

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 21, 2016

SUPREME COURT - CRIMINAL CASES

TUBBS V. STATE

CRIMINAL - FELONY

EVIDENCE - HEARSAY - TENDER YEARS EXCEPTION - Under MRE 803(25), a statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide a substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act

EVIDENCE - HEARSAY - INDICIA OF RELIABILITY - The comment to MRE 803(25) provides the following factors to determine a statement's indicia of reliability: (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated

EVIDENCE - COMPETENCY - CHILDREN - Before allowing a child to testify, the judge should determine that the child has the ability to perceive and remember events, to understand and answer questions intelligently, and to comprehend and accept the importance of truthfulness

CRIMINAL PROCEDURE - EVIDENCE - CHAIN OF CUSTODY - The presumption of regularity supports the official acts of public officers, and the burden to produce evidence of a broken chain of custody is on the defendant

CRIMINAL PROCEDURE - EVIDENCE - CHAIN OF CUSTODY - In determining whether there has been a break in the chain of custody, the law does not require a proponent of evidence to produce every handler of the evidence, and a mere suggestion that substitution could have possibly occurred does not meet the burden of showing probable substitution

FACTS

Because she was working late, D.J. left her children at the home of her uncle, Thomas Tubbs. D.J. took the children straight home after she got off work. Her three-year-old daughter, T.J. went to the restroom, then called for D.J.'s help. As D.J. was pulling down her underpants, T.J. said, "Thomas licked me." D.J. asked L.J., the child's grandmother who lived with them, to come to the bathroom and asked T.J. to tell L.J. what had happened. T.J. pointed to her vagina and told L.J. that Tubbs touched her. Investigator Randy Naylor took the clothes T.J. had been wearing to the evidence room, where Raymond Elledge locked them up. Oral swabs from Tubbs were placed in a box, which was then placed in a sealed envelope. The State's forensic expert, Kathryn Moyses Rogers, testified that she received the swabs and clothes from Elledge in the same bag, but the envelope was still sealed. The DNA matched Tubbs's. At the time of trial, T.J. was five years old. In a hearing to determine T.J.'s competency to testify, T.J. knew how old she was, that she went to school, and the names of her teachers. She stated that those who "tell stories" on other people get in trouble with their parents and God. The court questioned D.J., who stated that she had not received any bad reports from T.J.'s teachers and that T.J. had an above average reading level. The trial court found T.J. to be competent and allowed her to testify

to her statements to her mother and grandmother under the tender-years hearsay exception. The court also admitted T.J.'s clothes that the oral swabs as evidence. The jury found Tubbs guilty of molestation. Tubbs appealed.

ISSUES

Whether the trial court erred (1) in admitting L.J.'s tender-years testimony, (2) in ruling T.J. competent to testify, and (3) in admitting T.J.'s clothes and the oral swabs due to a break in the chain of custody.

HOLDING

(1) Because T.J. testified at trial and the court found that the statement to the mother was made in a safe space where the child could give an unsolicited response, that the mother, grandmother and Tubbs had a good relationship, thus there was no ulterior motive for the child to lie, that the child and her grandmother had a close relationship, that the child had no reason to fabricate her testimony, and that the issue of whether the event happened as T.J. said it did was for the jury to decide, there was sufficient findings on the record supporting the trial court's decision to allow T.J.'s statement under the tender-years hearsay exception. (2) Because T.J. remembered the judge from the previous trial, knew how old she was, that she went to school, and the names of her teachers, along with her testimony that she was aware that lying about the acts of others would get her in trouble with both her parents and God, and D.J. testified that T.J.'s teachers had never given T.J. a bad report and that T.J. could read at a level higher than her grade level, the trial court did not abuse its discretion in finding T.J. competent to testify. (3) Because the presumption of regularity attached to Investigator Naylor's and Rogers's acts, Elledge was not required to testify under state law, and Tubbs only offered the mere suggestion that substitution of evidence could have possibly occurred, the court did not err in admitting the evidence. Therefore, the Supreme Court affirmed the judgment of the Warren County Circuit Court.

Affirmed - No. 2014-KA-00337-SCT (Feb. 18, 2016)

En Banc Opinion by Presiding Justice Randolph

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

Hunter Nolan Aikens & George T. Holmes (State Pub. Defender Office) for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Abby Abide](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 21, 2016

COURT OF APPEALS - CIVIL CASES

BLANCHARD V. MIZE

CIVIL – REAL PROPERTY

CIVIL LAW - SUMMARY JUDGMENT - RENDERING - Summary judgment shall be rendered if there is no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law

FORECLOSURE - NOTICE REQUIREMENT - PUBLICATION - The Mississippi Code requires only that a notice be posted in the courthouse of the county where the land is situated, and that a notice of sale be published in a paper of general circulation, and any additional notice requirements beyond those expressed in the code are determined by the provisions of the particular note and deed of trust

FACTS

In 2003, Elizabeth Blanchard purchased her home at 914 West Commerce St. in Aberdeen, MS and in order to do so, Blanchard executed a deed of trust. This deed required the trustee to provide Blanchard with notice prior to acceleration, advise her of an opportunity to cure, and warn her that failure to cure may result in foreclosure. Because of financial difficulty, Blanchard fell behind on loan payments, only making partial loan payments from 2008 to 2009. In late 2009 or early 2010, Blanchard received written notice that she would have to pay \$5,000 "to save her home."

On June 10, 2010, Emily Corteau, the trustee, advertised sale of property by posting notice in the Monroe County Courthouse and by publishing notice for three weeks in a local newspaper. On July 9, 2010 the deed of trust was foreclosed on, and a substituted trustee's deed was executed, which conveyed the property to U.S. Bank. On February 7, 2011 the property was sold to Nathan A. Mize. Blanchard filed a complaint in the Monroe County Circuit Court seeking damages for tortious conduct; breach of contract; and/or wrongful, illegal, or fraudulent foreclosure. Mize filed for summary judgment claiming that he should be dismissed from the suit because of the bona fide purchaser defense. Blanchard argued that there was a genuine issue of material fact as to the notice of acceleration and therefore summary judgment would be premature. The court ultimately declined to make a ruling on the notice claim but did rule Mize was a bona fide purchaser, thereby granting the motion for summary judgment. Blanchard appealed.

ISSUES

Whether the court erred by granting Mize's motion for summary judgment.

HOLDING

Because there was no proof that notice of acceleration of the foreclosure was not given and because Mize was a bona fide purchaser, the court did not err in granting Mize's motion for summary judgment. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Monroe County Circuit Court.

Affirmed - 2014-CA-01703-COA (Feb. 16, 2016)

En Banc Opinion by Justice Lee

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

William Joseph Kerley & Elizabeth Ann Roche for Appellant - Gene D. Berry for Appellees

Briefed by [Darlan Etienne](#)

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BYRD V. STUBBS

CIVIL - MEDICAL MALPRACTICE

NEGLIGENCE - CAUSATION – SUPERSEDING CAUSE - A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about; the original actor's negligence may be superseded by a subsequent actor's negligence only if the subsequent negligence was unforeseeable

TRIAL - JURY INSTRUCTIONS - GRANT OR REFUSAL - When analyzing the grant or refusal of a jury instruction, two questions should be asked: Does the instruction contain a correct statement of law and is the instruction warranted by the evidence

TRIAL - JURY INSTRUCTIONS - OBJECTIONS - When a jury instruction is offered at trial, it is the duty of the opposing party, in order to preserve this point for appeal, to state a contemporaneous objection in specific terms so that the trial court has an opportunity to correct any mistake

TRIAL - JURY INSTRUCTIONS - THEORY OF THE CASE - A defendant is entitled to have jury instructions given which present his theory of the case when there exists a foundation in the evidence for the instructions

TRIAL - JURY INSTRUCTIONS - STANDARD OF REVIEW - The jury instructions actually given must be read as a whole; if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found

FACTS

In May 2004, at Dr. Kenneth Stubbs's recommendation, Margaret Byrd underwent a diagnostic colonoscopy. Dr. Thomas Weed performed the procedure, diagnosed Byrd with diverticulosis, and reported his findings to Dr. Stubbs. Byrd claims that in early June she began experiencing nausea, diarrhea, and vomiting. She went to Natchez Regional Medical Center's emergency room for treatment on July 19. Dr. Seki diagnosed Byrd with acute gastroenteritis—an inflammation of the intestinal tract that can be either viral or bacterial. In contrast to Byrd's testimony that her condition had been poor and worsening for weeks, Dr. Stubbs testified that when he arrived at the hospital that night,

Byrd told him that she had been experiencing symptoms for only two or three days, which she blamed on some oysters she had eaten. Dr. Stubbs's testimony was consistent with his own contemporaneous notes, as well as the notes of Dr. Seki and other emergency room personnel. Byrd returned home on July 21.

On July 23 she went back to the emergency room complaining of pain, nausea, and vomiting. Dr. Seki again treated and examined her, and he again prescribed medication for pain and nausea. Dr. Seki discharged Byrd that same day without any additional testing, and, without notifying Dr. Stubbs. There was no dispute at trial that Dr. Seki's failure to notify Dr. Stubbs of Byrd's return and condition was negligent. The next day, July 24, Byrd went to the emergency room again. An x-ray showed an obstruction of the bowel, an ileus, and sepsis --a potentially life-threatening infection.

Byrd was hospitalized for thirteen days following her surgery. In 2006, Byrd filed suit in the Adams County Circuit Court against Dr. Stubbs, Dr. Seki, and Natchez Regional Medical Center. In 2007, Dr. Seki and the hospital settled the claims against them, and the case eventually was tried on November 5-7, 2013, with Dr. Stubbs as the only remaining defendant. At trial, the jury was given instruction on the issue of superseding causation. After Byrd rested her case, Dr. Stubbs moved for a directed verdict. The judge reserved ruling and allowed the trial to proceed. When Dr. Stubbs renewed his motion at the close of the evidence, the judge allowed the case to go to the jury. The jury returned a general verdict in favor of Dr. Stubbs. Byrd filed a motion for a new trial, which was denied. Byrd appealed.

ISSUES

Whether (1) the trial court erred in giving a superseding cause instruction that lacked a foundation in the evidence; (2) the trial court instruction misstated the law.

HOLDING

Because (1), the evidence raised a jury question as to whether Dr. Seki's subsequent negligence was an independent and unforeseeable cause of Byrd's injuries, the trial judge did not err in giving a superseding cause instruction; and because (2) Byrd did not raise the misstatement of the law objection at trial, the objection was not preserved and cannot be raised on appeal and the trial court did not misstate the law. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Adams County Circuit Court.

Affirmed - 2014-CA-00233-COA (Feb. 16, 2016)

En Banc Opinion by Judge Wilson

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

F.M. Turner III for Appellant - Stuart Bragg Harmon and Robert L. Johnson III for Appellee

Briefed by [Breanna Goff](#)

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HAWKINS V. HALE

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - ADMISSIONS - REQUESTS FOR ADMISSIONS - Pursuant to Miss. R. Civ. P. 36(a), a matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admissions a written objection addressed to the matter

CIVIL PROCEDURE - ADMISSIONS - WITHDRAWAL OR AMENDMENT - Pursuant to Miss. R. Civ. P. 36(b), the court may permit withdrawal or amendment when the presentation of the merits of the action will be served thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits

TORTS - ANIMAL ATTACKS - DANGEROUS PROPENSITY RULE - An animal owner may be exposed to liability for an attack by his or her animal when: (1) there is some proof that the animal has exhibited some dangerous

propensity or disposition that the owner was aware of prior to the attack complained of; and (2) there is proof that the owner reasonably should have foreseen that the animal was likely to attack someone

FACTS

Curtis Hawkins was injured when Daniel Hale's dog escaped from his restraints in Hale's backyard. According to a neighbor who witnessed the incident, the dog escaped the first time after Hawkins and his wife were taunting and provoking the animal. The neighbor intervened and put the dog back on its restraints. Several minutes later, the dog escaped again and bit Hawkins. Hawkins filed a personal-injury lawsuit against Hale, seeking damages for injuries sustained as a result of the dog bite. On October 2, 2013, Hale served both of Hawkins's attorneys, Cheryl Ann Webster and Robert G. Johnston, with requests for admissions, interrogatories, and requests for production. After nearly three months neither attorney responded to the admissions, and in December Hale filed a motion for summary judgment. At this point Johnston realized the error and claimed that the requests were misfiled and mislaid and requested a motion for leave to file late responses. Webster never gave a reason for her inadvertence. The circuit court denied Hawkins's motion for leave and granted summary judgment in favor of Hale. Hawkins appealed.

ISSUES

Whether the trial court (1) abused its discretion in denying Hawkins's motion for leave to file untimely responses to Hale's requests for admissions, and (2) erred in granting summary judgment.

HOLDING

(1) The county court acted within its discretion in denying Hawkins's motion to withdraw the deemed admissions, and (2) because of the thoroughness of the admissions, and because Hawkins could provide no proof that Hale knew of the dangerous propensity of the dog, there was no genuine issue of material fact. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2015-CA-00433-COA (Feb. 16, 2016)

En Banc Opinion by Judge James

Hon. Albert B. Smith III (Coahoma County Circuit Court)

Robert G. Johnston & Cheryl Ann Webster for Appellant - William O. Luckett Jr. for Appellee

Briefed by [Robert T. Noland](#)

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HUGHES V. HUGHES

CIVIL - DOMESTIC RELATIONS

DIVORCE - ALIMONY - MATERIAL CHANGE IN CIRCUMSTANCES - The chancellor may terminate alimony payments when there has been a material change in circumstances such as mutual support by a romantic partner

DIVORCE - ALIMONY - COHABITATION - Proof of cohabitation or de facto marriage shifts the burden of proof in an action to terminate alimony to the recipient spouse to come forward with evidence suggesting that there is no mutual support

DIVORCE- ALIMONY - GROUNDS OF TERMINATION - A relationship accompanied by sexual activity, along, does not forfeit alimony

DIVORCE - ALIMONY - DE FACTO MARRIAGE - A de facto marriage sufficient to terminate alimony payments may occur absent cohabitation if the alimony recipient and another person (1) are deliberately avoiding remarriage merely to continue receiving alimony, or (2) have so fashioned their relationship to include their physical living arrangements and financial affairs that they could reasonably be considered as have entered into a de facto marriage

FACTS

Tim and Mariel Hughes were married in 1983 and divorced in 2008. Tim was ordered to pay \$2,500 per month in alimony. Tim brought this action to terminate alimony due to a change in circumstances, namely material support from Mariel's boyfriend Darrell Hill. Mariel and Darrell maintain separate residences. Darrell keeps his corvette parked in Mariel's garage but does not keep any other belongings in the house. Tim's private investigator reported that Darrell

spent the night at Mariel’s home seven times out of the twelve times that the private investigator drove by. Mariel and Darrell vacation together and pay most of their own expenses on the vacations. The Hughes’s daughter testified that “Darrell doesn’t live at her house.” The chancellor found that there was no cohabitation or de facto marriage and denied Tim’s petition to terminate alimony. Therefore, Tim appealed.

ISSUE

Whether the chancellor erred in finding that there was no material change in circumstances warranting a termination in alimony because the recipient spouse was neither cohabitating or in a de facto marriage with her boyfriend.

HOLDING

The evidence was sufficient for the chancellor to find that the burden of proving a material change in circumstances was not shifted due to cohabitation or de facto marriage. Therefore, the finding of the chancellor was affirmed.

Affirmed - 2014-CA-00815-COA (Feb. 16, 2016)

Opinion by Judge Wilson

Hon. Jaye A. Bradley (Jackson County Chancery Court)

Jamie E. Cook & Earl L. Denham for Appellant - Donald P. Sigalas for Appellee

Briefed by [Jacob A. Bradley](#)

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LAMBERTH V. S. PANOLA SCH. DIST.

CIVIL – STATE BOARDS AND AGENCIES

APPELLATE PROCEDURE – STATE BOARDS AND AGENCIES – SCHOOL BOARD ACTIONS – An employee aggrieved by a school board’s final decision on a matter is entitled to judicial review, but to properly perfect appeal, the employee must, within 20 days of the receipt of the board’s final decision: (1) file a petition with the clerk of the chancery court within the judicial district in which the school district is located; and (2) execute and file a bond payable to the school of at least \$200

APPELLATE PROCEDURE – STATE BOARDS AND AGENCIES – STATUTORY REQUIREMENTS– Absent extenuating circumstances, an appellant’s failure to meet the statutory requirements of filing a timely bond is “fatal to appeal”

FACTS

In 2013, Joseph Eugene Lamberth, an assistant principal at South Panola High School, was accused of: (1) threatening a student; (2) using abusive, profane, and vulgar language with a student; (3) behaving inappropriately; (4) exhibiting poor judgment and unprofessional behavior; and (5) committing multiple ethical violations. After a hearing regarding Lamberth’s alleged offenses, the superintendent of the South Panola School District recommended to the South Panola School Board that Lamberth be terminated. The Board unanimously upheld the superintendent’s recommendation and terminated Lamberth. Although Lamberth appealed the Board’s decision to the chancery court within the requisite 20-day period, he failed to file the statutorily required \$200 bond. The District filed a motion to dismiss for Lamberth’s failure to pay the bond; the chancery court dismissed the action with prejudice. Lamberth appealed.

ISSUE

Whether the school employee’s failure failure to file the \$200 bond warranted dismissal of his appeal of an adverse decision by the school board.

HOLDING

Because Lamberth failed to file the bond, he did not meet the statutory requirements to perfect his appeal. Therefore, the Panola County Chancery Court properly granted the District’s motion to dismiss.

Affirmed - 2014-CA-01408-COA (Feb. 16, 2016)

Opinion by Judge Ishee

Hon. Mitchell M. Lundy Jr. (Panola County Chancery Court)

Carlos E. Moore, Darryl A. Wilson & Tangala L. Hollis for Appellant – Elizabeth Lee Maron & Holmes S. Adams for Appellee
Briefed by [J. Matthew Orr](#)

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NORTRAX SOUTH, INC. v. THORNHILL FORESTRY SERVICE, INC.

CIVIL - OTHER

PROPERTY - PURCHASER'S LIABILITY - SALES TAX - Under *Woodrich v. St. Catherine Gravel Co.*, the Supreme Court held the liability of the purchaser is for the amount of the sales tax imposed on the seller

FACTS

Nortrax South sold Thornhill Forestry Service several bulldozers over the course of three years. In these transactions, Nortrax collected three percent sales tax on the understanding that Thornhill was eligible for this reduced rate. The Mississippi Department of Revenue (“MDOR”) later determined that Thornhill was not eligible for the reduced rate and was instead subject to the ordinary rate. Nortrax sued to collect the difference. The suit was stayed while Nortrax, in cooperation with Thornhill, appealed the MDOR’s decision through administrative remedies. The decision was affirmed and the second appeal was dismissed for failure to timely file an administrative appeal. Nortrax filed suit to collect from Thornhill. However, the court denied relief because Nortrax contested the tax liability on Thornhill’s behalf and doing so inadvertently terminated the MDOR appeals process. Nortrax appealed.

ISSUE

Whether the trial court erred ruling that Thornhill cannot be bound to the amount determined by the MDOR even though it was not a party to the proceedings.

HOLDING

Because liability of the purchaser is for the amount of the sales tax imposed on the seller and Thornhill did not dispute that it owed sales tax, the Marion County Circuit Court erred as a matter of law. Therefore, judgment was rendered in favor of Nortrax and remanded to determine pre and post-judgment interest.

Reversed, Rendered and Remanded - 2014-CA-01355-COA (Feb. 16, 2016)

Opinion by Judge Fair

Hon. Anthony Alan Mozingo (Marion County Circuit Court)

John Thomas Rouse & M. Brent Hicks for Appellant - R. Andrew Foxworth & Teresa Prillhart Johnson for Appellee

Briefed by [Paul Wallace](#)

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RINGO v. WILSON

CIVIL - PERSONAL INJURY

PERSONAL INJURY - CAUSATION - BURDEN OF PROOF - If the plaintiff cannot identify the point at which she fell, she cannot meet the burden of proof to show that a particular defect caused her fall

PROPERTY - DOMESTICATED ANIMALS - DANGEROUS PROPENSITY - There must be some proof that the animal has exhibited some dangerous propensity or disposition prior to the attack complained of, and, moreover, it must be shown that the owner knew or reasonably should have known of this propensity or disposition and reasonably should have foreseen that the animal was likely to attack someone; a dangerous propensity is one which is not natural to the class of animals to which the offending animal belongs

FACTS

Jeanette Ringo was startled by a Peekapoo dog owned by Lela Wilson and Tela Wilson Collins and fell in their driveway while backing away from the dog. At the time of Ringo's visit, Wilson and Collins were not home and the dog was tied up outside of the home. Ringo attempted to argue that the property owners' failure to repair a crack in their driveway possibly caused her fall. Ringo filed suit for personal injuries in the Montgomery County Circuit Court. Collins and Wilson filed a motion for summary judgment, which the circuit court granted. Ringo appealed.

ISSUES

Whether the trial court properly granted summary judgment on the issue of (1) premises liability, and (2) Wilson and Collins' placement of the dog and the dog's dangerous propensities.

HOLDING

(1) Because Ringo failed to prove that Wilson and Collins' failure to fix a crack in the driveway was the cause of her fall, the Court of Appeals found that the trial court did not err in granting summary judgment in favor of the defendants. (2) Because Ringo could not point to any indication specifically that the dog would, or did, attack, and because barking from a dog is not considered a propensity separate from its natural inclinations, the Court of Appeals found that the trial court did not err in granting summary judgment to Wilson and Collins. Therefore, the Court of Appeals affirmed the judgment of the Montgomery County Circuit Court.

DISSENT

Judge James argued that, in viewing the facts in the light most favorable to Ringo, a genuine issue of material fact existed as to whether Wilson and Collins negligently failed to maintain their premises in a reasonably safe condition. In addition, he felt that there was a genuine issue as to whether the dog was actually tied up or not. Thus, Judge James would have reversed the trial court's judgment and remanded for further proceedings.

Affirmed - 2014-CA-01313-COA (Feb. 16, 2016)

En Banc Opinion by Presiding Judge Griffis - Dissent by Judge James

Hon. C.E. Morgan III (Montgomery County Circuit Court)

Robert G. Johnston for Appellant - Blayne Thomas Ingram & David Lee Gladden Jr. for Appellee

Briefed by [Autumn T. Breeden](#)

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SHARKEY V. BARBER

CIVIL - WRONGFUL DEATH

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - DISCOVERY RULE - The discovery rule applies only in actions in which no other limitation is prescribed

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - CONCEALMENT - In addition to proving an affirmative act of concealment, the party alleging fraudulent concealment must prove that despite his due diligence, he was unable to discover the claim before the expiration of the statute of limitations; the test on whether to toll the statute of limitations is whether a reasonable person similarly situated would have discovered potential claims

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - CONCEALMENT - In regard to an allegation of fraudulent concealment, there must be shown some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim; mere allegations that the opposing party has complete control over the information are not sufficient

FACTS

On January 7, 2012, Cedric Sharkey was shot and killed after being chased by Frank, Frank's brother Steven Barber, and Barry Ware. Chris, as administrator of his brother Cedric Sharkey's estate, filed a wrongful death suit against Frank, Steven, and Barry on July 28, 2014. The suit was dismissed as time-barred. Chris appealed.

ISSUES

Whether the court erred (1) by not applying the discovery rule to intentional torts and (2) by not allowing the statute of limitations to toll because of fraudulent concealment.

HOLDING

(1) Because all three of the claims were intentional torts, the Discovery Rule could not be relied upon to save the untimely claims. (2) Because Chris could not show that Frank engaged in some act or conduct affirmative in nature to conceal discovery, and that he acted with due diligence, there was no fraudulent concealment. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

Affirmed - 2015-CA-00518-COA (Feb. 16, 2016)

En Banc Opinion by Judge Ishee

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

Davie Wayne Baria, Robert C. Williamson & Brandon Currie Jones for Appellant - J. Niles McNeel for Appellee

Briefed by [Rod Hickman](#)

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TAYLOR V. DELTA REG'L MED. CTR.

CIVIL - MEDICAL MALPRACTICE

MEDICAL MALPRACTICE - TORTS CLAIM ACT - NEGLIGENT HIRING - Staffing decisions of county hospitals are discretionary functions, an exception to the waiver of immunity in the Mississippi Tort Claims Act

MEDICAL MALPRACTICE - TORTS CLAIM ACT - CAUSES OF ACTION - The Mississippi Torts Claim Act does not grant a plaintiff a right to recover for a county hospital's mere violation of a statute or regulation

FACTS

In July 2003, LeKenray Taylor sustained a massive gunshot wound to the chest during a drive-by shooting in Rosedale. He was transported to the emergency room at Delta Regional Medical Center (DRMC) in Greenville. The on-call general surgeon, Dr. Allen Billsby, examined Taylor, but noted the extensive injuries to Taylor's blood vessels of his heart and lungs were beyond his training as a general surgeon. Efforts were made to obtain a cardiothoracic surgeon and/or relocate Taylor to a different hospital – all to no avail. Later that night, Dr. Hugh Gamble (who was not on call) received a message that a cardiothoracic surgeon was needed, and he proceeded to DRMC to evaluate and ultimately operate on Taylor nearly 5 hours after Taylor had been shot. Taylor survived the surgery, however Dr. Gamble's prognosis was grim, and Taylor passed away a few hours later.

In January 2005, Willie Taylor (LeKenray Taylor's mother and the administratrix of his estate) filed suit against DRMC and the two doctors. After a long procedural battle spanning several years that resulted in both doctors being dismissed from the suit, an interlocutory appeal to the Mississippi Supreme Court, and DRMC making multiple motions for summary judgment on several grounds (most notably failure to prosecute), the case ultimately went to trial in October 2013. After hearing expert testimony from both sides about the standard of care and relevant trauma care center regulations, the trial judge dismissed Taylor's complaints by finding that DRMC did not violate the regulation in effect during 2003. The trial court also found that DRMC's staffing decisions on the number of cardiothoracic surgeons to employ and keep on-call was a discretionary decision entitled to immunity under the Mississippi Torts Claim Act (MTCA). The circuit court denied Taylor's motion to alter or amend the judgment or for a new trial. Taylor appealed.

ISSUES

Whether the trial court erred in finding that (1) DRMC met the standard of care and complied with the trauma care systems regulations of 2003 and (2) DRMC's staffing decisions were entitled to immunity under the Mississippi Tort Claims Act.

HOLDING

(1) Because the MTCA does not grant a plaintiff a right to recover for the mere violation of a regulation where no private cause of action exists, there was no argument on appeal that the Legislature intended to create private rights of

action under the trauma care systems regulations; and, furthermore, because the trauma care systems regulations in effect in 2003 were purely voluntary, Taylor's claim of DRMC's negligence via noncompliance fails. (2) Because Miss. Code Ann. § 11-46-9(1)(g) gives discretionary powers to governmental entities in regards to the hiring of personnel, DRMC is immune from any claim that it was negligent in not having a cardiothoracic surgeon on call the night of Taylor's fatal shooting. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

Affirmed - 2014-CA-00250-COA (Feb. 16, 2016)

Opinion by Judge Wilson

Hon. Richard A. Smith (Washington County Circuit Court)

Helen E. Morris & Jimmie L. Collins for Appellant - L. Carl Hagwood, Mary Frances Stallings-England, & Jacob O. Malatesta for Appellee

Briefed by [John G. Archer](#)

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WILBANKS V. HICKMAN

CIVIL - PERSONAL INJURY

PREMISES LIABILITY - DUTY TO WARN - BUSINESS INVITEE - Premises owner has a general duty to provide a reasonably safe place to work and give warning of danger, and the owner has a duty to conduct reasonable inspections to discover dangerous conditions existing on premises

PREMISES LIABILITY - REASONABLE INSPECTION - SCOPE OF INSPECTION - There is no liability for harm resulting from conditions which no unreasonable risk was to be anticipated or risks the occupier did not know and could not have discovered with reasonable care

FACTS

Prior to moving into her new home, Katherine Hickman spent months remodeling. She hired Leebo Wilhite, a licensed electrician, to install an electrical outlet for her dryer. Wilhite testified that he installed the fuse box and ran wires for the outlet, but he did not install the outlet. Hickman also hired Gregory Wilbanks, a licensed contractor, to do some repair work and odd jobs at her home. Wilbanks testified he had been under Hickman's home five or six times, and on one occasion he spent approximately an hour and a half in the crawlspace under the home. Hickman testified that her friend, Scotty Kilgo, moved her washer and dryer into her home and installed them. Kilgo stated that he handled the dryer vent duct without incident after he plugged in the dryer and turned on the circuit breaker. Hickman used the dryer on a few occasions and mentioned to Wilbanks that she did not think it was working properly. She called Wilbanks and asked if he could install a coaxial cable for her television. Wilbanks was seriously injured when he touched the dryer vent duct in the crawlspace beneath the home while installing the cable. Wilbanks subsequently filed a complaint alleging negligence against both Hickman and Wilhite. Wilbanks alleged he was a business invitee at Hickman's home and, therefore, Hickman owed him a duty to "exercise reasonable care to ascertain the actual condition of her premises and after having discovered it, either make it reasonably safe by repair or to give warning of the actual condition and the risk involved thereon." Hickman subsequently moved for summary judgment. Wilbanks filed a response, and after hearing oral argument, the circuit court granted Hickman's motion. Wilbanks appealed.

ISSUE

Whether the trial court erred in granting Hickman's motion for summary judgment.

HOLDING

There was no dispute that Wilbanks was an independent contractor and a business invitee to Hickman's home when he was injured. Thus, Hickman had a general duty to provide Wilbanks with a reasonably safe place to work or give warning of danger. However, because Hickman had neither actual nor constructive knowledge of the dangerous condition, she did not have a duty to warn. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

Affirmed - 2014-CA-01354-COA (Feb. 16,2016)

Opinion by Judge Wilson

Hon. Thomas J. Gardner III (Alcorn County Circuit Court)

Thomas Orville Cooley & Casey L. Lott for Appellant - Chris H. Deaton for Appellee

Briefed by [Sean Doran](#)

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COURT OF APPEALS – CRIMINAL CASES

CHESTER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SENTENCING - APPEAL - Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - When read together, if the jury instructions state the law of the case and create no injustice, then no reversible error will be found

FACTS

On March 28, 2013, Darex Antonio Chester was convicted of unlawful sale of between one and two grams of cocaine, unlawful sale of less than one hundred dosage units of Diazepam, and unlawful sale of less than one hundred dosage units of Triazolam. On April 8, 2013, Chester was sentenced as a habitual offender and a prior drug offender without eligibility for parole or probation. Chester’s appellate counsel filed a brief with the Court of Appeals stating that no arguable issues existed for appeal. Chester appealed.

ISSUES

Whether (1) the Court of Appeals should direct the trial court to answer Chester’s petition to clarify his sentence; (2) the sentences imposed by the trial court were excessive, disproportionate to his crimes, and constituted cruel and unusual punishment; and (3) the trial court should not have given jury instruction S-9.

HOLDING

(1) Chester filed a petition for writ of mandamus with the Court of Appeals requesting a clarification of his sentence, and the Court of Appeals denied the request. Chester’s current request was procedurally barred since he failed to file the petition within fourteen days after the initial decision. (2) Because Chester’s sentences fell within the statutory limits, they were not excessive, disproportionate or cruel and unusual. Thus, the trial court did not abuse its discretion in sentencing Chester. (3) Chester did not cite any relevant authority to support his argument that the jury instruction was improper, so the issue was procedurally barred. Notwithstanding the bar, the objectionable jury instruction merely defined the term “dosage unit” under the statute, so it was not a preemptory instruction. Therefore, the Court of Appeals affirmed the judgement of the Pike Country Circuit Court.

Affirmed - 2014-KA-00964-COA (Feb. 16, 2016)

Opinion by Chief Judge Lee

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

W. Daniel Hinchcliff & George T. Holmes (State Pub. Defender Office) for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Kathryn Fowler](#)

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JOHNSON V. STATE

CRIMINAL - FELONY

APPELLATE COUNSEL - INDIGENT CRIMINAL DEFENDANT - NO ARGUABLE ISSUES FOR APPEAL

- In order for an appellate counsel to conclude that no arguable issues exist on appeal when representing an indigent criminal defendant, the appellate counsel must follow this process set out in *Lindsey v. State*: (1) Counsel must file and serve a brief in compliance with MRCP 28(a)(1)-(4), (7), ensuring that a trained legal eye has searched the record; (2) as part of the brief filed, counsel must certify that there are no arguable issues, that he or she scoured the record and came to this conclusion by examining specific instances throughout the record; (3) Counsel must send a copy of the brief to the defendant to inform the client that they found no arguable issues in the record and advise the client of their right to file a pro se brief; (4) should the defendant raise any arguable issue or should the appellate court discover any arguable issue in its review of the record, the court, if circumstances warrant, require appellate counsel to submit supplemental briefing on the issues, regardless of the probability of the defendant's success on appeal; and (5) once briefing is complete, the appellate court must consider the case on its merits and render a decision

FACTS

On March 11, 2012, Mickey Lee Johnson's wife, Diane, found Johnson, with their minor daughter A.J. Johnson was on his knees with his pants down, and was directly behind A.J. who was lying on her side holding her underwear. Diane testified that, at this point, Johnson jumped up and ran to the closet stating that the situation was not as it appeared. The next day, Diane notified the police. A.J. testified that Johnson approached her that night to have sexual intercourse. After she refused, he became violent and ordered her to remove her underwear. He then proceeded to have sexual intercourse with her. A.J. also testified that Johnson had been raping her for some time, but she never told anyone because he threatened her with violence. Evidence also indicated that Johnson was the father of A.J.'s two children. Johnson also testified, admitted his intention to have sexual intercourse with A.J. on Mar. 11, 2012, but denied that any penetration occurred. On cross-examination, he invoked his right against self-incrimination. Johnson was convicted for sexual battery and sentenced to twenty years with five years of supervised probation. Johnson's post-trial motions were denied. Johnson is now represented by the Indigent Appeals Division of the Office of the State Public Defender. However, Johnson's counsel filed a brief with the Court stating that no arguable issues existed for appeal. Johnson's appellate attorney confirmed that he 1) sent a copy of his brief to Johnson, 2) there was correspondence informing Johnson that he found no arguable error, and 3) Johnson had a right to file a pro se brief. Additionally, Johnson's appellate attorney filed a brief with the court requesting a forty-day extension for Johnson to file a pro se supplemental brief. The court granted the motion, however, Johnson failed to file a pro se brief.

ISSUE

Whether Johnson's appellate counsel correctly determined that no arguable issues existed for appeal and correctly followed the process of informing criminal defendant that no arguable issues existed for appeal.

HOLDING

Johnson's attorney indicated he diligently and thoroughly examined the record before concluding that there are no issues on appeal, specifically stating he examined: (1) the reason for Johnson's arrest and surrounding circumstances; (2) any possible violation of Johnson's right to counsel; (3) the entire trial transcript; (4) all rulings of the trial court; (5) possible prosecutorial misconduct; (6) all jury instructions; (7) all exhibits, whether admitted into evidence or not; (8) possible misrepresentation of the law in sentencing; (9) the indictment and all pleadings in the record; (10) any possible ineffective assistance issues; (11) admissibility of prior bad acts; (12) sufficiency of evidence on consent or lack of consent; and (13) any other possible reviewable issues. Further, Johnson's appellate counsel confirmed that he sent a copy of the brief to Johnson, and informed Johnson of his right to file a pro se brief. Additionally, the Court did not find reason for supplemental briefing on the issue, concluding that Johnson's appellate counsel did not commit reversible error. Therefore, the Washington County Circuit Court's conviction and sentence was affirmed.

Affirmed – 2014-KA-00719-COA (Feb. 16, 2016)

Opinion by Chief Judge Lee

Hon. Margaret Carey-McCray (Washington County Circuit Court)

W. Daniel Hincheliff (State Pub. Defender's Office) for Appellant – Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Katherine M. Portner](#)

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NEAL V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - COMPETENCY TO STAND TRIAL - EVALUATION - The circuit court must order a mental evaluation and conduct a competency hearing if it has reasonable ground to believe that the defendant is incompetent to stand trial

CRIMINAL LAW - COMPETENCY - MENTAL STATE - There are two distinct instances in which a defendant's state of mind may become relevant: (1) at the time of the crime, or (2) at trial or the guilty-plea hearing

CRIMINAL LAW - RELIEF - INEFFECTIVE ASSISTANCE OF COUNCIL - In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show: (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced him

FACTS

On November 22, 2011, Alton Neal pleaded guilty to one count of aggravated domestic violence and was sentenced to twenty years in the custody of the Mississippi Department of Corrections, with ten years suspended and five years of supervised probation after completion of ten years in custody. On December 23, 2013, Neal filed a motion for PCR, which was denied. Neal appeals.

ISSUES

Whether (1) Neal's guilty plea was obtained voluntarily and (2) he received ineffective assistance of counsel.

HOLDING

Because of Neal's own statements at trial contradicting his claims made in his request for post-conviction relief, the Court of Appeals affirmed the ruling of the trial court.

Affirmed - 2015-CP-00166-COA (February 16, 2015)

Opinion by Chief Justice Lee

Hon. Robert Walter Bailey (Lauderdale County Circuit Court)

Alton Neal (Pro Se) for Appellant - Office of the Attorney General by Laura Hogan Tedder for Appellee

Briefed by [Alexander Ash](#)

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SHIES V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - WAIVER - FAVORABLE BENEFITS - A defendant cannot stand mute when handed an illegal sentence that is more favorable than what the legal sentence would have been, reap the favorable benefits of that illegal sentence, and later claim to have been prejudiced as a result

POST-CONVICTION RELIEF - ILLEGAL SENTENCE - SENTENCE SERVED - A PCR motion is not the proper avenue to seek reduction of a sentence and the reduction or reconsideration of a sentence by a judge must occur prior to the expiration of the sentencing term

INEFFECTIVE ASSISTANCE OF COUNSEL - DEFICIENT PERFORMANCE - PREJUDICE - In order to make an ineffective assistance of counsel claim, one must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced him

FACTS

Ricky Shies was indicted on two separate cases: one credit-card fraud and one cocaine possession. On or around May 9, 2003, Shies was indicted for four counts of credit-card fraud. On or around August 11, 2003, he was indicted for one

count of possession of cocaine. On February 16, 2004, the State filed a motion to amend the indictment to include habitual-offender language. The record is silent as to whether the amendment was allowed and does not contain an order allowing it. On February 18, 2004, Shies, pursuant to a plea agreement, filed petitions to enter guilty pleas to two counts of credit-card fraud and to possession of cocaine. His plea petition provided that he was charged as a habitual offender on the credit-card fraud charges. Shies was sentenced to two consecutive five-year terms for the credit-card fraud and a ten-year term for the possession of cocaine. Both sentences were in the custody of the MDOC, and the sentences were to be served consecutively for a total of twenty years. On July 22, 2014 after serving his full sentence for credit card fraud, Shies filed a motion for post-conviction relief, claiming that his sentence for was illegal. The circuit court dismissed the motion as time-barred and without merit. Shies appealed.

ISSUES

Whether Shies received (1) illegal sentences such that he is entitled to post-conviction relief, and (2) ineffective assistance of counsel.

HOLDING

(1) The circuit court sentenced Shies under Section 99-19-81, thus, his two five-year sentences for the credit-card fraud charges were illegal in that they exceeded the maximum penalty prescribed by the statute. However, because Shies has already served his sentences for the credit-card fraud, the Court of Appeals lacks the authority to grant the requested relief of a sentence reduction in the cocaine case. (2) Because Shies did not establish that his trial counsel's alleged failures were outside the ambit of trial strategy or that he was prejudiced by trial counsel's representation, he failed to prove that he received ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Justice Barnes argued that the appellant could challenge a sentence that expired because he is still in custody for a consecutive sentence imposed at the same time as the challenged sentence. He dissents with the majority's conclusion that it has no power to grant Shies relief from his illegal sentences.

Affirmed - 2014-CP-01351-COA (Feb. 16, 2016)

En Banc Opinion by Justice Irving - Concurrence in Part & Dissent in Part by Justice Barnes
Hon. Judge Lee J. Howard (Lowndes County Circuit Court)
Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee
Briefed by [Shayna Giles](#)

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