

MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 3, 2016

SUPREME COURT - CIVIL CASES

READY V. RWI TRANSP., LLC

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - MOTION PRACTICE - SUMMARY JUDGMENT - Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and the evidence must be viewed in the light most favorable to the non-moving party

TORTS - NEGLIGENCE – ELEMENTS -To prevail on a claim of negligence, the plaintiff must prove (1) duty, (2) breach of duty, (3) causation, and (4) damages by a preponderance of the evidence

TORTS - NEGLIGENCE - FORESEEABILITY - If a negligent act of a complaint is a remote cause superseded by an independent intervening cause leading sequentially to the injury, that original act is neither foreseeable nor proximate

FACTS

Two automobile accidents occurred on the evening of May 24, 2012, on Interstate 55 North in Grenada County. In the first accident, David Williams was traveling northbound in a RWI Transportation, LLC, tractor-trailer, and Brian Spurlock was traveling northbound in a Ford truck. As Williams tried to change lanes, his trailer contacted Spurlock's truck, causing the truck to overturn and come to rest across both northbound lanes. The accident occurred at 7:13pm. Derrick Willis of the Mississippi Highway Patrol was dispatched to the scene, stopping all northbound traffic. After a tow truck arrived and carried the truck away, Willis re-opened both northbound lanes and left the scene at 8:09pm. He crossed over the median and traveled three quarters of a mile south on I-55 from the first accident, where he then observed the truck of George Ready, II, in the median. Willis diverted to the new accident scene and arrived at 8:21pm. In this second accident, Ready had been travelling northbound on I-55 in the right lane in his GMC truck. Shannon Carroll was in a UPS tractor-trailer which was still stopped in the right northbound lane, where it was forced to stop as a result of the backed-up traffic from the first accident. Ready collided with the rear of the UPS tractor-trailer. Ready filed suit against RWI and Williams, alleging claims of negligence and negligent entrustment. RWI and Williams moved for summary judgment, arguing that Ready's injury was not foreseeable from the first accident and thus Ready was not owed a duty by RWI and Williams. Willis testified that the weather was clear, it was daylight, and the road was dry. Gordon Wilson, who was in a car directly in front of the UPS tractor-trailer, testified that both he and the UPS tractor-trailer had their four-way flashing lights on while stopped and that he observed Ready traveling about sixty-five miles per hour before slamming his breaks and attempting to swerve left. The Grenada County Circuit Court then entered an order granting summary judgment in favor of RWI and Williams, finding Ready's injury was not foreseeable and that Ready was owed no duty. Ready appealed.

ISSUE

Whether the trial court properly granted summary judgment.

HOLDING

Because Williams's presumed negligent conduct was too remote in time and distance to cause Ready's injuries, it was not foreseeable that such conduct would cause such injuries. Therefore, the Supreme Court affirmed the summary judgment of the Grenada County Circuit Court.

Affirmed -2015-CA-00227-SCT (Nov. 3, 2016)

Opinion by Justice Randolph

Hon. C. E. Morgan III (Grenada County Circuit Court)

Edwards P. Connell Jr., Charles M. Merkel Jr., & Corrie Schuler for Appellant -James R. Moore Jr. & Ronald Eric Toney for Appellees

Briefed by [Brittany Barbee](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – NOVEMBER 1, 2016

COURT OF APPEALS - CIVIL CASES

EWING V. EWING

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - MARITAL PROPERTY - LINE OF DEMARCATION - When equitably dividing marital property, chancellors should declare a line of demarcation in the findings

DOMESTIC RELATIONS - MARITAL PROPERTY - FERGUSON ANALYSIS - While chancellors need not make findings as to each and every *Ferguson* factor, they cannot simply mention the guidelines and state they are following them and applying them to the facts of the case; the *Ferguson* factors must be applied

DOMESTIC RELATIONS - MARITAL PROPERTY - DEBT - Debts acquired during the course of the marriage are subject to equitable distribution

DOMESTIC RELATIONS - PERIODIC ALIMONY - AMOUNT - In determining the amount payable for periodic alimony, the chancellor must consider not only the reasonable needs of the party receiving the payment, but also the right of the paying party to lead as normal a life as reasonably possible with a decent standard of living

DOMESTIC RELATIONS - ATTORNEY'S FEES - AWARD CRITERIA - Generally, unless the party requesting attorney's fees can establish the inability to pay, such fees should not be awarded

FACTS

Morgan and Melanie Ewing were married, and almost twelve years later, Melanie filed for divorce. After several years of proceedings, the chancellor conducted a bench trial and entered a judgment granting the divorce. Additionally, Morgan was ordered to pay child support, permanent alimony, lump-sum alimony, Melanie's attorney's fee, and two-thirds of all unpaid medical expenses of the children. In response, Morgan filed a motion for reconsideration or in the alternative a new trial, primarily seeking a reduction for the awards of child support, alimony, and attorney's fees. The chancellor granted the request in part by reducing the per month child support amount and giving credit for child support already paid. All other requests were denied. Morgan appealed.

ISSUE(S)

Whether the chancellor erred in (1) dividing the marital estate, (2) granting Melanie periodic alimony, and (3) awarding attorney's fees to Melanie.

HOLDING

(1) The chancellor, implicitly instead of explicitly, declared the line of demarcation. Since the parties disputed the line of demarcation, this amounted to error in dividing the marital estate. Additionally, the chancellor failed to conduct a thorough analysis of the *Ferguson* factors and failed to make a finding regarding distribution of the marital debt. Both of these actions amount to error in dividing the marital estate. (2) Because the chancellor did not consider Morgan's other financial obligations and his ability to maintain a decent standard of living, the amount awarded for periodic alimony constituted error. However, the award of periodic alimony itself was warranted. (3) The chancellor failed to make a finding regarding whether Melanie was unable to pay her attorney fees. This failure also amounted to error. Therefore,

the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Desoto County Chancery Court.

Affirmed in Part; Reversed and Remanded in Part - 2015-CA-01105-COA (Nov. 1, 2016)

Opinion by Presiding Judge Griffis

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

Jerry Wesley Hisaw for Appellant - David Mark Slocum Jr. for Appellee

Briefed by [Bethany Poppelreiter](#)

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GIBBS V. PORTERVILLE WATER ASSOC. BD. OF DIRECTORS

CIVIL - OTHER

CIVIL PROCEDURE - SUMMARY JUDGMENT - M.R.C.P. 56 - Summary judgment is proper when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law

CIVIL PROCEDURE - SUMMARY JUDGMENT - BURDEN OF PROOF - When a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law

CONTRACTS - EMPLOYMENT - AT WILL - Under the doctrine of employment at will, either an employer or an employee may terminate an employment relationship, unless the parties are bound by an employment contract or a contract detailing the term of employment

EMPLOYMENT LAW - AT WILL - EXCEPTION - Where the employment relationship is “at-will,” then the employee may be terminated for any reason, except reasons independently declared legally impermissible

FACTS

Gibbs sued the Porterville Water Association Board of Directors (“Board”) for wrongful termination after being fired as an at will employee. The circuit court granted the Board’s motion for summary judgment and dismissed Gibbs’ complaint with prejudice. Gibbs appealed.

ISSUES

Whether the circuit court erred in granting the Board’s motion for summary judgment because (1) there were genuine issues of material fact regarding the existence of an employment contract between Gibbs and the Board; and (2) the Board was estopped from asserting at-will employment as a defense because Gibbs detrimentally relied on the Board hiring him as a full-time employee when he retired from the military.

HOLDING

(1) Because there were no genuine issues of material fact, the circuit court did not err in granting summary judgment.
(2) Because the evidence indicated that Gibbs was an at-will employee, the termination was lawful regardless of Gibbs’ expectations of full-time employment. Therefore, the Court of Appeals affirmed the judgment of the Kemper County Circuit Court.

CONCURRENCE

Judge Carlton argued that because Gibbs failed to allege in his complaint that he was terminated based upon his military service (a legally impermissible motive that would have been an exception to the employment at will rule), the circuit court did not err in granting summary judgment.

Affirmed - 2015-CA-00883-COA (Nov. 1, 2016)

Opinion by Presiding Judge Irving - Concurrence by Judge Carlton

Hon. Lester F. Williamson Jr. (Kemper County Circuit Court)
Bennie L. Jones Jr. & Roberta Lynn Haughton for Appellant - Kenneth Dustin Markham for Appellee
Briefed by [Brittany Bane](#)

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MAIN STREET HOLDING, INC. v. OMSIV, INC.

CIVIL - REAL PROPERTY

REAL PROPERTY - TRESPASSING - DAMAGES - Where there is a trespass to land, the owner has a right to at least nominal damages

LITIGATION - DAMAGES - ATTORNEY'S FEES - The court shall award reasonable attorney's fees and costs against any party if that party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct

DAMAGES - ATTORNEY'S FEES - ABUSE OF DISCRETION - When reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, the appellate court is limited to a consideration of whether the trial court abused its discretion

FACTS

Main Street, Inc. ("Appellant") entered an agreement to sell 1.8 acres of a 5.46 acre piece of property to Omsiv, Inc. ("Appellee"). The parties executed an easement grant in which the parties agreed that the cost and upkeep related to the ingress/egress easement would be split pro rata between all present or subsequent owners of the subdivided parcels on the original 5.46 acre tract of land. Appellee constructed a hotel on its parcel and installed utility lines along the driveway just beyond the boundary of the easement, as Appellant's owner had given Appellee oral permission to do so. After construction was completed, Appellee sought payment from Appellant for its share of the total cost of \$45,000, but Appellant never made any payment. Appellant then filed a complaint alleging that Appellee trespassed by installing the poles outside of the easement. Appellee denied any trespass and counterclaimed for Appellant's share of the construction costs. Appellee then received a temporary restraining order and preliminary injunction to prevent Appellant from shutting off all utilities from Appellee's property, as Appellant threatened. The chancellor concluded that the parties' contract was unambiguous in its assertion of pro-rata shares, so the cost must be split between the three parties owning property on the parcel. Thus, the chancellor ordered Appellant to reimburse Appellee for two-thirds of the costs that it incurred. The chancellor also found that Appellant unnecessarily prolonged and complicated the litigation by attempting to offset its unambiguous contractual obligation by claiming nonexistent damages based on Appellee's trespass and by egregiously moving to shut off the utilities. The chancellor awarded no damages to Appellant for the trespass and awarded attorney's fees to Appellee. Main Street appealed.

ISSUES

Whether the trial court erred by (1) denying even nominal damages to Main Street, Inc. for its trespass claim and (2) awarding attorney's fees to Omsiv, Inc.

HOLDING

(1) Because the chancellor found that Omsiv committed a trespass, Omsiv was entitled to nominal damages, despite a lack of any actual damages. (2) Because Main Street pursued legal maneuvers that were frivolous, egregious in nature, and calculated to delay and harass Omsiv, the chancellor did not abuse his discretion in awarding attorney's fees to Omsiv. Therefore, the Court of Appeals reversed and rendered in part and affirmed in part the judgment of the Hinds County Chancery Court.

Reversed and Rendered in Part; Affirmed in Part - 2015-CA-00737-COA (Nov. 1, 2016)

Opinion by Judge Wilson

Hon. William H. Singletary (Hinds County Chancery Court)

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MCDOWELL V. ZION BAPTIST CHURCH

CIVIL - REAL PROPERTY

SETTLEMENT AGREEMENT - INCORPORATION BY REFERENCE - MODIFICATION OF JUDGMENT - A chancellor has authority to incorporate a settlement agreement into a final judgment by reference

CIVIL PROCEDURE – MODIFICATION OF JUDGMENT - M.R.C.P. 60(a) – Pursuant to Rule 60(a) of the Mississippi Rules of Civil Procedure, a chancellor may modify or clarify a final judgment

EASEMENTS - DOMINANT ESTATE OWNER - DUTY TO MAINTAIN - The dominant estate owner of an easement for ingress and egress has the burden to repair and maintain the easement and is entitled to work on the easement at his own expense so as to keep it reasonably usable as a road

EVIDENCE - OUTSIDE THE RECORD - REVIEW ON APPEAL - Evidence outside the record will not be considered for the first time on appeal unless the court chooses to take judicial notice of it as an adjudicative fact

FACTS

Sean and Julia McDowell negotiated a settlement with Zion Baptist Church after disputes over property lines. In the Memorandum of Settlement, the McDowells agreed to grant Zion an easement for ingress and egress over the driveway and for parking. The parties also agreed that gravel may be placed on the surface of the driveway. In April 2014, the Pontotoc County Chancery Court questioned the parties about the Memorandum of Settlement and adopted it as the order, judgment, and decree of the court. The chancellor entered the consent judgment in September 2014, which noted the conveyances but not the maintenance provision about gravel. In February 2015, Zion filed a motion to enforce the maintenance provision after the driveway became unfit for use. The chancellor ordered the Memorandum of Settlement to be incorporated into the prior consent judgment, authorizing the placement of gravel on the driveway. The chancellor denied with prejudice the McDowells motion to dismiss and denied Zion's request for attorney's fees. The McDowells appealed, and Zion cross-appealed.

ISSUES

Whether (1) the chancellor lacked jurisdiction to enforce the settlement memorandum, (2) the chancellor erred by modifying his consent judgment to incorporate the parties' settlement memorandum, (3) the chancellor erred by enforcing the maintenance provision contained in the settlement memorandum, (4) the Southern Building Code permitted the placement of gravel on the easement, (5) the settlement memorandum authorized Zion to place gravel and timber markers on the easement, (6) the chancellor erred by granting Zion an implied right to maintain the easement, (7) the chancellor erred by considering evidence the McDowells submitted after Zion filed its motion to enforce, and (8) the chancellor erred by denying Zion's request for attorney's fees.

HOLDING

(1) Because the chancellor had authority to incorporate by reference the settlement memorandum into the consent judgment, the chancellor had jurisdiction to enforce the settlement memorandum. (2) Because no substantive changes were made to the consent judgment, the chancellor did not err by modifying or clarifying the judgment. (3) Because the settlement memorandum was incorporated into the prior judgment and because the maintenance provision was an express term of the settlement, the chancellor did not err by enforcing the provision. (4) Because the McDowells failed to present evidence of the Southern Building Code to the chancellor, that evidence was not reviewed for the first time on appeal. (5) Because Zion was the dominant estate owner of the easement, Zion had authority to place gravel and timber markers on the driveway. (6) Because the easement encompasses the duty to maintain and repair, the chancellor did not err by granting Zion an implied right to maintain the easement. (7) Because evidence the McDowells submitted about the motion to enforce did not adversely affect a substantial right of Zion, the issue was without merit. (8) Because the McDowells' appeal was not frivolous and their interference with the settlement memorandum was in

good faith, the chancellor did not err by denying Zion's request for attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the Pontotoc County Chancery Court.

Affirmed - 2015-CA-00690-COA (Nov. 1, 2016)

Opinion by Judge Carlton

Hon. John Andrew Hatcher (Pontotoc County Chancery Court)

Thomas Melvin McElroy for Appellants - Leo Joseph Carmody Jr. for Appellee

Briefed by [Allison Bruff](#)

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McDUFF V. McDUFF

CIVIL - DOMESTIC RELATIONS

DIVORCE - FRAUD - BURDEN OF PROOF - A party seeking to set aside a divorce decree based on fraud or mistake must prove (1) that the facts constituting the fraud or mistake must have been the controlling factors in the effectuation of the original decree, without which the decree would not have been made as it was made; (2) the facts justifying the relief must be clearly and positively alleged as facts and must be clearly and convincingly proved; (3) the facts must not have been known to the injured party at the time of the original decree; and (4) the ignorance thereof at the time must not have been the result of the want of reasonable care and diligence

FRAUD OR MISREPRESENTATION - RELIANCE - GENERALLY - Reliance on a fraudulent statement must be reasonable or justifiable, and it is the same for negligent misrepresentation

FACTS

Kenneth McDuff and Teresa McDuff owned and co-owned two pieces of real property in Wilkinson County, known as the "Hill" and "Foster Lake" properties, respectively. Kenneth McDuff and Foster Lake co-owner Kenneth Brown had a "falling out," which resulted in Brown filing a petition to partite the Foster Lake property. He offered to settle the partition lawsuit by buying the Hill property and the McDuff's interest in the Foster Lake property, but Kenneth McDuff declined. While the partition lawsuit was pending, Teresa filed a complaint for divorce from Kenneth. They participated in a mediation, which resulted in a divorce decree where Kenneth would pay a lump sum amount in exchange for relinquishment of her interest in various properties, including the Hill and Foster Lake properties. Kenneth's attorney testified that during the mediation, the mediator informed Kenneth that Teresa was on the phone with Brown, and he offered to purchase the Hill property. Neither Kenneth nor the attorney claimed the mediator specifically stated Brown would buy the property, but assumed he would. Neither party contacted Brown to confirm the offer before Kenneth signed the PSA. Kenneth attempted to contact Brown after, but Brown responded that no offer was ever made. Kenneth filed a motion to set aside the PSA and divorce decree alleging misrepresentation and misconduct by Teresa. At the partition hearing, Brown testified that he would only purchase the property from Teresa and that the sale was contingent on other factors. Kenneth testified and indicated it was these omissions that caused him to believe Brown offered the sale. Kenneth served subpoenas on Brown, Teresa, and the mediator for depositions, which the chancellor quashed. The chancellor further denied Kenneth's motions requesting discovery and setting aside the PSA and divorce decree. Kenneth appealed.

ISSUES

Whether the chancellor erred by denying his motion to (1) set aside the PSA and divorce decree and (2) conduct discovery or subpoena the mediator to testify.

HOLDING

(1) Because Kenneth did not exercise reasonable care and diligence in confirming the offer with Brown and Kenneth failed to ask to speak to Brown during the mediation, the chancellor did not err in setting aside the PSA or divorce decree. (2) Further, the chancellor did not err in quashing the motions to conduct discovery or subpoena the mediator

because no amount of discovery or additional testimony would have produced evidence supporting setting aside the PSA or divorce decree. Therefore, the Court of Appeals affirmed the decision of the Wilkinson County Chancery Court.

DISSENT

Judge Ishee argued that by denying the request to perform additional discovery and quashing the subpoenas without a hearing, the chancellor was without sufficient information to make a ruling. Therefore, the decision should have been reversed.

Affirmed - 2015-CA-00040-COA (Nov. 1, 2016)

En Banc Opinion by Judge Wilson - Dissent by Judge Ishee

Hon. George Ward (Wilkinson County Chancery Court)

W. Brady Kellems & Joseph Preston Durr for Appellant - Lisa Jordan Dale for Appellee

Briefed by [Patrick Huston](#)

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PARISH V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - TIME-BAR - GUILTY PLEA - A motion for post-conviction collateral relief from a guilty plea must be made within three years after entry of the judgment of conviction

POST-CONVICTION RELIEF - TIME-BAR - STATUTORY EXCEPTIONS - In order to be exempt from the three-year time bar on motions for post-conviction collateral relief, a movant must show a change in the law due to an intervening decision of the United States Supreme Court or Mississippi Supreme Court, new evidence not reasonably discoverable at trial, or that his sentence has expired or his parole, probation, or conditional release has been unlawfully revoked

POST-CONVICTION RELIEF - EXCEPTIONS - FUNDAMENTAL CONSTITUTIONAL RIGHTS - In addition to statutory exceptions, errors affecting fundamental constitutional rights are exempted from the procedural bars on motions for post-conviction collateral relief

FACTS

James Kenard Parish entered a negotiated guilty plea for possession of cocaine with intent to sell on December 3, 2007. Because Parish had previously been convicted of ten felony crimes, the State sought to sentence Parish as a habitual offender. Rejecting the negotiated plea deal, the Harrison County Circuit Court sentenced Parish to serve twenty years as a habitual offender. On December 22, 2014, seven years after his voluntary guilty plea, Parish filed a motion in the trial court for post-conviction collateral relief, claiming that the plea was involuntary because he was the victim of a breached plea-bargain agreement and he received ineffective assistance of counsel. On August 18, 2015, the circuit court found that Parish's motion was time-barred under the Mississippi Uniform Post-Conviction Collateral Relief Act. Parish filed a timely notice of appeal of the decision on September 11, 2015. On December 8, 2015, the circuit court entered a second order upholding the time-bar, despite the absence of a plea colloquy in the record. Parish appealed.

ISSUE

Whether the trial court erred in denying Parish's motion for post-conviction collateral relief.

HOLDING

Because Parish's motion for post-conviction collateral relief was filed four years after the three-year statutory limitation, the motion was untimely. Additionally, Parish failed to raise any claims which would provide an exemption from the time-bar, such as demonstrating a statutory exception or a deprivation of fundamental constitutional rights. Therefore, the Court of Appeals affirmed the decision of the Harrison County Circuit Court.

Affirmed - 2015-CP-01374-COA (Nov. 1, 2016)

Opinion by Presiding Judge Griffis

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court)
Pro se for Appellant – Billy L. Gore (Att’y Gen. Office) for Appellee
Briefed by [James Kelly](#)

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PUBLIC EMPLOYEES’ RETIREMENT SYSTEM V. JAMES

CIVIL - STATE BOARD AND AGENCIES

ADMINISTRATIVE AGENCIES - CHALLENGING AGENCY ACTION - STANDARD OF REVIEW -

Reviewing courts must determine whether agency action was (1) supported by substantial evidence; (2) arbitrary or capricious; (3) beyond the agency’s power; or (4) violating some statutory or constitutional right of complaining party

ADMINISTRATIVE AGENCIES - PUBLIC EMPLOYEES’ RETIREMENT SYSTEM (PERS) - REBUTTABLE PRESUMPTION -

There is a rebuttable presumption in favor of a PERS ruling
ADMINISTRATIVE AGENCIES - DISABILITY BENEFITS - BURDEN OF PROOF - The applicant for disability income bears the burden of proving they are actually disabled

FACTS

Kristie James began experiencing back pain in 2007, and consulted with several doctors in an attempt to alleviate her pain. After having a failed spinal fusion, her doctor noted that James was “unable to perform all of the necessary duties of her job.” The doctor assigned James a permanent partial impairment (PPI) rating of “twenty-three percent whole person” and “thirty percent lumbar spine,” marking her prognosis for recovery as “poor.” James is a seventh-grade teacher and her job duties include “standing, walking, sitting, bending, reaching, stooping, and pushing.” The principal of James’s school renewed her contract despite her physical limitations, but she signed a form stating James had difficulty performing her job duties. The Public Employees’ Retirement System (PERS) denied James request for non-duty-related disability benefits, however the trial court reversed PERS’s decision, and awarded James disability benefits. PERS appeals.

ISSUE

Whether PERS’s decision denying James disability benefits was supported by substantial evidence.

HOLDING

Because James produced sufficient evidence of her disability to show she was actually disabled, she successfully rebutted the presumption in favor of the PERS ruling, Therefore the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2015-SA-01362-COA (Nov. 1, 2016)

Opinion by Chief Judge Lee

Hon. Winston L. Kidd (Hinds County Circuit Court)

Jane L. Mapp (Att’y Gen. Office) for Appellant - George S. Luter for Appellee

Briefed by [Josh Rhodes](#)

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SWAIM V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - DRIVING UNDER THE INFLUENCE - THIRD CONVICTION - Pursuant to Miss. Code Ann. § 63-11-30(2)(c), for any third conviction of a DUI within five years, the person shall be guilty of a felony and fined between two thousand and five thousand dollars, and shall serve between one and five years

CRIMINAL LAW - DRIVING UNDER THE INFLUENCE - CONVICTION REQUIREMENT - The only requirement for a felony DUI conviction is that the indictment supplies enough information to the defendant to identify with certainty the prior convictions relied upon by the State for enhanced punishment

INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - *STRICKLAND* - A claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - AFFIDAVITS IN SUPPORT - In cases involving post-conviction collateral relief, where a party only offers affidavits, the ineffective assistance claim is without merit

CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER - A guilty plea waives claims of ineffective assistance of counsel except insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea; the defendant must show that the deficient conduct proximately resulted in the guilty plea, and but for counsel's errors, the defendant would not have entered the plea

FACTS

James Allen Swaim was convicted of felony DUI after he was arrested for his third DUI offense in five years. Swaim entered a guilty plea and the trial court sentenced him to five years. Swaim filed a motion for post-conviction collateral relief. The trial court denied his motion. Swaim appealed.

ISSUES

Whether the trial court erred in (1) finding Swaim guilty of felony DUI and (2) denying Swaim's claims of ineffective assistance of counsel and involuntary guilty plea.

HOLDING

(1) Because the information on the indictment sufficiently apprised Swaim of the charge of felony DUI and his petition to enter a guilty plea stated he was arrested for his third DUI offense, Swaim was properly convicted of felony DUI. (2) Because Swaim failed to attach affidavits to support his claim of ineffective assistance of counsel and failed to demonstrate that his attorney withheld information or that his attorney improperly induced him to plead guilty, Swaim failed to show that his counsel's actions constituted error or caused prejudice. Therefore, the Court of Appeals affirmed the judgement of the Harrison County Circuit Court.

Affirmed - 2015-CP-01341-COA (Nov. 01, 2016)

Opinion by Presiding Judge Griffis

Hon. Christopher Louis Schmidt (Harrison County Circuit Court)

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

Briefed by [Kaylee Beauchamp](#)

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THOMAS V . CREWS

CIVIL- DOMESTIC RELATIONS

FAMILY LAW - ABUSE OF DISCRETION - RECONSIDERATION OF CHILD SUPPORT - A chancellor may consider adjustments to achieve an equitable result, including but not limited to, considering a reasonable necessary existing expense or debt

FAMILY LAW - ABUSE OF DISCRETION – REIMBURSEMENT OF ATTORNEY FEES - A party is not entitled to attorney’s fees where the party has the financial ability to pay the fees.

FACTS

Rachel Thomas and Michael Crews were divorced in 2007. As part of the divorce proceedings, issues of child custody and support were adjudicated, resulting in custody for Thomas and a visitation schedule for Crews to visit his daughter, Lunden. The agreement required Crews to pay monthly child-support to Thomas. The parties also agreed to evenly split the cost of Lunden’s extra-curricular activities. After a myriad of conflicts concerning mental-health treatment and expanded extracurricular activities, Thomas sought modification of the visitation schedule and an increase in child support, along with attorney fees. After a variety of motions, depositions and discovery requests, the chancellor increased the child-support amount to \$1000 per month and denied Thomas’s request for attorney’s fees. The Rankin County Chancery Court also clarified the meaning of “extracurricular” to be reserved for activities stemming from work. Thomas appealed.

ISSUES

Whether the chancery court erred in (1) awarding \$1,000 per month in child support and in clarifying the term “extracurricular” and (2) denying Thomas’ request for attorney’s fees.

HOLDING

(1) Because the chancery court considered the inappropriateness of Section 43-19-101 of the Mississippi Code annotated and considered Crews’s employment responsibilities and other obligations detailed in the financial disclosure, the chancellor did not abuse his discretion. The chancellor was within the statutory guideline to consider Crews’s necessary and existing debt as the other obligations Crews was responsible for. The Chancellor also referenced the distinction that Thomas herself had made in describing school volleyball and competitive volleyball during hearings and depositions. In cross-examination, Thomas referenced competitive volleyball as an expansion of extracurricular activities. As a result, the chancellor did not abuse his discretion when reminding the parties of the distinction between the two activities. (2) Because the chancellor’s determination that the parties were capable to pay attorney fees on their own was supported by the record, the chancellor did not abuse his discretion. The record demonstrates that while Thomas may have to rearrange personal expenses, she was not unable to pay such fees. Also, the chancellor’s denial of attorney fee compensation was predicated on the resolution of the two parties’ discovery dispute. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - No. 2015-Ca-01298-COA (11/01/2016)
Opinion by Judge James
Hon. William R Barnett (Rankin County Chancery Court)
Lisa Joy Gill for Appellant - Jeffery Birl Rimes for Appellee
Briefed by [Horacio Hernandez](#)

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COURT OF APPEALS - CRIMINAL CASES

BIRKLEY V. STATE

CRIMINAL - FELONY

EVIDENCE - PRIOR BAD ACTS - ADMISSIBILITY - Evidence of prior bad acts may be admissible if its probative value outweighs its prejudicial effect and if it is offered for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

EVIDENCE - HEARSAY - DEFINITION - Hearsay is a statement, other than one made by the defendant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement

FACTS

Casey Birkley was convicted by a jury for armed robbery. He was sentenced to life imprisonment, as a habitual offender under Mississippi Code Annotated § 99-19-83. Birkley filed a motion for a judgment notwithstanding the verdict, alleging the trial court erred in admitting evidence of his prior convictions and allowing hearsay testimony in violation of the Confrontation Clause of the Sixth Amendment. The trial court denied the motion. Birkley appealed.

ISSUES

Whether (1) the trial court erred in admitting evidence of Birkley's prior armed-robbery convictions and (2) testimony regarding the photo identification of Birkley by a witness who did not testify was improper hearsay and violated Birkley's rights under the Sixth Amendment Confrontation Clause.

HOLDING

(1) Because the admission of Birkley's prior armed robberies was more prejudicial than probative under Mississippi Rule of Evidence 404(b), it was an abuse of discretion to admit the evidence. (2) Because the court found a reversible error for the first issue, it did not find it necessary to determine whether the hearsay issue should be reversed. Therefore, the Court of Appeals reversed and remanded the judgment of the Washington County Circuit Court.

Reversed and Remanded - 2015-KA-00859-COA (Nov. 1, 2016)

Opinion by Judge Barnes

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

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Davis Vaughn](#)

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CARVER V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - DRUG POSSESSION - CONSTRUCTIVE POSSESSION - Drug possession can be constructive, if evidence can demonstrate defendant was (1) aware of the presence and character of a particular substance and (2) was intentionally and consciously in possession of it

EVIDENCE - PRIOR CRIMES - RULE 404(b) - Evidence of a crime other than the one for which the accused is being tried generally will not be admissible

CRIMINAL PROCEDURE - SENTENCING - DISCRETION - Sentencing is within the complete discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute

CRIMINAL PROCEDURE - SENTENCING - PROCEDURAL BAR - Failure to object to sentencing at trial is generally procedurally barred on appeal, unless the sentence was illegal

FACTS

Marvin Carver was the passenger in a stopped vehicle, where the State Trooper smelled a strong scent of burnt marijuana, and found nearly four ounces of marijuana and a firearm. Carver testified at trial that he did not know about, or own, the firearm or the marijuana found in the car, and that the driver told Carver that he had brought some "weed" along to smoke recreationally over the holiday weekend. Carver had previously spent nine years in prison for a drug-possession charge. The trial court found Carver guilty of possession of more than 30 grams but less than 250 grams of marijuana. Carver appealed.

ISSUES

Whether the trial court erred in (1) finding that the evidence was sufficiency to support the appellant's conviction; (2) admitting evidence of his prior arrest for auto burglary, misdemeanor convictions, and sale of cocaine; and (3) sentencing him as a habitual offender under § 41-29-147.

HOLDING

(1) Because Carver admitted that he intended to smoke the marijuana and it was within his immediate control in the console of the car, he manifested an undivided interest in the amount and presence of the marijuana and there was sufficient evidence to find he was in constructive possession of the drugs. (2) Because counsel failed to make a contemporaneous objection to the admission of prior convictions at trial, this question was procedurally barred on appeal. (3) Because Carver was found to be a subsequent drug offender under § 41-29-147, the trial court was authorized to double his maximum sentence for the possession of marijuana. Therefore, the Court of Appeals confirmed the judgment of the Madison County Circuit Court.

DISSENT

Presiding Judge Irving argued that precedent was insufficient to find constructive possession in this case, and there was insufficient evidence in the record to prove Carver was purposefully “rendering aid” to aid and abet in the crime.

Affirmed - 2015-KA-00384 - (Nov. 1, 2016)

En Banc Opinion by Judge James – Dissent by Presiding Judge Irving

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

George T. Holmes & Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Ladonna C. Holland (Att’y Gen. Office) for Appellee

Briefed by [Meredith Pohl](#)

COLLINS V. STATE

CRIMINAL - FELONY

FELONY - FIRST-DEGREE MURDER - DEFINITION - First degree murder is the killing of a human being with deliberate design to effect the death of the person killed

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - *STRICKLAND* - The test for ineffective assistance of counsel is whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL STRATEGY – Actions which fall under acceptable “trial strategy” include failure to call certain witnesses and make certain objections, and do not necessarily render counsel’s actions ineffective

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - PRESUMPTION OF STRATEGY – There is always a strong, yet rebuttable, presumption that the actions by defense counsel are reasonably strategic

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - PREJUDICIAL STANDARD – Prejudice is found if but for counsel’s errors there is a reasonable probability that the outcome of the trial would have been different

FACTS

Tavaris Collins was convicted of first-degree murder and two counts of possession of a weapon by a convicted felon. He was sentenced to life without parole for the murder and ten years each for the counts of possession of a weapon by a convicted felon. Collins appealed.

ISSUE

Whether (1) the evidence was sufficient to convict Collins and (2) he received ineffective assistance of counsel.

HOLDING

(1) Viewing the evidence in the light most favorable to the State, there was a sufficient proof of the elements of first-degree murder to convict Collins. (2) Because the decisions made by defense counsel were reasonable trial strategy under the circumstances and did not rise to a level of prejudice high enough to change the outcome of the trial, Collins did not receive ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Clay County Circuit Court.

Affirmed - 2015-KA-00848-COA (Nov. 1, 2016)

Opinion by Judge Barnes

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

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Ladonna C. Holland (Att'y Gen. Office) for Appellee

Briefed by [Morgan L. Stringer](#)

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HEISSER V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - STANDARD OF REVIEW - PLAIN ERROR - A finding of plain error requires the finding of not only an error, but one that resulted from a miscarriage of justice affecting the defendant's fundamental rights

CRIMINAL LAW – BURGLARY – ELEMENTS - Burglary is the breaking and entering of a dwelling house or inner door of such dwelling house of another with intent to commit some crime therein

FACTS

Bryce Heisser and two others forced their way into Linda Brett's home. The intruders stole personal property of Brett. Before fleeing, the phone lines were cut and Heisser used a knife to cut Brett's throat and stab her repeatedly. Heisser was convicted of armed robbery, aggravated assault and burglary of a dwelling. Heisser appealed.

ISSUE

Whether the jury was properly instructed on the elements of the crime.

HOLDING

Because Heisser did not object to the jury instruction at trial and in his post-trial motion, there could only be reversal upon finding of plain error. There was no error in instructing the jury as to burglary. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2015-KA-01046 (Nov. 1, 2006)

Opinion by Chief Judge Lee

Hon. Samac S. Richardson (Rankin County Circuit Court)

W. Daniel Hincliff & George T. Holmes (Pub. Def. Office) for Appellant - Scott Stuart & Michael Guest (Att'y Gen. Office) for Appellee

Briefed by [Ally Heine](#)

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JEFFERSON V. STATE

CRIMINAL - FELONY

SCOPE OF OPENING STATEMENT - PROSECUTION - PROPER JURY INSTRUCTION - Properly instructing the jury that opening statements are not evidence is generally sufficient to mitigate against attorneys stating what they expect the proof to show and the proof not following the expectation laid out in opening statements

INVESTIGATION - BASIS FOR INVESTIGATION - ADMISSIBILITY OF INFORMATION - Information obtained in the course of an investigation is admissible when used to show the basis of the investigation and ultimate arrest of the defendant

CONTROLLED SUBSTANCE - POSSESSION - IN GENERAL - Possession of a controlled substance may be actual or constructive

CONTROLLED SUBSTANCE - POSSESSION - CONSTRUCTIVE POSSESSION - Constructive possession may be established where the evidence, considered under the totality of the circumstances, shows that the defendant knowingly exercised control over the contraband

CONSPIRACY - DEFINITION - AGREEMENT FOR UNLAWFUL PURPOSE - To prove conspiracy the State must prove that two or more persons agreed to commit a crime or agreed to accomplish an unlawful purpose

FACTS

Dominick Riley, a United States postal inspector, was suspicious of a package addressed to “the Jefferson family” that was mailed from California to Canton, Mississippi. After securing a federal search warrant, the package was opened by the Mississippi Bureau of Narcotics (MBN) and two kilograms of marijuana were discovered. The MBN and Riley conducted a controlled delivery where Paulette Jefferson affirmed that she was expecting a package and signed for the package. Paulette threw the package to the ground after seeing that she was being watched by police. Upon Anthony Jefferson’s arrival, he admitted that the package was his. The next day Anthony waived his *Miranda* rights via a written waiver form. Anthony told agents that he knew the package was coming, that he arranged for the individual in California to send the package, and that he knew what was in the package. The trial court also allowed the agents’ testimony regarding Anthony’s verbal statement in addition to his written statement. The Madison County Circuit Court convicted Anthony of possession of marijuana in an amount more than one kilogram but less than five kilograms with intent to distribute and conspiracy to possess marijuana in an amount greater than one kilogram but less than five kilograms. Anthony’s motion for judgment notwithstanding the verdict (JNOV) and motion for new trial were denied. Anthony appealed.

ISSUES

Whether (1) the trial court erred in refusing to suppress Anthony’s verbal confession; (2) the prosecution made an improper opening statement by stating that it intended to prove Paulette said the package was not hers, that it was Anthony’s, and that Anthony told her to sign for it; (3) the trial court erred in allowing course-of-investigation testimony from the agent in response to Paulette’s statement; and (4) the trial court erred in denying Anthony’s JNOV or a new trial.

HOLDING

(1) Because Anthony’s testimony to exclude his confession was contradicted by the other competent evidence that the statements were made, the court did not error in refusing to suppress his statements to law enforcement officers. (2) Because the jury was properly instructed that opening statements are not evidence, there was no error in reference to the prosecutor’s opening statement. (3) Because the information the agent obtained from the course of the investigation provided for the basis of the investigation and Anthony’s arrest, the trial court did not error in admitting the evidence. (4) Because Anthony admitted to the ownership of the marijuana and admitted that he arranged to have the marijuana sent to the house and because Paulette planned to receive the package and deliver it to Anthony, there was sufficient evidence to support the finding of possession and conspiracy to possess marijuana. Therefore, the Court of Appeals affirmed the ruling of the Madison County Circuit Court.

Affirmed - 2015-KA-00948-COA (Nov. 1, 2016)

Opinion by Judge Greenlee

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

George T. Holmes & Phillip Broadhead (Pub. Def. Office) & William Andy Sumrall for Appellant - Barbara Wakeland Byrd & Jason L. Davis (Att’y Gen Office) for Appellee.

Briefed by [J. Marc McMillian](#)

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