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Supreme Court – Civil

Barton v. Barton - Family Law – Domestic Violence Protection Order – Guardian Ad Litem – In June 2019, Christine Barton (“Jorgensen”) was granted a temporary domestic-abuse protection order against her ex-husband Cary Barton (“Barton”), premised on an alleged threat that Barton made to Jorgensen and on an alleged incident where Barton inappropriately touched their minor child. Two days after receiving the temporary protection order, Jorgensen filed a complaint in the First Judicial District of the Harrison County Chancery Court, seeking an immediate temporary order suspending Barton’s visitation rights, appointing a guardian ad litem for the minor child, and barring Barton from contacting her. The chancery court was informed about the prior protection order and entered a temporary restraining order until the hearing scheduled the following week. During the expedited hearing, the chancery court reviewed the pleadings, heard testimony, listened to oral argument, and ruled against Jorgensen. In addition to the ruling on the issues, the chancery court set aside the temporary restraining order and dissolved the justice court’s protective order. Jorgensen filed an interlocutory appeal.

The Mississippi Supreme Court reviewed Jorgensen’s appeal, where she argued that a guardian ad litem (“GAL”) should have been appointed under Miss. Code Ann. § 93-5-23. For the first time on appeal, Jorgensen also argued that (1) she was entitled to a *final* domestic-violence protection order under Miss. Code § 93-21-3; (2) the failure to grant a final protection order was against the best interests of the parties; and (3) the failure to grant a final protection order was contrary to the evidence presented at the hearing. In response to whether a GAL should have been appointed, the Supreme Court said that Miss. Code Ann. § 93-5-23 directs the appointment of a GAL only in custody proceedings, and this was not a custody proceeding. Thus, the statute was inapplicable. As for the second, third, and fourth issues, the complaint that Jorgensen filed asked the chancery court to order a temporary restraining order, not a final domestic-violence protection order. As a result, the chancery court did not err because the matter was not presented to it for decision. Therefore, the Supreme Court affirmed the judgment of the Harrison County Chancery Court.

Justice Beam concurred, arguing that the limitation on Miss. Code Ann. § 93-5-23, which only allows a guardian ad litem to be appointed in custody situations and not in a visitation dispute, needs to be brought to the Legislature’s attention because a child can just as easily be harmed during a visitation as when the child is with the custodial parent.

Briefed by [John Michael Sweatt](#)

Richards v. Wilson - Civil Procedure – Motions – Abuse of Discretion – Larry Wilson’s tractor and Joseph Richard’s motorcycle, with Brandy Reed as his passenger, collided on Highway 9 in Choctaw County, Mississippi. At trial, the parties presented the jury an all-or-nothing choice, in that they were to find Wilson 100

percent liable for Richards's and Reed's injuries or not liable at all. The jury was given Jury Instruction 7, which was a lengthy instruction with a series of propositions followed by questions. If the jury answered yes to all the questions, it was to find Wilson liable and determine Richards's and Reed's damages. If the jury answered no to any one question, it was to find in Wilson's favor. Despite jury confusion with the instructions, the jury found in favor of Richards and Reed. Wilson filed a motion for a new trial, arguing confusion over the jury instructions or disagreement about liability led the jury to reach a compromise verdict. Richards and Reed filed a motion to amend the judgment as it related to medical damages and for an additur for damages for pain and suffering. The trial judge granted Wilson's motion for a new trial, making Richards and Reed's motion moot. The trial judge agreed that Jury Instruction 7 was confusing and peremptory, and that the verdict was a compromise verdict. The case was retried in September 2018, and the jury found for Wilson. Richards and Reed filed a motion for judgment notwithstanding the verdict ("JNOV") or, alternatively, a new trial. The trial judge denied the motion.

Richards and Reed appealed, arguing that the trial court erred by granting Wilson's motion for new trial after the first jury verdict and by denying his motion for JNOV following the second verdict. The trial judge granted a new trial based on a faulty jury instruction that led to a compromise verdict. The source of the jury's confusion stemmed from Jury Instruction 7, and the instruction was peremptory. Therefore, the verdict was a compromise verdict and the trial judge did not abuse his discretion by granting a new trial based on jury confusion created by Instruction 7. Further, there were several indicia of compromise present which supported the finding of a compromise verdict. The record showed obvious juror confusion during deliberations, coupled with the special verdict itself, which reduced or denied uncontested damages. Based on various indicia of compromise, the trial judge did not abuse his discretion by granting Wilson's motion for a new trial following the first trial based on a compromise verdict. Therefore, the Supreme Court affirmed the judgment of the Choctaw County Circuit Court.

Briefed by [Madison Reightler](#)

Tucker v. Miss. Bar - Bar Matters – Reinstatement – Suspension – In 2011, attorney Samuel L. Tucker, Sr. ("Tucker") agreed to represent Elton Hartzler in a dispute with Hartzler's contractor. The representation contract required "a non-refundable retainer of \$2500 against which the attorney will charge his time at the rate of \$200.00 per hour, accounted in quarter hour increments." Tucker did not place this advance fee in a client trust account because Tucker did not have a client trust account from 1995 to 2019. According to his testimony, Tucker only performed minimal work on Hartzler's case, he did not maintain a record of the work he performed, and he did not return the unearned portion of the retainer until May 2019 — three years after Hartzler filed a complaint with the Mississippi Bar and months after the Bar filed a formal complaint against Tucker. Tucker appeared before the Complaint Tribunal in June 2019, where he admitted the allegations were true. The Complaint Tribunal concluded he had violated three of the Mississippi Rules of Professional Conduct and imposed a six-month suspension. On appeal, the now-retired Tucker requested that the Supreme Court automatically reinstate him to the practice of law at the end of the suspension period, alleviating the time and expense of the reinstatement process imposed by Rule 12(a) of the Rules of Discipline for the Mississippi State Bar. The Supreme Court held that Tucker's six-month suspension for negligently commingling his client's funds and not maintaining a client trust account for a prolonged period of time was an appropriate sanction. Further, under Rule 12(a), an attorney who has been suspended for six months or more must petition the Court for reinstatement. Therefore, the Supreme Court affirmed the Complaint Tribunal's decision suspending Tucker from the practice of law for six months.

Briefed by [Cecelia Hurt](#)

Wilson v. State - Post-Conviction Relief – Notice of Appeal – Failure to File – William Wilson was convicted and sentenced to death for capital murder plus twenty years for felonious child abuse. On post-conviction review, the Supreme Court determined that Wilson was entitled to an evidentiary hearing. After the evidentiary hearing, the Lee County Circuit Court remanded the case for sentencing and set aside Wilson’s sentence of death but did not set aside his guilty plea. Neither Wilson nor the Office of Post-Conviction Relief filed a notice of appeal, so Wilson filed a motion for leave to file an out-of-time appeal. The circuit court found that Wilson failed to demonstrate good cause to grant an out-of-time appeal. Wilson appealed.

On appeal, Wilson argued that he wished to pursue an appeal, but he did not have an attorney. Wilson also argued that he had good cause for the circuit court to grant his out-of-time appeal. The Supreme Court found that the circuit court did not have the authority to grant an out-of-time appeal because Wilson’s appeal was not a post-conviction motion for an out-of-time appeal. Instead, his appeal was a normal motion for an out-of-time appeal filed under the normal Rules of Appellate Procedure. Because Wilson incorrectly filed his motion for an out-of-time appeal in the circuit court, the circuit court did not have the authority to grant the appeal. Therefore, the Supreme Court affirmed the judgment of the Lee County Circuit Court.

Presiding Justice King dissented, arguing that the Supreme Court should suspend the Rules of Appellate Procedure and allow Wilson’s out-of-time appeal because forcing Wilson to file a Rule 27 motion would be a waste of judicial resources. He also argued that Wilson’s appeal should be granted because he was effectively denied his right to perfect his appeal through no fault of his own.

Briefed by [Blake Tims](#)

Court of Appeals – Civil

Gamma Healthcare Inc. v. Estate of Grantham - Appellate Procedure – Mootness – Worker’s Compensation – Sharon Grantham experienced permanent paraplegia after a work-related accident. Her employer, Gamma Healthcare Inc., and its workers’ compensation insurance carrier, Employers Insurance Company of Wausau (collectively, “the Employer/Carrier”) paid workers’ compensation benefits and provided medical treatment. Disputes later arose regarding Grantham’s requests for modifications to her home and a wheelchair-accessible van. The administrative judge (“AJ”) ordered the Employer/Carrier to pay for necessary modifications and a wheelchair-accessible van. The AJ and the Workers’ Compensation Commission also ordered the Employer/Carrier to replace the HVAC systems at Grantham’s home and to pay for property/collision insurance for Grantham’s van. Lastly, the Commission ordered the Employer/Carrier to pay attorney’s fees as a sanction for appealing the AJ’s order to replace the septic and HVAC systems. On appeal, the Employer/Carrier challenged the Commission’s orders regarding the septic and HVAC systems, insurance, and sanctions. Grantham passed away after the appeal was filed and Grantham’s Estate was substituted as the appellee. The Estate conceded that Grantham’s death abates the Employer/Carrier’s obligations to make home repairs and pay for insurance on the van.

The Court of Appeals found that the primary issues in the appeal were moot and dismissed the appeal from the Commission’s orders that required the Employer/Carrier to replace the septic and HVAC systems and pay for van insurance. In addition, the Commission’s and the AJ’s orders on those subjects were vacated.

The Court of Appeals did not address the merits of those issues because they are moot, but it vacated the underlying orders because they required the Employer/Carrier to take actions that the parties agreed were no longer required. Therefore, the Supreme Court dismissed the appeal in part as moot, vacated in part the Mississippi Workers' Compensation Commission's orders, and reversed and rendered the order imposing sanctions.

Judge McDonald concurred in part and dissented in part. She argued that Grantham was alive when Wausau presented these issues to the Commission, and the controversy was viable at that time. Further, she argued that she would not vacate the orders of the Commission or the AJ, opting instead to follow Mississippi Supreme Court precedent rather than the federal precedent the majority adopted.

Briefed by [Joshua L. Holmes](#)

[K.F.M. v. Jackson Cty. Youth Ct.](#) - Family Law – Anticipatory Neglect – Reasonable-Efforts Bypass – Aggravated Circumstances – Notice – In February 2018, the Jackson County Department of Child Protection Services (“CPS”) took K.F.M.’s two children into custody following allegations of abuse and neglect. The State filed a motion to bypass reasonable efforts toward reunification based on the available medical evidence and testimony. K.F.M. entered a plea of no contest to the allegations. CPS was informed on July 31, 2018 that K.F.M. had given birth to K.M. and took custody of K.M. the next day under the theory of anticipatory neglect based upon the neglect of K.F.M.’s other two children. In August 2018, the Jackson County Youth Court adjudicated K.F.M.’s eldest two children as abused and neglected and found aggravated circumstances allowing CPS a reasonable-efforts bypass regarding K.F.M. Additionally, the youth court had a shelter hearing for K.M. and accepted a permanency plan and determined that reasonable efforts were not necessary due to the history of the case. The shelter hearing record communicated that both the guardian ad litem and prosecutor intended to request a bypass of reasonable efforts toward reunification. In October 2018, K.M. was adjudicated as an abused and neglected child based upon the theory of anticipatory neglect. The trial court held that reasonable efforts to reunify K.M. with her parents were not required because aggravated circumstances existed regarding the treatment of K.M.’s siblings and the permanency plan for termination of parental rights and adoption was approved.

On appeal, K.F.M. argued that the trial court erred in failing to require written notice of the State’s intent to bypass reasonable efforts of reunification. K.F.M. cited no authority for her contention that a finding of aggravated circumstances must be in writing. Further, Miss. Code Ann. § 43-21-603(7)(c)(i) makes no mention of any requirement that a motion be made, orally or in writing, prior to a youth court’s finding of aggravated circumstances. Although K.F.M. did not raise issue of the youth court’s order, the Court of Appeals determined that the youth court based its findings of aggravated circumstances correctly upon the neglect and abuse of K.M.’s siblings. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Youth Court.

Judge McCarty concurred with the decision considering the unique circumstances presented on appeal. However, he emphasized the importance of due process when the State seeks to establish aggravated circumstances and the need for the State to provide parents with fundamentally fair procedures. In bypass cases such as this, he believes the State should file a written motion that it is seeking to establish aggravated circumstances as a basis for bypass of reunification.

Briefed by [Greyson Young](#)

Scott v. Jackson Neurosurgery Clinic PLLC - Torts – Medical Malpractice – Duty of Care – Proximate Cause – Following a neck surgery that neurosurgeon Dr. Adam Lewis performed, Edna Scott developed a cerebrospinal fluid (“CSF”) leak. Scott sued Dr. Lewis, and his clinic, Jackson Neurosurgery Clinic PLLC, for medical malpractice. Dr. Lewis discussed the possible risks with Scott prior to her surgery, which included the possibility of the formation of a hematoma that could result during the surgery even absent any negligence. After the surgery, Scott had complications swallowing and breathing and she subsequently went to the emergency room, where Dr. Ilercil treated her for a hematoma. Scott, with the help of her expert witness, Dr. Richmond, opined that Dr. Lewis injured Scott’s dura during her surgery and used DuraGen to repair the injury. Scott argued that because Dr. Lewis failed to report that he used DuraGen in post-operative notes that would inform other treating physicians of the injury and substance used to repair the injury, Dr. Lewis breached his standard of care. Dr. Lewis’s expert witness, Dr. McGrail, testified that the use of DuraGen to reinforce Scott’s dura “was completely unrelated” to Scott’s hematoma and had no effect on Dr. Ilercil’s ability to evacuate the hematoma, and Dr. Lewis’s alleged failure to document the injury made no difference to Scott’s subsequent course of treatment in the hospital as any medical course of action “would have been exactly the same as it was” regardless of a disclosure that Dr. Lewis used DuraGen. Dr. Lewis and Jackson Neurosurgery Clinic PLLC moved for a directed verdict, which the trial court granted. Scott appealed.

In order for Scott to prove medical malpractice, she was required to come forward with proof sufficient for a jury to find that (1) Dr. Lewis had a duty to conform to a specific standard of care, (2) Dr. Lewis breached that standard, and (3) Dr. Lewis’s breach proximately caused an injury to Scott. Scott failed to present any evidence that afforded a reasonable basis for the conclusion that it is more likely than not that Dr. Lewis’s alleged non-disclosure was a cause in fact of any injury to Scott. Rather, the evidence at trial showed that the alleged non-disclosure had no impact on Scott’s subsequent treatment, so the trial judge did not err by granting the motion for a directed verdict. Further, Scott failed to offer any specific facts or an explanation as to how she had a prolonged hospitalization because of Dr. Lewis’s alleged non-disclosure. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Briefed by [Muriel Collins](#)

Smith ex rel. Willis v. City of Southaven - Miss. Tort Claims Act – Police-Protection Immunity – Pursuit – Reckless Disregard – Following a minor traffic accident in Southaven, Mississippi, Kameron Williams fled the scene at a high rate of speed because he was on probation and driving with a suspended driver’s license. A few minutes later, Officer Kenny Bryant passed Williams heading in the opposite direction. Officer Bryant estimated that Williams’s vehicle was traveling at nearly 100 miles per hour on a road with a speed limit of forty miles per hour. Officer Bryant made a U-turn and turned on his blue lights to make a traffic stop. Approximately fourteen seconds before Officer Bryant made the U-turn, Williams ran a red light at the next intersection and crashed into a vehicle driven by Percy Willis, who was killed. Officer Bryant arrived at the scene of the fatal accident approximately thirty seconds later. Tonjala Lynelle Houston Smith, the administratrix of Willis’s estate, filed a wrongful death action on behalf of Willis’s two children against the City of Southaven (the “City”), alleging that Officer Bryant was “in pursuit” of Williams at the time of the accident and that the City was not entitled to police-protection immunity because Officer Bryant acted in “reckless disregard” in pursuing Williams. The City moved for summary judgment on the plaintiff’s claims, and the Desoto County Circuit Court granted the City’s motion. Smith appealed.

Miss. Code Ann. § 11-46-9(1)(c) states, “A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [a]rising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury[.]” In assessing “reckless disregard” in police-pursuit cases, Mississippi courts apply the ten-factor *Brister/Richardson* test. The circuit court did not err by not analyzing Officer Bryant’s conduct using the ten-factor *Brister/Richardson* test because Officer Bryant was not “in pursuit” of Williams when Williams collided with Willis. Furthermore, the circuit court did not err by finding that the plaintiffs failed to raise a genuine issue of material fact regarding the allegation that Officer Bryant acted in “reckless disregard” in fulfilling his duties as a police officer because the plaintiffs presented no evidence that Officer Bryant acted with “conscious indifference to consequences, amounting almost to a willingness that harm should follow.” Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Briefed by [Cody Austin](#)

Soffra v. Shieldsboro Dev., Inc. - Property – Wrongful Foreclosure – Conversion – Nikki Tingstrom bought a home in Bay St. Louis from Edward Soffra. Tingstrom gave Soffra a down payment and a promissory note secured by a deed of trust. Within six months of the purchase, Soffra sent Tingstrom a notice of default, alleging she had missed payments and threatened foreclosure. Tingstrom denied that she was in default. Donald Rafferty, Tingstrom’s friend, issued a check to Tingstrom to try to end the dispute. Although the payment did not cover the amount that Soffra alleged was due, Soffra cancelled the foreclosure sale. Several months later, Soffra’s attorney sent Rafferty a letter notifying that Tingstrom was in default and enclosed a notice of trustee’s sale scheduled for September 9, 2016. Rafferty sent Tingstrom a check for the current month’s mortgage payment, but Soffra rejected it as insufficient. On September 9, 2016, Soffra repurchased the property at the foreclosure sale for \$70,000 and received a substitute trustee’s deed. Tingstrom sued Soffra in the Hancock County Chancery Court, alleging wrongful foreclosure, breach of contract, and conversion. After trial, the chancellor found that Soffra had wrongfully foreclosed on the property, breached the duty of good faith and fair dealing, and committed the tort of conversion. The chancellor set aside the foreclosure, awarded compensatory and punitive damages, and cancelled the deed of trust. Soffra appealed.

Mississippi is a non-judicial foreclosure state; therefore, the mortgagee is not required to directly notify the mortgagor of an impending foreclosure unless the parties to the deed of trust contract for more notice than required by statute. In this case, the parties contracted for additional notice in their deed of trust. However, the notice Tingstrom provided did not satisfy the notice requirements of the deed of trust because notice was given only twenty-eight days before the sale. Therefore, the trial court did not err in finding that Soffra wrongfully foreclosed on the property. Regarding the issue of conversion, Soffra failed to make any contemporaneous objections. Therefore, the issue was tried by implied consent. The trial court granted compensatory damages to make Tingstrom whole for the losses that the order setting aside the foreclosure did not remedy. Therefore, the chancellor did not grant Tingstrom an impermissible double recovery. However, the evidence did not support the amount of compensatory damages. As a result, the Court of Appeals reversed and remanded the case for a new determination of compensatory damages. Further, because a defendant waives his right to rely on statutory punitive damages cap when he fails to present any evidence to establish his net worth, and because Soffra failed to present any evidence of his net worth, the trial court did not err by awarding punitive damages. Lastly, the trial court lacked the authority in cancelling the parties’ promissory note and deed of trust, thus the

Court of Appeals reversed the cancellation of the deed of trust and remanded for further proceedings. Therefore, the Court of Appeals affirmed in part; reversed and remanded in part the judgment of the Hancock County Chancery Court.

Briefed by [Betsy Lee Montague](#)

Court of Appeals – Post-Conviction Relief

Blankenship v. State - Post-Conviction Relief – Parole Eligibility – Due Process – Joseph Blankenship pled guilty to one count of child exploitation pursuant to Miss. Code Ann. § 97-5-33(5). The Desoto County Circuit Court sentenced him to serve forty years imprisonment with thirty years suspended and ten years to serve, followed by thirty years of post-release supervision. In his motion for post-conviction relief, Blankenship argued that his parole ineligibility based on his violent-offender status violated his constitutional right to due process. Further, Blankenship argued that a jury should have decided whether the crime he committed was a crime of violence in accordance with Miss. Code Ann. § 97-3-2(1)(e). Because Blankenship was convicted of a sex crime, he was ineligible for parole and his constitutional rights were not violated. In addition, because Blankenship committed a per se crime of violence in accordance with Miss. Code Ann. § 97-3-2(1)(e), the circuit court was not required to submit the issue of whether Blankenship committed a crime of violence to the jury. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Briefed by [Morgan Hart](#)

Higginbotham v. State - Post-Conviction Relief – Guilty Plea – Time Bar – James Higginbotham pled guilty to murder pursuant to Miss. Code Ann. § 99-3-19 and the Winston County Circuit Court sentenced him to life imprisonment. Higginbotham filed his first motion for post-conviction relief (“PCR”) on April 7, 2011, which the circuit court denied after an evidentiary hearing. Nearly ten years later, Higginbotham filed a motion to vacate his conviction, which the circuit court treated as a second PCR motion and denied. Higginbotham appealed. In his second motion for PCR, Higginbotham argued that there was an “insufficient factual basis for his guilty plea” resulting in an illegal sentence and that his right to due process was violated by the circuit court’s placing restrictions on the motions that he was allowed to file. Because Higginbotham’s second PCR motion was filed outside of the three-year limit allowed by statute and nearly ten years after the entry of his guilty plea, the motion was time barred. Also, because the circuit court denied Higginbotham’s first motion for PCR pursuant to an order, Miss. Code. Ann. § 99-39-23(6) barred the second motion for PCR as a successive motion. Finally, because Higginbotham failed to substantiate his claim that a fundamental-right exception exists, both of the claims in his second PCR motion were barred as untimely and successive, respectively. Therefore, the Court of Appeals affirmed the judgment of the Winston County Circuit Court.

Briefed by [Bess Fisher](#)

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