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Mississippi Cases Editors: Ashley House & Mason Scioneaux

# MISSISSIPPI SUPREME COURT DECISIONS – JULY 27, 2023

## SUPREME COURT - ORDERS

## RE: MISS. R. APP. P.

### EN BANC ORDER

**ORDER**

This order, before the court on its own motion, amended the Mississippi Rules of Appellate Procedure to provide that all transcripts prepared by court reporters must have no fewer than twenty-five typed lines per page with each typed line numbered in the left margin. All typing must extend to the right margin and be double spaced with no more than a double space between paragraphs. This amendment takes effect August 1, 2023, and is to be distributed by the clerk of court for the Mississippi Supreme Court to West Publishing Company for publication in the *Mississippi Rules of Court* and in the *Southern Reporter, Third Series (Mississippi Edition)*.

Exhibit A, referenced and attached to the Order, shows the amendments to Appendix III.

**Ordered - 89-R-99027-SCT (July 12, 2023)**
En Banc Order by Chief Justice Randolph
Briefed by Brandon D. Peterson
Edited by Nivory Gordon & Mason Scioneaux

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## SUPREME COURT - CRIMINAL CASES

## REDD V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - JURY VERDICT - WEIGHT OF EVIDENCE -** The Supreme Court will not disturb the jury's verdict unless it appears to be so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice
**EVIDENCE - OBJECTIONS - PROCEDURAL BAR -** A defendant is procedurally barred from asserting an issue on appeal if he fails to object to the statements during trial
**CRIMINAL PROCEDURE - JURY SELECTION - RACIAL DISCRIMINATION -** A defendant bears the burden to establish violation of the fair cross-section requirement of jury composition

**FACTS**

April Stevenson, her nephew Jordan Gaston, and other family members went to a pool hall in Eupora shortly after midnight. As the group entered, Daryl Redd said to Stevenson and Gaston, "Who invited you f****ts." Gaston asked Redd to repeat himself then pushed Redd. A fight broke out between the two men. After others broke the men apart, Redd left the pool hall and said he was "fixing to kill you Mfers." Redd returned to Gaston and Stevenson inside the pool hall, this time with an "AK-47" type rifle. Stevenson stepped between Gaston and Redd for fear that Redd would

kill her nephew. Due to the proximity of the three, Redd could not fully raise his rifle. He shot Stevenson just above her right knee. After Redd shot Stevenson, Gaston's cousin, Antwayn Patterson, wrestled the gun from Redd and removed the gun's magazine. Eupora Police Chief Lawrence Caradine arrived on the scene after being called to the disturbance before the shooting. When he saw Stevenson's condition, Caradine called an ambulance and sat to interview an injured Redd. Redd told Caradine that Gaston and Stevenson jumped him and that he got his gun for protection. At trial, Redd testified that Gaston, Stevenson, and Stevenson's cousin, Haven Patterson, beat him. Redd said that he tried to leave the pool hall but reentered upon realizing his car keys were left inside. As his injured leg gave out, Patterson came from behind to take his gun when "it went off," shooting Stevenson, according to Redd. Redd claimed to have no intent or ill-will toward Stevenson or Gaston. The jury returned a verdict on two counts. On the first count, the jury found Redd guilty of aggravated assault, causing bodily injury to Stevenson by shooting her in the leg with a deadly weapon. On the second count, the jury found Redd not guilty of aggravated assault, attempting to cause bodily injury to Gaston by shooting at him with a deadly weapon. Redd appealed.

### ISSUES

Whether (1) the evidence was insufficient to support the jury's verdict and/or the verdict was inconsistent with the overwhelming weight of the evidence; (2) the trial court committed reversible error by failing to rule on various defense objections; (3) the State argued facts not in evidence during closing arguments; and (4) Redd was prejudiced because the jury venire failed to provide an adequate number of potential jury members of Redd's race.

### HOLDING

(1) Because Redd had a contentious history with Stevenson independent from Gaston and because a reasonable jury could conclude, based on that history and trial testimony, that Redd harbored malintent toward Stevenson apart from his animus toward Gaston, the jury properly weighed the evidence which supported a finding of guilt on one count and not the other. (2) Because Redd failed to seek a definitive ruling or request corrective action from the trial court following his objection, the matter was barred from review on appeal. (3) Because Redd failed to obtain a definitive ruling from the trial court on an objection to closing arguments and because the prosecution merely drew inferences from the evidence in closing arguments, the matter was barred from review on appeal and without merit. (4) Because Redd did not object to the racial composition of the venire in the trial court and because the record was silent concerning its composition, the issue of the jury's racial composition was both procedurally barred and without merit. Therefore, the Supreme Court affirmed the judgment of the Webster County Circuit Court.

**Affirmed - 2022-KA-00175-SCT (July 27, 2023)**
Opinion by Justice Beam
Hon. George M. Mitchell Jr. (Webster County Circuit Court)
A. E. (Rusty) Harlow Jr., Kathi Chrestman Wilson, & Morgan Kay Jackson for Appellant - Casey Bonner Farmer (Att'y Gen. Office) for Appellee
Briefed by William Davis
Edited by Kayla Tran & Mason Scioneaux

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## YOUNG V. STATE

**CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER -** Any person convicted of a felony who had been previously convicted twice upon charges separately brought and arising out of separate incidents at different times with sentences of one or more years imprisonment is a habitual offender and must be sentenced to a maximum term of imprisonment with no eligibility of parole
**CRIMINAL PROCEDURE - HABITUAL OFFENDER - APPEALS -** When a criminal defendant fails to request a separate hearing at the time of sentencing as to whether he is a habitual offender, he is precluded from raising that issue on appeal, even if there is substantive merit to the defendant's argument

**CRIMINAL PROCEDURE - HABITUAL OFFENDER - SUFFICIENCY OF EVIDENCE -** When evidence is insufficient to affirm a criminal defendant as a habitual offender, the defendant is entitled to resentencing as a nonhabitual offender on remand

## FACTS

In October 2020, Earl Young was indicted for kidnapping, gratification of lust, aggravated assault, statutory rape, and as a habitual offender. Following trial, Young's jury returned a guilty verdict of gratification of lust. The circuit court then held a sentencing hearing for the conviction of gratification of lust. Before the hearing, a Pre-Post Sentence Investigation report was submitted to the court containing Young's prior criminal record, including wire fraud, commercial burglary, and grand larceny. The report did not contain information about the length of his prior sentences nor when they occurred. The circuit court sentenced Young as a habitual offender under Miss. Code Ann. § 99-19-81, which stated a person who had been convicted twice of any felony brought separately and sentenced for one year or more shall be sentenced to the maximum term of imprisonment without the possibility of parole. Young was sentenced to a maximum of fifteen years without the possibility of parole. Young appealed.

## ISSUES

Whether (1) the indictment was sufficient to charge Young as a habitual offender; and (2) the evidence was sufficient to support a habitual offender sentence.

## HOLDING

(1) Because the form of the indictment was defective and failed to specify Young's prior convictions by the name of the crime, the court where the conviction occurred, the cause numbers and dates of conviction, and length of incarceration, because the State did not serve the defendant with notice of his prior convictions, and because the indictment could have been amended in circuit court but Young failed to object during trial, the issue was effectively waived, and Young was barred from raising it for the first time on appeal. (2) Because the State's indictment was defective and the State failed to prove that Young had at least two prior felony convictions that were brought and arose out of separate incidents at different times and that Young was sentenced to separate terms of at least one year for the prior convictions, the evidence was insufficient to support Young's sentence as a habitual offender. Therefore, the Supreme Court reversed and remanded the judgment of the Humphreys County Circuit Court.

**Reversed & Remanded - 2021-KA-00940-SCT (July 27, 2023)**
Opinion by Justice Chamberlin
Hon. Barry W. Ford (Humphreys County Circuit Court)
Mollie M. McMillin & George T. Holmes (Pub. Def. Office) for Appellant - Barbara Byrd (Att'y Gen. Office) for Appellee
Briefed by Katie Shaw
Edited by Emilee Crocker & Mason Scioneaux

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# MISSISSIPPI COURT OF APPEALS DECISIONS – JULY 25, 2023

## *COURT OF APPEALS - CIVIL CASES*

## BABIN V. WENDELTA, INC.

### CIVIL - PERSONAL INJURY

**TORTS - PREMISES LIABILITY - PROVING NEGLIGENCE -** To recover in a negligence suit, the claimant must prove (1) that some negligent act of the proprietor caused the injury; or (2) that the proprietor had actual knowledge of a dangerous condition and failed to warn the public; or (3) show that the dangerous condition existed for a sufficient amount of time to impute constructive knowledge to the proprietor, such that the proprietor should have known of the dangerous condition

**TORTS - PREMISES LIABILITY - ANSI STANDARDS -** The ANSI standards provide "when mats migrate a considerable distance, they shall be secured in place or another mat shall be selected that reduces or eliminates migration," and "Areas where migration may take place shall be monitored and the hazard corrected"; the ANSI standards are relevant to whether a party used reasonable care

**EVIDENCE - WITNESSES - WITNESS CREDIBILITY -** Conflicting testimony creates questions of fact for a jury to resolve

**CIVIL PROCEDURE - SUMMARY JUDGMENT - TRIAL DETERMINATION -** Summary judgment is not a substitute for the trial of disputed fact issues, accordingly, the court cannot try issues of fact on a motion for summary judgment; it may only determine whether there are issues to be tried, and it cannot be used to deprive a litigant of a full trial of genuine fact issues

**CIVIL PROCEDURE - SUMMARY JUDGMENT - GENUINE ISSUE OF MATERIAL FACT -** To establish a genuine issue of material fact, a party must support his claim with evidence upon which a fair-minded jury could return a favorable verdict

## FACTS

In 2019, Ainslie Babin and her family stopped for lunch at Wendy's. Babin, who wore leg braces for a congenital neurological condition, entered the restaurant and slipped on a mat near the door. Babin's husband, Brad, testified that when he came to assist Babin, he also kept slipping on the mat. Brad later described the mat as "wore out" on the bottom "where if you step on it, it would slide." Other family members described the mat similarly. As a result of her fall, Babin suffered a right ankle fracture and underwent surgery. After Babin was transported to the hospital, some of her family members saw several Wendy's employees place the mat back to see if it slid, and it did. Babin filed a complaint against Wendelta, Inc. ("Wendy's") in circuit court claiming that Wendy's was negligent and breached its duty to the public to exercise reasonable care in maintaining its premises in a reasonably safe condition for customers. Wendy's district manager, Riche Karl, testified he was at the restaurant the day of the incident. Karl testified they placed the mats there because the tiled floor could be slippery, especially because moisture from condensation would get on floor. Karl testified that Wendy's managers were not required to purchase a specific type of rug for its store's entryways. Karl testified that a week before the incident, he instructed the store manager, Monique Reed, to purchase new mats. Karl then testified that he put the mats in their place the morning of the incident, and they did not move or slide at that time. Reed testified that Wendy's had no official policies concerning the mats and that she had bought the current mats from Lowe's. Reed testified that she did not notice the mats slipping or moving before the incident. Neither Karl or Reed witnessed Babin's fall. Wendy's employee, Rodney Weston, testified that he saw Babin step on the mat which slipped from under her, causing her to fall. Weston testified that the area Babin fell was known to be slippery because of its lack of ventilation, so he usually put out a wet floor sign. However, the pictures of the scene later analyzed did not show a sign. Another Wendy's employee, Cherri Trotter, testified that the mats slid so they were placed longways so they did not slide as much. Trotter also testified that Karl was not at work that day, but was called after the incident. In addition to testimony from Babin's family and Wendy's employees, Babin hired a safety expert named Dennis Howard to examine the mat she slipped on and where it was placed. Howard descibred the mat as a two-foot by three-foot utility mat. Howard confirmed on the Lowe's receipt that the mats were purchased for roughly thirteen dollars. Howard testified that the mat he inspected was irregularly buckled and had a rip on its out edge, along with very few slip-resistance qualities. Howard testified that Wendy's failed to comply with industry safety standards, namely the American National Standards Institute, Inc. ("ANSI"), by not replacing the mat prior to the incident. Wendy's did not contest Howard credentials as an expert, nor did they retain an expert to rebut Howard's opinions, nor did they move to strike Howard's testimony as irrelevant or unreliable. Wendy's filed a motion for summary judgment, arguing there was no genuine issue of material fact in dispute and that Babin could not establish that the mat was a dangerous condition, an element necessary to sustain her claim. To support the motion, Wendy's submitted a receipt from Lowe's showing Wendy's bought two mats of different sizes and types a week prior to the incident, which they claimed were "commercially reasonable" mats. Wendy's attached a description of the bigger and more expensive mat, which was inconsistent with the mat analyzed by Howard. Babin and Wendy's also submitted the ANSI guidelines to reduce slips, trips, and falls. After hearing arguments from both parties, the circuit court granted Wendy's motion finding that Babin could not prove that any negligence of Wendy's created a dangerous condition that caused her injury. Furthermore, the circuit court found there was no dangerous condition that existed for a sufficient amount of time so that Wendy's should have known

of the existence of the dangerous condition. Lastly, the circuit court found that the ANSI Standard Guide was unpersuasive because the standards were voluntary and did not create a question of fact. Babin appealed.

## ISSUE

Whether the circuit court erred in granting Wendy's motion for summary judgment.

## HOLDING

Because Wendy's managers failed to testify what type of mat was used in the entryways or why the mats were commercially reasonable, because the mat preserved and inspected by Babin's expert did not match the Lowe's receipt of the supposed commercially reasonable mat, because Babin presented undisputed expert testimony that the mat Babin slipped on was not commercially reasonable, because Babin presented testimony to dispute that Wendy's managers had checked the mat before the incident and that it did not slide, because Wendy's employees testified that the mats were known to slide, because Babin presented unopposed expert testimony that Wendy's created a dangerous condition with its choice of mats to use in the entryways, because the ANSI standards supported Babin's expert testimony and were relevant as to whether Wendy's used reasonable care, and because the trier of fact should have resolved any conflicting testimony regarding Wendy's creation of a dangerous condition, there was a genuine issue of material fact regarding the existence of a dangerous condition, and the circuit court erred in granting Wendy's motion for summary judgment. Therefore, the Court of Appeals reversed and remanded the judgment of the Harrison County Circuit Court.

**Reversed & Remanded - 2022-CA-00341-COA (July 25, 2023)**
Opinion by Judge McDonald
Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, First Judicial Dist.)
Lauren Elizabeth Cavalier for Appellant - Kristi Rogers Brown for Appellee
Briefed by Hunter Seidler
Edited by Kara Edwards & Ashley House

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# BLANCHARD V. BLANCHARD

### CIVIL - DOMESTIC RELATIONS

**CONTRACTS - PROPERTY SETTLEMENT AGREEMENTS - APPLICABLE LAW -** Contract law shall apply to property settlement agreements; the status of the parties as spouses does not change the type of law applicable to the agreement

**CONTRACTS - CONTRACT INTERPRETATION - AMBIGUITY OF CONTRACTS -** To interpret a contract, the court must determine (1) whether the contract is ambiguous by analyzing its express wording and enforcing the plain meaning where there is no ambiguity; (2) if the contract is deemed ambiguous, the court applies the meaning more favorable to the non-drafting party; and (3) if the contract's meaning remains ambiguous, the court will consider extrinsic evidence

**CONTRACTS - CONTRACT INTERPRETATION - WHOLE CONTRACT -** To determine whether a contract is ambiguous, the court reviews the express wording of the contract as a whole

## FACTS

When Christopher ("Chris") Blanchard and Tammie Blanchard divorced, the parties entered into a Property Settlement Agreement ("PSA"). Tammie's attorney drafted the PSA because Chris was pro se. Section fourteen of the PSA granted Tammie the exclusive use and possession of the parties' marital home and granted Chris a right to half of the "net proceeds" of the marital home at the time of its future sale. According to the PSA, Tammie must sell the marital home when the parties' youngest child turns eighteen, but Tammie may sell the home at any time prior. Nearly three years after the PSA, Tammie refinanced the home. When Tammie attempted to sell the house, Tammie contended that her earlier refinancing of the home severed Chris's right to receive any compensation and that she was entitled to all the proceeds. In November 2020, Chris filed a complaint for injunctive relief in chancery court. While Tammie's attempt

to sell the home was unsuccessful, the parties requested that the chancery court resolve their dispute regarding the PSA's meaning due to anticipated further conflict regarding the PSA's terms. In April 2021, the chancery court entered an interlocutory order concluding that the relevant terms of the PSA were ambiguous and sent the case to trial to allow the parties to offer parol evidence to clarify the PSA's meaning. At trial, a prior draft of the PSA was admitted into evidence which showed that the language granting equity to Chris was added at his insistence. The original draft granted Tammie the marital home outright and gave Chris no right to any equity in the home, whereas the final PSA granted Chris a right to equity. At trial, Tammie testified that she understood the "current mortgage" stated in the PSA to be the existing mortgage on the marital home at the time of the divorce. Tammie testified that she believed that if she refinanced the home, Chris would no longer have a right to any equity under section fourteen. Tammie's attorney testified that he drafted the PSA based on his discussions with Tammie and that he did not advise Chris on the meaning of any provisions. Tammie's attorney testified he believed he drafted the provision so that Chris would be owed nothing if Tammie refinanced the home or sold it before the parties' youngest child turned eighteen. Chris testified that he wanted Tammie and their children to remain in the marital home after the divorce, but he wanted to preserve his right to equity in the home. Chris further testified that he understood and believed that the PSA granted him a right to half of the proceeds from the sale of the marital home, even if Tammie refinanced the home. The chancery court found that section fourteen of the PSA was ambiguous, the intent of the parties remained unascertainable even after applying traditional canons of contract construction, and that based on testimony and other parol evidence, the intent of the parties in section fourteen of the PSA was that Tammie's refinancing of the property severed Chris's interest in the equity of the marital home. Chris filed a motion to alter or amend the judgment, which was denied. Chris appealed.

### ISSUE

Whether the chancery court erred in finding that Tammie refinancing the marital home extinguished Chris's right to the net proceeds from its sale.

### HOLDING

Because the PSA expressly stated that the current mortgage was to be paid in full and the net proceeds be divided equally between Tammie and Chris upon the sale of the marital home, because "current mortgage" solely referred to the mortgage on the home when sold and did not undermine Chris's right to receive half the net proceeds upon the sale of the home, and because even if there was ambiguity, as the non-drafting party, Chris's interpretation of the PSA would be applied, the chancery court erred in finding that Tammie refinancing the marital home extinguished Chris's right to half of the net proceeds from its sale. Therefore, the Court of Appeals reversed and rendered the judgment of the Pearl River County Chancery Court.

**Reversed & Rendered - 2022-CA-00356-COA (July 25, 2023)**
Opinion by Presiding Judge Wilson
Hon. Sheila Havard Smallwood (Pearl River County Chancery Court)
Stephen J. Maggio for Appellant - Kimberly-Joy Lockley Miri for Appellee
Briefed by Jack Furla
Edited by Doug Reynolds & Ashley House

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## In Re D.K. v. Youth Ct. of Lincoln Cnty., Miss.

**Civil - Custody**

**CIVIL PROCEDURE - PROCEEDINGS - YOUTH COURT JURISDICTION -** Pursuant to Miss. Code Ann. § 43-21-151(1), youth courts shall have exclusive jurisdiction in all proceedings concerning a delinquent child, a child in need of supervision, a neglected child, an abused child, or a dependent child; pursuant to Unif. R. Youth Ct. Prac. 2(b), youth court proceedings commence when a report or complaint of a child within the jurisdiction of the youth court requires an action by the youth court, chancery court, referee appointed, or designee appointed

**CIVIL PROCEDURE - SERVICE OF PROCESS - WAIVER OF OBJECTIONS -** Where one participates in a matter, presents evidence, calls witnesses, and cross-examines witnesses, one subjects himself to the court's jurisdiction and waives all objections based on improper or insufficient service of process; pursuant to Miss. Code Ann. § 43-21-507(2), the Youth Court Act allows a party other than the child to waive service of summons on himself by written stipulation or by voluntary appearance at the hearing

**FAMILY LAW - CUSTODY - PROPER DISPOSITION -** The paramount concern in determining the proper disposition is the best interest of the child

**CIVIL PROCEDURE - APPEALS - SUPPLEMENTATION OF THE RECORD -** Pursuant to Miss. R. App. P. (10)(e), if any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth; pursuant to Miss. R. App. P 10(f), this rule should not be construed as empowering the parties to add to the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal

## FACTS

L.K.K. and D.W.K. ("Louis and Donna") had five children during the course of their marriage. In July 2016, an investigation by the Mississippi Department of Child Protective Services ("CPS") revealed allegations of sexual abuse by Louis and Donna toward four of their children. The Southwest Mississippi Children's Advocacy Center ("CAC") interviewed three of the children. The CAC recorded these interviews. In their interviews, all three children detailed sexually abusive behavior from Louis and Donna. In August 2016, the Lincoln County Youth Court entered intake orders for all four children, as well as a custody change order and emergency custody order. The youth court also appointed a Guardian ad Litem ("GAL") to the case. The youth court initially scheduled an adjudication hearing for September 2016. However, following a total of twelve continuances, due mainly in part to motions filed by Louis and Donna, the youth court finally held the adjudication hearing in December 2018. Louis appeared and elected to leave toward the beginning of the second witness's testimony. Donna was present for the entirety of the hearing, representing herself pro se. Neither Louis nor Donna made an objection to service of process on the record. The youth court formally admitted, and thus considered, several forms of evidence in the adjudicative hearing. This evidence included testimony from two of Louis and Donna's daughters, forensic reports from the children's interviews with CAC, testimony from the employees who conducted those interviews, testimony from the children's therapist, and testimony and an official report from the GAL. The youth court determined that all four children were either abused or neglected. Following the adjudicative hearing, the parties moved to the disposition phase. The youth court received both CPS's recommendation and the GAL's recommendation. The GAL recommended custody of the children be placed with their maternal aunt, and the youth court awarded custody to the children's maternal aunt. Louis and Donna filed several motions, including a motion to supplement the record with videos of the children's interviews with CAC. The youth court denied these motions. Louis and Donna appealed.

## ISSUES

Whether the youth court erred in (1) proceeding with the case; (2) service of process; (3) deciding to maintain physical placement with the children's maternal aunt and custody with CPS; and (4) failing to supplement the record on appeal with the videos of the children's interviews with the CAC.

## HOLDING

(1) Because the youth court's jurisdiction commenced in August 2016 when it entered intake orders, emergency orders, and custody-change orders, the youth court maintained proper jurisdiction and did not err in proceeding with the case. (2) Because Louis and Donna were properly noticed for the initial hearing in September 2016, because that order, and every order for continuance following, dictated that the previous process of the youth court remained in full force and effect, and because Louis and Donna appeared at the adjudication hearing in December 2018 and did not properly raise the issue before the youth court either by motion or objection, the youth court did not err in its service of process, and the issue was without merit. (3) Because the youth court was provided the children's testimony, forensic reports, testimony of CAC employees, testimony from the children's therapist, and an official report from the GAL, the youth court did not lack the evidence that the children were sexually abused and neglected, and the evidence supported its decision that maintaining physical placement with the children's maternal aunt and custody with CPS was in the children's best interests. (4) Because the video recordings of the children's interviews with CAC were part of the record

on appeal, because the record was clear that the youth court expressly stated it did not utilize the recordings in reaching a final decision, and because the record on appeal was sufficient to determine that there was substantial evidence to support the youth court's decision, the youth court did not err in failing to supplement the record, and the issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Youth Court.

**Affirmed - 2019-CP-00451-COA (July 25, 2023)**
Opinion by Judge Lawrence
Hon. Brad Russell Boerner (Lincoln County Youth Court)
*Pro se* for Appellants - George Malta & Jared Frank Evans for Appellee

**Consolidated with:**

**Affirmed - 2020-CP-01307-COA (July 25, 2023)**
Hon. Brad Russell Boerner (Lincoln County Youth Court)
*Pro se* for Appellants - George Malta & Jared Frank Evans for Appellee
Briefed by Emily Phillips
Edited by Nivory Gordon & Mason Scioneaux

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## KEENUM V. CITY OF MOSS POINT

### CIVIL - OTHER

**MUNICIPAL LAW - ZONING ORDINANCES - CONSTRUCTION -** Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be obtained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the zoning ordinance as a whole
**MUNICIPAL LAW - ZONING ORDINANCES - SPECIAL EXCEPTIONS -** In a zoning ordinance, a "special exception" is defined as "a use that would not be appropriate generally or without restriction throughout a zoning district, but which, if controlled as to number, area, location, or relation to the neighborhood, would promote public health, safety, convenience, or general welfare; "semi-public recreational area" is a use by special exception in an R-1A zone
**MUNICIPAL LAW - ZONING ORDINANCES - COMMERCIAL USE -** "Commercial activity" is defined as any type of business activity which is carried on for a profit; commercial uses are prohibited in an R-1A zone
**MUNICIPAL LAW - ZONING ORDINANCES - INCOMPATIBLE VARIANCES -** Variances that are incompatible with the terms of an ordinance should not be granted

### FACTS

In June 2020, Frankie Brown submitted an application to the Board of Adjustment for a special exception to the zoning ordinance to develop a "semi-public recreational area" in the City of Moss Point ("Moss Point"). The proposed development was requested in an area zoned R-1A, primarily designated for single-family residential development. Brown sought Moss Point's special permission to allow his project to be considered a "semi-public recreational area" which was a special exception according to the zoning ordinance for R-1A zones. Donovan Scruggs, Brown's expert, proposed that the development would include (1) additional public parking for approximately thirty trucks and trailers adjacent to the existing Jackson County McInnis Bayou Boat Launch; (2) a recreational area with amenities, including a pier, docking slips, kayak rentals, picnic tables, and outdoor family games; (3) an on-river fueling station for boaters; and (4) a bait shop, a place to purchase snacks and beverages, and a restaurant on the river and similar retail. In a July 2020 Board of Adjustment meeting, Rhonda Rigby and Paul Keenum presented concerns about the development. Rigby was a former restaurant owner on the same street that spoke to concerns regarding increased traffic that would result from the development. Keenum was an adjoining landowner that raised concerns regarding the environmental impact the fueling station would have on the water and the interference the business would have on his right to peacefully enjoy his home. The Board of Adjustment ultimately recommended that Brown's application be approved by the Board of

Aldermen. In July 2020, Keenum's counsel sent a notice of appeal to the Moss Point City Clerk. In August 2020, the Board of Alderman approved Brown's application for the special exception designation. Keenum and Rigby appealed to the Jackson County Circuit Court, arguing that Moss Point's approval of the special exception violated the zoning ordinance by allowing a commercial business in a residential area zoned R1A. The circuit court entered an order affirming the Board of Aldermen's decision by finding that the grant of the special exception was not arbitrary or capricious and was supported by substantial evidence. Keenum appealed.

### ISSUES

Whether Moss Point erred in (1) its interpretation and application of its ordinance by granting the special exception for Brown's project and (2) granting Brown's special exception designation for a prohibited use.

### HOLDING

(1) Because the term "semi-public recreation area" was not defined in the zoning ordinance, because the accepted use of the phrase "commercial activity" referred to any activity carried on for a profit, because commercial use was prohibited in an R-1A zone by the zoning ordinance, and because Brown's development was a commercial for-profit venture prohibited under the zoning ordinance, Moss Point erred in its interpretation and application of its ordinance by granting the special exception for Brown's project. (2) Because nothing in the record suggested that Moss Point considered that Brown's commercial for-profit venture was prohibited under the zoning ordinance, and because Moss Point's interpretation of "semi-public recreational area" would render meaningless the clear prohibition of commercial uses in R-1A zones, Moss Point erred in granting Brown's special exception designation for a prohibited use. Therefore, the Court of Appeals reversed and rendered the judgment of the Jackson County Circuit Court.

**Reversed & Rendered - 2021-CA-01044-COA (July 25, 2023)**
Opinion by Judge Emfinger
Hon. Dale Harkey (Jackson County Circuit Court)
Christopher Brice Wiggins for Appellant - Amy Lassitter St. Pe', Robert Thomas Schwartz, & Christian J. Strickland for Appellees
Briefed by Dane D. Norvell II
Edited by Kayla Tran & Ashley House

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

## ROBERSON V. STATE

**CIVIL - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - STATUTORY BARS - SUCCESSIVE MOTIONS -** Miss. Code Ann. § 99-39-23(6) states that any order dismissing or denying relief to a motion for post-conviction relief shall bar any second or successive motion, absent a statutory exception

**POST-CONVICTION RELIEF - FUNDAMENTAL RIGHTS EXCEPTIONS - *HOWELL* -** The *Howell* Court overruled any precedent that applied the "judicially crafted fundamental rights exception to constitutional, substantive enactments of the Legislature"; the Legislature can only enact substantive law and may not enact procedural law

**CRIMINAL PROCEDURE - INVOLUNTARY PLEA - BURDEN OF PROOF -** A defendant bears the burden of proving by a preponderance of the evidence that his plea was involuntarily entered, and that he pled guilty in reliance on affirmative misinformation regarding the possibility of parole

**CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF -** In order to succeed on an ineffective assistance of counsel claim, the claimant must prove that his counsel's performance was deficient and the deficiency prejudiced his defense; there is a strong rebuttable presumption that counsel's conduct falls within the wide range of reasonable profession assistance

**CRIMINAL PROCEDURE - VOLUNTARY GUILTY PLEA - INEFFECTIVE ASSISTANCE OF COUNSEL WAIVER -** A voluntary guilty plea waives claims of ineffective assistance of counsel, except insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea

## FACTS

In 2013, Nathaniel Roberson was indicted for capital murder and motor-vehicle theft. Public Defender David Tisdell was appointed by the circuit court as Roberson's attorney. Lela Hubbard, a mitigation specialist for the Office of Capital Defense Counsel, also assisted Tisdell in a limited capacity. In January 2015, Roberson pled guilty to both crimes and was sentenced to life in prison without eligibility for parole for the murder conviction and ten years for the motor-vehicle theft. In June 2015, Roberson filed his first post-conviction relief ("PCR") motion pro se, which was denied by the circuit court. Roberson filed a second PCR motion through counsel in January 2018, claiming that his guilty plea was involuntary and that he received ineffective assistance of counsel. At an evidentiary hearing regarding the PCR motion, Tisdell testified that Roberson admitted to committing crimes and sought to plead guilty. Tisdell testified that he informed Roberson that no plea deal was available, and explained the punishments Roberson could receive. Tisdell testified that Roberson understood his situation and the possibility he could be sentenced to life without parole but wanted to plead guilty anyway. Hubbard testified that she was in communication with Roberson more often than Tisdell. Hubbard testified that Tisdell told her there was a plea deal, and that she encouraged Roberson to "take the deal" based on her belief that one was in place. Hubbard testified that her belief was never corrected by Tisdell. However, Hubbard's supervisor testified that when he met with the district attorney, the district attorney told him that the State did not offer Roberson any plea deal. Hubbard's supervisor testified that he believed Hubbard just misunderstood that there was no plea deal. During the plea colloquy, Hubbard was allowed to stand next to Roberson and Tisdell at the bench. The trial court directed Roberson to ask either of them questions about things he did not understand. Roberson testified that he thought he was being offered a plea deal that would have him out of jail in ten years. Roberson claimed Tisdell told him if he answered yes to all the questions the trial court asked at the plea colloquy, Roberson would only be sentenced to ten years. Roberson testified that if he knew he could have received a sentence of life without parole, he would not have pled guilty. The circuit court granted Roberson relief as to his sentence for motor-vehicle theft, resentencing him to five years. The court denied Roberson's involuntary plea claim and ineffective-assistance claim. Roberson appealed.

## ISSUES

Whether (1) Roberson's PCR motion fell under a statutory exception to survive the Uniform Post-Conviction Collateral Relief Act's statutory bars; (2) the circuit court erred in finding that Roberson voluntarily entered his guilty plea; and (3) the circuit court erred in finding that Roberson's counsel was effective.

## HOLDING

(1) Because Roberson filed his first PCR motion within the statute of limitations and the circuit court denied it, because Roberson failed to raise his ineffective assistance claim in his first PCR motion, because Roberson's below-average intelligence failed to rise to the level of exceptional circumstances required to justify ignoring the Uniform Post-Conviction Collateral Relief Act's statutory bars, and because Roberson was granted an evidentiary hearing making it possible for the Court of Appeals to address the merits of his claim, Roberson's PCR motion did not fall under a statutory exception to survive the Uniform Post-Conviction Collateral Relief Act's statutory bars. (2) Because Roberson's and Hubbard's testimonies claiming they believed a plea deal existed were deemed unreliable by the circuit court, because Roberson was properly informed of the lack of a plea deal and the possible sentences at his plea colloquy, because Tisdell's testimony consistently provided that there was no plea deal, and because an involuntary plea did not implicate fundamental rights that could survive statutory bars, the circuit court properly found that Roberson voluntarily entered his guilty plea. (3) Because the misinformation came from a non-lawyer and not Roberson's counsel, because the State had substantial evidence suggesting Roberson committed the crime, because Roberson could not show that his counsel's purported errors proximately resulted in his guilty plea, because Roberson could not show that he would not have pled guilty but for Tisdell's purported errors, and because Tisdell's failure to turn over Roberson's case file did not override the evidence in the record of Roberson's guilty plea, the circuit court properly found that Roberson's counsel was effective. Therefore, Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

## CONCURRENCE IN PART & IN RESULT

Presiding Judge Wilson agreed that the circuit court's order partially denying Roberson's PCR motion was properly affirmed. However, he argued that Roberson's PCR motion was barred by the plain language of Miss. Code Ann. § 99-39-23(6) because Roberson did not appeal his first PCR motion, nor did he qualify for any successive-motions bar exception included in the statute. He also asserted that he would not apply *Howell* here, rather he would continue to assume that there was a fundamental-rights exception to the successive-motions bar, regardless of the fact that it was not met in Roberson's case.

**Affirmed - 2021-CA-01182-COA (July 25, 2023)**
En Banc Opinion by Judge Greenlee - Concurrence in Part & in Result by Presiding Judge Wilson
Hon. Charles E. Webster (Coahoma Country Circuit Court)
Franklin Davis Rosenblatt for Appellant - Allison Horne (Att'y Gen. Office) for Appellee
Briefed by Madeline Crane
Edited by Kennedy Gerard & Ashley House

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