

**MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 12, 2020*****SUPREME COURT - CIVIL CASES*****TM WOOD PROD. V. MARIETTA WOOD SUPPLY, INC.****CIVIL - CONTRACT**

**CIVIL PROCEDURE - DEFAULT JUDGMENT - MOTION TO SET ASIDE** - Miss. R. Civ. P. 60(b)(6) allows a trial court to grant relief based on a sufficient showing of fraud, mistake or other justifiable reason

**CIVIL PROCEDURE - DUE PROCESS - NOTICE** - Miss. R. Civ. P. 40(b) requires the clerk to mail or personally deliver notice of the date and time of trial within three days to all parties not present at the setting

**CIVIL PROCEDURE - DUE PROCESS - NOTICE** - There is a presumption that mail deposited, postage prepaid and properly addressed is timely delivered to the person addressed

**FACTS**

Marietta Wood Supply, Inc., and Marietta Dry Kiln, LLC (collectively, “Marietta”) contracted with TM Wood Products, M Wood Products, Inc., Marty Wood, and Kim Whitlow (collectively, “TM Wood”) to sell lumber. Marietta filed a complaint against TM Wood, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. Marietta further alleged fraudulent inducement, concealment, misrepresentation, and negligence. The case eventually became inactive. At that time, TM Wood’s attorney, Roy Percy, was appointed as the United States Magistrate Judge for the Northern District of Mississippi and filed a motion to withdraw as counsel. The trial court granted the motion and stayed the case for sixty days to allow TM Wood to seek new counsel. The order stated that “[p]ending the appearance of new counsel of record for said defendants, service of any papers upon said defendants shall be made by mailing a copy to them at their respective addresses as follows: . . . .” TM Wood argued that the circuit clerk failed to send notice of the impending trial to TM Wood in accordance with Miss. R. Civ. P. 40(b). Marietta and TM Wood had a hearing on the motion to set aside the judgment. The trial court found that Marietta presented credible evidence that notice of the proposed order setting trial and signed order setting trial were mailed to TM Wood, prepaid, properly addressed, and timely delivered. The trial court also found that TM Wood had presented no evidence to rebut that presumption. TM Wood appealed.

**ISSUE**

Whether the circuit court erred by finding that TM Wood had notice of the bench trial.

**HOLDING**

Because the clerk failed to send notice of the impending trial to TM Wood in accordance with Miss. R. Civ. P. 40(b), the trial court abused its discretion by denying TM Wood’s motion to set aside the judgment. Therefore, the Supreme Court reversed the judgment of the Prentiss County Circuit Court.

**Reversed & Remanded - 2019-CA-01227-SCT (Nov. 12, 2020)**

Opinion by Presiding Justice King

Hon. John R. White (Prentiss County Circuit Court)

Arthur D. Spratlin Jr. & Kathleen Elizabeth Carrington for Appellants - Casey Langston Lott & Thomas Orville Cooley for Appellees

Briefed by [Morgan Hart](#)

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## *SUPREME COURT - ORDERS*

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### **WARNER V. STATE**

#### **EN BANC ORDER**

#### **ORDER**

Jerry Lee Warner filed an Application for Leave to Proceed in the trial court, his seventh motion for post-conviction relief. Warner argued that his sentence was illegal and that he was denied due process at sentencing. The Supreme Court recognized that Warner's claims were exceptions to procedural bars, but nonetheless found Warner's claims insufficient to merit waiving the bars due to lack of basis for the truth of the claim. The Supreme Court subsequently warned Warner that future frivolous filings may result not only in monetary sanctions, but also in restrictions on filing applications for post-conviction collateral relief (or pleadings in that nature) in forma pauperis. Therefore, the Supreme Court denied Warner's seventh motion for post-conviction relief.

#### **OBJECTION IN PART**

Presiding Justice King agreed that Warner's application for post-conviction relief did not merit relief, but he disagreed with the Supreme Court's finding that the application was frivolous and with its warning that future filings deemed frivolous may result in sanctions or filing restrictions. He argued that imposing monetary sanctions upon a criminal defendant only serves to punish the defendant and preclude him from exercising his lawful right to appeal. He further argued that to cut off an indigent defendant's right to proceed in forma pauperis is simply cutting off his access to the courts, a violation of his constitutional right. Rather, he argued that the Supreme Court should only deny or dismiss motions that lack merit.

**Denied - 2014-M-01337 (Nov. 12, 2020)**

En Banc Order by Justice Randolph - Objection in Part by Presiding Justice King

Briefed by [Bess Fisher](#)

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## **MISSISSIPPI COURT OF APPEALS DECISIONS – NOVEMBER 10, 2020**

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### *COURT OF APPEALS - CIVIL CASES*

### **PIERCE REALTY INC. V. PIERCE**

#### **CIVIL - CONTRACT**

**CONTRACTS - FORMATION - GIFTS** - To prove the exchange of a gift, the donee must establish by clear and convincing evidence the following elements: (1) a donor competent to make a gift; (2) a voluntary act of the donor with donative intent; (3) that the gift was complete and not conditional; (4) delivery by the donor; and (5) that the gift was irrevocable

**CONTRACTS - FORMATION - ELEMENTS** - To prove a contract, a party must prove: (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contract formation

**CONTRACTS - ENFORCEMENT - MATERIAL TERMS** - A contract is unenforceable if the material terms are not sufficiently definite

**REAL ESTATE - BROKERS - COMMISSIONS** - To collect a fee as a real estate broker, a plaintiff must be duly licensed and, in the absence of a license, will not be allowed to recover

#### **FACTS**

Dennis Pierce, a licensed real estate broker and owner of Pierce Realty Inc. (“Pierce Realty”), employed his brother, Darian Pierce, to work at the company as a licensed real estate salesperson. The relationship between the two brothers eventually deteriorated and they agreed that they could no longer work together. In January 2015, the brothers executed a contract granting all shares of Pierce Realty Inc. to Darian. One of the ways that Pierce Realty generated income was through broker’s commissions from leasing commercial property. In Mississippi, these payments could only be legally received by a person holding a broker’s license, which Dennis had, but Darian did not. As a result of the stock transfer, the company immediately stopped receiving the real estate broker’s commissions, which cut a significant source of income for Pierce Realty. Because the commissions were routed through another company that Dennis controlled, Darian was furious and saw the cessation in commission income as an attack from Dennis. Darian later sued Dennis and other related entities on twenty-two causes of action, including the cessation of payments on the real estate broker’s commissions. Dennis and Darian disagreed whether the document they executed was a gift or a contract. The trial court found that regardless of whether the document was a gift or contract, it only transferred the shares of Pierce Realty and not any real estate broker’s commissions. Additionally, the trial court found that only Dennis could receive the real estate broker’s commissions because he was the only real estate broker at the company. Accordingly, the trial court granted summary judgment as to all of Darian’s claims against Dennis and denied any relief to Darian as to summary judgment. Darian appealed.

### **ISSUES**

Whether the circuit court erred in finding (1) that the only corporate assets that Dennis sold to Darian were the shares of Pierce Realty and (2) that Dennis did not have the authority to sell, transfer, and assign to Darian the right to collect real estate broker’s commissions.

### **HOLDING**

(1) Because the material terms of the document did not sufficiently define any transfer of the real estate broker’s commissions that Pierce Realty received, the circuit court did not err in finding that the only corporate assets that Dennis sold to Darian were the shares of Pierce Realty. (2) Because Darian was only a licensed real estate agent and not a licensed real estate broker, the circuit court did not err in finding that Dennis did not have the authority to sell, transfer, and assign to Darian the right to collect the real estate broker’s commissions. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

#### **Affirmed - 2018-CA-01677-COA (Nov. 10, 2020)**

En Banc Opinion by Judge McCarty

Hon. Prentiss Greene Harrell (Lamar County Circuit Court)

L. Clark Hicks Jr. for Appellants - William A. Whitehead Jr. & Richard D. Norton for Appellees

Briefed by [Jack Hall](#)

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## **WINTERS V. FENG**

### **CIVIL - INSURANCE**

**CONTRACTS - TERMINATION - REQUIREMENT** - The termination of a contract is only permitted if there is a material breach

**CONTRACTS - BREACH - REQUIREMENT** - A party who has breached or failed to properly perform a contract has a responsibility and a right to cure the breach, and the non-breaching party must provide the other party a reasonable opportunity to cure the breach

### **FACTS**

In August 2015, John Winters and Eric Feng entered into a lease agreement in which Feng leased commercial property from Winters. The lease agreement required Feng to secure commercial insurance and property insurance. Feng subleased the commercial property to Arby’s Restaurant Group Inc. (“Arby’s”). Several months later, Winters requested

Feng to provide proof of insurance. Feng contacted Arby's, who provided Winters with the Certificate and insurance policy. The Certificate provided umbrella liability coverage of \$25,000,000 and property coverage of \$1,000,000. Although Feng provided the Certificate, Winters requested that Feng obtain additional insurance. Feng refused to do so because he believed that Arby's insurance policy was sufficient. In February 2016, Winters sent Feng and Arby's an email stating that he obtained insurance through State Farm and requested reimbursement. Winters's email stated that the email served as a thirty-day written notice as the lease agreement required. Winters stated that Feng never reimbursed him for the State Farm insurance policy and, in turn, breached the lease agreement. As a result, Winters claimed that he was entitled to immediate possession of the property. Feng and his sublessee remained in possession of the property, and Winters filed a complaint in the county court against Feng for failure to comply with the insurance requirements in the lease agreement. Feng answered the complaint, denying the claims and filing a counterclaim stating that Winters improperly terminated the lease agreement, intentionally breached the contract, and refused and rejected any payments for insurance. Feng filed a motion for summary judgment, and the county court granted his motion. In April 2017, Winters appealed to the Hinds County Circuit Court. In June 2019, the circuit court denied Winters's relief and affirmed the county court's grant of summary judgment for Feng. Winters appealed.

### **ISSUES**

Whether (1) Feng violated the lease agreement resulting in a lawful termination by Winters and (2) the circuit court erred in affirming the county court's grant of Feng's attorney's fees.

### **HOLDING**

(1) Because Winters received a copy of the Certificate and insurance and did not give Feng thirty days to cure any alleged breach, Feng did not fail to perform a substantial requirement of the contract. (2) Because the parties agreed in the lease agreement to the payment of attorney's fees and expenses if a legal dispute arose between them, the circuit court did not abuse its discretion in affirming the county court's award of attorney's fees for Feng. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2019-CA-01098-COA (Nov. 10, 2020)**

En Banc Opinion by Judge McDonald

Hon. Winston L. Kidd (Hinds County Circuit Court, First Judicial Dist.)

Richard R. Grindstaff & Bryce Christian Kunz for Appellant - Joe S. Deaton III & Richard Jason Canterbury for Appellee

Briefed by [Gabrielle Beech](#)

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## ***COURT OF APPEALS - CRIMINAL CASES***

### **COLLINS V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - ARMED ROBBERY - ELEMENTS** - Miss. Code Ann. § 97-3-79 states that every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery

**CRIMINAL PROCEDURE - INDICTMENT - CONSTRUCTIVE AMENDMENT** - A constructive amendment of the indictment occurs when the proof and instructions broaden the grounds upon which the defendant may be found guilty of the offense charged so that the defendant may be convicted without proof of the elements alleged by the grand jury in its indictment

**CRIMINAL PROCEDURE - CONSTRUCTIVE AMENDMENT - WAIVER** - A defendant's failure to object to the jury instruction as constructively amending the indictment waives this issue on appeal, and if no contemporaneous objection is made, the appellate court's review is limited to plain error

## **FACTS**

Early one morning, two masked men wielding firearms stormed inside the Eastside branch of State Bank and Trust in Brookhaven, Mississippi. The two men demanded money, and the bank employees emptied the bank vault into a garbage bag for them. The men left in opposite directions, and the bank employees later stated that they feared for their lives during the encounter. A short time later, Detective Jonathan Alford located a discarded handgun behind the bank. Nearby, he also found the garbage bag of money with bills scattered around, along with one of the men's discarded clothing. Around this time, Robert Collins was apprehended as a suspect in some nearby woods, and DNA collected from the discarded clothing matched Collins's DNA profile. After his arrest, Collins spoke with Chief Deputy Johnny Hall and stated that he only served as a "lookout." Collins then admitted that he was inside the bank, but again reverted back to the "lookout" story. At trial, Collins testified that he met his would-be conspirators in an apartment parking lot, and that Latrell Williams proposed robbing a bank. The others, besides Collins, were "for it." Collins alleged that Police Chief Kenny Collins had previously offered him \$5,000 to turn in Williams. Collins allegedly called Chief Collins and told him about the plan. Chief Collins allegedly told Collins to stick around, but did not return Collins's further phone calls. Collins testified that he watched the robbery on the porch of a house belonging to Calvin Craig, and that he was not involved in the robbery. Collins also testified that Chief Collins visited him in jail and asked for Williams and the other men's whereabouts. Collins told Chief Collins that he never told Hall that he was involved in the robbery. Both Hall and Chief Collins gave testimony that contradicted Collins's. Hall stated that Collins never told him about working for Chief Collins, or that he watched the robbery from Craig's porch. Chief Collins testified that he never talked to Collins prior to the bank robbery and that Collins was never "working" for him. Hall further testified that Collins admitted to participating in the robbery in their discussions subsequent to Collins's arrest. At an off-the-record conference following the closing of evidence, the trial judge stated that except for Collin's request for a peremptory instruction, the parties agreed on all proffered instructions to be given and neither side objected to any of the instructions. Collins was found guilty of conspiracy to commit armed robbery and armed robbery. Collins filed a motion for judgment notwithstanding the verdict or a new trial, which was denied. Collins appealed.

## **ISSUE**

Whether the jury instruction describing the elements of armed robbery constituted an impermissible constructive amendment of the indictment rising to the level of plain error.

## **HOLDING**

Because the discrepancy between the descriptions of the violence element in the indictment and jury instruction constituted a constructive amendment that did not prejudice Collins's defense since it did not hinge on the element constructively amended, and because Collins failed to object to the instruction at trial, the variance between the indictment and the jury instruction was not "plain error" and he waived the issue on appeal absent plain error. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Circuit Court.

### **Affirmed - 2019-KA-01190-COA (Nov. 10, 2020)**

En Bank Opinion by Presiding Judge Wilson

Hon. David H. Strong Jr. (Lincoln County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [Cameron Johnson](#)

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## **KELLY V. STATE**

### **CRIMINAL - FELONY**

**APPELLATE REVIEW - REFUSED JURY INSTRUCTIONS - STANDARD** - Refused jury instructions are considered with all the other jury instructions given; discretion is not abused if jury instructions are refused because they misstate the law, are fairly stated elsewhere, or are without foundation in the evidence

**CRIMINAL LAW - ABANDONMENT - STANDARD** - If the defendant voluntarily stops short of committing a crime without intervening, extraneous causes, then the defendant is not guilty

**CRIMINAL LAW - CAPITAL MURDER - BURGLARY** - According to Miss. Code Ann. § 97-3-9, capital murder includes a killing by a person engaged in the commission or attempt of burglary or robbery

**CRIMINAL LAW - JURY INSTRUCTIONS - MANSLAUGHTER** - Defendants are not entitled to manslaughter instructions for felony murder because a finding of manslaughter has no effect on the defendant's guilt since felony murder does not require the prosecution to prove the elements of murder, only to prove that the murder happened during the commission of one of the enumerated felonies

### **FACTS**

Demarco Kelly, Kyra McClenton, Tonisha Johnson, Tyjuan Metcalf, and Tyandre Thomas planned to rob a home on Museum Street after Kyra noticed an unsecured pile of drugs and money during a visit at the home. The group decided that while Kyra and Tonisha entertained the residents of the Museum Street home away from the address, Kelly, Tyjuan, and Tyandre would attempt to rob the Museum Street home. When the robbers arrived at the Museum Street home, they observed someone pull up to the residence in a car and enter the home. At trial, Toneisha testified that if the door was locked, the men would retreat and the group would implement their plan the next day. After discovering the door was locked, however, the men tried to kick the door in. When a voice inside asked who was at the door, the men stopped, scattered, and ran. Taylor and Brandon Woods were inside the house. Taylor exited the house to look for who kicked the door and walked to the edge of the porch, where Taylor was shot. Brandon called 911, but Taylor died on the way to the hospital. Kelly told the police that he fired one shot over his shoulder towards the back of the house and claimed that Metcalf shot twice towards the front of the house. Kelly also told the police that Metcalf admitted to shooting Taylor, but Kyra and Tonisha told the police that Kelly admitted to shooting Taylor. At trial, the judge refused to give jury instructions regarding an abandonment defense and culpable-negligence manslaughter. A jury found Kelly guilty of capital murder. Kelly appealed.

### **ISSUES**

Whether the circuit court erred in (1) refusing Kelly's proposed jury instructions on abandonment and (2) refusing Kelly's culpable-negligence manslaughter jury instruction.

### **HOLDING**

(1) Because Kelly did not abandon the robbery of his own volition and instead abandoned the robbery after encountering a locked door and people yelling from within the residence, Kelly lacked evidence to warrant an abandonment jury instruction. (2) Because the prosecution proved Kelly was involved in an attempted robbery at the time he killed Taylor, a finding of manslaughter was irrelevant to Kelly's guilt under felony murder, and a manslaughter instruction would have misstated the law. Therefore, the Court of Appeals affirmed the judgment of the Itawamba County Circuit Court.

**Affirmed - Docket Number (Nov. 10, 2020)**

Opinion by Judge McDonald

Hon. Paul S. Funderburk (Itawamba County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Matthew Wyatt Walton (Att'y Gen. Office) for Appellee

Briefed by [Kathleen Workman](#)

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