

MISSISSIPPI SUPREME COURT DECISIONS – MARCH 3, 2016

SUPREME COURT - CIVIL CASES

GEORGIA PACIFIC CORP. v. COOK TIMBER CO.

CIVIL - CONTRACT

ANTI-TRUST - UNILATERAL CLAIM - ALLEGATIONS - Under Miss. Code. Ann § 75-21-3, a valid anti-trust claim must allege that a business’s alleged violations were made for the purpose of destroying competition

CONSPIRACY - PRICE-FIXING - BURDEN OF PROOF - For a price-fixing conspiracy claim, the challenged anti-competitive conduct must stem from an agreement—tacit or expressed

CONTRACTS - BREACH-OF-CONTRACT - DIRECTED VERDICT - For a directed verdict on a breach-of-contract claim to survive, the evidence cannot be interpreted more than one way

FACTS

Georgia Pacific Corporation is a national wood-processing company with several Miss. facilities. In southeast Miss., Georgia Pacific operated the Leaf River Group, which consisted of five mills including the Taylorsville Plywood Plant, Taylorsville Chip Mill, Bay Springs Sawmill, New Augusta Sawmill, and the Leaf River Pulp Mill. In 1983, Cook Timber Company, a logging company based in Bay Springs, Miss., entered into a contract with Georgia Pacific, and from then until 2000, Cook Timber worked exclusively with Georgia Pacific. Eighty to ninety percent of Cook Timber’s wood was hauled to the Taylorsville Plywood Plant and Bay Springs Sawmill. The remainder was hauled to the Leaf River Pulp Mill. In March 2000, Georgia Pacific notified Cook Timber, by letter, that its Leaf River Pulp Mill would no longer receive any pine pulpwood deliveries from Cook Timber. Cook Timber filed suit, and after the circuit judge granted a directed verdict on Cook Timber’s breach-of-contract and conspiracy claims, the jury returned a verdict for both actual and punitive damages. Georgia Pacific appealed. Cook Timber cross-appealed.

ISSUES

Appeal: Whether the trial court erred in awarding Cook Timber a verdict on their unilateral anti-trust claim.

Cross-appeal: Whether the trial court erred in granting directed verdicts on Cook Timber’s breach-of-contract and conspiracy claims.

HOLDING

Appeal: Because Cook Timber failed to present sufficient evidence to prove any violation of Miss. Code. Ann. §75-21-3, the jury’s verdict based on that statute was incorrect. Therefore, the Supreme Court reversed the judgment of the Jasper County Circuit Court.

Cross-Appeal: Because the email offered by Cook Timber could be read two different ways, and a reasonable juror could have concluded that Georgia Pacific culled wood for reasons unrelated to the wood’s quality, the directed verdict on the breach of contract claim was improper. Further, because the email offered by Cook Timber, at most, establishes conscious parallelism, and lacked establishing an express or implied agreement between the parties, the directed verdict on the conspiracy claim was proper. Therefore, the Supreme Court affirmed in part and reversed in part and remanded the judgment of the Jasper County Circuit Court.

CONCURRENCE

Justice Maxwell agreed with the majority’s analysis regarding the breach-of-contract and anti-trust claims. However, he wrote a separate opinion to emphasize that punitive damages might still be available on remand.

DISSENT

Justice King disagreed with the majority's analysis of Cook Timber's evidence presented for their anti-trust claim. He argued that the majority's interpretation of the statute was wrong, and therefore the evidence presented was sufficient to survive a directed verdict. Further, Justice King also agreed with the trial court's judgment that anti-trust cases should have punitive damages.

Direct Appeal: Reversed & Rendered; Cross Appeal: Affirmed In Part, Reversed In Part & Remanded - 2013-CA-01869-SCT (Mar. 3, 2016)

En Banc Opinion by Presiding Justice Dickinson - Concurrence by Justice Maxwell - Dissent by Justice King

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

James H. Heidelberg, Stephen Walker Burrow, & Joe Sam Owen for Appellant - Joseph E. Roberts Jr., Rance N. Ulmer, Eugene Coursey Tullos, & Thomas L. Tullos for Appellee

Briefed by [Nash Gilmore](#)

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RIDGWAY LANE & ASSOC. V. WATSON

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - LATENT INJURY OR DISEASE - Mississippi law tolls the general three-year statute of limitations for actions involving a 'latent injury or disease' until such time as the plaintiff has discovered, or by reasonable diligence should have discovered, the injury

CIVIL PROCEDURE - PERSONAL INJURY - DISCOVERY OF INJURY - Discovery of an injury is an issue of fact to be decided by a jury when there is a genuine dispute

FACTS

Marcus and Patricia Byrd's home was located in a subdivision managed by Ridgway, Lane & Assocs. (Ridgway). When the Byrds purchased the home, the previous owner informed them that work had previously been performed to correct a leak in the dining room ceiling. From 2004 through 2010, Marcus sent notices to Ridgway that water was leaking at his home, damaging the ceiling, walls, and floors and fostering the growth of mold and mildew. In response to each complaint, Ridgway sent a repairman to correct the leak. However, the leaks continued to cause damage to the house.

Prior to moving into the home, Marcus underwent a liver transplant, requiring him to take immunosuppressive medication. Marcus's medical records indicated that he suffered from sneezing attacks and chronic cough since 2006. In 2008, Dr. Scott Layne ordered radiological testing of Marcus's chest, revealing that he suffered from possible traction bronchiectasis. Mr. Byrd subsequently developed mycobacterium abscessus, severely affecting his sleep pattern and causing him to lose about sixty pounds between 2008 and 2009.

The Byrds filed a complaint in the Madison County Circuit Court in 2011, claiming that both Ridgway and the homeowner's association failure to repair the leak caused water to damage the home and property inside. The Byrds also claimed that Marcus developed breathing problems as a result of mold exposure. Both Ridgway and the homeowner's association filed motions for summary judgement asserting that the statute of limitations had expired. The trial court granted both motions with regard to the property damage claims but denied both motions respecting the personal injury claims. Ridgway and the homeowner's association appealed.

ISSUE

Whether the trial court erred in denying Ridgway's motion for summary judgement regarding the Byrds' personal injury claims.

HOLDING

Because the determination of the time at which Marcus knew or by reasonable diligence should have known of his illness was unclear in the record, a genuine issue of material fact existed regarding whether the Byrds were within the

three-year statute of limitations when their complaint was filed in 2011. Therefore, the Supreme Court affirmed the Circuit Court's denial of summary judgment with regard to the personal injury claims and remanded the case for further proceedings.

Affirmed - 2014-IA-00721-SCT (Mar. 3, 2016)

En Banc Opinion by Justice Kitchens

Hon. John Huey Emfinger (Madison County Circuit Court)

Jeffery Monroe Williams, Jeffery P. Hubbard & Cowles Edgar Symmes for Appellants - John F. Hawkins & Edward Gibson for Appellee

Briefed by [William H. Holley](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 1, 2016

COURT OF APPEALS - CIVIL CASES

BAILEY V. BARKSDALE

CIVIL - WILLS, TRUSTS, AND ESTATES

CIVIL PROCEDURE - APPELLATE JURISDICTION - FINAL JUDGMENT - Pursuant to Miss. R. Civ. P. 54(b), even if the parties to an appeal do not raise the issue of appellate jurisdiction, the court must address whether a chancellor's order was a final, appealable judgment; for the judgment to be final, the order must make an expressed determination that there is no just reason for delay and an expressed direction for the entry of the judgment

FACTS

Gerald E. Bailey was one of seven children determined to be Jerry Ann Barksdale's heirs-at-law. Following Barksdale's death, the administrator of her estate, Larry Bailey, filed a petition for an order to return property to the estate and other relief against Gerald. According to the clerk's docket, the clerk issued both a Miss. R. Civ. P. 81 summons and a "30 day summons" to Gerald. A month later the chancellor entered an order that the chancery court had jurisdiction over the parties, venue was proper, Gerald was properly served with a Rule 81 summons, and he failed to appear. Thereafter, the chancellor executed a default judgment. After Gerald filed a Rule 60 motion, he appeared in court and testified that he had not received personal service but heard about the hearing from his brother. The chancellor rejected Gerald's explanation and refused to set aside the default judgment. At a later date the chancellor signed a judgment that, among other matters, overruled the motion to set aside the default judgment and determined that the estate was entitled to a judgment against Gerald in the amount of \$158,846.00. The chancellor, however, refrained from ruling on the attorney's fee claim until the close of the estate. Gerald appealed.

ISSUES

Whether (1) the chancellor was correct to enter a default judgment in an estate matter and (2) the chancellor's judgment was a final appealable judgment.

HOLDING

(1) Because the chancellor's judgment was not a final appealable judgment, the Court of Appeals had no jurisdiction to determine this issue. (2) Because the chancellor left open the amount of attorney's fees until the close of the estate, the judgment was not a final appealable judgment. Therefore, the Court of Appeals dismissed the appeal.

DISSENT

Judge James would hold that the case should be dismissed for lack of subject-matter jurisdiction because the Rule 4 summons did not give the chancellor jurisdiction over those claims before the chancery court.

Appellant's Mississippi Rule of Civil Procedure 60 Motion Denied - 2014-CA-01379-COA (Mar. 01, 2016)

En Banc Opinion by Presiding Judge Griffis- Dissent by Judge James
Hon. Deborah J. Gambrell (Forrest County Chancery Court)
Elliot G. Mestayer for Appellant - Shawn M. Lowrey, Thomas Michael Reed, & Richard Anthony Filce for Appellee
Briefed by [Robert T. Noland](#)

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BROWN V. WALDRON

CIVIL - CONTRACT

BUSINESS ORGANIZATIONS - DISSOLVEMENT – RELATION BACK - The reinstatement of a dissolved corporation does not ‘relate back’ to the time of dissolution so as to absolve the officers of personal liability for debts incurred by them during the period of dissolution

BUSINESS ORGANIZATIONS - PIERCING THE CORPORATE VEIL – LLC - To pierce the veil of an LLC the complaining party must prove LLC membership as well as (a) some frustration of contractual expectations, (b) flagrant disregard of LLC formalities by the LLC members, and (c) fraud or misfeasance by the LLC member

CONTRACT - NEW HOME WARRANTY ACT - BUILDER - Mississippi Code § 83-58-3(a) defines a builder as any person, corporation, partnership, or other entity which constructs a home for the purpose of sale

CONTRACT - AGENCY – UNDISCLOSED PRINCIPAL - A person acting as agent for another is personally answerable if at the time of making the contract in his principal’s behalf he failed to disclose the fact of his agency

FACTS

In 2006, Tom and Shannon Brown purchased a home in Hattiesburg, Mississippi, built by Waldron Properties LLC. In 2008, the Browns contacted Waldron about drainage issues. Waldron wrote a check for \$1,500 to cover repair costs. This check was drawn on the Waldron Properties account and signed by Waldron. In 2011, the Browns noticed cracks in a wall and hired a licensed engineer to inspect the home. The engineer found that the problems were caused by a defect in the foundation. On January 5, 2012, pursuant to the New Home Warranty Act (NHWA), the Browns notified Murray Waldron, the sole member of Waldron Properties, of the defects and gave him the opportunity to cure. After receiving no response from Waldron, the Browns filed suit against Waldron d/b/a Waldron Properties LLC alleging negligence and breach of warranty. The trial court granted Waldron’s request for summary judgment, but later granted the Browns’ motion to reconsider, set aside its previous judgment, and reopened discovery. Upon conclusion of discovery, Waldron filed his second request for summary judgment. The Browns also filed a motion for summary judgment. After a hearing, the trial court denied the Browns’ motion and granted Waldron’s motion. The trial court found that Waldron Properties, not Waldron individually, was the builder of the Browns’ home. Thus, Waldron was not personally liable for any defects in the home’s construction. The Browns appealed.

ISSUES

Whether (1) Waldron is personally liable for the defects since he built the home, (2) the NHWA constitutes a contract between them and Waldron, (3) Waldron is personally liable as an agent of an undisclosed principal, (4) if Waldron Properties is the builder, the corporate veil should have been pierced to hold Waldron personally liable, (5) the reinstatement of a defunct LLC does not relieve Waldron of personal liability, and (6) allowing Waldron to reinstate Waldron Properties to avoid personal liability is unconstitutional.

HOLDING

(1) Because the NHWA does contemplate that an individual person can be a builder and it is clear that Waldron was not the builder of the Browns’ home. (2) There was no a contract,(3) Most documents in the record indicate that Waldron Properties was the builder. (4) The Browns did not enter into a contract with Waldron or Waldron Properties, nor did they present credible evidence to indicate the contrary. (5) Mississippi Code § 83-58-3(a) is clear that the reinstatement of a corporation relates back to the date of dissolution and any liability during this period is determined as if the dissolution never occurred. (6) Parties challenging the constitutionality of a statute must notify the Attorney General under Mississippi Rule of Civil Procedure 24(d) and, if the constitutional challenge is raised in the Court of

Appeals, serve a copy of their appellate brief on the Attorney General or appropriate governmental body. The Browns did neither, therefore the trial court did not err. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

Affirmed - 2014-CA-01036-COA (Mar. 01, 2016)

Opinion by Chief Judge Lee

Hon. Anthony Alan Mozino (Lamar County Circuit Court)

Samuel Steven McHard and Paul Manion Anderson for Appellant - Mark A. Nelson for Appellee

Briefed by [Breanna Goff](#)

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DAVENPORT V. HERTZ EQUIP. RENTAL CORP.

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - SUMMARY JUDGMENT – STANDARD - Under Miss. R. Civ. P. 56(c), summary judgment should be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law

CIVIL PROCEDURE - SUMMARY JUDGMENT - STANDARD - Summary judgment is appropriate when the non-moving party has failed to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial

CIVIL PROCEDURE - SUBSTITUTION - RELATION BACK - A reasonably diligent inquiry into the identity of the unknown defendant must be made within the limitation period in order for a substitution under Rule 9(h) to allow a claim to relate back to the date of the original pleading

CERTIFICATION - FINAL ORDERS - CERTIFICATION - Any appeal from a judgment that does not include a Rule 54(b) certification is interlocutory, requiring permission from the Supreme Court before appealing

FACTS

Davis Davenport sustained on-the-job injuries after a raised “man buggy” that he was in, suddenly fell to the ground. Almost three years later, Davenport filed a complaint against the following parties: (1) JKS Construction Inc., a subcontractor of the general contractor Dynamic Services Inc.; (2) Dynamic Services Inc.; (3) RSC Equipment Rental Inc., which later became United Rentals; and (4) John Doe Corporations 1 and 2. At the time of Davenport's original complaint, he alleged that the John Doe Corporations were strictly liable for negligently distributing and/or manufacturing the man buggy or its component parts. Davenport then moved to substitute Hertz Equipment Rental Corporation (Hertz) for one of the John Doe Corporations. The trial court granted Davenport's motion to substitute. Davenport then filed an amended complaint, substituting Hertz for John Doe Corporation 2 and included theories of liability against Hertz that were not asserted in the original complaint against the original defendants. Following the filing of the amended complaint, Hertz filed a motion to dismiss the complaint under Miss. R. Civ. P. 12(b)(6), alleging that Hertz had been improperly substituted and that the applicable statute of limitations had run. Following a hearing, the trial court denied Hertz's motion to dismiss. The trial court, however, did find that Davenport had improperly added additional theories of liability and struck those allegations. By separate order, the trial court dismissed the amended complaint and ordered Davenport to file a new amended complaint in compliance with its order that allowed the substitution of Hertz. Davenport complied, and filed a second amended complaint. Hertz then filed a motion for summary judgment under Miss. R. Civ. P. 56., which the trial court granted. Regarding Terex Corporation (Terex), Davenport, pursuant to permission granted by an agreed order, filed his fourth amended complaint, substituting Terex for John Doe Corporation 1. In this amended complaint, Davenport alleged that Terex was the manufacturer of the man buggy. Terex also moved for summary judgment, asserting that it was improperly substituted and that the statute of limitations had run. After a hearing on Terex's motion, the trial court granted summary judgment in Terex's favor, finding that Davenport had failed to make a reasonably diligent inquiry to identify the manufacturer. Davenport appealed.

ISSUES

Whether trial court erred in (1) granting summary judgment in favor of Hertz, (2) granting summary judgment in favor of Terex, and (3) certifying Hertz's judgment as final pursuant to Miss. R. Civ. P. 54(b).

HOLDING

(1) Because the statute of limitations had run, and Hertz was not properly substituted pursuant to Rule 9(h)—and even if it was, the relating-back provision of Rule 15(c)(2) did not apply because Davenport failed to establish that he utilized reasonable diligence in an effort to timely identify Hertz as a party—the trial court did not err in granting summary judgment in favor of Hertz. (2) Because the order granting summary judgment in favor of Terex did not include a Rule 54(b) certification, and Davenport failed to obtain permission from the Supreme Court before appealing, the Terex appeal was dismissed for lack of jurisdiction. (3) Because Davenport failed to provide any authority for his argument that a court errs by granting a motion for entry of a Rule 54(b) judgment while an opposing motion for reconsideration is still pending, the trial court did not abuse its discretion in granting the 54(b) final judgment. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2014-CA-00179-COA Consolidated with 2014-CA-01021-COA (Mar. 1, 2016)

Opinion by Presiding Judge Irving

Hon. John Huey Emfinger (Rankin County Circuit Court)

Carlos Eugene Moore & Tangala Laniece Hollis for Appellant - James Grady Wyly III, Kyle Stuart Moran, & Michael Franklin Held for Appellee

Briefed by [Alexander Ash](#)

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HARDIN V. GRANTHAM

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - DIVORCE - MODIFICATION OR TERMINATION OF ALIMONY PAYMENTS - Modifications to alimony payments is not permitted if no unforeseeable or material change in circumstances occurred since the initial divorce; however, if a substantial unanticipated change occurred, the chancellor should consider the *Armstrong* factors

DOMESTIC RELATIONS - MODIFICATION OR TERMINATION OF ALIMONY PAYMENTS - ARMSTRONG FACTORS - When evaluating the *Armstrong* factors, chancellors should compare the relative positions of the parties at the time of request for modification in addition to considering the wife's accustomed standard of living, less her own resources, as well as the husband's ability to pay

DOMESTIC RELATIONS - MODIFICATION OR TERMINATION OF ALIMONY PAYMENTS - OTHER FINANCIAL OBLIGATIONS - A party that voluntarily worsens their financial situation by incurring other debts and financial obligation has no claim that alimony payments should be modified or terminated

FACTS

Robert Hardin and Betty Grantham Hardin divorced in 1991 after fourteen years of marriage. At this time, the Chancellor awarded Betty \$750 monthly permanent alimony. In April, 2013, Robert stopped paying his alimony to Betty and on May 9, 2013, he filed a petition to modify or terminate his permanent alimony payments asserting that a material change in circumstances had occurred. At a hearing conducted in February, 2015, the chancellor found Betty to be a credible witness while finding that Robert provided evasive and inconsistent answers. The chancellor then reviewed both parties' income and financials at the time of the divorce in 1991 and also incorporated some of the findings made by Judge John C. Love Jr, the judge that granted the couple's divorce in 1991. Judge Love determined that Robert's future income would be \$40,000 and based Betty's alimony award from that number. Next, the chancellor in the present case examined both parties' incomes and financials upon Robert's petition. The chancellor also conducted an analysis of the *Armstrong* factors, finding that the only material change in circumstances was that Robert's business became very successful providing him many luxuries. These luxuries include buying a house, buying a Porsche, buying a yacht (and winning a lawsuit against the yacht's manufacturer), purchasing a motorcycle, going on a fourteen-day vacation to Mexico, receiving a substantial inheritance from his father, and going public with a new barbecue restaurant

and offering a \$1,000 award to the winner of the company's label contest. Further, the chancellor found that at the present time, Robert's financial situation is no worse than it was at the time of the couple's divorce. Additionally, the chancellor noted that Betty is a sixty-six year old retired public school teacher that relies on the alimony payment each month. Thus, the chancellor concluded that no material change in circumstances occurred that were not reasonably anticipated at the time of the divorce and denied Robert's petition. The chancellor also found that Robert owed ten months of back pay, amounting to \$7,500. Robert appeals.

ISSUE

Whether the Carroll County Chancery Court erred in denying Robert's petition for modification or termination of permanent alimony.

HOLDING

The chancellor successfully analyzed the *Armstrong* factors because he compared the parties' relative positions at the time of the divorce with the parties' relative positions in the present concluding that (1) the only material change that occurred was that Robert's success business afforded him a more luxurious lifestyle post-divorce; and (2) at the time of the hearing Robert's financial situation was no worse than at the time of the divorce. Additionally, Robert's claim that his alimony payments should be modified or terminated because he voluntarily incurred debt and other financial obligations has no merit, and the record contains sufficient evidence to support the chancellor's finding that no material change in circumstances occurred that warranted modification of permanent-alimony. Therefore, the Carroll County Chancery Court did not err, the issue lacks merit, and the Chancery Court's denial of Robert's petition is affirmed.

Affirmed - 2014-CA-00781-COA (March 1, 2016)

Opinion by Judge Carlton

Hon. Joseph Kilgore (Carroll County Chancery Court)

Tom P. Calhoun III for Appellant - Patricia Abraham Rodgers & Katherine Tackett Mills for Appellee

Briefed by [Katherine M. Portner](#)

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HUSLEY V. FOUNTAINBLEAU MGMT. SERV. AND AMERICAN HOME ASSURANCE CO.

CIVIL - WORKER'S COMPENSATION

WORKERS' COMPENSATION - APPEAL - STANDARD TO OVERTURN - A commission decision that is supported by substantial evidence may not be overturned even if the appellate court, acting as the fact-finder, would have reached the opposite conclusion

WORKERS' COMPENSATION - EMPLOYER LIABILITY - INTERVENING CAUSE - Once it is shown that a disability was produced by an injury and that the employee continues to be disabled, the presumption is that the disability continues to be causally related to the injury, and the burden of proof is upon the employer to show that the continuing disability is due to some other intervening cause or preexisting condition for which he is not responsible.

FACTS

Albert Husley Jr. began work as an apartment-complex maintenance person for Fountainbleau Management Services and American Home Assurance Company ("Fountainbleau") in early 2009. In March 2009, while unloading a twenty-foot roll of carpet, Husley aggravated his back. Husley went to the emergency room, and was released the same day. Husley saw three neurosurgeons between March 2009 and June 2010, and all released him with no work restrictions. Shortly after his March 2009 injury, Fountainbleau terminated Husley for unrelated reasons. Husley then relocated and started work as a maintenance person at another complex, and on his application indicated that he was capable of working without any restrictions. While working for the new employer, Husley injured his back again, this time requiring time off of work. Even though Husley was removed from work by the doctor he continued to work, further injuring himself. Shortly thereafter, Husley was terminated from his job. After filing a petition to controvert, the administrative judge ("AJ") found that the March 2009 incident was a temporary exacerbation of a preexisting condition, which was

more significantly aggravated by injuries sustained in 2010 while Husley was working for a different employer. Ultimately the AJ found that there was an intervening cause of Husley's injury, which prevented Husley from holding Fountainbleau liable. The Miss. Workers' Comp. Comm'n later affirmed the AJ's decision. Husley appealed.

ISSUE

Whether the administrative judge's findings of fact that were used by the Commission were supported by substantial evidence.

HOLDING

Because Husley testified that none of the physicians or healthcare providers he saw between March 2009 and June 2010 imposed any work restrictions, the testimony and medical records support the AJ's and Commission's findings that there was an intervening cause preventing Husley from holding Fountainbleau liable. Therefore, the Court of Appeals affirmed the judgment of the Miss. Workers' Comp. Comm'n .

Affirmed - 2015-WC-00416-COA (Mar. 1, 2016)

Opinion by Chief Judge Lee

(Mississippi Workers' Compensation Commission)

Brent M. Bickham for Appellant - Jeffrey Stephen Moffett & Jeremy Thomas England for Appellees

Briefed by [Autumn T. Breeden](#)

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MORELAND V. SPEARS

CIVIL – CUSTODY

CIVIL LAW - STANDARD OF REVIEW - CHILD CUSTODY - The chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard, and if the findings are supported by substantial, credible evidence the findings made by the chancellor may not be set aside or disturbed

DOMESTIC RELATIONS - CHILD CUSTODY - CHANGE IN CIRCUMSTANCES - The party seeking a modification must show by a preponderance of the evidence (1) that a substantial change in circumstance has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interest mandate a change of custody

CHILD CUSTODY - MATERIAL CHANGE IN CIRCUMSTANCE - MODIFICATIONS - In considering whether there has been such a change in circumstance, the totality of the circumstances should be considered

CHILD CUSTODY - VISITATION - MODIFICATIONS - To modify a visitation order it must be shown that the prior decree for reasonable visitation is not working and that a modification is in the best interest of the child

FACTS

Kenneth Moreland and Brandy Moreland Greenwood Spears divorced and as a part of their divorce decree agreed to have joint legal custody of their daughter Lauren. Ms. Brandy was the custodial parent, giving Ken liberal visitations. Ken and Brandy alternated claiming Lauren as a dependent. Ken also was required to pay \$400 monthly child support, one-half of school expenses, if the parties agree to enroll Lauren in a private preschool or school and one-half of any activity expenses up to two activities, which the parties agree are reasonable and necessary for Lauren. In August 2013 Brandy filed a petition for a modification of the child-custody agreement and arguing that Ken was in contempt for failing to pay half of Lauren's tuition and activity expenses. Brandy further sought full legal custody, and change to the visitation schedule, a mental evaluation of Ken and reimbursement for all owed expenses incurred in bringing the petition for modification. At a hearing in March of 2014 the chancellor granted Brandy sole legal custody, modified Ken's visitation, and ordered that only Brandy could claim Lauren as a dependent. Ken appealed.

ISSUES

Whether the chancellor erred (1) in awarding Brandy full legal custody, (2) in modifying visitation, and (3) in preventing Ken from claiming Lauren as a dependent for tax purposes.

HOLDING

(1) Because the chancellor failed to use Albright factors to determine the best interest of the child and there was no material change in circumstances that adversely affected Lauren, the chancellor erred in awarding full custody to Brandy. (2) Because Brandy took Lauren late to school several times and there was no evidence to indicate that the visitation schedule was not working, the court erred in modifying visitation. (3) Because Ken does not need to pay expenses unilaterally decided on by Brandy, the chancellor erred in preventing Ken from claiming Lauren as a dependent for tax purposes. Therefore, the Court of Appeals reversed and rendered the judgment of the Adams County Chancery Court.

Reversed and Rendered - 2014-CA-00629-COA (Mar. 1, 2016)

Opinion by Presiding Judge Griffis

Hon. George Ward (Adams County Chancery Court)

Michael James Malouf Jr., Melissa Ann Malouf & Robert Eugene Jones II for Appellant - Joseph Bilbo Moffett for Appellees

Briefed by [Darlan Etienne](#)

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SMITH V. MARTIN

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - FINDING OF FACT - MANIFESTLY WRONG - The Court of Appeals is bound to accept the findings of the chancellor unless he is manifestly wrong or there is an abuse of discretion

EVIDENCE - ERROR - PREJUDICE OR HARM - For a case to be reversed based upon the erroneous admission or exclusion of evidence, the error must result in prejudice or harm that adversely affects a substantial right of a party

VISITATION RIGHTS - GRANDPARENTS - STATUTORY RIGHT - Grandparent-visitation rights are governed by statute in Mississippi and may only be considered where the statutory requirements are met

FACTS

Kimberly and Marty Martin married in 1996 and divorced in 2003. The couple had two sons, Cliff and Hank. Kimberly was awarded custody of the two children, and Marty received visitation rights supervised by his parents, Milton and Geneva Martin (the Martins). On Feb. 8, 2008, Marty Martin committed suicide. Following Marty's death, Kimberly allowed the Martins to continue visitation with the children as they had prior to Marty's death. On May 17, 2008, Kimberly married Brandon Smith. In 2010, Brandon adopted Kimberly's children. Following an incident on Jan. 2, 2011, Kimberly and Brandon discontinued the Martins' visitation with the children. Kimberly testified that she ended the Martins' visitation with the children due in part to an incident on Jan. 2, 2011 and due in part to negative changes in the children's behavior she and Brandon had observed following their visits with the Martins. On Aug. 3, 2011, the Martins filed a petition for grandparent visitation pursuant to Miss. Code Ann. § 93-16-3(2). On Aug. 9, 2011, the Martins filed a motion for temporary visitation. The chancellor granted the Martins temporary telephone visitation up to two times a week during specified hours, along with a physical visitation on Dec. 28, 2011 to be supervised by a mutual friend of the parties. On May 16, 2013, the chancellor entered an order finding that the Martins were entitled to visitation under Miss. Code Ann. §§ 93-16-3(1)-(2) and the *Martin* factors. The chancellor granted the Martins visitation with the children on the third weekend of every month. In order to facilitate a smooth visitation experience between the Martins and the children, the chancellor also ordered the Smiths, the Martins, and the children to attend family counseling until the counselor determined the need for counseling no longer existed. The Smiths then filed a motion for new trial, which was denied. The Smiths appealed.

ISSUES

Whether the chancellor (1) followed a non-judicial philosophy that was incompatible with trying cases and controversies; (2) abused her discretion by excluding certain testimony as hearsay; (3) erred by finding visitation was in the grandchildren's best interests before analyzing the *Martin* factors; (4) applied an erroneous legal standard that placed an

improper burden of proof on the Smiths; (5) improperly substituted her judgment for that of the Smiths; and (6) erred by ordering the Smiths to participate in family counseling with a court-appointed counselor.

HOLDING

(1) Because the Court of Appeals found that the chancellor did not abuse her discretion in ruling on the admission and exclusion of evidence in such a way that resulted in prejudice or harm that adversely affected the substantial rights of the Smiths, the issue lacked merit. (2) Because the chancellor did not abuse her discretion in excluding Brandon's proffered testimony, the issue lacked merit. (3) Because the record contains sufficient evidence to support the chancellor's findings that the Martins were entitled to grandparent-visitation rights under Miss. law, the issue lacked merit. (4) Because the grandparent-visitation right is a statutory right and the chancellor found that the Martins met the statutory requirements, the issue lacked merit. (5) Because the chancellor considered the criteria of Section 93-16-3 and the *Martin* factors in her decision to award grandparent visitation for children's best interests, the issue lacked merit. (6) Because the Court of Appeals found no evidence that the chancellor exceeded her authority in ordering the Smiths to participate in family counseling with a court-appointed counselor, the issue lacked merit. Therefore, the Court of Appeals affirmed the judgment of the Yazoo County Chancery Court.

Affirmed - 2014-CA-00040-COA (Mar. 1, 2016)

En Banc Opinion by Judge Carlton

Hon. Janace H. Goree (Yazoo County Chancery Court)

George S. Whitten Jr. & Tom P. Calhoun III for Appellants - James H. Powell III for Appellees

Briefed by [Shayna Giles](#)

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WEEKS V. WEEKS

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - STANDARD OF REVIEW - When an appellate court reviews a chancellor's decision in a divorce case (including all related issues), the scope of review is limited by the substantial evidence/manifest error rule, which dictates that the chancellor's factual findings will not be disturbed unless manifestly wrong, clearly erroneous, or an erroneous legal standard was applied

FAMILY LAW - DIVORCE - MODIFICATION OF ALIMONY - In deciding whether to modify alimony, the chancellor must apply the *Armstrong* factors, which entails comparing the relative positions of the parties at the time of the request for modification in relation to their positions at the time of the divorce decree

FAMILY LAW - CHILD SUPPORT - CONTEMPT - Failure to pay child support makes a prima facie case for contempt

CIVIL PROCEDURE - MOTION TO SET ASIDE - TIMEFRAME - A motion to set aside a judgment must be brought within a reasonable time

FACTS

Roland and Deborah Weeks married in 1978, separated in 1992, and divorced in 2001. In its final judgment of divorce, the chancellor awarded Deborah about one-third of the marital assets but no alimony. On appeal, the chancellor's alimony ruling was reversed and remanded (*Weeks v. Weeks*). The chancellor subsequently ordered Roland to pay Deborah approximately \$3,900 per month, including periodic alimony, health insurance, and life insurance. Deborah appealed and the judgment was largely affirmed; however, the matter was remanded for the chancellor to reconsider certain aspects of attorney's fees and child support awards (*Weeks II*). Several motions by both parties followed: Roland filed a motion to reduce his alimony obligation; Deborah filed a motion to pursue the child support and attorney's fees previously remanded, and a motion to set aside an order denying an upward modification of alimony. The chancellor denied Roland's motion, finding that Roland remained capable of paying his alimony obligation, and awarded Deborah back child support but denied her request for attorney's fees, finding the attorney's fees to be both unreasonable and within her ability to pay. Roland appealed. Deborah cross-appealed.

ISSUES

Whether the chancellor erred in (1) denying Deborah interest on back child support, (2) denying Deborah's motion for attorney's fees, (3) denying Roland's motion for downward modification of alimony, (4) ordering Roland to pay \$1,890 per summer-month in child support, minus what he had already paid for those months, (5) refusing to find Roland in contempt for failing to comply with the child support order, (6) denying Deborah's motion to set aside an order that denied her an increase in alimony, and (7) whether Roland should be required to pay for the parts of the record designated by Deborah.

HOLDING

(1) Because interest is required for child support arrearages, the chancellor erred in refusing to award it. (2) While the issue of whether Deborah could pay her attorney's fees before *Weeks II* was barred by the res judicata effect of prior litigation, the issue of whether she can pay them since is a separate consideration, and because the chancellor had sufficient evidence to find Deborah possessed substantial liquid assets, it did not abuse its discretion in denying her request for attorney's fees accumulated since *Weeks II*. (3) Regardless of whether Roland was required to prove a material change of circumstances, the chancellor did not abuse its discretion in denying Roland's motion for downward modification of alimony because it had sufficient evidence to deny the motion. (4) Because this issue was barred by the res judicata effect of prior litigation, the trial court did not err in ordering Roland to pay summer child support. (5) Because this issue was barred by res judicata, and Deborah presented nothing new on the merits, the chancellor did not err in refusing to find Roland in contempt. (6) The chancellor did not abuse its discretion in denying Deborah's motion to set aside an order that denied her an increase in alimony because Deborah failed to show a fraud on the court, and also failed to bring her claim within a reasonable time, as required by Miss. R. Civ. P. 60(b)(6). (7) Because Deborah failed to distinguish between portions of the record necessary for responding to issues raised by Roland in his appeal and those she designated as cross-appellant, there was no error. Therefore, the Court of Appeals affirmed the Harrison County Chancery Court's judgment on direct appeal and affirmed in part and reversed & remanded in part on cross-appeal.

Affirmed on Direct Appeal; Affirmed in Part & Reversed & Remanded in Part on Cross-Appeal - No. 2014-CA-00807-COA (Mar. 1, 2016)

Opinion by Judge Fair

Hon. Carter O. Bise (Harrison County Chancery Court)

Thomas W. Crockett Jr. & Henry Laird for Appellant - Andrew Austin Clark & Russell S. Gill for Appellee

Briefed by [J. Matthew Orr](#)

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COURT OF APPEALS - CRIMINAL CASES

GRAHAM V. STATE

CRIMINAL - FELONY

CONSPIRACY - FORMATION - INTENT - For there to be a conspiracy, there must be recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose

CONSPIRACY - EXISTENCE – CIRCUMSTANTIAL EVIDENCE- The existence of a conspiracy, and a defendant’s membership in it, may be proved entirely by circumstantial evidence

SENTENCING - HABITUAL OFFENDER – PROOF - Before a court may sentence a defendant under Miss. Code Ann. § 99-19-81, the State must properly charge the accused as a habitual offender and then prove the prior offenses by competent evidence beyond a reasonable doubt

FACTS

A grand jury indicted Andrew Graham for bringing marijuana, a controlled substance, into a correctional facility and conspiracy to possess a controlled substance inside a correctional facility. Prior to trial, the State moved to amend Graham’s indictment to reflect his habitual-offender status. The State offered into evidence certified copies of sentencing orders related to Graham’s prior felony convictions to prove the predicate offenses to establish his habitual-offender status. Graham raised no objection to the State’s motion to amend his indictment. The circuit court granted the State’s motion to amend Graham’s indictment to reflect his prior felony convictions and his habitual-offender status. The sentencing orders reflected that Graham possessed two previous felony convictions. After observing Graham and another inmate behaving suspiciously on video surveillance, officers searched them. The other inmate had three envelopes concealed on him. Graham had complained of feeling cold before he went outside and was allowed to take a blanket with him to the yard, and the officers noticed that Graham’s blanket looked bulky. While Graham attempted to pass the blanket to the other inmate, officers intercepted the blanket and discovered a yellow bag inside Graham’s blanket that contained additional envelopes. The envelopes concealed in Graham’s blanket contained tobacco and what appeared to be, and was later confirmed to be, marijuana. The jury failed to reach a verdict on Count I of Graham’s indictment for bringing marijuana, a controlled substance, into a correctional facility. The jury found Graham guilty of Count II for conspiracy to possess a controlled substance inside a correctional facility. During Graham’s sentencing hearing, the State sought to have Graham sentenced as a habitual offender. The circuit court referenced its pretrial ruling, which ordered Graham’s indictment to be amended to reflect his prior felony convictions and his habitual-offender status. After referencing its previous ruling, the circuit court sentenced Graham, as a habitual offender, to five years in the Miss. Dept. of Corrections’ custody and fined Graham \$2,000. Graham appealed.

ISSUES

Whether (1) Graham’s indictment was defective; (2) the evidence was legally sufficient to support his conviction; and (3) Graham was illegally sentenced as a habitual offender.

HOLDING

(1) Because Graham failed to raise his argument that the indictment was defective in that Count II did not specify the controlled substance before the circuit court, the issue was barred. (2) When viewing the evidence in the record in the light most favorable to the State, a rational juror could have found Graham guilty of conspiracy to possess a controlled substance inside a correctional facility, so the issue was meritless. (3) Because no manifest miscarriage of justice resulted from Graham’s sentence as a habitual offender, the issue had no merit. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Circuit Court.

Affirmed - 2014-KA-01783-COA (Mar. 1, 2016)

Opinion by Judge Carlton

Hon. Michael M. Taylor (Lincoln County Circuit Court)

George T. Holmes & Justin Taylor Cook (State Pub. Defender Office) for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Kathryn Fowler](#)

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