

MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 11, 2022**COURT OF APPEALS - CIVIL CASES****FLOYD V. TUNICA CNTY.****CIVIL - WRONGFUL DEATH**

MISS. TORT CLAIMS ACT - GOVERNMENTAL ENTITY IMMUNITY - POLICE-PROTECTION EXEMPTION - Miss. Code Ann. § 11-46-9(1)(c) states that a police officer is immune from liability unless the officer acts in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury

CIVIL PROCEDURE - MOTION TO DISMISS - STANDARD OF REVIEW - A motion to dismiss is proper and should be granted if the plaintiff failed to prove one or more essential elements of his claim or if the quality of the proof is insufficient to sustain the burden of proof for the plaintiff

TORTS - STANDARDS - RECKLESS DISREGARD - Reckless disregard is a higher standard than gross negligence and embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act

FACTS

In April 2012, a man informed the front desk at the Hollywood Casino in Robinsonville that he heard crying coming from Room 139. After sending casino security to check the on the room around 6 a.m., the front desk received multiple calls from Brandi Floyd in Room 139. Brandi told the front desk she needed assistance, urging that she could not get “him” off her and that casino security had permission to enter the room. While waiting for the authorities to arrive, casino security officer Eric Brown noticed through Room 139’s window that a lady appeared to have specks of blood on her and that a man was in the room. Deputy Dornae Mosby, casino security, and Deputy Arthur Griham proceeded to Room 139. The two deputies heard glass break and ran to the front of the casino to find Nathaniel Yates outside the broken window of Room 139. Yates jumped back into Room 139 as Mosby drew his taser. Mosby, after telling Yates to “get down” and Yates refusing to listen, used the taser twice on Yates, but Yates was not affected. After other deputies arrived on scene, Yates jumped out the window a second time, and two other deputies used their tasers to subdue and arrest Yates. Deputies then entered Room 139 and found Brandi dead, with multiple stab wounds and a badly mutilated face. Travis Floyd, as a wrongful death beneficiary and on behalf of Brandi’s minor child, sued Tunica County (the “County”), alleging that the Tunica County Sheriff’s Department acted with reckless disregard and conscious indifference to the safety and well-being of his daughter and her unborn child. Before the trial, the County moved for summary judgment, arguing that it owed no duty to Brandi at the time of her death, and that the County was immune from liability under the police-protection exemption of the Mississippi Tort Claims Act (“MTCA”). The trial court denied the motion for summary judgment. During the trial, Travis’s expert witness testified that, given all the circumstances, the deputies should have used deadly force, and their failure to do so showed that they acted with reckless disregard. After Travis rested his case, the County moved for a Miss. R. Civ. P. 41(b) involuntary dismissal on the same grounds as its previous motion for summary judgment, and the trial court granted the motion. Travis appealed.

ISSUE

Whether the trial court erred in basing its dismissal of the case on the police-protection exemption of the MTCA.

HOLDING

Because the MTCA, in Miss. Code Ann. § 11-46-9(1)(c), grants police protection unless the officer acts with reckless disregard, because a motion to dismiss shall be granted if the quality of the proof does not meet the plaintiff’s burden of proof, and because there was substantial evidence to support the trial judge’s findings of fact and conclusion that the

deputies exercised reasonable judgment given the circumstances, the trial court was within its rights to grant the motion to dismiss. Therefore, the Court of Appeals affirmed the judgment of the Tunica County Circuit Court.

Affirmed - 2019-CA-01213-COA (Jan. 11, 2022)

Opinion by Presiding Judge Wilson

Hon. Linda F. Coleman (Tunica County Circuit Court)

John Kevin Cavender & George Chadwick Reeves for Appellant - Daniel Judson Griffith, Arnold Ursua Luciano, & Bethany Ann Tarpley for Appellees

Briefed by [William Doherty](#)

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GULF COAST TRANSIT SERVS. V. MISS. DEP'T OF EMP. SEC.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - STATE AGENCIES - DECISIONS - An administrative agency's decision is considered arbitrary and capricious if the decision is not based on substantial evidence

EMPLOYMENT LAW - EMPLOYEE RELATIONSHIP - FACTORS - Factors to be considered in determining whether an employee-employer or independent-contractor relationship exists include: (1) the extent of control exercised over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the skill required in the particular occupation; (4) whether the employer supplies the tools and place of work for the person doing the work; (5) the length of time for which the person is employed; (6) the method of payment, whether by time or by the job; and (7) whether or not the work is a part of the regular business of the employer

EMPLOYMENT LAW - EMPLOYEE RELATIONSHIP - EMPLOYEE STATUS - The relevant question in determining whether an individual is an employee or independent contractor is whether an employer has the right to exercise control over the work of an employee

FACTS

In 2013, Frederick Dawkins terminated his independent-contractor agreement with Gulf Coast Transit Services, LLC ("GCTS") and later filed for unemployment benefits. The Mississippi Department of Employment Security ("MDES") conducted an investigation after it found that there were no wages recorded for Dawkins. A representative of the MDES interviewed Dawkins and GCTS, and each completed questionnaires during the investigation. The MDES was presented with a copy of the "Independent Contractor Agreement" between GCTS and Dawkins. Based on its findings of the investigation, the MDES determined that an employer-employee relationship existed between Dawkins and GCTS. GCTS appealed to the administrative law judge ("ALJ"). In 2014, following a hearing where MDES representatives provided testimony, the ALJ affirmed the determination of the MDES and held that GCTS was required to register with the MDES and pay unemployment insurance tax on Dawkins. GCTS appealed. In 2016, the MDES Board of Review accepted the "Findings of Fact and Opinion" of the ALJ and affirmed the ALJ's decision. GCTS appealed this holding to the Hinds County Circuit Court, which affirmed the decision. GCTS appealed.

ISSUE

Whether the decision finding Dawkins an employee of GCTS rather than an independent contractor was based on substantial evidence.

HOLDING

Because Dawkins was not supervised while he was working, because he was not required to work certain hours nor required to accept a certain number of customers, and because he was compensated through his customers, among other pertinent factors, Dawkins's employment status constituted that of an independent contractor, and, therefore, the ALJ's decision finding him an independent contractor was in error. Therefore, the Court of Appeals reversed and rendered the judgment of the Hinds County Circuit Court.

Reversed & Rendered - 2020-CC-01315-COA (Jan. 11, 2022)

Opinion by Judge Greenlee

Hon. Isadore W. Patrick Jr. (Hinds County Circuit Court, First Judicial Dist.)

Donald C. Dornan Jr. & Stephanie Gee Beaver for Appellant - Albert B. White for Appellee

Briefed by [Abbey Bufkin](#)

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HARDIN V. HARDIN

CIVIL - DOMESTIC RELATIONS

SETTLEMENT AGREEMENT - INTENTION - CONSENT & VALIDITY - Announcing in open court the settlement of the dispute that is the purpose for the hearing, with recital of the terms of the settlement into the record, followed by an agreement to end the hearing, reflects an intention to be bound at that time

CIVIL PROCEDURE - AWARDS - ATTORNEY'S FEES - The Court of Appeals reviews a chancellor's award of attorney's fees in domestic-relations matters using an abuse-of-discretion standard, bearing in mind that chancellors are afforded broad discretion in these determinations

CIVIL PROCEDURE - MOTION PRACTICE - AMEND OR ALTER JUDGMENT - To succeed on a Miss. R. Civ. P. 59(e) motion, the movant must show: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent manifest injustice

FACTS

Lisa and Derry Hardin married in 1983. In June 2013, the couple separated, and Lisa filed a complaint for separate maintenance and temporary relief. In early 2014, the chancellor entered an agreed temporary order on Lisa's complaint. In 2015, Lisa filed a contempt motion and moved to amend her separate-maintenance complaint. Subsequently, Derry filed a fault-based divorce complaint against Lisa. In 2018, the chancellor granted Lisa's request for separate maintenance and dismissed Derry's fault-based divorce complaint. However, the chancellor postponed any ruling on the amount and form of Lisa's separate maintenance, her attorney's fees request, and her contempt claims against Derry. In 2019, the chancellor held a hearing on the parties' remaining issues. During the hearing, the chancellor read aloud the terms each party had agreed upon while in the court's presence. The terms provided that Derry would pay for specific structural fixes to the couple's marital home and that Lisa would be the beneficiary of Derry's life insurance policy. Neither party objected to the chancellor's reading of the terms. However, neither party ever signed an agreed order consummating the terms. The chancellor ordered Lisa to provide a statement of the payments paid towards her attorney's fees within fourteen days of the hearing, but neither Lisa nor her attorney did so. In January 2020, the chancellor entered the final judgment, which set forth those terms read aloud in the 2019 hearing and denied Lisa's request for attorney's fees. Lisa subsequently filed a motion to reconsider. In October 2020, the chancellor entered an order disposing of Lisa's motion. Lisa appealed. Furthermore, in his appellate brief, Derry requested attorney's fees and cost of appeal, which the Court of Appeals dismissed without prejudice because Derry failed to include any legal authority to support the request.

ISSUES

Whether the chancellor erred by (1) enforcing the parties' pretrial agreement; (2) denying Lisa's request for attorney's fees; and (3) denying Lisa's motion to reconsider.

HOLDING

(1) Because the chancellor announced in open court and dictated into the record the specific terms of the agreement, and because neither party objected to the terms, the chancellor did not err by enforcing the parties' pretrial agreement. (2) Because Lisa failed to provide a statement regarding her payments towards her attorney's fees, the chancellor was unable to accurately determine Lisa's remaining balance of attorney's fees; thus, the chancellor did not abuse her discretion or err in denying Lisa's request for attorney's fees. (3) Because there was not a change in controlling law, new evidence to consider, or a clear error of law, the chancellor did not err in denying Lisa's motion to reconsider. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court.

Affirmed - 2020-CA-01314-COA (Jan. 11, 2022)
Opinion by Judge Smith
Hon. Rhea Hudson Sheldon (Forrest County Chancery Court)
Phillip Lloyd Londeree for Appellant - Renee M. Porter for Appellee
Briefed by [Chandler Coleman](#)

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HAYS V. LAFORGE

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

TORTS - DEFAMATION - ELEMENTS - To establish a defamation claim, an ordinary plaintiff must show: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication

TORTS - DEFENSES TO DEFAMATION - QUALIFIED PRIVILEGE - In a defamation action, where qualified privilege exists to protect a defendant's statements, a presumption of the defendant's good faith in making the statements arises; to overcome the presumption, the statements must have been made with actual malice

TORTS - DEFAMATION - ACTUAL MALICE STANDARD - "Actual malice," for purposes of overcoming the presumption that a statement subject to a qualified privilege is presumed to be made in good faith, means that, at the time the comments were published, the speaker either knew them to be false or made them in reckless disregard of their truth

TORTS - FALSE LIGHT INVASION OF PRIVACY - ELEMENTS - One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed

TORTS - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS - ELEMENTS - To prevail on a claim for intentional infliction of emotional distress, the severity of the conduct at issue must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community

FACTS

William "Bill" Hays was chair of the language and literature division at Delta State University until 2014, when the University did not reappoint him as division chair. Controversy followed. People wrote dozens of letters and e-mails to University President William LaForge urging him to reverse the decision. Many wore T-shirts containing slogans in support of Hays, and some graduate students and an alumnus created a "Reinstate Bill Hays" Facebook page that featured cartoons that poked fun at the University's administration. Despite these efforts, the University declined to reverse its decision. Hays's emails to members of the University community and deposition testimony proved that Hays was complicit in the controversy. Additionally, LaForge received complaints regarding Hays's unprofessional behavior towards his colleagues. Provost Charles McAdams informed LaForge that Hays's reinstatement campaign had disrupted the unity in the language and literature division. LaForge addressed the division, including Hays, in August 2014. He warned Hays that he would be held accountable for his unprofessional behavior. Hays subsequently retired from the University and, in November 2015, filed suit. In March 2016, he filed an amended complaint, seeking to recover for slander, slander per se, false light invasion of privacy, and intentional infliction of emotional distress arising from statements that LaForge made in August 2014. LaForge answered and moved for summary judgment, claiming the alleged defamatory statements were not actionable as a matter of law, Hays could not prove actual malice, qualified privilege barred Hays's claims, and there was insufficient evidence to support Hays's claims of false light invasion of privacy and intentional infliction of emotional distress. The trial court granted LaForge's motion, finding that Hays

failed to prove that LaForge exceeded the scope of his qualified privilege or acted with actual malice. Hays filed a Motion for Relief from Judgment or to Alter or Amend Judgment, which the court denied. Hays appealed.

ISSUE

Whether the trial court erred by granting summary judgment in favor of LaForge.

HOLDING

Because LaForge did not make statements of false and defamatory fact concerning Hays, because qualified privilege barred Hays's claims, because Hays failed to show the existence of a genuine issue of material fact with respect to the "actual malice" element of his defamation claim, and because Hays failed to prove that LaForge acted with the requisite outrageous, atrocious, and utterly intolerable conduct sufficient to create a genuine issue of material fact with respect to his intentional infliction of emotional distress claim, the trial court did not err by granting summary judgment in favor of LaForge. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

Affirmed - 2020-CA-00639-COA (Jan. 11, 2022)

Opinion by Presiding Judge Carlton

Hon. Charles E. Webster (Bolivar County Circuit Court, Second Judicial Dist.)

Ronald W. Lewis for Appellant - J. Cal Mayo Jr. & Sarah Katherine Embry for Appellee

Briefed by [Idena Allen](#)

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JOHNSON V. STATE

CIVIL - OTHER

POST-CONVICTION RELIEF - EXPUNGEMENT - DISCRETION - Pursuant to Miss. Code Ann. § 99-19-71(2)(b), a court has the discretion to grant a request for expungement if the court determines that the applicant is rehabilitated from the offense which is the subject of the petition

CIVIL PROCEDURE - JUDGMENT - RELIEF - Pursuant to Miss. R. Civ. P. 60(b)(6), a trial court may set aside one of its previous orders for any reason justifying relief, even if no express findings under this rule are made

CIVIL PROCEDURE - JUDGMENT - RELIEF - On motion pursuant to Miss. R. Civ. P. 60(b)(1), the court may relieve a party from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party

FACTS

In 2007, Maurice Johnson pled guilty to one charge of marijuana possession. Johnson served his time for this sentence without incident. In 2018, Johnson was indicted for selling methamphetamine, as a second-time drug offender, which made him eligible for an enhanced penalty. After multiple continuances at the request of Johnson's prior counsel, Attorney Sanford Knott entered his appearance in the case in February 2020. Knott then filed a petition and a proposed order for expungement of the 2007 charge on March 10, 2020. Knott asserted that he sent a copy of both documents to the State. The State disputed it received a copy of the proposed order, while acknowledging receipt of the petition for expungement on March 16, 2020. In May 2020, the trial court signed the proposed expungement order after over two months had passed with no response from the State. However, the circuit clerk did not file the order of expungement until the day after the State had filed a motion to set the expungement order aside. According to the State, Knott filed the expungement order with the clerk only after communications with the State, which had expressed its opposition to the petition. However, by that time, the expungement order presumably had already been signed by the trial judge. The State indicated in its motion to set aside the expungement that Johnson had again been arrested in 2020 for three charges of conspiracy to possess controlled substances. The State's motion was made pursuant to Miss. R. Civ. P. 60(b)(1) and Miss. R. Civ. P. 60 (b)(6) and alleged that Knott knew of the 2020 arrest prior to his mailing the order of expungement for filing. Upon receiving the State's motion, the trial court immediately ordered a hearing on the matter. At the hearing, the State alleged that Knott's behavior was a misrepresentation in order to gain an advantage in another criminal action, while Knott expressed his adherence to the law as written. The trial judge stated that he

believed the actions of Johnson’s lawyer did not constitute an “utter misrepresentation.” However, the trial judge found that Johnson had a duty to disclose his pending felony charges when he made his expungement request. The trial court then set aside its prior order of expungement. Johnson appealed.

ISSUE

Whether the trial court erred in setting aside its order of expungement.

HOLDING

Because the facts in the record, including Johnson’s 2018 indictment, Johnson’s arrest in 2020 for three charges, and the timeline of Knott’s actions as Johnson’s attorney sufficed to show that the trial court’s order setting aside its order of expungement could have and should have been set aside under Miss. R. Civ. P. 60(b)(6) as the State requested in its original motion to set aside the order of expungement, the trial court did not abuse its discretion in vacating the order of expungement even though express findings under Miss. R. Civ. P. 60(b)(6) were not made. Therefore, the Court of Appeals affirmed the judgment of the Scott County Circuit Court.

Affirmed - 2020-CA-01395-COA (Jan. 11, 2022)

Opinion by Judge Westbrook

Hon. Brian Kennedy Burns (Scott County Circuit Court)

Sanford E. Knott for Appellant - Allison Kay Hartman (Att’y Gen. Office) for Appellee

Briefed by [Marianna Nichols](#)

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JOWETT V. SMBD, INC.

CIVIL - CONTRACT

CIVIL PROCEEDURE - RES JUDICATA - BARRED CLAIMS - The doctrine of res judicata bars parties from litigating claims within the scope of the judgment in a prior action, including claims that were made or should have been made in the prior suit

CIVIL PROCEDURE - RES JUDICATA - REQUIRED IDENTITIES - Application of the doctrine of res judicata requires the presence of four continuities between a formerly adjudicated case and the case at hand: identity of the (1) subject matter of the action; (2) cause of action; (3) parties to the cause of action; and (4) quality or character of a person against whom the claim is made

CIVIL PROCEDURE - RES JUDICATA - IDENTITY OF PARTIES - The Supreme Court has repeatedly held that strict identity of parties is not necessary for res judicata to apply; a defendant who was not a party to the original action can assert res judicata so long as it is in privity with a named defendant in the original action

FACTS

In 1994, Juliet Lawson Jowett and Richard Scruggs, with others, formed the law firm of Scruggs, Millette, Lawson, Bozeman, & Dent, P.A. (“SMLBD”) of which Jowett owned eight percent of the shares. During her tenure, Jowett primarily handled cases concerning occupational hearing loss (“OHL”) and hand-arm vibration (“HAVS”); her employment agreement with SMLBD (“Agreement”) granted her one-third of the net fees earned in OHS/HAVS cases. Jowett later opened her own office and performed no further work for SMLBD but did continue to receive her salary and other benefits. In 1998, Jowett was officially terminated, and the firm rebranded as Scruggs, Millette, Bozeman & Dent, P.A. (“SMBD”). Subsequently, in 1999, Jowett filed suit against Scruggs and SMLBD, claiming improper expulsion as a firm shareholder and seeking compensation for the value of her shares and the undistributed income owed to her under the Agreement. The chancery court awarded Jowett approximately \$420,000, which was affirmed on Jowett’s appeal. In 2014, Jowett filed a new complaint against Scruggs and SMBD, alleging fraudulent concealment of additional OHS/HAVS settlements for which she was entitled compensation under the Agreement. SMBD and Scruggs asserted the doctrine of res judicata as an affirmative defense and moved for summary judgment which the chancery court granted. Jowett appealed.

ISSUE

Whether the chancellor erred in granting summary judgment on the basis of res judicata.

HOLDING

Because Jowett’s complaints filed in both her first chancery action and in the 2014 suit specifically asserted claims to proceeds from OHL/HAVS settlements and judgments, and because SMBD’s status as the successor to SMLBD clearly placed it “in privity” with SMLBD, the four identities of res judicata were presented, and the chancellor properly granted Scruggs and SMBD’s motion for summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2020-CP-00348-COA (Jan. 11, 2022)

Opinion by Presiding Judge Wilson

Hon. Michael H. Ward (Jackson County Chancery Court)

Pro se for Appellant - J. Cal Mayo Jr. & Sarah Katherine Embry for Appellees

Briefed by [Katharine Van Pelt](#)

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OKHUYSEN V. CITY OF STARKVILLE

CIVIL - REAL PROPERTY

PROPERTY - PUBLIC MENACE - COSTS & PENALTIES - Miss. Code Ann. § 21-19-11(1) authorizes a municipal governing authority to hold a hearing and adjudicate a property to be a menace to the public health, safety, and welfare of the community; if the property is deemed a public menace, and if the owner does not clean the land himself, the city may proceed to clean the land and assess the owner for the cleanup costs and a penalty

CONSTITUTIONAL LAW - SEARCH & SEIZURE - BREADTH OF PROTECTIONS - Miss. Const. art. III, § 23 provides that the people shall be secure in their persons, houses, and possessions from unreasonable seizure or search; the protection afforded by this section is somewhat broader than the Fourth Amendment to the U.S. Constitution because it protects all of the people’s possessions, not just their papers and effects

CONSTITUTIONAL LAW - SEARCH & SEIZURE - BREADTH OF PROTECTIONS - The protections of Miss. Const. art. III, § 23 apply to all the land owned by the person searched and makes no exception for open fields; the primary question under § 23 is whether the official who conducted the search committed a trespass in going on the lands of the defendant

PROPERTY - TRESPASS - INTENT - A common-law trespass is an entry upon the land of another without a license or other right for one’s own purpose; the requisite intent for a trespass is an intention to enter upon the particular piece of land in question, irrespective of whether the actor knows or should know that he is not entitled to enter, even if the trespasser has a good-faith belief that he has a right to enter the land

CONSTITUTIONAL LAW - SEARCH & SEIZURE - CONTROLLING LAW - A municipal ordinance cannot authorize a search that the Mississippi Constitution prohibits; the validity of a search must be determined based on Miss. Const. art. III, § 23 and Supreme Court decisions interpreting it, not by reference to municipal ordinances

EVIDENCE - WARRANT REQUIREMENT - ADMINISTRATIVE INSPECTIONS - The warrant requirement of Miss. Const. art. III, § 23 applies to administrative inspections intended to verify compliance with municipal health codes or building codes

FACTS

Walter Okhuysen owns vacant property in Starkville. In January 2019, Jeff Lyles, a code enforcement officer for the City of Starkville (the “City”), went onto Okhuysen’s property without Okhuysen’s consent and without a warrant in order to investigate possible violations of the Starkville Code of Ordinances (the “City Code”). While on the property, Lyles took pictures evidencing alleged violations, including an abandoned truck, various scattered debris, and overgrown vegetation. The City subsequently sent Okhuysen a letter notifying him that his property was in violation of the City Code and that he had ten days to bring his property into compliance. In March 2019, Lyles, in his official capacity, filed

a complaint against Okhuysen in municipal court, alleging that Okhuysen had unlawfully and willfully violated the City Code. He was subsequently found guilty of ordinance violations and received a fine. The City then sent Okhuysen another letter, again alleging that his property was in violation of the City Code. This second letter was largely identical to the original letter, with the addition of language stating that the property could fall subject to Miss. Code Ann. § 21-19-11 as a public menace. The City’s Board of Aldermen (the “Board”) held a public hearing in November 2019 and subsequently voted to declare the property a public menace and ordered that Okhuysen had until January 2020 to clean the property. If Okhuysen failed to do so, the City would take steps to clean the property and assess Okhuysen for the cleanup costs and a penalty consistent with Miss. Code Ann. § 21-19-11(1). Okhuysen appealed the Board’s decision to the circuit court, which affirmed the Board’s decision. Okhuysen appealed.

ISSUE

Whether the circuit court erred in holding that the evidence used in the adjudication of Okhuysen’s property as a public menace was not obtained in violation of Miss. Const. art. III, § 23.

HOLDING

Because a municipal ordinance cannot authorize a search that the Mississippi Constitution prohibits, because a warrant was required for the administrative inspection conducted upon the property, because the plain-view argument was not properly raised by the City and lacked support in the record, because the City should not have been able to declare Okhuysen’s property a public menace based on evidence that the City’s own agent obtained in violation of the Mississippi Constitution, and because the City never argued that the good faith exception to the exclusionary rule applied, Lyles committed a trespass by entering and inspecting Okhuysen’s property without permission or a warrant, and the circuit court erred in holding that the evidence used in the adjudication of the property as a public menace was not obtained in violation of Miss. Const. art. III, § 23. Therefore, the Court of Appeals reversed and rendered the judgment of the Oktibbeha County Circuit Court.

DISSENT

Presiding Judge Carlton disagreed that the Board erred in relying on the evidence obtained by Lyles in adjudicating Okhuysen’s property to be a public menace. She argued that, under the plain view doctrine, Lyles was substantiated in going onto Okhuysen’s land without a warrant to conduct the inspection. Further, she argued that the evidence Lyles obtained should not have been subject to the exclusionary rule in this civil proceeding, and, even if it were, the evidence should have been excepted from the exclusionary rule under the good faith exception to that rule. Therefore, she would have affirmed the circuit court’s order affirming the Board’s decision, dismissing Okhuysen’s appeal.

Reversed & Rendered - 2020-CA-00662-COA (Jan. 11, 2022)

Opinion by Presiding Judge Wilson - Dissent by Presiding Judge Carlton
Hon. Lee J. Howard (Oktibbeha County Circuit Court)
Gary Goodwin for Appellant - Christopher James Latimer for Appellees
Briefed by [John C. Nelson, Jr.](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

TANNER V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - DISMISSAL - EVIDENTIARY HEARING - Pursuant to Miss. Code Ann. § 99-39-11(2), a circuit court may summarily dismiss a post-conviction relief motion without holding an evidentiary hearing if it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief

POST-CONVICTION RELIEF - EVIDENTIARY HEARING - REQUIREMENT - When the only support the defendant offers in support of a PCR motion is his own affidavit and it is contradicted by unimpeachable documents in the record, the Court has held that an evidentiary hearing is not required; however, when the movant attaches an affidavit of another who supports the allegation, the trial court may be required to conduct an evidentiary hearing

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - A guilty plea is binding if entered voluntarily, knowingly, and intelligently, and the standard is met if the defendant is advised concerning the nature of the charge against him and the consequences of the plea

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - An allegation that the defendant pled guilty in response to counsel's mistaken advice may vitiate a guilty plea because it indicates the defendant may not have been fully aware of the consequences of the plea

POST-CONVICTION RELIEF - EVIDENTIARY HEARING - ERRONEOUS INFORMATION - Erroneous information concerning parole and sentencing at least entitles the petitioner to an evidentiary hearing on whether he or she relied on the erroneous information in making his or her guilty plea

FACTS

In March 2018, Markey Tanner pled guilty to two felonies: driving under the influence (“DUI”) causing disfigurement or death and leaving the scene of an accident. The trial court accepted Tanner’s guilty plea, sentencing him to twenty-five years in custody, with ten years suspended and fifteen years to serve for his DUI conviction, and twenty years in custody for his conviction of leaving the scene with five years of post-release supervision. The trial court ordered both sentences to run concurrently for a total of twenty years’ incarceration and five years’ post-release supervision. In June 2020, Tanner filed a motion for post-conviction relief (“PCR”) asserting that his guilty plea was involuntarily entered and that he had received ineffective assistance of counsel. Specifically, Tanner alleged that his counsel provided him with erroneous information which included an assurance that the trial judge had agreed that if Tanner pled guilty, Tanner would receive a two-year sentence. To support his claim, Tanner attached an affidavit from his mother to his PCR motion, which stated that she overheard Tanner’s counsel inform Tanner that the trial judge had agreed to sentence Tanner to fifteen years with ten years suspended, two years to serve, and three years of post-release supervision if Tanner pled guilty. The trial court denied Tanner’s PCR motion without holding an evidentiary hearing on his claims. As to Tanner’s claim that his plea was involuntary, the trial court explained that Tanner failed to provide any evidence to support his claim and that his testimony under oath at his sentencing hearing contradicted his PCR claims. As to Tanner’s claim of ineffective assistance of counsel, the trial court found no indication that Tanner’s counsel’s representation fell below an objective standard of reasonableness nor any evidence but for Tanner’s counsel’s errors, the result would have been different. Tanner appealed

ISSUES

Whether the trial court erred in denying Tanner’s PCR motion without holding an evidentiary hearing to determine whether (1) Tanner’s guilty plea was involuntarily entered and (2) Tanner received ineffective assistance of counsel.

HOLDING

(1) Because both Tanner and his mother provided affidavits asserting that Tanner’s counsel misinformed him as to the actual sentence he would receive if he pled guilty, and because the plea colloquy did not address or correct the issue of whether Tanner was advised that the trial judge agreed to a specific, lesser sentence if Tanner pled guilty, the trial court erred in denying Tanner an evidentiary hearing on whether his plea was involuntarily entered. (2) Because Tanner submitted his own affidavit, as well as an affidavit from his mother, stating that Tanner’s counsel informed him that he would receive a lesser sentence than the one he actually received if he entered a guilty plea, the trial court erred in denying Tanner an evidentiary hearing on his claim of ineffective assistance of counsel. Therefore, the Court of Appeals reversed and remanded the judgment of the Harrison County Circuit Court.

DISSENT

Judge Lawrence argued that precedent of appellate courts in Mississippi granted discretion to a trial court for a summary denial of a request for an evidentiary hearing when the plea petition and plea-hearing transcript “substantially contradict” the facts alleged in a PCR motion and accompanying affidavits. He argued that because the plea petition signed under oath and Tanner’s responses at the plea hearing made under oath proved that Tanner’s allegations were a sham, wholly

refuted, and substantially contradicted, the trial court did not err in denying Tanner’s request for an evidentiary hearing on his PCR claims.

Reversed & Remanded - 2020-CP-01123-COA (Jan. 11, 2022)

En Banc Opinion by Presiding Judge Carlton - Dissent by Judge Lawrence
Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)
Pro se for Appellant - Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee
Briefed by [Regan Monk](#)

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