

**MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 28, 2017****SUPREME COURT - CIVIL CASES****CITY OF MERIDIAN V. \$104,960.00****CIVIL - OTHER****UNIFORM CONTROLLED SUBSTANCES LAW - FORFEITURE - FORFEITABLE PROPERTY -**

Pursuant to Miss. Code Ann. §§ 41-29-153(a)(5) and 41-29-153(a)(7), personal and real property which are used or intended for use in violation of the Mississippi Uniform Controlled Substances Law are subject to forfeiture

**CIVIL FORFEITURE - PETITION - REASON FOR FORFEITURE** - A petition for forfeiture must identify the property to be forfeited and state the reason for forfeiture

**CIVIL PROCEDURE - MOTION TO DISMISS - FAILURE TO STATE A CLAIM** - Miss. R. Civ. P. 12(b)(6) provides that a party may move to dismiss if a pleading fails to state a claim upon which relief can be granted; it must appear beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim

**FACTS**

Meridian police were conducting a traffic stop when they found \$104,690 in Maria Catalan's truck after Catalan consented to the search. The City of Meridian filed a petition for forfeiture of the money and Catalan's truck. After discovery and a hearing, the Lauderdale County County Court found that the petition did not offer a reason for forfeiture and granted Catalan's motion to dismiss for failure to state a claim, which the Lauderdale County Circuit Court affirmed. The City appealed, and the Court of Appeals affirmed, finding that the City presented no facts or circumstances to show how the use or intended use of the money and truck violated the Mississippi Uniform Controlled Substances Law. The City petitioned for writ of certiorari.

**ISSUE**

Whether the trial court erred in granting Catalan's motion to dismiss for failure to state a claim.

**HOLDING**

Because Mississippi is a notice-pleadings state and the petition alleged generally that Catalan's money and truck were used or intended for use in violation of the Mississippi Uniform Controlled Substances Law, the trial court erred in granting Catalan's motion to dismiss for failure to state a claim. Therefore, the Supreme Court reversed the order of the Lauderdale County County Court, reversed the judgment of the Lauderdale County Circuit Court, and remanded the case for further proceedings.

**DISSENT**

Justice Coleman argued that the majority applied the wrong standard for determining the sufficiency of the complaint. He asserted that the no-set-of-facts test employed by the majority was abandoned by the United States Supreme Court for good reason. Justice Coleman would abrogate the no-set-of-facts test in favor of the current standard of sufficiency established in *Ashcroft v. Iqbal*.

**Reversed & Remanded - 2015-CT-00710-SCT (Sept. 28, 2017)**

En Banc Opinion by Justice Beam - Dissent by Justice Coleman

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

Andy Davis for Appellant - J. Stewart Parrish & Jessica Leigh Massey for Appellees

Briefed by [Allison A. Bruff](#)

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## HATHORN V. LOUISVILLE UTILS. COMM.

### CIVIL - PERSONAL INJURY

**MUNICIPALITIES - COMMISSIONS - SUBSIDIARIES** - A municipal commission is a subsidiary of a city and is subsequently released from a lawsuit when a plaintiff files a full, final, and absolute release with a city and its subsidiaries

**SETTLEMENT AGREEMENT - INTERPRETATION - FOUR CORNERS** - If a term is clear and unambiguous in the settlement agreement, the intent of the parties is determined by the four corners of the document

### FACTS

Paula Hathorn sued the Louisville Utilities Commission along with the City of Louisville and O'Reilly Auto Parts store located in Louisville for personal injuries. She claimed the injuries resulted from stepping into a sunken utility box set into a sidewalk in front of O'Reilly Auto Parts. Hathorn subsequently dismissed the City of Louisville and O'Reilly Auto Parts from the suit after entering into a settlement agreement with each separately. In the settlement agreement with the City, Hathorn released all claims against the City and its subsidiaries. Upon finding the Commission to be a subsidiary of the City, the Winston County Circuit Court granted the Commission's request for summary judgment. Hathorn appealed.

### ISSUE

Whether the trial court erred in ruling that Hathorn released all claims against the Commission when she executed the release with the City.

### HOLDING

Because Hathorn executed a "full, final, and absolute release" with the City that discharged all claims against the City and its "successors, agents, attorneys, insurers, and subsidiaries," and the Commission is a subsidiary of the City according to Miss. Code Ann. § 21-27-13, Hathorn released all claims against the Commission when she executed the release with the City. Hathorn's intent was clear based on the unambiguous terms within the four corners of the settlement agreement. Furthermore, references to Louisville Municipalities in her initial complaints and brief in opposition to the Commission's motion for summary judgment constituted an admission by Hathorn that the Commission is a subsidiary of the City. Therefore, the Supreme Court affirmed the judgment of the Winston County Circuit Court.

**Affirmed - 2016-CA-01317-SCT (Sept. 28, 2017)**

En Banc Opinion by Justice Beam

Hon. Joseph H. Loper Jr. (Winston County Circuit Court)

Bradford Keith Morris for Appellant - Joseph Walter Gill & Rebecca B. Cowan for Appellee

Briefed by [Caroline Loveless](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 26, 2017

### COURT OF APPEALS - CIVIL CASES

## ESTATE OF JONES V. PRUITT

### CIVIL - REAL PROPERTY

**PROPERTY - PRESCRIPTIVE EASEMENT - ELEMENTS** - The following elements must be proven to establish a prescriptive easement claim: use of the property is (1) under a 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 - ELEMENTS** - The following elements must be proven to establish an adverse possession of land claim: use of the property is (1) under a 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

**APPELLATE PROCEDURE - SCOPE OF REVIEW** - A trial judge cannot be put in error on a matter not presented to him

**PROFESSIONAL RESPONSIBILITIES - DUTY OF COUNSEL** - It is the duty of counsel to make more than an assertion; counsel should state reasons for his propositions, and cite authorities in their support

**APPELLATE PROCEDURE - REMEDIES - ATTORNEYS' FEES** - Appellate courts will not reverse the trial court on the question of attorneys' fees unless there is a manifest abuse of discretion in making the allowance

## **FACTS**

In 2000, Siblings, Sidney Jones, Jeffery Jones, and Lindrith Jones Thompson (the Joneses) inherited from their mother a 206-acre plot of land in Madison County, Mississippi. Bocee Pruitt owned the land adjacent to the Joneses since 1966, and transferred the land to her daughter, Irozenell Pruitt in 2011 (the Pruitts). The Pruitts did not live on the land and visited infrequently. The Joneses and Pruitts maintained a peaceful relationship prior to this dispute. The Joneses accessed their property through a roadway connecting their property to a public road. A locking gate was constructed at the entrance of the roadway. The Joneses built a deer-camp structure in an area on the very edge of their property, adjacent to the Pruitts' property. The parties offered conflicting testimony as to when construction took place, but at some point between 1999 and 2001, it was alleged that the structure was enlarged to the extent that it crossed the property line and encroached onto the Pruitts' property. However, Irozenell testified that a survey was conducted around 2004, which did not reflect that the structure was encroaching onto her property. She offered additional testimony that she visited the land in 2004 and that the structure was not visibly encroaching onto her land at that time. In October 2011, the Pruitts delivered an eviction notice demanding the Joneses remove the structure from the Pruitts' land and remove the lock from the gate entering the property. The Joneses refused to comply and filed their complaint in December 2011, alleging adverse possession or a prescriptive easement as to the roadway and alleging adverse possession as to the deer-camp structure. The Pruitts filed their answer and counterclaim for ejection of the deer-camp structure from their property and damages resulting from the alleged trespass. A bench trial in the Chancery Court of Madison County followed. At trial, the Joneses presented Kelly Blake Mendrop, an expert witness in civil roadway design and construction. During his testimony, Mendrop stated he prepared a report based, in part, on a survey previously prepared by a deceased T. McDonald. The Chancery Court found that Mendrop could not testify as to the truth and veracity of the survey. In January 2015, the court denied the Joneses' claims for adverse possession or a prescriptive easement as to the roadway and denied the Joneses' claim for adverse possession as to the deer-camp structure. The court instructed the Joneses to remove the lock from the gate on the roadway. Further, the court granted the counterclaim for ejection in part, ordering the Joneses to remove their structure from the Pruitts' property. The court also granted the Pruitts' request for attorneys' fees. The court denied the Pruitts' claim for damages resulting from the alleged trespass. The Joneses filed a motion for reconsideration, which was heard by Chancellor Robert G. Clark III. In September 2015, Chancellor Clark upheld all of Chancellor Harvey-Goree's findings except for the award of attorneys' fees to the Pruitts, which he set aside. The Joneses appealed. Irozenell Pruitt cross-appealed the chancery court's setting aside of attorneys' fees.

## **ISSUES**

Whether the chancery court erred in (1) denying the Joneses' claims for adverse possession or prescriptive easement with respect to the 455-foot roadway, (2) denying the Joneses' claims for adverse possession with respect to the deer-camp structure, (3) excluding Kelly Blake Mendrop from testifying regarding a survey of the property, and (4) vacating its previous award of attorneys' fees.

## **HOLDING**

(1) Because the Joneses failed to establish that their use of the roadway was hostile, the chancery court did not err in denying the Joneses' claims for adverse possession or prescriptive easement with respect to the 455-foot roadway. (2) Because the Joneses presented no evidence as to when the structure was enlarged to the extent that it began actually

encroaching upon the Pruitts' property, and because the Pruitts presented evidence that the structure was not encroaching upon their property as late as 2004, the chancery court did not err in denying the Joneses' claims for adverse possession or prescriptive easement with respect to the deer-camp structure. (3) Because a trial judge cannot be put in error on a matter not presented to him, and because the Joneses made no argument regarding the exclusion of Kelly Blake Mendrop's testimony at trial or on appeal, the court refused to consider the issue. Further, the court noted that even if the chancellor erred in excluding the testimony, such an error was harmless. (4) Because the chancellor determined that the Pruitts failed to offer any evidence as to the financial ability of the Joneses to pay, no abuse of discretion was found in the chancellor's setting aside of attorneys' fees. Therefore, the Court of Appeals affirmed the judgment of the Madison County Chancery Court.

**Affirmed - 2015-CA-01559-COA (Sept. 26, 2017)**

Opinion by Presiding Judge Irving

Hon. Janace Harvey-Goree (Madison County Chancery Court)

Pamela L. Hancock & Glenn S. Swartzfager for Appellants - C.R. Montgomery & John Prince Martin for Appellees

Briefed by [William L. Moorer](#)

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## ETHRIDGE V. ETHRIDGE

### CIVIL - CUSTODY

**FAMILY LAW - CUSTODY – AGE CONSIDERATIONS** - The age and sex of a child are merely factors to be considered under *Albright*, and the Supreme Court has significantly weakened the once strong presumption that a mother is generally best suited to raise a young child

**FAMILY LAW - CUSTODY - VISITATION** - Visitation is a matter within the chancellor's sound discretion, and the chancellor is charged with fashioning a visitation schedule that is in the best interests of the children

**CIVIL PROCEDURE - FRAUD - BURDEN OF PROOF** - Fraud must be proved by clear and convincing evidence; mere nondisclosure of pertinent facts to the court does not add up to fraud upon the court for purposes of vacating a judgment under Miss. R. Civ. P. 60(b)

### FACTS

Christy and Thomas Ethridge filed for divorce under irreconcilable differences, leaving the issue of child custody of their infant daughter to the court. After conducting an *Albright* analysis, the court awarded physical custody to Christy, and joint legal custody to both Christy and Thomas. Thomas entered a motion for reconsideration on the grounds that the tender-years doctrine was used to award physical custody to Christy and that Christy allegedly perjured herself by not affirmatively stating she had voluntarily committed herself six years prior. The trial court denied Thomas's motion. Thomas appealed.

### ISSUES

Whether (1) the trial court erred in awarding physical custody to Christy under the *Albright* factors and the tender-years doctrine, and (2) Christy's alleged perjury was enough to place physical custody or more extensive visitation with Thomas.

### HOLDING

(1) Because the *Albright* factors are not a formula, but a balancing test for the chancellor, and because the tender-years doctrine is only one factor considered, the trial court did not abuse its discretion by awarding custody to Christy. (2) Because Christy supplied the court with her mental health history, and because Thomas's attorney had every chance to enter it into evidence but failed to do so, Christy did not perjure herself. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court.

**Affirmed - 2016-CA-00785-COA (Sept. 26, 2017)**

Opinion by Presiding Judge Irving  
Hon. M. Ronald Doleac (Forrest County Chancery Court)  
Dianne Herman Ellis for Appellant - S. Christopher Farris for Appellee  
Briefed by [Nikki Breeland](#)

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## **WILLIAMS V. POTTER & SIMS FOODS, INC.**

### **CIVIL - PERSONAL INJURY**

**CIVIL - TORT - PREMISES LIABILITY ACTION** - In order to succeed in a premises liability action, the plaintiff must prove (1) a negligent act by the defendant caused the plaintiff's injury; or, (2) the defendant had actual knowledge of a dangerous condition, but failed to warn the plaintiff of the danger; or, (3) the dangerous condition remained long enough to impute constructive knowledge to the defendant

**CIVIL - TORT - DUTY OF STORE OWNER** - The store owner is not an insurer of a business invitee's injuries

### **FACTS**

Sharon Williams was shopping at Potter & Sims Foods, Inc. ("Food Depot") in Jackson, Mississippi. She allegedly inhaled white powder from a broken light bulb when she shook the box of bulbs. Williams alleged she sustained injuries, and as a result, had to have nasal surgery. Williams also alleged the bulbs were broken from the negligent acts of Food Depot's employees. Additionally, Williams alleged that Food Depot failed to exercise ordinary care to discover the presence of the powder on or about the outside of the box when it was placed on the shelf and that Food Depot failed to exercise reasonable care to discover and remove the boxes from the shelves when it was foreseeable that the boxes could be handled by customers. Food Depot answered and denied all allegations of negligence stating that who broke the bulbs and whether Food Depot knew the broken bulbs were on the shelf were contested issues even though they did not dispute that the bulbs were broken. On June 17, 2015, Food Depot filed a motion for summary judgment. On July 8, 2015, approximately one month before the trial, Williams filed a motion seeking an order allowing her to take the deposition of her treating physician, Dr. Jaden Young. The court denied her motion on the grounds that the deadline to designate expert witnesses had passed and according to Dr. Young's deposition testimony, her injuries were not connected to the Food Depot incident. On or about October 14, 2015, the court issued an order granting Food Depot's motion for summary judgment. Williams appealed.

### **ISSUE**

Whether the circuit court erred in granting Food Depot's motion for summary judgment after finding no genuine issue of material fact.

### **HOLDING**

Because Williams failed to prove negligence, actual knowledge, or constructive knowledge on behalf of Food Depot by failing to establish when or how the light bulbs were broken, who broke them, or how long they had remained on the store shelf before she picked them up, no genuine issue of material fact existed and the circuit court did not err in granting summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2016-CA-00824-COA (Sept. 26, 2017)**

En Banc Opinion by Presiding Judge Irving  
Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)  
Frank Thackston for Appellant - Frances R. Shields for Appellee  
Briefed by [Michael Farese](#)

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## COURT OF APPEALS - POST-CONVICTION RELIEF

### ALEXANDER V. STATE

#### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - PROCEDURAL BAR - TIME** - Pursuant to Miss. Code Ann. § 99-39-5(2), a PCR motion challenging a guilty plea must be filed within three years of the entry of the judgment of conviction

**POST-CONVICTION RELIEF - ILLEGAL SENTENCE - PENALTY** - When a defendant is sentenced prior to a statute's amendment, the penalty of the statute as it existed at the time of sentencing applies

**POST-CONVICTION RELIEF - EARLY RELEASE PAROLE - TIME SERVED** - An inmate shall not be eligible for the earned time allowance if the inmate was convicted of a sex crime

#### FACTS

In July 2003, Raymond Alexander was indicted on one count of possession of a controlled substance by a Rankin County grand jury. In 2004, Alexander pled guilty to the charge, and was placed in the Mississippi Department of Corrections' (MDOC) non-adjudication program to serve a term of five years of supervised probation. Alexander was informed that if he did not comply with the any of the conditions of the non-adjudication program, he would be sentenced to eight years in the custody of MDOC. Later in 2004, Alexander failed to pay court costs and admitted to molesting a nine-year-old girl. Alexander was found to be in violation of the non-adjudication guidelines, and was sentenced to eight years in the custody of the MDOC. In 2005, Alexander was indicted in the Circuit Court of Rankin County on one count of gratification of lust and two counts of sexual battery, and Alexander pled guilty to one count of sexual gratification and one count of sexual battery. Alexander was sentenced to twelve years for gratification of lust and thirty years for sexual battery, with twelve years to serve, eighteen years suspended, and five years of post-release supervision. In June 2016, Alexander filed a "petition for immediate release on probation and in the alternative immediate release on parole," which the circuit court treated as a PCR motion. The circuit court denied the motion, finding that the motion was time-barred and without merit. In July 2016, Alexander filed a petition in the Mississippi Supreme Court. Because there had been no direct appeal of Alexander's convictions and sentences, the Supreme Court dismissed Alexander's petition without prejudice and found that it could be brought in the circuit court as a PCR motion. In September 2016, Alexander filed his second PCR motion. The circuit court dismissed his motion, stating it was time-barred, successive, and without merit. Alexander appealed.

#### ISSUES

Whether the circuit court erred in determining that (1) Alexander's PCR motion was time-barred, (2) Alexander received an illegal sentence, and (3) Alexander was ineligible for an earned-time allowance.

#### HOLDING

(1) Because Alexander did not file the PCR motion until 2016, the circuit court correctly found that Alexander's motion was time-barred. (2) Because, in 2004, Miss. Code Ann. § 41-29-139(c)(1)(B) provided a sentence of not less than two years and not more than eight years for possession of a controlled substance, the circuit court correctly found that Alexander did not receive an illegal sentence. (3) Because Alexander was convicted of gratification of lust and sexual battery in 2005, the circuit court correctly found that Alexander was not eligible for an earned-time allowance. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2016-CP-01454-COA (Sep. 26, 2017)**

Opinion by Judge Westbrook

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

*Pro se* for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Off.) for Appellee

Briefed by [Emily Warwick](#)

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## HILLIARD V. STATE

### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS** - According to Miss. Code Ann. § 99-39-5(2), a post-conviction relief motion challenging a guilty plea must be filed within three years of the entry of the judgment of conviction

**CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER** - The reclassification of a felony to a misdemeanor does not change a defendant's qualification for habitual-offender status

#### FACTS

In 2012, James Hilliard pled guilty to conspiracy to sell cocaine. The State sought to enhance Hilliard's sentence by designating him as a habitual offender by pointing to two prior convictions for felony possession of a controlled substance in California. The trial court found Hilliard qualified for habitual-offender status, and he was sentenced to seventeen years for the conspiracy charge, with four years suspended and thirteen to serve as a habitual offender. In May 2016, Hilliard appealed, claiming that his enhanced sentence as a habitual offender was improper because one of his felony convictions from California was subsequently reclassified as a misdemeanor. The trial court denied his motion because it was barred by the statute of limitations. Hilliard appealed.

#### ISSUE

Whether the trial court erred in denying Hilliard's motion for post-conviction relief as time barred.

#### HOLDING

Because Hilliard pled guilty in July 2012 and his motion for post-conviction relief was filed in May 2016, it was procedurally barred. Additionally, because Hilliard told the court at the plea hearing that he understood and stipulated to two prior felony convictions in California, which qualified him for habitual-offender status, Hilliard's argument for resentencing was without merit. Therefore, the Court of Appeals affirmed the judgment of the Lafayette County Circuit Court.

**Affirmed - 2016-CP-00913-COA (Sep. 26, 2017)**

Opinion by Judge Barnes

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

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

Briefed by [Luke Kelly](#)

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## RANDLE V. STATE

### CIVIL - POST-CONVICTION RELIEF

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

**EVIDENCE - PAROLE HEARINGS - RULES OF EVIDENCE** - The Mississippi Rules of Evidence do not apply to proceedings granting or revoking probation

#### FACTS

Monroe Randle pled guilty to capital murder and was sentenced to life in prison in Mississippi. He was paroled and allowed to live in Ohio with his half-brother Danny Woods and his half-brother's girlfriend Robin Graham. Randle was

arrested and convicted in Ohio for gun possession and threatening serious bodily harm to Woods and Graham. Randle's parole was revoked due to these charges. Randle appealed.

### ISSUES

Whether (1) trial court erred in dismissing Randle's motion for post-conviction relief; (2) the trial court erred in allowing Woods's and Graham's statements as evidence; and (3) the judge exhibited bias when he referenced Randle's prior felony convictions during the hearing.

### HOLDING

(1) Because Randle admitted to the charges and turned himself over to the police, there was sufficient evidence to revoke Randle's parole. (2) Because the Mississippi Rules of Evidence do not apply to parole hearings, the issue was without merit. (3) Because the judge mentioned Randle's prior felony convictions in the context of discussing the genesis of Randle's petition, there was no indication that the reference to the prior conviction demonstrated bias. Therefore, the Court of Appeals affirmed the judgment of the Clay County Circuit Court.

**Affirmed - 2016-CP-01245-COA (Sept. 26, 2017)**

Opinion by Judge Westbrook

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

*Pro se* for Appellant - Kaylyn Harvilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Tyler Alcorn](#)

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

### **HARRIS V. STATE**

#### **CRIMINAL - FELONY**

**CONSTITUTIONAL LAW - CONFRONTATION CLAUSE - WITNESS TESTIMONY** - The Confrontation Clause guarantees only an opportunity for effective cross-examination and is not violated during a preliminary hearing unless the party is significantly limited in the scope or nature of cross-examination

**EVIDENCE - HEARSAY - EXCITED UTTERANCE** - Miss. R. Evid. 803(2) allows an out-of-court statement as an exception to hearsay when the statement relates to a startling event and was made while the declarant was under the stress or excitement of the event

### FACTS

Ranzino Harris attempted to contact his previous girlfriend, Ashley Lee. After being unable to reach her, he went to Lee's house and found Lee with her sister and two men who were staying at the house that evening, Murray and Brewer. Harris confronted Lee and began choking her in the bathroom of the home. The attack prompted action by Murray and Brewer, who pinned Harris down on a bed and began punching him repeatedly. Upon Lee's and her sister's request, Murray and Brewer eventually released Harris, who left the house. Harris returned moments later with a pistol drawn and fired two shots, both of which struck Murray. Murray died shortly thereafter from his wounds. The police responded to the 911 call reporting the potential homicide at Lee's home, and Harris surrendered to the Columbus Police Department. He was indicted for one count of deliberate-design murder and one count of aggravated assault. A four-day jury trial was held, during which time a detective and Lee were witnesses. The detective testified that, upon arriving at Lee's home, the police found Brewer in emotional distress, repeatedly walking in circles and stating, "He didn't have to do this." Lee was found to be unavailable to testify at trial, but she did testify during the preliminary hearing. Prior to trial, the State moved to use Lee's prior testimony and Harris did not object. Harris was found guilty of murder and sentenced to life imprisonment in the custody of the Mississippi Department of Corrections. Harris moved for a



judgement notwithstanding the verdict (JNOV) or, in the alternative, a new trial, both of which were denied. Harris appealed.

### **ISSUES**

Whether the trial court erred in (1) admitting an unavailable witness's preliminary hearing testimony in violation of Harris's right under the Confrontation Clause; (2) admitting a witness's hearsay statement as an excited utterance; (3) finding that the evidence was sufficient to sustain a murder conviction; and (4) upholding the jury's verdict.

### **HOLDING**

(1) Because Harris's cross-examination of the witness during the preliminary hearing was not limited in scope or nature, the admission of the witness's prior testimony did not violate the Sixth Amendment. (2) Because testimony established that Brewer was visibly upset when he made his statement, any testimony regarding Brewer's statements fell under the excited utterance exception to hearsay evidence. (3) Because Harris admitted to killing Murray after he left and returned to the house, the evidence supported the essential elements necessary for a deliberate-design murder conviction. (4) Because the overwhelming weight of evidence was not contrary to the jury's verdict, the trial court did not err in upholding the verdict.

#### **Affirmed - 2016-KA-00347-COA (Sep. 26, 2017)**

En Banc Opinion by Judge Greenlee

Hon. Lee Sorrels Coleman (Lowndes County Circuit Court)

Richard Shane McLaughlin & Nicole H. McLaughlin for Appellant - Abbie Eason Koonce & Scott Winston Colom (Att'y Gen. Office) for Appellee

Briefed by [Kelsey Dismukes](#)

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## **KENNEDY V. STATE**

### **CRIMINAL - FELONY**

**EVIDENCE - SUFFICIENCY - STANDARD OF REVIEW** - The court will only disturb a verdict when it is so contrary to the weight of the evidence that allowing it to stand would be an unconscionable injustice

**CRIMINAL PROCEDURE - EVIDENCE - CREDIBILITY OF WITNESSES** - It is the responsibility of the jury to determine credibility of witnesses

### **FACTS**

Shanki Kennedy was convicted of assaulting Victoria Watts in Watts's home. Watts had recently been through a divorce, and Kennedy was allegedly dating Watt's ex-husband. On the night of the incident, Watts was in her home asleep in her bed when she heard someone enter. The attacker, who Watts identified as Kennedy, attacked Watts with a tire iron, causing her severe injury. After the incident, police investigated and took statements from Watts and her son. Kennedy was later found in a nearby hospital seeking treatment for her own injuries. She initially stated that she had been in Watts' home, but Watt's attacked her first. However, Kennedy later claimed that she had fabricated the story and instead then claimed that Watts attacked her near her place of work. At trial, the jury found Kennedy guilty of aggravated assault. Kennedy filed a motion for a judgment notwithstanding the verdict and a motion for a new trial. The Holmes County Circuit Court denied these requests. Kennedy appealed.

### **ISSUES**

Whether the trial court erred in denying Kennedy's motions because the verdict was not supported by the (1) overwhelming weight of evidence, and (2) sufficiency of evidence.

### **HOLDING**

(1) Because the jury was presented with conflicting testimony and ultimately did not believe Kennedy's versions of events, the trial court did not err in finding that the verdict was not against the overwhelming weight of the evidence. (2) Because the testimony of those involved in the attack and that of the treating physician supported Victoria's version of events, sufficient evidence existed to prove the elements of aggravated assault. Therefore, the Court of Appeals affirmed the judgment of the Holmes County Circuit Court.

**Affirmed - 2016-KA-00253-COA (Sept. 26, 2017)**

Opinion by Judge Barnes

Hon. Jannie M. Lewis (Holmes County Circuit Court)

George T. Holmes & Phillip Broadhead for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Zachary Harper](#)

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## TOPPS V. STATE

### CRIMINAL - FELONY

**CRIMINAL - CONVICTION - SUFFICIENCY OF EVIDENCE** - Evidence is sufficient when reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

**CRIMINAL - CONVICTION - WEIGHT OF EVIDENCE** - When reviewing a denial of a motion for a new trial, the court will only disturb the verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

**CRIMINAL PROCEDURE - FLEEING LAW ENFORCEMENT - REASONABLE SUSPICION** - To secure a conviction for fleeing a law officer in a motor vehicle, the State must prove that the attempted traffic stop was the product of the officer's reasonable suspicion; reasonable suspicion can arise in several ways, including from the officer's personal observations

### FACTS

Police responded to a domestic-disturbance call from James Topps. When the officer talked to Topps's wife Gloria, Topps tried to talk over her, then said to the officer, "If y'all put your hands on me, I'm going to kill y'all." Topps walked out, and then drove his vehicle directly through an area where twenty kids were playing. Topps then sped off and ran a stop sign in front of the officers. One officer got into his patrol car, activated lights and sirens and pursued Topps. Topps drove almost eighty miles an hour until he reached a bridge construction area, where he drove through a fence and into a pasture, and finally stopped. When the officer got out of his car, Topps put his vehicle in reverse and drove within five feet of the officer. The officer fired three rounds at Topps's back tire to disable the vehicle, but Topps drove away and the pursuit was terminated. Topps was convicted of felony fleeing a law enforcement officer and aggravated assault on a law enforcement officer. Topps appealed.

### ISSUES

Whether Topps' s conviction was against the (1) weight of the evidence and (2) sufficiency of the evidence.

### HOLDING

(1) Because the officer had reasonable suspicion of domestic violence and Topps ran a stop sign, there was sufficient evidence to support Topps's conviction of felony fleeing a law enforcement officer. On count two, because of Topps threat to police and because the officer testified Topps tried to hit him with his vehicle, a rational trier of fact could have found Topps guilty of aggravated assault on a law enforcement officer. (2) Because conflicting evidence does not evince overwhelming evidence, and it is the jury's duty to resolve the conflict, neither verdict was against the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Montgomery County Circuit Court.

**Affirmed - 2016-KA-01547-COA (Sept. 26, 2017)**

En Banc Opinion by Judge Fair

Hon. Joseph H. Loper Jr. (Montgomery County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Sarah Raben](#)

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