

**MISSISSIPPI SUPREME COURT DECISIONS – JUNE 17, 2021****SUPREME COURT - CIVIL CASES****HARRELD V. BANKS****CIVIL - ELECTION CONTEST**

**ELECTION LAW - RESIDENCY CONTESTATION - BURDEN OF PROOF** - Under *Hubbard*, the party contesting a vote due to residency has the burden of proof to show that voters were disqualified and how they voted and the presumption of legality of the vote must be overcome by affirmative proof

**ELECTION LAW - VOTER REGISTRATION - REMOVAL FROM VOTER ROLLS** - Miss. Code Ann. § 23-15-153 provides certain steps for the removal from voting rolls due to a change in residence

**ELECTION LAW - ELECTION CONDUCT - IRREGULARITIES OR DEFECTS** - Under *Boyd*, the integrity of the application is strengthened when an absentee ballot was filled out and notarized by the circuit clerk, rendering mistakes more likely to be technicalities and making it more difficult to justify invalidating the vote

**FACTS**

Jim Harreld and Karl Banks ran for the District 4 Supervisor in Madison County. Banks won the general election on November 5, 2019 by fifty-seven votes. The Madison County Election Commission certified Banks as the winner of the election. Harreld challenged the election, alleging that there were incorrect ballot styles distributed, illegal absentee ballot counted, and improper ballot rejections, among other issues. Harreld requested the trial court to decertify the election and order a special election. Harreld submitted an amended petition, alleging that more than 200 individuals were incorrectly placed in District 4 and 140 voters that resided in the District were incorrectly placed outside of District 4 by the Statewide Election Management System (“SEMS”). Subsequently, he requested the trial court to declare him the winner of the general election. The boundaries for District 4 were based on the 2010 census and approved in 2011 by the Madison County Board of Supervisors. Both parties agreed to a bench trial and the Madison County Circuit Court affirmed the election as certified. The trial court concluded that no sufficient questions were raised that cast doubt on the will of the voters and that Harreld failed to prove that enough illegal votes were cast to change the election’s outcome. Harreld appealed.

**ISSUES**

Whether the trial court erred by (1) concluding that mistakes in SEMS did not require a special election; (2) finding Harreld’s evidence regarding voters living at certain addresses insufficient to show lack of residence in District 4; (3) concluding that Harreld failed to meet his burden of proof that voters in split precincts cast illegal votes; and (4) ignoring ballots that were counted or not counted in violation of election law.

**HOLDING**

(1) Because Harreld did not meet his burden of proof to show that voters misplaced by SEMS casted illegal votes, the trial court did not manifestly err. (2) Because Harreld failed to present sufficient evidence that an abandonment of District 4 residency occurred, to provide any evidence that residency was established outside of District 4, and to show that the proper steps were taken to allow these voters to be removed from the voter rolls, the trial court did not manifestly err. (3) Because the record neither supported Harreld’s claims of illegal votes being cast in split precincts nor showed substantial failure to materially comply with election statutes, the trial court did not manifestly err. (4) Because Harreld neither alleged any fraud or intentional wrongdoing to the absentee and uninitiate ballots nor met his burden of proof for the affidavit ballots that were and were not counted, the trial court did not manifestly err. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

## DISSENT

Justice Griffis argued that the special judge's decision should have been reversed and a special election should have been called because the trial judge failed to consider the election-contest claim based on the proper legal standard and Harreld satisfied both prongs of the correct legal standard.

### **Affirmed - 2020-EC-00477-SCT (June 17, 2021)**

Opinion by Presiding Justice King - Dissent by Justice Griffis  
Hon. Lamar Pickard (Madison County Circuit Court)  
Spencer Mark Ritchie for Appellant - Willie Griffin for Appellee  
Briefed by [Muriel Collins](#)

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## **McGOWEN V. ROMAN CATHOLIC DIOCESE OF BILOXI**

### **CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE**

**TORTS - LATENT INJURY - STATUTE OF LIMITATIONS** - Miss. Code Ann. § 15-1-49(2) provides that in actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury  
**TORTS - LATENT INJURY - REASONABLE KNOWLEDGE** - Because there is no bright-line rule, the specific facts of the case will determine whether the plaintiff knew or reasonably should have known that an injury existed  
**CIVIL PROCEDURE - MOTION PRACTICE - DISMISSAL** - When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim

### FACTS

In September 2019, Robert McGowen filed a complaint alleging that he had been sexually and emotionally abused by Father John Scanlon at Sacred Heart Catholic Church from 1984 to 1985 when McGowen was twelve to thirteen years old. According to McGowen, he repressed the memories until December 2018 while receiving therapy from Dr. Deborah Dawes to work through the trauma of the alleged abuse. Dawes determined that McGowen suffered from major depression and post-traumatic stress disorder. She further determined that McGowen had repressed the memories and ultimately found his reports of abuse as credible. Sacred Heart Catholic Church and the Roman Catholic Diocese of Biloxi answered the complaint and moved to dismiss under Miss. R. Civ. P. 12, arguing that McGowen's claims were barred by the statute of limitations in Miss. Code Ann. § 15-1-49. The circuit court entered an order dismissing the complaint without prejudice. McGowen appealed.

### ISSUE

Whether the circuit court erred by failing to apply the discovery rule.

### HOLDING

Because McGowen did not know of his injury until late 2018, and because whether McGowen knew about the injury should have been reserved as a jury question, McGowen's allegations sufficed to invoke the discovery rule. Thus, the circuit court erred by failing to apply the discovery rule and by dismissing the case under Miss. Code Ann. § 15-1-49. Therefore, the Supreme Court reversed and remanded the judgment of the Forrest County Circuit Court.

### DISSENT

Justice Griffis argued that the discovery rule did not apply and that the case was properly dismissed because McGowen's claims were barred by the applicable statute of limitations. He reasoned that sexual abuse acts of this nature are not a latent injury because, due to his age at the time of the abuse and the nature of the physical acts, McGowen was aware of the abuse at the time of its occurrence. Therefore, the discovery rule should not apply because, while he may have repressed the memories, McGowen knew or should have known at that time an injury had occurred.

**Reversed & Remanded - 2020-CA-00418-SCT (June 17, 2021)**

Opinion by Justice Coleman - Dissent by Justice Griffis

Hon. Jon Mark Weathers (Forrest County Circuit Court)

John F. Hawkins for Appellant - Christian Strickland, Robert T. Schwartz, & Jordan R. Mathews for Appellees

Briefed by [Bess Fisher](#)

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## MISS. BAPTIST HEALTH SYS. V. HARRIS

### CIVIL - MEDICAL MALPRACTICE

**TORTS - MEDICAL MALPRACTICE - LOSS-OF-CHANCE** - To recover under the loss-of-chance theory, the plaintiff must prove that, but for the physician's negligence, he or she had a reasonable probability of a substantial improvement

**TORTS - ELEMENTS - CAUSATION** - Proof of causation must not leave the causal connection a matter of conjecture, it must be something more than consistent with the plaintiff's theory

### FACTS

In January 2016, Roosevelt Ard reported to the emergency room at Mississippi Baptist Medical Center ("MBMC") complaining of chest pain and leg numbness. A physician ordered one shot of Dilaudid for Ard's pain. After a chest x-ray and EKG turned up normal, the physician discharged Ard. Eight hours later, Ard was found unresponsive. An ambulance brought Ard to the hospital, however, he was pronounced dead on arrival. Shemika Harris and Latina Walker filed a complaint against MBMC and Mississippi Baptist Health Systems ("MBHS") on behalf of Ard's two minor children, arguing that MBMC was vicariously liable for the allegedly negligent medical care that Ard received. After Harris and Walker did not respond to discovery requests for two years, MBMC and MBHS filed motions for summary judgment. The circuit court entered orders granting MBHS's motion without prejudice and denying MBMC's motion. MBMC appealed.

### ISSUES

Whether the circuit court erred in (1) denying MBMC's motion for summary judgment and (2) granting MBHS's motion for summary judgment without prejudice.

### HOLDING

(1) Because Walker and Harris could not establish causation nor make a prima facie case of medical negligence as to the nursing staff of MBMC, the circuit court erred in denying its motion for summary judgment. (2) Because Walker and Harris admitted they had no basis for a claim against MBHS, MBHS was not liable as a matter of law, therefore, the circuit court's order granting summary judgment in favor of MBHS should be amended to state that the claims against MBHS are dismissed with prejudice. Therefore, the Supreme Court affirmed in part and reversed and rendered in part the judgment of the Hinds County Circuit Court.

**Affirmed In Part; Reversed & Rendered In Part - 2019-IA-01378 (June 17, 2021)**

Opinion by Justice Beam

Hon. Tomie T. Green (Hinds County Circuit Court)

D. Collier Graham Jr., Rebecca Hawkins, & Mallory Miller Street for Appellants - William W. Fulgham for Appellees

Briefed by [Jack Hall](#)

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## MISS. FARM BUREAU CAS. INS. CO. V. HARDIN

## CIVIL - INSURANCE

**CIVIL PROCEDURE - SUMMARY JUDGMENT - STANDARD** - Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law

**INSURANCE LAW - TERMS AND PROVISIONS - INTERPRETATION** - The language and provisions of insurance policies are viewed as contracts and are subject to the same rules of interpretation as other contracts; insurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain and to ensure that rates have been properly calculated

**INSURANCE LAW - NAMED PERILS COVERAGE - BURDEN OF PROOF** - Under named perils coverage, the burden of proof rests with the insured to prove that the damages sustained were covered by the peril insured against

### **FACTS**

Jean Hardin purchased a homeowner's policy from Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau"), which was set to commence on July 1, 2013 and run through July 1, 2014. Hardin contended that the only documents she received from Farm Bureau were the Declaration Page, supporting documents, and the policy HO-2. Hardin alleged that, in November 2013, she noticed a sudden collapse in her home's flooring and contacted Farm Bureau about the loss. Farm Bureau investigated and found that only a small part of the loss would be covered under the policy. Farm Bureau hired Jason G. Grover to investigate the loss. In his report, Grover found that the damages were caused by "long-term deterioration" of the flooring and framing of the home due to excess moisture from poor ventilation and drainage. Grover stated that the elevation survey indicated that rainwater flowed and pooled beneath the crawlspace of the house. Grover found that other than the flooring damage due to a leaking shower pan in the guest bathroom, all other damages were caused by the aforementioned reasons. In her deposition, Hardin testified that the water drainage problem was caused by the town of Leakesville's failure to maintain its drainage ditches near her property. She noticed the damage when the flooring in her son's room dropped "about four inches" but that the walls of the house were still standing. Hardin sued Farm Bureau. Farm Bureau filed for summary judgment and was denied. Farm Bureau appealed.

### **ISSUES**

Whether (1) the damage fell within a "Peril Insured Against" under the policy; (2) the home was in a state of collapse as defined by the policy; (3) the policy's "Water Damage Exclusion" applied; and (4) Farm Bureau had an "arguable or legitimate" basis for denying Hardin's claims.

### **HOLDING**

(1) Because the policy booklet which Hardin admittedly received provided an exemption from coverage, because coverage was exempted in cases of accidental overflow or discharge of the insured's premises, and because Hardin admitted that the damages were caused by the overflowing drainage ditch maintained by the town of Leakesville, the damage did not fall within a "Peril Insured Against." (2) Because Hardin admitted in her deposition that her home was still standing under the definition of the policy, the home was not in a state of collapse. (3) Because Hardin not only failed to prove that her claim was covered as a peril insured against, but readily admitted that it was not by attributing its cause to the unmaintained drainage ditch, the broad water-damage exclusion would apply. (4) Because Hardin's home was not in a state of collapse and its damage was not the result of a Peril Insured Against, Farm Bureau had an arguable or legitimate basis for denying Hardin's claim. Therefore, the Supreme Court reversed and remanded the decision of the Greene County Circuit Court.

### **Reversed & Remanded - 2020-IA-00332-SCT (June 17, 2021)**

Opinion by Justice Coleman

Hon. Michael H. Ward

Sam S. Thomas & Owen P. Terry for Appellant - A. Malcolm N. Murphy for Appellee

Briefed by [Cameron Johnson](#)

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## *SUPREME COURT - CRIMINAL CASES*

### **TURNER V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - AGGRAVATED ASSAULT - ELEMENTS** - Miss. Code Ann. § 97-3-7(2)(a) provides that a person is guilty of aggravated assault if he attempts to cause or purposely or knowingly causes serious bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

**EVIDENCE - ADMISSIBILITY - LAY OPINION** - Pursuant to Miss. R. Evid. 701, if a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (1) rationally based on the perception of the witness, (2) helpful to clearly understanding of the witness's testimony, and (3) not based on scientific, technical or other specialized knowledge

**EVIDENCE - ADMISSIBILITY - EXPERT OPINION** - Pursuant to Miss. R. Evid. 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case

**EVIDENCE - ADMISSIBILITY - DISCRETION** - Relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused

#### **FACTS**

In May 2018, Mississippi Highway Patrol Trooper Derek Earnest, Belmont Police Officers James Guthery and Randy Cornelison, and Tishomingo County Sheriff's Deputy Jason Moore set up a safety checkpoint in North Belmont. Trooper Earnest testified that he saw a car abruptly stop, pull into a parking lot, and then turn around and dart in the opposite direction of the roadblock. He further testified that the vehicle did not use a turn signal and there was no tag light. Deputy Moore then followed the vehicle to conduct a routine traffic stop. He testified that the tag was also expired. Deputy Moore pulled over the truck and the driver was identified as Brian Turner. Turner was asked to exit his vehicle and place his hands behind his back. Shortly after, Turner got back in his car and a short pursuit initiated. Eventually, Deputy Moore and Turner's cars collided, and Officer Guthery arrived and told Turner to show him his hands and to drop his gun. Officer Guthery testified that, as he told Turner to exit the vehicle, he saw a rifle appear in Turner's hands. He then saw Turner rock towards him with the rifle, and so he began to shoot. Officer Guthery was the first to open fire. Deputy Moore then heard gunfire and began shooting in self-defense. Turner fled the scene and was later arrested in Tennessee. In October 2018, Turner was indicted by a grand jury for one count of failure to stop, three counts of aggravated assault of a law-enforcement officer and one count of felon in possession of a firearm. Turner filed a Motion seeking the State's production of all Dash Camera and Body Camera Surveillance footage which the court granted. Turner also filed a motion to suppress any evidence that was obtained as a result of an illegal search, seizure, and arrest. The circuit court denied Turner's motion to suppress, recognizing that Turner never stopped at the roadblock and the officers had the ability to pursue a car that committed traffic violations. The jury found Turner not guilty on one count and guilty on four counts. In October 2019, Turner filed a Judgment Notwithstanding the Verdict ("JNOV") Motion which was denied. Turner appealed.

#### **ISSUES**

Whether (1) there was insufficient evidence to support the convictions for aggravated assault of a law-enforcement officer; (2) the circuit court erred by allowing the State to present improper lay-opinion evidence; (3) the circuit court erred by determining the roadblock was constitutional; (4) the circuit court erred by allowing the district attorney to comment to the jury regarding Turner's decision to not call a witness; (5) the circuit court erred by not requiring the

State to produce body- and dash-camera footage to Turner; and (6) the circuit court erred by overruling Turner's objection to the district attorney's use of a scaled drawing at trial that was not produced to Turner.

### **HOLDING**

(1) Because, when viewing the evidence in the light most favorable to the guilty verdicts, allowing Turner's convictions to stand would not sanction an unconscionable injustice and would simply uphold the jury's determination, the convictions were not against the overwhelming weight of the evidence. (2) Because no expert testimony was required for Agent Woodruff to opine about the utility of taping firearm magazines together and the subsequent ability to quickly reload a gun since it is common sense, because Agent Woodruff's opinion was based on his rational observations of the firearm magazines, because Agent Woodruff's testimony had no bearing on whether Turner committed aggravated assault or acted in self-defense, because any potential error resulting from Agent Woodruff's testimony would have been harmless, and because Agent Woodruff's testimony was not expert testimony within the meaning of Miss. R. Evid. 702 and did not require scientific, technical, or specialized knowledge, Turner was not prejudiced, and the circuit court did not err by allowing Agent Woodruff to testify as a lay opinion. (3) Because Turner did not allege that a Fourth Amendment seizure occurred at the roadblock, and because no unreasonable seizure occurred during the stop, the issue was without merit. (4) Because Turner's counsel first commented on the State's failure to call Office Belue to testify prior to the State's comment on Turner's failure to do so, the assignment of error lacked merit. (5) Because the circuit court ordered law-enforcement agencies to produce any and all body-camera and dash-camera footage in their possession, and because each relevant law-enforcement witnesses for the State testified under oath that the footage was not available and the agencies were not in possession of any body- or dash-camera footage, the circuit court did not err since it required the State to produce body and dash-camera footage to Turner. (6) Because Miss. R. Crim. P. 17.2 does not address nor require the production of demonstratives prior to trial and because the admission of demonstrative evidence is within the wide discretion of the trial court, the circuit court did not err. Therefore, the Supreme Court affirmed the judgment of the Tishomingo County Circuit Court.

### **DISSENT**

Presiding Justice King disagreed with allowing Agent Woodruff to testify as a lay opinion and he accordingly found that the trial court committed reversible error. He reasoned that testifying as to the meaning of a quick-change operation with taped-together magazines, the trajectory of the projectiles, and the positions of the officers required specialized knowledge and should have been considered expert testimony. He further reasoned that an average person would not be able to determine the location of the shooters by looking at bullet holes in vehicles. Additionally, he stated that the way in which the prosecution prefaced its questions by asking Agent Woodruff to speculate based on his training and experience, showed that the Agent should have first been qualified as a witness before providing his opinion. Therefore, he concluded that the admission of Agent Woodruff's testimony, without first qualifying him as an expert, could not be considered harmless.

#### **Affirmed - 2019-KA-01724-SCT (June 17, 2021)**

En Banc Opinion by Justice Chamberlin - Dissent by Presiding Justice King

Hon. Kelly Lee Mims (Tishomingo County Circuit Court)

Andrew W. Stuart II & Adam G. Pinkard for Appellant - Scott Stuart (Att'y Gen Office) for Appellee

Briefed by [Madison Reightler](#)

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## **MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 15, 2021**

### ***COURT OF APPEALS - CIVIL CASES***

**BINGHAM V. JOHNSON**

**CIVIL - CUSTODY**



**FAMILY LAW - CUSTODY - AGE CONSIDERATIONS** - The age and sex of a child are merely factors to be considered under *Albright*, and the Supreme Court has significantly weakened the once strong presumption that a mother is generally best suited to raise a young child; a child of seven has been held to be long past the age where it requires attention of such a character from the mother

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - The *Albright* factors are as follows: (1) age, health, and sex of the child; (2) continuity of care prior to the separation; (3) parenting skills and the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) the physical and mental health and age of the parents; (6) the emotional ties of parent and child; (7) the moral fitness of the parents; (8) the home, school, and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) the stability of the home environment and employment of each parent; and (11) other factors relevant to the parent-child relationship

**FAMILY LAW - CUSTODY - BEST INTEREST OF CHILD** - The polestar consideration in a child custody case is the best interest of the child

### **FACTS**

Kenneth Johnson and Kelly Bingham married in 2014 and had one child, K.J., together in 2015. Johnson filed for divorce in November 2017. In December 2017, the parties entered into an agreed temporary order that gave Bingham temporary custody of K.J, allowed Johnson visitation every other weekend, and required him to pay \$352 per month in child support. The parties reached an agreement as to the division of property but proceeded to trial on the issues of child custody and child support. Regarding custody, the chancellor thoroughly discussed the *Albright* factors to determine the best interest of the child. The chancellor found the factor of the age, sex, and health of the child slightly favored Bingham. Conversely, the chancellor found that the following factors favored Johnson: moral fitness of the parents; the home, school, and community record of the child; and stability of the home environment and employment of each parent. Ultimately, the chancellor found that awarding Johnson physical and legal custody was in K.J.'s best interest. The trial court awarded Bingham visitation rights and ordered her to pay \$243 a month in child support. Bingham filed a motion for reconsideration, arguing that the chancellor erred in his *Albright* analysis. The court denied Bingham's motion. Bingham appealed.

### **ISSUE**

Whether the chancellor's *Albright* analysis and his determination of K.J.'s best interest was erroneous or an abuse of discretion.

### **HOLDING**

Because the chancellor's *Albright* analysis and ultimate determination were supported by substantial evidence produced at trial, the chancellor's *Albright* analysis and his determination of K.J.'s best interest were neither clearly erroneous nor an abuse of discretion. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Chancery Court.

**Affirmed - 2019-CA-00402-COA (June 15, 2021)**

Opinion by Judge Lawrence

Hon. Edward E. Patten Jr. (Lincoln County Chancery Court)

Jeffery Kendrick Harness for Appellant - Joseph A. Fernald Jr. for Appellee

Briefed by [Joshua L. Holmes](#)

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## **DEAR V. CARES CTR. INC.**

### **CIVIL - OTHER**

**CIVIL PROCEDURE - DIRECTED VERDICT - STANDARD OF REVIEW** - Miss. R. Civ. P. 50(a) provides that a judge is required to take a case from a jury when any verdict other than the directed verdict would be erroneous as a matter of law

**EMPLOYMENT LAW - AT-WILL EMPLOYMENT - WHISTLEBLOWER EXCEPTION** - A public policy exception prevents employers from firing at-will employees if the employee reports a crime that is actually illegal and warrants the imposition of criminal, rather than civil, penalties

**CRIMINAL LAW - CHILD ABUSE - STRANGULATION** - Miss. Code Ann. § 97-5-39(2) provides that a person commits felonious child abuse if they intentionally, knowingly, or recklessly strangle, choke, smother, or in any way interfere with a child's breathing

**CRIMINAL LAW - ASSAULT - SERIOUS BODILY INJURY** - Miss. Code Ann. § 97-3-7(1)(a) provides that a person commits assault if they attempt by physical menace to put another in fear of imminent serious bodily injury

### **FACTS**

In November 2018, Canopy Children's Solutions ("Canopy") hired Chase Dear to work as substitute a teacher at Cares Center Inc. ("Cares"), a school for children with emotional and behavioral disabilities. On his ninth day, Dear witnessed Arthur McLaughlin, a behavioral specialist assigned to Dear's classroom, perform a management-of-assaultive-behavior ("MAB") hold on a violent student. Dear informed administrators that McLaughlin performed an improper MAB hold by "body-slammng" the student to the ground. After administrators informed Dear that he would be a part-time substitute, Dear called child protection services and reported that McLaughlin slammed the student to the ground, then used his forearm to choke the student. An internal investigation absolved McLaughlin of all wrong-doing. Four days after Dear reported the incident, he was terminated his employment due to "red flags" about his personality and workplace performance. Dear filed a civil complaint asserting that Cares wrongfully terminated his employment because he reported McLaughlin's alleged criminal conduct. Cares moved for a directed verdict pursuant to Miss. R. Civ. P. 50(a), which the circuit court granted, finding that Dear failed to establish that an actual crime occurred and failed to prove that his termination would not have happened but for his report of abuse. Dear appealed.

### **ISSUE**

Whether the trial court judge incorrectly granted a directed verdict by concluding that the plaintiff failed to produce enough evidence to substantiate a whistleblower exception to the at-will employment doctrine.

### **HOLDING**

Because Dear failed to produce sufficient credible evidence that McLaughlin committed criminal conduct, namely child abuse or assault, the circuit court did not err in granting Cares a directed verdict. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

**Affirmed - 2020-CA-00341-COA (June 15, 2021)**

Opinion by Judge Smith

Hon. Prentiss Greene Harrell (Lamar County Circuit Court)

Daniel Myers Waide for Appellant - Jason Scott Gilbert & Hugh Ruston Comley for Appellee

Briefed by [Kathleen Workman](#)

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## **IN RE WILLIAM CLAY CALDWELL, JR.**

### **CIVIL - OTHER**

**CIVIL PROCEDURE - MOOTNESS DOCTRINE - EXCEPTION** - A case is moot where no practical benefit exists to the plaintiff or detriment to the defendant; an exception to the mootness doctrine applies if the challenged action is capable of repetition yet evading review, to meet this exception, a challenged action has to be (1) too short to be fully litigated prior to its cessation or expiration and (2) a reasonable expectation that the same complaining party would be subject to the same action

**CIVIL PROCEDURE - APPEALS - EVIDENCE** - Appellants bear the responsibility to provide the record of the trial proceedings wherein the error claimed is brought before this court; if the appellant intends to urge on appeal that



a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion

**CIVIL PROCEDURE - REVIEWING COURT - LIMITATIONS** - A reviewing court cannot consider matters which do not appear in the record and must limit itself to the facts that do not appear in the record

### FACTS

In March 2020, Balbina Caldwell initiated civil-commitment proceedings against her husband, William Caldwell Jr. Prior to Balbina's initiation of the proceedings, William voluntarily admitted himself to the Veterans Administration Medical Center ("the VA") for three days. However, Balbina remained concerned for her son's safety, as William's discharge date neared. Following Balbina's petition, the chancellor entered an order on March 31, 2020 to have William admitted to the VA for thirty to ninety days for observation, diagnosis, and treatment. Fifteen days later, the chancellor entered another order to discharge William. William appealed.

### ISSUE

Whether William's appeal fell within an exception to the mootness doctrine.

### HOLDING

Because William failed to provide a complete record for the court to review all matters necessary to the appeal, the court could not determine whether his appeal fell within a recognized exception to the mootness doctrine. Therefore, the Court of Appeals dismissed Caldwell's appeal.

#### **Appeal Dismissed - 2020-CP-00402-COA (June 15, 2021)**

Opinion by Judge Smith

Hon. D. Neil Harris Sr. (Jackson County Chancery Court)

*Pro se* for Appellant

Briefed by [Gabrielle Beech](#)

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## **MISS. STATE BD. OF NURSING V. MACK**

### **CIVIL - STATE BOARDS & AGENCIES**

**ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS** - An agency's conclusions must remain undisturbed unless the agency's order (1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional rights

**EVIDENCE - ADMISSIBILITY - SETTLEMENT AGREEMENTS** - Miss. R. Evid. 408 provides that settlement agreements are not admissible to prove liability or guilt

### FACTS

Robin Mack, a nurse practitioner at the G.V. (Sonny) Montgomery Veterans' Administrative Medical Center ("VA"), was investigated for failing to complete clinical notes in a timely manner, misrepresenting clinical records, providing false information to a patient, and misusing clinic time management. Following an investigation, Mack signed a settlement agreement with the VA and was suspended for seven days. After the seven days, Mack returned to work at the VA. In 2016, the Mississippi State Board of Nursing ("Board") filed a formal complaint against Mack based on the VA's investigation. The Board charged Mack with negligently or willfully practicing nursing below the accepted standard and falsifying, or in a repeatedly negligent manner making incorrect entries, or failing to make essential entries on records. The complaint cited a specific incident for each charge. A three-member panel of the Board held a hearing and found Mack guilty of both charges and placed her registered nurse license on probation. Mack appealed to the full Board, which affirmed the panel's decision. Mack then appealed to the Madison County Chancery Court, which reversed the decision, finding that it was unsupported by substantial evidence and that it was arbitrary and capricious. The Board appealed.

## ISSUES

Whether the chancery court (1) erred when it found the Board's findings and decisions were not supported by substantial evidence, were arbitrary and capricious, and thus, violated Mack's due process rights and (2) abused its discretion by reweighing the evidence previously considered by the Board, thereby substituting its judgment for that of the Board.

## HOLDING

(1) Because the Board improperly used the settlement agreement as proof of guilt, because there was no evidence to support the findings of the VA's investigation, and because the allegedly improper documentation incidents were not substantial evidence, the chancery court properly held that the Board's decision was not supported by substantial evidence and was arbitrary and capricious. (2) Because the chancellor attempted to ascertain if there was substantial evidence to support the charges, not to reweigh the evidence, and because the chancellor cited the correct legal standard from the bench when making his ruling, the argument was without merit. Therefore, the Court of Appeals affirmed the judgment of the Madison County Chancery Court.

### **Affirmed - 2019-SA-01620-COA (June 15, 2021)**

Opinion by Chief Judge Barnes

Hon. James Christopher Walker (Madison County Chancery Court)

Brett B. Thompson-May for Appellant - Adrienne P. Parker for Appellee

Briefed by [Caroline Heavey](#)

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## **RAWAN HAYAF, LLP V. FRIERSON**

### **CIVIL - STATE BOARDS & AGENCIES**

**TAX LAW - APPELLATE REVIEW - STANDARD OF REVIEW** - Under Miss. Code Ann. § 27-77-7(5), the chancery court shall give no deference to the decision of the Board of Tax Appeals, the Board of Review or the Department of Revenue, but shall give deference to the department's interpretation and application of the statutes as reflected in duly enacted regulations and other officially adopted publications

**TAX LAW - SALES TAX - LIMITATION OF ACTIONS** - Miss. Code Ann. § 27-65-42(2)(a) provides that for any tax period where a taxpayer fails to file a return, his liability, including penalties and interest, may be assessed at any time

**TAX LAW - SALES TAX - PENALTIES FOR LATE RETURN** - Miss. Code Ann. § 27-65-39 provides that if any part of the deficient or delinquent tax is due to negligence or failure to comply with the provisions without intent to defraud, there may be added as damages ten percent of the total amount of deficiency or delinquency in the tax

**TAX LAW - INCOME TAX - RETURNS TO BE EXAMINED** - Miss. Code Ann. § 27-7-49(3) provides that only refusal or delay by the taxpayer in providing income-tax documentation for examination shall result in a prima facie assessment

## FACTS

Rawan Hayaf LLP ("Hayaf"), owned by Ali M. Saleh, Hayaf Saleh, and Sena Edha (collectively referred to as "Saleh"), was created in June 2013. Hayaf operated a convenience store and gas station in Meadville. The Mississippi Department of Revenue ("MDOR") notified the appellants on June 13, 2016 that their records were being audited for taxes due to the State of Mississippi for the period from "June 1, 2013, through current period(s)." The notice advised them to "have available all records that prove income, deductions, exemptions, and credit necessary to determine their Mississippi tax liability." In May 2017, the MDOR assessed Hayaf sales tax in the amount of \$120,860 and prepaid wireless tax in the amount of \$3,175, for the audit period of June 1, 2013 through October 31, 2016. Ali M. Saleh was assessed \$11,096 in individual income tax for the audit period of January 1, 2013, through December 31, 2015 and Hayaf Saleh and Sena Edha were assessed \$17,226 in individual income tax for the same period. The auditor based the tax assessments on documentation such as: (1) the auditor's recapped daily and monthly sales sheets, based on the appellants' own records,

(2) the LLP's bank statements from 2015, (3) the 2015 general ledger, (4) 2015 purchase invoices, (5) monthly sales sheets for December 2014 through October 2016, (6) daily sales sheets for the audit period, (7) vender verification from third parties for gas purchases and sales, and (8) income-tax return information. According to the MDOR, much of the taxpayers' records were "sporadic and incomplete, therefore, the auditor had to use those records that were complete to calculate an average daily sales amount of \$2,801.66. Additionally, the auditor could not tie the provided sales tax returns to the taxpayers' bank statements so additional records were requested and never provided. Thus, the MDOR's sales tax findings were entitled to a presumption of prima facie correctness under Miss. Code Ann. § 27-65-37(1). The appellants, however, did not challenged this presumption of correctness on appeal except with regard to the assessments of individual income tax. Hayaf and Saleh filed an appeal with the MDOR's Board of Review, and a hearing was conducted in which the Board granted them two additional weeks to provide documentation to refute the MDOR's findings. However, after the taxpayers provided no documentation, the Board of Review affirmed and upheld the tax assessments. Hayaf and Saleh appealed the decision to the Board of Appeals which also affirmed the assessments. Hayaf and Saleh then filed an appeal with the chancery court. The MDOR filed a motion for summary judgment, attaching exhibits of the notices and the Appellants' responses to the MDOR requests for admission. The chancery court subsequently denied the taxpayers' request for additional time for discovery and granted the MDOR's motion for summary judgment. Hayaf and Saleh appealed.

### **ISSUES**

Whether (1) Hayaf received proper notice of the sales tax audit; (2) Hayaf received proper notice of the prepaid wireless tax audit; (3) there was a genuine issue of material fact whether the Card Reader in Dispenser Fuel Pump System ("CRIND") transactions were included in the MDOR's sales tax calculations; (4) there was insufficient evidence to support the MDOR's assessment of penalty and interest; and (5) there was insufficient evidence to support the individual income tax assessments.

### **HOLDING**

(1) Because the MDOR left the ending date open to allow the auditors time to complete the audit and to bring the taxpayers up to date on their tax liabilities, and because this procedure was within the meaning of the statute, Hayaf was properly notified of the sales tax audit. (2) Because Hayaf's failure to register and remit prepaid wireless taxes was discovered during the audit, placing it within the statutory provision and eliminating the limitations period on the prepaid-wireless audit, Hayaf was properly notified of the audit in accordance with Miss. Code Ann. § 27-65-42(2)(a). (3) Because Hayaf offered only bare assertions that the audit incorrectly included the CRIND transactions, the audit papers must have been assumed trustworthy and correct under applicable law. (4) Because the statutory language in Miss. Code Ann. §§ 27-65-39 and 27-7-51(6)(c) granted the commissioner the discretion to impose penalties and interest as damages, the chancery court did not err in upholding the MDOR's tax assessments, which included penalties and interest. (5) Because the taxpayers failed to show that a genuine dispute existed regarding the correctness of the income tax assessments once the presumption of prima facie correctness arose, there was no merit to Saleh's claims on this issue. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Chancery Court.

**Affirmed - 2019-SA-01600-COA (June 15, 2021)**

Opinion by Chief Judge Barnes

Hon. Denise Owens (Hinds County Chancery Court, First Judicial Dist.)

James Gary McGee Jr. for Appellants - Matthew Timmons Henry & John Stewart Stringer for Appellee

Briefed by [Cecelia Hurt](#)

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**ROBERTS V. CONNER**

**CIVIL - CUSTODY**

**FAMILY LAW - CUSTODY - VISITATION** - Visitation is a matter within the chancellor's sound discretion, and the chancellor is charged with fashioning a visitation schedule that is in the best interests of the children

**CIVIL PROCEDURE - RES JUDICATA - IDENTITIES** - For the bar of res judicata to apply, four identities must be present: (1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom a claim is made; The absence of any one of these four identities is fatal to the defense of res judicata

**EVIDENCE - HEARSAY - INADMISSIBILITY** - Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted and is inadmissible unless the statement fits within an exception provided for in Miss. R. Evid. 803 or 804

## **FACTS**

After a divorce action, Randy Lafayette had custody of his daughter, Laura. Randy subsequently died unexpectedly. After Randy's death, his close friends Ezra and Kristina Conner filed a petition for emergency temporary custody which was contested by Laura's natural mother, Crystal Roberts. Randy's mother, Lucille Lafayette, joined the Conners in asking the chancery court to award custody of Laura to the Conners instead of Crystal. The Conners and Lucille argued that Crystal was unfit to have custody, citing an unstable living environment caused in part by Crystal traveling with her husband when he frequently did so for his job. The trial court appointed a guardian ad litem ("GAL"), however, the GAL did not visit Crystal's home in Florida. Crystal filed a motion for continuance, requesting that the GAL investigate her living arrangements. The court denied Crystal's motion. Preceding trial, Crystal's Florida residence incurred significant damage due to a hurricane causing Crystal and her husband to live temporarily in Mississippi. Crystal did not provide the trial court nor the GAL an address for her Mississippi rental home. The trial court found that the Conners overcame the natural parent presumption and awarded custody of Laura to the Conners. Crystal appealed.

## **ISSUES**

Whether the chancery court (1) erred in denying Crystal's motion for continuance; (2) applied the proper legal standard in awarding temporary and permanent custody of Laura to the Conners; (3) was barred by the doctrine of res judicata from considering the facts from Randy and Crystal's prior divorce trial in determining custody in this case; (4) erred in relying on "mistaken facts" and uncorroborated hearsay in finding Crystal unfit to have custody of Laura, or rather was the court's finding supported by credible evidence; (5) erred in imposing geographical restrictions on Crystal's visitation without making any specific findings as to the necessity of those restrictions, in light of the fact that Crystal's nuclear family had a permanent residence in Florida; and (6) properly apportioned the GAL fees between Crystal and the Conners.

## **HOLDING**

(1) Because Crystal suffered no manifest injustice or prejudice by virtue of the denial of her motion for a continuance, the chancery court did not err in denying her motion for a continuance. (2) Because the chancery court was provided overwhelming evidence of neglect and evidence of Crystal's unfitness based on four areas, the chancery court applied the proper legal standard in awarding temporary and permanent custody to the Conners. (3) Because it was appropriate for the chancery court to consider evidence prior to a divorce for the limited purpose of determining whether Laura had been educationally neglected, the chancery court was not barred by the doctrine of res judicata from considering the evidence. (4) Because the chancellor relied on the testimony of multiple witnesses and substantial evidence presented at trial in rendering his opinion on custody, the chancery court did not base its findings on mistaken facts or uncorroborated hearsay. (5) Because there was no evidence of suitable housing in Florida, and because Crystal had family living in Mississippi with whom she could stay when exercising visitation, the chancery court did not err in imposing geographical restrictions on visitation. (6) Because GAL fees are considered court costs, the chancery court properly apportioned the GAL fees between Crystal and the Conners. Therefore, the Court of Appeals affirmed the judgment of the Calhoun County Chancery Court.

**Affirmed - 2019-CA-01782-COA (June 15, 2021)**

Opinion by Judge Lawrence

Hon. Robert Q. Whitwell (Calhoun County Chancery Court)

Jeffrey Birl Rimes & Sarah Lindsey Hammons for Appellant - Kelly Gunter Williams & David L. Valentine for Appellees

Briefed by [Blake Tims](#)

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## WALMART ASSOCS. INC. V. CAULEY

### CIVIL - WORKERS' COMPENSATION

**WORKERS' COMPENSATION - DISABILITY BENEFITS - PERMANENT BENEFITS** - The concept of disability comprises a physical injury coupled with a loss of wage-earning capacity; therefore, a claimant can only receive permanent disability benefits for a body-as-a-whole injury if the injury resulted in a loss of wage-earning capacity

**WORKERS' COMPENSATION - LOSS OF WAGE-EARNING CAPACITY - FACTORS** - Courts consider multiple factors in determining loss of wage-earning capacity: (1) an increase in general wage levels, (2) increased maturity or training, (3) longer hours worked, (4) sympathy wages, (5) temporary and unpredictable character of post-injury earnings, (6) employee's inability to work, (7) employee's failure to be hired elsewhere and (8) the continuance of pain and other related circumstances

**WORKERS' COMPENSATION - PERMANENT DISABILITY - EMPLOYMENT** - In order to establish a prima facie case of permanent disability for a body-as-a-whole injury, a claimant must make reasonable efforts to obtain the same or similar employment; the determination of reasonableness of a claimant's job varies by situation and depends on a number of factors, such as job availability, economics of the economy, claimant's skills and the nature of the disability

### FACTS

Joyce Cauley was a longtime employee of Walmart. In 2008, she was hired as an assistant store manager at the Walmart in Laurel. On May 9, 2016, at the beginning of her shift, Cauley ordered her colleague to take down an endcap that had fallen twice the day before. As she instructed her colleague to take it down, the endcap fell on Cauley, and she then fell across a low pallet and onto the cement floor. Cauley notified Walmart of her injury and sought treatment the same day. Cauley was diagnosed with contusions to her shoulder and referred to Southern Bone & Joint Specialists where she was treated by Dr. Michael Patterson. Dr. Patterson recommended medication and physical therapy and determined Cauley was unable to work. For the next several months, she continued treatment at occupational therapy. Cauley returned to her role as assistant manager in September 2016, receiving the same pay as before her injury. Nevertheless, she was only able to return to work with accommodations, specifically through medical restrictions and occasional leaves of absence. Dr. Patterson conducted a muscle and nerve evaluation, which revealed a pinched nerve in the cervical spine. A functional capacity examination ("FCE") determined Cauley was able to perform just over seventy-six percent of the physical demands of her assistant manager job. Cauley's pain persisted into 2019, three years after her work injury. Cauley continued working as assistant manager, however, she struggled to perform basic duties at work. In addition to following medical restrictions, Walmart allowed Cauley to take several intermittent and personal leaves of absence. On two occasions Dr. Trussell completed FMLA forms outlining the terms of intermittent leaves of absence. Cauley was also granted personal leaves of absence to care for her brother, who struggled with severe long-term injuries from a near-fatal car wreck. Cauley took a personal leave of absence to care for her brother in early 2019. Walmart granted that leave, which was set to expire on May 15, 2019. She was scheduled to return to work on May 16. Cauley testified that she fully intended to return to work that day but experienced back pain that prevented her from doing so. She did not go to work until May 19, 2019. Manny Martinez, Cauley's manager, informed Cauley that she was being placed on inactive status for thirty days and that Walmart was replacing her. Martinez told Cauley she would have to search for new jobs on "the Wire," an online portal for Walmart employees. She would have thirty days to look for a position at another Walmart store before being terminated. When Cauley was placed on inactive status and lost her job as assistant manager, she requested to be reinstated to that position. When that effort was unsuccessful, she searched Walmart's online portal numerous times to find either a lower-level position at the Laurel store or any position at another location. Effectively locked out of Walmart's system, Cauley expanded her search and applied for at least fourteen various positions in a wide geographic area. She ultimately got a job at Lowe's, earning significantly less than her salaried position at Walmart. Cauley filed a petition to controvert, naming Walmart as her employer as Walmart had never fired her. The Administrative Judge ("AJ") determined that Cauley reached maximum medical improvement ("MMI") on December



7, 2018 and found that Cauley suffered a twenty-five percent loss of wage-earning capacity. She further found Cauley's job to be adequate and not a "mere sham." She awarded temporary total disability benefits for \$468.63 per week from the date of injury to the MMI date with credit for wages paid during that time and permanent partial disability benefits for \$158.04 per week beginning immediately after the MMI date. The Commission adopted and affirmed the AJ's decision. Walmart appealed.

### **ISSUES**

Whether (1) Cauley overcame the rebuttable presumption against loss of wage-earning capacity; (2) Cauley established a prima facie case of loss of wage-earning capacity; (3) substantial evidence supported the AJ's determination of twenty-five percent loss of wage-earning capacity; and (4) substantial evidence supporting the finding that Cauley's job search was adequate and not a "mere sham."

### **HOLDING**

(1) Because Cauley was only able continue her job at Walmart as she was granted accommodations, Cauley overcame the presumption against loss of wage-earning capacity by showing her post-injury Walmart wages were not a reliable indicator of her capacity to earn wages. (2) Because Cauley's post-injury wages were temporary and unreliable, and because Martinez admitted Cauley missed work because of her injury, there was substantial evidence that Cauley established a prima facie case of loss of wage-earning capacity. (3) Because finding of twenty-five percent loss of wage-earning capacity was supported by substantial evidence, the AJ did not err in finding that Cauley's loss of wage-earning capacity was supported by substantial evidence. (4) Because evidence clearly showed Cauley made reasonable efforts to find the same or other employment as she asked to be reinstated in her old position and applied to countless other jobs in surrounding areas, the AJ properly found substantial evidence to support that Cauley's job search was adequate and not a "mere sham. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

**Affirmed - 2020-WC-00929-COA (June 15, 2021)**

Opinion by Judge McCarty

Mississippi Workers' Compensation Commission

Casey Dale Younger & Nicholas Denson Garrard for Appellants - Taylor Rhue Brinkley for Appellee

Briefed by [Betsy Lee Montague](#)

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