

MISSISSIPPI SUPREME COURT DECISIONS – AUGUST 25, 2022**SUPREME COURT - CIVIL CASES****MISS. DIV. OF MEDICAID V. YALOBUSHA CNTY. NURSING HOME****CIVIL - STATE BOARDS & AGENCIES**

PUBLIC WELFARE - NURSING FACILITIES - TAXES AND FEDERAL FUNDS - Pursuant to Miss. Code Ann. §§ 43-13-145(1)(a) and 43-13-145(4), nursing home facilities are taxed at the maximum rate allowed by federal law, and the state Medicaid division cannot impose an additional tax on nursing facilities as an assessment for payment of the state share match for upper payment limit federal funds

PUBLIC WELFARE - NURSING FACILITIES - INTERGOVERNMENTAL TRANSFERS - Nursing facilities that make intergovernmental transfers of the amount of the state's share of the upper payment limit cannot claim such transfers as allowable costs for reimbursement purposes

PUBLIC WELFARE - NURSING FACILITIES - REIMBURSEMENTS - A hospital-owned nursing facility cannot include a portion of the hospital's assessment cost for reimbursement purposes

ADMINISTRATIVE LAW - EQUITABLE ESTOPPEL - PRIOR ACCEPTANCE - An agency's prior acceptance of a hospital assessment as an allowable cost does not represent an affirmative representation by the state's Medicaid division for purposes of equitable estoppel

ADMINISTRATIVE LAW - MISTAKES OF LAW - CORRECTIONS - An agency may correct mistakes of law, even when a party relied to its detriment on the mistake

FACTS

The Mississippi Division of Medicaid ("DOM") and Yalobusha County Nursing Home ("YNH") disputed four costs submitted for reimbursement by YNH in its fiscal year 2013 Medicaid cost report. The Medicare Upper Payment Limits ("UPL") Program, a federal supplement payment program, allowed providers to receive the difference between what Medicaid paid for a particular service and what Medicare would have paid if the provider could pay the state's portion of the UPL payment. By paying the state's share, providers would be entitled to receive the federal portion of the UPL payment as reimbursement. However, under Miss. Code Ann. § 43-13-145(1)-(3), nursing facilities were taxed at the maximum rate under federal law, and as a result, the DOM could not impose any additional tax on nursing facilities to make all facilities in the state eligible for a UPL payment. Thus, the UPL program was not available for privately owned or state nursing homes, but only for county or other local government owned or operated nursing facilities, which were able to make intergovernmental transfers ("IGTs") in the amount of the state's share of the UPL payment that entitled them to reimbursement with federal funds. These IGTs were not considered a tax that would interfere with the six percent bed tax. Under the Mississippi State Plan, an agreement between the State and the Federal Government, all nursing facilities filed cost reports based on a standard year-end. The DOM used the cost report to determine the per diem rate that it would reimburse the provider. For fiscal years ("FY") 2011 and 2012, YNH reported its IGTs as taxes on its cost reports and the DOM accepted these reports, reimbursing YNH under the UPL program without raising issues with YNH's reporting.

YNH timely filed its FY 2013 cost report, and after filing, the DOM conducted a cost report review prior to rate determination to evaluate the necessity and reasonableness of facility costs in order to determine the allowable costs used in the calculation of the prospective per diem rate. The DOM initially approved of YNH's reporting of the IGT as a tax in its first and second desk reviews of the cost report. However, in its third desk review, the DOM removed YNH's UPL payment. YNH, through its accountant Richard Lefoldt, appealed the third desk review because the UPL payment had been allowed in the FY 2011 and FY 2012 cost reports, and since the DOM had changed its policy on this

issue, it argued the change should have been applied prospectively and not retroactively. In response, the DOM stated that it denied YNH's appeal because the State Plan stated that 100 percent of the calculated UPL would be paid to the non-state government owned or operated facilities, and Miss. Code Ann. 43-13-145 stated that the DOM should assess each hospital and nursing facility for the sole purpose of financing the state portion of the UPL Program. The DOM reasoned that including the IGT for the facility's UPL payment of reimbursable costs violated both state and federal law because the facility would receive state and federal funds to finance the facility's IGT. According to the federal Centers for Medicare and Medicaid Services, the state share of the nursing facility ("NF") did not qualify as a tax, as it was not paid by all NF providers and was considered a broad-based and uniform tax. The NF UPL match was different from the broad-based bed tax and the tax used to fund the state share of the hospital supplemental payments, which are paid by all hospitals. After the denial of its appeal, YNH requested an appeal and administrative hearing regarding the Amended III Desk Review. In the interim, YNH submitted an amended cost report. Then, the DOM stated that it had conducted Amended IV Desk Review. First, the DOM again disallowed the nursing home UPL payment. Second, the DOM disallowed the hospital assessment paid by Yalobusha Hospital, because it was not an allowable nursing home expense. YNH argued that the DOM had represented that the hospital assessment was allowed when it held a training seminar at the hospital and gave trainees a sample cost report that included the hospital assessment and advised trainees that this was an allowable cost. Third, the DOM adjusted the nursing home social services allocation costs because the amended hospital cost report submitted by YNH was not filed with the DOM's hospital program or with Medicare, and the DOM considered it unofficial. Lastly, the DOM removed the administrative and general costs in the cost report, reasoning that they were excess overhead from the disallowance of YNH's UPL assessment in the Amended III Desk Review.

YNH appealed the four adjustments the DOM made in the Amended IV Desk Review. YNH argued that the only adjustment that had been made in its amended cost report was to revise the allocation basis for social services, which resulted in an increase of \$36,448 in the social services costs allocated to YNH and a decrease in the same amount of social services costs allocated to Yalobusha Hospital. The effect of this change was only a decrease of \$1,495 in Medicare reimbursement to Yalobusha Hospital, but in order to file an amended cost report with Medicare, the provider was required to request a reopening of the finalized cost report and to show that a material error of at least \$10,000 had been made on the previous report. Thus, because the change only decreased the Medicare reimbursement by \$1,495, Medicare would not have accepted the amended cost report. YNH requested that the DOM accept the hospital cost report that was submitted as part of YNH's amended cost report, and the DOM denied YNH's appeal request. The hearing officer found that the DOM had committed no errors and that its determinations had been based on substantial evidence. YNH appealed the DOM's final order to the chancery court, which found that the DOM acted arbitrarily, capriciously, or unreasonably in each of its adjustments and ruled in favor of YNH on all issues. The DOM appealed.

ISSUES

Whether (1) the DOM properly corrected and disallowed on YNH's FY 2013 Medicaid Cost Report a line item of approximately \$1.1 million claimed by YNH as an allowable cost; (2) Yalobusha's Hospital allocation of a portion of its hospital assessment to the YNH was an allowable cost on the nursing facility's own FY 2013 Medicaid Cost Report; (3) the DOM properly disallowed the social services cost allocated by Yalobusha Hospital to YNH that did not match the cost numbers in the hospital's filed and audited Medicare cost report; and (4) the DOM correctly made an adjustment to the nursing home administrative and general expenses.

HOLDING

(1) Because the nursing home bed tax was set at the maximum rate allowed by federal law and no additional tax could be imposed on nursing home facilities as an assessment for payment of the state share match for the UPL funds, because the YNH's IGT was not a tax and therefore not an allowable cost because of the prohibition of using federal or state funds to finance YNH's IGT payment, because the UPL assessment related to the reasonable and necessary care of Medicaid beneficiaries and the IGT was an alternative way for long-term nursing facilities to pay the state share match for the UPL funds, because the UPL assessment was not broad based or uniformly imposed, because the IGT did not qualify as a healthcare-related tax, because the IGT was not a cost that was actually incurred and could not be considered a tax for reimbursement purposes since YNH received approximately four times what it paid in the IGT, and because the DOM did not establish a norm by accepting prior cost reports that included the nursing home UPL assessment, the DOM's decision to disallow the nursing home UPL assessment on YNH's FY 2013 cost report was supported by

substantial evidence. (2) Because the YNH presented no credible evidence specifically showing that the hospital assessment related to patient care at YNH, because an agency may correct mistakes of law even when a party relied to its detriment on the mistake, and because the training seminar held by the DOM did not constitute an affirmative representation that the hospital assessment was an allowable cost, the DOM's disallowance of the hospital assessment on YNH's cost report was reasonable and not arbitrary or capricious. (3) Because YNH submitted an unofficial hospital cost report in lieu of the finalized and audited hospital cost report that was available, the DOM's decision to adjust YNH's allocated costs to match the filed and audited costs reported by the hospital to Medicare instead of the unofficial report was not arbitrary or capricious. (4) Because the DOM disallowed YNH's UPL assessment on the cost report, and because the additional administrative and general costs related to the inclusion of the UPL assessment in the cost report, the DOM appropriately removed the nursing home administrative and general expenses from the cost report. Therefore, the Supreme Court reversed and rendered the judgment of the Hinds County Chancery Court.

DISSENT

Justice Griffis argued that the DOM's adjustments were arbitrary and capricious, and that the chancery court's judgment should have been affirmed. He found that the DOM provided no reason for its departure from its established policy of accepting the UPL tax as an allowable cost, and therefore its decision to disallow the UPL tax in its cost report was arbitrary and capricious. Similarly, he found that the DOM's decisions with regard to the other costs were not based on established policy, were arbitrary and capricious, and the DOM was equitably estopped from making certain arguments regarding the hospital assessment since it held a training seminar that informed YNH accountants that the hospital assessment was an allowable cost. Therefore, he would have affirmed the judgment of the chancery court.

Reversed & Rendered - 2021-SA-00030-SCT (Aug. 25, 2022)

Opinion by Presiding Justice King - Dissent by Justice Griffis

Hon. Denise Owens (Hinds County Chancery Court)

Janet McMurtray, T. Hunt Cole Jr., & Samuel Philip Goff (Att'y Gen. Office) for Appellants - Thomas L. Kirkland Jr., Matthew David Sitton, & Allison Carter Simpson for Appellee

Briefed by [Oliver Samples](#)

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

STATE V. LONG BEACH HARBOR RESORT, LLC

CIVIL - STATE BOARDS & AGENCIES

STATE BOARDS & AGENCIES - SECRETARY OF STATE - TRUSTEE OF PUBLIC TIDELANDS - Pursuant to Miss. Code Ann. § 29-1-107(2)(a), the Secretary of State, with approval from the Governor, may rent or lease surface lands, tidelands, or submerged lands owned or controlled by the State lying in or adjacent to the Mississippi Sound or Gulf of Mexico

STATE BOARDS & AGENCIES - PUBLIC TRUST TIDELANDS - LIMITS ON AUTHORITY - Pursuant to Miss. Code Ann. § 29-1-1(1), use and possession of the lands may be reassigned by act of the Legislature or by interagency conveyance where each agency has statutory authority to acquire and dispose of land

CONTRACTS - THIRD PARTY ACTIONS - RATIFICATION - Ratification occurs by (a) manifesting assent that the act shall affect that person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents and results in an immediate effect on legal relations between all involved parties and recasts those legal relations as they would have been had the agent acted with actual authority

FACTS

In 2010, Long Beach Harbor Resort, LLC ("the Resort") entered into an Amended and Restated Lease Agreement ("the Resort Lease") with the City of Long Beach ("the City") granting the Resort exclusive gaming rights to two parcels of land. In 2011, the City entered into a Boundary Agreement with the State, through the Secretary of State, delineating the Public Trust Tidelands within the Long Beach Harbor and a Tidelands Lease authorizing the City to use the tidelands defined by the Boundary Agreement but located within the harbor. The Tidelands Lease included a portion of the land

leased to the Resort in the Resort Lease, and the Tidelands Lease authorized the City to use the leased area in the tidelands for harbor and development uses only. In 2017, the Resort entered into an Option Agreement with the Secretary of State for a Public Trust Tidelands Lease to agree on the terms of a tidelands lease for the portion of the land the Resort was leasing from the City that was located on the tidelands. In order to enter into the proposed tidelands lease, the State required that the Resort cancel or terminate any existing tidelands lease with the City. The Option Agreement expired the following year, and the Secretary of State and the Resort never entered into a tidelands lease. In January 2019, the Resort was granted gaming site approval by the Mississippi Gaming Commission. On September 10, 2019, the Secretary of State sent the Resort a proposed tidelands lease with the requirements that the tidelands property at issue be removed from any prior leases and that the Resort provide evidence of the City's approval of a direct, gaming-related lease between the Resort and the Secretary of State. On September 27, 2019, the Resort filed a declaratory judgment action against the Secretary of State asking the chancery court to declare that the Resort did not need a tidelands lease. Approximately one month later, the Secretary of State responded and argued that the Boundary Agreement was binding and required that the Resort have a lease and any acquisition of the tidelands by the Resort was void as the property was held in trust by the State. In 2020, the Resort filed three motions for summary judgment, and the chancery court granted the third motion, finding that the Resort had a valid and enforceable property right. The State appealed.

ISSUE

Whether the State, through its trustee, the Secretary of State, explicitly ratified the Resort Lease entered into between the Resort and the City.

HOLDING

Because the State partially assigned its tidelands leasehold right to the City in both the Boundary Agreement and the Tidelands Lease, and because the State acknowledged and incorporated the Resort Lease and the related uses of the property in the Tidelands Lease with the City, the State specifically ratified the prior Resort Lease, and the Resort was not required to enter into a separate tidelands lease with the State. Therefore, the Supreme Court affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2021-CA-00430-SCT (Aug. 25, 2022)

Opinion by Justice Chamberlin

Hon. James B. Persons (Harrison County Chancery Court)

Joshua W. Danos, G. Charles Bordis, & Mary Jo Woods (Att'y Gen. Office) for Appellant - Henry Laird, Michael Cavanaugh, Michael Whitehead, & Frederick T. Hoff Jr. for Appellee

Briefed by [Merritt Baria](#)

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

THORNHILL V. WALKER-HILL ENV'T

CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

TORTS - ADMINISTRATIVE REMEDIES - BAD-FAITH ACTIONS - Claimants are required to exhaust their administrative remedies, or obtain a final judgment from the Workers' Compensation Commission prior to instituting a bad-faith action

TORTS - EXHAUSTION OF REMEDIES - SETTLEMENT - Administrative remedies are exhausted when a settlement claim is approved by the Commission and when nothing is left pending before the Commission

FACTS

Jeremy Thornhill claimed he injured his back while working and sought workers' compensation benefits from his employer, Walker-Hill Environmental ("Employer"), and its insurance carrier, Zurich American Insurance Company of Illinois ("Carrier"). The Employer/Carrier denied his request on the grounds he had not sustained a compensable injury. Eventually, the parties came to a compromise settlement under Miss. Code Ann. § 71-3-29 and Thornhill submitted the

settlement to the Workers' Compensation Commission ("Commission") for approval. After examining the application, the Commission approved the settlement and dismissed Thornhill's case with prejudice. Thornhill believed his administrative remedies were exhausted and then filed a complaint in trial court against the Employer/Carrier, asserting a bad faith claim. The Employer/Carrier filed a motion to dismiss, arguing Thornhill failed to exhaust his administrative remedies before the Commission because the Commission never determined Thornhill was entitled to workers' compensation benefits. The trial court granted the motion on the basis that it did not have jurisdiction. Thornhill appealed, and the Court of Appeals reversed and remanded the case, finding that Thornhill exhausted his administrative remedies and that the circuit court had jurisdiction to hear his bad faith claim. The Court of Appeals further determined that Thornhill's administrative remedies were exhausted because he settled his workers' compensation claim, the Commission approved the settlement, and nothing was pending before the Commission. The Employer/Carrier petitioned for writ of certiorari.

ISSUES

Whether (1) the Commission's approval of a settlement constituted a finding that exhausts one's administrative remedies, thereby allowing a plaintiff to proceed with a bad faith claim; (2) the circuit court has jurisdiction to hear Thornhill's bad faith claim.

HOLDING

(1) Because Thornhill's compromise settlement with the Employer/Carrier was approved and he had no further business with the Commission, he exhausted his administrative remedies and the circuit court committed reversible error by granting the motion to dismiss. (2) Because there were no issues left pending before the Commission, and because Thornhill's compromise settlement was approved by the Commission, the circuit court had jurisdiction to hear Thornhill's bad faith claim. Therefore, the Supreme Court affirmed the judgment of the Court of Appeals, reversed the judgment of the Marion County Circuit Court, and remanded the case.

The Judgment of the Court of Appeals is Affirmed. The Judgment of the Marion County Circuit Court is Reversed, & The Case is Remanded - 2020-CT-01181-SCT (Aug. 25, 2022)

En Banc Opinion by Presiding Justice Kitchens

Hon. Anthony Alan Mazingo (Marion County Circuit Court)

Raynetra Lashell Gustavis, Rogen K. Chhabra, & Darryl Moses Gibbs for Appellant - Olivia Yen Truong, Doris Theresa Bobadilla, & Nathan L. Burrow for Appellees

Briefed by [Emilee Crocker](#)

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

MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 23, 2022

COURT OF APPEALS - CIVIL CASES

EVERY V. UNIV. OF MISS.

CIVIL - STATE BOARDS & AGENCIES

CIVIL PROCEDURE - JURISDICTION - REMOVAL - An appellant may not remove to circuit court, by writ of certiorari, an act of an inferior tribunal that is administrative or legislative in nature; a circuit court may only review an act of an inferior tribunal that is judicial or quasi-judicial in nature

ADMINISTRATIVE AGENCIES - PUBLIC UNIVERSITIES - FINDINGS OF FACT - An administrative agency or commission should disclose findings of fact on the basis of its decisions; a university administrative agency is not required to disclose findings of fact if it is not a statutorily created administrative agency

EMPLOYMENT LAW - AT-WILL EMPLOYMENT - TERMINATION - An employee or an employer may have a good reason, a wrong reason, or no reason for terminating the employment contract; a protected interest in employment exists only where the employee has an express or implied right to continued employment

ADMINISTRATIVE AGENCIES - PUBLIC UNIVERSITIES - DUE PROCESS - A university employment investigation is not required to interview and investigate every witness present at an incident

CONSTITUTIONAL LAW - FIRST AMENDMENT - PUBLIC EMPLOYER- A public employer is prohibited from taking actions designed to suppress the rights of public employees to participate in public affairs if the speech is a matter of public concern; the speech is not protected if a public employee makes statements under their official duties; an employer may give up their First Amendment rights by signing a confidentiality agreement

EMPLOYMENT LAW - EMPLOYEE PROTECTIONS - WHISTLEBLOWING - A terminated employee may not claim protection under a universities' code of ethics and whistleblower protections policies after their termination

ADMINISTRATIVE AGENCIES - PUBLIC UNIVERSITIES - HEARINGS - There is no legal authority concerning the burden of proof at university employment hearings; there is no grievance hearing policy requiring the format of university employment hearings

FACTS

In 2017, the University of Mississippi (“University”) terminated Angela Avery’s employment. For fifteen years Avery was employed by the University’s University Development Office and the University Foundation in various capacities. After Avery reported conflicts with and harassment by her supervisor, she was moved to the Development Office and part of the Annual Giving team. While at the Development Office, she raised more than two and a half million dollars for the University. Additionally, Avery and her supervisor at the Development Office got along well. However, in 2016 her supervisor left the position, and the harassment resumed. In the fall of 2016, the interim supervisor met with a human resources manager to report the history of problems in the department, such as unprofessional behavior and work absences. In November of 2016, a Progressive Discipline Policy was put in place to remedy the toxicity of the team. This policy laid out a plan of receiving a verbal notice, a formal warning, and then a dismissal as a last resort. In November 2016, a meeting was held to address the unprofessional actions of inappropriate interactions, disrespectful gossiping, disrespectful communications, and confrontational behavior between the staff. At the meeting, Avery admitted to engaging in some of the conduct at issue. The team was subsequently instructed to act professionally in the office and to treat each other with respect, dignity, and civility. Although Avery was present at the meeting, she was also provided with a letter summarizing the meeting. There was also a statement warning that failure to meet expectations discussed in the meeting would be grounds for further discipline and possibly termination. The meeting constituted a verbal notice under the progressive policy, and the letter served as written notice. Subsequently, in December 2016, another co-worker reported Avery’s continued unprofessional conduct. During an investigation into the situation, Avery’s manner towards her co-worker was deemed to be aggressive, defensive, dismissive, and demeaning. The outcome of the investigation resulted in Avery receiving another formal warning. While searching for a new director in 2017, the team continued to experience further tension. Avery signed a confidentiality agreement agreeing not to discuss the matter with those without authority even though she was not a part of the search committee. She broke this agreement when she discussed the matter after hours with individuals from the Development Office and the Foundation and informed them of conflicts of interest with one of the candidates. In February 2017, another co-worker expressed ethical concerns about Avery to the interim supervisor regarding monetary gifts that Avery was not tasked to work on. Avery was then given twenty-four hours to decide whether to resign or have her employment terminated. Avery did not respond and was discharged from the University. Avery requested a written explanation of the reasons for her termination, and the interim supervisor replied in a formal letter that the reasons for her termination were due to her failure to comply with the verbal and written warnings, difficult working conditions due to the tension between Avery and her previous supervisor, and ethical concerns regarding the integrity of data collected from monetary gifts. Avery requested the University Personnel Action Review Board (“PARB”) to review her termination. After a hearing in March 2017, the PARB voted unanimously to uphold Avery’s termination. Avery then appealed to the chancellor, who denied the appeal and found the termination was supported by substantial evidence. Avery then petitioned the circuit court for certiorari review. The circuit court affirmed Avery’s termination. Avery appealed.

ISSUES

Whether (1) the circuit court lacked subject matter jurisdiction over Avery’s petition for writ of certiorari; (2) Avery was deprived due process when the University failed to provide findings of fact concerning her termination; (3) Avery was deprived due process when the University failed to provide clear and consistent reasons for her termination that affected her ability to prepare an adequate defense at the PARB hearing; (4) the format of the of the PARB hearing and irrelevant

evidence provided by the University violated Avery's due process; (5) Avery was deprived due process when Human Resource's personnel at the PARB hearing admitted they did not interview all witnesses involved in an incident that was the basis of Avery's termination; (6) the University violated Avery's First Amendment rights by using her statements regarding the search for a director of Annual Giving as a basis for termination; and (7) the circuit court erred in finding substantial evidence supported the PARB's decision to terminate Avery.

HOLDING

(1) Because Avery appealed the decision of PARB, which is a quasi-judicial administrative panel, and not the chancellor's decision, the circuit court had subject matter jurisdiction. (2) Because no statutory authority required the PARB, which was created by the University not the legislature, to disclose the reason for its decision, and because the University's Complaint and Grievance Procedure for Nonfaculty Personnel policies did not require the PARB to make findings of fact, Avery was not deprived of due process when the University failed to provide findings of facts concerning her termination. (3) Because Avery was an at-will employee, because she was repeatedly notified of the reasons for her termination through verbal and written notices, because Avery was provided an opportunity to be heard, because she was given several opportunities for rebuttal, and because she was given a witness list and the documents the University would rely on one week before the hearing, Avery was given adequate notice of the reasons for her termination before the grievance hearing, satisfying due process. (4) Because there was no legal authority concerning the burden of proof at university employment hearings, because there was no grievance hearing policy requiring the University to present its witnesses first, and because the chancellor and the PARB only considered the evidence and documents in 2016 and 2017, the format of the of the PARB hearing and irrelevant evidence provided by the University did not violate Avery's due process. (5) Because a witness admitted at the PARB hearing that she should have gotten Avery's side of the story, because the witness stated that other witnesses showed that the incident happened, and because the witnesses were deemed to be objective, Avery's due process argument regarding an incomplete investigation did not warrant reversal. (6) Because Avery signed a confidentiality agreement, because the University elected to restrict her speech in her professional responsibilities and not as a private citizen, because the speech occurred during the scope of her employment, and because Avery's whistleblower email was written after she was terminated, the University did not violate the First Amendment by terminating Avery. (7) Because the circuit court cited both written notices regarding Avery's disrespectful and confrontational behavior, and because the circuit court cited testimonies from other co-workers, the circuit court did not err in finding substantial evidence that supported the PARB's decision to terminate Avery. Therefore, the Court of Appeals affirmed the judgment of the Lafayette County Circuit Court.

Affirmed - 2021-CA-00471-COA (Aug. 23, 2022)

Opinion by Chief Judge Barnes

Hon. James McClure III (Lafayette County Circuit Court)

Goodloe Tankersley Lewis for Appellant - J. Cal Mayo Jr. & Sarah Katherine Embry for Appellee

Briefed by [Kayla Tran](#)

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

TURNER & ASSOCS. P.L.L.C. V. ESTATE OF WATKINS

CIVIL - LEGAL MALPRACTICE

CONTRACTS - STATUTE OF FRAUDS - WAIVER - If a party fails to raise the statute of frauds as a defense in his answer to a complaint, he will be deemed to have waived the defense

CONTRACTS - STATUTE OF FRAUDS - SETTLEMENT AGREEMENT- Wherever the main purpose and object of a promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute of frauds, although the performance of it may incidentally have the effect of extinguishing the liability of another

CONTRACTS - BREACH - DAMAGES - Damages should be the amount that would place the nonbreaching party in the position where it would have been but for the breach, no more and no less

CIVIL PROCEDURE - SUMMARY JUDGMENT - ADMISSIONS - A matter is admitted unless, within thirty days, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection; a court may base a grant of summary judgment upon an admission if the court is satisfied that there are no outstanding genuine issues of material fact in the case

CIVIL PROCEDURE - SUBSTITUTION OF PARTIES - SUGGESTION OF DEATH - Under Miss. R. Civ. P. 25, the ninety-day period to substitute parties begins running after the death is suggested upon the record by service of a statement of the fact of the death, without restriction on who may serve the statement of the fact of death

FACTS

While working on a house, Gerald Watkins fell off the roof and was injured. Watkins hired Turner & Associates P.L.L.C. (“Turner & Associates”) to sue the homeowner and insurance company. Turner & Associates told Watkins a lawsuit was filed on his behalf, a trial date was set, and a settlement as high as half a million dollars was possible. Eight years later, however, Watkins discovered the law firm never filed his lawsuit, and the statute of limitations on the suit had long since expired. After Watkins fired Turner & Associates, Watkins received \$18,000 through a resolution made with Carolyn Turner Karriem, a non-lawyer employee of Turner & Associates that was Watkins’s sole contact with the firm. Additionally, the parties agreed to a settlement for \$300,000, minus the \$18,000 already paid. Watkins never received the remaining \$282,000 or a release, and subsequently hired a new attorney to represent him against Turner & Associates. Watkins eventually received a settlement release, but no representative from Turner & Associates signed the release. Eleven years after his injury, Watkins sued Turner & Associates alleging legal malpractice and breach of contract, among other claims. Watkins died during the course of the lawsuit, and the trial court granted summary judgment in favor of Watkins based on Turner & Associate’s failure to respond to requests for admissions. Turner & Associates appealed, and the Court of Appeals dismissed it for lack of jurisdiction. Next, the trial court entered a final judgment, and awarded Watkins’s estate \$282,000, granted a motion to substitute parties, denied Turner & Associates’ request to withdraw the requests for admissions, and refused to revisit the original grant of summary judgment. Turner & Associates appealed.

ISSUES

Whether the (1) settlement release was barred by the statute of frauds; (2) damages awarded to Watkins were unreasonable; (3) Turner & Associates admitted Watkins’s allegations; and (4) trial court had jurisdiction given Watkins died and his counsel failed to file a timely suggestion of death.

HOLDING

(1) Because Turner & Associates failed to raise the issue until its motion for reconsideration of the final judgment, and because the settlement agreement was an agreement by Turner & Associates to settle Watkins’s malpractice claim against the law firm and not a mere promise to answer for the debt or default or miscarriage of another person, the settlement release was not barred by the statute of frauds. (2) Because the trial court granted Watkins no more and no less than the amount the parties bargained for, and because Watkins received exactly the amount he was owed under the agreement, the damages were not unreasonable. (3) Because Turner & Associates failed to respond to requests for admissions, and because Turner & Associates waived its legal malpractice defenses by entering into the settlement agreement, the factual disputes relating to the legal malpractice claim were conclusively established. (4) Because no suggestion of death was ever made upon the record to trigger the ninety-day time requirement set out by Miss. R. Civ. P. 25, and because there was no requirement to file a suggestion of death, the trial court had jurisdiction over Watkins’s claim. Therefore, the Court of Appeals affirmed the judgment of the Pontotoc County Circuit Court.

Affirmed - 2021-CA-00258-COA (Aug. 23, 2022)

Opinion by Judge McCarty

Hon. John R. White (Pontotoc County Circuit Court)

Angela Turner Ford for Appellants - J. Rhea Tannehill Jr. & Jacob Bystrom Jordan for Appellee

Briefed by [Mason Borneman](#)

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

CIVIL - CONTRACT

CONTRACTS - ARBITRATION - WAIVER - Arbitration can be waived where a party actively participates in a lawsuit or takes other action inconsistent with the right to arbitration, or when a party substantially invokes the judicial process

CONTRACTS - ARBITRATION - FRAUDULENT INDUCEMENT - An arbitration clause will not be invalidated unless the complaint specifically and clearly alleges the party was fraudulently induced to enter into the agreement to arbitrate; this fraudulent inducement must be independent of any fraud inducing the contract as a whole

CONTRACTS - CONTRACTING PARTY - DUTY TO READ - A person is charged with knowing the contents of any document that he or she executes and is under an obligation to read a contract before signing it

CONTRACTS - TERMS - UNCONSCIONABLE CONTRACT - An unconscionable contract affronts the sense of decency, where procedural unconscionability is established by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties, or a lack of opportunity to study the contract and inquire about the contract terms and a substantively unconscionable contract contains terms that are so unreasonably favorable to one party that the contract imposes oppressive terms on the weaker party

CONTRACTS - ARBITRATION - RETROACTIVE APPLICATION - If an arbitration clause contains language stating that it applies to all transactions or business between the parties, then the court may apply the arbitration clause retroactively

FACTS

Between 2005 and 2008, Freese & Goss PLLC (“Freese & Goss”), Bossier and Associates PPLC, Sweet and Freese PLLC, and others (“Attorneys”) signed up potential claimants affected by polychlorinated biphenyls (“PCB”) contamination. The clients signed contingency fee contracts that did not contain an arbitration clause. In February 2008, the Attorneys notified certain claimants that they decided to not pursue their claims and released these persons from the retainer agreements. The Attorneys then initiated three lawsuits on behalf of the remaining claimants. In March 2010, the Attorneys reached a tentative settlement agreement with one party for that company to pay twenty-eight million dollars, conditioned upon the execution and receipt of releases from all potential claimants, including those previously released. In response to the contingency, the Attorneys began to re-sign previously released clients and new potential claimants. Approximately 3,000 individuals signed the second retainer with Don Mitchell and Freese & Goss, which contained an arbitration agreement and increased attorney’s fees from forty percent to forty-five percent of any amount recovered from a settlement. In July 2010, the parties entered into a confidential master settlement agreement and money was disbursed to the claimants. In July 2013, 288 individuals (“Claimants”) filed a complaint in circuit court against the Attorneys for certain actions taken during the course of their representation in the PCB litigation. In November 2013, the Attorneys filed a motion to dismiss and compel arbitration based upon the arbitration clause contained in the second retainers. In February 2015, the circuit court issued a protective order prohibiting discovery until the circuit court conducted a hearing on the Attorneys’ motion to dismiss and compel arbitration. The Attorneys filed a renewed motion to dismiss and compel arbitration, or in the alternative, a motion to sever. The Claimants pursued other discovery in 2015, and the Attorneys filed motions to stay the discovery requests until after the motion to compel was decided. After a hearing in April 2020, the circuit court granted the motion to dismiss and compel arbitration as to all claimants whose contracts contained an arbitration clause and denied the motion as to all claimants whose contracts did not have an arbitration clause. The Claimants then filed a motion to reconsider, which was denied. The Claimants appealed.

ISSUES

Whether (1) the circuit court erred in ruling that the Attorneys did not waive and abandon their motion to compel arbitration because the Attorneys delayed bringing their motion for more than five years and actively participated in litigation; (2) the circuit court erred in refusing to first decide the issue of whether the Claimants were fraudulently induced into signing the second contingency fee agreement containing the arbitration clause; (3) it was a clear error of law to compel arbitration because the Attorneys breached their fiduciary duty owed to the Claimants; (4) it was a clear

error of law and manifestly unjust to enforce the arbitration clause as both procedurally and substantively unconscionable; and (5) the arbitration agreement should have been retroactively applied to the Attorneys' allegedly wrongful conduct that occurred before the agreement was executed.

HOLDING

(1) Because the Attorneys filed two motions to compel arbitration and thus made it clear that they intended to assert their right to arbitrate from the time the lawsuit was initiated, because the Attorneys did not participate in discovery, advance the litigation, or otherwise invoke the judicial process in the present case, the Attorneys did not waive their right to arbitration. (2) Because the Claimants did not specifically and clearly allege in the complaint, the written responses, or the oral argument before the circuit court that they were fraudulently induced to enter into the arbitration agreement in the second retainer by any fraudulent misrepresentations, the circuit court properly granted the Attorneys' motion to compel arbitration as to the Claimants whose second retainer contained an arbitration clause. (3) Because the Claimants did not produce any evidence that they did not know what they were signing when they executed the second retainer, because there was no proof that the Claimants signed the second retainer involuntarily or that they were not given an opportunity to review the agreement and inquire about its terms, and because the Attorneys were available to answer any questions or better explain the agreement, the circuit court did not err by concluding the Attorneys did not breach their fiduciary duty owed to the Claimants. (4) Because there was a sense of urgency to locate the Claimants, and because the only oppressive terms identified by the Claimants were the five-percent increase in attorney's fees, the inclusion of an arbitration clause, and the cost of commercial arbitration, the Claimants failed to show the second retainer was either procedurally or substantively unconscionable. (5) Because the arbitration clause did not limit arbitration to claims arising under the second retainer, but rather the broad category of all transactions relating to the agreement, the arbitration clause could have been applied to the Attorneys' conduct before the second retainers were signed by the Claimants. Therefore, the Court of Appeals affirmed the judgment of the Covich County Circuit Court.

Affirmed - 2020-CA-01280-COA (Aug. 23, 2022)

Opinion by Judge Emfinger

Hon. Tomika Harris Irving (Covich County Circuit Court)

Chuck McRae & Annette Bulger Mathis for Appellants - Christopher Daniel Meyer, Joshua Wayne Stover, & Richard Arthur Freese for Appellees

Briefed by [Anna Beavers](#)

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

COURT OF APPEALS - POST-CONVICTION RELIEF

CHANDLER V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - GUILTY PLEAS - WAIVER - A valid guilty plea waives the right to challenge the sufficiency of the State's evidence

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

CRIMINAL PROCEDURE - SENTENCING - GROSS DISPROPORTIONALITY - In determining whether a particular sentence is grossly disproportionate, a court must first compare the gravity of the offense to the severity of the sentence; only in the rare case where this threshold comparison leads to an inference of gross disproportionality will the court then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions

APPELLATE PROCEDURE - SUFFICIENCY OF RECORD - APPELLANT RESPONSIBILITY - It is the responsibility of the appellant to designate the record pursuant to Miss. R. App. P.10(b) in a manner sufficient to allow a court to review the appellant's issues

FACTS

In April 2014, Louis Edward Chandler drove his vehicle northbound in a southbound lane of travel. While traveling northbound, Chandler collided with a car driven by Joanna K. Hardwick with Maurice Hall riding as a passenger. Hardwick and Hall suffered severe injuries as a result of the accident. Chandler was found to have been driving with a blood-alcohol concentration of zero point one nine percent. In January 2017, Chandler agreed that the stated facts were true and pled guilty in circuit court to two counts of aggravated DUI. Chandler was sentenced to a term of seven years in the custody of the Mississippi Department of Corrections, with five years suspended and two years to serve, for count one's conviction and fifteen years, with five years suspended and ten years to serve, for count two's conviction. The sentences were ordered to run consecutively. Chandler was ordered to pay court costs for both counts, a fine in the amount of \$500 for count two, and restitution in the amount of \$360,000. In January 2020, Chandler filed a pro se motion for post-conviction relief. In August 2020, the circuit court dismissed Chandler's motion without a hearing. Chandler appealed.

ISSUES

Whether (1) Chandler properly challenged the factual basis of his guilty pleas; (2) Chandler was denied due process in violation of his Fifth, Sixth, Seventh, and Fourteenth Amendment rights by improper commingling of criminal and civil proceedings; (3) Chandler was denied due process in violation of the Sixth Amendment by denial of effective assistance of counsel; (4) Chandler was denied due process in violation of his Fifth, Sixth, and Fourteenth Amendment rights by improper judicial instructions; (5) the circuit court abused its judicial discretion by imposing excessively harsh sentencing in violation of the Eighth Amendment; and (6) the circuit court improperly imposed excessive restitution in violation of Chandler's Eighth Amendment right and Miss. Code Ann. § 99-37-3.

HOLDING

(1) Because Chandler admitted that the facts proffered by the State were true, and because he freely, voluntarily, knowingly, and intelligently entered pleas of guilty, Chandler waived his right to challenge the factual basis of his guilty pleas. (2) Because Chandler failed to show that the pending civil lawsuit was improperly commingled with his criminal case or that it had any impact upon the voluntariness of his guilty pleas to the charges in the underlying criminal case, because Chandler failed to show how settlement negotiations by his attorney for the civil lawsuit had any impact upon the voluntariness of his guilty pleas, and because Chandler's arguments were not supported by the appellate record or citation of authority, there was no error by the circuit court that adversely affected Chandler's substantial rights or that would cause a reasonable person to question the circuit court's impartiality. (3) Because Chandler provided nothing to show that an actual conflict of interest adversely affected his lawyer's performance, and because Chandler did not plead the claim of his counsel's deficient performance with specificity or affidavits, Chandler's Sixth Amendment right was not violated. (4) Because there was no indication on the record that Chandler had fired his attorney or did not wish to be represented by his attorney at trial, because Chandler acknowledged his satisfaction with his attorney under oath, and because Chandler failed to provide a record sufficient for review of the issue, Chandler's Fifth, Sixth, and Fourteenth Amendment rights were not violated. (5) Because Chandler failed to establish any inference of gross disproportionality, and because both of Chandler's sentences were well below the statutory maximum sentence, the circuit court did not abuse its judicial discretion. (6) Because Chandler failed to ensure that the appellate record contained the matters necessary to decide the issues presented, and because the restitution order was set aside, the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Clay County Circuit Court.

Affirmed - 2020-CP-01060-COA (Aug. 23, 2022)

Opinion by Judge Emfinger

Hon. James T. Kitchens Jr. (Clay County Circuit Court)

Pro se for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [Joe M. Curry II](#)

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

COURT OF APPEALS - CRIMINAL CASES

MOFFETT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF -

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

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL STRATEGY - A defendant must overcome a strong but rebuttable presumption that decisions made by defense counsel are strategic and that counsel's decision of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy

CRIMINAL PROCEDURE - POLICE INTERROGATION - CONFESSION - If a confession is the result of threat, inducements, or promises, however slight, it is not voluntary; the test is whether the inducement is of the nature calculated under the circumstances to induce a confession irrespective of its truth or falsity

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSE - To be entitled to a lesser-included offense instruction, the defendant must point to evidence in the record from which a jury could reasonably

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice; this high standard is necessary because any factual disputes are properly resolved by the jury, not by an appellate court

FACTS

In August 2017, Jonicqua Moffett and Cordaeil Miller were engaged in an all-day argument that ultimately ended in Moffett stabbing and killing Miller. Throughout the investigation, Moffett provided several different stories about the events leading up to Miller's death. At trial, Investigator Jeff Byrd testified that Moffett stated after an argument with Miller, she went inside the residence while he walked down the street, and she later saw Miller standing outside holding his chest. Byrd further testified that he photographed Moffett at the scene and did not observe any injuries to her person. Investigator Dale Bounds testified that Moffett originally told the same story that she did to first responders until he informed her of eyewitnesses to the couple's argument. After Bounds told Moffett about the witnesses, she admitted to stabbing Miller and provided a written statement. In Moffett's statement, she stated that Miller was with another woman and after a confrontation, a verbal argument ensued. Moffett then said that she and Miller were tussling, she grabbed a knife to protect herself, and then Miller was stabbed while she attempted to free herself. During trial, Moffett's testimony surrounding the stabbing was contradictory and confusing. Moffett indicated the stabbing was accidental some of the time, and at other times she claimed it was self-defense. Moffett ultimately admitted that her decision to obtain a knife and continue fighting with Miller led to his death. A jury found Moffett guilty of second-degree murder and her post-trial motions were denied. Moffett appealed.

ISSUES

Whether (1) Moffett received ineffective assistance of counsel at trial for failure to request a culpable-negligence instruction; (2) Moffett received ineffective assistance of counsel at trial for failure to request an accident or misfortune instruction; (3) Moffett's counsel was ineffective for admitting to the trial court that there was no evidentiary basis for a heat-of-passion manslaughter jury instruction and whether the trial judge abused his discretion in denying the requested instruction; (4) the circuit court erred in allowing Moffett's videotaped statement and written statement into evidence; and (5) the evidence was insufficient to support Moffett's conviction and the verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because Moffett’s attorney’s decision to not request a culpable-negligence instruction could have been considered trial strategy, she did not receive ineffective assistance of counsel. (2) Because Moffett’s attorney’s decision to not request an accident or misfortune instruction fell within the ambit of trial strategy, it could not be considered ineffective assistance of counsel. (3) Because none of the evidence supported that Moffett acted in the heat of passion and her attorney admitted as such, there was no abuse of discretion in the circuit court’s refusal of the jury instruction and her counsel was not ineffective. (4) Because the circuit court applied the correct legal standard, and because Investigator Bounds stated a known truth to Moffett, her confession was not coerced and the circuit court did not err in allowing Moffett’s confession into evidence. (5) Because the State provided evidence that any reasonable juror could have found the essential elements proved beyond a reasonable doubt, and because the jury’s verdict gave greater weight and credibility to the State’s witnesses and evidence, the evidence was legally sufficient to support Moffett’s conviction and the verdict was not against the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2021-KA-00622-COA (Aug. 23, 2022)

Opinion by Judge Lawrence

Hon. Jon Mark Weathers (Forrest County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Allison Kay Hartman (Att’y Gen. Office) for Appellee

Briefed by [Maya Langendoen](#)

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

MISSISSIPPI CASES EDITOR

EMILY DUCK

ASSOCIATE CASES EDITORS

CHASE BAKER

KELSEY DAVIS

MORGAN ARRINGTON JONES

DALLAS MARTIN

REGAN MONK

J. EVAN THOMAS

Thank you for supporting the Mississippi Law Journal.

Questions or comments: Emily Duck, 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. If you have questions about accessing or using the BriefServ website, please contact us at support@mississippilawjournal.org