

MISSISSIPPI SUPREME COURT DECISIONS – APRIL 1, 2021***SUPREME COURT - CIVIL CASES*****CARR V. MISS. LOTTERY CORP.****CIVIL - OTHER**

APPELLATE PROCEDURE - FINALITY - STANDARD OF REVIEW - The appellate court must address the question of the finality of the trial court's order on its own initiative

APPELLATE PROCEDURE - FINALITY - REQUIREMENTS - When more than one claim for relief is presented, an order that adjudicates fewer than all the claims for relief is not final unless the judge makes an expressed determination that there is no just reason for delay and gives an expressed direction for the entry of the judgment as final

FACTS

In the year preceding the statutory creation of the Mississippi Lottery, Jonathan Carr purchased and registered more than fifty domain names containing various iterations of the name of the Mississippi Lottery. The Mississippi Lottery Corporation ("MLC") accused Carr of cybersquatting by registering domain names in bad faith so that he could profit by selling them back to MLC. Carr claimed reverse domain-name hijacking, alleging MLC violated his ownership rights to the domains which he planned to use in good faith to promote religious opposition to gambling and to provide gambling addiction resources. Carr filed his complaint in the Harrison County Circuit Court to prevent an arbitration order in MLC's favor from becoming effectual. Carr purchased the domains through GoDaddy.com, which contained an arbitration agreement that any ownership dispute should be submitted to arbitration. Carr and MLC filed competing motions for preliminary injunction aimed at gaining the rights to five domain names. Counsel for both parties had no qualms with combining the preliminary injunction with relief on the merits, as time was of the essence; however, Carr asserted and preserved his right to a jury trial. The trial court granted MLC's motion for preliminary injunction and denied Carr's motion. The trial court consolidated the hearing with the trial on the merits, but only on the parties' claims for injunctive relief. Carr's entitlement to a jury trial was unaffected. The order granted MLC a permanent injunction and directed Carr to transfer five domain names to MLC. Carr filed a motion for a new trial, which was denied. Carr appealed.

ISSUE

Whether the trial court's order was appealable.

HOLDING

Because the order did not adjudicate all claims for relief, and because it did not contain a Miss. R. Civ. P. 54(b) certification, the order was not final and thus not appealable. Therefore, the Supreme Court dismissed Carr's appeal.

Appeal Dismissed - 2020-CA-00285-SCT (Apr. 1, 2021)

Opinion by Justice Maxwell

Hon. Roger T. Clark (Harrison County Circuit Court)

Christopher Brian McDaniel & Brett Woods Robinson for Appellant - Roderick Mark Alexander Jr. & Bryan Carl Sawyers for Appellee

Briefed by [Cameron Johnson](#)

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JOHNSON & JOHNSON V. FITCH EX REL. MISS.

CIVIL - OTHER

COMMERCE REGULATION - CONSUMER PROTECTION ACT - INTERPRETATION - Pursuant to Miss. Code Ann. § 75-24-3(c), it is the intent of the Legislature that in construing what constitutes unfair or deceptive trade practices, the courts will be guided by the Federal Trade Commission and the federal courts

FOOD, DRUG, AND COSMETIC ACT - LABELING OR PACKAGING - EXPRESS PREEMPTION - Pursuant to 21 U.S.C. § 379s(a), no state or political subdivision of a state may establish or continue in effect any requirement for labeling or packaging of a cosmetic that is different from or in addition to, or that is otherwise not identical with, a requirement specifically applicable to a particular cosmetic or class of cosmetics

FEDERAL SUPREMACY - CONFLICTING LAWS - IMPLIED PREEMPTION - Under *International Paper Co.*, state law is preempted if it interferes with the methods by which the federal statute was designed to reach its goal

FACTS

Johnson & Johnson was engaged in the business of manufacturing, selling, and marketing consumer products. One of their most popular products was Johnson's Baby Power, which included talc up until 2020. For decades, studies have given rise to claims of risk of cancer associated with the use of products containing talc. In 2014, the State filed a complaint against Johnson & Johnson for unlawful, unfair, and deceptive business practices related to two products, alleging, in part, failure to warn consumers of the risk of ovarian cancer in women who used talc. The State sought an injunction pursuant to the Miss. Consumer Protection Act ("Act") to require Johnson & Johnson to warn consumers of the hazards associated with talc use. The State also sought a civil penalty of up to \$10,000 for each violation of the Act. Johnson & Johnson moved for summary judgment and argued that the Act did not apply to the labeling of products regulated by the federal Food and Drug Administration. Additionally, Johnson & Johnson argued that, even if the Act applied, summary judgment was still proper since federal law preempted the State's labeling claim. In 2018, the chancery court denied Johnson & Johnson's motion for summary judgment. Johnson & Johnson appealed.

ISSUES

Whether (1) the Act governed the State's labeling claim and (2) the State's claim was preempted by federal law.

HOLDING

(1) Because the chancellor was not bound by a federal court or a Federal Trade Commission interpretation of the Federal Trade Commission Act, and because the chancellor was to only be guided by such interpretations, the Act did not preclude the State's claim. (2) Because the State's claim was not expressly preempted, and because the Food and Drug Administration chose not to exercise its regulatory authority, the State had the freedom to regulate cosmetics and was not barred by the principles of express or implied preemption. Therefore, the Supreme Court affirmed and remanded the judgment of the Hinds County Chancery Court.

Affirmed & Remanded - 2019-IA-00033-SCT (Apr. 1, 2021)

En Banc Opinion by Justice Coleman

Hon. J. Dewayne Thomas (Hinds County Chancery Court)

Meade W. Mitchell, John C. Henegan, Orlando R. Richmond, Mark A. Dreher, Charles A. Byrd, Peter C. Harvey, & Erin P. Lane for Appellants - Patrick C. Malouf, Ta'Shia S. Gordon, Timothy W. Porter, Laurel Li Harris, R. Allen Smith Jr., Wendy R. Fleishman, Paulina Do Amaral, George W. Neville, Donald L. Kilgore, & Jacqueline H. Ray for Appellee

Briefed by [Muriel Collins](#)

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MISS. BAR V. HOLMES

CIVIL - BAR MATTERS

BAR MATTERS - DISCIPLINE - RECIPROCITY DOCTRINE - A sanction imposed in Mississippi generally mirrors the sanction imposed in the sister state, absent extraordinary circumstances which compel, justify, or support variance from the foreign jurisdiction's sanction

BAR MATTERS - DISCIPLINE - CRITERION - The criterion used in determining appropriate reciprocal discipline includes: (1) the nature of the misconduct involved; (2) the need to deter similar misconduct; (3) the preservation of the dignity and reputation of the profession; (4) the protection of the public; (5) the sanction imposed in similar cases; (6) the duty violated; (7) the lawyer's mental state; (8) the actual or potential injury resulting from the misconduct; and (9) the existence of aggravating and mitigating factors are taken into consideration in determining the appropriate discipline

FACTS

In August 2019, Mary Lee Holmes, a Mississippi attorney, assumed the representation of Sye Blossman, a criminal defendant in Louisiana, without *pro hac vice* admission under Louisiana law. According to the Office of Disciplinary Counsel, Holmes gave legal advice to Blossman while in jail, discussed Blossman's case with the Washington Parish sheriff, filed a motion with the local court to enroll on Blossman's behalf, appeared with Blossman at his arraignment, and received and signed a receipt of discovery on behalf of Blossman before receiving *pro hac vice* admission. Holmes admitted to violating Louisiana Rules of Professional Conduct and, subsequently, the Louisiana Supreme Court issued an order publicly reprimanding Holmes for engaging in unauthorized practice in Louisiana. After the public reprimand, the Mississippi Bar filed a formal complaint for reciprocal discipline against Holmes. Holmes responded, admitting each allegation in the complaint and admitting that her public discipline by the Louisiana Supreme Court constituted grounds for discipline by the Mississippi Supreme Court.

ISSUE

Whether more severe sanctions than those imposed by Louisiana should be imposed on Holmes by Mississippi for engaging in unauthorized practice in Louisiana.

HOLDING

Because there were no extraordinary circumstances compelling a more severe sanction, the Supreme Court ordered a public reprimand and assessment of costs and expenses.

Public Reprimand & Assessment of Costs and Expenses - 2020-BD-01183-SCT (Apr. 1, 2021)

En Banc Opinion by Justice Beam

Melissa Selman Scott for Complainant - *Pro se* for Respondent

Briefed by [John Michael Sweatt](#)

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STANFORD V. MISS. BAR

CIVIL - BAR MATTERS

BAR MATTERS - REINSTATEMENT - REQUIREMENTS - For an attorney to be reinstated, the attorney must (1) state the cause or causes for suspension or disbarment; (2) give the name and current address of all persons, parties, firms, or legal entities who suffered pecuniary loss due to the improper conduct; (3) make full amends and restitution; (4) show that he or she has the necessary moral character for the practice of law; and (5) demonstrate the requisite legal education to be reinstated to the privilege of practicing law

PROFESSIONAL RESPONSIBILITY - REINSTATEMENT - ADVERSE DETERMINATION - Pursuant to Miss. R. Prof'l Conduct 12.6, if a petition for reinstatement is denied or otherwise dismissed, no other petition shall be filed until one year after the date of the prior adverse decision

FACTS

M. Reid Stanford was suspended from the practice of law in September 2017 by the Court and a Complaint Tribunal due to his mishandling of clients' money. The following year, Stanford applied for reinstatement by the Court, but was denied because he failed to satisfy each jurisdictional requirement for reinstatement. After the Court disposed of Stanford's first petition, he filed a motion for rehearing and a stay of further proceedings in January 2019. The motion was denied. Stanford then filed a second petition seeking reinstatement one year after the first disposition, in accordance with Miss. R. Prof'l Conduct 12.6. Stanford submitted seventeen letters of recommendation and proof that he identified and made full amends with the individual that suffered harm. After Stanford filed his second petition, the Mississippi Bar ("Bar") conducted another investigation and deposed him. The Bar recommended Stanford for reinstatement and verified that Stanford had identified and made amends with the injured and had the requisite moral character and mental health for the practice of law. Stanford seeks reinstatement by the Court.

ISSUE

Whether Stanford satisfied the jurisdictional requirements for reinstatement.

HOLDING

Because Stanford provided an adequate account for the actions resulting in his suspension, because he identified and made full amends with the injured party, and because he demonstrated the necessary moral character and requisite legal education, Stanford satisfied the jurisdictional requirements. Therefore, Stanford was reinstated to the practice of law.

Reinstatement Granted - 2020-BR-00270-SCT (Apr. 1, 2021)

En Banc Opinion by Justice Coleman

Andrew J. Kilpatrick & M. Reid Stanford for Petitioner - Adam B. Kilgore for Respondent

Briefed by [Madison Reightler](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 30, 2021

COURT OF APPEALS - CIVIL CASES

CALHOUN V. MISS. TRANSP. COMM'N

CIVIL - PERSONAL INJURY

PERSONAL INJURY - MISS. DEP'T. OF TRANSP. - DUTY - The Mississippi Department of Transportation carries a ministerial duty to maintain highways in such a way as to afford convenient, comfortable, and economic use thereof by the public at all times

PERSONAL INJURY - MISS. DEP'T. OF TRANSP. - CAUSE OF ACTION - A plaintiff may also maintain a claim for negligent maintenance or a claim for failure of basic maintenance

CIVIL PROCEDURE - APPEAL - SUMMARY JUDGMENT - When the non-moving party has failed to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial, the court will affirm summary judgment

FACTS

Janan Holland and Linda Calhoun were on a parade float pulled by a pickup truck in the 2015 St. Patrick's Day parade on Highway 90 in Ocean Springs when a low-hanging limb fell and struck them, injuring both. They filed suit against the Mississippi Transportation Commission, the Mississippi Department of Transportation ("MDOT"), and the City of Ocean Springs, claiming that the defendants had a ministerial duty to maintain a clear roadway and breached their duty by allowing the oak limb to hang too low. A representative from the MDOT testified that the department had a maintenance superintendent who conducted monthly inspections of the highways in and around Ocean Springs and had traveled through the same area within two weeks of the accident. The maintenance superintendent wrote detailed reports regarding maintenance issues, though none identified low hanging limbs in that area. The trial court granted

summary judgment for the defendants, finding that there was no evidence the inspections were deficient. Holland and Calhoun, with their husbands, appealed.

ISSUE

Whether the trial court erred in finding that the parade route was properly maintained and inspected.

HOLDING

Because the appellants did not produce any evidence that would sufficiently prove the causation element in the negligent maintenance theory, the trial court did not err in finding that the parade route was properly maintained and inspected.

DISSENT

Judge Lawrence argued that the appellants' complaint alleging negligent maintenance of Highway 90 was sufficient to be considered a genuine issue of material fact, which would preclude summary judgment being granted.

Affirmed - 2019-SA-01818-COA (Mar. 30, 2021)

En Banc Opinion by Judge McCarty - Dissent by Judge Lawrence

Hon. Dale Harkey (Jackson County Circuit Court)

Albert Ralph Jordan IV & Kristopher W. Carter for Appellants - William E. Whitfield III & Kaara Lena Lind for Appellees

Briefed by [Jack Hall](#)

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IN RE CONSERVATORSHIP OF GENO V. GENO

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - Assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage

FAMILY LAW - DIVORCE - CLASSIFICATION OF ASSETS - Non-marital assets may lose their status as such if the party commingles the asset with marital property or uses the assets for the benefit of the family

FAMILY LAW - DIVORCE - ALIMONY - Only after the chancellor equitably divides the marital property and determines that one spouse has suffered a deficit should alimony be considered

FAMILY LAW - DIVORCE - VALUATION OF ASSETS - Valuation may be accomplished by adopting the values cited in the parties' financial disclosures, in the testimony, or in other evidence; the chancellor is entitled to make an independent judgment of a property's value, especially where estimates of the parties vary widely

FAMILY LAW - DIVORCE - FERGUSON FACTORS - *Ferguson* factors must be considered on the record in every property division case for appellate purposes to provide a checklist to assist in the accuracy of their rulings

FACTS

Craig and Michelle Geno were married for seven years. During the marriage, the family's main source of income came from Craig's law practice, while Michelle stayed at home to care for the couple's children. The couple separated in July 2015 and, two weeks later, Craig filed a complaint for divorce. In June 2016, the parties consented to a divorce on the ground of irreconcilable differences. The chancery court entered an Agreed Order in August 2016 which provided, in part, that Craig was to pay for the transportation of Michelle's furniture from the current residence to her new residence and that he was to receive credit for those funds from any final award to Michelle. During the proceedings, Michelle experienced mental health issues which required hospitalization, causing the chancery court to appoint a conservator to take over her estate in January 2017. The court determined that the marital estate had a total value of \$3.9 million and that, with the exception of Craig's law practice, the value of the marital estate should be divided equally between the parties. However, three assets were considered to be Craig's separate, nonmarital property: (1) HG Realty LLC ("HGR"), a company Craig formed in 2003; (2) a portion of a Vanguard account; and (3) an ING/BankPlus account. Michelle was awarded permanent periodic alimony of \$2,500 per month. Michelle filed a

motion to reconsider the judgment regarding the chancery court's determination of non-marital property and alimony. Craig filed a motion to alter or amend the judgment, asking the court to increase its finding for Michelle's wasteful dissipation as assets for the following reasons. Craig claimed that the value of Michelle's unexplained funds was over \$512,000.00, yet Michelle was awarded less than one-half of funds she wasted and did not account for. Craig also claimed that the alimony award was over and above distributions that were balanced in the division of marital assets. The court entered an updated order in November 2018, denying the relief requested by the parties. The court clarified Michelle's equitable share of the marital assets and the method of transferring funds. Michelle appealed and Craig cross-appealed.

ISSUES

Whether the trial court erred in (1) classifying certain assets as non-marital property; (2) its decision not to award Michelle a larger amount of alimony; (3) its valuation of Craig's law practice; (4) its failing to properly consider Michelle's dissipation of marital assets; and (5) its determination of the alimony award.

HOLDING

(1) Because Michelle was never involved in the management of HGR nor provided funds for its upkeep, HGR was properly classified as non-marital property. Further, because Michelle was never added to the Vanguard account or made any contributions, and because the account was not commingled, the Vanguard account was properly classified as non-marital property. Lastly, because the court considered all additional funds added to the ING/BankPlus account during the marriage, the account was properly classified as non-marital property. (2) Because Michelle failed to point to any deficit she sustained that the trial court did not take into account, and because Michelle failed to demonstrate that the award of alimony was inadequate, the trial court did not err in its decision not to award Michelle a larger amount of alimony. (3) Because the chancellor fully explored the available proof and arrived at the best conclusions that he could, despite the fact that the trial court's deduction of the outstanding checks and accounts payable may not have been precise, the trial court did not err in its valuation of Craig's law practice. (4) Because the trial court made no specific findings on the record as to why the remaining funds requested by Craig were not also attributed to Michelle, with seemingly no regard to the credible evidence that Craig produced as to Michelle's siphoning of funds from their marital account and her undisputed excessive spending during the couple's separation, the trial court erred by failing to properly consider Michelle's dissipation of assets with specificity. (5) Because the trial court's determination regarding Michelle's illness was supported by substantial evidence, and because the trial court considered, among other factors, Michelle's illness, treatment requirements, and her inability to earn enough to support herself in the manner she had become accustomed, the trial court did not err in its determination of the alimony award. Therefore, on direct appeal, the Court of Appeals affirmed the judgment of the Madison County Chancery Court. On cross-appeal, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Madison County Chancery Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Westbrook agreed that the trial court failed to make specific findings regarding Craig's claim of wasteful dissipation. She argued that the chancellor gave sufficient consideration to Michelle's expenditures before designating an amount for wasteful dissipation.

On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed In Part; Reversed & Remanded In Part - 2018-CA-01767-COA (Mar. 30, 2021)

En Banc Opinion by Chief Judge Barnes - Concurrence In Part & Dissent In Part by Judge Westbrook

Hon. J. Larry Buffington (Madison County Chancery Court)

J. Peyton Randolph II, Robert W. Long, & Rick D. Patt for Appellant - David Bridges for Appellee

Briefed by [Cecelia Hurt](#)

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LACOSTE V. LACOSTE

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - CHILD SUPPORT - RETROACTIVE REDUCTION - Miss. Code Ann. § 43-19-34(4) provides that any order for the support of minor children, whether entered through the judicial system or through an expedited process, shall not be subject to a downward retroactive modification

MARITAL ESTATE - EQUITABLE DISTRIBUTION - FERGUSON FACTORS - In distributing a marital estate, a chancellor first must classify each asset as marital or non-marital property and then equitably divide the marital property according to the *Ferguson* factors

FACTS

Paul and Laura Lacoste were married in 2006 and separated in 2012. Laura was granted a divorce based on habitual cruel and inhuman treatment in 2014. The trial court ordered Paul to pay Laura rehabilitative alimony for twenty-four months, \$4,280 in child support monthly, \$73,000 within 10 years for her interest of the marital estate, and \$5,000 toward Laura's attorney's fees. Paul received all interest in his business. Paul moved for a new trial, which was denied. Paul appealed and, in 2016, the Court of Appeals reversed and remanded for further proceedings to determine the value of Paul's business and to revisit the equitable distribution of property because it hinged on the business's valuation. It also affirmed the decisions on the remaining issues, including child support. Both Paul and Laura filed requests for modification and, in 2018, the chancellor held a hearing to address the remanded issues and the requests for modification. The chancellor denied Laura's request for increased alimony, granted Paul's request for decreased child support payments, denied Paul's request for retroactive reduction of child support payments, and classified and equitably distributed the parties' marital assets. Paul appealed.

ISSUES

Whether the chancellor erred in (1) denying Paul's request for a retroactive reduction of his child support and (2) dividing the marital assets subsequent to the revaluation of his business.

HOLDING

(1) Because Paul failed to provide the chancellor with any case law in support of his request for a retroactive modification, and because statutory law was clear that downward retroactive modifications of child support were not permitted, the chancellor did not err in denying Paul's request for retroactive reduction. (2) Because the chancellor properly relied upon one of the approved methods of business valuation and properly considered the *Ferguson* factors in making a decision regarding equitable distribution, the chancellor did not err in the property division. Therefore, the Court of Appeals affirmed the judgment of the Madison County Chancery Court.

Affirmed - 2019-CA-00891-COA (consolidated with 2014-CA-01724-COA) (Mar. 30, 2021)

Opinion by Judge Westbrook

Hon. Cynthia L. Brewer (Madison County Chancery Court)

Matthew Allen Baldridge for Appellant - G. Charles Bordis IV for Appellee

Briefed by [Kathleen Workman](#)

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OUTLAW V. O'CALLAGHAN

CIVIL - REAL PROPERTY

TAX SALE - NOTICE - TIMELINESS - Miss. Code Ann. § 27-43-1 provides that the clerk of the chancery court shall, within 180 days and not less than sixty days prior to the expiration of the time of redemption with respect to land sold, either to individuals or to the state, be required to issue notice to the record owner of the land sold as of one hundred eighty (180) days prior to the expiration of the time of redemption

TAX SALE - NOTICE - PROPERTY DESCRIPTION - Miss. Code Ann. § 27-43-1 governs the form of statutory notice to the record landowner and merely provides that the clerk "here describe lands" to be forfeited

TAX SALE - NOTICE - STANDARD OF REVIEW - Notice statutes shall be strictly construed in favor of the landowners, and any deviation from the statutorily mandated procedure renders the sale void

TAX SALE - NOTICE - METHOD - Miss. Code Ann. § 27-43-3 requires that notice by mail shall be by registered or certified mail; in the event the notice by mail is returned undelivered, the clerk shall make further search and inquiry to ascertain the reputed owner’s street and post office address

FACTS

In 2009, Linda and Michael O’Callaghan purchased two residences in Oktibbeha County (“subject property”) to be used as rental properties. The properties were titled in the name of Kenmare Group LLC (“Kenmare”), which was purportedly a Mississippi limited liability company with the O’Callaghans’ La Canada, California home address listed as its mailing address. Kenmare was never registered with the Mississippi Secretary of State’s office. In 2014, Linda sold the La Canada home and moved to La Canada Flintridge, California. Linda continued to receive rental income from the subject property and received and paid the ad valorem personal property taxes; however, she had not paid the property taxes for nearly three years. In 2012, Markeeta Outlaw purchased the subject property at a tax sale for the 2011 unpaid taxes. In May 2014, the chancery clerk sent a notice of forfeiture by certified mail to Kenmare at the La Canada address, stating the owner had a right of redemption until August 27, 2014. The clerk’s office received the certified mail return receipt, which listed the date of delivery as May 29, 2014; however, it contained an illegible signature which the clerk’s office flagged as “unable to read.” In November 2014, the chancery clerk recorded the conveyance of land sold for taxes in the county’s land records and issued Outlaw a tax deed. Outlaw filed suit to quiet and confirm title for the subject property. In October 2016, the chancery court granted Outlaw a default judgment, and Linda’s property management company notified her of the tax sale. In October 2017, Linda moved to set aside the default judgment. The chancery court found deficiencies in the statutorily required notice and granted the motion to set aside in favor of Linda. Outlaw appealed.

ISSUES

Whether the chancery court erred in finding that the tax sale was void due to the clerk’s failure to comply with the statutory requirements of (1) the property description; (2) the clerk’s seal and signature; and (3) the return receipt.

HOLDING

(1) Because the chancery court cited no relevant authority to support its finding that the property’s legal description must be fully included in the notice of forfeiture, the property description in the notice was sufficient to inform Linda of the specific property at issue. (2) Because the notice provided obvious clues that it was an official document, and because it lacked the clerk’s signature and seal, the notice was fatally flawed and, therefore, the chancery court did not err. (3) Because the clerk strictly complied with her statutorily required duties, and because the notice was sent to Kenmore, not Linda individually, the court did not find any warning to the clerk that the notice may have been undelivered. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Chancery Court.

Affirmed - 2019-CA-00318-COA (Mar. 30, 2021)

En Banc Opinion by Chief Judge Barnes

Hon. Kenneth M. Burns (Oktibbeha County Chancery Court)

James Ray Mozingo & Horace Hunter Twiford IV for Appellant - Jay Howard Hurdle for Appellee

Briefed by [Caroline Heavey](#)

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SMITH V. DOE

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - PARENTAL RIGHTS - TERMINATION - A court may terminate parental rights when, after conducting an evidentiary hearing, the court finds by clear and convincing evidence that the parent has engaged in conduct constituting abandonment or desertion of the child and that termination of the parent’s parental rights is appropriate because reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome

PARENTAL RIGHTS - TERMINATION - ABANDONMENT - Miss. Code Ann. § 93-15-103(a) defines abandonment as any conduct by the parent, whether consisting of a single incident or actions over an extended period of time, that evinces a settled purpose to relinquish all parental claims and responsibilities, and abandonment may be established by showing that, for a child who is three years of age or older, the parent has deliberately made no contact with the child for at least one year

PARENTAL RIGHTS - TERMINATION - REUNIFICATION - Reunification is undesirable when the parent's abusive or neglectful conduct has caused substantial erosion of the relationship between the parent and the child, which can be proved by showing a prolonged absence and lack of communication between the parent and the child

PARENTAL RIGHTS - TERMINATION - BEST INTEREST OF CHILD - Even where one of the grounds for termination is proven by clear and convincing evidence, the trial court must still consider whether termination is in the best interest of the child, and the sole reason for the appointment a guardian ad litem is to ensure that the best interest of a minor child is fully sought out and protected

FACTS

In February 2012, Michael Smith and Katie Doe had their child, Matthew. Doe and Smith lived together with their child until June, when Doe and Matthew moved out. In July 2012, Doe and Smith met and discussed Smith's visitation schedule but came to no resolution. After moving to Georgia in January 2013, Smith emailed Doe requesting a visitation schedule, however, Doe never received it as the email contained no domain address. Smith moved back to Mississippi in February. A month later, Doe brought Matthew to spend time with Smith. Smith did not see Matthew again until that November, which was the last time that he saw Matthew. In 2016, Smith filed a complaint to establish paternity, for permanent custody, for a temporary judgment, and for other relief. Doe signed a voluntary acknowledgment of paternity and her counsel prepared a temporary order establishing a visitation schedule, which Smith rejected. In May 2018, a hearing for visitation took place, which Doe failed to attend. The chancery court awarded Smith joint legal custody and delineated a visitation schedule. In August 2018, Doe filed a motion for relief from the judgment and a counter-petition for termination of parental rights, modification of child support, and other relief. Smith denied all allegations in Doe's motion and filed a counterclaim for contempt. The chancery court granted Doe's motion without a hearing. In November, a guardian ad litem ("GAL") was appointed to investigate and make a recommendation about what would be in the child's best interest. The GAL reported that, while Smith had been paying child support since 2015, he abandoned Matthew because he had no contact with the child in over a year. The GAL stated that Smith told her that he had not seen Matthew since Thanksgiving 2013 and presented little evidence that he attempted to contact Matthew. At trial in September 2019, the GAL testified that it was in the best interest of the child to terminate Smith's parental rights on the ground of abandonment, against reunification because Smith failed to exercise reasonable visitation or communication with the child, and that there was a substantial erosion of Smith's relationship with Matthew. The chancery court then issued an opinion and final judgment terminating Smith's parental rights. Smith appealed.

ISSUES

Whether the chancery court erred in (1) finding Smith abandoned his child and terminating Smith's parental rights; (2) deciding that reunification between Smith and the child was not desirable toward obtaining a satisfactory permanency outcome; (3) finding that termination of Smith's parental rights was in the best interest of the child.

HOLDING

(1) Because the GAL's recommendations and witness testimonies that Smith failed to exercise reasonable visitation or communication with his child were clear and convincing evidence constituting abandonment, the chancery court did not err in terminating Smith's parental rights. (2) Because Smith's own testimony and his almost five-year absence from his child's life constituted clear and convincing evidence that reunification was not desirable toward obtaining a satisfactory permanency outcome, the chancery court did not err in its decision. (3) Because the GAL recommended that termination of Smith's parental rights would be in the best interest of the child and the chancery court followed this recommendation, the chancery court did not manifestly err in its decision. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court.

Affirmed - 2019-CA-01654-COA (Mar. 30, 2021)

Opinion by Judge McDonald

Hon. Sheila Havard Smallwood (Forrest County Chancery Court)
Charles E. Lawrence Jr. for Appellant - Shawn M. Lowrey for Appellee
Briefed by [Mckenzie Williamson](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

GALES V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE - VOLUNTARY PLEA - REQUIREMENTS - A plea is considered voluntary and intelligent only if the defendant is informed of the nature of the charge against him and the consequences of the plea; the court must determine whether the defendant understands the minimum and maximum sentences for the charge

CIVIL PROCEDURE - DEFECTIVE INDICTMENT - EXCEPTIONS - The entry of a knowing and voluntary plea waives all other defects or insufficiencies in the indictment except when the court lacks subject matter jurisdiction or when the indictment fails to charge an essential element of the crime

CIVIL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - CLAIMS - When a defendant's assertions of ineffective assistance of counsel are substantially contradicted by the court record of the proceedings, the court may disregard such assertions

FACTS

In 2016, Gene Gales Jr. was indicted as a non-violent habitual offender for attempted grand larceny and possession of burglar's tools. In May 2017, Gales pled guilty to attempted grand larceny, but the State chose not to proceed for his possession of burglar's tools. The trial court sentenced Gales to five years in custody, with all but time served suspended, and three years of post-release supervision ("PRS"). Additionally, Gales was ordered to pay \$500 to the Forrest County Public Defender's Fund and all court costs. Gales subsequently violated the terms of his PRS and, accordingly, his sentence was revoked. The trial court sentenced Gales to serve his original sentence of five years in the custody of the Mississippi Department of Corrections. In May 2019, Gales filed a PCR motion claiming that his plea was involuntary, he was denied due process, his indictment was defective, and he received ineffective assistance of counsel. The trial court dismissed his motion. Gales appealed.

ISSUES

Whether (1) Gales's plea was involuntary; (2) Gales was denied due process; (3) Gales's indictment was defective; and (4) Gales received ineffective assistance of counsel.

HOLDING

(1) Because the plea-hearing transcript reflected that Gales was informed of the nature of the charge against him, his plea was not involuntary. (2) Because Gales's plea was voluntary, his right to due process was not violated (3) Because the indictment charged each element of the crime of attempted grand larceny, and because the court had subject matter jurisdiction, Gales's indictment was not defective. (4) Because the record reflected that Gales was not coerced into pleading guilty and that he was satisfied with his attorney's representation, Gales did not receive ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2019-CP-00773-COA (Mar. 30, 2021)

Opinion by Judge Greenlee
Hon. Robert B. Helfrich (Forrest County Circuit Court)
Pro se for Appellant - Allison Kay Hartman (Att'y Gen. Office) for Appellee
Briefed by [Gabrielle Beech](#)

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JOHNSON V. STATE

CIVIL - POST CONVICTION RELIEF

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - A guilty plea will only be binding upon a criminal defendant if it is voluntary and intelligently entered, which means a defendant must be advised about the nature of the crime charged against him and the consequences of the guilty plea

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - SUBSEQUENT MOTIONS - The post-conviction relief statute allows a prisoner to file subsequent motions for relief and motions after expiration of the statute of limitations if he can show: (1) that there has been an intervening decision of the United States Supreme Court or of the Mississippi Supreme Court that would have adversely affected the outcome of his conviction or sentence; (2) that he has new evidence that was not discoverable at the time of trial; (3) that his sentence has expired; or (4) that his probation or parole has been revoked

FACTS

Robert Johnson was indicted as a habitual offender for business burglary, possession of a firearm by a felon, and felony fleeing. In 2018, he pled guilty and was sentenced to serve four years and six months as a habitual offender for felony fleeing and a consecutive and suspended sentence of ten years for being in possession of a firearm. In June 2019, Johnson filed a motion to correct his sentence. He alleged that his plea was involuntary and that he received ineffective assistance of counsel because his attorney misled him regarding the terms of his plea deal. The circuit court treated the motion as a PCR motion and denied the motion, finding that Johnson's plea was voluntary and that he failed to prove his ineffective assistance claim. In October 2019, Johnson filed a motion to withdraw his plea agreement. He alleged that his attorney erroneously advised him that he was guilty of felony fleeing, when he was only guilty of misdemeanor fleeing because he did not endanger persons or property. Johnson argued that his plea was involuntary because he did not understand the charge. The circuit court treated the motion as a PCR motion and denied it because it was an impermissible successive PCR motion. Johnson appealed.

ISSUE

Whether Johnson's plea was involuntary because he was not informed of the true elements of the crime of felony fleeing.

HOLDING

Because the indictment provided formal notice of the elements of the crime to which Johnson pled guilty, and because, in his sworn plea petition, Johnson confirmed that his attorney had explained the elements of the crime to him, Johnson's plea was not involuntary. Therefore, the Court of Appeals affirmed the judgment of the Humphreys County Circuit Court.

Affirmed - 2020-CP-00118-COA (Mar. 30, 2021)

Opinion by Presiding Judge Wilson

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

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

Briefed by [Blake Tims](#)

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TAYLOR V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - COMPETENCY - PRESUMPTION OF MENTAL COMPETENCY - Under the rules of criminal procedure, there is a presumption of mental competency; the presence of a mental illness, defect, or disability alone is not grounds for finding a defendant incompetent to stand trial

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - A claimant of ineffective assistance of counsel bears the burden of proof to show that (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense

CRIMINAL PROCEDURE - GUILTY PLEA - FACTUAL BASIS - Prior to accepting a defendant's guilty plea, the circuit court must first decide whether the plea is voluntarily and intelligently made and whether a factual basis exists to support the plea; there are many ways to establish a factual basis, including a statement of the prosecutor, the testimony of live witnesses, prior proceedings, as well as an actual admission by the defendant

FACTS

In January 2020, Willie Taylor pled guilty to armed robbery. He was sentenced to twenty-five years, with fifteen years to serve in the custody of the Mississippi Department of Corrections and five years of post-release supervision. Subsequently, in April 2020, Taylor filed a PCR motion. In denying his PCR motion, the circuit court noted that neither Taylor nor his attorney disputed the State's evidence and that no witnesses testified at the plea hearing. Taylor appealed.

ISSUES

Whether the trial court erred in (1) not ordering a psychiatric evaluation or a competency hearing; (2) finding Taylor's ineffective assistance claims to be without merit; (3) finding a factual basis existed for Taylor's guilty plea; and (4) entering Taylor's sentence.

HOLDING

(1) Because the judge did not receive any information that, objectively considered, would reasonably have raised doubt about Taylor's competence, the trial court did not err by failing to order a psychiatric evaluation or conduct a competency hearing. (2) Because Taylor's attorney did not have reasonable grounds to believe he was mentally incompetent, and because, at the plea hearing, Taylor stated he was satisfied with his attorney's representation, the trial court did not err in finding Taylor's ineffective-assistance claims were without merit. (3) Because both Taylor and his attorney stated to the trial court that they did not disagree with the factual basis, the trial court did not err in finding that a factual basis was established to support his plea. (4) Because Taylor's sentence conformed with the applicable penalty statutes, it was not an illegal sentence. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2020-CP-00621-COA (Mar. 30, 2021)

Opinion by Judge Greenlee

Hon. Dewey Key Arthur (Madison County Circuit Court)

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

Briefed by [Betsy Lee Montague](#)

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COURT OF APPEALS - CRIMINAL CASES

JOHNSON V. STATE

CRIMINAL - MISDEMEANOR

CRIMINAL PROCEDURE - MIRANDA RIGHTS - CUSTODIAL INTERROGATION - Under *Berkemer*, a person is not "in custody" for purposes of *Miranda* during a routine traffic stop

EVIDENCE - ADMISSIBILITY - DUI TEST - Under *Prince*, before a court may admit into evidence the results of a DUI test, the court must first determine that: (1) the proper procedures were followed; (2) the operator of the machine was properly certified to perform the test; and (3) the accuracy of the machines was properly certified

EVIDENCE - WEIGHT AND SUFFICIENCY - SUPPORT FOR VERDICT OR FINDING - When testing the sufficiency of evidence, the court views the evidence in the light most favorable to the State; the court must affirm if any rational juror could have found the essential elements of the crime beyond a reasonable doubt

FACTS

In September 2016, a Madison police officer stopped Nikolas Johnson after observing him speeding and failing to maintain his lane of traffic. After being pulled over, Johnson consented to a breathalyzer test which showed that he had consumed alcohol. After the test, Johnson admitted that he had been drinking and should not have been driving. Johnson was arrested for reckless driving and driving under the influence. At the police station, Johnson was read his *Miranda* rights and advised of the consequences of not taking a second breathalyzer test. The subsequent Intoxilyzer-8000 test showed that his blood-alcohol concentration was above 0.13 percent. Johnson was also charged with disorderly conduct because he argued with a police officer at the station and refused the officer's orders to stand up and enter a cell. Johnson was convicted on all three charges in Madison Municipal Court and appealed to county court which also found him guilty. Consequently, Johnson appealed to the Madison County Circuit Court which affirmed his convictions. Johnson appealed.

ISSUES

Whether (1) the trial court properly denied Johnson's motion to suppress; (2) the trial court abused its discretion by admitting the Intoxilyzer-8000 test results; and (3) the State presented sufficient evidence to convict Johnson on all three charges.

HOLDING

(1) Because routine traffic stops are not custodial interrogations for purposes of *Miranda*, and because the officer's actions did not transform the routine stop into a custodial interrogation, Johnson's roadside statements were not the product of a custodial interrogation and, therefore, the trial court properly denied Johnson's motion to suppress. (2) Because the State presented sufficient evidence that the machine's accuracy was properly certified, the trial court did not abuse its discretion by admitting the results of the Intoxilyzer-8000 test. (3) Because Johnson was speeding while weaving in and out of his lane, because the State presented sufficient evidence to reasonably infer that Johnson intended to breach the peace by refusing the officer's lawful orders, and because the evidence was clearly sufficient to support the DUI conviction, the State presented sufficient evidence for all charges. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2019-KM-01853-COA (Mar. 30, 2021)

Opinion by Presiding Judge Wilson

Hon. Steve S. Ratcliff III (Madison County Circuit Court)

Howard Brown for Appellant - John Hedglin for Appellee

Briefed by [Joshua L. Holmes](#)

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KIVINEN V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - AGGRAVATED ASSAULT - ELEMENTS - Under Miss. Code Ann. § 97-3-7(2)(a), person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - Failure to instruct the jury on the essential elements of the crime is reversible error; it is always and, in every case, reversible error for the courts to deny an accused the right to have a jury decide guilt as to each and every element

FACTS

Sami Kivinen, Dionna Denning, Charles Pickett, and Matthew Willis were patrons at the Under-the-Hill Saloon. A dispute arose between Kivinen and Pickett. After the exchange, a bartender ordered Kivinen to leave the bar and called him a cab. The other patrons remained at the bar until closing. As Willis was walking to his car to give Pickett a ride home, he saw Kivinen jump out of nearby bushes, unwrap a pistol, and strike Pickett on the head with it. Pickett fell to the ground and a person with Kivinen, later identified as Kivinen’s son, began beating Pickett on his head with a bat. Pickett filed charges against Kivinen and his son, resulting in Kivinen’s indictment for aggravated assault under Miss. Code Ann. § 97-3-7. A jury found Kivinen guilty of aggravated assault. The trial court sentenced Kivinen to serve ten years but agreed to suspend his sentence on the condition of his deportation from the United States to his home country of Finland. Kivinen filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court denied his motion. Kivinen appealed.

ISSUE

Whether the State omitted an essential element from its jury instruction.

HOLDING

Because the word “serious” in the phrase “serious bodily injury” was an essential element of the crime of aggravated assault, and because the state omitted the word “serious” from its jury instruction, Kivinen was deprived the opportunity to adapt his defense, the jury was improperly and inadequately instructed, and the omission was a reversible error. Therefore, the Court of Appeals reversed and remanded the judgment of the Adams County Circuit Court.

DISSENT

Presiding Judge Wilson argued that Kivinen’s conviction should be affirmed because the jury instruction covered the elements of the offense and because Kivinen waived any objection to any other alleged imperfection in the instruction. He noted that, although the jury instructions could have been clearer, the instructions, when read together as a whole, sufficiently covered the elements of aggravated assault. Therefore, Kivinen’s conviction and sentence should be affirmed.

Reversed & Remanded - 2019-KA-01416-COA (Mar. 30, 2021)

Opinion by Judge McCarty - Dissent by Presiding Judge Wilson

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

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Abbie Eason Koonce (Att’y Gen. Office) for Appellee

Briefed by [Schyler Burney](#)

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