

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 5, 2017***SUPREME COURT - CIVIL CASES*****ESTATE OF PUCKETT V. CLEMENT****CIVIL - WILLS, TRUSTS, & ESTATES**

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - WAIVER - A defendant waives his statute of limitations defense if he is actively involved in the litigation and unreasonably delays the litigation process

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - CIRCUMVENTION - A plaintiff may not style her cause outside of a recognized statutory category in order to circumvent the statute of limitations

FACTS

Carol Clement maintained that her neighbor Russell Puckett said she could have two planters on his front porch when he either passed away or closed the antique store in which he lived. By September of 2009, Clement heard rumors of Puckett's death, and Puckett's antique stores had seen little to no activity, so Clement removed one of Puckett's planters from Puckett's front porch with the assistance of her daughter. When Clement was leaving the porch, Clement maintains that Puckett shot four shotgun rounds towards her direction, two of the shots striking her, causing the planter to explode. Clement filed suit on June 11, 2010 for a mirage of negligence charges against Puckett. The statute of limitations expired on March 16, 2012 after tolling. On August 12, 2014, Puckett's Estate was substituted as the defendant after multiple motions for additional time were granted. Gerald Puckett was named executor of the Estate on March 15, 2016, and on March 18, 2016, the Estate filed a brief in support of a motion to dismiss the negligence suit. The trial court denied the Estate's motion to dismiss on April 21, 2016. The Estate appealed.

ISSUE

Whether the trial court erred in denying the Estate's motion to dismiss because it did not waive its statute of limitations defense.

HOLDING

Because the Estate did not actively participate all the while or unreasonably delay the litigation process and because Clement did not perfect service within the required statutory period, the trial court erred in denying the Estate's motion to dismiss. Therefore, the Supreme Court reversed the judgment of the Warren County Circuit Court.

CONCURRENCE

Presiding Justice Kitchens, contended that Clement's claims were not styled outside of their recognized statutory category. Clement could have proven a set of facts that would entitle her to relief in her claim of either negligence or gross negligence. Nevertheless, Clement allowed the three-year statute of limitations to expire, therefore barring her negligence claims.

Reserved & Rendered 2016-IA-00636-SCT (Oct. 5, 2017)

En Banc Opinion by Justice Chamberlin - Concurrence by Presiding Justice Kitchens

Hon. Isadore W. Patrick Jr. (Warren County Circuit Court)

Kenneth B. Rector for Appellant David M. Sessums for Appellee

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

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LONG V. VITKAUSKAS

CIVIL - TORTS - OTHER THAN PERSONAL

CIVIL PROCEDURE - SERVICE OF PROCESS - PRESUMPTION OF CORRECTNESS - Under Miss. R. Civ. P. 4(c)(5), a rebuttable presumption arises that a signed return receipt is valid when delivery is restricted

CIVIL PROCEDURE - SERVICE OF PROCESS - REBUTTABLE PRESUMPTION - Under Miss. R. Civ. P. 4(c)(5), a presumption of correctness can be rebutted, but only if the defendant objects thereto and submits an offer of proof to the contrary

FACTS

Douglas Michael Long and his wife separated on May 16, 2011. On March 17, 2014, Long sued David Vitkauskas, a Pennsylvania resident, in DeSoto County Circuit Court for alienation of affections. Long attempted to serve process via certified mail marked “restricted delivery” pursuant to Miss. R. Civ. P. 4(c)(5). The mailing was addressed to Vitkauskas at his place of employment. While delivery was restricted to Vitkauskas, the return receipt was signed by someone named “Mary” with the last name illegible. Vitkauskas’s attorney filed a motion to dismiss on the basis of insufficient service of process. The trial court granted Vitkauskas’s motion, finding that service was insufficient because the signature, “Mary Bre . . . ,” appeared on the return receipt instead of Vitkauskas’s signature. Long filed a motion for reconsideration, stating process was adequate under the rules or, alternatively, for additional time to serve Vitkauskas. The trial court denied Long’s motion for consideration, and the Court of Appeals affirmed on appeal. Long petitioned for writ of certiorari.

ISSUES

Whether the trial court and the Court of Appeals erred by (1) finding that service of process was insufficient, and (2) refusing to consider Long’s request for additional time to serve Vitkauskas.

HOLDING

(1) Because Long complied with every requirement of Rule 4(c)(5), and Vitkauskas failed to offer extrinsic evidence in objection, service of process was sufficient. (2) Because service of process was sufficient, this issue was moot. Therefore, the Supreme Court reversed and remanded the judgments of the DeSoto County Circuit Court and Court of Appeals.

DISSENT

Justice Coleman argued that the majority misapplied the presumption of correctness that applies to a return of process. He would have affirmed the trial court and Court of Appeals.

Reversed & Remanded - 2015-CT-00527-SCT (Oct. 5, 2017)

En Banc Opinion by Chief Justice Waller Dissent by Justice Coleman

Hon. Robert P. Chamberlin (DeSoto County Circuit Court)

Michael J. Malouf, James Matthew Lenderman, & Robert Eugene Jones II for Appellant - A. E. (Rusty) Harlow Jr. & Kathi C. Wilson for Appellee

Briefed by [Katie Berry](#)

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WHITNEY BANK V. TRIANGLE CONSTR. CO., INC.

CIVIL - OTHER

MORTGAGES & DEEDS OF TRUST - LIEN PRIORITY - CONSTRUCTION LOAN - The lien of a deed of trust securing a construction loan has priority over mechanics' and materialmen's liens only to the extent that: (a) the funds disbursed actually went into the construction, or (b) to the extent that the construction lender used reasonable diligence in disbursing the construction loan

MORTGAGES & DEEDS OF TRUST - CONSTRUCTION LOAN - PURCHASE PRICE - The purchase price of the property is not a cost of construction under some circumstances

REMEDIES - INTEREST & FEES - TRIAL JUDGE'S DISCRETION - The trial judge has wide discretion in determining appropriate interest and attorney's fees

FACTS

Whitney Bank issued a line of credit to fund Reunion of Biloxi's development project. The first draw on the loan was in the amount of \$966,872.71 and was used to pay off the existing purchase loan on the land. Then, Reunion and Triangle Construction Company entered into a contract for Triangle to be the contractor on the project. For each distribution to Reunion, Whitney's attorney checked the chancery court for liens on the property and obtained an affidavit from the owner of Reunion. The affidavit attested that all subcontractors had been paid and that the contractor waived any claim to a lien or interest in the property. The owner signed the affidavit twice for Reunion, as the owner and the contractor. The owner encountered financial difficulties, and construction on the project slowed. Triangle filed a construction and materialmen's lien on the property in the amount of \$214,314.18. After Reunion defaulted on the loan, Whitney foreclosed and sold the property for \$800,000.00. Whitney and Triangle filed claims for the remaining amounts they were owed. The chancery court found that Triangle was the general contractor on the project and that Whitney failed to use reasonable diligence in disbursing the construction loan. The chancery court found that Triangle's lien had priority over Whitney's and awarded attorney's fees and interest. Whitney appealed.

ISSUES

Whether the chancery court erred in its determination (1) that Triangle's lien had priority over Whitney's lien, and (2) of attorney's fees and interest.

HOLDING

(1) Because Whitney's disbursement of funds to pay off the existing loan on the land were not funds that actually went into the cost of construction, and Whitney knew or should have known that materialmen and contractors were not being paid, the chancery court did not err in its determination that Triangle's lien had priority. (2) Because Whitney did not properly object to the interest rate and the chancery court properly considered the appropriate factors, the chancery court did not abuse its discretion in its determination of attorney's fees and interest. Therefore, the Supreme Court affirmed the judgment of the Harrison County Chancery Court.

DISSENT

Justice Chamberlin argued that ample case law supports the conclusion that the use of loan funds to pay off the existing loan on the land constitutes funds that went into construction. He would find that Whitney's lien had priority over Triangle's lien.

Affirmed - 2016-CA-00728-SCT (Oct. 5, 2017)

En Banc Opinion by Justice King Dissent by Justice Chamberlin

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

Derek Andrew Henderson for Appellant D. Ronald Musgrove, Michael Shelton Smith II, & Macy Derald Hanson for Appellee

Briefed by [Nathan Simpson](#)

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SUPREME COURT - CRIMINAL CASES

WELLS V. STATE

CRIMINAL - FELONY

EVIDENCE - MOTIONS IN LIMINE - Motions in limine should be granted only in situations where the material or evidence in question will be inadmissible at a trial under the rules of evidence and the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury

CRIMINAL LAW - THEORY OF SELF-DEFENSE - IMMINENT DANGER - In order to justify a killing on the ground of self-defense, there must be some overt act, indicating a present intent to kill the party or do him some great personal injury, and the danger of such design being accomplished must be imminent, that is to say, immediate, pressing, and unavoidable at the time of killing

CRIMINAL LAW - MANSLAUGHTER - HEAT OF PASSION - Heat-of-passion manslaughter requires a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter

FACTS

On August 3, 2015, William B. Wells shot and killed Kendrick Brown in front of the Madison County Courthouse because Wells believed that Brown or someone under order by Brown shot Wells's mother in an attempt to kill her. A jury convicted Wells of first degree murder, but according to Wells, the jury never got to hear why he shot Brown, due to the circuit court's decision to grant several of the State's motions in limine. Wells filed a motion for a new trial, which the circuit court denied. Wells appealed.

ISSUES

Whether the circuit court (1) incorrectly and erroneously defined self-defense when granting the motions in limine, which in turn violated his due-process right to defend himself and to put on his theory of the case; and (2) erred when it barred Wells's theory of the case as to manslaughter.

HOLDING

(1) Because the circuit court's interpretation and definition of self-defense and the word imminent did not deviate at all from Mississippi case law and there was no evidence of imminent danger at the time Wells shot Brown, the evidence presented did not support a theory of self-defense. Further, because self-defense was not available to Wells as a defense, the evidence of his mother's shooting was not relevant and allowing that evidence would have confused the jury. Thus, the circuit court did not abuse its discretion in granting the State's motions in limine. (2) Because Wells failed to provide any evidence that he was in a state of violent or uncontrollable rage at the time of the shooting, which would require a separate defense of manslaughter, the circuit court did not abuse its discretion in barring the theory of manslaughter. Therefore, the Mississippi Supreme Court affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2016-KA-00959-SCT (Oct. 5, 2017)

En Banc Opinion by Justice Coleman

Hon. Steve S. Ratcliff III (Madison County Circuit Court)

John W. Christopher & Erik Gregory Faries for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Lora Wuerdeman](#)

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SUPREME COURT - ORDERS

IN RE MISSISSIPPI RULES OF APPELLATE PROCEDURE

COURT ORDER

ORDER

This en banc Order by the Mississippi Supreme Court, made in consideration of the court's own motion, amends Rule 22(a) of the Mississippi Rules of Appellate Procedure. This amendment became effective upon entry of the Order on September 29, 2017.

[Exhibit A](#), referenced in and attached to the Order, shows edits to Rule 22(a). Subsection (a) of Rule 22 now provides that applications for post-conviction collateral relief in criminal cases "are" (rather than "may be") governed by Miss. Code Ann. § 99-39-1, *et seq.* (Supp. 1994) and Rule 22.

Ordered 89-R-99027-SCT (Sept. 29, 2017)
En Banc Order by Presiding Justice Randolph
Briefed by [Allison A. Bruff](#)

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IN RE MISSISSIPPI RULES OF APPELLATE PROCEDURE

COURT ORDER

ORDER

This en banc Order by the Mississippi Supreme Court, made in consideration of the court's own motion, strikes Rule 24 from the Mississippi Rules of Appellate Procedure. This amendment to the Rules became effective upon entry of the Order on September 29, 2017.

[Exhibit A](#), referenced in and attached to the Order, shows that Rule 24 is struck in its entirety.

Ordered 89-R-99027-SCT (Sept. 29, 2017)
En Banc Order by Presiding Justice Randolph
Briefed by [Allison A. Bruff](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 3, 2017

COURT OF APPEALS - CIVIL CASES

ELMORE V. DIXIE PIPELINE CO.

CIVIL - PROPERTY DAMAGE

CIVIL PROCEDURE - DISCOVERY - JUDICIAL DISCRETION - Circuit courts have broad discretion in discovery matters, and the denial of a motion seeking production of documents submitted three weeks after the agreed upon discovery deadline is not an abuse of such broad discretion

EVIDENCE - ADMISSIBILITY - EXPERT TESTIMONY - If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

TORTS - STRICT LIABILITY - ULTRAHAZARDOUS - In determining whether an activity is ultrahazardous, courts consider the existence of a high degree of risk of some harm to the person, land, or chattels of others, the likelihood that the harm that results from it will be great, the inability to eliminate the risk by the exercise of reasonable care, the extent to which the activity is not a manner of common usage, the inappropriateness of the activity to the place it was carried on, and the extent to which its value to the community is outweighed by its dangerous attributes

TORTS - NEGLIGENCE - RES IPSA LOQUITUR - To apply res ipsa loquitur, the plaintiff must prove that the injury suffered would not have occurred in the normal course of things if those in control of the instrumentality had used proper care

FACTS

Dixie Pipeline Company operates a buried pipeline through which liquid propane is transported from Texas to North Carolina. The pipeline was originally constructed in 1961 using a low-frequency electric resistance welding (ERW) process. In 1988 and 1989, the Pipeline and Hazardous Materials Safety Administration issued an alert notice to all hazardous-liquid-propane operators who had in place ERW pipe manufactured before 1970. Neither of these notices, however, required pipeline operators to cease operating pre-1970 manufactured ERW pipe, or remove and replace the pipe. On November 1, 2007, the pipeline ruptured near Carmichael, Mississippi. At the time, Edith Elmore owned a house approximately 1.1 miles from the accident site. Elmore claimed her house suffered structural damages as a result of the accident. The National Transportation Safety Board (NTSB) investigated the pipeline rupture and concluded that the probable cause was the failure of a weld that caused the pipe to fracture along the longitudinal seam weld, a portion of the upstream girth weld, and portions of the adjacent pipe joints. The NTSB also concluded that corrosion, excavation damage, the controller's actions, and the operating conditions of the pipeline were not factors in the rupture. Elmore asserted claims of negligence, strict liability, and punitive damages against Dixie, as the operator of the pipeline. Before trial, the circuit court granted summary judgment in favor of Dixie on the strict liability and punitive damages claim. The court later granted Dixie's motion for summary judgment on Elmore's claim for negligence after excluding Dr. Clarke from offering opinion testimony regarding the standard of care for pipeline operators, or any violation of that standard of care by Dixie. Elmore appealed.

ISSUES

Whether the circuit court erred in (1) denying Elmore's motion to direct Dixie to produce the corporate decision taken in Texas litigation, (2) excluding the opinion testimony of Elmore's expert, Dr. Kendall Clarke, (3) dismissing Elmore's claim of strict liability, and (4) dismissing Elmore's claim of negligence.

HOLDING

(1) Because Elmore filed her motion directing Dixie to produce the corporate decision taken in certain Texas litigation almost three weeks after the agreed-upon discovery deadline, the motion was properly dismissed. (2) Because Dr. Clarke lacked familiarity with the federal safety regulations and standards governing the operation and maintenance of the pipeline, the circuit court properly excluded his ability to opine as to the standard of care for pipeline operators or any violation of that standard of care by Dixie. (3) Because the transportation of liquid propane does not constitute an ultrahazardous activity, strict liability is not applicable. (4) Because Dixie complied with the governing federal regulations for operation and management of the pipeline and the NTSB found that controller actions and operating conditions were not factors in the rupture, Elmore's claim that the pipe ordinarily would not have ruptured had Dixie used reasonable care and caution in the operation of the pipeline was properly dismissed. Therefore, the Court of Appeals affirmed the judgment of the Clarke County Circuit Court.

Affirmed - 2015-CA-01499-COA (Oct. 3, 2017)

Opinion by Presiding Judge Griffis
Hon. Lester F. Williamson Jr. (Clarke County Circuit Court)
John W. Christopher and James W. Nobles Jr. for Appellant - James G. House III and Laura G. Goodson for Appellee
Briefed by [Jay Michael Patterson](#)

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INGE V. INGE

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - STANDARD OF REVIEW - ABUSE OF DISCRETION - An appellate court will not disturb the chancellor's opinion when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied

DIVORCE PROCEEDINGS - DIVISION OF ASSETS - PROPERTIES - The goals of an equitable distribution are a fair division of marital property based on the facts of each case and termination of the legal relationship in a manner which each party may realize self-sufficiency

DIVORCE PROCEEDINGS - DIVISION OF ASSETS - FERGUSON ANALYSIS - A chancellor should consider each of the factors laid out in *Ferguson v. Ferguson* when dividing properties in a divorce, but it is not reversible error for a chancellor to fail to make an explicit fact by fact finding, where it is clear the chancellor considered all of the relevant factors

FACTS

In 2001, Denise Inge filed for divorce after twenty-five years of marriage to her husband, Evie Inge. Evie moved out of their home shortly thereafter but the two would not consent to an irreconcilable differences divorce until December 2015—almost fourteen years later. The equitable division of assets included each party keeping their respective retirement accounts and Denise having to pay Evie \$45,000 in order to keep the marital home. Denise argued that the chancellor ordered her to pay Evie too much and that the final judgment contained factual and legal errors. Denise appealed.

ISSUES

Whether the chancellor court erred in (1) failing to consider *Ferguson* factor 7—the needs of the parties for financial security with due regard to the combination of assets, income, and earning capacity; and (2) failing to properly value or account for the parties' retirement accounts.

HOLDING

(1) Because the chancellor addressed factor 6, which necessarily implicates the parties' needs for financial security and is closely related to factor 7, the chancellor did not err in weighing the *Ferguson* factors. (2) Because Denise was awarded more of the value of the marital home to compensate for Evie being awarded the full value of his larger retirement benefits, the chancellor did not err in equitably distributing the marital assets. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Chancery Court.

Affirmed - 2016-CA-01276-COA (Oct. 3, 2017)

Opinion by Judge Wilson
Hon. Dorothy Winston Colom (Oktibbeha County Chancery Court)
Jay Howard Hurdle for Appellant - Tamekia R. Goliday for Appellee
Briefed by [Jacob Swatley](#)

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LOWE V. CITY OF MOSS POINT

CIVIL - TORTS

GOVERNMENT ENTITIES - IMMUNITY - DISCRETIONARY FUNCTION - A function is discretionary if the duty or activity that forms the basis of the suit is not imposed by law and depends upon the judgment or choice of government entity or its employee; all acts performed in furtherance of a discretionary function or duty are themselves entitled to immunity

GOVERNMENT ENTITIES - IMMUNITY - MINISTERIAL FUNCTION - A ministerial function is one that is positively imposed by law, either through statute or regulation; if the function is ministerial, rather than discretionary, there is no immunity for the acts performed in furtherance of the function

FACTS

Following an event at a community rental space owned by the City of Moss Point, Bobbie Jean Lowe walked to her car in effort to leave when she stepped in a grass-covered hole, fell, and injured her ankle. Lowe filed suit against the City alleging negligent maintenance of the lawn and facility at the community rental space that proximately caused her injuries. Following limited discovery by both parties, the City filed a motion for summary judgment asserting immunity from suit pursuant to Miss. Code Ann. § 11-49-9(1)(d), (v). The trial court granted the City's motion, finding immunity under § 11-49-9(1)(d). Lowe appealed.

ISSUES

Whether (1) the City's lawn maintenance is a discretionary function, and (2) the trial court erred in granting summary judgment for the City.

HOLDING

(1) Because the statutes cited by Lowe empowers—not requires or imposes—the City with the authority to purchase, maintain, care, or control the premises, the overarching function of the City is discretionary and not ministerial. (2) Because both the governmental function in this case and the activity at issue in furtherance of that function are discretionary, the City was entitled to immunity and summary judgement was proper. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2016-CA-01012-COA (Oct. 3, 2017)

En Banc Opinion by Chief Judge Lee

Hon. Dale Harkey (Jackson County Circuit Court)

David C. Frazier for Appellant - Amy Lassitter St. Pe' & James Everett Lambert III for Appellee

Briefed by [Charlotte Cooper](#)

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MARLIN BUS. BANK V. STEVENS AUCTION CO.

CIVIL CONTRACT

CIVIL PROCEDURE FOREIGN JUDGMENTS FULL FAITH & CREDIT A judgment from a foreign state is presumed valid and may only be invalidated by a showing of lack of jurisdiction

CIVIL PROCEDURE FOREIGN JUDGMENTS EXTRINSIC FRAUD The courts in this State are not required to recognize the judgment of another state if the judgment was obtained by extrinsic fraud

FACTS

John D. Stevens was owner and operator of Stevens Auction Company in Aberdeen, Mississippi. Stevens contracted with Security Depot, Inc. for delivery, installation, and service of video-surveillance equipment on the auction premises.

Security Depot, a Georgia company, presented Stevens with a lease agreement providing for a \$217 payment at delivery, with payments of the same amount to be paid over the sixty-month lease term. The agreement also contained a clause providing that the laws of Georgia would control any legal proceeding related to the agreement. On the day of installation, Security Depot presented Stevens with a second lease agreement with Marlin Business Bank, a third-party finance company. The second agreement also required Stevens to make sixty monthly payments of \$217 to Marlin. It also provided that Pennsylvania law would govern the agreement, and any suit relating to the lease would be brought in state or federal court in Pennsylvania. After Stevens made two payments to Security Depot and none to Marlin, the equipment malfunctioned. Stevens stopped making payments, and Marlin brought suit against Stevens in Philadelphia Municipal Court. After Stevens neither appeared nor responded to the pleadings, Marlin obtained a default judgment against Stevens in the amount of \$11,459.50. Marlin filed notice of enrollment of the Pennsylvania judgment to Monroe County Circuit Court. After a hearing in which no evidence was offered, the circuit judge declined to allow the Pennsylvania judgment to be enrolled in Monroe County. Marlin appealed.

ISSUE

Whether the circuit court erred in denying Marlin's request to enroll the Pennsylvania judgment.

HOLDING

Because Stevens failed to allege lack of jurisdiction or that the Pennsylvania judgment was obtained by extrinsic fraudulent conduct on the part of Marlin, and instead argued only that the contracts were improperly executed, the circuit court erred in denying full faith and credit to the Pennsylvania judgment. Therefore, the Court of Appeals reversed and remanded the judgment of the Monroe County Circuit Court.

Reversed & Remanded 2016-CA-01085-COA (Oct. 3, 2017)

Opinion by Presiding Judge Griffis

Hon. James Seth Andrew Pounds (Monroe County Circuit Court)

M. Reed Martz for Appellant P. Nelson Smith Jr. for Appellees

Briefed by [Daniel Tankersley](#)

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PAIGE V. WELLS FARGO & Co.

CIVIL - OTHER

CIVIL PROCEDURE - MOTION PRACTICE - ALLEGATIONS - Pursuant to Miss. R. Civ. P. 12(b)(6), the court must accept the allegations contained in the complaint as true

CIVIL PROCEDURE - MOTION PRACTICE - DISMISSAL - Pursuant to Miss. R. Civ. P. 12(b)(6), motions should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim

FACTS

Jerry Paige and Paige Electric Company, LLC leased a storage space to Bret Gibson, an out of state contractor working on the Mississippi Gulf Coast following Katrina. Gibson was indebted to Paige Electric for more than \$80,000 for the storage space. Gibson tendered an insurance check to Paige Electric that he received as payment from Jim Wylie for work performed on Wylie's residence. The check was payable to Wylie and the company holding the mortgage on his home, HomeEq Service Corporation, which was owned by Wells Fargo at the time. Wylie verified to Paige Electric that the check had been properly endorsed and it was accepted and the excess monies given back to Gibson. Five months after the check was accepted, Wells Fargo notified BancorpSouth, Paige Electric's bank, that an endorsement was forged. BancorpSouth rejected these claims. More than a year later, BancorpSouth contacted Paige Electric and advised them that another hold was placed on their account. BancorpSouth then deducted the entire amount of the check from Paige Electric's account. Paige Electric filed suit to recover the check's value from Wylie, Gibson, HomeEq,

BancorpSouth, and Wells Fargo. Wells Fargo moved to dismiss the claims under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. The clerk of court dismissed the claims sua sponte. Paige Electric amended the complaint, dropping claims against Wylie and Gibson and asserted that HomeEq, BancorpSouth, and Wells Fargo were liable. Wells Fargo moved to dismiss the amended complaint, and the circuit court granted the motion to dismiss. Paige Electric appealed.

ISSUE

Whether the circuit court erred in dismissing Paige Electric's claims against Wells Fargo.

HOLDING

Because Paige Electric cited inapplicable sections of the Mississippi Code and failed to support its arguments of various code sections persuasively, Paige Electric failed to state a claim upon which relief could be granted. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-CA-00484-COA (Oct. 3, 2017)

Opinion by Judge Westbrook

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

Blewett W. Thomas for Appellant - Michael James Bentley for Appellee

Briefed by [D. Hunter V. Robertson](#)

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SEYMOUR V. TURNER

CIVIL - REAL PROPERTY

PROPERTY - JOINT TENANCY - SEVERANCE - Pending suit for partition does not survive the death of one of the joint tenants; at the moment of death, ownership vests exclusively in the surviving joint tenant or tenants and the doctrine of severance of the joint tenancy does not occur until the partition suit reaches final judgment

APPELLATE PROCEDURE - BRIEFS - CITATIONS - Pursuant to Miss. R. App. P. 28(a)(7), an appellant's brief must contain citations to the authorities, statutes, and parts of the record relied on, and the failure to cite any authority is a procedural bar that does not obligate the reviewing court to consider the assignment

FACTS

In 1995, Brenda Seymour and Richard Turner purchased a home and the deed of property indicated that Brenda and Turner were joint tenants with express rights of survivorship and not tenants in common. In 2011, Brenda filed a complaint requesting that the court partite the property. After litigation was filed, Brenda died and her estate was substituted as the plaintiff, with Joshua Seymour serving as administrator. At trial on February 11, 2016, Turner and counsel for Brenda's estate were present. As Richard failed to answer the complaint in this matter, a default judgment was also entered. Richard admitted at trial that he did not make the tax payments on the property. The court found that upon Brenda's death, the subject property automatically vested in Richard. The chancellor did not address the ad valorem taxes but did find that Richard owned the house by virtue of the right of survivorship that accompanies a joint tenancy. On April 4, 2016, the court denied Joshua's motion for reconsideration. Joshua appealed.

ISSUES

Whether (1) joint tenancy converted to a tenancy in common at the time that Brenda filed her suit to partite the property, and (2) the chancellor applied an erroneous legal standard in regard to the circumstances giving rise to the appeal brought about by Brenda's death.

HOLDING

(1) Because the doctrine of severance of the joint tenancy does not occur until the partition suit reaches final judgment, the filing of Brenda's complaint had no effect on the status of the property as a joint tenancy, and the joint tenancy was not converted to a tenancy in common at the time Brenda filed her suit. (2) Because the Mississippi Rules of Appellate

Procedure require an appellant's brief to contain citations to the authorities, statutes, and parts of the record relied on, Joshua's failure to cite authority was a procedural bar. As such, the chancellor correctly applied the legal standard to the circumstances giving rise to the appeal. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2016-CA-00592-COA (Oct. 3, 2017)

Opinion by Presiding Judge Irving
Hon. Jaye A. Bradley (Jackson County Chancery Court)
Virgil G. Gillespie for Appellant - *Pro Se* for Appellee
Briefed by [Mary-Katherine Black](#)

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SIMMONS V. HARRISON COUNTY DEP'T OF HUMAN SERVS.

CIVIL - OTHER

CIVIL PROCEDURE - CONFLICT OF LAWS - TERMINATION OF PARENTAL RIGHTS - The rules of civil procedure have limited applicability to termination of parental rights actions, and statutory procedures control to the extent they are in conflict with the rules of civil procedure

CIVIL PROCEDURE - WAIVER OF SERVICE OF PROCESS - TERMINATION OF PARENTAL RIGHTS - In termination of parental rights action, the right to receive notice of a hearing may be relinquished, and the relationship of the parent and child terminated by the execution of a written voluntary release, signed by the parent
RELINQUISHMENT OF PARENTAL RIGHTS - REQUIREMENTS - In termination of parental rights actions commencing prior to 2016, a parent's written relinquishment of parental rights is not required to include a child's full name, date and time of birth, and place of birth

FACTS

Following an investigation for drug abuse and child neglect, the Harrison County Department of Human Services (DHS) took custody of Maria Simmons's five children and placed them in temporary foster care. This was the third time Simmons's child, Justin Smith, had entered DHS custody. Following failed reunification efforts, DHS sought to terminate Simmons's parental rights over Smith. The Surrender of Parental Rights and Consent to Adoption document signed by Simmons incorrectly listed Smith's date of birth as February 2, 2005 instead of February 1, 2005. Prior to the termination of rights hearing, DHS discovered and corrected the error; however, Simmons refused to sign the corrected document and failed to report to the hearing. The chancellor terminated Simmons's parental rights. Simmons contested the decision, alleging she was denied due process as she did not receive a copy of the petition for termination of parental rights and was unaware of the hearing date, in violation of the rules of civil procedure. The chancellor denied the motion, find that Simmons was aware she was surrendering parental rights and waived service of process when she signed the surrender document. The chancellor also found that Smith's incorrect date of birth on the document was a non-fatal defect. Simmons appealed.

ISSUES

Whether (1) the chancery court had personal jurisdiction over Simmons, and (2) the error to Smith's date of birth invalidated Simmons's consent.

HOLDING

(1) Because Simmons voluntarily signed the surrender and release form, and the form specified that signing would result in waiver of service of process and further notice of hearing, the form conformed to controlling statutory provisions granting the chancery court personal jurisdiction over Simmons. (2) Because the governing statute did not require inclusion of the child's date of birth on a parent's execution of written release, and the date of birth had no effect on

Simmons's voluntary surrender and waiver of process, the error to Smith's date of birth did not invalidate the consent. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2016-CA-00955-COA (Oct. 3, 2017)

Opinion by Presiding Judge Griffis

Hon. Jennifer T. Schloegel (Harrison County Chancery Court, First Judicial Dist.)

Carolyn Ann Geary for Appellant - Tonya Michelle Blair for Appellee

Briefed by [Marilyn Higdon](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

BASS V. STATE

CIVIL POST-CONVICTION RELIEF

POST-CONVICTION RELIEF PROCEDURAL BARS TIME Miss. Code Ann. § 99-39-5(2) establishes that a post-conviction relief claim may only be filed within three years of conviction

POST-CONVICTION RELIEF PROCEDURAL BARS - SUCCESSIVE WRIT Miss. Code Ann. § 99-39-23(b) provides that when a prisoner has already filed a PCR motion, the second or successive PCR motion is barred as a successive writ

POST-CONVICTION RELIEF PROCEDURAL BARS EXCEPTIONS Errors affecting fundamental constitutional rights are excepted from procedural bars on PCR motions

FACTS

In 2009, Terell Bass pled guilty to capital murder, manslaughter, and aggravated assault. He was sentenced to life for capital murder and thirty additional years for manslaughter and aggravated assault. He filed his first PCR motion in 2015 on the basis of constitutional-rights violations, but the motion was denied. Shortly after, he filed his second PCR motion, which was also denied by the Marion County Circuit Court. Bass appealed.

ISSUES

Whether the circuit court erred in denying Bass's PCR motion as (1) time barred and (2) successive.

HOLDING

(1) Because Bass filed this PCR motion after the three-year period allowed under Miss. Code Ann. § 99-39-5(2), the circuit court properly denied the PCR motion as time-barred. (2) Because Bass had filed a previous PCR motion, his second PCR motion was properly barred as a successive writ. Therefore, the Court of Appeals affirmed the judgment of the Marion County Circuit Court.

Affirmed 2016-CP-01362-COA (Oct. 3, 2017)

En Banc Opinion by Chief Judge Lee

Hon. Anthony Alan Mozingo (Marion County Circuit Court)

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

Briefed by [Hale Neilson](#)

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HOOGHE V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - PRELIMINARY HEARING - WAIVER - A defendant who has been indicted by a grand jury shall not be entitled to a preliminary hearing

CRIMINAL PROCEDURE - GUILTY PLEA - DEFECTIVE INDICTMENT - The entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment with only two exceptions: (1) a guilty plea does not waive an indictment's failure to charge an essential element of the crime, and (2) a guilty plea does not waive lack of subject matter jurisdiction

POST-CONVICTION RELIEF - WAIVER OF CLAIMS - Miss. Code Ann. § 99-39-21(1) prohibits a prisoner from raising certain issues in a PCR motion if they should have been raised prior to filing a PCR motion, and failure to raise these issues acts as a waiver

PLEA BARGAINS - INEFFECTIVE COUNSEL - WAIVER - A voluntary 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

FACTS

Thomas Hooghe was arrested on April 24, 2014, in connection with thefts in Madison County. Hooghe was later indicted on four charges. Hooghe pled guilty to all four charges, in exchange for the State abandoning the prosecution of Hooghe as a habitual offender. The court subsequently sentenced him to forty-five years in custody of the Mississippi Department of Corrections. Hooghe submitted a post-conviction relief ("PCR") motion with a properly sworn statement of facts and verified oath attached. Hooghe claimed numerous bases for post-conviction relief, but was ultimately denied by the circuit court. Hooghe appealed.

ISSUES

Whether (1) the State denied Hooghe a preliminary hearing, (2) the first indictment was multiplicitous, (3) both indictments failed to allege the "proximate cause" element of larceny, (4) he was illegally sentenced due to an amendment of the larceny statutes, (5) the circuit court was without jurisdiction to accept his guilty plea as to the second indictment, (6) the auto-larceny statute under which he was convicted is unconstitutionally vague, (7) there was no factual basis for his convictions, (8) he received ineffective assistance of counsel, and (9) these cumulative errors prejudiced him.

HOLDING

(1) Because a defendant who has been indicted by a grand jury is not entitled to a preliminary hearing, the claim was without merit. (2) Because the entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in an indictment, Hooghe was barred from raising this issue on appeal. (3) Because Hooghe entered a guilty plea, the State's burden to prove the crime beyond a reasonable doubt was removed. (4) Because the statute in effect at the time an offense was committed is the one that must control the prosecution of the offense, the trial court correctly denied Hooghe's claim. (5) Because the record included a document entitled "Waiver of Arraignment and Entry of Plea," signed by Hooghe, wherein he acknowledged service of the second indictment and waived arraignment, this issue was without merit. (6) Because Hooghe failed to raise this issue before filing his PCR motion, and Miss. Code Ann. § 99-39-21(1) "prohibits a prisoner from raising certain issues in a PCR motion if they should have been raised prior to filing a PCR motion, and failure to raise these issues acts as a waiver," this issue was without merit. (7) Because Hooghe testified that the probability of his conviction was greater than his acquittal, and that he wished to take advantage of the plea bargain being offered by the State, there was factual basis to support the convictions. (8) Because Hooghe stated during his plea hearing that he was satisfied with his lawyer's representation, Hooghe failed to prove that counsel's performance was deficient, or that said deficiency prejudiced him. (9) Because Hooghe failed to satisfy his burden of showing that he was entitled to post-conviction relief by a preponderance of the evidence, this claim was properly denied. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2016-CP-01039-COA (Oct. 3, 2017)

Opinion by Presiding Judge Irving

Hon. John Huey Emfinger (Madison County Circuit Court)

Pro se for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Addison K. Watson](#)

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WHATLEY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - STATUTORY AMENDMENT - Pursuant to Miss. Code Ann. § 47-7-3(1)(g)(i), the Legislature expanded parole eligibility to persons convicted after July 1, 2014

POST-CONVICTION RELIEF - PAROLE ELIGIBILITY - ENHANCED PENALTIES - Pursuant to Miss. Code Ann. § 47-7-3(1)(f), persons convicted of “felonies with enhanced penalties” between June 30, 1995, and July 1, 2014, are not eligible for parole, and according to Mississippi case law, a felony conviction as a subsequent drug offender is a felony with an enhanced penalty

FACTS

In 2010, William Whatley pled guilty to selling a Schedule II controlled substance called Dilaudid. Because he was a subsequent drug offender, the court sentenced him to serve sixty years in the Mississippi Department of Corrections (MDOC), pursuant to Miss. Code Ann. §§ 41-29-139(b)(1) (Rev. 2009) & 41-29-147 (Rev. 2013). However, the sentencing order provided that Whatley would be released after serving a term of twenty years and placed on post-release supervision for five years. In 2011, Whatley filed a motion for post-conviction relief, which the circuit court denied. The Mississippi Supreme Court affirmed this denial. In 2016, Whatley filed a second motion for post-conviction relief based on 2014 amendments to parole statutes. The circuit court found that Whatley was barred from being released on parole and, thus, denied his motion. Whatley appealed.

ISSUE

Whether a person, convicted in 2011, is eligible for parole in light of amendments made to the state parole statutes in 2014.

HOLDING

Because Miss. Code Ann. § 47-7-3(1)(f) (Supp. 2016) states that persons convicted of “felonies with enhanced penalties” between June 30, 1995, and July 1, 2014, are not eligible for parole, Whatley’s claim that he is eligible for parole was without merit. Whatley was convicted in 2011, and case law indicates that “felonies with enhanced penalties” include a felony conviction as a subsequent drug offender. Any changes to the parole statutes that confer eligibility upon persons convicted after July 1, 2014, are not relevant to this case. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2016-CP-01292-COA (Oct. 3, 2017)

Opinion by Judge Wilson

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

Pro se for Appellant - Anthony Louis Schmidt (Att’y Gen. Office) for Appellee

Briefed by [Katherine Farese](#)

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YOUNG V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SUMMARY DISMISSAL - APPEAL - On appeal, the Court of Appeals will affirm the summary dismissal of a post-conviction relief petition if the petitioner has failed to demonstrate a claim procedurally alive substantially showing the denial of a state or federal right

CRIMINAL LAW - SENTENCING - PLEA AGREEMENTS - By pleading guilty and negotiating a mutually acceptable plea agreement, a defendant waives his right to a trial by a jury of his peers and also the right for the jury to impose his sentence

CONSTITUTIONAL LAW - EX POST FACTO CLAUSE - APPLICATION - The Ex Post Facto Clauses of the State and Federal Constitutions apply to legislative acts, not judicial decisions

FACTS

Vincent Young was sentenced to life imprisonment for armed robbery. In exchange for joining the State's recommendation that he receive a life sentence, the prosecution dropped an aggravated count and agreed not to prosecute Young as a habitual offender on the armed robbery charge. Twenty-five years later, Young filed a motion for post-conviction relief, claiming that his sentence was illegal because at the time of his offense, only a jury could sentence him to life imprisonment for armed robbery. The circuit court dismissed his petition, finding it time-barred and without merit. Young appealed.

ISSUES

Whether (1) Young was sentenced to life imprisonment illegally, and (2) his sentence constituted an Ex-Post Facto violation based on subsequent Supreme Court decisions.

HOLDING

(1) Because Young waived his present challenge to the legality of his life sentence by virtue of his voluntary, negotiated plea agreement, his claim was properly denied. (2) Because Ex-Post Facto Clauses of the State and Federal Constitutions apply to legislative acts, not judicial decisions, his sentence was not constitutionally violative. Therefore, the Court of Appeals affirmed the judgment of the Union County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Judge Wilson argued that the dicta in the majority opinion was unnecessary and ignored the Court of Appeals' obligation to follow directly controlling Supreme Court precedent. However, he agreed that Young's petition was properly denied based on Young's waiver as part of the plea agreement.

Affirmed - 2016-CP-00542-COA (Oct. 3, 2017)

En Banc Opinion by Judge Fair Partial Concurrence/Dissent by Judge Wilson

Hon. John Kelly Luther (Union County Circuit Court)

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

Briefed by [Sean Grady](#)

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COURT OF APPEALS - CRIMINAL CASES

DAVIS V. STATE

CRIMINAL FELONY

CRIMINAL PROCEDURE APPEALS WITHDRAWAL OF COUNSEL An appellant's attorney may withdraw as counsel on appeal so long as he (1) files a *Lindsey* brief in compliance with Mississippi Rules of Appellate Procedure and certifies that there are no arguable issues before the court, (2) serves every party with the brief, and (3) further advises the defendant of his right to file a *pro se* brief

CRIMINAL PROCEDURE WITNESS TESTIMONY EXCLUDED TESTIMONY Uniform Rule of Circuit & County Court Practice 9.04(C)(1) requires the disclosure of the names and addresses of all witnesses in chief which the defendant may offer at trial

CRIMINAL PROCEDURE CLOSING ARGUMENT CONTEMPORANEOUS OBJECTIONS Contemporaneous objections to allegedly erroneous comments of the prosecuting attorney in closing arguments must be made or the point is waived

FACTS

A Hancock County jury convicted Glen Joseph Davis of the murder of Maurice Colly, and the circuit court sentenced him to life in prison without eligibility of parole or early release. During the trial, the State presented video footage obtained from the Kmart in Waveland that showed Davis purchasing medical tape and bandages at 6:25 p.m. on March 7, 2012. The tape and bandages, along with a receipt showing the date and time of purchase were found in Colly's home. The State also provided the testimony of four women—Jo, Jodi, Rene, and Lori—who met Davis on a dating website. Each of these women were in contact with Davis during the days surrounding the murder of Colly. Using their testimonies and the locations of calls made from Davis's cell phone, the State was able to place Davis in the vicinity of ATM machines at the time that withdrawals were made from Colly's bank account. One of the witnesses, Jo, testified that on April 27, 2012, Davis asked to borrow her car. She agreed, but Davis never returned her car or spoke to her again. That same day, Davis went to Lori's apartment to retrieve some items he had stored there. She testified that he "was in a hurry" and left quickly. Davis was later arrested in Michigan after the case was featured on the television show *America's Most Wanted*. When he was arrested, he was wearing a salt-and-pepper wig, the package for which was found in Colly's house during the investigation. The local sheriff's department in Wyoming, Michigan found Jo's car abandoned and inside were some items that were reported missing from Colly's house by his nephew, Wally. Davis testified in his defense at trial, accounting for his whereabouts during the few days surrounding the murder of Colly. He testified that he did not kill Colly and that the items found in Jo's car were given to him by Colly and that he had not stolen them. While presenting his case, Davis attempted to call Paula Jacobson as a witness; however, the trial judge excluded Jacobson's testimony because Davis failed to disclose her as a witness until well after the State had rested its case-in-chief. The trial court found Davis guilty of deliberate design murder. Davis appealed. Davis's appointed appellate counsel filed a *Lindsey* brief, certifying that he had examined the record and had identified no arguable issues for appeal. Davis subsequently filed a supplemental *pro se* brief.

ISSUES

Whether the trial court erred in (1) excluding Jacobson's testimony, (2) allowing Detective Hudgen's testimony, and (3) allowing the prosecutor's allegedly "inflammatory remarks" during closing arguments.

HOLDING

(1) Because Davis did not disclose Jacobson as a witness and because the exclusion of her testimony did not prejudice his case, the trial judge's ruling was not an abuse of discretion. (2) Because the trial judge allowed Davis's counsel to question Hudgens further in the presence of the jury, the alleged inconsistencies were explored on cross-examination, and the issue was without merit. (3) Because Davis did not make contemporaneous objections to the remarks during the closing argument, the point was waived. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Circuit Court.

Affirmed 2015-KA-01491-COA (Oct. 3, 2017)

Opinion by Judge Wilson

Hon. Lisa P. Dodson (Hancock County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Maggie Vinzant](#)

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