

**MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 9, 2017****SUPREME COURT - CIVIL CASES****DARBY V. COMBS****CIVIL - CUSTODY**

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - When making a custody determination, chancellors must weigh factors such as the health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship

**FAMILY LAW - CUSTODY - THIRD PARTY CUSTODY** - Pursuant to Miss. Code Ann. § 93-5-24, upon a finding by the court that both of the parents of the child have abandoned or deserted such child or that both such parents are mentally, morally, or otherwise unfit to rear and train the child, the court may award physical and legal custody to: (1) the person in whose home the child has been living in a wholesome and stable environment; or (2) any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child

**FACTS**

Crystal Combs and Andrew Darby had a child, Adriana Rose Darby, in early 2013. As the two were young (18 and 20, respectively) and unwed, Crystal took care of Adriana at her grandparents' (Harold and Karron Combs) home. In August 2013, Monica Darby—Andrew's mother and Adriana's grandmother—filed a petition for custody or visitation, alleging neglect by Andrew and Crystal. Both parents were found to be unfit for custody due to drug use, mental health, and violence issues. Considering the *Albright* factors, the chancellor found that joint physical custody between the Combses and Monica Darby would be best, allowing supervised visitation for Andrew and Crystal. The Court of Appeals affirmed the chancellor's judgment. Monica Darby petitioned for writ of certiorari.

**ISSUES**

Whether (1) the Court of Appeals erred in affirming the chancellor's award of joint custody to two third parties, and (2) the two parties could cooperate under the joint custody order.

**HOLDING**

(1) Because Miss. Code Ann. § 93-5-24 includes language such as "the parties" as those who will be involved in joint custody arrangements, third-party joint custody orders are allowed under the statute. (2) Because the chancellor weighed the *Albright* factors independently of the guardian ad litem's recommendation and decided joint-custody was in the best interest of the child, the chancellor's custody decision was not erroneous. The Supreme Court found that the chancellor's third-party custody arrangement was workable in this "unusual" case. Therefore, the Supreme Court affirmed the judgment of the DeSoto County Chancery Court.

**PARTIAL CONCURRENCE/DISSENT**

Presiding Justice Kitchens agreed the chancellor was within his power to award joint custody to third parties under Miss. Code Ann. § 93-5-24; however, he argued the chancellor reversibly erred by failing to make an express finding that the parties could cooperate willingly in the rearing of the child. Presiding Justice Kitchens would have reversed and remanded for the chancellor to make an express finding that the parties could cooperate in the rearing of Adriana.

**Affirmed - 2015-CT-00793-SCT (Nov. 9, 2017)**

En Banc Opinion by Justice Maxwell - Partial Concurrence/Dissent by Presiding Justice Kitchens  
Hon. Mitchell M. Lundy Jr. (DeSoto County Chancery Court)  
Tracy Buster Walsh for Appellants - A. E. (Rusty) Harlow Jr. & Kathi Crestman Wilson for Appellees  
Briefed by [Nikki Breeland](#)

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## SMITH V. MISS. DEP'T OF MENTAL HEALTH

### CIVIL - STATE BOARDS & AGENCIES

**APPELLATE PROCEDURE - DISMISSAL - MOOTNESS** - An appeal is moot and must be dismissed when an appellant is unable to show that a ruling in his favor would be of any practical benefit to him

**PROFESSIONAL RESPONSIBILITY - PHYSICIAN - REQUIREMENTS** - Miss. Code Ann. § 41-21-99 states that a mental facility physician must evaluate each patient and review the records as to the need for continued treatment as often as practicable, but not less frequently than every six months

#### FACTS

Dr. Ralph A. Smith Jr. was arrested and indicted in 2012 for capital murder, conspiracy, and burglary. In 2014, Dr. Smith was declared incompetent to stand trial and the Leflore County District Attorney's Office filed an affidavit in chancery court to begin civil-commitment proceedings. In January 2015, Dr. Smith was ordered to be committed to the Mississippi State Hospital at Whitfield. Believing that he did not belong in Whitfield, Dr. Smith requested hearings, filed a habeas petition, and filed another related appeal in the Supreme Court. In the related appeal, it was established that the judge discharged Dr. Smith to a different "step-down" facility.

#### ISSUE

Whether the Supreme Court could grant the relief requested by Dr. Smith.

#### HOLDING

Because Dr. Smith had already been discharged to an outpatient facility, the relief he requested could not be granted by the Supreme Court. Therefore, the Supreme Court dismissed the appeal from the Hinds County Chancery Court as moot.

**Dismissed as Moot - 2016-SA-00987-SCT (Nov. 9, 2017)**

Opinion by Justice Maxwell  
Hon. Denise Owens (Hinds County Chancery Court)  
William Charles Bell for Appellant - Benny McCalip "Mac" May & Harold Edward Pizzetta III (Att'y Gen. Office) for Appellees  
Briefed by [Luke Kelly](#)

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## *SUPREME COURT - CRIMINAL CASES*

## BLAKENEY V. STATE

### CRIMINAL - DEATH PENALTY - DIRECT APPEAL

**EVIDENCE - WITNESSES - DISCLOSURE** - The accused has an interest in knowing reasonably well in advance of trial what the prosecution will try to prove and how it will attempt to make its proof which includes the names of persons the State expects to call as witnesses

**CONSTITUTIONAL LAW - CONFRONTATION RIGHTS** - A defendant is denied his Sixth Amendment rights when the trial court admits into evidence incriminating statements that State agents have deliberately elicited from him after he has been indicted and that were made in the absence of counsel

**CONSTITUTIONAL LAW - CONFRONTATION CLAUSE - PRIMA FACIE CASE** - A defendant establishes a Sixth Amendment violation when he (1) shows that the informant was not freelancing at the time he obtained incriminating evidence, but that he was working for the State, and (2) demonstrates that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks

**PROFESSIONAL RESPONSIBILITY - BAD FAITH - DISCLOSURE** - A prosecutor must make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of the responsibility by a protective order of the tribunal

### **FACTS**

In 2010, Justin Blakeney was watching his girlfriend's two-year-old daughter. When the child lost consciousness, the child was rushed to the hospital, and a CAT scan revealed a diffuse brain injury. Hospital personnel called law enforcement to investigate the matter. The physician informed investigators he believed the injury was related to child abuse. The child never regained consciousness and was disconnected from life support after two days. An autopsy determined the cause of death was blunt force trauma to the head and classified the manner of death as homicide. A grand jury indicted Blakeney for capital murder while in commission of felonious child abuse. During pretrial detention, officers searched Blakeney's cell and person, finding literature and a number of large tattoos associated with a racial supremacy organization. Later, an informant named Gregory Hancock contacted the sheriff's department and claimed that Blakeney confessed. The informant was a member of the racial supremacy group and alleged that Blakeney had told him this to see if he could use the child's murder to gain membership. Hancock agreed to wear a wire and visit Blakeney to corroborate the allegations. This conversation led to a search warrant for Blakeney's cell and person and resulted in finding a number of tattoos related to the racial supremacy group. After a number of continuances and the trial court's denial of Blakeney's motion for change of venue, the trial court declared a mistrial when only eleven jurors were available to serve. The court reversed its previous denial of the change of venue sought by Blakeney. The trial court transferred venue to Greene County. During the pre-trial discovery period, Blakeney had been attempting to obtain information with which he could impeach Hancock. Through supplemental discovery, Blakeney attempted to gain access to information not attainable through public record. Blakeney then sought to compel its production. The trial court stated that it would not compel information that was not in the personal possession of the prosecutor – including information in possession of the sheriff's department. Blakeney eventually gained access to the information through a subpoena duces tecum. In 2014, the prosecution filed a motion to admit a statement made by Hancock to law enforcement officers. Hancock did not testify at trial. The State later produced a letter disclosing a new jailhouse informant, along with three previously undisclosed expert witnesses. The trial court denied Blakeney's motion for continuance. The jury found Blakeney guilty of capital murder and sentenced him to death. Blakeney appealed.

### **ISSUES**

Whether (1) the trial court erred in denying Blakeney a continuance after the State introduced previously undisclosed expert and lay witnesses on the eve of trial, (2) the trial court erred in admitting any evidence obtained from or through agents of the State, and (3) prosecutorial misconduct tainted the litigation.

### **HOLDING**

(1) Because the accused has an interest in knowing reasonably well in advance of trial what the prosecution will try to prove and how it will attempt to make its proof which includes the names of persons the State expects to call as witnesses, the trial court erred in denying Blakeney a continuance when it introduced previously undisclosed expert and lay witness on the eve of trial. (2) Because both confidential informants were working as agents of the State, and because they both solicited statements from Blakeney after a point at which his Sixth Amendment right to counsel had attached, the trial court erred in admitting evidence that violated Blakeney's Sixth Amendment right to counsel. (3) Because

Blakeney did show that the State's failure to disclose contents of ATF reports of electronic evidence was in error and bad faith, failure to disclose the reports constituted a denial of Blakeney's right to due process. Further, this practice of disposing of exculpatory evidence demonstrated bad faith equating to prosecutorial misconduct requiring a reversal of the case. Therefore, the Supreme Court reversed and remanded the judgment of the Jones County Circuit Court.

**Reversed & Remanded - 2015-DP-00058-SCT (Nov. 9, 2017)**

En Banc Opinion by Justice King

Hon. Billy Joe Landrum (Jones County Circuit Court)

Alison R. Steiner & William R. LaBarre (Pub. Def. Office) for Appellant - Brad Alan Smith & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [William L. Moorer](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS – NOVEMBER 7, 2017**

**COURT OF APPEALS - CIVIL CASES**

**BAGGETT V. BAGGETT**

**CIVIL - DOMESTIC RELATIONS**

**DOMESTIC RELATIONS - DIVORCE - HABITUAL CRUEL AND INHUMAN TREATMENT** - The offended spouse must show that the offending spouse's behavior endangers life, limb, or health, or creates reasonable apprehension of such danger, rendering the relationship unsafe or that the spouse's behavior is so unnatural to the non-offending spouse that they are no longer able to discharge the duties of marriage, thus destroying the basis for its continuance

**DOMESTIC RELATIONS - DIVORCE - HABITUAL DRUNKENNESS** - The offended spouse must show that the offending spouse frequently abused alcohol, the alcohol abuse negatively affected the marriage, and the alcohol abuse continued at the time of trial

**FACTS**

Renee Baggett filed a complaint for divorce against her husband, James Baggett, on the bases of habitual cruel and inhuman treatment and habitual drunkenness. The couple was married for over twenty years, and both parties stipulated that James had drunk for the entirety of the marriage, with occasional periods of abstinence, followed by a relapse back into drinking soon after. Approximately ten years before Renee filed for divorce, the couple was involved in a domestic violence dispute where the police were called. The couple disagreed on the facts of that dispute: Renee claiming that she was severely beaten in the face and James claiming it was merely pushing and shoving. Several witnesses who knew the couple well testified that they knew about James's alcohol problem and had seen him get aggressive with Renee. Only one witness could recall any bruising indicating more than pushing or shoving. Toward the end of the trial, Renee attempted to introduce the deposition of Dr. Patel; however, the trial court denied this request because James's counsel was given only one day's notice of the deposition, and he was unable to attend. James moved to dismiss the complaint, and the Wayne County Chancery Court granted the dismissal. Renee appealed.

**ISSUES**

Whether the trial court erred in (1) dismissing Renee's complaint, (2) failing to make findings of fact and conclusions of law, and (3) excluding Dr. Patel's deposition.

**HOLDING**

(1) Because there was only one reported incident of domestic violence, which occurred nearly ten years prior, and because James did not commit any deplorable acts that caused his drinking to rise to the level of habitual drunkenness, the trial court did not err in dismissing Renee's complaint. (2) Because neither party requested the court to make findings

of fact or conclusions of law, and the facts were not hotly contested, complex, or in dispute, the trial court did not err in failing to make findings of fact or conclusions of law. (3) Because the James's counsel was given short notice of the deposition and was unable to attend or question the deponent, the testimony was more of a statement than a deposition, and the trial court properly excluded it. Therefore, the Court of Appeals affirmed the judgment of the Wayne County Chancery Court.

**Affirmed - 2016-CA-00537-COA (Nov. 7, 2017)**

En Banc Opinion by Presiding Judge Irving

Hon. Franklin C. McKenzie Jr. (Wayne County Chancery Court)

Carol Ann Estes Bustin for Appellant - Risher Grantham Caves & Terry L. Caves for Appellee

Briefed by [Zachary Harper](#)

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## BLACK V. BLACK

### CIVIL - DOMESTIC RELATIONS

**CIVIL PROCEDURE - AWARDS - ATTORNEY'S FEES** - The court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification

**CIVIL PROCEDURE - AWARDS - ATTORNEY'S FEES** - Attorney's fees may be justified where the equities suggest one party should assist the other, and the other party is unable to pay

**FAMILY LAW - CHILD SUPPORT - PAYMENT DETERMINATION** - Where a noncustodial parent's adjusted gross income exceeds \$100,000 per year, the court shall make a written finding in the record as to whether or not the application of the guidelines established in Miss. Code Ann. § 43-19-101 is reasonable

### FACTS

Arthur Black and Alicia Black divorced under the terms of a prenuptial agreement. Alicia argued that photocopies of the agreement were insufficient to prove the legitimacy of signatures and that the terms were unconscionable. A hearing on the agreement found it to be a valid and enforceable prenuptial agreement and its terms not unconscionable. Arthur's request for sanctions and attorney's fees was denied. However, the chancellor awarded Alicia attorney's fees because of her inability to pay. After trial, each party filed motions to have the judgment set aside, altered, or amended. Alicia sought to have Arthur's visitation rights adjusted. Arthur sought a review of the monetary distribution of the estate. The chancellor issued his post-trial order. Arthur appealed.

### ISSUES

Whether the chancellor erred in (1) denying Arthur's request for sanctions and attorney's fees; (2) failing to divide a debt between parties; (3) allocating a bank account in full to Alicia; (4) allocating tax returns; (5) awarding attorney's fees to Alicia for inability to pay; (6) deviating from statutory guidelines in awarding child-support payments; and (7) failing to include visitation changes agreed upon between the parties in their post-trial motions.

### HOLDING

(1) Because the prenuptial agreements presented as evidence were photocopies and not the originals, there was a legitimate question about the validity of the signatures. As such, the attacks were not frivolous. (2) Because the debt was listed on the financial statements of both parties and both parties testified at trial that the debt was jointly owned, the chancellor erred in failing to divide the debt in accordance to the prenuptial agreement. (3) Because all presented evidence on the bank account showed that it was used to support Alicia and her children during the litigation, there was substantial evidence to support the chancellor's allocation of it to Alicia. (4) Because during the original trial the couple's taxes were going to be filed as "married filing jointly," the chancellor divided the return solely based on the prenuptial

agreement. However, when the taxes were actually filed, they were filed as “married filing separately.” Accordingly, the calculation of the payment was remanded to determine what portion of the refund was attributable to income earned after the divorce. (5) Because Alicia’s attorney’s fees did not accrue as a property right by virtue of marriage, it fell outside of the scope of the prenuptial agreement. (6) Because Arthur earned over \$100,000 per year and the parties agreed to maintain their child’s private schooling, there was no error in deviating from the statutory guidelines. (7) Because an agreement on the record is not sufficient to ensure absence of future conflict, the visitation changes were remanded to the chancery court to memorialize the agreed-upon changes. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Jackson County Chancery Court.

### **PARTIAL CONCURRENCE/DISSENT**

Judge Wilson disagreed with the majority on the issue of awarding attorney’s fees to Alicia. The prenuptial agreement prohibits Alicia from “any right to receive support.” Judge Wilson argued that an award given because of inability to pay is a form of support and therefore waived under the prenuptial agreement.

#### **Affirmed in Part & Reversed in Part - 2016-CA-00104-COA (Nov. 7, 2017)**

En Banc Opinion by Judge Barnes - Partial Concurrence/Dissent by Judge Wilson

Hon. G. Charles Bordis IV (Jackson County Chancery Court)

Dean Holleman for Appellant - Nita Louise Chase & Tanya Mitchell Graham for Appellee

Briefed by [Tyler Alcorn](#)

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## **HAVARD V. SUMRALL**

### **CIVIL - MEDICAL MALPRACTICE**

**APPEALS - INTERLOCUTORY ORDERS - JURISDICTION** - A judgment will only be considered final and appealable if it adjudicates the merits of the controversy which settles all the issues as to all the parties and requires no further action by the lower court

**CIVIL PROCEDURE - DISMISSAL OF CLAIMS - DELAY** - Delay alone may suffice for a dismissal under Miss. R. Civ. P. 41(b), and factors other than delay are not required

### **FACTS**

James and Margaret Havard filed a medical malpractice action against Tanelle Sumrall, a nurse, after she injected James with the wrong medication and caused him to have a heart attack. The Havards then amended their complaint to include Sumrall’s employer, the Akeso Group. For almost two years, no activity appeared on the docket; the Havards did not file motions, request for discovery, or move the case forward in any way. Sumrall filed a motion to dismiss for failure to prosecute, which the trial court granted. The Havards attempted to appeal this ruling, but the Court of Appeals concluded that it was not an appealable ruling as it was interlocutory. However, the Havards’ claims against the Akeso Group remained active, and the Havards won a default judgment when the Akeso Group failed to respond to their complaint. After this judgment was handed down, the Havards appealed, asserting that the circuit court erred in its earlier decision to dismiss their complaint against Sumrall for failure to prosecute. In response, Sumrall contended that the court lacked jurisdiction to hear the appeal.

### **ISSUES**

Whether (1) the Court of Appeals had jurisdiction over the Havards’ appeal, and (2) the circuit court erred by dismissing the Havards’ complaint for failure to prosecute.

### **HOLDING**

(1) Because the default judgment against the Akeso Group constituted a final judgment that settled all issues between the parties and the Havards filed their appeal in a timely manner, the Court of Appeals had jurisdiction to hear the appeal. (2) Because there was a clear record of delay, and the Havards never filed a motion for extension of time, the

circuit court did not abuse its discretion in dismissing the complaint against Sumrall for failure to prosecute. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

**Affirmed - 2016-CA-01585-COA (consolidated with 2015-CA-00138-COA) (Nov. 7, 2017)**

Opinion by Judge Carlton

Hon. Prentiss Greene Harrell (Lamar County Circuit Court)

S. Wayne Easterling & Gerald Alan Dickerson for Appellants - Douglas G. Mercier & Jessica Leigh Dilmore for Appellees

Briefed by [Sean Grady](#)

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## LITTLE V. RICHEY

### CIVIL - PROPERTY

**PROPERTY - ADVERSE POSSESSION - ELEMENTS** - For possession to be adverse, it must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful

**PROPERTY - ADVERSE POSSESSION - FENCE RULE** - The mere presence of a fence, without more, has never been sufficient to sustain a claim of adverse possession

**PROPERTY - ADVERSE POSSESSION - OPEN, NOTORIOUS, & VISIBLE** - A claim of adverse possession cannot begin unless the landowner has actual or constructive knowledge that there is an adverse claim against the property

**EVIDENCE - DEPOSITION TESTIMONY - ADMISSIBILITY** - The admission of deposition testimony is within the sound discretion of the trial court

### FACTS

In 2011, Donald and Nancy Richey filed a complaint against Tim and Anthony Little for a claim of adverse possession. The Richeys claimed that they erected a fence in 1994 and exercised domain over the disputed area since then. The Littles argued that the fence was actually built in 2004, and, therefore, the adverse possession had not met the ten-year statutory requirement. At trial in 2016, Tim Little was dismissed from the case because he no longer owned the property in question. At this time, the remaining defendant, Anthony Little, asked the trial court for a continuance because he claimed the counsel that previously represented him was only retained by Tim. The trial court granted the continuance but warned Little that he would not receive another continuance unless there was an emergency. Little hired counsel who then requested a continuance, which was denied. At trial, the judge admitted deposition testimony from both parties and found that the fence was erected in 1994. Additionally, she found that the Richeys treated the property in a manner consistent with the elements of adverse possession. The trial judge granted the Richeys' claim of adverse possession. Anthony Little appealed.

### ISSUES

Whether (1) the trial court abused its discretion in denying the motion for additional time to conduct discovery; (2) the Richeys failed to prove each element of their adverse possession claim by clear and convincing evidence; and (3) the trial court abused its discretion in admitting certain deposition testimony.

### HOLDING

(1) Because Anthony Little did not suffer a manifest injustice, the trial court did not abuse its discretion in denying the motion for additional time to conduct discovery. (2) Because there was substantial evidence in the record to support the Richey's claim for adverse possession, the trial judge did not abuse her discretion. (3) Because Anthony Little was a party to the lawsuit at the time the deposition was taken, the trial judge did not abuse her discretion in allowing the deposition into evidence. Therefore, the Court of Appeals affirmed the judgment of the Monroe County Chancery Court.

**Affirmed - 2016-CA-01423-COA (Nov. 7, 2017)**

Opinion by Judge Carlton

Hon. Jacqueline Estes Mask (Monroe County Chancery Court)

Sarah Cline Stevens for Appellant - L. Bradley Dillard & John M. Creekmore for Appellees

Briefed by [Addison K. Watson](#)

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## MANNING V. PERRY

### CIVIL - REAL PROPERTY

**CONSTRUCTIVE TRUST - STATUTE OF LIMITATIONS - CHARGEABLE ACT** - The statute of limitations applicable to actions involving constructive trusts begins to run at the time the act or acts were committed by which the actor becomes chargeable

**CONSTRUCTIVE TRUST - STATUTE OF LIMITATIONS - FILING** - The statute of limitations applicable to actions involving constructive trusts provides that bills for relief must be filed within ten years after the cause thereof

### FACTS

Henry and Addie Manning held in title a seventy-eight acre parcel of land in Pike County, which they deeded to their son Ed Manning in 1994. Henry died in 1994, and Addie died in 1998. Following Ed's death in 2011, the seventy-eight acre parcel passed to Ed's wife, Joan Manning. In August of 2013, Ed's siblings (the "Mannings") filed their first suit seeking reformation of the deed and imposition of a constructive trust against Joan. In October of 2013, Joan sold the seventy-eight acre parcel to Robert and Paige Perry in a transaction financed by the Pike National Bank. After the sale, the Mannings sued Joan, the Perrys, and the Bank, for an adjudication of their ownership of the property as beneficiaries of a constructive trust of which Ed had been trustee. The suit was dismissed from the Pike County Chancery Court, refiled in the U.S. District Court for the Southern District of Mississippi, dismissed again, and refiled again in the Pike County Chancery Court. In each of their filings, the Mannings asserted that Ed was not really a fee simple owner of the real estate at issue, but was rather a trustee of the land for himself and his siblings. On their return to the chancery court, the Mannings again filed for reformation of the 1994 deed and imposition of a constructive trust on the approximately nine acres titled in Joan's name and the seventy-eight acres held by the Perrys. Joan and the Perrys answered, and asserted several affirmative defenses, including a statute of frauds defense and two statutes of limitations defenses. Joan and the Perrys failed to assert their defense of "bona fide purchaser of value without notice." Without consideration of the statute of frauds and statute of limitations affirmative defenses, the chancellor found the Perrys were bona fide purchasers for value without notice and granted summary judgment in favor of Joan and the Perrys. The chancellor subsequently denied the Mannings' motion to reconsider. The Mannings appealed.

### ISSUES

Whether (1) the statute of limitations began to run after Henry's death in 1994, Addie's death in 1998, Ed's death in 2011, or the ancillary probate of Ed's will in 2013; and (2) the Manning siblings filed suit within the time provided by the statute of limitations.

### HOLDING

(1) Because Addie's death in 1998 marked the time by which the actor became chargeable, the statute of limitations began to run after Addie's death in 1998. (2) Because the Manning siblings did not file suit until 2013, their claims were barred by the statute of limitations. Therefore, the Court of Appeals affirmed the judgment of the Pike County Chancery Court.

**Affirmed - 2016-CA-00444-COA (Nov. 7, 2017)**

En Banc Opinion by Judge Fair

Hon. J. Larry Buffington (Pike County Chancery Court)



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## SMITH V. MULL

### CIVIL - DOMESTIC RELATIONS

**DIVORCE DECREES - CONTEMPT - AMBIGUITY OF DECREE** - Provisions intended to address special circumstances developed to serve the best interests of the children, so long as clear and specific, can have broad application

**DIVORCE DECREES - CONTEMPT - ATTORNEY'S FEES** - Where a ruling of contempt is affirmed on appeal, previously awarded attorney's fees for contempt are also affirmed

**FAMILY LAW - VISITATION-EXCHANGE - LOCATION MODIFICATION** - To modify a visitation order, it must be shown that the prior decree for visitation is not working and that a modification is in the best interest of the child; the routine a child has been accustomed to in a visitation exchange can be taken into consideration when determining if modification of a visitation is appropriate

#### FACTS

Michael Smith and Kimberly Mull married in 2005 and had two children. In 2011, Mull was granted a divorce from Smith on grounds of adultery, and the parties were awarded joint legal custody of their children. After Mull relocated from Tupelo to Atlanta, she and Smith modified their visitation agreement to meet in Leeds, Alabama. However, as a result of Smith occasionally working in Kentucky, the parties occasionally met in Chattanooga for visitation-exchange. After a time, complications arose with the visitation exchange location when Smith was in Kentucky. Smith petitioned the court to modify the exchange location to be "the most convenient location for the exchange of the minor children." Mull counterclaimed, asserting that Smith was in contempt of the divorce decree after bringing the children to a neighborhood cookout where others were consuming alcohol. The chancery court denied Smith's petition to modify the visitation exchange location, and found Smith in contempt of the divorce decree's alcohol provision. Smith appealed.

#### ISSUES

Whether the chancery court erred in (1) finding Smith in contempt of the divorce decree's alcohol provision; (2) awarding Mull \$425 in attorneys' fees; and (3) denying Smith's request for modification of the visitation-exchange location.

#### HOLDING

(1) Because the terms of the alcohol-restrictive provision were intended to address Smith's alcohol use and were clear and specific, the chancery court did not abuse its discretion by citing Smith for his willful violation of the court order. (2) Because Smith was properly held in contempt for violation of the alcohol restriction provision, Mull was properly awarded attorney's fees. (3) Because Smith failed to show that the visitation-exchange location was not working to serve the best interest of the children, his request for modification was properly denied. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

#### **Affirmed - 2016-CA-00524-COA (Nov. 10, 2017)**

Opinion by Chief Judge Lee

Hon. Jacqueline Estes Mask (Lee County Chancery Court)

Jak McGee Smith for Appellant - Jason D. Herring & Michael Spencer Chapman for Appellee

Briefed by [Hale Neilson](#)

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## SULLIVAN V. SULLIVAN

### CIVIL - DOMESTIC RELATIONS

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

**DOMESTIC RELATIONS - DIVORCE - FERGUSON ANALYSIS** - Failing to make an explicit factor-by-factor *Ferguson* analysis does not require reversal where the chancellor still considered the relevant factors; failing to mention *Ferguson* or apply its guidelines in a final divorce decree is a reversible error

**DOMESTIC RELATIONS - DIVORCE - ARMSTRONG ANALYSIS** - Failure to make an on-the-record *Armstrong* analysis is manifest error requiring reversal

### FACTS

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

### ISSUES

Whether the chancellor failed (1) to make specific findings of facts and conclusions of law as required by *Ferguson v. Ferguson* and (2) to make specific findings regarding the alimony award.

### HOLDING

(1) Because the record does not show that the chancellor ever adequately considered or applied the *Ferguson* factors, the chancellor committed reversible error. (2) Because the chancellor failed to make an on-the-record *Armstrong* analysis and failed to make specific findings regarding the alimony award, the chancellor erred. Therefore, the Court of Appeals reversed and remanded the judgment of the Lee County Chancery Court.

### **Reversed & Remanded - 2015-CA-01513-COA (Nov. 7, 2017)**

En Banc Opinion by Chief Judge Lee

Hon. Jacqueline Estes Mask (Lee County Chancery Court)

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

Briefed by [Nathan Simpson](#)

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## TULLOS V. TULLOS

### CIVIL - DOMESTIC RELATIONS

**FAMILY LAW - CUSTODY - MODIFICATION** - Miss. R. Civ. P. 81(d)(2) provides that if an action for custody modification is not heard on the date set forth in the summons, it may, by order signed that day, be continued to a later day for hearing without additional summons on the defendant or respondent

**CIVIL PROCEDURE - NOTICE - DEFECTIVE PROCESS** - While actual notice does not cure defective process, there is no defective process under Miss. R. Civ. P. 81 if defendant had adequate notice of the pending custody matter at its inception

## **FACTS**

A judgment of divorce was entered for Jessica and James Tullos in March 2014. Jessica was given physical custody of their minor children, and James was given visitation and required to pay child support. In August 2015, James filed a petition to modify the judgment, requesting that the chancery court award him physical custody and require Jessica to pay child support. James alleged that Jessica was using illegal drugs in the presence of their children. Jessica was served with the petition and summons in September 2015. That same month, the chancery court entered an order continuing the matter, signed by both parties. The chancery court entered four additional continuances over the next few months, and appointed a guardian ad litem (GAL) for the minor children. A hearing on the petition to modify custody was finally held in May 2016. After hearing testimony from James and the GAL, the chancellor ruled from the bench that it was in the best interest of the children to reside with James but did not sign an order reflecting this ruling. Another chancellor in the same district signed an order in July 2016, officially awarding James physical custody of both minor children. Jessica appealed.

## **ISSUE**

Whether the chancery court erred in entering a final judgment against Jessica Tullos because they failed to re-issue a new summons, and Jessica was therefore improperly noticed of the subsequent court-ordered continuances.

## **HOLDING**

Because Jessica had notice of the first continuance and was aware of the pending custody matter, and because the chancellor signed every order of continuance on each respective hearing date in accordance with Miss. R. Civ. P. 81(d), Jessica's initial summons was preserved. Therefore, the Court of Appeals affirmed the judgment of Smith County Chancery Court.

### **Affirmed - 2016-CA-01117-COA (Nov. 7, 2017)**

Opinion by Judge Westbrook

Hon. Gerald Marion Martin (Smith County Chancery Court)

W. Terrell Stubbs & Lauren Elizabeth Cavalier for Appellant - Raymond Patrick Tullos for Appellee

Briefed by [Daniel Tankersley](#)

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## **WEBER V. WEBER**

### **CIVIL - CUSTODY**

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - The chancellor should consider the following factors to determine the best interest of the child: (1) age, health and sex of the child; (2) determination of the parent that had the continuity of care prior to the separation; (3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) physical and mental health and age of the parents; (6) emotional ties of parent and child; (7) moral fitness of parents; (8) the home, school and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) stability of home environment and employment of each parent; and (11) other factors relevant to the parent-child relationship

## **FACTS**

Zachary Dakota Weber ("Dakota") and Krystal Bryant Weber ("Krystal") had a son together in 2011 and were later married for a brief period before they separated, and Dakota filed for divorce. Dakota and Krystal agreed to an irreconcilable-differences divorce and reserved issues of custody, visitation, and child support for the chancellor's discretion. After the chancellor conduct an *Albright* analysis, he awarded Krystal physical custody of the child with both parties retaining legal custody. The chancellor also ordered Dakota to pay \$300.00 per month in child support, and the chancellor set a visitation schedule. Dakota appealed.

## ISSUES

Whether the trial court erred in (1) applying the *Albright* standards, and (2) granting Krystal sole physical custody of the child.

## HOLDING

(1) Because the trial court found 7 of 11 *Albright* factors as neutral to either parent, but continuity of care, parenting skills, willingness and capacity, and stability of home environment all weighed in Krystal's favor, the lower court did not err in granting physical custody to Krystal. (2) Because joint-physical custody would not have promoted the best interests of the child—specifically viewing Dakota's living arrangements and lack of financial support—the lower court did not abuse its discretion in granting Krystal sole physical custody. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court.

**Affirmed 2016-CA-01339-COA (Nov. 7, 2017)**

Opinion by Chief Judge Lee

Hon. Deborah J. Gambrell (Forrest County Chancery Court)

Phillip Lloyd Londeree for Appellant Harry Ray Lane for Appellee

Briefed by [Andrew P. Cicero, III](#)

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

### **BIAS V. STATE**

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

**CRIMINAL - VOLUNTARY GUILTY PLEA - INEFFECTIVE ASSISTANCE** - A voluntary guilty plea waives claims of ineffective assistance of counsel except insofar as the alleged ineffectiveness relates to the voluntariness of the giving the guilty plea

**CRIMINAL - EVIDENTIARY HEARING - ENTITLEMENT** - No hearing is required when, based on the record of the guilty plea hearing, it is clear that the petitioner is entitled to no relief

**EVIDENCE - SEXUAL BATTERY - PROOF** - In a sexual assault case, an intact hymen is not conclusive proof that no penetration occurred

## FACTS

A three-year-old female was experiencing irregular vaginal discharge and frequent urination. Taken to the hospital some four to six weeks later, the minor child tested positive for chlamydia and gonorrhea. The medical examination showed no tearing in the vaginal, perineal, or anal area. A hospital social worker wrote in a report that the minor child told her grandmother her father, Jake Bias, "hurt her private area." Some months later, Bias pled guilty in the Hinds County Circuit Court to statutory rape for having willful, felonious, and unlawful sexual intercourse with a minor child. Additionally, Bias admitted to having a venereal disease. While incarcerated, Bias filed a motion for post-conviction relief (PCR). His motion was denied. Bias appealed.

## ISSUES

Whether (1) Bias received ineffective assistance of counsel, (2) Bias's confession matched the physical evidence, and (3) Bias was entitled to an evidentiary hearing.

## HOLDING

(1) Because Bias previously pled guilty, acknowledged he was satisfied with his counsel's assistance, and raised no issue regarding voluntariness of his guilty plea, the Court of Appeals found no merit to this issue. (2) Because Bias's PCR motion was incomplete and the appellate record did not contain a complete statement of the allegations and argument

made at trial, the Court of Appeals did not address whether Bias's confession matched the physical evidence. (3) Because Bias was not entitled to relief, the Court of Appeals found he was not entitled to an evidentiary hearing. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2016-CA-00682-COA (Nov. 7, 2017)**

Opinion by Presiding Judge Irving

Hon. Tomie T. Green (Hinds County Circuit Court)

Cynthia Ann Stewart for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Charlotte Cooper](#)

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

### **COLLINS V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - SUFFICIENCY OF EVIDENCE - CIRCUMSTANTIAL EVIDENCE** - When addressing the legal sufficiency of the evidence, all evidence is considered in the light most favorable to the State; the fact that the State's evidence supporting a conviction is circumstantial does not mean the evidence is insufficient

**CRIMINAL LAW - CORPUS DELICTI - CRIMINAL AGENCY** - To establish the corpus delicti in a homicide case, there must be proof of (1) the death of a human being and (2) a criminal agency causing the death; testimony establishing evidence of trajectory and path of a bullet can be used to conclude that the evidence and reasonable inferences which the jury was justified in drawing sufficiently establishes criminal agency

**CONSTITUTIONAL LAW - DOUBLE JEOPARDY - NEW TRIAL** - When a criminal defendant successfully obtains a reversal and remand of a circuit court's judgment, granting a new trial does not amount to double jeopardy

**CONSTITUTIONAL LAW - SENTENCING - HABITUAL OFFENDER STATUTE** - 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**

Jairus Collins was convicted of murder. The cause of death of the victim was multiple gunshot wounds. Prior to this appeal, the Mississippi Supreme Court reversed the conviction and remanded for a new trial. Following retrial, Collins was again convicted of murder and sentenced as a habitual offender to serve life in prison without the possibility of parole. Collins moved for a judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. The circuit court denied the motion. Collins appealed.

#### **ISSUES**

Whether (1) the verdict was against the overwhelming weight of the evidence, (2) the State proved corpus delicti, (3) the retrial was barred by the Double Jeopardy Clause, and (4) Miss. Code Ann. § 99-19-83 is unconstitutional.

#### **HOLDING**

(1) Because Collins knew the victim, had in his possession the gun used in the crime, and had texted the victim prior to the murder, there was sufficient circumstantial evidence to convict Collins. (2) Because the medical examiner's testimony established evidence of the trajectory and path of bullets, the State proved corpus delicti. (3) Because the Supreme Court's decision to reverse and remand did not implicate the Double Jeopardy Clause, the retrial was not constitutionally violative. (4) Because the circuit court determined habitual offender status solely on the evidence of Collin's prior convictions, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2016-KA-01002-COA (Nov. 7, 2017)**

Opinion by Judge Westbrook

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

Michael Adelman for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Marilyn Higdon](#)

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## MCCADNEY V. STATE

### CRIMINAL - FELONY

**CRIMINAL LAW - APPELLATE PROCEDURE - LINDSEY BRIEF** - Where the appellant's counsel finds no arguable issues for review, counsel must file and serve a brief certifying that there are no issues supporting the client's appeal

**CRIMINAL LAW - APPELLATE PROCEDURE - PRO SE BRIEF** - Once counsel files a brief certifying that there are no arguable issues for reviews, counsel must send a copy to the defendant advising the client of the right to file a *pro se* brief

**CRIMINAL LAW - APPELLATE PROCEDURE - SUPPLEMENTAL BRIEF** - Should the defendant raise any arguable issue in a *pro se* brief or should the appellate court discover any arguable issue in its review of the record, the court must, if circumstances warrant, require appellate counsel to submit supplemental briefing on the issue, regardless of the probability of the defendant's success on appeal

### FACTS

Benjamin McCadney was convicted by a jury in the Bolivar County Circuit Court of aggravated assault with a firearm enhancement. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections, with an additional five-year sentence for the firearm enhancement, to run consecutively. Finding no arguable issue for appeal, McCadney's appellate counsel filed a *Lindsey* brief, indicating such. McCadney's counsel sent a copy of the *Lindsey* brief to McCadney, advising him that he found no arguable issues in the record and also informing McCadney that he had the right to file a *pro se* brief. McCadney was granted an additional forty-five days to file a *pro se* brief, which he failed to do. The Mississippi Court of Appeals undertook independent review of the case pursuant to *Lindsey*.

### ISSUE

Whether the record revealed any arguable issues mandating a supplemental brief.

### HOLDING

Because McCadney failed to file a *pro se* brief and the record did not present arguable issues on appeal, a supplemental brief was not necessary. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

**Affirmed - 2016-KA-01101-COA (Nov. 7, 2017)**

Opinion by Chief Justice Lee

Hon. Albert B. Smith III (Bolivar County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Katie Berry](#)

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## MISKELL V. STATE

### CRIMINAL - FELONY

**PROSECUTORIAL MISCONDUCT - CLOSING ARGUMENT - SEND-A-MESSAGE** - When reviewing a send-the-message claim, the appellate court considers two threshold questions: (1) did defense counsel object and (2) was the comment uninvited by the defense

**JUROR SELECTION - DISCRIMINATORY INTENT - RACE-NEUTRALITY** - Once a defendant has established a prima facie case of discrimination, the prosecution has the burden to offer a race-neutral explanation for striking the potential juror, which need not be persuasive or even plausible so long as the reasons are not inherently discriminatory

### **FACTS**

While attending a house party in Hattiesburg, Mississippi, Albert Pollard went outside to purchase marijuana from Marquis Harris. As Pollard pulled money out of his pocket to pay for the drugs, he heard someone say, “Freeze, don’t move.” Pollard testified that a man, who he later identified as Vernell Miskell, ran towards him with a gun pointed at him. Pollard ran off and heard six shots fired from behind him. Pollard suffered three gunshot wounds and was in the hospital for two weeks. A Forrest County grand jury indicted Harris and Miskell for aggravated assault stemming from the shooting at the house party. Harris pled guilty to aggravated assault and then testified against Miskell at trial. Additionally, the jury heard conflicting testimony from different witnesses at the house party regarding the identification of the shooter. The jury ultimately found Miskell guilty of aggravated assault and sentenced him to twenty years in Mississippi Department of Corrections (MDOC) custody. The trial court denied Miskell’s post-trial motions for a judgment notwithstanding the verdict (JNOV) and new trial. Miskell appealed.

### **ISSUES**

Whether (1) the trial court erred in determining that the State’s reasons for striking African American jurors were race neutral; (2) the trial court erred in denying Miskell’s motion for JNOV because the State failed to prove the elements of the crime of aggravated assault beyond a reasonable doubt; (3) the trial court erred in denying Miskell’s motion for a new trial because the verdict was against the weight of the evidence; (4) the trial court erred in granting jury instruction S-5 and denying proposed jury instruction D-7; (5) the prosecutor made inappropriate comments during closing arguments that constituted a send-a-message argument; and (6) the cumulative effect of all errors resulted in an unfair trial and plain error.

### **HOLDING**

(1) Because defense counsel never actually objected to the prosecutor’s for-cause challenges as to prospective jurors, the trial court’s determination that no *Batson* violation occurred was not clearly erroneous or against the overwhelming weight of the evidence. (2) Because the testimony against Miskell at trial supported a finding of guilty beyond a reasonable doubt and because the State is given the benefit of all favorable inferences reasonably drawn from the evidence, the trial court did not err in denying Miskell’s motion for JNOV. (3) Because the evidence on the record reflected that Harris’s testimony was indeed consistent with and supported by other witnesses, the verdict was not so contrary to the overwhelming weight of the evidence that an unconscionable injustice would occur by allowing the verdict to stand. (4) Because precedent reflected that jury instruction S-5 constituted a correct statement of law, the jury was properly instructed. (5) Because the record reflected that the statements were invited by the defense counsel and the prosecutor commented on the actual evidence offered at trial, the comments during closing argument failed to cause unjust prejudice to Miskell. (6) Because no error was found on any of Miskell’s claims, there was no cumulative error warranting a reversal of the verdict. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2016-KA-01306-COA (Nov. 7, 2017)**

Opinion by Judge Carlton

Hon. Jon Mark Weathers (Forrest County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Katy Taylor Gerber (Att’y Gen. Office) for Appellee

Briefed by [Mary-Katherine Black](#)

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