

MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 14, 2017**SUPREME COURT - CIVIL CASES****DODD V. HINES****CIVIL - MEDICAL MALPRACTICE**

INTENTIONAL TORTS - MEDICAL MALPRACTICE - CONSENT - No physician may perform any procedure on a patient no matter how slight or well-intentioned without that patient's informed consent

MEDICAL MALPRACTICE - INFORMED CONSENT - EVIDENCE - Consent to medical procedures and the risks those procedures bring are within the common knowledge of laymen; thus, consent is a question for the jury when there is a question of fact

FACTS

Lacy Dodd underwent surgery to remove ovarian cysts for the purpose of increasing her possibility of having a viable pregnancy. Dodd executed a consent form prior to surgery authorizing the procedure. Dr. Randall Hines, the treating physician, discovered abnormalities in the ovarian cysts and other signs of cancerous tissue and, after consultation with another doctor, removed both of Dodd's ovaries. After biopsying the ovaries, Dodd's care-givers discovered Dodd suffered from a condition where benign tumors exhibit cancerous features. Dodd filed suit against Dr. Hines for negligently removing her ovaries. Dr. Hines submitted an affidavit stating that he informed Dodd of the possible risks involved with the surgery, while Dodd alleged she did not make informed consent. Upon a motion by Dr. Hines, the trial court granted summary judgment on the basis that Dodd consented to surgery to remove ovarian cysts. On appeal, the Court of Appeals reversed, holding that Dodd had not given express consent for the removal of her ovaries and the consent form did not summarily provide consent to remove her ovaries. Dr. Hines filed a petition for writ of certiorari.

ISSUE

Whether the trial court erred in granting summary judgment solely on the executed consent form.

HOLDING

Because the question of informed consent does not turn on expert testimony, and because Dodd alleges she did not give informed consent that authorized the removal of her ovaries, the trial court erred in granting summary judgment to Dr. Hines on the issue of consent. There remains a genuine issue of material fact on that issue. Therefore, the Supreme Court affirmed the judgment of the Court of Appeals, reversed the judgment of the Rankin County Circuit Court, and remanded for further proceedings.

CONCURRENCE

Presiding Justice Dickinson concurred in result only, disagreeing with the majority that a genuine issue of material fact existed regarding whether Dodd gave informed consent. He argued that Dodd consented to procedures—like the removal of her ovaries—deemed necessary by her physicians.

Affirmed - 2015-CT-00334-SCT (Sept. 14, 2017)

En Banc Opinion by Justice Coleman - Concurrence by Presiding Justice Dickinson

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

Sarah Lynn Dickey & J. Keith Pearson for Appellants - Michael F. Meyers, Whitman B. Johnson III, Benjamin Collier Lewis,

John Burley Howell III, & Walter T. Johnson for Appellees

Briefed by [D. Kirkwood Palmer](#)

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HATFIELD V. DEER HAVEN HOMEOWNERS ASS'N

CIVIL - REAL PROPERTY

APPELLATE PROCEDURE - MOTION TO STRIKE - DISRESPECTFUL LANGUAGE - Miss. R. App. P. 28(1) provides that any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and the appropriate appellate court will take such further action as it may deem proper

CIVIL PROCEDURE - AWARDS - ATTORNEY'S FEES - When a statute or contract provides for attorney's fees, they are recoverable with credible evidence showing the fees incurred

CIVIL PROCEDURE - APPEAL - ATTORNEY'S FEES - When an appellee is awarded attorney's fees in the trial court, and the appellee successfully defends that award on appeal, the court may also award fees incurred in litigating the appeal

FACTS

The Deer Haven Homeowners Association (the "Association") filed a Complaint for Mandatory Injunction and Other Relief against Arlin George Hatfield III in the Chancery Court of Madison County for violating the subdivision's restrictive covenants by erecting pens for various fowl. Hatfield answered and filed a counterclaim seeking declaratory judgment. The Association filed an amended complaint alleging that the Madison County Board of Supervisors rendered a decision finding that Hatfield's activity violated the Madison County Zoning Ordinance. The parties filed motions for summary judgment. The chancellor subsequently held a hearing and granted the motion ruling that the Association was entitled to injunctive relief. Later the chancellor held a hearing on the motion to reconsider regarding attorney's fees and granted the motion and rewarded the Association \$50,250 in attorney's fees. Hatfield appealed.

ISSUES

Whether (1) the trial court erred in granting the Association's motion to strike portions of Hatfield's brief according to Miss. R. App. P. 28(1); (2) the trial court erred in awarding attorney's fees to the Association; and (3) an additional award for attorney's fees for litigating the appeal is proper.

HOLDING

(1) Because Hatfield offered no evidence nor cited any authority to show that any of the chancellor's rulings were erroneous sans attorney's fees, and because these matters should have been addressed through disciplinary proceedings not direct appeal, the motion to strike was properly granted in accordance to Miss. R. App. P. 28(1). (2) Because the Association prevailed in the relief sought, they were entitled to be awarded attorney's fees according to the covenant. (3) Because the Association successfully defended the award of attorney's fees on appeal, the Association is entitled to half of the award granted by the trial court for cost of appeal. Therefore, the Supreme Court affirmed the judgment of the Madison County Chancery Court.

PARTIAL CONCURRENCE/DISSENT

Justice Chamberlin argued that the majority was correct in awarding the Association attorney's fees for the cost of the appeal; however, he took issue with the holding that allows for half of the trial court's award. Instead, Justice Chamberlin asserted that a better practice would be for the party seeking attorney's fees on appeal should support that claim by offering affidavits and time records to establish the actual fee expended on appeal. Justice Chamberlin dissented on this issue and would treat a motion for attorney's fees on appeal the same as a motion at the trial level, where evidence is needed in order for a reasonable award to be established.

Affirmed - 2016-CP-00820-SCT (Sept. 14, 2017)

En Banc Opinion by Presiding Justice Dickinson - Partial Concurrence/Dissent by Justice Chamberlin
Hon. Robert George Clark III (Madison County Chancery Court)

Pro se for Appellant - Timothy James Anzenberger, Michael Scott Jones, & James L. Martin for Appellee
Briefed by [D. Hunter V. Robertson](#)

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SUPREME COURT - POST-CONVICTION RELIEF

BROWN V. STATE

CIVIL - DEATH PENALTY - POST-CONVICTION

DEATH PENALTY - POST-CONVICTION RELIEF - DISCOVERY - Miss. R. App. P. 22(c) requires certain mandatory disclosures to the defendant, including the transfer of certain files to the petitioner or his post-conviction relief counsel and allows prepetition discovery at the trial court's discretion and upon a showing of need

DEATH PENALTY - POST-CONVICTION RELIEF - SUCCESSIVE PETITIONS - Criminal defendants are entitled to file only one petition for post-conviction, subject to limited exceptions, and Miss. R. App. P. 22(c) does not apply to successive petitions for post-conviction relief

FACTS

Joseph Patrick Brown was convicted of capital murder and sentenced to death in 1994. His conviction and sentence were affirmed by the Supreme Court in 1996. Brown filed a petition for post-conviction relief, which was ultimately denied in 2012. Brown filed a successive petition for post-conviction relief requesting the same relief that was previously denied to him. In this petition, he presented the Adams County Circuit Court with several discovery needs, but his motion failed to identify with any particularity the issues which he planned to raise in his successive petition. Specifically, he requested a "pre-petition discovery" to "file a meaningful and constitutionally adequate motion for leave to proceed in the trial court with a petition for post-conviction relief." The Adams County Circuit Court found that Brown was not entitled to discovery before filing his petition and denied his motion for leave to invoke discovery. Brown appealed.

ISSUE

Whether the trial court erred in denying Brown's motion for leave to invoke discovery in his successive petition for post-conviction relief.

HOLDING

Because Miss. R. App. P. 22(c) does not apply to successive petitions for post-conviction relief, the circuit court did not err in denying Brown's motion to invoke discovery. Miss. R. App. P. 22(c)(4)(ii) requires certain mandatory disclosures to a defendant, including the transfer of certain files to the petitioner or his post-conviction relief counsel and allows prepetition discovery at the trial court's discretion and upon a showing of need. Rule 22(c)(4)(ii) must be read in light of the Uniform Post-Conviction Collateral Relief Act's rule that criminal defendants are entitled to file only one petition for post-conviction. Accordingly, Brown was not entitled to discovery before filing his successive petition. Therefore, the Supreme Court affirmed the judgment of the Adams County Circuit Court.

DISSENT

Presiding Justice Dickinson argued that Miss. R. App. P. 22(c) limits a petitioner's access with a case-by-case analysis of whether the petitioner established a need for the information sought. He argued Rule 22 contains no limitation for successive petitions for post-conviction relief.

Affirmed - 2015-DR-01099-SCT (Sept. 14, 2017)

En Banc Opinion by Chief Justice Waller - Dissent by Presiding Justice Dickinson

Hon. Forrest A. Johnson Jr. (Adams County Circuit Court)

Jamila K. Alexander, Louwlynn Vanzetta Williams, & Alexander Kassoff, (Office of Capital Post-Conviction Counsel) for

Appellant - Brad Smith (Att'y Gen. Office) for Appellee

Briefed by [Caroline Loveless](#)

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SUPREME COURT - CRIMINAL CASES

JOHNSON V. STATE

CRIMINAL - FELONY

CRIMINAL - CONVICTION - SUFFICIENCY OF EVIDENCE - When reviewing the sufficiency of the State's evidence, the relevant question is whether, after viewing 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 considering the weight of the evidence, the court views the evidence in the light most favorable to the verdict and will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

FACTS

Betty Kate Lee was in her home when she heard someone enter, and not long after, a man with a knife stood over her. The man demanded money; however, he ultimately fled after Lee threatened her grandson would kill him. Multiple eye witness came forward claiming to have witnessed a man near Lee's home around the time of the incident, all of whom agreed that the man was Nicholas Johnson and testified to the same at trial. Additionally, Lee identified the intruder from surveillance photos. The jury found Johnson guilty of burglary and attempted armed robbery. Johnson appealed.

ISSUE

Whether Johnson's conviction was against the weight and sufficiency of the evidence.

HOLDING

Because there were three eye-witness identifications, all expressed with absolute certainty, a rational trier of fact could have found Johnson was the perpetrator beyond a reasonable doubt. Further, the jury's conclusion was not against the overwhelming weight of the evidence. Therefore, the Supreme Court affirmed the judgment of the Panola County Circuit Court.

Affirmed - 2016-KA-00599-SCT (Sept. 14, 2017)

Opinion by Presiding Justice Dickinson

Hon. Smith Murphey (Panola County Circuit Court)

Greta Regina Ballard for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Sarah Raben](#)

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ROBERTS V. STATE

CRIMINAL - FELONY

CRIMINAL - MEDICAL RECORDS - IN CAMERA REVIEW - Trial courts can perform *in camera* reviews of medical records to determine relevancy, materiality, and to see if they are exculpatory

CRIMINAL - EXCULPATORY EVIDENCE - DUE PROCESS OF LAW - Due process of law does not require the State to use its investigatory resources to procure exculpatory evidence for use by the defense

FACTS

On October 1, 2013, thirteen-year-old Tanya was walking to school when a man—later identified as Jafron Roberts—approached her from behind, choked her, and thrust her into the passenger seat of his car. Tanya tried to escape, but Roberts restrained her with his right hand. Roberts punched her in the face and told her she would not return home if she tried to get out of the car. Roberts drove her into an abandoned house and ordered her to undress. Tanya stated

that Roberts forced her to perform oral sex and other sexual acts. Tanya left her underwear in the house to prove her presence there. Roberts later dropped Tanya off one block from where he had taken her. Tanya called 911 to report her rape, that she had been hit in the face, and to describe her attacker. Tanya was transported to the hospital where she was examined by a sexual assault nurse examiner, and a sexual assault kit was performed. Tanya described her assailant. Tanya was unable to identify the abandoned house with police but recognized Roberts's car. Police intercepted the car, and Tanya identified Roberts as her assailant. The next day, officers located the abandoned house, which was consistent with Tanya's description, and the underwear that Tanya left was located. Police interviewed Roberts three days after the incident where he refused to sign a rights waiver form but continued to talk to police. He provided an alibi that he was at the WIN job center at the time of the alleged crime. He said he saw Tanya walking later on and tried to sell her iPads. He later admitted that he took Tanya to a house where he claimed they had consensual sex. Tanya's pants contained epithelial cells and sperm cells, and the epithelial cells tested positive for the presence of Y-STRs. A partial Y-STR profile was cut from Tanya's pants, and it did not exclude Roberts. Roberts was tried and convicted of kidnapping and statutory rape. He was acquitted of sexual battery. Roberts was sentenced to thirty years for kidnapping and thirty-seven years for statutory rape, with the sentences to run concurrently. Roberts appealed.

ISSUES

Whether (1) the trial court erred by overruling Roberts's motion to suppress his statement; (2) the trial court erred by denying Roberts's request for production and in camera inspection of medical records; (3) Roberts was denied due process by the loss of defense evidence; (4) the trial court erred in allowing expert opinions not given to a reasonable degree of scientific certainty; and (5) the pre-indictment delay resulted in a denial of due process.

HOLDING

(1) Because the trial court's conclusion found that in the totality of the circumstances Robert's confession was freely and voluntarily given, and his rights waiver was knowingly, intelligently and voluntarily made, the trial court did not err. (2) Because the overwhelming evidence that Roberts committed statutory rape against Tanya would not be negated even if the medical records showed Tanya had engaged in sexual intercourse with a different male the day before, the trial court did not err in denying Roberts's request. (3) Because Roberts never raised the issue of denial of due process by loss of defense evidence at trial, it was procedurally barred. Further, the possible video recording evidence from the cameras at the WIN job center was never obtained by the State and never in their possession or control, so the State did not lose, destroy, or fail to preserve it. (4) Because the expert provided testimony on the frequency of the partial match and provided a margin of error, the trial court's refusal to exclude the expert testimony was not in error. (5) Because Roberts never requested dismissal of the indictment based on a due process violation, this issue was procedurally barred. Furthermore, Roberts has not shown prejudice or that the delay was intentional and used by the prosecution to gain a tactical advantage over him. As such, the issue was without merit. Therefore, the Supreme Court affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2016-KA-00847-SCT (Sept. 14, 2017)

Opinion by Justice Kitchens

Hon. Justin Miller Cobb (Lauderdale County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Michael Farese](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 12, 2017

COURT OF APPEALS - CIVIL CASES

CITY OF JACKSON V. GRAHAM

CIVIL - PERSONAL INJURY

APPELLATE PROCEDURE - REVERSAL – CONCLUSION - A lower court’s decision will not be reversed where the court reaches the right conclusion, although for the wrong reason

TORTS - IMMUNITY - MISSISSIPPI TORT CLAIMS ACT - The Mississippi Tort Claims Act shields the government from liability based on any act of an employee engaged in the performance or execution of duties, unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury

TORTS - CAUSATION - PRIMA FACIE EVIDENCE - When a party exhibits bills for examination by the court and testifies that the bills were incurred as a result of the injuries complained of, they become prima facie evidence that the bills were necessary and reasonable; however, opposing party may rebut the necessity and reasonableness of the bills by proper evidence

FACTS

Wavie Graham suffered injuries as a result of Jackson Police Officer Undrae Martin striking her car with his police cruiser. At the time, Officer Martin was responding to a disturbance call and did not employ the cruiser’s emergency lights or sirens. Graham filed a claim against the City of Jackson and Officer Martin, pursuant to the Mississippi Tort Claims Act (MTCA), alleging that Officer Martin acted with reckless disregard for the safety of the public. The trial court used the ten factors established by the Mississippi Supreme Court when analyzing police-pursuit cases. The court determined Officer Martin acted with reckless disregard, and thus, he was not covered under the immunity afforded by the MTCA. The City of Jackson appealed.

ISSUES

Whether the trial court erred in (1) applying the ten-point test previously used only in “pursuit cases” to determine whether Officer Martin was guilty of reckless disregard, and (2) not requiring expert testimony to determine the causation of Graham’s injuries.

HOLDING

(1) Because the trial court correctly determined, based on the totality of the circumstances, that Officer Martin acted with reckless disregard, despite incorrectly applying the ten factors to the facts in the case, the trial court did not err in finding Officer Martin acted with reckless disregard. (2) Because Graham submitted medical bills and testified that she received medical treatment for injuries from the accident, and the City of Jackson failed to rebut the testimony, Graham was not required to proffer any expert testimony. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2016-CA-00805-COA (Sept. 12, 2017)

Opinion by Judge Westbrook

Hon. William A. Gowan Jr. (Hinds County Circuit Court, First Judicial Dist.)

James Richard Davis Jr. & Monica Davis Joiner for Appellant - Benjamin Seth Thompson & Stacy Everett Pepper for Appellee

Briefed by [Marilyn Higdon](#)

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ESTATE OF BANKSTON V. CLC OF BILOXI, LLC

CIVIL - CONTRACT

LACK OF CAPACITY - MEDICAL SURROGACY - HEALTH-CARE DECISIONS - Third parties may make healthcare decisions for a patient who is an adult or emancipated minor if the patient has been determined by his/her primary physician to lack capacity and no agent or guardian has been appointed, or the agent or guardian is reasonably unavailable

LACK OF CAPACITY - CRITERIA - NON-PHYSICIAN OPINION - Under Miss. Code Ann. § 41-41-221, a non-physician’s opinion is irrelevant in determining whether the patient possesses or lacks decision-making capacity

LACK OF CAPACITY - BURDEN OF PROOF - MEDICAL RECORDS - Medical records that document a diagnosis or symptoms indicating a lack of capacity is not the equivalent of an affirmative determination by a physician that the patient lacks capacity

FACTS

After falling in his home, Jack Bankston was treated at the University of Mississippi Medical Center (UMMC) for head and cervical spine trauma. While in the hospital, he experienced respiratory distress requiring an emergency tracheostomy to be performed. Two weeks after being admitted to UMMC, Bankston was transferred to Regency at Forest General Hospital, a long-term, acute-care center, and received treatment from Dr. Ralph Kahler. Bankston stayed at Regency nearly a month before being discharged. On the same day as his discharge, Bankston was admitted to Community Living Center (CLC) in Biloxi, Mississippi. During his first day at the center, Bankston made several attempts to climb out of his bed by grasping the handrail and climbing over the side of the bed. He was placed back into his bed twice, and that same evening was found lying on the floor on his back. He was taken to the emergency room at Biloxi Regional Medical Center, where he passed away the following day. Bankston’s wife, Victoria, filed a wrongful death complaint alleging negligence against CLC, to which CLC responded with a motion to dismiss and compel arbitration. The trial court held a hearing on CLC’s motion, and ordered supplemental briefing on the issue of whether Bankston lacked capacity under Miss. Code Ann. § 41-41-203(d). The trial court found that Bankston lacked capacity and Victoria had the authority to act as his surrogate, thereby binding Bankston to the CLC admission agreement and arbitration clause contained within. The trial court denied the Estate’s motion to reconsider. The Estate appealed.

ISSUE

Whether the trial court erred in finding that Victoria was the proper healthcare surrogate to Bankston, such that she possessed the authority to bind Bankston to CLC’s admission agreement, containing an arbitration clause.

HOLDING

Because Dr. Kahler’s diagnoses indicated—but did not include a definitive determination—that Bankston lacked capacity prior to his admittance to CLC, the trial court erred in finding that Victoria was the proper healthcare surrogate to Bankston. Therefore, the Court of Appeals reversed and remanded the judgment to the Harrison County Circuit Court.

DISSENT

Judge Carlton argued that Dr. Kahler’s discharge-summary note was appropriately used by the trial court to indicate that Bankston lacked capacity because Bankston’s symptoms were clearly consistent with an individual who could not acknowledge understanding, and the evidence presented at trial supported the trial court’s finding that Victoria was Bankston’s surrogate.

Reversed & Remanded - 2016-CA-01190-COA (Sep. 12, 2017)

En Banc Opinion by Chief Judge Lee - Dissent by Judge Carlton

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)

William Harvey Barton & Danielle Brewer Jones for Appellant - John G. Wheeler & Margaret Sams Gratz for Appellee

Briefed by [Kelsey Dismukes](#)

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ESTATE OF LABASSE V. LABASSE

CIVIL - WILLS, TRUSTS, & ESTATES

WILLS & ESTATES - DUTIES OF EXECUTOR - ADMINISTERING & CLOSING ESTATE - Executor cannot complain of errors caused by failure to administer and close estate, when she made no objections at trial level

WILLS & ESTATES - RENUNCIATION OF WILL - SPOUSAL-SHARE ELECTION - Pursuant to Miss. Code Ann. § 91-5-25, a spouse can renounce a decedent's will and instead, elect his or her legal share of decedent's estate

CIVIL PROCEDURE - INSUFFICIENT SERVICE OF PROCESS - PRESERVATION FOR APPEAL - A defendant who appears and defends against the merits of a claim that falls under Miss. R. Civ. P. 81 (requiring special summons in matters involving estates) without asserting his or her objections to insufficient service waives the claim for appeal

FACTS

Less than a month before his death, Louis Labasse published an instrument that purported to be his last will and testament. The will left his wife, Ruby, a life estate in their homestead, and his interest in the couple's joint checking account. The will left his daughters from a prior marriage, Wendy Chester and Pamela Ortis, the remainder of his property. Wendy filed a petition to probate her father's will and to be appointed executor of his estate, which the chancellor granted. Ruby then renounced the will, and filed a spousal-share election pursuant to Miss. Code Ann. § 91-5-25. Ruby also filed two separate petitions to contest the will, remove Wendy as executor, and establish her widow's right to the possession of the couple's homestead. In February, the chancellor entered an order responding to these various petitions which, among other things, dismissed Ruby's petitions to contest the will and remove Wendy as executor. The order also granted Ruby's petition to establish possession of the homestead, as well as her spousal-share election, awarding her a one-third interest in Louis's estate. Ruby filed a Motion for Citation of Contempt against Wendy for disobeying the February order by failing to file an estate inventory and accounting. In June, the chancellor issued another order which directed Wendy, as executor, to file an inventory and accounting, and to pay Ruby's attorney's fees related to the contempt action. When Wendy finally filed the inventory and accounting, Ruby timely objected. In an order on these objections, the chancellor awarded a monetary judgment against Wendy in the amount of \$18,795.98 plus interest, ordering her to file a final accounting and petition to close the estate. Wendy appealed.

ISSUES

Whether the chancellor erred by (1) ruling upon the final accounting, petition to close the estate, and Ruby's objections to the final accounting; (2) awarding Ruby a one-third interest in the estate; (3) ruling on Ruby's Motion for Citation of Contempt against Wendy; and (4) awarding Ruby attorney's fees.

HOLDING

(1) Because Wendy repeatedly failed to fulfill her duty as executor to administer and close the estate, and failed to object to the accounting and petition to close at the trial level, the chancellor did not err in her ruling. (2) Because Ruby complied with Miss. Code Ann. § 91-5-25 in renouncing the will and electing her spousal share, the chancellor did not err by awarding Ruby one-third interest in the estate. (3) Because Wendy responded to the merits of the contempt action and failed to assert an objection to the defective service, the chancellor did not err in her ruling. (4) Because Wendy failed to comply with the chancellor's prior order, which is sufficient evidence to support award of attorney's fees related to action for contempt, the chancellor did not err by granting Ruby attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Chancery Court.

Affirmed - 2016-CA-00414-COA (Sept. 12, 2017)

Opinion by Judge Carlton

Hon. Deborah J. Gambrell (Pearl River County Chancery Court)

G. Charles Bordis IV for Appellant - James L. Gray for Appellee

Briefed by [Daniel Tankersley](#)

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HODGES V. THE UNIV. OF MISS. MED. CTR.

CIVIL - WRONGFUL DEATH

EVIDENCE - EXPERT TESTIMONY - WITNESS - Expert testimony should only be admitted if it withstands the two-prong inquiry under Miss. R. Evid. 702: (1) the witness must be qualified by virtue of his or her knowledge, skill, experience, or education, and (2) the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue

MEDICAL MALPRACTICE - EXPERT TESTIMONY - CAUSATION - The success of a plaintiff in establishing a case of medical malpractice rests heavily on the shoulders of the plaintiff's selected medical expert who must articulate an objective standard of care and establish that the failure was the proximate cause or proximate contributing cause of the alleged injuries

MEDICAL MALPRACTICE - EXPERT WITNESS - DISQUALIFICATION - A trial judge's disqualification of a plaintiff's expert witness in a medical-malpractice suit is justified where the expert witness lacks both knowledge and familiarity with the hospital or similar facility

FACTS

Isaac Hodges was admitted to the University of Mississippi Medical Center (UMMC) for treatment of two gunshot wounds. Dr. Soltys performed a repair of a large gastric perforation, a cholecystectomy, and a packing of the liver bed during the initial procedure. Isaac also suffered from gallbladder issues and a fractured humerus. Shortly after leaving the hospital, Isaac's condition deteriorated, and he returned to the hospital where he died four days later. Isaac's father, Karl Hodges, filed suit against UMMC asserting a claim of medical negligence and tendered Dr. Brickman as an expert witness in the field of general vascular and trauma surgery. During the voir dire by counsel for UMMC, Dr. Brickman explained that he does not have an office in general surgery, is no longer board certified, has not been a primary surgeon in over a decade, and never possessed a board certification in critical-care medicine. The trial judge ruled from the bench wherein he found that Dr. Brickman failed to meet the requirements of Miss. R. Evid. 702 and also failed to sufficiently articulate the applicable medical standard of care or a breach thereof. Hodges appealed.

ISSUE

Whether the trial court erred in finding Dr. Brickman unqualified to provide expert testimony.

HOLDING

Because Dr. Brickman lacked both knowledge and familiarity with the hospital or similar facility and did not articulate an objective standard of care or breach, the trial judge did not abuse his discretion in striking Dr. Brickman as an expert witness. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2016-CA-00870-COA (Sept. 12, 2017)

Opinion by Judge Carlton

Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)

Jay Max Kilpatrick for Appellant - Walter T. Johnson, Susan Latham Steffey, & William Abram Orlansky for Appellee

Briefed by [Mary-Katherine Black](#)

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JACKSON-GEORGE REG'L LIBRARY SYS. v. MISS. DEP'T. OF EMP'T SEC.

CIVIL - STATE BOARDS & AGENCIES

APPEALS - AGENCY DECISIONS - STANDARD OF REVIEW - An administrative agency decision will not be disturbed on appeal unless it (1) is not supported by substantial evidence; (2) is arbitrary and capricious; (3) is beyond the scope or power granted to the agency; or (4) violates one's constitutional rights

UNEMPLOYMENT BENEFITS - BASIS OF DENIAL - MISCONDUCT - A person is disqualified from receiving unemployment benefits if they were discharged for conduct evincing deliberate violation or disregard of the expectations of their employer

SUBSTANTIAL EVIDENCE - DEFINITION - Substantial evidence is evidence which affords a substantial basis of fact from which the fact in issue can be reasonably inferred

HEARSAY - TESTIMONY - PERSONAL KNOWLEDGE - Assertion of personal knowledge based on unsupported employee correspondence is insufficient to demonstrate one's personal knowledge to constitute sufficient evidence or allow witness testimony under Miss. R. Evid. 602

FACTS

Johnell Fowler was terminated by the Jackson-George Regional Library System (JGRS) after posting a suggestive photo of a library patron on Facebook. Fowler was on a probationary period for unrelated infractions in her employment at the time the photo was posted. Fowler sought unemployment benefits and was denied by the claims examiner because her termination arose from employee misconduct. On appeal before an administrative law judge (ALJ), however, the claim examiner's findings were reversed and benefits were awarded. JGRS appealed the ALJ's decision to the Mississippi Department of Employment Security (MDES) Board of Review (the Board), which adopted and affirmed the ALJ's findings and conclusions. Aggrieved, JGRS then appealed to the Jackson County Circuit Court, which affirmed the Board's decision. JGRS appealed.

ISSUE

Whether the trial court erred in affirming the Board's decision as being supported by substantial evidence.

HOLDING

Because the Board based its decision on uncorroborated hearsay not supported by personal knowledge, its decision was not based upon substantial evidence, and thus, was arbitrary and capricious. Therefore, the Court of Appeals reversed and rendered the judgment of the Jackson County Circuit Court.

Reversed & Rendered - 2016-CC-01201-COA (Sept. 12, 2017)

Opinion by Judge Ishee

Hon. Robert P. Krebs (Jackson County Circuit Court)

Stacie Elizabeth Zorn for Appellant - Albert B. White & Anna Crain Clemmer for Appellee

Briefed by [Hale Neilson](#)

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PREMIER ENTM'T BILOXI, LLC v. P.T.E. SYS. INT'L, LLC

CIVIL - CONTRACT

CIVIL PROCEDURE - THIRD-PARTY COMPLAINT - DERIVATIVE REQUIREMENT - The requirement that the third-party complaint be for derivative or secondary liability may be met by, for example, an allegation of a right of indemnity (contractual or otherwise), contribution, subrogation, or warranty

CIVIL PROCEDURE - COMMON-LAW INDEMNITY - A claim for common-law indemnity requires (1) the damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person, and (2) it must appear that the claimant did not actively or affirmatively participate in the wrong

FACTS

Premier Entertainment Biloxi, LLC ("Premier") and Roy Anderson Corporation ("Anderson") entered into a contract, which provided that Premier would buy post-tension cables for Anderson to install during the construction of Premier's Hard Rock Hotel and Casino. The contract required Premier to maintain an "all-risk" insurance policy and to be liable for losses not fully covered by insurance. During construction, many of the cables failed, resulting in property loss and damages to Anderson. Anderson sued Premier for breach of contract, claiming that Premier failed to maintain adequate "all-risk" insurance or that Premier failed to compensate Anderson for losses not covered by insurance. Premier then filed a third-party complaint against P.T.E. Systems International, LLC ("PTE"), the cable supplier, alleging claims of

common-law indemnity, breach of multiple implied and express warranties, and products liability. PTE moved to dismiss, arguing that Anderson was suing Premier for its failure to acquire adequate insurance, and therefore, who was negligent was not in question. The trial court granted PTE's motion. Premier appealed.

ISSUE

Whether Premier's claim against PTE is derivative of Anderson's claim against Premier, thus warranting a third-party complaint.

HOLDING

Because the contract required Premier to maintain "all-risk" insurance and compensate Anderson for any loss not covered by insurance, and Anderson's claim against Premier was to enforce both aspects of that provision, Premier's third-party complaint against PTE is derivative of Anderson's claim against Premier. Therefore, the Court of Appeals reversed and remanded the judgment of the Harrison County Circuit Court.

Reversed & Remanded - 2016-CA-01282-COA (Sept. 12, 2017)

Opinion by Judge Barnes

Hon. Roger T. Clark (Harrison County Circuit Court, Second Judicial Dist.)

James Joseph Crongeyer Jr. & Michael W. Ulmer for Appellant - Thomas Lynn Carpenter Jr. for Appellee

Briefed by [Nathan Simpson](#)

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STOCKETT V. CLASSIC MANOR BUILDERS, INC.

CIVIL - PERSONAL INJURY

PERSONAL INJURY - DAMAGES - ADDITUR - An additur may be awarded if the court finds that the jury was influenced by bias, prejudice, or passion, or if the damages were contrary to the overwhelming weight of credible evidence

PERSONAL INJURY - DAMAGES - AWARDS BY JURY - Awards fixed by jury determination are not merely advisory and will not be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount, and outrageous

CIVIL PROCEDURE - POST-TRIAL MOTIONS - NEW TRIAL - The motion for a new trial has only been employed in rare cases when there would be injustice either in allowing the verdict to stand or in granting a judgment notwithstanding the verdict

FACTS

Roger Morris, acting in the course and scope of his employment for Classic Manor, was travelling immediately behind Frank Stockett when Morris struck the rear of Stockett's vehicle. Stockett claimed the impact caused his seatbelt to restrain his left shoulder and left him dazed. Soon thereafter he was taken to the emergency room, where he allegedly complained of pain in his left shoulder, left knee, back, and head. Stockett was referred to an orthopedic surgeon, Dr. Jones, who concluded that Stockett had pain over his AC joint, pain with rotation, and a weakened rotator cuff. An MRI taken revealed that Stockett had a superior labral tear and AC-joint arthrosis. After Dr. Jones performed a surgery to alleviate Stockett's pain, Stockett returned to work and was released from Dr. Jones' care. At that time Dr. Jones concluded that Stockett had reached maximum medical improvement with 0% permanent partial impairment (PPI). Stockett returned to Dr. Jones sixteen months later complaining of pain in his shoulder. Dr. Jones administered an injection and prescribed Stockett anti-inflammatory medication with supplemental physical therapy. Two months later, Stockett returned to Dr. Jones again, who revised his assessment of Stockett to 10% PPI based on what Stockett had conveyed to him. However, Dr. Jones testified that there was no structural or anatomical reason for Stockett's pain and that Stockett may have been embellishing his pain. Nevertheless, Dr. Jones was convinced to a reasonable degree of medical certainty that the accident caused Stockett's initial shoulder injury. However, Classic Manor's expert testified

that Stockett's torn labrum was not related to the accident. Classic Manor's expert opined the fact that Stockett waited fifteen days after the accident to lodge a complaint with his family physician about the pain in his shoulder weighed against his finding that the accident caused the injury. He further stated that the type of injury Stockett experienced was not common based upon the position Stockett's shoulder would have been in during the accident. At the conclusion of the trial, the jury found Morris and Classic Manor 100% at fault. Stockett proved medical expenses of \$41,882.18 and lost wages of \$3,397.08 totaling \$45,279.26. The jury awarded Stockett \$50,000. Stockett moved for a new trial or, in the alternative, an additur, claiming that the verdict was contrary to the overwhelming weight of the evidence, or that the jury evinced bias, passion, and prejudice against Stockett. The circuit court denied his motion. Stockett appealed.

ISSUES

Whether the trial court abused its discretion in denying Stockett's motion for (1) an additur, and (2) a new trial.

HOLDING

(1) Because Stockett received a sum of \$4,720.74 beyond his actual damages, and there was no finding of uncontested pain and suffering, the trial court did not abuse its discretion in denying Stockett's motion for an additur. (2) Because there was conflicting evidence concerning the cause of Stockett's pain, the trial court did not abuse its discretion in denying Stockett's motion for a new trial. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2016-CA-01027-COA (Sep. 12, 2017)

Opinion by Judge Ishee

Hon. John Huey Emfinger (Rankin County Circuit Court)

Keith D. Obert, Roy Gregg Rogers & William F. Brown for Appellant - David L. Sanders & John Brian Hyneman for Appellees

Briefed by [Sean Grady](#)

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TELECOM TOWER GRP., LLC v. HONEYSUCKLE CREEK HOLDINGS, INC.

CIVIL - OTHER

PROPERTY - EQUITABLE LIEN - ENFORCEMENT - The court has access to broad equitable powers to enforce its judgments

PROPERTY - DOCTRINE OF MERGER - EXCEPTION - A merge will not be applied by a court of equity when the extinguishment of the lessor estate will work an injustice to another person interested in its preservation

CIVIL PROCEDURE - FRIVOLOUS APPEAL - ATTORNEY'S FEES - The court shall award just damages and single or double costs to the appellee in the event that it determines that an appeal is frivolous

FACTS

Honeysuckle Creek Holdings, Inc. entered into an agreement to assign its lessee's interest in a plot of land to Cross Development, LLC for Cross to build a cellular-tower. Cross built a tower, but it remained vacant. Honeysuckle sued Cross for breach of contract and won monetary damages and received an equitable lien against the land lease. Cross then sold its lessee's interest in the land and its lessor's interest in the cellular-tower to Telecom Tower Group, LLC. Telecom later purchased the lessor's interest in the land, giving them both the lessee's and lessor's interest in the land. Telecom claimed that it did not owe Honeysuckle any more money from equitable lien because it was extinguished through the doctrine of merger. Honeysuckle asked the chancellor to "unwind" the land-lease termination, arguing that Telecom acquired the land to fraudulently terminate the lease that was subject to Honeysuckle's equitable lien. The chancellor held that Honeysuckle's equitable lien should not be extinguished under the doctrine of merger and issued a writ of garnishment against Telecom to enforce the lien. Telecom appealed. Honeysuckle filed a conditional cross-appeal.

ISSUES

Whether (1) the trial court erred in finding that Honeysuckle had an equitable lien on Telecom's property; (2) the trial court erred in issuing a writ of garnishment against Telecom when Honeysuckle had no judgment against Telecom; (3) the equitable lien was terminated through the doctrine of merger when Telecom obtained the lessee's and lessor's interest in the land; and (4) Telecom was required to pay Honeysuckle's attorneys' fees for a frivolous appeal.

HOLDING

(1) Because the Court of Appeals had already ruled that Honeysuckle had an equitable lien on the property in *Telecom I*, the issue was without merit. (2) Because courts have broad equitable powers to enforce a judgment, the Court of Appeals rejected Telecom's narrow interpretation of the equitable lien. (3) Because extinguishing the lessor estate would be an injustice to Honeysuckle's equitable lien, the rule of merger does not apply. (4) Because Telecom's behavior in the appeal and underlying litigation did not rise to being frivolous, the Court of Appeals declined to sanction or award attorney's fees. Finally, the Court of Appeals did not address Honeysuckle's conditional cross-appeal. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2015-CA-01285-COA (Sep. 12, 2017)

Opinion by Presiding Judge Irving

Hon. J. Dewayne Thomas (Hinds County Chancery Court, Second Judicial Dist.)

Gary Dale Thrash, John Newton Satcher II, & Adam Frazier Thrash for Appellant - Michael James Bentley & Michael Leland Cowan for Appellee

Briefed by [Tyler Alcorn](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

BARDNEY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - FINAL JUDGMENT - SUCCESSIVE MOTIONS - An order denying a post-conviction relief motion is a final judgment and bars other successive post-conviction relief motions

POST-CONVICTION RELIEF - GUILTY PLEA - INEFFECTIVE ASSISTANCE - A defendant's guilty plea waives claims of ineffective assistance of counsel insofar as the alleged ineffectiveness relates to the voluntariness of the guilty plea

FACTS

Tommie Penn and his girlfriend, Patricia Young were murdered at their home in 1994. Their neighbor witnessed Larry Bardney stab Penn in his front yard and follow Young into the home, where she was later found dead. A shirt Bardney was wearing was recovered at the crime scene, and blood matching Penn's blood type was found on Bardney's underwear. Bardney was indicted and later pled guilty to both murders. However, Bardney's defense attorneys contended that he had consistently maintained his innocence in meetings with them. Bardney was sentenced to two concurrent life sentences in the Mississippi Department of Corrections. Bardney filed for post-conviction relief in 1996, arguing his guilty plea was coerced. The Mississippi Supreme Court affirmed his conviction, noting that his guilty plea was voluntarily entered. In 2015, Bardney again filed a motion for post-conviction relief, contending that his indictment was fatally defective and his counsel was ineffective. The circuit court denied the motion on the merits. Bardney appealed.

ISSUES

Whether the trial court erred in not finding (1) Bardney's indictment was fatally defective, and (2) his counsel was ineffective at the time of his guilty plea.

HOLDING

(1) Because the indictment identified the victims by name and surname, it carried the necessary implication that the individuals were human beings, and because “unlawfully” is synonymous with the phrase “without authority of law,” the indictment was not defective. (2) Because a defendant’s guilty plea waives claims of ineffective counsel in relation to the voluntariness of giving the guilty plea, the trial court did not err in finding Bardney received effective assistance of counsel. Also, Bardney’s claims were procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Humphreys County Circuit Court.

Affirmed - 2016-CP-00822-COA (Sept. 12, 2017)

Opinion by Judge Barnes

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

Pro Se for Appellant - Alisha Marie Ainsworth (Att’y Gen. Office) for Appellee

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

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DARDEN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - ADMINISTRATIVE RELIEF - TIME SERVED - An inmate must first seek administrative relief when seeking resolution of the amount of time served

POST-CONVICTION RELIEF - PLEADING - TIME CREDIT - A post-conviction relief pleading is not the proper means to calculate and receive credit for the initial time served

SENTENCING - ARMED ROBBERY - PAROLE ELIGIBILITY - Pursuant to Miss. Code Ann. §§ 47-7-3(c)(ii), & 97-3-115 *et seq.*, no person shall be eligible for parole who shall, on or after October 1, 1994, be convicted of robbery, attempted robbery or carjacking through the display of a firearm

FACTS

In 2006, Christopher Darden was found guilty of robbery by displaying a deadly weapon. He was subsequently sentenced to a twelve-year term, with seven years to serve, and five years of post-release supervision. In 2015, the circuit court found that Darden had violated conditions of his post-conviction supervision. As a consequence of this violation, the circuit court revoked his post-release supervision and ordered that he serve the remainder of his sentence in the custody of Mississippi Department of Corrections. Darden filed a motion to clarify the revocation of his post-release supervision. The circuit court denied said motion. Darden appealed.

ISSUES

Whether the circuit court erred in (1) finding Darden was required to first seek an administrative remedy to determine credit for time served; (2) revoking the remainder of Darden’s sentence instead of sending him to a technical-violation center; and (3) finding that Darden was ineligible for parole.

HOLDING

(1) Because a post-conviction relief pleading is not the proper means to calculate and received credit for time served, and because Darden failed to exhaust his administrative remedy with the MDOC, the circuit court did not err in finding Darden was required to first seek an administrative remedy to determine credit for time served. (2) Because the record showed Darden had violated the conditions of his post-release supervision numerous times, the circuit court had the jurisdiction and discretion to revoke the remainder of Darden’s sentence instead of sending him to a technical-violation center. (3) Because Miss. Code Ann. § 47-7-3(c)(ii) precludes parole for a person convicted of robbery through the display of a firearm, the circuit court did not err in finding that Darden was ineligible for parole. Therefore, the Court of Appeals affirmed the judgment of the Greene County Circuit Court.

Affirmed - 2016-CP-01094-COA (Sept. 12, 2017)

Opinion by Judge Ishee

Hon. Dale Harkey (Greene County Circuit Court)

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

Briefed by [Charlotte Cooper](#)

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FRIERSON V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PETITIONER'S STATEMENT OF FACTS - Miss. Code Ann. § 99-39-9(1)(c)-(e) requires the post-conviction petitioner to include a concise statement of the claims or grounds upon which the motion is based, a sworn statement of the specific facts within the movant’s knowledge, and a specific statement of facts that are not within the movant’s knowledge

POST-CONVICTION RELIEF - INARTFULLY DRAFTED PLEADINGS - PRO SE PETITIONER - Meritorious claims of pro se petitioners will not be avoided based on inartfully drafted pleadings, but the petition must comply with Miss. Code Ann. § 99-39-9

FACTS

On July 8, 2013, Bernice Frierson pled guilty to one count of possession of pseudoephedrine with intent to distribute. Frierson was sentenced to twenty years in the custody of the Mississippi Department of Corrections. Frierson filed a motion for post-conviction relief in October 2015 alleging a multitude of errors by the trial court. On March 1, 2016, the circuit court dismissed Frierson’s motion because it did not conform to the requirements listed under Miss. Code Ann. § 99-39-9. Specifically, the circuit court found the motion deficient because it lacked a statement of the claims or grounds upon which it was based, and it lacked a sworn statement of the specific facts that were within his knowledge. Frierson appealed.

ISSUE

Whether the circuit court erred in dismissing Frierson’s post-conviction relief motion as deficient.

HOLDING

Because the motion lacked a concise statement of the claims or grounds, a sworn statement of specific facts within Frierson’s knowledge, and a specific statement of facts not within his knowledge, the dismissal was proper. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Circuit Court.

Affirmed - 2016-CP-00474-COA (Sept. 12, 2017)

Opinion by Judge Ishee

Hon. Anthony Alan Mozingo (Pearl River County Circuit Court)

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

Briefed by [Addison K. Watson](#)

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SIMS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - SUBSEQUENT MOTIONS - Pursuant to Miss. Code Ann. § 99-39-23(6), any order dismissing or denying a petitioner's motion for relief is a final judgment and shall be a bar to a second or successive motion

POST-CONVICTION RELIEF - PROCEDURAL BAR - WAIVER - An issue that has been addressed in a final judgment with specific findings of facts and conclusions of law may not be raised again by a PCR movant unless the movant brings constitutional-right violation claims; however, there must at least appear to be some basis for the truth of the claim before the procedural bar will be waived

CRIMINAL PROCEDURE - SENTENCING - RESTITUTION - Pursuant to Miss. Code Ann. § 99-37-1(d), the trial court is well within its discretion to impose restitution for the benefit of any victim whom the court determines has suffered pecuniary damages as a result of criminal activities

FACTS

In 2005, Johnny Ray Sims pled guilty to one count of aggravated assault (Count III) stemming from a car crash instigated by a police chase. The State dismissed one victim (Count I) and Sims' girlfriend's claim (Count II), but Sims was sentenced to twenty years, serving fourteen months and the remainder in post-release supervision, for Count III. In addition, Sims was ordered to pay restitution to the two car crash victims (Count I and Count III). Sims brought this post-conviction relief motion, his third to date, to contest the restitution to the victim under Count I, arguing it was an illegal sentence for a dismissed charge. The trial court dismissed Sims's motion, finding that Sims's PCR motion was a successive writ and without merit due to his two previous PCR motions. Sims appealed.

ISSUE

Whether the trial court properly dismissed Sims's third PCR motion as a successive writ without merit.

HOLDING

Because Sims originally waived his right to object to the restitution order by not bringing it in the original trial, and because the Supreme Court previously ruled the restitution order was lawful, the PCR motion was a successive writ without merit. Therefore, the Court of Appeals affirmed the judgment of the Marion County Circuit Court.

Affirmed - 2016-CP-01377-COA (Sept. 12, 2017)

Opinion by Chief Judge Lee

Hon. Prentiss Greene Harrell (Marion County Circuit Court)

Pro se for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Nikki Breeland](#)

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YATES V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - ELEMENTS - To succeed on an ineffective assistance of counsel claim, a defendant must show: (1) counsel's performance was deficient, and (2) this deficiency prejudiced the defense

CRIMINAL LAW - GUILTY PLEA - VALIDITY - A guilty plea is valid if it is entered into voluntarily, knowingly, and intelligently

CRIMINAL LAW - GUILTY PLEA - WAIVER - A guilty plea operates to waive the right that the prosecution prove each element of the offense beyond a reasonable doubt

FACTS

In July 2009, David Yates was indicted for one count of sexual battery of a child under the age of fourteen, and one count of fondling of a child under the age of sixteen, under Miss. Code Ann. §§ 97-3-95(1)(d) and 97-5-23. Yates entered an open plea to both counts and was sentenced to life in the custody of the Mississippi Department of Corrections

(MDOC) for the sexual-battery charge and fifteen years for the fondling charge, to be served consecutively. At the plea hearing, Yates declared he understood the sentences, stated that he was satisfied with the services of his counsel, and did not contest the prosecution's potential offer of proof establishing that the victim was under the age of fourteen at the time of the offenses. Subsequently, Yates filed a PCR motion alleging ineffective assistance of counsel, an involuntary guilty plea, and lack of a factual basis for his plea. Specifically, Yates contended his trial counsel advised him to enter an open plea of guilty so that he would receive a lighter sentence, because if he went to trial he would be found guilty and sentenced to life imprisonment. An evidentiary hearing was held and both Yates and Oby Rogers, his former defense counsel, testified. Rogers admitted to telling Yates that he thought Yates would be found guilty, and informed Yates of the benefits of an open plea. Rogers denied telling Yates that if convicted by a jury, Yates would be sentenced to life. Yates submitted affidavits in support of his allegations. The trial court found no grounds to grant Yates's PCR motion, and denied it. Yates appealed.

ISSUES

Whether the trial court erred in denying Yates' post-conviction relief motion based on (1) ineffective assistance of counsel, (2) an involuntary guilty plea, and (3) failure to prove the age of the victim.

HOLDING

(1) Because Yates's allegations of ineffective assistance of counsel were contradicted by his plea petition, his sworn testimony at the plea and evidentiary hearings, and sworn testimony of counsel at the evidentiary hearing, Yates did not receive ineffective assistance. (2) Because Yates's claim of an involuntary plea was also contradicted by the plea and evidentiary hearing transcripts, Yates's plea was not involuntary. (3) Because Yates's guilty plea waived the claim that the prosecution failed to introduce proof of the victim's age, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Covington County Circuit Court.

Affirmed - 2016-CP-00254-COA (Sept. 12, 2017)

Opinion by Judge Barnes

Hon. William R. Barnett (Covington County Circuit Court)

Pro se for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Katie Berry](#)

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COURT OF APPEALS - CRIMINAL CASES

DILLARD V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - APPEALS - NO ARGUABLE ISSUES - When an appellant's attorney finds no arguable issues for appeal, the attorney should follow the five-step process set out in *Lindsey*: (1) counsel must file and serve a brief in compliance with Miss. R. App. P. 28(a)(1)-(5), (8); (2) counsel must certify that there are no arguable issues supporting the client's appeal; (3) counsel must send a copy to the defendant, inform the client that counsel could find no arguable issues in the record, and advise the client of the right to file a pro se brief; (4) should the defendant then raise any arguable issues, the court must require appellate counsel to submit supplemental briefing on the issue; and (5) the appellate court must consider the case on its merits and render a decision

FACTS

Jasprell Dillard was convicted of aggravated assault with a firearm and sentenced to serve fifteen years in the custody of the Mississippi Department of Corrections, with an additional, consecutive five-year sentence for the firearm enhancement, and five years' probation. Dillard's attorney submitted a brief having found no arguable issues for appeal

of the trial court's conviction. The court gave Dillard forty days' additional time to file a pro se brief. Dillard failed to file a pro se brief within 40 days.

ISSUE

Whether there were any arguable issues on appeal requiring a supplemental brief.

HOLDING

Because Dillard's attorney properly followed the procedure set out by the Mississippi Supreme Court in *Lindsey* and because the record revealed no arguable issues upon review, no supplemental briefing was required. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

Affirmed - 2016-KA-01066-COA (Sep. 12, 2017)

Opinion by Chief Judge Lee

Hon. Albert B. Smith III (Bolivar County Circuit Court, Second Judicial Dist.)

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

Briefed by [Luke Kelly](#)

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DUNNAWAY V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - LACK OF ARGUABLE ISSUES - On appeal, where the appellant's counsel does not find any arguable issues for review, counsel must file and serve a brief in compliance with Miss. R. App. P. 28(a)(1)-(5), (8); the appellate court must consider the case on its merits and render a decision

APPELLATE PROCEDURE - LACK OF ARGUABLE ISSUES - A counsel must certify that there are no arguable issues supporting the client's appeal, and he or she has reached this conclusion after scouring the record thoroughly, specifically examining: (a) the reason for the arrest and the circumstances surrounding arrest; (b) any possible violations of the client's right to counsel; (c) the entire trial transcript; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; and (h) possible misapplication of the law in sentencing

FACTS

A Harrison County Circuit Court jury found Kendrick Dunnaway guilty of possession of a controlled substance with intent to distribute in violation of Miss Code Ann. § 41-29-139(a)(1). Dunnaway was sentenced as a habitual offender to twenty-five years without eligibility for parole or early release. Dunnaway appealed.

ISSUE

Whether (1) appellant's counsel, finding no arguable issues for review, complied with Miss. R. App. P. 28(a)(1)-(5), (8); and (2) the appellate court's independent review of Dunnaway's criminal trial, in the absence of any arguable issues submitted for review by the appellant, revealed any arguable issues when considering the case on its merits.

HOLDING

(1) Because Dunnaway's counsel filed a brief certifying he had diligently searched both the procedural and factual history of this criminal record and found no arguable issues for appellate review, the court held that Dunnaway's counsel complied with Miss. R. App. P. 28(a)(1)-(5), (8). Further, counsel sent a copy of the brief to Dunnaway, informing him of his right to file a *pro se* brief, and Dunnaway failed to file a *pro se* brief. (2) Because court's independent review of the record found no arguable issues when considering the case on its merits, there was no error. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-KA-01125-COA (Sept. 12, 2017)

Opinion by Chief Judge Lee
Hon. Roger T. Clark (Harrison County Circuit Court, Second Judicial Dist.)
Benjamin Allen Suber for Appellant (Pub. Def. Office) - Lisa L. Blount (Att’y Gen. Office) for Appellee
Briefed by [William L. Moorer](#)

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HILL 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

EVIDENCE - MOTION TO SUPPRESS - ADMISSIBILITY - Regardless of relation to the accused, it is up to the jury to determine credibility of witnesses

FACTS

Fred Hill drove to the victim’s parent’s house with a gun and verbally threatened the victim. Later that night, the victim was shot and killed. Several witnesses, including the victim’s parents and a neighbor, testified they heard shots fired and saw Hill flee the scene. Bullets were found at the scene crime, and bullets of the same caliber were found in Hill’s yard. Additionally, a gunshot residue test was performed on Hill’s girlfriend’s vehicle. When first interviewed, Hill denied involvement; however, he later confessed to the crime. The jury found Hill guilty. Hill filed a motion for directed verdict, a request for a peremptory instruction, and a motion for a judgment notwithstanding the verdict. The Lincoln County Circuit Court denied these requests. Hill appealed.

ISSUES

Whether the circuit court erred in (1) finding the verdict was against the sufficiency and overwhelming weight of the evidence, and (2) denying Hill’s two motions to suppress.

HOLDING

(1) Because there were witnesses who heard Hill threaten the victim and then saw Hill flee the scene of the crime, the evidence was deemed legally sufficient. Additionally, it is up to the jury to determine credibility of witnesses, and 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. Thus, the circuit court did not err when it denied Hill’s post-trial motion. (2) Because there is existing precedent that stipulates that threatening the arrest of a suspect’s family member will not render a confession involuntary if there is probable cause to arrest such person, the trial court’s refusal to grant Hill’s motion to suppress was not in error. Additionally, Hill’s girlfriend verbally consented to the search of her car; thus, the trial court was correct in not granting Hill’s motion to suppress evidence from the car. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Circuit Court.

Affirmed - 2016-KA-00594-COA (Sept. 12, 2017)

Opinion by Chief Judge Lee
Hon. David H. Strong Jr. (Lincoln County Circuit Court)
M.A. Bass Jr. for Appellant - Joseph Scott Hemleben (Att’y Gen. Office) for Appellee
Briefed by [Zachary Harper](#)

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SHELBY V. STATE

CRIMINAL - FELONY

NEW TRIAL - WEIGHT OF EVIDENCE - UNCONSCIONABLE INJUSTICE - When reviewing a denial of a motion for a new trial based on an objection to the weight of evidence, an appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of evidence that to allow it to stand would sanction an unconscionable injustice

EVIDENCE - WITNESS TESTIMONY - CREDIBILITY - The jury is the judge of the weight and credibility of testimony

FACTS

On April 11, 2012, the Jackson Fire Department and Jackson Police Department responded to a fire. Officer Gibson observed a body that had been burned beyond recognition in the fire. The body had duct tape around the face and head and was amidst fragments of blue tarpaulin and woven rope. Shortly after the body was found, Officer Sanders reported his brother, Duan Penn, as missing. Dental records confirmed that the burned body was Penn's. On May 18, 2012, the Jackson Police Department conducted a search of 512 Huron Street, which led to the discovery of blue tarpaulin, woven rope, a roll of duct tape, and evidence of a burn pile. On October 2, 2012, Marcus Shelby, Marcellos Coleman, and Janice Pittman were indicted for the murder and kidnapping of Penn. During Shelby's trial, Pittman testified that she participated in the beating of Penn and then returned to her porch and watched Shelby and Coleman, along with two other males, continue to beat Penn and then carry his body to Coleman's backyard. Pittman also testified that she gave Coleman money to purchase gasoline. A jury in the Hinds County Circuit Court convicted Shelby of the murder of Penn, and the circuit court sentenced him as a habitual offender to life imprisonment without the possibility of parole. Shelby filed a motion for JNOV or a new trial on May 27, 2015. The court denied his motion two days later. On January 19, 2016, Shelby filed a handwritten letter requesting an out-of-time appeal, stating that his counsel had failed to take action on his behalf. On February 11, 2016, Shelby's attorney filed a motion for leave to file an out-of-time appeal, arguing that he had never received a copy of the order denying Shelby's motion for JNOV or a new trial. The court granted the motion. Shelby appealed. Shelby's trial attorney subsequently withdrew from his appeal, and Shelby was allowed to proceed with newly appointed counsel.

ISSUE

Whether the verdict was against the overwhelming weight of the evidence based on contradictory testimony.

HOLDING

Because Pittman's testimony placed Shelby at the scene of Penn's murder and other testimony did not necessarily and directly contradict that account, the verdict was not against the overwhelming weight of the evidence. In addition, the jury is the judge of the weight and credibility of testimony, and allowing the verdict to stand would not sanction an unconscionable injustice. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2016-KA-00312-COA (Sept. 12, 2017)

Opinion by Presiding Judge Irving

Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)

Benjamin Allen Suber (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Emily Warwick](#)

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