

**MISSISSIPPI SUPREME COURT DECISIONS – APRIL 13, 2023****SUPREME COURT - CIVIL CASES****DEEPAK JASCO, LLC V. PALMER****CIVIL - WRONGFUL DEATH**

**CIVIL PROCEDURE - SUMMARY JUDGMENT - NON-MOVANT'S BURDEN** - Summary judgment is appropriate when the non-moving party has failed to make a showing sufficient to establish the existence of an essential element essential to the party's case, and on which that party will bear the burden of proof at trial; bare assertions are simply not enough to avoid summary judgment

**TORTS - NEGLIGENCE - PREMISES LIABILITY** - A plaintiff must show that the defendant breached a particular duty owed to the plaintiff and that the breach of duty proximately caused damages; while it is true that those in control of real property have a duty, if reasonably possible, to remedy most dangerous conditions on their property and to warn of those they cannot eliminate, that duty presupposes the defendant knows, or should know, of the dangerous condition

**TORTS - NEGLIGENCE - THREAT OF ASSAULT** - Where the alleged dangerous condition is the threat of an assault, the requisite cause to anticipate the assault may arise from (1) actual or constructive knowledge of the assailant's violent nature, or (2) actual or constructive knowledge that an atmosphere of violence exists on the premises; mere accidents on the premises do not require actual or constructive knowledge

**FACTS**

In September 2017, Charles Green was stabbed and killed. The body was discovered in a parking lot of a deserted building. Deepak Jasco, LLC, ("Jasco") was a convenience store in the adjacent lot to where the body was found. Green's sister, Luretha Green Palmer, filed a wrongful death lawsuit against Jasco and asserted a claim for premises liability based on negligent security. The complaint alleged a history of dangerous crimes on Jasco's property and its surrounding areas of which they were aware. Jasco offered the affidavit of a land surveyor showing that Green's death occurred on property not owned by Jasco. Jasco filed a motion for summary judgment, but the circuit court denied the motion. Jasco petitioned for an interlocutory appeal.

**ISSUES**

Whether (1) Palmer met the requisite burden of proof necessary for Jasco's motion for summary judgment and (2) there was a genuine issue of material fact about whether Green's death occurred on Jasco's property.

**HOLDING**

(1) Because Palmer only offered bare assertions and nonspecific allegations that Jasco's property was in a crime-ridden area with a history of dangerous crimes without offering any competent or admissible evidence to establish that Jasco had actual or constructive knowledge of an atmosphere of violence or other instances of crime at or near the Jasco property, Palmer failed to meet her burden of production, and Jasco was entitled to summary judgment. (2) Because a land surveyor determined that Green was not killed on Jasco's property after he surveyed the property, located the property lines, and ascertained ownership records in tax records, Palmer failed to offer evidence that there was a genuine issue of material fact about whether Green's death occurred on Jasco's property, and Jasco was entitled to summary judgment. Therefore, the Supreme Court reversed and rendered the judgment of the Hinds County Circuit Court.

**CONCURRENCE IN PART & IN RESULT**

Justice Maxwell agreed with the majority that Palmer failed to meet her burden to survive summary judgment but maintained that he would not address Jasco's claim about whether Green was stabbed on Jasco's property because the exact location of Green's death was a disputed fact which should not be addressed at the summary judgment stage.

**Reversed & Rendered - 2021-IA-00702-SCT (Apr. 13, 2023)**

Opinion by Justice Griffis - Concurrence in Part & in Result by Justice Maxwell

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

Jay Marshall Atkins & Mason Scott Montgomery for Appellants - John Curtis Hall II for Appellee

Briefed by [AnnaGrace Meeks](#)

Edited by [Thomas Simpson](#) & [Ashley House](#)

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## LUXE HOMES, LLC V. BREWER

### CIVIL - CONTRACT

**CONTRACTS - INTERPRETATION - AMBIGUITY** - When there is ambiguity in a contract provision, it must be interpreted against the party or agent of the party who drafted the provision; if the contract provision is unambiguous, then it must be enforced as written

**CONTRACTS - ENFORCEABILITY - FORUM SELECTION CLAUSE** - Forum selection clauses are presumptively valid and enforceable unless the resisting party can prove: (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of its day in court; or (3) the enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision

**CONTRACTS - ENFORCEABILITY - FORUM SELECTION CLAUSE** - When reviewing a forum selection clause, a court must first determine if the clause is mandatory or permissive; if a clause is mandatory, then the court decides if it is enforceable; if the clause is permissive, then the clause is not enforced

**CIVIL PROCEDURE - VENUE - SUBJECT MATTER JURISDICTION** - Chancery court may have pendent jurisdiction over the legal claims if it appears from the face of a well-pleaded complaint that an independent basis for equity jurisdiction exists; if the complaint seeks legal relief, even in combination with equitable relief, the circuit court can have proper subject matter jurisdiction; it is more appropriate for a circuit court to hear equity claims than it is for a chancery court to hear actions at law since circuit courts have general jurisdiction but chancery courts enjoy only limited jurisdiction

### FACTS

In January 2021, Luxe Homes contracted with the Brewers to build a home in Hinds county. The Brewers's representation, Century 21, prepared a form contract with a provision that required the property be conveyed to the Brewers by May 2021. The contract also contained a venue provision that stated, "Venue of any action filed by either party to the contract, whether against each other or any broker or agent involved shall be the Circuit Court of Rankin County." Due to COVID-19, inclement weather, and various other reasons, the property was not completed by the agreed upon deadline. In June 2021, the Brewers filed suit against Luxe Homes in Hinds County Chancery Court for breach of contract, negligent and intentional misrepresentation, and a declaratory judgment. They requested specific performance, reasonable attorneys' fees, general damages, special damages, and punitive damages. The Brewers further alleged construction had not even substantially begun at time of filing of the complaint. In November 2021, Luxe Homes filed a motion to transfer venue, alleging that the contract with the Brewers provided that venue was only proper in Rankin County Circuit Court. In January 2022, the chancellor held a hearing on Luxe Homes's motion and entered an order denying the request to transfer venue because the provision was permissive in nature and therefore unenforceable. Luxe Homes petitioned for interlocutory appeal.

### ISSUES

Whether (1) the forum selection clause is mandatory or permissive; (2) the forum selection clause is enforceable; and (3) the case can properly be transferred to Rankin County Circuit Court.

### **HOLDING**

(1) Because of the unambiguous use of the word “shall” in the venue provision, and because multiple references to filing suit in Rankin County exhibited the parties’ intent at the time of the formation of the contract, the forum selection clause was mandatory. (2) Because the parties agreed to these contract provisions, because the forum selection clause was presumptively valid, and because the Brewers failed to rebut the presumption of validity, the contract venue provision was enforceable. (3) Because the parties had an unambiguous contract that contained mandatory requirements that the suit be heard by the Rankin County Circuit Court, because the complaint requested specific performance, reasonable attorneys’ fees, general damages, special damages, and punitive damages, because the circuit court had general jurisdiction of both legal and equitable remedies, and because any ambiguity in the venue provisions should have been interpreted against the Brewers because they prepared the contract, the Brewers’ argument that circuit court had no authority to order specific performance was without merit, and venue could have properly been transferred to Rankin County Circuit Court. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Chancery Court.

### **Reversed & Remanded - 2022-IA-00132-SCT (Apr. 13, 2023)**

En Banc Opinion by Justice Chamberlin

Hon. Denise Owens (Hinds County Chancery Court)

F. Russell Brabec & Arthur F. Jernigan Jr. for Appellants - Robert M. Frey & La’Toyia J. Slay for Appellees

Briefed by [Maya Langendoen](#)

Edited by [Thomas Simpson](#) & [Mason Scioneaux](#)

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## **SEL BUS. SERVS., LLC V. LORD**

### **CIVIL - REAL PROPERTY**

**CONTRACTS - STATUTE OF FRAUDS - EQUITABLE LIEN** - The statute of frauds does not apply to an equitable lien that arises by law, because such a lien rests on the principles of justice and fairness and not whether an enforceable contract had been formed

**CONTRACTS - STATUTE OF FRAUDS - EQUITABLE ESTOPPEL** - The doctrine of equitable estoppel may be used to enforce an oral contract which would otherwise be unenforceable under the statute of frauds

**CONTRACTS - STATUTE OF FRAUDS - UNJUST ENRICHMENT** - Unjust enrichment only applies to situations where there is no legal contract and the person sought to be charged is in possession of money or property which in good conscience and justice, he should not retain but should deliver to another

### **FACTS**

In early 2020, Wilburn Lord Jr. orally agreed to sell a building in Rolling Fork, Mississippi, to SEL Business Services (“SEL”) and Skip Lloyd for \$60,000. Soon after, SEL started paying taxes on the building, moved in, and made repairs. However, Lloyd never went through with the sale and sold the building to Sharkey Issaquena Community Hospital in July 2020. Soon after, SEL sought to enjoin the sale and filed a petition for injunctive relief against Lord, later filing an amendment to add the hospital as a defendant. Additionally, the amended complaint alleged that Lord had breached their contract and requested specific performance. SEL also alleged detrimental reliance and promissory estoppel. It requested that if the court found that the remedies SEL asked for were inapplicable, “[that] the Court disgorge all funds paid to Defendants and/or otherwise award all monetary damages available under Mississippi law.” Lord then moved for summary judgment based on the statute of frauds and claimed that the statute of frauds barred SEL’s claim for specific performance and any “derivative” equitable claims. At the summary judgment hearing, SEL admitted that the oral contract was unenforceable, so specific performance was unavailable. However, SEL insisted that the statute of

frauds did not bar unjust enrichment. The Chancellor then granted both motions for summary judgment in favor of Lord. SEL appealed timely, but the ruling was affirmed. SEL petitioned for writ of certiorari.

### **ISSUE**

Whether the statute of frauds barred every equitable remedy on an oral contract to sell property.

### **HOLDING**

Because unjust enrichment only applies in situations where there is no legal contract, and because an equitable lien can sometimes provide a remedy for money expended under an unenforceable contract, the statute of frauds does not bar the equitable lien remedy. Therefore, the Supreme Court affirmed in part and reversed and remanded in part the judgment of the Sharkey County Chancery Court.

### **Affirmed in Part; Reversed & Remanded in Part - 2021-CT-00368-SCT (Apr. 13, 2023)**

En Banc Opinion by Justice Maxwell

Hon. Jaye A. Bradley (Sharkey County Chancery Court)

C. W. Walker III for Appellants - Frank J. Dantone Jr., John P. Sneed, Charles Edward Cowan, & Edward D. Lamar for Appellees

Briefed by [Albert Soussis](#)

Edited by [Kara Edwards](#) & [Mason Scioneaux](#)

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

### **ANDERSON V. STATE**

#### **CRIMINAL - FELONY**

**HOMICIDE - EXCUSABLE HOMICIDE - CULPABILITY** - If a killing occurs by accident or misfortune while doing a lawful act by lawful means with usual and ordinary caution and without any unlawful intent then it is considered excusable homicide; the nature of the argument must cause a defendant to believe he is threatened with grave and impending danger that would justify a homicide

**JURY INSTRUCTIONS - EXCUSABLE HOMICIDE - UNLAWFUL ACT** - If a defendant admits they had been engaged in an unlawful act then they are not entitled to an excusable homicide instruction

**EVIDENCE - ADMISSIBILITY - PRIOR BAD ACTS** - Proof of another crime or act is allowed when it is so interrelated to the charged crime that it constitutes either a single transaction or occurrence or a closely related series of transactions or occurrences; prior bad acts may be admissible for proving a defendant's state of mind or to tell a complete story to the jury

#### **FACTS**

In September 2020, Samuel Anderson and his girlfriend, Rhae Ann Height, were living in the pool house behind his grandmother Evelyn Davenport's house. On September 25, Height was scheduled for a court appearance in Simpson County regarding an indictment for the possession of methamphetamine. The night before, Anderson and Height stayed at a friend's house where the couple used methamphetamine. Height testified that the couple had not slept in three days. The couple drove to Davenport's house before heading to court. Height testified that Anderson got out of the car and went inside and could hear Anderson and Davenport talking loudly. Anderson came outside, grabbed an unloaded shotgun from the backseat, loaded it, and walked back inside with the appearance that he could kill somebody. Height felt scared and yelled at Anderson to stop, but she left in the car after Anderson went back into the house. Anderson's sister, Halley Wells, testified that she saw a white Mustang in the driveway that she had never seen before. However, Height was in the car, Anderson was outside of it, and they appeared to be arguing. Then, Wells saw Anderson leave the car with a gun. Wells watched Anderson go into Davenport's house with the gun, and then she heard a gunshot. Wells ultimately called 911, watched Anderson run out of the house, and hide the gun in a crawl space under the house.

Investigator Zach Primeaux and another officer found Davenport shot in the abdomen. Davenport told the officers that Anderson had shot her with a shotgun. Davenport died from her injuries thirteen days later. Deputy Dustin Keys found a shotgun in the crawl space under the house. Anderson was arrested and transported to the Warren County Jail. At trial, Anderson testified that when he told Davenport he was taking Height to the courthouse that morning, Davenport did not want him to go and refused to give him gas money. Anderson believed Davenport likely knew he was high, and that may have been why she did not want him to take Height to court. Anderson stated that he went to retrieve the shotgun from the Mustang. Anderson could not remember why he had the shotgun, but he did not want to travel with the gun because he had a prior felony conviction. Anderson stated he did not check to see if the gun was loaded and that his plan was to take the shotgun inside without Davenport noticing and place it in a closet. Once inside, Davenport could tell Anderson was hiding something, so she walked up and snatched the gun causing it to go off. Anderson testified that he did not know why Height stated that he looked angry before going inside with a gun, and he also denied taking a shell from the car's console and loading the gun. Anderson stated he placed the gun under the house because he knew he was not supposed to be around a gun. Anderson testified that he could not recall being mad at Davenport, although he admitted they may have had an argument that morning. Anderson testified that he did not bring the gun inside with the intent to shoot Davenport, and that Davenport did nothing to provoke or enrage him. Dr. Mark LeVaughn performed Davenport's autopsy and concluded the gunshot impact was at close range and the manner of death was homicide. The State rested at the close of Dr. LeVaughn's testimony. The trial court denied Anderson's motion for a directed verdict. A jury found Anderson guilty of murder. Anderson appealed.

### **ISSUES**

Whether the trial court erred by (1) refusing an instruction on excusable homicide by accident and (2) admitting evidence of Anderson's other bad acts.

### **HOLDING**

(1) Because Davenport's death was not an accident, and even if it was, the excusable homicide by accident instruction did not apply since Anderson was a convicted felon in possession of a firearm, therefore, engaged in unlawful conduct when the crime occurred, and because the disagreement over gas money was insufficient provocation for Anderson to believe he was threatened with grave and impending danger that would warrant an excusable homicide, the trial court did not err by refusing an excusable homicide by accident instruction since it found that it did not apply. (2) Because Anderson testified that he had been using methamphetamine, and because the claim that Anderson was using methamphetamine at the time of the incident was a fact relevant to his state of mind and motive at the time of the incident, the trial court's decision to allow evidence of Anderson's other bad acts was not erroneous. Therefore, the Supreme Court affirmed the judgment of the Warren County Circuit Court.

**Affirmed - 2022-KA-00007-SCT (Apr. 13, 2023)**

Opinion by Justice Beam

Hon. Toni Demetresse Terrett (Warren County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Ross Dockins](#)

Edited by [Kayla Tran](#) & [Ashley House](#)

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**MISSISSIPPI COURT OF APPEALS DECISIONS – APRIL 11, 2023**  
**COURT OF APPEALS - CIVIL CASES**

**DAWSON V. BURG**

**CIVIL - PERSONAL INJURY**

**TORTS - NEGLIGENCE - BORROWED SERVANT** - Under the borrowed servant doctrine, a servant, in general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes the servant of the borrower, although he remains in the general employment of the lender

**TORTS - NEGLIGENCE - BORROWED SERVANT** - In determining whether one is a borrowed servant, courts consider (1) whose work is being performed, (2) who controls or has the right to control the workman as to the work being performed, and (3) whether the workman voluntarily accepted the special employment

**CONTRACTS - INTERPRETATION - WAIVER** - The reality of the workplace and the parties' actions in carrying out a contract can impliedly modify, alter, or waive express contract provisions

**TORTS - NEGLIGENCE - FELLOW SERVANT** - The Mississippi Workmen's Compensation Act bars a suit by an injured employee against a fellow servant when the plaintiff is covered by the Act

**FACTS**

Staffing agency Brambles Inc. assigned Roger Dawson to work for Dollar General in its warehouse and provided workers' compensation coverage to Dawson. Another staffing agency, Professional Staffing Company Inc. ("Professional Staffing"), assigned Larry Burgs to the same warehouse. In September 2018, Dollar General and Professional Staffing created a temporary service agreement stating that Burgs was an employee of Professional Staffing and should not be considered an employee of Dollar General. However, the agreement indicated that Dollar General would be responsible for training, assisting, instructing, and supervising employees. The agreement also stated that Professional Staffing was an independent contractor for Dollar General. The document noted that the initial service agreement term would run for one year. Over a year later, in December 2019, Dawson was injured when Burgs turned the throttle on a stuck pallet jack that pinned Dawson's leg against a merchandise rack. Liberty Mutual, the worker's compensation insurance carrier for Brambles Inc., compensated Dawson for his injuries. In November 2020, Dawson filed a negligence complaint against Burgs and Professional Staffing under the doctrine of respondeat superior. Liberty Mutual filed an intervening complaint asserting that it had paid benefits to Dawson and was entitled to reimbursement if a court found Burgs and Professional Staffing liable for Dawson's injury. In March 2021, Burgs and Professional Staffing filed a motion for summary judgment, alleging that Dawson could only recover through workers' compensation because Burgs was a "borrowed servant" of Dollar General during the accident. In an affidavit, Professional Staffing's office manager stated that Professional Staffing had no control over job assignments, that Burgs voluntarily accepted temporary employment at Dollar General, that Dollar General trained Burgs, and that Burgs worked on behalf of Dollar General and at their discretion. Dawson admitted that Burgs was performing work for Dollar General at the time of the accident. In August 2021, the circuit court granted Burgs's and Professional Staffing's motion for summary judgment, finding that Burgs was immune from liability as Dawson's "fellow servant" and that Professional Staffing was not vicariously liable for Burgs's actions. Dawson appealed.

**ISSUE**

Whether the circuit court erred by granting Burgs's and Professional Staffing's motion for summary judgment.

**HOLDING**

Because Dollar General controlled, supervised, and trained Burgs who was voluntarily working at Dollar General, because Dawson failed to demonstrate significant probative evidence that Dollar General did not have exclusive control over Burgs, because there was no general issue of material fact as to Burgs's status as a borrowed servant, because Burgs was Dollar General's borrowed servant during the accident, because Dawson was limited to workers' compensation benefits as his exclusive remedy, and because Burgs was Dawson's fellow servant, Burgs was immune from liability and Professional Staffing was not vicariously liable for Burgs's actions, and the circuit court did not err by granting Burgs's



and Professional Staffing’s motion for summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Circuit Court.

## **DISSENT**

Judge Westbrook argued that the circuit court erred by granting summary judgment because a genuine issue of material fact existed as to whether Dollar General exercised exclusive control over Burgs. She cited a provision in the contract stating that Burgs was an employee of Professional Staffing and a provision limiting the scope of Burgs’s work without Professional Staffing’s express permission.

### **Affirmed - 2021-CA-01038-COA (Apr. 11, 2023)**

En Banc Opinion by Judge Greenlee - Dissent by Judge Westbrook

Hon. Richard A. Smith (Sunflower County Circuit Court)

Charles M. Merkel Jr., Edward P. Connell Jr., & Robert Alexander Carson III for Appellant - Robert P. Thompson & Charles Barton Wynn Jr. for Appellees

Briefed by [Meaghan Pickles](#)

Edited by [Emilee Crocker](#) & [Ashley House](#)

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## **FAGAN V. FAULKNER**

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

**TORTS - DEFAMATION - SLANDER** - To prove slander, the following elements must be shown: (1) a false statement that has the capacity to injure the plaintiff’s reputation; (2) an unprivileged publication; (3) negligence or greater fault on the part of the publisher; (4) and either actionability of statement irrespective of special harm or the existence of special harm caused by the publication

**TORTS - DEFAMATION - SLANDER PER SE** - Slander per se, which includes words imputing a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade, or business, does not require a showing of special harm

**TORTS - LIBEL - OPINION STATEMENTS** - Name-calling and verbal abuse are to be taken as statements of opinion and do not give rise to an action for libel unless they clearly and unmistakably imply the allegation of undisclosed false and defamatory facts as the basis for the opinion

**TORTS - DEFAMATION - CLEAR & UNMISTAKABLE** - Defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation, or conjecture

**TORTS - DEFAMATION - MCFADDEN** - In *McFadden*, a physician sued an insurance adjuster for slander after the insurance adjuster told a client that he would not settle her case unless she stopped treatment with that physician because he was a “crackpot” and a “quack,” referring to the physician’s professional abilities; the client canceled her treatment with the physician based on the insurance adjuster’s comments

### **FACTS**

Judy Faulkner worked at North Mississippi Surgery Center’s Ambulatory Surgery Center in Tupelo as a surgical scheduler and where Dr. Bryan Fagan worked as a surgeon. Though Dr. Fagan had individual ownership interests in the surgical center, he was not Faulkner’s employer, and the two worked together on a weekly basis for several years. In February 2016, Dr. Fagan wanted to swap two of his surgery times. Faulkner informed Dr. Fagan that he could, but the piece of surgical equipment that he was trained to perform surgery with would be unavailable. Dr. Fagan became upset, and later that day, he called Faulkner derogatory names during one of his surgeries. Faulkner was not in the room at the time, but four or five individuals were present. When word got back to Faulkner, Dr. Fagan called Faulkner and apologized. Dr. Fagan also apologized to everyone who was present in the operating room, apologized to Faulkner again, in person, at the surgery center, and gave Faulkner an additional semi-public apology that she requested. The two continued working together with no further arguments. One year later, Faulkner sued Dr. Fagan for defamation and intentional infliction of emotional distress. After Dr. Fagan was denied a directed verdict, the trial court found that he

was not liable for intentional infliction of emotional distress but liable for the defamation claim of slander per se since it was common knowledge throughout the workplace that Dr. Fagan was displeased with Faulkner's work after he intentionally uttered a false and unprivileged statement to third parties. The trial court rendered a \$30,000 judgment against Dr. Fagan. The Lee Country Circuit Court affirmed the trial court's judgment. Dr. Fagan appealed.

### ISSUES

Whether the (1) trial court committed manifest error in ruling that Dr. Fagan's words were actionable as a defamation claim of slander per se; (2) evidence showed that the name-calling attacked Faulkner's professional capacity or was made regarding Faulkner's ability to perform her job; and (3) trial court improperly relied on *McFadden* to support its ruling that Dr. Fagan's words spoken about Faulkner were an attack on her ability to schedule surgeries.

### HOLDING

(1) Because Dr. Fagan's words were merely name-calling and his opinion at the time, because the derogatory words could not be considered true or false within the context that they were spoken, and because Dr. Fagan claimed he was upset about the situation and there was no evidence that Dr. Fagan's words were in the context of Faulkner's professional abilities, the trial court erred in ruling Dr. Fagan's words were actionable as a defamation claim of slander per se. (2) Because there was no evidence connecting Dr. Fagan's words to the context of Faulkner's professional world, because Faulkner's slander claim was related only to the one-time name-calling and Faulkner continued to work and interact with Dr. Fagan throughout the litigation with no issues, because giving Dr. Fagan's words meaning would result in innuendo, speculation, or conjecture, and because there was no evidence that Dr. Fagan even made the statement, the trial court made improper inferences that Dr. Fagan's name-calling was referencing Faulkner's professional abilities. (3) Because there was no evidence that showed the derogatory words were used in the context of Faulkner's professional abilities as was the case in *McFadden*, the trial court improperly relied on *McFadden* to support its ruling that Dr. Fagan's words spoken about Faulkner were an attack on her ability to schedule surgeries. Therefore, the Court of Appeals reversed and rendered the judgment of the Lee County Circuit Court.

### DISSENT

Judge McCarty argued that if the evidence was viewed in a light most favorable to the jury's verdict, then reasonable minds could believe that Dr. Fagan was commenting adversely on Faulkner's professional abilities since he made the comments around other work colleagues. He argued because Dr. Fagan did not unequivocally deny a connection between his statement and Faulkner's ability to do her job, there was evidence to show that the statement was not a simple profanity but was actionable under the law of slander, irrespective of special harm.

#### **Reversed & Rendered - 2022-CA-00130-COA (Apr. 11, 2023)**

En Banc Opinion by Chief Judge Barnes - Dissent by Judge McCarty

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

Mark Nolan Halbert & Brandi Elizabeth Soper for Appellant - Dennis Howard Farris Jr. for Appellee

Briefed by [Olivia Schwab](#)

Edited by [Kennedy Gerard](#) & [Ashley House](#)

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

### **BLACKMORE V. STATE**

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

**CRIMINAL LAW - CRIME CLASSIFICATIONS - VIOLENT CRIMES** - Miss. Code Ann. § 97-3-2 provides a list of crimes that are to be classified as crimes of violence, including aggravated DUI



**CRIMINAL LAW - STATE LEGISLATURE - POWERS** - The power to create, define, and punish any criminal act rests exclusively within the authority of the State Legislature unless limited by constitutional provisions

**CRIMINAL LAW - STATUTORY INTERPRETATION - PLAIN MEANING** - If a statute is not ambiguous, the court should interpret and apply the statute according to its plain meaning

### **FACTS**

Cedric Blackmore, Joseph White, and Michael Traxler each pled guilty to aggravated driving under the influence (“DUI”) at trial. Blackmore pled guilty to two counts of aggravated in January 2020. White pled guilty to two counts of aggravated DUI in June 2017. Finally, Traxler pled guilty to one count of aggravated DUI in March 2016. The trial court sentenced Blackmore and White to two concurrent twenty-five-year terms in the Mississippi Department of Corrections (“MDOC”) and Traxler to twenty-five years in MDOC. The trial court further classified Blackmore, White, and Traxler as violent offenders under Miss. Code Ann. § 97-3-2(1)(a). Blackmore, White, and Traxler filed a motion for post-conviction relief (“PCR”) in 2021, asserting that the violent offender classification was unconstitutional. The trial court denied each motion. Blackmore, White, and Traxler appealed.

### **ISSUE**

Whether the trial court erred by denying Blackmore, White, and Traxler’s PCR motions arguing they were improperly classified as violent offenders.

### **HOLDING**

Because the State Legislature properly enacted a statute that plainly defined aggravated DUI as a violent crime which is within its exclusive authority, and because Blackmore, White, and Traxler each pled guilty to aggravated DUI, the trial court did not err by denying Blackmore, White, and Traxler’s PCR motions because they were properly classified as violent offenders. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court and the Rankin County Circuit Court.

#### **Affirmed - 2021-CA-00743-COA (Apr. 11, 2023)**

Opinion by Judge Lawrence

Hon. M. James Chaney Jr. (Warren County Circuit Court)

Michael R. Bonner for Appellant - Allison Kay Hartman & Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

#### **Consolidated with:**

#### **Affirmed - 2021-CA-00744-COA (Apr. 11, 2023)**

Hon. M. James Chaney Jr. (Warren County Circuit Court)

Michael R. Bonner for Appellant - Allison Kay Hartman & Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

#### **Consolidated with:**

#### **Affirmed - 2021-CA-00769-COA (Apr. 11, 2023)**

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

Michael R. Bonner for Appellant - Allison Kay Hartman & Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

Briefed by [Thomas Simpson](#)

Edited by [Kara Edwards](#) & [Ashley House](#)

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## **HOLLIDAY V. STATE**

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

**POST-CONVICTION RELIEF - INEFFECTIVE COUNSEL - GUILTY PLEA** - A plea is voluntary if the court advised a defendant of his rights, the nature of the charge against him, and the consequences of his plea

**POST-CONVICTION RELIEF - EVIDENTIARY HEARING - PETITION** - A post-conviction relief petition may be dismissed without the benefit of a hearing if it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case that the movant is not entitled to any relief

**POST-CONVICTION RELIEF - INEFFECTIVE COUNSEL - GUILTY PLEA** - A post-conviction relief ineffective-assistance-of-counsel claim is without merit if the defendant knowingly and voluntarily pled guilty and was aware of the consequences of that decision

### **FACTS**

Michael Holliday was indicted in Kemper County on one count of statutory rape and one count of sexual battery. He was also charged with one count of incest and one count of child exploitation. Holliday’s daughter was the victim in each of his charges. His first court-appointed counsel withdrew due to his appointment as a circuit court judge. Holliday was then appointed a second attorney which he claimed worked out a plea deal of ten years to serve but later withdrew as his counsel due to becoming an assistant district attorney. Holliday also claimed that despite his withdrawal, the attorney assured him the ten-year deal would stand. However, Holliday later stated that because of docket overcrowding, the plea was never submitted to the trial court. Thereafter, a third attorney was appointed, and Holliday claimed the new attorney offered him fifteen years to serve, but he ultimately turned it down and requested a trial. Afterward, Holliday filed a petition to enter a guilty plea. During the hearing on the guilty plea, the State abandoned the other two charges. The trial court then explained to Holliday that by pleading guilty, he would waive certain constitutional guarantees or rights. He stated that he understood, and his attorney went over his rights with him. Subsequently, the court entered an order accepting Holliday’s guilty plea and set his sentencing date. The court sentenced him to thirty years to serve in custody for statutory rape and fifteen years to serve in custody for sexual battery, with fifteen years suspended. Holliday timely filed a petition for post-conviction relief (“PCR”) arguing his due process rights were violated because he pled guilty with the expectancy of a much lesser sentence than thirty years day-for-day. He also argued that his due process rights were violated because the State “successfully eliminated” his daughter from giving her opinion regarding an appropriate sentence. Holliday further argued his trial counsel was ineffective because the attorney failed to timely accept the original plea offer, failed to advise him that a plea in the blind would expose him to a harsher sentence, and failed to properly marshal favorable testimony from the victim. The trial court denied Holliday’s PCR petition. Holliday appealed.

### **ISSUE**

Whether the trial court erred in denying an evidentiary hearing for the dismissal of Holliday’s PCR petition.

### **HOLDING**

Because Holliday’s guilty pleas were knowing and voluntary, and because he affirmed he was fully aware of the consequences of his decisions, Holliday’s ineffective-assistance-of-counsel claim was without merit, and the trial court did not err in denying an evidentiary hearing for the dismissal of his PCR petition. Therefore, the Court of Appeals affirmed the judgment of the Kemper County Circuit Court.

**Affirmed - 2022-CA-00149-COA (Apr. 11, 2023)**

Opinion by Judge McCarty

Hon. Robert Thomas Bailey (Kemper County Circuit Court)

James A. Williams for Appellant - Casey B. Farmer (Att’y Gen. Office) for Appellee

Briefed by [Kara Edwards](#)

Edited by [Kayla Tran](#) & [Mason Scioneaux](#)

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## **SIMONEAUX V. STATE**

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

**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 - SUCCESSIVE MOTIONS** - The Uniform Post-Conviction Collateral Relief Act provides that any order dismissing the petitioner’s motion or otherwise denying relief requested in a post-conviction relief motion shall be a bar to a second or successive motion

**POST-CONVICTION RELIEF - STATUTORY EXCEPTIONS - BURDEN OF PROOF** - Post-conviction relief movants bear the burden to prove a statutory exception to the Uniform Post-Conviction Collateral Relief Act’s litigation bars

**POST-CONVICTION RELIEF - EXCEPTIONS - FUNDAMENTAL RIGHTS EXCEPTIONS** - Claims alleging involuntary guilty pleas or ineffective assistance of counsel fall within the judicially crafted fundamental-rights exception to the statutory bars, but the fundamental-rights exception that applies to procedural bars to PCR motions cannot be applied to constitutional, substantive bars codified in the Uniform Post-Conviction Collateral Relief Act

## **FACTS**

In 2004, Richard Simoneaux pled guilty to six charges in two separate causes. Simoneaux was sentenced to serve a total of twenty-five years in custody, with each sentence in each count to run concurrently. Simoneaux filed two post-conviction relief (“PCR”) motions before he filed his third (current) motion. In his first motion, the Court of Appeals struck a banishment provision in his sentencing order but affirmed the circuit court’s denial of relief when he asserted multiple arguments, including claims that his guilty pleas were involuntary and that his trial attorney provided ineffective assistance of counsel. The Court of Appeals subsequently affirmed the circuit court’s dismissal of Simoneaux’s second PCR motion, finding Simoneaux essentially asserted a *Brady* violation of suppressing evidence, which his voluntary guilty pleas precluded. Simoneaux’s current PCR motion, filed in 2021, alleged issues that related to the voluntariness of his guilty pleas and the effectiveness of his trial attorney. Simoneaux further attached affidavits by him and his mother in support of his PCR motion without proof in support of his claims. The circuit court determined these claims were successive, barred by the statute of limitations and res judicata, and failed to meet any statutory exceptions for procedural bars. Simoneaux appealed.

## **ISSUE**

Whether the circuit court correctly concluded that Simoneaux’s post-conviction relief claim was barred by the Uniform Post-Conviction Collateral Relief Act (UPCCRA).

## **HOLDING**

Because Simoneaux filed his third PCR motion almost seventeen years after his guilty plea, because he filed this current PCR motion after his previous two PCR motions were dismissed, because Simoneaux’s allegations of involuntary pleas and ineffective counsel fell outside the statutory exceptions to the UPCCRA, because Simoneaux’s involuntary plea and ineffective counsel claims were fundamental-rights exceptions that failed to overcome the UPCCRA’s litigation bars, and because Simoneaux and his mother’s affidavit did not offer proof to support his claims nor explain why he did not raise his claims within the statute of limitations, Simoneaux’s PCR motion was a time-barred and successive motion, and there existed no statutory exceptions applicable to his claims. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit.

**Affirmed - 2022-CP-00532-COA (Apr. 11, 2023)**

Opinion by Judge Smith

Hon. David H. Strong Jr. (Pike County Circuit Court)

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

Briefed by [Kennedy Gerard](#)

Edited by [Thomas Simpson](#) & [Mason Scioneaux](#)

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## COURT OF APPEALS - CRIMINAL CASES

### SMITH V. STATE

#### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - JURY SELECTION - BATSON CHALLENGE** - A *Batson* challenge requires a three-step analysis: (1) the party objecting to the use of a peremptory strike has the burden to make a prima facie case that race was the criterion for the strike; (2) if the objecting party makes such a showing, the burden shifts to the striking party to state a race-neutral reason for the strike; and (3) after the striking party offers its race-neutral explanation, the court must determine if the objecting party met its burden to prove purposeful discrimination in the exercise of the peremptory strike—that the stated reason for the strike was merely a pretext for discrimination

**CRIMINAL PROCEDURE - BATSON CHALLENGE - REMEDY** - If the trial judge fails to follow and complete the three-step *Batson* analysis or erroneously denies a peremptory strike on the ground that the defense failed to articulate a race-neutral reason, the remedy is a remand for a limited hearing for the trial judge to complete the *Batson* analysis; if the trial judge erroneously denies a valid peremptory strike by the defense, and that person served on the jury that convicted the defendant, the remedy is reversal of conviction and remand for a new trial

**EVIDENCE - ADMISSIBILITY - WAIVER** - An objection to the admissibility of evidence must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party; a defendant's failure to object to the admission of evidence at trial waives his right to raise the issue on appeal

**EVIDENCE - ADMISSIBILITY - AUTOPSY PHOTOS** - A photograph is considered to have a meaningful evidentiary purpose if it helps describe the circumstances of the killing, describes the location of the body and cause of death, or supplements or clarifies witness testimony; the entire question is for the sound discretion of the trial court

**EVIDENCE - ADMISSIBILITY - ABSENT WITNESS** - Testimonial statements of witnesses absent from trial are only admissible into evidence when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine; nontestimonial hearsay does not trigger the need for confrontation to be admissible

**EVIDENCE - AUTHENTICATION - NONTTESTIMONIAL EVIDENCE** - To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is

**EVIDENCE - CONFRONTATION CLAUSE - EXPERT TESTIMONY** - To determine whether an expert sufficiently participated in an analysis to satisfy a defendant's right to confrontation, the witness must have intimate knowledge of the particular report and the witness must be actively involved in the production of the report at issue

#### FACTS

The State charged Christopher Smith with one count of first-degree murder for shooting and killing Nakisa Benson. During jury selection, Smith exercised ten peremptory strikes on potential jurors. The State raised a reverse-*Batson* challenge to nine of the ten peremptory strikes, alleging the strikes were used to exclude white jurors. Smith struck juror eight for age and employment reasons, but the State pointed to similarly situated jurors that Smith did not strike. Smith struck juror ten for the fact he was a teacher and listed his employment as “academy,” but the State asserted that his employment was at “Academy Sports” and not as a teacher. Smith struck juror sixteen because he was a “white man” and property owner who could not relate to Smith, and the State offered no response. Finally, Smith struck juror thirty for employment reasons, but the State showed the juror had only worked for three days before jury selection. The trial court denied the peremptory strikes on jurors eight, ten, sixteen, and thirty, and placed all four back on the jury venire. The trial court did not articulate any reasons for juror 10 to be placed back on the venire. During pre-trial, the State pre-admitted several pieces of autopsy photographs, search warrants, and physical evidence to prove the cause and manner of Benson's death. Smith failed to object to the admission of the evidence. During trial, the State relied on expert witness Dr. Mark LeVaughn. Dr. LeVaughn consulted the pre-admitted photographs as he testified to the cause and manner of Benson's death. He was also required to review the staff pathologist's work as a supervisor and conduct his own independent determination. The trial court found Smith guilty of Benson's murder and sentenced Smith to life in prison. Smith appealed.

## ISSUES

Whether the trial court (1) failed to follow a proper *Batson* analysis; (2) erred in admitting the autopsy photographs; and (3) violated Smith's right to confront the witness by admitting the autopsy photographs during the witness's testimony.

## HOLDING

(1) Because the State established a prima facie case that the jurors' race was the reason for the strike, because Smith provided facially valid race-neutral reasons for jurors eight and thirty, because Smith provided an incorrect race-neutral reason for juror ten, because Smith failed to provide valid race-neutral reasons for juror sixteen, because the State pointed to jurors similarly situated to juror eight that were not struck by Smith, because the State showed that juror thirty was employed for only three days before jury selection, and because step-three of the *Batson* analysis was within the sound discretion of the trial court, the trial court found pretextual discrimination in the four peremptory strikes at issue and properly applied the *Batson* analysis. (2) Because Smith failed to object to the admission of the autopsy photographs pre-trial, because he did not suffer any prejudice by the admission of the photographs, and because the photographs were placed before the jury through witness testimony and other exhibits, the evidence served a meaningful evidentiary purpose and the trial court did not abuse its discretion in admitting the photographs. (3) Because the autopsy photographs were nontestimonial in nature, because the State offered the autopsy photos to authenticate that the photos were what the State claimed they were, because Dr. LeVaughn testified to the accurate depiction of the photographs, because Dr. LeVaughn actively reviewed the individual who performed the autopsy and made his own independent review, and because Smith did not bring this issue at trial, Smith's hearsay and authenticity arguments were without merit and his right to confront the witness was not violated. Therefore, the Court of Appeals affirmed the judgment of the Copiah County Circuit Court.

## CONCURRENCE IN PART AND DISSENT IN PART

Judge McCarty argued that the majority incorrectly applied precedent in finding that the *Batson* analysis of juror ten did not require remand. Instead, he maintained that precedent required a post-trial *Batson* hearing for juror ten because the trial court did not articulate why the juror was placed back on the venire. Therefore, the trial court erred by denying Smith's peremptory strike.

### **Affirmed - 2021-KA-01003-COA (Apr. 11, 2023)**

En Banc Opinion by Judge Lawrence - Concurrence in Part and Dissent in Part by Judge McCarty

Hon. Tomika Harris Irving (Copiah County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Casey B. Farmer (Att'y Gen. Office) for Appellee

Briefed by [Jacoby Gilmore](#)

Edited by [Thomas Simpson](#) & [Mason Scioneaux](#)

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