

**MISSISSIPPI SUPREME COURT DECISIONS – MARCH 10, 2022****SUPREME COURT - CIVIL CASES****ELLIS V. ELLIS****CIVIL - DOMESTIC RELATIONS**

**CIVIL PROCEDURE - DISMISSAL WITH PREJUDICE - FURTHER ACTION** - Dismissal with prejudice bars any further action on the same claim or cause

**DOMESTIC RELATIONS - DENIAL OF DIVORCE - PROPERTY DIVISION** - A chancellor who denies a divorce is without authority to order a division of property

**FACTS**

About a year after Joe Ellis left the marital home in Mississippi and moved to Texas, Tammy Ellis filed for divorce in Mississippi. The chancery court dismissed with prejudice Tammy Ellis's claim and Joe Ellis's counterclaim for divorce, which neither party challenged or appealed. Joe subsequently filed for divorce in Texas. Tammy was served with process but did not participate in the Texas proceedings, and the Texas trial court entered a default judgment of divorce that divided the marital assets. Tammy appealed the judgment of divorce, arguing that the Texas trial court lacked personal jurisdiction as to the distribution of marital property or alimony because she had no minimum contacts with Texas. The Texas Court of Appeals held that Tammy waived her arguments on appeal by failing to appear before the Texas trial court. However, before the Texas Court of Appeals affirmed the Texas trial court's judgment, Tammy filed motions in a Mississippi chancery court requesting distribution of marital property and financial awards. The Mississippi chancery court found that it had personal jurisdiction and entered an order distributing marital assets and awarding alimony and attorney's fees pursuant to Tammy's motions. Joe appealed.

**ISSUE**

Whether the chancery court possessed jurisdiction to divide marital assets and make financial awards.

**HOLDING**

Because the chancery court dismissed the divorce with prejudice, it lacked jurisdiction to divide marital assets and make financial awards. Therefore, the Supreme Court reversed and rendered the judgment of the Madison County Chancery Court.

**SPECIAL CONCURRENCE**

Presiding Justice Kitchens wrote to point out the inconsistency of the court's holding with a previous case, where the court affirmed a chancellor's order to mediate despite the chancery court's prior dismissal with prejudice of a conservatorship petition involving the only claims before the court. Believing that the previous case was decided wrongly, he concurred with the majority's decision.

**Reversed & Rendered - 2020-CA-00691-SCT (Mar. 10, 2022)**

Opinion by Justice Chamberlin - Special Concurrence by Presiding Justice Kitchens

Hon. Robert George Clark III (Madison County Chancery Court)

John S. Grant IV & John S. Grant III for Appellant - Rick D. Patt & Alicia C. Baladi for Appellee

Briefed by [Katharine Van Pelt](#)

[Click here to view the full opinion](#)

## LAKE SERENE PROP. OWNERS ASS'N INC. V. ESPLIN

### CIVIL - REAL PROPERTY

**REAL PROPERTY - RESTRICTIVE COVENANTS - RESIDENTIAL USE** - Whether property use is considered residential turns on if the property is used as a place of abode, not the length of time the property is being used as a place of abode

**REAL PROPERTY - RESTRICTIVE COVENANTS - INTERPRETATION** - Restrictive covenants are subject to strict construction; in the case of ambiguity, a court must construe restrictive covenants most strongly against the party seeking the restriction and in favor of the party being restricted

**REAL PROPERTY - RESTRICTIVE COVENANTS - AMENDMENT** - Any new rule that conflicts with the rights vested to landowners through the covenants requires an amendment, absent language in the covenants to the contrary

### FACTS

Lake Serene Property Owners Association (“LSPOA”) enforced restrictive covenants that run with Lake Serene, a residential subdivision. While the covenants restricted the properties to residential use, they previously allowed property owners to rent out the property without any specified minimum rental period. After discovering that Clyde Delbert Esplin was renting out his property through the internet service Airbnb, LSPOA sent Esplin written notices that his actions violated its charter, bylaws, and covenants. Subsequently, it amended its bylaws through a board of directors resolution, which prohibited renting property for terms of less than 180 days. LSPOA filed suit seeking to prevent Esplin from listing the property on Airbnb. The trial court found that Esplin’s use of the property was residential and that the amended bylaws were invalid. LSPOA appealed.

### ISSUES

Whether the trial court erred by finding that (1) Esplin’s listing of the property was not a commercial use; (2) Esplin’s use of the property did not violate the covenants; and (3) the adoption of the property-use rules in the bylaws of the LSPOA were invalid because they constituted an unauthorized amendment to the covenants governing the LSPOA.

### HOLDING

(1) Because the property was being used as a place of abode through the rentals, and because all commercial activity and exchange of funds occurred online, the trial court did not err in finding that Esplin’s use of his property was residential rather than commercial. (2) Because the covenants did not specifically address short-term rentals, and because covenants must be construed in the light most favorable to the party being restricted, the covenants permitted the short-term rentals. (3) Because the rules enacted by the LSPOA conflicted with the rights vested to Esplin as a property owner, the trial court did not err in finding that rules to be invalid as an unauthorized amendment. Therefore, the Supreme Court affirmed the judgment of the Lamar County Chancery Court.

### CONCURRENCE IN PART & DISSENT IN PART

Justice Ishee argued that although the short-term rentals were residential, the covenants did not guarantee an unrestricted right to any residential use and did not mention the owner’s right to lease his property at all. Further, because the minimum lease term was reasonable and did not contradict any rights reserved by the property owners in the covenants, he would have found the amendments to be valid.

#### **Affirmed - 2020-CA-00689-SCT (Mar. 10, 2022)**

En Banc Opinion by Justice Chamberlin - Concurrence in Part & Dissent in Part by Justice Ishee

Hon. Deborah J. Gambrell (Lamar County Chancery Court)

Phillip Lloyd Londeree for Appellant - Lewie G. “Skip” Negrotto IV for Appellee

Briefed by [Carter Babaz](#)

[Click here to view the full opinion](#)

---

## *SUPREME COURT - ORDERS*

### **KNOX V. STATE**

#### **EN BANC ORDER**

#### **ORDER**

Steve Knox filed a Second Amended Motion for Leave to File Successor Petition for Post-Conviction Relief. Knox was convicted of capital murder in 1999 for the strangulation death of a woman committed during the commission of a robbery and was subsequently sentenced to death. Knox filed a direct appeal, but his conviction was affirmed. He further sought post-conviction relief, but the Supreme Court denied his motion. In his second petition for post-conviction relief, Knox asked for leave to proceed in the trial court on the grounds that he received ineffective assistance of trial counsel and ineffective assistance of first post-conviction relief counsel, that the State should be barred from seeking the death penalty against him due to his severe mental disorder and traumatic brain injury, and that cumulative error warranted relief. As to Knox's claims of ineffective assistance of counsel, the court held that Knox's claims, which were also raised by Knox in his first post-conviction relief motion, did not warrant an exception to the procedural bars because he failed to demonstrate constitutionally deficient performance by original post-conviction relief counsel. As to Knox's claim that he was of a class of persons who should be excepted from the death penalty eligibility due to his intellectual disabilities and a traumatic brain injury he suffered when he was younger, the Court held the claim was barred by the procedural bars and did not fall within any exception to the bars. As to Knox's claim that cumulative error warranted that he should have received a new sentencing hearing, the Court held that Knox presented no argument as to why the claim should be excepted from the procedural bars. Therefore, because the claims raised by Knox were procedurally barred and not excepted, the Court denied Knox's Second Amended Motion for Leave to File Successor Petition for Post-Conviction Relief.

#### **OBJECTION**

Presiding Justice Kitchens disagreed with the Court's finding that Knox's claims were procedurally barred and not excepted. He argued that because Knox supported his application thoroughly with affidavits and other evidence as required by the Uniform Post-Conviction Collateral Relief Act, Knox's claims were excepted from the procedural bars ordinarily applicable to a successive petition, and Knox was entitled to an evidentiary hearing. Therefore, he argued, that because Knox made a substantial showing of a denial of his state and federal rights to the effective assistance of trial counsel and post-conviction counsel at the guilt and penalty phases of his death penalty trial, the Supreme Court should grant Knox's application for leave to proceed with a motion for post-conviction relief on his claims of ineffective assistance of counsel.

**Denied - 2014-DR-00849-SCT (Mar. 8, 2022)**

En Banc Order by Justice Beam - Objection by Presiding Justice Kitchens

Briefed by [Regan Monk](#)

[Click here to view the full opinion](#)

---

## *SUPREME COURT - CRIMINAL CASES*

### **RAINEY V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL LAW - WITNESS INTIMIDATION - REQUIREMENTS** - Pursuant to Miss. Code Ann. § 97-9-113(1)(d), a person commits the crime of intimidating a witness if he intentionally or knowingly solicits, encourages, or requests a witness to provide false information intended to defeat or defend against an existing criminal charge or hinder or interfere an ongoing investigation of a criminal act

**CRIMINAL LAW - WITNESS INTIMIDATION - PROOF** - Miss. Code Ann. § 91-9-113(1)(d) does not require proof that the defendant intimidated, threatened, or harassed the witness, rather, only that the defendant knowingly solicited, encouraged, or requested that the defendant provide false information; Miss. Code Ann. § 97-9-113(3) does not require that the intimidation prove successful for the defendant to violate the statute

**CRIMINAL PROCEDURE - APPELLATE REVIEW - SUFFICIENCY OF EVIDENCE** - When reviewing a sufficiency-of-the-evidence challenge, the critical inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

**CRIMINAL PROCEDURE - SENTENCING - PROPORTIONALITY** - The *Solem* test for disproportionate sentencing gives three objective criteria to weigh: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions; failure to address one of the factors procedurally bars the claim

## **FACTS**

Courtney Rainey was a resident and employee of the City of Canton. In March 2017, Rainey supported a local candidate in the upcoming municipal elections. Seeking to register new voters, Rainey approached Emma Ousley at her apartment, where she met Ousley, Marvin Cain, and Red. After convincing the three of them to fill out voter registration forms with her assistance, Rainey gave them all ten dollars for a round of beer. Red then used the money to purchase beer for the group. Rainey encountered Ousley once more prior to the election and gave Ousley a ride to vote by absentee ballot. After Ousley voted, Rainey gave her ten dollars so she could purchase lunch. In early 2018, the Madison County District Attorney's launched an investigation into possible voter fraud in the elections. The investigators questioned Ousley about Rainey's registration visit and prepared a statement that Rainey had come to the apartments, called out for anyone who wanted to vote, and asked if anyone wanted to make some money. The statement also noted that Rainey had given Ousley, Cain, and Red ten dollars each for beer, rather than ten dollars total for the three of them. However, Ousley signed the statement. Shortly thereafter, Rainey came to visit Ousley to inquire about the investigation and what Ousley had told the investigators. Rainey was then indicted on two counts of voter fraud and witness intimidation. At trial, Ousley acknowledged that she lied to investigators when she told them that Rainey had given them each ten dollars to purchase beer. She also testified that she did not tell the investigators that Rainey had given her money for lunch after giving her a ride to vote. Regarding her subsequent encounter with Rainey, Ousley testified that Rainey did not intimidate her but simply asked what she had told the investigators. Ousley first stated that she told Rainey she was going to tell the investigators the truth, but then contradicted this statement by testifying that it was Rainey who told her to tell the truth. Ousley also testified that Rainey had visited her work location two or three times, but Ousley was not there. Ousley did not testify as to the purpose of these visits, but she thought that Rainey wanted to convince her to change her story. She further testified that it was unusual for Rainey to visit her home or her place of business and these visits had only started recently. At no point did Ousley explicitly testify that Rainey told her to provide false information to investigators. In fact, she testified that Rainey did not tell her to say anything and that Rainey only told her to tell the truth. The jury found Rainey guilty of witness intimidation and Rainey was sentenced to serve fifteen years with three years suspended and five years' probation. On appeal, the Court of Appeals reversed and rendered Rainey's conviction, holding that the conviction did not violate her First Amendment right to free speech, but there was not sufficient evidence to support the conviction. The Court Appeals reasoned that, because Ousley never testified that Rainey intimidated, threatened, harassed, or instructed her to give false statements, and because Ousley had repeatedly testified that Rainey told her to tell the truth, no rational trier of fact could have concluded that the State satisfied the elements of the crime charged beyond a reasonable doubt. Because the Court of Appeals reversed the conviction for insufficient evidence, it did not address Rainey's third issue on appeal, whether the sentence violated her Eighth Amendment right to be free from cruel and unusual punishment. The State petitioned for a writ of certiorari.

## **ISSUES**

Whether (1) sufficient evidence was presented to convict Rainey of the crime of witness intimidation under Mississippi Code Ann. § 97-9-113(1)(d) and (2) Rainey’s sentence violated the Eighth Amendment right to be free of cruel and unusual punishment.

### **HOLDING**

(1) Because intimidation, threats, or harassment are not required to support a conviction under the statute, because the defendant need not succeed in an attempt to intimidate the witness to be convicted under the statute, and because the jury determined that sufficient evidence reasonably supported each element of the indictment and jury instructions, there was sufficient evidence to support Rainey’s conviction. (2) Because Rainey failed to address all three *Solem* factors, and because the sentence was not grossly disproportionate to the crime charged, her punishment did not violate the Eighth Amendment. Therefore, the Supreme Court reversed the judgment of the Court of Appeals and reinstated and affirmed the judgment of the Madison County Circuit Court.

### **DISSENT**

Presiding Justice Kitchens argued that a rational juror could have found that Rainey did not solicit, encourage, or request Ousley to provide false information to the investigators. Moreover, he argued that the prosecutor’s statements in his closing argument were misleading because they gave the impression that intimidation was a necessary element of the crime and that the past interactions of Rainey and Ousley could not overcome the complete absence of proof that Rainey encouraged or requested Ousley to provide false information to the investigators. Therefore, the conviction should be reversed and rendered.

### **The Judgment of the Court of Appeals is Reversed. The Judgment of the Madison County Circuit Court is Reinstated & Affirmed - 2019-CT-01651-SCT (Mar. 10, 2022)**

En Banc Opinion by Justice Griffis - Dissent by Presiding Justice Kitchens

Hon. Dewey Key Arthur (Madison County Circuit Court)

E. Carlos Tanner III for Appellant - Barbara Byrd (Att’y Gen. Office) for Appellee

Briefed by [Morgan Jones](#)

[Click here to view the full opinion](#)

## **MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 8, 2022**

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

#### **ARCHER V. HARLOW’S CASINO RESORT & SPA**

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

**CIVIL PROCEDURE - ANSWERS - DEADLINES** - Miss. R. Civ. P. 12(a) requires a defendant to serve his answer to a complaint within thirty days of service of the summons and complaint upon him

**CIVIL PROCEDURE - EXTENSIONS - EXCUSABLE NEGLIGENCE** - Miss. R. Civ. P. 6(b)(2) provides a trial court the discretion to permit a party to serve an answer after the expiration of the thirty-day time period where the party’s failure to act was the result of excusable neglect

**CIVIL PROCEDURE - FAILURE TO DEFEND - ENTRY OF DEFAULT** - Pursuant to Miss. R. Civ. P. 55(a), when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default only in the absence of any response by the defending party

**CIVIL PROCEDURE - CLERICAL ERRORS - AUTHORITY** - A trial court clerk has the authority to correct clerical errors without an order from court

**CIVIL PROCEDURE - MOTIONS TO AMEND - PRO SE PARTIES** - If dismissal of a pro se complaint for failure to state a claim pursuant to Miss. R. Civ. P. 12(b)(6) is warranted, it should be without prejudice to allow the party to file an amended complaint

**CIVIL PROCEDURE - MOTIONS - DUTY OF MOVANT** - When a motion or other pleading is filed, it is the duty of the movant to obtain a ruling on the motion by the court; a motion that is not ruled upon is presumed abandoned

### **FACTS**

Mary Archer filed a complaint against Harlow’s Casino Resort and Spa (“Harlow’s Casino”) alleging fraud and bad faith and seeking damages as the result of a missing casino kiosk ticket. In her complaint, Archer claimed that while she was patronizing at Harlow’s Casino, she placed five hundred dollars on a kiosk ticket. Archer alleged that she misplaced the ticket and sought assistance from Harlow’s Casino in recovering it. The ticket was never found. Archer served Harlow’s Casino with process on March 9, 2020, days before the escalation of the COVID-19 pandemic. Thirty-one days later, on April 9, counsel for Harlow’s Casino entered an appearance, filed a motion seeking an extension of time to file an answer, and filed a motion to dismiss the complaint pursuant to Miss. R. Civ. P. 12(b)(6). In its motion for an extension of time, Harlow’s Casino asserted it needed more time to file an answer due to the travel and work restrictions imposed by the pandemic. Harlow’s Casino submitted that the motion for an extension was not being made for the purpose of delay, but was made based upon current assignments and the need for time to prepare a response. The trial court granted Harlow’s Casino’s motion and extended the time for Harlow’s Casino to file its answer. On April 13, four days later, Archer filed an application for an entry of default with the circuit clerk and the clerk entered default that same day. However, on April 14, the clerk explained to Archer over email that she made the filings in error because, on April 9, counsel for Harlow’s Casino had filed an entry of appearance, a motion for extension of time, and a motion to dismiss. On May 8, Harlow’s Casino filed its answer and asserted the affirmative defenses of failure to state a claim upon which relief may be granted pursuant to Miss. R. Civ. P. 12(b)(6) and failure to plead fraud with particularity pursuant to Miss. R. Civ. P. 9(b). Archer moved to strike Harlow’s Casino’s answer, arguing that the motions filed by Harlow’s Casino on April 9 were untimely pursuant to Miss. R. Civ. P. 12(a) and that Harlow’s Casino failed to show the requisite “excusable neglect” for obtaining an extension of time. Archer also filed a response to Harlow’s Casino’s motion to dismiss. In her response, she maintained that she stated a claim upon which relief may be granted and requested that the trial court grant her leave to amend her complaint pursuant to Miss. R. Civ. P. 15(a). The trial court granted Harlow’s Casino’s motion to dismiss, finding that Archer failed to state a claim for which relief could be granted and failed to plead fraud with particularity. Archer appealed.

### **ISSUES**

Whether (1) the trial court erred in finding that Harlow’s Casino demonstrated “excusable neglect” when seeking an extension to file its responses to Archer’s complaint; (2) the circuit clerk erred by removing the entry of default against Harlow’s Casino; (3) the trial court erred by dismissing Archer’s complaint without giving her a chance to amend her pleadings; and (4) the trial court erred by granting Harlow’s Casino’s motion to dismiss prior to addressing Archer’s motions.

### **HOLDING**

(1) Because COVID-19 restrictions had directly hindered the Casino’s ability to prepare its answer, the trial court did not abuse its discretion in determining that Harlow’s Casino’s failure to file its answer within the required thirty-day period constituted “excusable neglect.” (2) Because the circuit clerk made a clerical error in entering default against Harlow’s Casino when it filed responses prior to Archer’s application for entry of default, the circuit clerk was authorized to correct the error without an order of the court. (3) Because Archer was a pro se plaintiff, and because the trial court did not specify whether it was dismissing Archer’s complaint with or without prejudice, the trial court erred in dismissing her complaint for failure to state a claim without granting her leave to amend. (4) Because Archer failed to obtain a ruling from the trial court on her motions, the trial court did not err by granting the Casino’s motion to dismiss prior to addressing Archer’s motions. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Washington County Circuit Court.

#### **Affirmed in Part; Reversed & Remanded in Part - 2020-CP-00930-COA (Mar. 8, 2022)**

Opinion by Presiding Judge Carlton

Hon. Carol L. White-Richard (Washington County Circuit Court)

*Pro se* for Appellant - Cathy M. Beeding, Caroline Baker Smith, & Louis Frascogna for Appellee

Briefed by [Marianna Nichols](#)

[Click here to view the full opinion](#)



## ERVES V. HOSEMANN

### CIVIL - REAL PROPERTY

**EVIDENCE - EXPERT WITNESS - ADMISSIBILITY** - When determining whether expert testimony is admissible, trial judges should act as gatekeepers and must determine whether the proposed testimony meets the requirements of Miss. R. Evid. 702; although Miss. R. Evid. 702 lists experience as a way in which a witness may qualify as an expert, this does not mean that the witness must have experience testifying as an expert

**APPELLATE REVIEW - BRIEFS - CITING AUTHORITY** - Appellant's failure to cite any authority in their brief precludes appellate review pursuant to Miss. R. App. P. 28(a)(7)

**CIVIL PROCEDURE - EVIDENCE - VERDICT** - When determining whether a verdict is against the overwhelming weight of the evidence, a court accepts as true the evidence presented as supportive of the verdict

### FACTS

Carl and Dale Erves's ("the Erveses") ancestor, John Erves, owned over 200 acres of land in Section 8 and a portion of Section 7, Township 15 North, Range 5 East in Warren County, Mississippi. John donated two acres to Warren County to install a public road called Bovina Cutoff Road ("Bovina Road"), which runs north and south and has a curve that cuts through the Erveses' property. The Erveses presented a 1966 survey that showed that they owned a narrow strip of land, which measured approximately 150 feet on the west side of Bovina Road. In 1966, the Erveses' land was divided into ten parcels. In 1986, James Wilson bought Tract 4 of the Erveses' property. Tract 4 contained the curved portion of Bovina Road and the narrow strip of land on the west side of the road. Ronald Lampkin owned land that shared a common boundary with the Erveses' property. The border ran north and south, and the Erveses owned the land on the east side of the property line, and Lampkin owned the land on the west side. In April and May of 2016, the Hosemanns and the Gullets ("Hosemanns") purchased land from Lampkin and built homes on their respective properties. These properties were adjacent to and adjoined Bovina Road. Shortly thereafter, the Hosemanns obtained the necessary permits to build driveways connecting Bovina Road to their properties. Wilson did not object to the construction. In August 2016, Wilson deeded Tract 4 to Carl Erves, and in 2018, Carl quitclaimed the property to his cousin Dale Erves and himself. Although construction on the Hosemanns' driveways began before the Erveses came into possession of Tract 4, the Erveses claimed that the driveways encroached on their land. In July 2017, the Erveses filed a preliminary and permanent injunction to stop the Hosemanns from using their driveways and accessing their property from Bovina Road. The chancellor held that the Erveses failed to establish legal title to the property on the west side of Bovina Road, where the Hosemanns' driveways are located. The Erveses appealed.

### ISSUES

Whether the chancellor erred (1) by admitting the testimony of Hosemanns' two expert witnesses and (2) because his judgment was against the overwhelming weight of evidence.

### HOLDING

(1) Because Richard Tolbert and Marc Broome, the Hosemanns' expert witnesses, had extensive experience in surveying land, and because Miss. R. Evid. 702 required the court to look at the witnesses' experience in the subject matter rather than their experience in testifying as an expert, the chancellor did not err in allowing Tolbert and Broome to testify. (2) Because the Erveses did not provide any authority in support of their allegation pursuant to Miss. R. App. P. 28(a)(7), and because the Erveses rely on a 1966 survey which was inapplicable after the expansion of Bovina Road, the chancellor did not err in ruling against the Erveses. Therefore, the Court of Appeals affirmed the judgment of the Warren County Chancery Court.

**Affirmed - 2020-CA-00467-COA (Mar. 8, 2022)**

Opinion by Judge Westbrook

Hon. Bennie Le Nard Richard (Warren County Chancery Court)

Kenya Reese Martin for Appellants - Michael S. McKay & Kevin Earl Gay for Appellees

Briefed by [Chandler Coleman](#)

[Click here to view the full opinion](#)

## EVERETT V. DYKES

### CIVIL - PROPERTY DAMAGE

**APPELLATE PROCEDURE - MOTION FOR RECUSAL - APPEALS** - Miss. R. App. P. 48(B) requires a party appealing a trial court’s denial of a motion for recusal to file a petition in the Supreme Court along with a copy of the trial court’s order

**APPELLATE PROCEDURE - MOTION FOR RECUSAL - TIMING** - Pursuant to Miss. R. App. P. 48(B), if the trial court has ruled on a motion for recusal, or if after thirty days the trial court has not ruled on the motion, a party has fourteen days to file an appeal with the Supreme Court

**CIVIL PROCEDURE - MOTION FOR RECUSAL - TIMING** - Pursuant to Miss. Unif. Cir. & Cnty. R. 1.15, a party has thirty days to file a motion for recusal upon learning the identity of the judge who has been assigned to the case

### FACTS

After Moses Everett struck a cow while driving his automobile in Covington County, he filed a negligence suit against various defendants, including the Covington County Board of Supervisors (“Board of Supervisors”), for alleged property damage to his vehicle. Approximately four months after initiating the suit, Everett filed a motion seeking the recusal of the trial court judge, contending that the Board of Supervisors’ ability to disburse funds to the court created a conflict of interest. Everett never noticed the court for a hearing on his recusal motion, but during a motions hearing, Everett argued that his recusal motion should be heard before any of his other pre-trial motions. The trial court permitted Everett to proceed with his recusal argument but ultimately denied the motion. Everett then requested leave from the court to appeal the ruling, which the trial court granted, and all proceedings were stayed until the appeal was resolved. Later, the trial court again denied the motion for recusal. Everett appealed.

### ISSUE

Whether the trial court erred when it denied Everett’s motion for recusal.

### HOLDING

Because Everett did not include a transcript of the trial court’s denial of his motion for recusal in his appeal, and because Everett filed his appeal sixty-six days after the motion for recusal was filed, and not within the time limit outlined in Miss. R. App. P. 48(B), his appeal was procedurally barred. Therefore, the Court of Appeals dismissed Everett’s appeal for lack of appellate jurisdiction.

### **Appeal Dismissed - 2020-CP-01331-COA (Mar. 08, 2022)**

Opinion by Presiding Judge Carlton

Hon. Stanley Alex Sorey (Covington County Circuit Court)

*Pro se* for Appellant - William Robert Allen, Pamela Luckie Castle, Margaret Zimmerman Smith, Lance Wesley Martin, & Anna Little Morris for Appellees

Briefed by [John McDonald](#)

[Click here to view the full opinion](#)

## RIVES V. ISHEE

### CIVIL - CONTRACT



**CONTRACTS - BREACH - LATENT INJURY** - There is a three-year statute of limitations for causes of action for breach of contract but under Miss. Code. Ann. § 15-1-49(2), if a claim involves latent injuries, the cause of action does not accrue until the plaintiff has discovered or should have discovered the injury

**CONTRACTS - STATUTE OF LIMITATIONS - FAILURE TO PROSECUTE** - The statute of limitations is not tolled during a proceeding that is dismissed for failure to prosecute, regardless of whether the clerk, the judge, or a party initiates the dismissal

**CONTRACTS - BREACH - CAUSE OF ACTION** - The cause of action in a breach of contract case accrues at the time of the breach, not the time the damages from the breach occur

**CONTRACTS - QUANTUM MERUIT - APPLICABILITY** - The remedy of quantum meruit is applicable where there is no legal contract; when a contract does exist, the parties cannot abandon same and resort to quantum meruit

## **FACTS**

In 2014, brothers William and Richard Rives contracted with Jason Ishee to open a Georgia Blue restaurant on property the brothers owned. With this deal, Ishee and the Rives brothers created a joint company called R.I.R., LLC, to run the restaurant. The three partners signed an operating agreement and memorandum of understanding regarding the new company's duties and financial obligations. The Rives brothers alleged that they relinquished their lease and negotiated a new one for the restaurant, with the Rives brothers and Ishee each putting up \$75,000. The Rives brothers alleged that they offered to pay the \$75,000 both immediately after signing the necessary paperwork and over the course of the following months, but Ishee refused to take the money. In the spring of 2015, the restaurant opened. The Rives brothers, concerned after not seeing any money from the restaurant over a period of a few months, asked Ishee in August 2015 to look at the restaurant's finances. Ishee's lawyer refused, telling the brothers they could not look at the restaurant's finances since they had not contributed their \$75,000. After a few months, Ishee unilaterally dissolved R.I.R., LLC. In 2016, the Rives brothers filed a lawsuit against Ishee and the Georgia Blue parent company, but the suit was dismissed for want of prosecution, and there was no appeal. On April 5, 2019, the Rives Brothers again filed suit against Ishee and Georgia Blue, alleging that Ishee breached the contract between them by refusing to take the brothers' \$75,000 contribution, denying the brothers access to the restaurant's finances, and dissolving the joint company. The brothers sought a judgment for breach of contract and quantum meruit. Ishee responded with a motion to dismiss, arguing the second lawsuit was time-barred. The trial court ruled in favor of Ishee, holding that the lawsuit was time-barred. The dismissal of all claims was reduced to an order, and the Rives brothers unsuccessfully sought reconsideration. The Rives brothers appealed.

## **ISSUES**

Whether the appellants' (1) breach-of-contract claims were filed past the statute of limitations and (2) claim for quantum meruit was time-barred.

## **HOLDING**

(1) Because the Rives brothers admitted that there were no latent injuries, because there was no toll on the statute of limitations for the claims since the first suit was dismissed for want of prosecution, because denial of the Rives brothers' access to the restaurant's finances, and not the dissolution of the company, constituted the accrual of the claims, and because the second suit was not filed within three years of the accrual of the claims, the claims were time-barred. (2) Because the Rives brothers and Ishee had a contract for the Georgia Blue restaurant, the remedy of quantum meruit was inapplicable. Therefore, the Court of Appeals affirmed the judgment of the Madison County Chancery Court.

## **CONCURRENCE IN PART & DISSENT IN PART**

Judge Westbrook argued that the Rives brothers could not bring a suit against Ishee for wrongful dissolution until they received actual notice of the dissolution, which occurred on April 7, 2016, when Ishee filed the articles of dissolution. Since the Rives brothers filed a complaint within three years of April 7, 2016, and that complaint included the alleged wrongful dissolution claim, she argued that the complaint's wrongful dissolution claim was not time-barred.

### **Affirmed - 2020-CA-01328-COA (Mar. 8, 2022)**

En Banc Opinion by Judge McCarty - Concurrence in Part & Dissent in Part by Judge Westbrook

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

George Cayce Nicols for Appellants - C. Brent Jones for Appellees

Briefed by [William Doherty](#)

[Click here to view the full opinion](#)

---

## ***COURT OF APPEALS - POST-CONVICTION RELIEF***

### **CROCKETT V. STATE**

#### **CIVIL - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - GUILTY PLEA** - Miss. Code Ann. § 99-39-5(2) states that unless there is a statutory exception, a post-conviction relief motion after a guilty plea must be made within three years after entry of the judgment of conviction

**CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS** - A guilty plea will only be binding upon a defendant if it is voluntarily, knowingly, and intelligently entered, which means the defendant must know the elements of the charges against him, the nature and factual basis of the charges, and the consequences of the guilty plea

**POST-CONVICTION RELIEF - EVIDENTIARY HEARING - ISSUES OF FACT** - Trial courts enjoy wide discretion in determining whether an evidentiary hearing should be granted; an evidentiary hearing is not required when the defendant fails to demonstrate that there are unresolved issues of fact that could warrant relief

#### **FACTS**

A grand jury indicted Kendrick Crockett on two counts of forcible rape, one count of kidnapping, two counts of sexual battery, one count of house burglary, one count of motor vehicle theft, and armed robbery. In February 2011, Crockett pled guilty to two counts of forcible rape, two counts of sexual battery, and one count of house burglary, and received a sentence of thirty years' imprisonment for each rape conviction, thirty years' imprisonment for each sexual battery conviction, and ten years' imprisonment for house burglary. In May 2018, more than six and a half years after his guilty pleas, Crockett filed a post-conviction relief motion ("PCR"), claiming his guilty pleas were involuntary and that he had been denied due process. As a result, Crockett requested an evidentiary hearing. The circuit court denied Crockett's motions and found that his PCR motion was time-barred by the three-year statute of limitations. The circuit court also ruled that he had not met the burden of proof required to show that his plea was involuntary and that he had not sufficiently proved that an evidentiary hearing was necessary. Crockett appealed.

#### **ISSUES**

Whether the circuit court erred in (1) finding that Crockett's post-conviction relief motion was time-barred; (2) denying Crockett's post-conviction relief motion on the merits of his involuntary plea claim; and (3) denying Crockett's request for an evidentiary hearing.

#### **HOLDING**

(1) Because Crockett's post-conviction relief motion was not made within three years after entry of the judgment of conviction, the circuit court properly found that Crockett's post-conviction relief motion was time-barred. (2) Because Crockett acknowledged that he was voluntarily pleading guilty and waiving his rights when he signed his sworn petition and in the colloquy at his plea hearing, and because he presented no evidence of mental incapacity at the time he pled guilty, the circuit court properly denied Crockett's post-conviction relief motion on the merits. (3) Because the circuit court had discretion to determine whether an evidentiary hearing was necessary, and because Crockett failed to demonstrate that there were facts he would have presented that would warrant relief, the circuit court properly denied Crockett's request for an evidentiary hearing. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

**Affirmed - 2021-CP-00022-COA (Mar. 8, 2022)**

Opinion by Judge McDonald

Hon. Betty W. Sanders (Hinds Country Circuit Court, First Judicial Dist.)

---

## COURT OF APPEALS - CRIMINAL CASES

### HAMER V. STATE

#### CRIMINAL - FELONY

**EVIDENCE - ADMISSIBILITY - PROBATIVE VALUE** - A trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice

**EVIDENCE - SUFFICIENT EVIDENCE - ONE-CONTINUOUS-TRANSACTION** - Under Mississippi law, the one-continuous-transaction rule is used to determine whether the evidence establishes the requisite nexus between the killing and the underlying felony to constitute capital murder; the State has the burden to prove that the two crimes are connected in a chain of events and occur as part of the *res gestae*

**CRIMINAL PROCEDURE - JURY TRIAL - GOLDEN RULE ARGUMENTS** - Golden Rule arguments ask the jury to put themselves in the place of one of the parties and are prohibited

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PERMANENT INCORRIGIBILITY** - Under the *Miller* factors, a separate factual finding of permanent incorrigibility is not required for life-without-parole sentences to be imposed on a murderer under 18 years old

#### FACTS

After seeing three armed men outside his house in the early hours of the morning, Paul Koster called 911. The men told Koster they were FBI agents, and Koster opened the door. Koster was then shot to death. The men told Koster’s guest, Ayla Hopper, to get down on the ground, and they shot Hopper repeatedly. Koster’s surveillance camera caught the men on camera. Prior to leaving the scene, the 911 call recorded someone saying, “I don’t see no more guns,” and “Let’s go! Let’s go! We on camera.” It was later established that Nakero Hamer, Kaderis Hamer, and T.J. Hamer went into the home as Terrenz Mason acted as the lookout. After the three men returned, Mason testified that they brought back a rifle that they did not have when they left the car. Officers arrived at the scene, discovering the victims dead from multiple gunshot wounds. Investigator Rainey remembered that Koster was a confidential informant for Tennessee authorities in a federal investigation of Keith Hamer for suspected drug trafficking across state lines. Keith’s son, Nakero, was seventeen years old and worked as a “runner” for Keith, delivering drugs. Investigator Rainey contacted FBI Special Agents about the possible connection to Keith. The agents visited Keith while he was in federal custody and told him of the deaths of Koster and Hopper. Keith offered to call his son to prove that neither of them had anything to do with the deaths. Nakero denied involvement at first but later confessed to the crimes during a recorded phone call because he thought Koster was responsible for his father’s arrest. A warrant was issued, and Nakero was arrested. Nakero was indicted for two counts of capital murder and theft. The jury found Nakero guilty of two counts of capital murder. He was sentenced to life imprisonment without the possibility of parole for both counts. Nakero appealed.

#### ISSUES

Whether (1) the trial court erred in admitting the wiretapped phone calls into evidence; (2) there was sufficient evidence to support the underlying felony of armed robbery for Nakero’s capital murder convictions; (3) the state’s closing argument was an impermissible Golden Rule argument; and (4) the jury was properly instructed on *Miller* factors for juvenile offenders receiving life without parole sentences.

#### HOLDING

(1) Because the testimony and recorded calls were admissible as proof of motive and to tell the complete story to the jury, and because the prejudicial effects of the phone calls and testimony did not substantially outweigh its probative value, the trial court did not abuse its discretion in admitting the wiretapped phone calls into evidence (2) Because Mississippi follows the one-continuous-transaction rule, and because witnesses and testimony established that Nakero was present during the armed robbery and that a rifle was stolen from the home, there was sufficient evidence for a reasonable jury to find Nakero guilty of capital murder with the underlying felony of armed robbery. (3) Because the State did not ask the jurors to place themselves in the position of the victims under the specific circumstances of the crime in order to determine Nakero's guilt, the closing argument was not an impermissible Golden Rule argument. (4) Because Nakero did not object to the jury instructions at trial, and because a separate factual finding of permanent incorrigibility is not required, the jury was properly instructed on the *Miller* factors. Therefore, the Court of Appeals affirmed the judgment of the Tippah County Circuit Court.

### **CONCURRENCE**

Judge Westbrook argued that the State did not sufficiently prove that Nakero committed armed robbery. Based on the evidence presented, she argued that no rational juror could conclude that the State proved all the elements of the underlying armed robbery offense beyond a reasonable doubt, and the capital murder conviction should be reversed and remanded for sentencing for first-degree murder.

**Affirmed - 2019-KA-01633-COA (Mar. 8, 2022)**

Opinion by Judge McCarty - Concurrence by Judge Westbrook

Hon. John Kelly Luther (Tippah County Circuit Court)

John D. Watson & Jane E. Tucker for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [Marlee Russell](#)

[Click here to view the full opinion](#)

### **MISSISSIPPI CASES EDITOR**

**EMILY DUCK**

### **ASSOCIATE CASES EDITORS**

**GABRIELLE BEECH**

**CAROLINE HEAVEY**

**JOSHUA HOLMES**

**CECELIA HURT**

**BETSY MONTAGUE**

**BLAKE TIMS**

*Thank you for supporting the Mississippi Law Journal.*

Questions or comments: Emily Duck, [newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org)

All BriefServ subscribers traditionally receive access to our website with archived case briefs since January 2007.

Our BriefServ Archive is available to subscribers at <https://mississippilawjournal.org/briefserv/>. Currently, our digital database is still being updated with previous editions of the Newsletter. Requests for previous editions of the Newsletter not yet available in the BriefServ Archive can be made to Emily Duck,

[newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org). If you have questions about accessing or using the BriefServ website, please contact us at [support@mississippilawjournal.org](mailto:support@mississippilawjournal.org)