of cocaine. The trial court then revoked Simmons's PRS and imposed the previously suspended eight-year sentence. On July 9, 2014, the trial court accepted Simmons's guilty plea and sentenced him to one year for the cocaine possession to run consecutively to Simmons's eight-year sentence for the forgery charge. On April 19, 2016, Simmons filed a PCR motion to attack the validity of the 2010 forgery conviction. The trial court found Simmons's PCR motion time barred because it was filed six years after the conviction. Simmons appealed.

### ISSUES

Whether (1) the trial court unlawfully revoked Simmons's PRS; (2) newly discovered evidence entitled Simmons to relief; (3) Simmons's right against double jeopardy was violated; (4) whether Simmons's indictment was defective; and (5) Simmons's right to a speedy trial was violated.

### HOLDING

(1) Because the trial court's finding that Simmons violated the terms of his PRS was not clearly erroneous, Simmons's argument lacked merit. (2) Because Simmons failed to provide any support for his argument, there was no merit to the argument that he was entitled to relief. (3), (4), & (5) Because three of the issues related to Simmons's 2014 conviction,

the issues were not properly brought before the court, and the Court of Appeals declined to consider them on appeal. Therefore, the Court of Appeals affirmed the judgment of the Lafayette County Circuit Court.

**Affirmed - 2016-CP-00720-COA (May 23, 2017)**

Opinion by Judge Carlton

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

*Pro se* for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Blake Brookshire](#)

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

### **CHAMBLISS V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - MISTRIAL - IMPROPER COMMENTS** - While a comment by a single prospective juror during voir dire may taint the entire panel, where there is no evidence of such a taint, the court may correctly refuse to disqualify the entire panel from service if the jury affirms that it can render a verdict based solely on the evidence brought before the court

**CONSTITUTIONAL LAW - SIXTH AMENDMENT - CONFRONTATION CLAUSE** - The Sixth Amendment to the United States Constitution states that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him, so the testimonial statements of a witness who does not testify at trial are inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination

**EVIDENCE - HEARSAY - FINGERPRINTS** - Fingerprints are not testimonial evidence since they are created as a natural part of the routine administrative step incident to arrest

#### **FACTS**

Rothell Chambliss was recorded on security cameras walking around Michael Dubois's property at approximately the same time that some of the campers on Dubois's property were burglarized. Dubois turned the video over to the Jefferson County Sheriff's Department, and Deputy James Bailey recognized Chambliss from the video. Deputy Bailey processed the scene and collected fingerprints, which were sent to the Mississippi Crime Laboratory for analysis. The Mississippi Crime Lab matched the fingerprints from the scene with "known prints" of Chambliss from the Mississippi criminal history database. Chambliss was indicted on one count of burglary of a dwelling; his indictment reflected his status as a habitual offender. During voir dire, a prospective juror stated in front of the entire jury panel that he had testified against Chambliss for breaking and entering before. The defense moved for a mistrial, which was denied. At trial, after the State rested its case-in-chief, Chambliss's motion for a directed verdict was denied. Chambliss was sentenced as a habitual offender to twenty-five years in prison without the possibility of probation or parole. Chambliss filed an unsuccessful motion for a new trial or, in the alternative, a judgment notwithstanding the verdict. Chambliss appealed.

#### **ISSUES**

Whether the trial court (1) erred in denying Chambliss's motion for a mistrial during voir dire, and (2) violated the Confrontation Clause in admitting testimony regarding "known" fingerprints of Chambliss.

#### **HOLDING**

(1) Because the judge instructed the jury of their duty to be fair and impartial and the jury showed no evidence of bias or prejudice, Chambliss was not prejudiced by the comment made by the prospective juror, and the judge did not abuse his discretion by denying Chambliss's motion for a mistrial. (2) Because fingerprints are not considered testimonial evidence and the Confrontation Clause does not apply to nontestimonial hearsay, the judge did not abuse his discretion

by admitting testimony regarding “known” fingerprints of Chambliss nor did the testimony result in a manifest miscarriage of justice. Therefore, the Court of Appeals affirmed the judgment of the Jefferson County Circuit Court.

**Affirmed - 2016-KA-00316-COA (May 23, 2017)**

Opinion by Judge Carlton

Hon. Lamar Pickard (Jefferson County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Joseph Scott Hemleben (Att’y Gen. Office) for Appellee

Briefed by [Mallory Bland](#)

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## COLLINS V. STATE

### CRIMINAL - FELONY

**CONSTITUTIONAL LAW - SPEEDY TRIAL - DELAY** - If a defendant fails to raise the statutory right to a speedy trial within 270 days of his arraignment, he acquiesces to the delay

**CRIMINAL PROCEDURE - NEW TRIAL - WEIGHT OF EVIDENCE** - When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, the court will not disturb a verdict unless it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

**JURY - SENTENCING - ENHANCED SENTENCES** - Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt

### FACTS

In November 2012, Jarius Collins was indicted as a habitual offender for murder and possession of a deadly weapon by a convicted felon. Collins was convicted of murder following a jury trial in March 2013, however, the Mississippi Supreme Court reversed the conviction because the trial court erred in suppressing evidence, and remanded the case for further proceedings. In October 2015, Collins moved to dismiss, arguing that his right to a speedy trial had been violated. The trial court denied Collins’s motion to dismiss, and the case proceeded to trial in February 2016. Again, the jury found Collins guilty, and Collins filed a motion for JNOV or a new trial, which the court denied. Collins appealed.

### ISSUES

Whether the trial court erred in denying Collins’s motion for a judgment notwithstanding the verdict or a new trial because (1) the charge should have been dismissed with prejudice because Collins’s statutory and constitutional rights to a speedy trial were violated; (2) the verdict was against the overwhelming weight of the evidence; and (3) Collins’s sentence as a habitual offender violated the Mississippi Constitution.

### HOLDING

(1) Because Collins failed to raise his right to a speedy trial until three years after his arraignment, his right to a speedy trial was not violated. (2) Because the jury found that the State’s witnesses were sufficiently credible as to material issues to prove Collins’s guilt beyond a reasonable doubt, the verdict was not against the overwhelming weight of the evidence. (3) Because the State is not required to prove prior convictions to a jury, it was constitutionally permissible for the judge to impose an enhanced sentence based on the judge’s own finding that Collins was a habitual offender. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2016-KA-00422-COA (May 23, 2017)**

Opinion by Judge Wilson

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

Michael Adelman for Appellant - Katy Taylor Gerber (Att’y Gen. Office) for Appellee

Briefed by [Catherine Norton](#)

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## PRINCE V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - EVIDENCE - DUI TESTS** - Before a court may admit into evidence the results of a DUI test, the court must first determine that: (1) the proper procedures were followed; (2) the operator of the machine was properly certified to perform the test; and (3) the accuracy of the machine was properly certified

**CRIMINAL PROCEDURE - JNOV - SUFFICIENCY OF EVIDENCE** - A challenge to the sufficiency of the evidence requires the court to determine whether the evidence shows beyond a reasonable doubt that the accused committed the act charged, and that they did so under such circumstances that every element of the offense existed

**CRIMINAL PROCEDURE - EVIDENCE - OVERWHELMING WEIGHT STANDARD** - The court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

**CRIMINAL PROCEDURE - PROPOSED JURY INSTRUCTIONS - STANDARD** - Proposed instructions should generally be granted if they are correct statements of law, are supported by the evidence, and are not repetitious

### FACTS

Brett Prince was convicted in the Hinds County Circuit Court of five counts of aggravated driving under the influence (DUI) in violation of Miss. Code Ann. § 63-11-30(5). The lower court found Prince operated his vehicle while under the influence of alcohol and that he was the cause of both the resulting death and serious bodily injuries. Prince appealed.

### ISSUES

Whether (1) the circuit court erred in admitting evidence the results of the Intoxilyzer; (2) the circuit court erred in denying Prince's motion for a JNOV; (3) the verdict was against the weight of the evidence; and (4) the circuit court erred in denying a proposed jury instruction.

### HOLDING

(1) Because the proper procedures were followed, the operator of the Intoxilyzer was properly certified to perform the test, and the accuracy of the machine was properly certified, the circuit court did not err in admitting into evidence the results of the Intoxilyzer. (2) Because there was substantial, credible, and reasonable evidence to sufficiently support Prince's convictions of aggravated DUI, the circuit court did not err in denying Prince's motion for a JNOV. (3) Because the jury's verdict would not amount to an unconscionable injustice, the verdict was not against the overwhelming weight of the evidence. (4) Because the jury instructions ultimately given were accurate statements of law and Prince repeatedly asserted his theory of the case throughout trial, the circuit court did not err in denying proposed jury instruction. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2015-KA-01890-COA (May 23, 2017)**

Opinion by Judge Ishee

Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial District)

Kevin Dale Camp & Jared Keith Tomlinson for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Kyle Hansen](#)

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## STUBBS V. STATE

### CRIMINAL - FELONY

**CRIMINAL LAW - BURGLARY - ELEMENTS** - Burglary of a non-dwelling consists of the breaking and entering of a building, in which any goods, merchandise, equipment, or valuable thing is kept for use, sale, deposit, or transportation, with the intent to steal therein, or to commit any felony

**CRIMINAL LAW - BURGLARY - ENTRY** - The slightest physical entry into a previously secure enclosure is sufficient to satisfy the “entering” component of a burglary

**FELONY - APPELLATE REVIEW - SUFFICIENCY OF EVIDENCE** - 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

**TRIAL - PRELIMINARY PROCEEDINGS - CONTINUANCE** - The decision to grant or deny a continuance is left to the sound discretion of the trial court, and unless manifest injustice appears to have resulted from the denial of a continuance, an appellate court should not reverse

### **FACTS**

Cornell Stubbs and Jonathan Holmes were indicted for burglary of a storage shed. The State proceeded to trial against Stubbs. After voir dire, Stubbs advised the trial court that he no longer wanted his attorney to represent him and proceeded to trial self-represented. At trial, the victim testified that he saw Stubbs and Holmes grabbing stuff from inside his shed and putting it into the back of their truck. When the victim asked Stubbs and Holmes what they were doing, Stubbs responded that “John Smith” had given them permission to enter the shed and take the property. The victim then dialed 911. Stubbs and Jones fled but were later stopped by law enforcement. At the traffic stop, the officer observed a pair of bolt cutters, a broken lock, and a measuring wheel in the back of the truck. During an interview with the lead investigator of the case, Stubbs admitted to cutting and/or assisting in cutting the lock. Further, when Stubbs was asked to give a description of “John Smith,” he was unable to describe him at all. Stubbs was found guilty of burglary and sentenced, as a habitual offender, to seven years’ imprisonment. Stubbs appealed.

### **ISSUES**

Whether trial court erred in (1) finding that the verdict was not against the overwhelming weight of the evidence; (2) failing to continue the trial after Stubbs fired his counsel; and (3) denying Stubbs a preliminary hearing.

### **HOLDING**

(1) Because testimony showed that Stubbs popped the lock to the shed, opened the door to the shed, picked up the measuring wheel that had fallen out of the shed, and put the measuring wheel in his truck, the verdict was not so contrary to the overwhelming weight of the evidence. (2) Because Stubbs never moved for a continuance and instead insisted on representing himself, there was no abuse of discretion in the trial court’s refusal to continue the trial. (3) Because there was no support to the claim that Stubbs’s attorney forged his name on the waiver of preliminary hearing, Stubbs was not denied his fundamental right to a preliminary hearing. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2015-KA-00924-COA (May 23, 2017)**

Opinion by Presiding Judge Griffis

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

Benjamin A. Suber for Appellant (Pub. Def. Office) - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Kaitlyn McMellon](#)

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