

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 13, 2016

SUPREME COURT - CIVIL CASES

CARNEY V. CARNEY

CIVIL – DOMESTIC RELATIONS

CIVIL PROCEDURE - APPEAL OF FACTUAL FINDINGS - STANDARD OF REVIEW - The Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied

FAMILY LAW - DIVORCE - ALIMONY - Lump-sum alimony can serve two purposes: either to aid the chancellor in equitably dividing the marital estate under the *Ferguson* factors, or to aid the chancellor in correcting an equitable deficit, resulting from the equitable distribution of the marital estate under the *Armstrong* factors

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - The chancellor must determine the fair market value of the assets and equitably divide the marital property according to the following factors: (1) substantial contribution to the accumulation of the property, under which the chancellor should consider (a) the parties' direct or indirect economic contribution to the acquisition of the property, (b) the parties' contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties, and duration of the marriage, and (c) the contribution to the education, training or other accomplishments by the other spouse bearing on the earning power of the spouse accumulating the assets; (2) the degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise; (3) the market value and the emotional value of the assets subject to distribution; (4) absent equitable factors to the contrary, the value of assets not ordinarily subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse; (5) tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution; (6) the extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties; (7) the needs of the parties for financial security with due regard to the combination of assets, income and earning capacity, and (8) any other factor which in equity should be considered

FACTS

This case is the second appeal of the equitable distribution of assets of Howard Carney III and Andrea Bell Carney following their divorce. Howard and Andrea filed a consent to a joint withdrawal of fault grounds, requesting an irreconcilable differences divorce on January 13, 2010. The parties asked that the chancellor determine the issues of child support, property division, alimony, and attorney fees. In the first appeal, the Supreme Court held that the chancellor erred by awarding 100% of the equity in the marital home to the wife, in the absence of an explanation for that award. On remand, the chancellor reweighed the *Ferguson* factors, and again awarded 100% of the equity of the domicile to Andrea Carney, explaining that she had awarded all the equity to the wife to avoid an award of lump sum alimony. The chancellor found that the parties lacked sufficient assets that could be used to eliminate the need for periodic alimony. She also found that the majority of the equity had come from the wife's contribution of \$165,000 in life insurance proceeds toward the purchase of the residence, and that the wife had strong emotional ties to that home, which had been her family's "home place" since 1937.

ISSUE

Whether the chancellor's award of the equity in the marital home to Andrea Carney rendered the equitable distribution clearly erroneous.

HOLDING

Because Andrea Carney made substantial contribution to the acquisition of the home, had emotional attachment to the home, and the fact that the award eliminated the need for alimony, the chancellor was not manifestly wrong in awarding her all of the equity in the marital home under the *Ferguson* factors.

DISSENT

Justice Dickinson disagreed with the majority because he believed that the Court's precedence should not entitle Andrea Carney to lump-sum alimony, but rather Howard should have been awarded lump-sum alimony. He came to this conclusion based of his findings that Andrea had a larger estate than Howard, which should weigh against her under the *Cheatham* holding.

Affirmed - 2015-CA-00222-SCT - (10/13/2016)

En Banc Opinion by Justice Kitchens- Dissent by Justice Dickinson

Hon. Chancellor Vicki R. Barnes (Warren County Chancery Court)

Clifford C. Whitney, III and J. Mack Varner for Appellant - Travis T. Vance, Jr. for Appellee

Briefed by [Daniel E. Smith](#)

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MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE V. WEISENBERGER

CIVIL - JUDICIAL PERFORMANCE

JUDGES - WILLFUL MISCONDUCT - GENERALLY - This Court has found willful misconduct in office to be: the improper or wrong use of power of his office by a judge acting intentionally or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence

JUDGES - WILLFUL MISCONDUCT - GENERALLY - Willful misconduct in office of necessity is conduct prejudicial to the administration of justice which brings the judicial office into disrepute

JUDGES - REMOVAL OR DISCIPLINE - CANONS - Canon 1 of the Code of Judicial Conduct requires a judge to preserve the integrity and independence of the judiciary

JUDGES - REMOVAL OR DISCIPLINE - CANONS - Canon 2(A) requires a judge to respect and comply with the law and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"

JUDGES - REMOVAL OR DISCIPLINE - CANONS - Canon 4(A) states that a judge must conduct all extrajudicial activities so that they do not: "(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties"

JUDGES - REMOVAL OR DISCIPLINE - SANCTIONS - This Court applies a six-factor test to determine the appropriate sanctions, which considers: (1) the length and character of the judge's public service; (2) whether there is any prior case law on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of conduct; (5) whether the conduct was willful, intended to deprive the public of assets, or if it exploited the judge's position; and (6) the presence or absence of mitigating or aggravating factors

FACTS

Madison County Justice Court Judge William "Bill" Weisenberger Sr. was working at the Canton Flea Market directing traffic and parking. Twenty-three-year-old and mentally-disabled Eric Rivers was inappropriately touching a female at the flea market. Officers asked Rivers to leave the area, but Rivers returned after leaving and began inappropriately touching women again. Upon seeing this, Weisenberger slapped Rivers in the back of the head, directed a racial slur at Rivers, and told Rivers to run in a certain direction. Weisenberger was wearing a shirt that bore the state seal of Mississippi and that was labeled "Madison County Justice Court," and was carrying a sidearm and a pocket knife on his

person. Knowledge of Weisenberger's conduct was widespread and included reports in local newspapers, coverage on the local news, and radio stations and internet discussions. Weisenberger took a voluntary leave of absence from the bench and was later formally indicted by the Madison County Grand Jury. He was suspended from office without pay and was not reelected.

ISSUES

Whether (1) Weisenberger committed misconduct and (2) the recommended sanction was appropriate.

HOLDING

(1) Because Weisenberger purposefully and intentionally interfered in the situation with Rivers with aggression and willingly chose not to wait for a hired security guard or law enforcement officer, Weisenberger's actions rose to the level of willful misconduct. (2) Because Weisenberger's actions were willful, knowledge of the event was widespread, there were no mitigating factors, and this court has previously held that removal of office was appropriate, the sanction was appropriate. Therefore, the Supreme Court affirmed the ruling of the Mississippi Commission on Judicial Performance.

CONCURRENCES

Justice Coleman agreed that Weisenberger's egregious actions clearly constituted willful misconduct and conduct prejudicial to the administration of justice but believed the sanction should be included in order to better inform the Court's decisions in the future.

Presiding Justice Dickinson agreed with the majority's findings of misconduct but did not believe Weisenberger could be removed from office after the voters had already done so. He argued that it would have been proper to declare that if Weisenberger still had been in office, he would have been removed from it.

Removal From Office, Fine of \$1,000, and Assessed Costs in the Amount of \$5,918.46 - 2015-JP-00246-SCT (Oct. 13, 2016)

En Banc Opinion by Justice King.- Concurrences by Justice Coleman & Justice Dickinson

Hon. Lee J. Howard (Mississippi Commission on Judicial Performance)

Darlene D. Ballard, Rachel W. Michel, & Meagan Courtney Brittain for Appellant - William B. Kirksey & Christina Renee Huffman for Appellee

Briefed by [J. Marc McMillian](#)

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SMITH V. SMITH

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - GUARDIAN AD LITEM APPOINTMENTS - When a chancellor chooses to hear an abuse allegation during a custody hearing, an appointment of a guardian ad litem (GAL) is mandatory

FAMILY LAW - CUSTODY - ALBRIGHT FACTORS - When considering the factors for the best interest of the child, they are not variables in a mathematical formula, and the purpose of considering the factors is to ensure the chancellor considers all the relevant facts before making a decision

EVIDENCE - HEARSAY - TENDER YEARS EXCEPTION - The tender years exception doctrine has been diminished and is now considered only a presumption, especially if the child is male

FACTS

Rachel and David Smith married in 2004 and had two children; Samantha in 2006 and Larry in 2011. In 2011, Rachel believed that David had sexually abused Samantha and the Harrison County DHS and police department conducted an investigation, finding no evidence of abuse and seeking no criminal charges against David. Rachel still filed for divorce from David, and the chancellor entered a temporary order granting sole physical custody to Rachel and supervised visitation for David, and also appointed a guardian ad litem (GAL). A year later, the chancellor entered an order instructing the GAL to secure witnesses and gather evidence with regard to the sexual abuse allegations. After agreeing

to a consent decree to divorce in 2013, Rachel and David asked the chancellor to decide custody, visitation, and whether facts required supervised visitation. The chancellor decided the custody without asking the GAL to offer advice. David objected to certain evidence at trial and the chancellor eventually disallowed the evidence because he held the statements and evidence as unreliable. The chancellor also ordered Rachel to reimburse David for visitation costs, totaling \$8,080 for the year of visitations. Rachel appealed.

ISSUES

Whether the trial court erred in (1) rejecting the GAL's recommendation to appoint a counselor without giving reason why, (2) failing to have a written order explaining the GAL's role, (3) failing to have enough evidence to make a custody decision, (4) abusing its discretion with regard to the *Albright* factors, (5) excluding admissible evidence, and (6) awarding visitation reimbursement.

HOLDING

(1) Because the error did not ultimately affect custody, it was harmless and did not warrant remand. (2) Because there was no mandated rule requiring written orders when appointing a GAL, the issue was without merit. (3) Because there was ample evidence before the chancellor to make a custody decision, there was no abuse of discretion. (4) Because the chancellor weighed the evidence before him in considering the *Albright* factors, there was no abuse of discretion. (5) Because the chancellor found the evidence to be unreliable, it was properly excluded. (6) Because the chancellor found the visitation fees subject to the consent decree, he did not err in awarding visitation reimbursement. Therefore, the Supreme Court affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2015-CA-00213-SCT (Oct. 13, 2016)

Opinion by Justice Maxwell

Hon. Sanford R. Steckler (Harrison County Chancery Court)

Amanda Jane Proctor & William R. Wright for Appellant - Dean Holleman & Patrick Taylor Guild for Appellee

Briefed by [Tony Sax](#)

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SUPREME COURT - CRIMINAL CASES

HALL V. STATE

CRIMINAL - FELONY

EVIDENCE - FAILURE TO OBJECT - EFFECT ON APPEAL - Miss. R. Evid. 103(a) provides that a defendant's failure to object bars that defendant from raising the issue on appeal, but Miss. R. Evid. 103(d) allows plain-error doctrine to apply if the error resulted in a manifest miscarriage of justice or seriously affects the fairness, integrity or public reputation of judicial proceedings

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - PREJUDICE - To demonstrate ineffective assistance of counsel, it must be reasonably probable that, but for the attorney's errors, the outcome would have been different

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - SUFFICIENT RECORD OF ISSUE - M.R.A.P. provides that ineffective-assistance-of-counsel claims may be raised on direct appeal if such issues are based on facts fully apparent from the record

CRIMINAL PROCEDURE - VIOLATION OF CONSTITUTIONAL RIGHTS - PREJUDICE - Offenses of an accused's constitutional rights do not per se require reversal unless the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the rights violation

FACTS

Eddie Hall was convicted in trial court for the murder of Johnny Hubbard and was sentenced to life. Hall appealed. The Supreme Court affirmed the trial court's decision. The Supreme Court then granted Hall's subsequent motion for rehearing.

ISSUES

Whether (1) the trial court committed reversible error during the jury-selection process and (2) Hall received ineffective assistance of counsel.

HOLDING

(1) Although the trial court erred in appointing the jury foreperson, the trial court either did not commit error or cured its error in the remaining jury-selection issues and none of the issues could be shown to have affected the outcome of Hall's trial. (2) Because there was no testimony or evidence that anyone other than Hall fired the fatal shots and the overwhelming evidence supported Hall's conviction, any error in counsel's failure to object to the hearsay was harmless. Further, because the court could not find sufficient evidence to exist within the record to adequately address the claim that counsel requested a manslaughter plea when the potential jurors were present in the courtroom, the claim was dismissed. Therefore, the Supreme Court affirmed the judgment of the Covington County Circuit Court.

CONCURRENCE

Justice Kitchens agrees that error or not, the trial court's appointment of a jury foreperson was harmless. He argued that the Court's precedent and its rules do not prohibit a trial judge's selection and appointment of a foreperson for a petit jury.

Affirmed - 2014-KA-00986-SCT (Oct. 13, 2016)

Opinion by Presiding Justice Randolph - Concurrence by Justice Kitchens

Hon. Eddie H. Bowen (Covington County Circuit Court)

Donald W. Boykin for Appellant - Abbie Eason Koonce (Atty'n Gen. Office) for Appellee

Briefed by [Jonathan Barnes](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 11, 2016

COURT OF APPEALS - CIVIL CASES

FRANKLIN V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE –POST-CONVICTION RELIEF – STATUTE OF LIMITATIONS - Pursuant to MISS. CODE. ANN. section 99-39-5(2), a movant has three years to file a motion for post-conviction collateral relief

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - PROCEDURAL BAR - Pursuant to MISS. CODE. ANN. section 99-39-5(2), a failure to file a motion for post-conviction collateral relief within three years of a sentence, results in a procedural bar

POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - The Court may notice errors raised in a PCR motion that affect fundamental rights, but the mere assertion of a constitutional right violation does not trigger the exception

FACTS

On July 5, 2011, Robert Franklin plead guilty to one count of domestic aggravated assault. The Rankin County Circuit Court convicted Franklin and sentenced him to fifteen years, with twelve years suspended and five years of supervised probation. In 2013, Franklin was convicted of second-degree arson, and as a result, Franklin's probation was revoked

and suspension of his prior sentence for the domestic aggravated assault was terminated. On April 17, 2015, Franklin filed a motion for post-conviction collateral relief raising multiple issues; however, the Rankin County Circuit Court dismissed the motion as time-barred. Franklin appealed.

ISSUE

Whether the trial court erred in dismissing Franklin's motion for post-conviction collateral relief as time-barred.

HOLDING

Because Franklin's motion for post-conviction collateral relief was filed more than three years after his sentence was imposed, the motion was time-barred. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2015-CP-01043-COA (Oct. 11, 2016)

Opinion by Chief Judge Lee

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

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

Briefed by [Kaitlyn McMellon](#)

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NEELLY V. NEELLY

CIVIL - DOMESTIC RELATIONS

DIVORCE - NON-CUSTODIAL PARENT - TAX EXEMPTION - The decision to allocate the tax exemption to a noncustodial parent is to be made on a case-by-case basis in the exercise of the chancellor's wide discretion, and where the equities of the case require an allocation and order of waiver, the custodial parent's obligation to execute the release is to always be contingent on the receipt of all due and owing payments related to the care and maintenance of the dependent children

CHILD SUPPORT - TAX ADVANTAGE - EQUITABLE DISTRIBUTION - Chancellors can construct an order for child support that equitably takes into consideration which party received the benefit of tax advantages, while maximizing the overall income available to benefit the child

TAX EXEMPTION TRANSFER - MODIFICATION - MATERIAL CHANGE - When the request to transfer a tax exemption is pursuant to a request to modify a prior decree, a material and adverse change in circumstances must occur to transfer to one parent a tax exemption that was previously awarded to the other parent

FACTS

Edwin and Lisa Neelly divorced in 2005 and signed a divorce decree containing a Child Support and Custody Agreement ("Agreement"). Edwin was required to pay for half of all medical expenses, half of automobile expenses for the minor children, and reasonable college expenses. In May 2012, the court found Edwin in contempt and ordered him to pay Lisa \$3,500 for medical and automobile expenses and to provide the minor children with a fuel card. In January of 2013, Lisa filed a second motion for contempt asserting that Edwin failed to pay \$17,000. Edwin counter-petitioned, requesting a modification that would allow him to claim tax benefits related to his children. The court found Edwin in contempt, rejected his modification request, and ordered him to pay \$14,073.92 for all of the arrearage minus half of an unreasonable college expenses. Edwin Appealed.

ISSUES

Whether the trial court abused its discretion in denying Edwin's request for modification relating to tax benefits and erred in finding Edwin in contempt for failure to reimburse his share of qualified expenses to the minor children.

HOLDING

Because Edwin did not argue or present evidence showing a material change in circumstances, the trial court did not abuse its discretion by denying the modification request. Because the decree did not require pre-approval of expenses and because each expense was meticulously evaluated, the court did not err in finding Edwin in contempt. Therefore, the Court of Appeals affirmed the judgment of the Lee County Chancery Court.

Affirmed - 2015-CA-00438-COA (Oct. 11, 2016)

Opinion by Judge Greenlee

Hon. Mills E. Barbee (Lee County Chancery Court)

Joe M. Davis for Appellant - Jason D. Herring & Michael Spencer Chapman for Appellee

Briefed by [Desire'e Martinelli](#)

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POOLE V. WALTON

CIVIL - REAL PROPERTY

CIVIL - REAL PROPERTY - REMOVAL OF AN ADMINISTRATOR OF AN ESTATE - When a party states that he has no objection to his removal as administrator, nor to the subsequent appointment of the new administrator, in a hearing in front of the court on that matter, the court does not err by relying on that statement

FACTS

Vera Walton died intestate in July of 2009. Walter Poole Jr., Vera Walton's brother, filed a motion in the Lowndes County Chancery Court requesting appointment as administrator of Vera's estate. The court granted the motion. William H. Walton, Vera Walton's husband, filed a petition to remove Poole as the administrator. The court removed Poole and appointed William H. Walton as administrator of Vera Walton's estate. Poole appealed.

ISSUE

Whether the court erred in granting a motion to remove Walter Poole Jr. as administrator of Vera Walton's estate and subsequent appointment of William H. Walton as administrator.

HOLDING

Since Poole stated during the hearing that he had no objection to his removal as administrator of Vera's estate, nor the appointment of Walton as the new administrator, there was no error. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Chancery Court.

Affirmed -2015-CP-00604-COA (Oct. 11, 2016)

Opinion by Chief Judge Barnes

Hon. Dorothy Winston Colom (Lowndes County Chancery Court)

Pro se for Appellant - Joyce Ivy Chiles for Appellee

Briefed by [Joseph Rychlak](#)

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UNIVERSITY OF MISSISSIPPI MEDICAL CENTER V. HAMPTON

CIVIL - MEDICAL MALPRACTICE

MEDICAL MALPRACTICE - STATUTE OF LIMITATIONS - TOLLING - Pursuant to Miss. Code Ann. § 11-46-11(3), "the filing of a notice of claim . . . shall serve to toll the statute of limitations for a period of ninety-five days from the date the chief executive officer of the state agency receives the notice of the claim . . ."

MEDICAL MALPRACTICE - STATUTE OF LIMITATIONS - FILING OF ACTION - Miss. Code Ann. §11-46-11(3) states that “after the tolling period has expired, the claimant shall then have an additional ninety days to file any action against the governmental entity served with proper claim notice”

STATUTORY INTERPRETATION - CLARIFICATION - LATER AMENDMENT - In construing a statute, a court may look to later acts of the legislature to ascertain the correct meaning of a prior statute

STATUTE OF LIMITATIONS - WAIVER - FAILURE TO PURSUE - A defendant’s failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as waiver

STATUTE OF LIMITATIONS - WAIVER - DELAY - When waiver is asserted, the court looks to whether the delay in raising the defense was reasonable to determine if waiver has occurred

FACTS

On October 30, 2010, Kimrick Smith was stabbed in the torso in Marion County and airlifted to the University of Mississippi Medical Center (UMC) for emergency medical care. On November 8, 2010, Smith died after suddenly collapsing at his home in Marion County. Smith’s death was caused by blood leaking from a heart wound sustained in the stabbing. The heart injury was not discovered during Smith’s treatment at UMC. The parties agreed that November 12, 2010, was the latest possible discovery date by Kim Hampton of her wrongful-death action and the start of the one-year statute of limitations. UMC received pre-suit notice of Hampton’s wrongful death claim on November 7, 2011. February 10, 2012, marked ninety-five days following UMC’s receipt of notice of the claim and the end of the tolling period. UMC denied Hampton’s claim on February 28, 2012. Hampton filed a pro se complaint on May 29, 2012. UMC moved for summary judgement on May 28, 2013. The trial court denied the motion for summary judgment on November 4, 2013. UMC appealed.

ISSUES

Whether (1) Hampton filed her complaint outside the one-year statute of limitations and (2) UMC waived its statute-of-limitations defense.

HOLDING

(1) Because the statute-of-limitations is counted from the date on which the tolling period ended, not the date of the denial of the claim, Hampton filed her complaint outside the one-year statute of limitations. (2) Because UMC lacked exact knowledge of when Hampton discovered her claim and Hampton’s claim failed to plead the date when the claim was discovered or include facts that would indicate the discovery date of her claim, UMC did not waive its statute-of-limitations defense. Therefore, the Court of Appeals reversed the circuit court’s denial of UMC’s motion for summary judgment.

DISSENT

Presiding Judge Irving argued that because UMC’s initial focus was not limited to gathering information to support its statute-of-limitations defense, UMC was not diligent in making the effort to acquire the information it needed, and UMC participated in the litigation for over six months after it had acquired the requisite information, UMC waived its statute-of-limitations defense. Therefore, the circuit court’s denial of summary judgment should have been affirmed.

Reversed & Rendered - 2014-CA-01079-COA (Oct. 11, 2016)

En Banc Opinion by Judge Greenlee - Dissent by Presiding Judge Irving

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

Lanny R. Pace & Emilie Fischer Whitehead for Appellant - Crystal Wise Martin, Suzanne Griggins Keys & Sage Egger Harless for Appellee

Briefed by [Zachary Roberson](#)

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