

**MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 1, 2022****SUPREME COURT - CIVIL CASES****WHITE V. JERNIGAN COPELAND ATT'YS, PLLC****CIVIL - CONTRACT**

**CIVIL PROCEDURE - SUMMARY JUDGMENT - NONMOVANT BURDEN** - When a party files a motion for summary judgment, the opposing party is required to present proof in rebuttal or to present specific facts why he cannot oppose the motion and must specifically demonstrate how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact

**CIVIL PROCEDURE - SUMMARY JUDGMENT - RESPONSE** - Once a party files a motion for summary judgment, even if discovery has not concluded, the party opposing the motion may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial

**TORTS - MISS. TORT CLAIMS ACT - STATUTE OF LIMITATIONS** - Pursuant to Miss. Code Ann. § 11-46-11, all actions brought under the MTCA shall be commenced within one year of the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based; the one-year statute of limitations begins to run when the claimant knows, or by exercise of reasonable diligence should know, of both the damage or injury and the act or omission which proximately caused it

**CONTRACTS - AUTHORIZATION TO CONTRACT - STATE OFFICERS** - Pursuant to Miss. Code Ann. § 25-1-43, a state officer shall not enter into any contract on behalf of the state, or of any county, city, town, or village thereof, without being specially authorized by law or by order of the board of supervisors or municipal authorities

**ADMINISTRATIVE LAW - STATE AUDITOR - RETURN OF PUBLIC FUNDS** - Under Miss. Code Ann. § 7-7-211, the state auditor has the authority and duty to seek the return of public funds unlawfully withheld from the State; however, the state auditor must first make a written demand for recovery of public funds withheld and, if the demand is not paid, the attorney general has the sole authority to prosecute the case

**FACTS**

Former State Auditor Stacy Pickering, on behalf of the office of the state auditor ("OSA"), entered into a retention agreement with Jernigan Copeland Attorneys, PLLC ("JCA"). The OSA entered into this agreement to pursue litigation to recover funds that might have been rightfully owed to the State from prior litigation. The agreement provided, among other things, that the OSA would reimburse JCA for all fees and expenses. Pickering also hired a public relations firm called Xenophon Strategies, Inc. ("Xenophon") to assist in the matter. JCA then entered into a contract with Xenophon to protect communications and attorney-client privilege and work product doctrines for those communications. Xenophon sent invoices directly to JCA for its services. Pickering later decided not to pursue litigation. No invoices were paid to Xenophon, which led it to file suit against JCA in the United States District Court for the District of Columbia. Xenophon obtained a judgment against JCA for over \$400,000, and the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment. JCA filed suit against Auditor Shad White in 2018 for breach of contract and demanded judgment against the OSA for the unpaid principal balance of the Xenophon invoices, plus other costs, expenses, and interest. In the alternative, JCA requested judgment against the OSA for the fair and reasonable value of the services provided by JCA, plus costs and expenses. Lastly, JCA requested complete indemnification for all expenses, principal, and interest incurred by it with Xenophon. The OSA then filed a motion to dismiss the complaint or alternatively by granting summary judgment. The OSA argued that JCA and Pickering had failed to comply with statutory requirements and that JCA's claims were barred by the statute of limitations. In response,

JCA attached as exhibits certain emails between Arthur Jernigan and Pickering relating to the Xenophon charges, where Pickering stated he was working on getting payments to Xenophon and Jernigan informed Pickering of the lawsuit and judgment against JCA. An affidavit of Pickering was also included in which he stated that he had agreed that the OSA would pay Xenophon if the case was not filed. The trial court denied the OSA's summary judgment motion and found that genuine issues of material fact remained. The OSA petitioned for interlocutory appeal.

### ISSUES

Whether (1) the retention agreement was a nullity as a matter of law and (2) JCA's equitable claims were filed within the applicable statute of limitations.

### HOLDING

(1) Because no individual member, officer, employee, or agent of any agency could enter into a contract on behalf of a state agency without statutory authority pursuant to Miss. Code Ann. § 31-7-57, because Pickering did not comply with Miss. Code Ann. § 7-7-211 when he failed to make a written demand for recovery of public funds and relinquish prosecution of the case to the attorney general, because Miss. Code Ann. § 7-5-1 gave the attorney general the sole power to bring or defend a lawsuit on behalf of a state agency, because JCA failed to present evidence that it complied with Miss. Code Ann. § 7-7-211 or why it could not have obtained that evidence prior to the summary judgment motion, because JCA failed to present evidence that the attorney general declined representation or there had been a significant disagreement between Pickering and the attorney general prior to retaining outside counsel pursuant to Miss. Code Ann. § 7-5-39, and because JCA failed to provide any evidence that the retention agreement was approved by the Personal Service Contract Review Board as required by Miss. Code Ann. § 25-9-120, the contract between JCA and the OSA was void as a matter of law. (2) Because Miss. Code Ann. § 11-46-11 mandated that all actions brought under the Mississippi Tort Claims Act must be commenced within one year of the tortious conduct alleged, because the statute began to run when JCA had knowledge of both the damage and the act which proximately caused it in September 2015 when Xenophon filed its lawsuit against JCA, and because JCA did not file its notice of claim until May 2018, the implied contract claims were barred by the applicable statute of limitations. Therefore, the Supreme Court reversed and rendered the judgment of the Hinds County Circuit Court.

#### **Reversed & Rendered - 2020-IA-01404-SCT (Sept. 1, 2022)**

Opinion by Presiding Justice King

Hon. Winston L. Kidd (Hinds County Circuit Court)

Mary Jo Woods & Stephen Friedrich Schelver (Att'y Gen. Office) for Appellant - Jamie Deon Travis & Arthur F. Jernigan Jr. for Appellee

Briefed by [Katherine Hancock](#)

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## ***SUPREME COURT - ORDERS***

### **BADGER V. STATE**

#### **EN BANC ORDER**

### ORDER

In 2018, Craytonia Badger was convicted of burglary of a building and was sentenced as a habitual offender to seven years in prison. Badger's conviction was affirmed by the Court of Appeals in 2019. Badger has since filed two post-conviction applications. In the present application, Badger asserted that the habitual offender part of his sentence was illegal and that his trial counsel was ineffective for failing to discover the error. The Supreme Court found that Badger presented an insufficient claim to merit waiving the time, waiver, and successive-writ bars. The Supreme Court found the present application to be frivolous and that sanctions were merited since Badger was previously warned about future

filings deemed frivolous. Therefore, the Supreme Court denied Badger's Application for Post-Conviction Relief, restricted Badger from filing further applications for post-conviction collateral relief, or pleadings in that nature, related to his conviction and sentence in forma pauperis, and ordered the Clerk of the Court to not accept any further applications for post-conviction collateral relief unless Badger pays the applicable docket fee.

## **OBJECTION**

Presiding Justice King opposed the order restricting Badger from filing further post-conviction relief motions in forma pauperis. He argued that the Supreme Court prioritized efficiency over justice and claimed that imposing monetary sanctions on an indigent defendant and restricting access to the court system further punishes that defendant and ultimately violates his constitutional rights. He argued that the Court should have found Badger's application lacked merit instead of restricting his access to the courts.

### **Denied with Sanctions - 2020-M-00646 (Aug. 25, 2022)**

En Banc Order by Justice Griffis - Objection by Presiding Justice King

Briefed by [Thomas Simpson](#)

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## ***SUPREME COURT - CRIMINAL CASES***

### **HAYMON V. STATE**

#### **CRIMINAL - FELONY**

**EVIDENCE - CIRCUMSTANTIAL EVIDENCE - BURDEN OF PROOF** - Direct evidence is unnecessary to support a conviction so long as sufficient circumstantial evidence exists to establish guilt beyond a reasonable doubt

**CRIMINAL LAW - AGGRAVATED ASSAULT - ELEMENTS** - Miss. Code. Ann. § 97-3-7 states that a person is guilty of aggravated assault if he or she attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; mere bodily injury is sufficient so long as it is caused with other means likely to produce death or serious bodily harm

**CRIMINAL PROCEDURE - PRETRIAL IDENTIFICATION - PHOTO LINEUPS** - An out-of-court identification will be excluded if the identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification

**CRIMINAL PROCEDURE - PRETRIAL IDENTIFICATION - PHOTO LINEUPS** - When determining if an out-of-court identification is reliable, the court weighs the following: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation

#### **FACTS**

In March 2013, Danzel Williams received a text message from Crystal Pernel asking him to come chill at her aunt's house. Pernel and Danzel had been having sex for more than a year, even though Pernel had a boyfriend, Tajarvis Haymon. Before dark, borrowed his mother's car and drove to Pernel's aunt's house. Pernel directed Danzel to park in their usual spot and the two sat in the front seat of the car and talked. After a while, the two agreed to move to the back seat of the car. As Danzel was getting out of the car, two men dressed in black with hoodies and black face coverings jumped out of the bushes near the car. One man hit Danzel in the head with a pistol, and he fell to the ground. The two men searched Danzel and repeatedly asked where his money and gun were located. During the attack, Pernel stayed in the front seat of the car, then went back into her aunt's house. When neither money nor guns were found, the two men threw Danzel into the back seat of the car. One man drove the vehicle while the other sat in the back with a gun to Danzel's head. During the drive, Danzel was able to recognize the driver as Jamarcus Williams ("Chub"), one of Pernel's relatives, and the man holding the gun to his head as Pernel's boyfriend. Chub drove the car to where Danzel

was staying and followed Danzel to the house with a gun so he could get the money. When Danzel returned, he was able to look directly into Chub's face and recognize him. Danzel gave the men \$350 and ran back inside to alert his mother. The two men then drove away in Danzel's mother's car. Later that evening, Danzel gave a summary statement to the police, where he reported the men had robbed him. Then, Danzel went to the hospital for treatment of his injuries. The next day, Danzel gave a full statement to the police and identified Chub and Haymon from a photo lineup. The same day, a truck stop employee saw Pernell, Haymon, and Chub riding together in the stolen vehicle. Surveillance camera footage of the group at the truck stop was introduced as an exhibit at trial. The car was later discovered in a locked and gated backyard behind Pernell's aunt's house. At trial, Danzel identified Pernell and Haymon from the witness stand. The jury found Pernell and Haymon each guilty of two counts of armed robbery, one count of kidnapping, and one count of aggravated assault. Pernell and Haymon appealed.

## **ISSUES**

Whether the trial court erred in (1) denying Pernell's motion for directed verdict and/or a new trial; (2) failing to grant Pernell's request for a lesser included offense jury instruction for simple assault; and (3) failing to grant Haymon's motion to suppress the photo identification lineup.

## **HOLDING**

(1) Because there was sufficient circumstantial evidence to demonstrate a reasonable inference that Pernell was aware of the actual commission of the crime, and because the jury's verdict was not against the overwhelming weight of evidence, the trial court did not abuse its discretion by denying a new trial. (2) Because the State proved that Williams suffered bodily injury by other means likely to produce death or serious bodily harm, and because the jury could not have found Pernell guilty of a lesser offense than aggravated assault since it is not disputed that Danzel was assaulted with a deadly weapon, the trial court did not err by denying a jury instruction for simple assault. (3) Because the photo lineup was not impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification, and because there was substantial credible evidence to support the trial court's finding of reliability of the photo identification, the trial court did not err in denying the motion to suppress the photo lineup identification. Therefore, the Supreme Court affirmed the judgment of the Holmes County Circuit Court.

**Affirmed - 2021-KA-00240-SCT (Sept. 1, 2022)**

Opinion by Justice Chamberlin

Hon. Barry W. Ford (Holmes County Circuit Court)

Alva Peyton Taylor & Pearlene Jones for Appellants - Allison Horne (Att'y Gen. Office) for Appellee

Briefed by [Tyler White](#)

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## **WARD V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL LAW - SPEEDY TRIAL - LENGTH OF DELAY** - A delay of eight months or longer is presumptively prejudicial; a presumptively prejudicial delay acts as a triggering mechanism for conducting a *Barke* analysis

**CRIMINAL LAW - SPEEDY TRIAL - REASON FOR DELAY** - Without specific evidence explaining the reasons for delay in the trial, the court cannot accurately determine the ultimate factual question of whether good cause existed for the delay

**CRIMINAL LAW - SENTENCING - HABITUAL OFFENDER** - All that is required for a defendant to be validly sentenced as a habitual offender is that defendant be properly indicted as a habitual offender, that the prosecution prove prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof

## **FACTS**

Alphonso Ward was arrested in December 2017 for burglarizing an automobile. After being released upon posting bail, Ward was again arrested for another automobile burglary and a church burglary. In March 2018, Ward was indicted. The indictment revealed seven prior crimes committed in Bolivar County. Then, in June 2018, Ward was tried for the church and automobile burglary. Ward was convicted and sentenced as a habitual offender. Ward was sentenced to fourteen years for the church burglary and seven years for that automobile burglary, to run concurrently. Though Ward was originally set to be tried for all three crimes in June 2018, Ward waived arraignment for the first automobile burglary and demanded a speedy trial. Ward was not tried for the first automobile burglary until May 2021. Ward's motion to dismiss for violation of his right to a speedy trial was considered and rejected by the trial court at the pretrial hearing. The judge attributed the reason for the delay to the COVID-19 pandemic and other trials, including Ward's. At trial, the jury returned a guilty verdict. At Ward's sentencing hearing, the trial court was presented with two prior convictions that did not match the convictions attached to the indictment. After a review of the certified copies, the trial court sentenced Ward as a habitual offender to seven years in the custody of the Mississippi Department of Corrections. Ward appealed.

### **ISSUES**

Whether the trial court erred by (1) not conducting a proper analysis of the *Barker* factors when it denied Ward's motion to dismiss for lack of a speedy trial and (2) sentencing Ward as a habitual offender.

### **HOLDING**

(1) Because the delay was presumptively prejudicial, because there was no evidence to support the trial court's finding of good cause for delay of Ward's trial, and because the trial court did not conduct a proper *Barker* analysis, the trial court erred in denying Ward's motion to dismiss for lack of a speedy trial. (2) Because Ward was sentenced without the prior convictions being admitted into evidence, the trial court erred by sentencing Ward as a habitual offender without competent proof of his prior offenses. Therefore, the Supreme Court reversed and remanded the judgment of the Bolivar County Circuit.

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

Justice Maxwell argued that the State presented certified copies of two of Ward's prior felony convictions as exhibitions. He noted that though the copies were not made part of the record, it's clear that the trial court reviewed Ward's prior convictions. He argued that instead of vacating Ward's habitual offender sentence, the better course was to submit to the trial court the question of whether the record accurately reflected what occurred.

#### **Reversed & Remanded - 2021-KA-00664-SCT (Sept. 1, 2022)**

En Banc Opinion by Chief Justice Randolph - Concurrence in Part & Dissent in Part by Justice Maxwell

Hon. Linda F. Coleman (Bolivar County Circuit Court, Second Judicial Dist.)

George T. Holmes & Mollie Marie McMillin (Pub. Def. Office) for Appellant - Ashley Lauren Sulser (Att'y Gen. Office) for Appellee

Briefed by [Arreyah Whitlock](#)

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## **MISSISSIPPI COURT OF APPEALS DECISIONS – AUGUST 30, 2022**

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

#### **BBM VENTURES, LLC V. FRIERSON**

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

**ADMINISTRATIVE LAW - STATE AGENCIES - APPEALS** - Miss. Code Ann. § 27-77-5(1) states that taxpayers have sixty days from the date the agency mailed or delivered written notice of the action to appeal a tax assessment

**ADMINISTRATIVE LAW - TAX ASSESSMENTS - BURDEN OF PROOF** - A taxpayer's own undocumented recollection, which is uncorroborated, does not fulfill the taxpayer's burden of proof to overcome the prima facie presumption of correctness of a tax assessment

**ADMINISTRATIVE LAW - TAX ASSESSMENTS - DEDUCTIONS** - Deductions on an income tax return are not a matter of right, but are a statutory grant, which must be provided clearly under the statute; the taxpayer has the burden of proving that the facts bring the case squarely within the deduction provisions of the statute

**ADMINISTRATIVE LAW - TAX ASSESSMENTS - FRAUD PENALTY** - Miss. Code Ann. § 27-7-105(1) provides that if any part of any underpayment of tax required to be shown on a return or if any underpayment is finally assessed due to failure to file a return is due to fraud, there shall be added to the tax an amount equal to seventy-five percent of the portion of underpayment which is attributable to fraud

## **FACTS**

Ballery and Greta Bully own or hold a majority interest in BBM Ventures, LLC and Bully's Restaurant ("Taxpayers"). In September 2014, the Mississippi Department of Revenue ("MDOR") issued an Audit Selection Letter to the Taxpayers, which informed them of an impending audit and requested certain business records. In October 2014, MDOR also notified Ballery and Greta of a pending individual income tax audit and requested certain records. In August 2015, MDOR issued a notice of assessment for sales tax liabilities to BBM, a notice of assessment for individual income tax liabilities against Ballery and Greta, which included a seventy-five percent penalty for fraudulent underreporting of income, and an assessment for sales tax liabilities related to Bully's Restaurant to Ballery. In October 2015, the Taxpayers appealed the BBM sales tax and individual income tax assessments, and the MDOR's Board of Review upheld and affirmed the assessments against the Taxpayers. The Taxpayers then appealed to the Mississippi Board of Tax Appeals ("BTA"). After supplemental documentation was produced and reviewed, the MDOR reduced the assessments. In May 2017, the BTA affirmed the amended assessments. In July 2017, the Taxpayers filed a petition in chancery court and challenged the BTA's findings, and the MDOR denied that the Taxpayers were entitled to relief. In May 2018, the Taxpayers filed a motion for summary judgment, which the chancery court denied. A trial was held in January 2020 and both parties submitted proposed findings of fact and conclusions of law by the end of February 2020. Despite the filings, the chancery court clerk filed a motion to dismiss for want of prosecution in October 2020, stating there had been no action of record in the case in twelve months. After the chancery court entered an order of dismissal without prejudice, the Taxpayers filed a motion for reconsideration in November 2020. In February 2021, the chancery court entered a final judgment on the merits, which affirmed the BTA's findings and dismissed the Taxpayer's petition with prejudice. The Taxpayers appealed.

## **ISSUES**

Whether the chancery court erred in (1) ruling that the Taxpayers failed to appeal the sales tax assessment against Bully's restaurant; (2) affirming the sales tax assessment against BBM because the MDOR did not properly account for personal use and donations of inventory; (3) finding that the Taxpayers failed to produce source documentation for the majority of their business expenses and in affirming the individual income-tax assessment; and (4) determining that there was sufficient evidence to support the fraud penalty assessed in conjunction with the individual income-tax assessment against the Taxpayers.

## **HOLDING**

(1) Because there was substantial evidence supporting the notice of assessment, and because of the testimony about the auditing and mailing system, there was sufficient evidence for the chancery court to conclude that the MDOR mailed the notice and Ballery and Greta failed to appeal the assessment. (2) Because the Taxpayers did not corroborate Greta's testimony regarding donated items and gifts, the chancery court did not err in finding the MDOR's calculation of sales tax assessment was proper. (3) Because the Taxpayers failed to provide requested documents, did not produce verified or substantiated sources for the deductions, and lacked source documentation, the Taxpayers failed to demonstrate that the chancery court's ruling was not supported by substantial evidence or was manifest error. (4) Because the Taxpayers had unusually high unsubstantiated expenses and the Taxpayers had underreported business income, and because the MDOR's audit worksheet clearly indicated that Ballery and Greta had underreported their income, the Taxpayers failed to demonstrate that the chancery court committed manifest error in affirming the imposition of the fraud penalty. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Chancery Court.

**Affirmed - 2021-CA-00248-COA (Aug. 30, 2022)**

Opinion by Chief Judge Barnes

Hon. J. Dewayne Thomas (Hinds County Chancery Court, First Judicial Dist.)

James Gary McGee Jr. for Appellants - Matthew Timmons Henry & Kristen Najwana Blanchard for Appellee

Briefed by [Anna Palmer](#)

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## BELMER V. STATE

### CIVIL - OTHER

**APPELLATE PROCEDURE - ADJUDICATION - MOOTNESS** - Cases in which an actual controversy existed at trial, but the controversy has expired at the time of review, become moot; the Court has no authority to entertain an appeal when there is no actual controversy

**APPELLATE PROCEDURE - JURISDICTION - CIRCUIT COURT** - A prisoner's appeal of an MDOC decision or policy must be made in the circuit court of the county where the prisoner resides, not in the county of conviction

### FACTS

In 1996, Cornelius Belmer pled guilty to one count of armed robbery and one count of kidnapping and was sentenced to thirty years in custody of the Mississippi Department of Corrections ("MDOC"). Belmer filed several post-conviction collateral relief motions, all of which were denied or dismissed by the circuit court. For each motion, Belmer contended his thirty-year sentence was not mandatory and that he should have had the possibility of parole. Belmer filed a petition with MDOC's Administrative Remedy Program ("ARP") and was told his offenses were violent, therefore he was not eligible for parole, and the offenses were mandatory offenses. Belmer then filed a motion in the circuit court seeking judicial review of the ARP's determination and claimed that he received an unconstitutional and illegal sentence. The circuit court denied Belmer's motion based on successive-motion grounds. Belmer appealed.

### ISSUE

Whether an actual controversy existed for the Court of Appeals to review.

### HOLDING

Because Belmer was released on parole since the time he initiated the appeal and he was no longer incarcerated, and because the motion was filed in the incorrect jurisdiction, there was no controversy for the Court of Appeals to review. Therefore, the Court of Appeals dismissed the appeal as moot.

**Appeal Dismissed - 2021-CP-00398-COA (Aug. 30, 2022)**

Opinion by Judge Smith

Hon. Caleb Elias May (Leake County Circuit Court)

*Pro se* for Appellant - Ashley Lauren Sulser (Att'y Gen. Office) for Appellee

Briefed by [Spencer Cash](#)

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## SIMPSON CNTY. SCH. DIST. V. WIGLEY

### CIVIL - PERSONAL INJURY

**APPELLATE PROCEDURE - INVOLUNTARY DISMISSAL - WAIVER** - In both jury and non-jury cases, where a defending or responding party, following the overruling of a motion for a directed verdict or a motion to

dismiss, goes forward with evidence of his own, he waives the right to assign on appeal error in the failure of the trial judge to grant his motion

**TORTS - NEGLIGENT SUPERVISION - FORESEEABILITY** - Negligence will be deemed the legal cause if the injury is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act; foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others

**TORTS - FAILURE TO RENDER AID - AGGRAVATION OF INJURIES** - A plaintiff is required to prove that the failure to render aid resulted in an aggravation of the plaintiff's injuries

### **FACTS**

In 2016, JLH boarded the school bus to go home for the day. After the bus didn't start, the substitute bus driver told the students to get off the bus while she continued to try to start the school bus. The bus driver left the students unsupervised and several students, including JLH, began playing tag. After ten to fifteen minutes of playing, JLH fell and broke his leg. Joanna Wigley, JLH's mother, filed a complaint against the Simpson County School District ("the District") in the circuit court, alleging claims for relief such as negligence, gross negligence, reckless disregard for the rights and safety of the plaintiff, *res ipsa loquitur*, negligence per se, and negligent infliction of emotional distress. Further, Wigley alleged that the District was careless, reckless, and negligent in the supervision, care, and treatment of JLH's injury and that the District was responsible for the safety and security of all students and individuals present on school grounds. The District responded to the complaint by denying all allegations and asserting all Miss. R. Civ. P. 12(b)(1)-(6) defenses and most of the substantive and procedural defenses available. The District also filed a motion for summary judgment, arguing that the complaint was unsustainable or involved a discretionary function. After hearing arguments, the circuit court granted summary judgment in favor of the District, except for Wigley's negligent supervision claim. During the trial on the negligent supervision claim, JLH testified that the bus driver saw him lying on the ground and told him to get up. JLH further stated that he was on the ground for about forty-five minutes without receiving assistance and that a teacher, Ms. Magee called Wigley to inform her of the accident. Wigley testified that when she arrived at the scene, the ambulance had not arrived and JLH was lying on the ground and had not received help prior to her arrival. Wigley further explained that JLH received surgery and began physical therapy, which lasted around three months. The District moved for involuntary dismissal under Miss. R. Civ. P. 41(b) and requested judgment in its favor, but the motion was denied. The District's Superintendent then testified that the job description of bus drivers did not explicitly state that they had a duty to supervise students when they were off the bus. The circuit court entered judgment in favor of Wigley and awarded \$287,000 in damages. The circuit court found that the District had breached its duty to properly supervise JLH and the other students while they were playing, and that breach was a direct and proximate cause of JLH's injury. The District appealed.

### **ISSUES**

Whether the circuit court erred (1) as a matter of law by denying the District's motion for involuntary dismissal based on insufficient evidence of negligence; (2) as a matter of law by entering judgment for Wigley; and (3) in finding that the District breached a duty to render aid and caused JLH's injury.

### **HOLDING**

(1) Because the District introduced evidence on its own behalf, the District waived its right to challenge the circuit court's denial of the District's Miss. R. Civ. P. 41(b) motion as error on appeal. (2) Because the injury happened suddenly and accidentally, because the accident was unforeseeable even if more supervision had been present, and because Wigley did not provide any facts proving causation, the circuit court erred in finding that the District's actions were the proximate legal cause of JLH's injury. (3) Because Wigley failed to prove that the District's alleged failure to render aid caused JLH's damages, because moving JLH could have resulted in further potential liability for the District, and because there was no evidence to show that JLH's injury was aggravated by any alleged failure to render aid, the circuit court erred in finding the District breached its duty and caused the injury. Therefore, the Court of Appeals reversed and rendered the judgment of the Simpson County Circuit Court.

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

Judge Lawrence agreed that there was a lack of substantial evidence of negligent supervision. However, he argued there was substantial, credible, and reliable evidence to support the circuit court's determination that the District failed to



render sufficient aid after JLH's injury. Because he believed the liability for failure to supervise was not supported by substantial evidence, that portion of the judgment should have been reversed and remanded. He would have remanded the case for determination of damages for the claim the evidence supported.

### **DISSENT**

Judge McCarty argued that JLH lying in the sun without any assistance for any period of time before calling 911 was a breach of the ministerial duty the District owed to JLH. He further noted that the majority should not have divided the liability into two parts, but that the District only had a single duty – to use ordinary care in the exercise of its ministerial duty to provide a safe school environment. He argued that the District breached its duty and that the District provided no evidence to contradict JLH's testimony, so the circuit court did not commit manifest error in its ruling.

### **Reversed & Rendered - 2021-CA-00009-C0A (Aug. 30, 2022)**

Opinion by Judge McDonald - Concurrence in Part & Dissent in Part by Judge Lawrence - Dissent by Judge McCarty  
Hon. Stanley Alex Sorey (Simpson County Circuit Court)  
Steven Lloyd Lacey & Allison Perry Fry for Appellant - W. Terrell Stubbs for Appellee  
Briefed by [Mariah Rhodes](#)

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## **WILSON V. LEXINGTON MANOR SENIOR CARE, LLC**

### **CIVIL - CONTRACT**

**CONTRACTS - ARBITRATION - FEDERAL ARBITRATION ACT** - The Federal Arbitration Act has clear authority to govern agreements formed in interstate commerce wherein a contractual provision provides for alternative dispute resolution

**CONTRACTS - ARBITRATION - MOTION TO COMPEL** - Under the Federal Arbitration Act, a motion to compel arbitration is valid when (1) there is a valid arbitration agreement and (2) the parties' dispute is within the scope of the arbitration agreement

**CONTRACTS - ARBITRATION - WAIVER** - A party may waive arbitration rights by either (1) actively participating in or substantially invoking litigation resulting in detriment or prejudice to the other party, or (2) engaging in conduct inconsistent with timely enforcing the arbitration agreement

### **FACTS**

In 2015, Willie Wilson was admitted to Lexington Manor Senior Care ("LMSC") on two separate occasions due to the decline of his health. On one occasion, Wilson was admitted to LMSC by his estranged wife, Glenda Wilson, and on the other occasion, he was admitted by his stepson, Eugene Wilson. Both Glenda and Eugene, on behalf of Willie, signed identical admission agreements that contained an arbitration provision. In August 2015, Willie died while in the care of LMSC. In 2017, Willie's son, Tovas Wilson, brought a wrongful death suit against LMSC on behalf of Willie's wrongful death beneficiaries. In February 2018, Charlie Wilson, as administrator of Willie's estate, filed a motion for enlargement of time to serve LMSC, after which LMSC was served in April 2018. Between April 2018 and July 2019, LMSC made several filings with the trial court; however, LMSC filed a motion to compel arbitration only after it had already filed an answer to the suit in which it did not assert arbitration as a defense, filed a motion to dismiss, and let a significant period of time elapse. In July 2019, nearly four-and-a-half months after filing its answer, and after a year of delay, Tovas died. In September 2019, the trial court entered a consent order substituting Charlie as the plaintiff and in October 2020, LMSC renewed its motion to compel arbitration. Subsequently, two hearings were held on the motion to compel arbitration. In December 2020, the trial court entered an order that stayed the matter and directed the case to proceed to arbitration. Wilson appealed.

### **ISSUE**

Whether LMSC waived its right to arbitrate and in turn waived the motion to compel arbitration.

### **HOLDING**

Because Charlie offered evidence of LMSC's substantial litigation, conduct by LMSC that was inconsistent with timely enforcing of arbitration, and prejudice to his claim resulting from this conduct, LMSC waived its right to arbitration, and in turn, waived the motion to compel arbitration, and the trial court erred in granting the motion to compel. Therefore, the Court of Appeals reversed and remanded the judgment of the Holmes County Circuit Court.

**Reversed & Remanded - 2021-CA-00072-COA (Aug. 30, 2022)**

Opinion by Judge Westbrook

Hon. Barry W. Ford (Holmes County Circuit Court)

Louise Harrell for Appellant - Jacob O. Malatesta & Michael Earl Phillips for Appellee

Briefed by [Conner Linkowski](#)

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

### **BELMER V. STATE**

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

**POST-CONVICTION RELIEF - PROCEDURAL BAR - SUCCESSIVE CLAIMS** - Pursuant to Miss. Code Ann. § 99-39-23(6), any order dismissing a petitioner's motion or otherwise denying relief is a final judgment and shall be a bar to a second or successive motion

**POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FAILURE TO FILE** - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

**POST-CONVICTION RELIEF - PROCEDURAL BAR - RES JUDICATA** - The doctrine of res judicata bars claims that have been considered and rejected in prior proceedings

**CRIMINAL PROCEDURE - GUILTY PLEAS - WAIVER** - A guilty plea operates as a waiver to all defenses that could have been presented except for those defenses going to the jurisdiction of the sentencing court

#### **FACTS**

In 1996, Cornelius Belmer pled guilty to armed robbery and kidnapping, and he was sentenced to thirty years and ten years, respectively, to be served concurrently. In 2003, Belmer filed his first motion for post-conviction relief ("PCR") and argued that he was never informed of the mandatory thirty-year sentence for armed robbery, so his guilty plea was not knowingly and voluntarily entered into. The circuit court dismissed Belmer's motion. In 2008, Belmer filed his second PCR motion and argued that he received ineffective assistance of counsel. The circuit court conducted an evidentiary hearing on the claim and subsequently denied Belmer's second motion. In 2010, Belmer filed his third PCR motion and raised the same claims from his second PCR motion. The circuit court dismissed the motion as a successive motion, and the Court of Appeals affirmed the decision. In 2020, Belmer filed his fourth PCR motion and argued the same ineffective-assistance-of-counsel claims as his prior PCR motions. The circuit court dismissed the motion, finding the claims were barred as successive. Belmer appealed.

#### **ISSUES**

Whether (1) the circuit court erred in finding that Belmer's PCR motion was procedurally barred; (2) Belmer's argument regarding his motion for a psychiatric evaluation lacked merit; and (3) the circuit court erred by failing to rule on Belmer's motion to supplement the record for his instant PCR motion.

#### **HOLDING**

(1) Because Belmer was barred from making successive PCR motions under Miss. Code Ann. § 99-39-23(6), because Belmer failed to file his fourth PCR motion within three years of his guilty plea as was required by Miss. Code Ann. § 99-39-5(2), and because Belmer's claims in his fourth PCR motion had already been considered and rejected in prior

proceedings, the circuit court did not err in finding that Belmer's fourth PCR motion was procedurally barred. (2) Because Belmer waived any pending motions and potential defenses when he entered his guilty plea, because the contents of an affidavit did not provide substantial evidence that Belmer was incompetent to enter a guilty plea, and because the issue of ineffective assistance of counsel was available for Belmer to raise in previous PCR motions, Belmer's argument lacked merit. (3) Because Belmer filed his motion to supplement the record after his PCR motion was dismissed, Belmer's argument lacked merit. Therefore, the Court of Appeals affirmed the judgment of the Leake County Circuit Court.

**Affirmed - 2021-CP-00410-COA (Aug. 30, 2022)**

Opinion by Judge Lawrence

Hon. Brian Kennedy Burns (Leake County Circuit Court)

*Pro se* for Appellant - Ashley Lauren Sulser (Att'y Gen. Office) for Appellee

Briefed by [Doug Reynolds](#)

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## LUCKETT V. STATE

### CIVIL - POST-CONVICTION RELIEF

**POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - PERSONAL AFFIDAVIT** - In the post-conviction relief context, a defendant's claims of ineffective assistance of counsel must be pled with specificity and be supported by affidavits other than their own; when a defendant's claims are unsubstantiated by anything other than their own self-serving statement in the affidavit, the defendant's ineffective assistance of counsel claim is without merit

**CRIMINAL LAW - ADEQUACY OF REPRESENTATION - REASONABLE PROBABILITY** - Under *Strickland*, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different

**POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - PLEA DEALS** - A lenient plea deal that results in a lesser sentence than the potential maximum penalty that a defendant could receive weighs heavily against finding injustice in the denial of an ineffective assistance of counsel claim

### FACTS

In 2019, Derrick Luckett was charged as a habitual offender under Miss. Code Ann. § 99-19-83 for burglary of a dwelling, conspiracy to commit burglary of a dwelling, and possession of a firearm by a felon. In 2020, Luckett entered a guilty plea to the burglary and conspiracy charges as a nonviolent habitual offender. Luckett's charge for possession of a firearm by a felon was nolle prosequed. When entering his guilty plea, Luckett expressed no issues with his counsel's representation. Luckett was sentenced to serve twenty-five years in the custody of the Mississippi Department of Corrections ("MDOC") for the burglary charge, and five years for the conspiracy charge, to run concurrently. In 2021, Luckett filed a motion for post-conviction relief ("PCR") alleging double jeopardy and various claims for ineffective assistance of counsel. The circuit court summarily dismissed Luckett's motion. Luckett appealed.

### ISSUE

Whether the circuit court erred in denying Luckett's PCR motion for ineffective assistance of counsel.

### HOLDING

Because Luckett offered no affidavit other than his own to support his claims, because nothing in the record indicated that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different to support Luckett's allegations of ineffective assistance of counsel, because Luckett's attorney negotiated a favorable disposition for his felon-in-possession charge, because the transcript of Luckett's plea proceedings clearly indicated that he was satisfied with his defense counsel's representation, and because the circuit

court found no individual errors, the circuit court did not err in denying Lockett's PCR motion for ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2021-CP-01248-COA (Aug. 30, 2022)**

Opinion by Chief Judge Barnes

Hon. M. Bradley Mills (Madison County Circuit Court)

*Pro se* for Appellant - Ashley Lauren Sulser (Att'y Gen. Office) for Appellee

Briefed by [Nivory Gordon](#)

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## **COURT OF APPEALS - CRIMINAL CASES**

### **McNAIR V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE** - When reviewing a challenge to the sufficiency of the evidence, the relevant question 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 - NEW TRIAL - WEIGHT 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

**CRIMINAL LAW - AGGRAVATED DOMESTIC VIOLENCE - ELEMENTS** - Miss. Code Ann. § 97-3-7(4)(a)(ii) states that a person is guilty of aggravated assault if he or she attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

#### **FACTS**

Roy McNair was convicted of aggravated domestic violence in the shooting of his wife, Rosie McNair, that occurred at their marital residence around 8:00 p.m. The shooting occurred after Rosie initiated divorce proceedings, which were ongoing due to disputes of assets and Roy seeking financial assets. Rosie identified Roy as a suspect in her shooting, even though she did not see the shooter, due to his knowing her nightly routine and a detective and investigator finding no signs of forced entry. Roy was arrested on the night that Rosie was shot. Roy also called an ex-girlfriend, Shirley Ford, the night of the shooting before he was arrested. Ford told Roy that she had seen his car parked in a certain place at a specific time, and Roy told her that he had not left his residence in two months. Surveillance footage of a vehicle matching the description of Roy's vehicle was seen driving away from his apartment at 7:22 p.m. and then back towards the apartment at 8:24 p.m. on the night of the shooting. Roy was interviewed by detectives in the early morning hours the day after the shooting. Roy recalled the events of the night as him going to the residence of his son, Devin McNair, to get a plate of food, returning to the apartment where he lived to a football game being at the halftime mark, and a friend calling to tell him that he was a suspect in the shooting. Roy stated that he had not been to the marital residence that evening but told detectives that he hoped he would not be on surveillance footage of the marital home on the night of the shooting if it was checked. After being arrested as a felon in possession of a firearm two days after Roy was arrested, Devin testified that Roy had given him a shotgun when he came to his residence and told him to dispose of the gun. Devin also stated that Roy told him that he, "did what he had to do" when asked about Rosie being shot. Pellets recovered at the crime scene, although mutilated, were consistent with that which could come out of a shotgun. It was also discovered that one positive gunshot residue ("GSR") particle was on Roy's t-shirt and several particles that indicated GSR was on his body and clothing. Searches from Roy's cell phone also revealed that Roy had searched for titles such as shotgun shells for home defense, surviving spouse receiving social security, spouses of retired disabled

soldiers receiving checks, and grants for disabled people. After considering the evidence at trial, Roy was convicted and sentenced to twenty years in the custody of the Mississippi Department of Corrections. Roy then filed a motion for judgment notwithstanding the verdict or a new trial, which the circuit court denied. Roy appealed.

## ISSUES

Whether (1) the evidence presented was sufficient to cause any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt and (2) the verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.

## HOLDING

(1) Because there was surveillance footage of Roy leaving his apartment, because his son testified that Roy gave him a gun to dispose of, because there was GSR on Roy's clothing, because Roy acted like he did not have any knowledge of the shooting when he spoke with law enforcement over the telephone but later stated that a friend had called him and told him that he was a suspect, and because Roy had a financial motive for the assault, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (2) Because the Court of Appeals does not reweigh evidence, assess witnesses' credibility, or resolve conflicts between evidence, those decisions being solely to the jury, because Roy's argument concerning his son's testimony asked the Court of Appeals to assess his son's credibility, and because Roy's argument concerning the GSR particles found on his person asked the Court of Appeals to reweigh evidence, the Court of Appeals could not say that the jury's verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

**Affirmed - 2021-KA-01121-COA (Aug. 30, 2022)**

Opinion by Judge Greenlee

Hon. Jon Mark Weathers (Forrest County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Casey Bonner Farmer (Att'y Gen. Office) for Appellee

Briefed by [Kennedy Gerard](#)

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## PERKINS V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - APPEALS - LINDSEY BRIEF** - *Lindsey* establishes the procedure to govern cases in which appellate counsel represents an indigent criminal defendant and does not believe his or her client's case presents any arguable issues on appeal; if appellate counsel finds no arguable issues in the record, he or she must then advise the defendant of his right to file a pro se brief

**CRIMINAL PROCEDURE - APPEALS - LINDSEY BRIEF** - In a *Lindsey* brief, to certify that there are no arguable issues supporting the client's appeal, appellate counsel must thoroughly review the record and specifically examine: (a) the reason for the arrest and the circumstances surrounding arrest; (b) any possible violations of the client's right to counsel; (c) the entire trial transcript; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; and (h) possible misapplication of the law in sentencing

## FACTS

In March 2018, thirteen-year-old Vicki attended her court-ordered visitation with her mother Tonya, and stepfather, David Perkins. Vicki's father Jeff had full custody of her, with Tonya having visitation every other weekend. During the weekend visitation, Perkins, Tonya, and Vicki went to church, out to eat, and came home to take an afternoon nap. Vicki was laying in bed between Tonya and Perkins. Tonya was asleep with her back to Vicki, while Perkins was on his back next to Vicki. Vicki fell asleep and awoke to Perkins moving and rubbing his fingers in her private area. Vicki immediately got up and called her father, Jeff, to pick her up. Jeff arrived and stated that he was going to file charges

against Perkins and take Vicki to the hospital to be examined. A sexual assault examination was performed on Vicki at Baton Children’s Hospital, and a forensic interview was conducted three days later at the Children’s Advocacy Center. During the examination, interview, and talking with investigators, Vicki’s story about the incident remained the same. After a jury trial, Perkins was convicted of sexual battery, and sentenced to forty years as a non-violent habitual offender. On appeal, Perkins’s counsel filed a *Lindsey* brief stating there were no arguable issues on appeal after thoroughly reviewing the record. Perkins then filed a one-page supplemental brief claiming he did not commit the crime and stated his version of the events.

### ISSUE

Whether there were any arguable issues on appeal that warranted reversal of Perkins's conviction and sentence.

### HOLDING

Because Perkins’s counsel filed a *Lindsey* brief certifying that the record presented no arguable issues for appeal, because Perkins did not raise any legal issues in his supplemental brief, and because Perkins could not, under the guise of argument, testify before the Court of Appeals, there were no issues on appeal that warranted reversal. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2021-KA-00129-COA (Aug. 30, 2022)**

Opinion by Chief Judge Barnes

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

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Hannah Elliott](#)

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