

**MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 21, 2023****SUPREME COURT - CIVIL CASES****MALOUF & MALOUF, PLLC V. EST. OF IVISON****CIVIL - WILLS, TRUSTS, & ESTATES**

**WILLS & ESTATES - APPEALS - FINAL JUDGMENT** - Miss. R. App. P. 4(a) requires the notice of appeal to be filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order being appealed; generally, only final judgments are appealable; an order that finally resolves a claim against an estate is final and appealable although the estate remains open

**WILLS & ESTATES - STATUTE OF LIMITATIONS - PROBATED CLAIMS** - An order that directs an estate to pay a timely probated claim renders the statute of limitations in Miss. Code Ann. § 15-1-25 inapplicable; the statute of limitations is four years and ninety days following issuance of the letters testamentary

**FACTS**

Herbert Ivison died in late 2014 with a large number of assets and debt. His will was probated and sought to divide millions in assets among his wife Rebecca and four sons. Three of his sons from a previous marriage – William, Andrew, and Brock (the “Ivisons”) – were at severe odds with Rebecca. Thus, a peaceful division of Herbert’s property was not possible. Furthermore, the solvency of Herbert’s Estate (“the Estate”) was in question because of a lack of liquid assets and nearly \$8 million in probated claims. Rebecca and the Ivisons agreed that someone should purchase the assets of the Estate so that the Estate could pay the probated claims. One such timely probated claim was that of Malouf & Malouf, PLLC (“Malouf”). Both Rebecca and the Ivisons submitted offers to the chancery court to purchase the Estate’s assets. The court accepted Rebecca’s offer over that of the Ivisons because Rebecca’s offer achieved “finality” by paying off probated claims, ending litigation, and allowing the Estate to be closed. On June 20, 2017, the court issued an Order Directing Sale of Estate Assets pursuant to Rebecca’s offer. Administrative turnover at both the chancery court and the Estate led to a substantial passage of time during which Malouf’s claim remained unpaid. Then, in January 2020, the Estate’s new executor, Ronald C. Morton, moved to declare certain claims, including Malouf’s, time-barred by Miss. Code Ann. § 15-1-25’s four-year statute of limitations for actions against an estate executor. Malouf responded in February and claimed that the June 20, 2017, order amounted to a judgment in its favor, thus relieving it of any further obligation in pursuit of its claim. The court agreed with Executor Morton and, in April 2020, ruled that Malouf’s claim was time-barred. Malouf moved to reconsider, and a year later, in May of 2021, the court denied Malouf’s motion. In June 2021, Malouf submitted an *ex parte* proposed judgment that would incorporate Miss. R. Civ. P. 54(b)’s language that ensured the ruling was final and appealable. After the court entered this order, Executor Morton moved to reconsider and withdraw the duplicate judgment. The court then withdrew the Rule 54(b) judgment through a *nunc pro tunc* order, and Malouf then moved to reconsider the *nunc pro tunc* order. Finally, in January 2022, the court withdrew and vacated both the proposed Rule 54(b) judgment and the *nunc pro tunc* orders. Undeterred, Malouf filed another Rule 54(b) judgment, which the court entered on July 28, 2022. Malouf appealed.

**ISSUES**

Whether (1) Malouf’s August 22, 2022, appeal was untimely, thereby depriving the Supreme Court of appellate jurisdiction and (2) Malouf’s probated claim was time-barred by Miss. Code Ann. § 15-1-25.

**HOLDING**

(1) Because the April 2020 order declaring Malouf’s probated claim to be time-barred was a non-final, interlocutory order, and because Malouf filed its notice of appeal within thirty days of the July 28, 2022, Rule 54(b) certified final

order, Malouf’s notice of appeal was timely. (2) Because the June 20, 2017, Order Directing Sale of Estate Assets recognized and secured Malouf’s right to payment, Miss. Code Ann. § 15-1-25’s statute of limitations was inapplicable, and Malouf had no further action to take. Therefore, the Supreme Court reversed the judgment of the Scott County Chancery Court.

**Reversed & Remanded - 2022-CA-00837-SCT (Sept. 21, 2023)**

Opinion by Justice Maxwell

Hon. Janace H. Goree (Scott County Chancery Court)

Michael J. Malouf, Jared William Phillips, & Robert Eugene Jones II for Appellant - Ronald C. Morton & Josiah Charles Burns for Appellee

Briefed by [William Davis](#)

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

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## SAUNDERS V. STATE

### CIVIL - UNCONSTITUTIONAL STATUTE

**CONSTITUTIONAL LAW - LEGISLATIVE COURTS - INFERIORITY** - A legislatively created court must be inferior in ultimate authority to the constitutionally created court that exercises the same jurisdiction, which is shown by giving the constitutional court controlling authority over the legislative court by appeal or certiorari

**CONSTITUTIONAL LAW - MISSISSIPPI CONSTITUTION - ELECTION OF JUDGES** - Miss. Const. art. VI, § 153 provides that circuit and chancery judges “shall be elected by the people” and hold office for four years

**CONSTITUTIONAL LAW - MISSISSIPPI CONSTITUTION - APPOINTMENT OF JUDGES** - Miss. Const. art. VI, § 165 provides that, when a judge or chancellor is unable or disqualified to preside at term of court, the Governor may commission another of legal knowledge to preside in place of the disqualified judge

**CONSTITUTIONAL LAW - POWERS OF THE CHIEF JUSTICE - APPOINTMENT OF SPECIAL JUDGES** - Miss. Code Ann. § 9-1-105(2) provides that the Chief Justice of the Supreme Court has the authority to appoint a special, temporary judge to a circuit, chancery, or county court in “the event of an emergency or overcrowded docket”

**CIVIL PROCEDURE - JUDICIAL IMMUNITY - JUDICIAL ACTS** - Judicial immunity applies to judicial acts, which includes the Chief Justice’s appointment of special judges

**CIVIL PROCEDURE - JUDICIAL IMMUNITY - INJUNCTIVE RELIEF** - As originally expressed under 42 U.S.C. § 1983, in an action brought against a judicial officer for an act or omission in their judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated, or declaratory relief was unavailable

**COURT ADMINISTRATION - CLERKS OF COURT - PARTICIPATION IN DISPUTES** - Clerks serve to file cases as they arrive but do not have a sufficiently personal stake in their outcomes to participate as adversaries

### FACTS

In 1989, the Legislature enacted Miss. Code Ann. § 9-1-105(2), which concerned special judicial appointments by the Chief Justice of the Supreme Court in the event of an emergency or overcrowded docket. Miss. Code Ann. § 9-1-105(2) was frequently used to assist trial courts with their caseloads, particularly within the Seventh Circuit Court District, the circuit at issue, for the dramatic increase of criminal matters in the past twenty years. More recently, at the close of the 2023 session, the Legislature passed House Bill 1020 (“HB 1020”). HB 1020, § 1 directed the Chief Justice to appoint four temporary judges for the Seventh Circuit Court District. HB 1020, § 4 created an inferior court for the Capitol Complex Improvement District (“CCID”), which encompassed a large portion of the City of Jackson including the State Capitol. HB 1020 provided that the CCID court would have the same jurisdiction as municipal courts. Soon after HB 1020’s passage, Ann Saunders, Sabreen Sharrief, and Dorothy Triplett (collectively, “Saunders”) filed a complaint for declaratory and injunctive relief in the Hinds County Chancery Court. Saunders alleged that HB 1020’s and Miss. Code Ann. § 9-1-105(2)’s appointment mechanisms were unconstitutional because circuit court judges must be elected, and alleged that the HB 1020 CCID court system was unconstitutional because the created courts lacked an express

right to appeal to the superior circuit court. In her initial complaint, Saunders named as defendants the Hon. Michael K. Randolph, in his official capacity as Chief Justice of the Supreme Court, and Zack Wallace, in his official capacity as Circuit Clerk of the Hinds County Circuit Court. The chancery court dismissed the Chief Justice under judicial immunity and the Circuit Clerk for having no personal stake in the lawsuit. The chancery court permitted the Attorney General to intervene to defend the constitutionality of the challenged legislation on behalf of the State. The State then filed a motion to dismiss Saunders's complaint, arguing Saunders could not establish a violation of the Constitution. Saunders amended her complaint to add the State, the Attorney General, and the Governor as defendants. The chancery court could not find the statutes unconstitutional beyond a reasonable doubt, so it entered a final order denying all relief requested for all three counts, dismissing Saunders's complaint. Saunders appealed.

## **ISSUES**

Whether the (1) Legislature's creation of the CCID court as an inferior court was constitutional; (2) appointment of special temporary judges under HB 1020, § 1 was constitutional; (3) appointment of special temporary judges under Miss. Code Ann. § 9-1-105(2) was constitutional; (4) chancery court properly dismissed the Chief Justice; and (5) chancery court properly dismissed the Circuit Clerk.

## **HOLDING**

(1) Because the Constitution directed the Legislature to establish inferior courts, because the CCID court met the definition of an inferior court in that the Legislature intended it to have the same jurisdiction and function as a municipal court, and because the CCID court had the municipal court's statutory appeals process and certiorari review conferred upon it for any CCID court judgment even without express language regarding the right to appeal, the Legislature's creation of the CCID court as an inferior court was constitutional. (2) Because Miss. Const. art. VI, § 153 required circuit judges to be elected by the people for a four-year term, and because the plain language of HB 1020, § 1 created four unelected circuit judges who bore the same powers and characteristics as ordinarily elected judges, the appointment of special temporary judges under HB 1020, § 1 was unconstitutional even with the presumption of validity afforded to legislative enactments. (3) Because Miss. Code Ann. § 9-1-105(2) permitted the temporary special appointment of judges, subject to the discretion of the Chief Justice and a majority of justices on the Supreme Court, in the event of and for the duration of an emergency or overcrowded docket, such as the criminal problems in Hinds County, and because the Governor's appointment power under Miss. Const. art. VI, § 165 was not the only procedural option in selecting special judges, the appointment of special temporary judges under Miss. Code Ann. § 9-1-105(2) was constitutional. (4) Because the doctrine of judicial immunity applied to the judicial act of appointing judges, because injunctive relief against the Chief Justice was properly denied since declaratory relief was readily available, because there was no reason to create an exception to the judicial immunity doctrine permitting Saunders to seek an injunction against the Chief Justice when the acts Saunders sought to enjoin were the Chief Justice's compliance with duly-enacted statutes, the chancery court properly dismissed the Chief Justice. (5) Because the Circuit Clerk did not have a personal stake in the outcome of disputes to participate as adversaries therein, and because Saunders did not allege the Circuit Clerk acted against the Constitution, the chancery court properly dismissed the Circuit Clerk of Hinds County. Therefore, the Supreme Court affirmed in part and reversed and rendered in part the judgment of the Hinds County Chancery Court.

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

Presiding Justice Kitchens agreed with the majority on all issues except the decision to uphold the CCID court because the Legislature did not expressly place the CCID court under the authority of the circuit court. He argued the CCID court did not fit the definition of a municipal court and was not entirely inferior to the circuit court. Therefore, he argued the CCID court did not reach constitutional criteria and could not be upheld.

### **Affirmed in Part; Reversed & Rendered in Part - 2023-CA-00584-SCT (Sept. 21, 2023)**

En Banc Opinion by Justice Maxwell - Concurrence in Part & Dissent in Part by Presiding Justice Kitchens

Hon. J. Dewayne Thomas (Hinds County Chancery Court)

J. Clifton Johnson II, Robert B. McDuff, Paloma Wu, Jacob Wayne Howard, Joshua Tom, Tanner John Lockhead, Brenda Wright, & Brittany Carter for Appellants - Justin L. Matheny, Rex Morris Shannon III, Gerald L. Kucia, Scott G. Stewart, Anthony Renard Simon, Pieter John Teeuwissen, Scherrie Lonnnette Prince, Mark A. Nelson, Ned A. Nelson, & Wilson Douglas Minor for Appellees Briefed by [Jonathan Gandara](#)

## WEST V. WEST

### CIVIL - DOMESTIC RELATIONS

**SECURED TRANSACTIONS - LIEN INTEREST - FORMATION** - Pursuant to Miss. Code Ann. § 75-8-209, a lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate

**CORPORATIONS - DEMAND LETTER - LIABILITY FOR NOTICE** - No more than ten days after levy, corporations or companies that neglect, refuse, or willfully make any false statement in a writing under oath delivered to the officer about the particulars of a demand and the value of a stock, share or interest, shall be liable for the full amount of the judgement or decree

**APPELLATE PROCEDURE - REMAND - FAILURE TO ADDRESS** - Where the appellate court has already decided a specific issue in a case on a prior appeal, the trial court has been found to be in error where, on remand, it has refused to follow the appellate court's opinions and direction; appellate courts may not rule upon material matters which the trial judge did not have the opportunity to judge

**CIVIL PROCEDURE - JURISDICTION - PRIORITY OF JURISDICTION RULE** - The priority of jurisdiction rule stands for the premise that if the first court in which an action is filed has proper jurisdiction, that court should retain jurisdiction over the whole controversy; a party may not use the tactic of filing two substantially identical complaints to expand procedural rights

**CIVIL PROCEDURE - STATUTE OF LIMITATIONS - JUDGMENT LIEN** - If an action is brought within seven years from the date the judgment was entered, then the lien on the judgement remains; failure to timely and reasonably raise any affirmative defense, coupled with active participation in the litigation process, ordinarily serves as a waiver

### FACTS

In November 1994, Tim and Debbie West divorced and incorporated a property settlement agreement into the divorce decree. Over five years after the divorce, Tim stopped paying what was due pursuant to the property settlement agreement. Debbie then filed a contempt proceeding. In 2008, after winning judgment for past-due alimony and attorney's fees, Debbie commenced a garnishment action against Tim for distributions from and shares in West Entities, a series of closely held businesses that Tim had interests in. Tim then sold back his stock to the respective companies. The Jones County Chancery Court held that the stocks were free of encumbrance and thus West Entities was free to acquire the stocks from Tim. Debbie appealed this decision, and it was consolidated with Tim's appeal of the initial action where Debbie won alimony and attorney's fees. The Supreme Court held that Debbie was a judgment creditor and remanded the case to the trial court for a priority of liens analysis. The Supreme Court also noted that West Entities had failed to abide by Miss. Code Ann. § 13-3-129 when they did not provide a written statement, under oath, of the particulars demanded by the officer, and of the value of the defendant's stocks, shares, or interest. On remand, the trial court held that West Entities had secured interests in Tim's stocks before Debbie and thus their liens held priority. Both parties appealed this decision. In the meantime, Tim filed a complaint for declaratory judgment arguing that the running of the statute of limitations as well as prior judgments rendered Debbie's 2008 judgment null and void. In this action, Tim was granted summary judgment despite Debbie's argument that the trial court lacked jurisdiction. Debbie appealed and Tim cross-appealed.

### ISSUES

Whether (1) the trial court erred by determining that West Entities' security interests had priority over Debbie's interests; (2) West Entities' failure to comply with Miss. Code Ann. § 13-3-129 entitled Debbie to a judgment against West Entities for the full amount owed on the 2008 judgment; (3) the trial court erred by failing to address Tim's claim for past due

child support; (4) the trial court lacked jurisdiction over this case; and (5) the trial court erred by granting summary judgment since the statute of limitations expired.

### **HOLDING**

(1) Because the Court could not determine the exact content of the restriction on the shares due to the poor condition and illegibility of the certificates and because it was unclear whether Debbie had actual or constructive notice of West Entities' claim priority in the corporations' bylaws, the trial court erred in determining that West Entities' security interest had priority over all other interests and remanded this issue for determination of whether any stock certificates contained notations of the lien restrictions. (2) Because neither the Supreme Court nor the trial court addressed whether West Entities was be subject to the statutory penalty in Miss. Code Ann. § 13-3-129 and because the Supreme Court did not make a definitive ruling about whether West Entities' failure to provide a written statement entitled Debbie to a full judgment or not, the issue was remanded for the chancery court to determine whether the statutory penalty should be applied. (3) Because the trial court erred by failing to address the claim, the Court remanded the issue of Tim's retroactive child support claim to be presented anew. (4) Because the complaint involved impermissible claim splitting regarding the same, single body of operative facts and against the same defendant and because Tim should not have been allowed to bring his separate complaint, the Court reversed the trial court's decision and reinstated the 2008 judgement, the writs of garnishments, and the writs of execution. (5) Because the 2008 judgement was valid when Debbie commenced the garnishment proceeding, because the statute of limitations was tolled, and because Tim failed to timely and reasonably raise a statute of limitations defense, thereby waving it, the trial court's decision was reversed with orders to dismiss the case and reinstate the 2008 judgement, the writs of garnishments, and writs of execution. Therefore, the Supreme Court reversed and remanded in part and reversed and rendered in part the judgment of the Jones County Chancery Court.

**On Direct Appeal: Reversed & Remanded. On Cross-Appeal: Reversed & Remanded - 2020-CA-01206-SCT (Sept. 21, 2023)**

Opinion by Presiding Justice Kitchens

Hon. Franklin C. McKenzie Jr. (Jones County Chancery Court, First Judicial Dist.)

David Bridges for Appellant - Terry L. Caves, Mark A. Nelson, Ned Andrew Nelson, & Risher Grantham Caves for Appellees

**Consolidated with:**

**Reversed & Rendered - 2022-CA-00147-SCT (Sept. 21, 2023)**

Hon. Franklin C. McKenzie Jr. (Jones County Chancery Court, First Judicial Dist.)

Todd Burwell for Appellant - Terry L. Caves & Risher Grantham Caves for Appellee

**Consolidated with: 2002-IA-01158-SCT**

**Consolidated with: 2008-CA-1700-SCT**

**Consolidated with: 2009-CA-01877-SCT**

**Consolidated with: 2010-CA-00316-SCT**

Briefed by [Summie Carlay](#)

Edited by [Nivory Gordon](#) & [Mason Scioneaux](#)

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

**MOORE V. STATE**

**EN BANC ORDER**

**ORDER**



Corey Moore was convicted of burglary of a dwelling. In 2020, the Supreme Court affirmed Moore's conviction. In 2023, Moore filed his second application for leave to proceed in the trial court. The Supreme Court denied Moore's application and warned Moore that future filings deemed frivolous would result in monetary convictions and restrictions on filing applications for post-conviction collateral relief in forma pauperis. The Supreme Court found Moore's application barred as untimely and successive, with no exception to the bars. Further, the Supreme Court found the filing frivolous. Therefore, the Supreme Court denied Moore's Application for Leave to Proceed in the Trial Court.

### **OBJECTION IN PART**

Presiding Justice King agreed that Moore's application for post-conviction relief should have been dismissed. However, he disagreed with the finding that the application was frivolous because Moore made reasonable arguments in his application for post-conviction relief. As such, he argued that Moore should not have been warned that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction collateral relief.

#### **Denied with Sanctions Warning - 2021-M-00111 (Sept. 18, 2023)**

En Banc Order by Justice Maxwell - Objection in Part by Presiding Justice King

Briefed by [Robert "Duncan" Jones](#)

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

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

### **JENKINS V. STATE**

#### **CRIMINAL - FELONY**

#### **CRIMINAL PROCEDURE - JURY INSTRUCTIONS - DETERMINING GRANT OR REFUSAL - A**

Defendant is entitled to have jury instructions given that present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction that incorrectly states the law, is covered fairly elsewhere in another instruction, or is without foundation in the evidence

#### **CRIMINAL PROCEDURE - DRIVING UNDER THE INFLUENCE - STATUTORY REQUIREMENTS**

- Under the statute for common law DUI, Miss. Code Ann. § 63-11-30(1)(a), it is unlawful for a person to drive or otherwise operate a vehicle if the person is under the influence of intoxicating liquor

#### **FACTS**

In July 2021, Deputy Chris Strickland was driving on a county road when he observed Rita Ann Jenkins's vehicle turn onto the county road, nearly strike a stop sign, and veer toward Deputy Strickland's vehicle. Deputy Strickland initiated his blue lights and pulled Jenkins's vehicle over. As Deputy Strickland spoke to Jenkins and explained why he stopped her, he smelled the odor of alcohol and noticed an open beer can in the center console. When asked if she had been drinking, Jenkins responded that she had consumed two beers and just got into an altercation with her boyfriend. Deputy Strickland called Deputy Julian Willis, a certified driving under the influence ("DUI") officer, to the scene to perform the field sobriety test. Jenkins refused to perform the walk-and-turn test and the one-legged-stand test but allowed Deputy Willis to perform a portable breath test, which indicated that Jenkins did have alcohol present on her breath. Deputy Willis transported Jenkins to the county jail and issued her a ticket for DUI. At trial, Jenkins testified that she consumed three beers before two p.m. during the day of the incident, was unsure why Deputy Strickland pulled her over, and denied almost hitting the stop sign or Deputy Strickland's vehicle. Jenkins stated that she did not know the beer was in her car and her appearance was due to having just woken up before the incident. Over Jenkins's objection, the trial court granted the State's jury instruction S-8 which provided that the State was not required to prove that alcohol impaired Jenkins's ability to drive or her level of impairment, only that she was driving a motor vehicle while under the influence of intoxicating liquor. The trial court then denied Jenkins's jury instruction D-7 which provided that

the State must prove beyond a reasonable doubt that Jenkins was operating her motor vehicle when she was impaired from alcohol. The jury found Jenkins guilty of DUI, third offense, pursuant to Miss. Code Ann. § 63-11-30(1)(a). Jenkins was sentenced to five years, with two years suspended and three years to serve. The trial court denied Jenkins's motion for a new trial. Jenkins appealed.

### **ISSUES**

Whether the trial court erred by (1) granting the State's jury instruction S-8 and (2) refusing Jenkins's jury instruction D-7.

### **HOLDING**

(1) Because the statute for common law DUI did not require the State to prove that alcohol impaired Jenkins's ability to drive or her level of impairment, because the jury was correctly instructed that the State was only required to prove Jenkins was driving under the influence of intoxicating liquor, the trial court did not err by granting the State's jury instruction S-8. (2) Because Jenkins's proposed jury instruction improperly stated the law by requiring the State to prove that Jenkins was impaired from alcohol, and because Jenkins's proposed jury instruction was fairly covered by other jury instructions since the jury was correctly instructed that the State had to prove beyond a reasonable doubt that Jenkins was under the influence of intoxicating liquor, the trial court did not err by refusing Jenkins's jury instruction D-7. Therefore, the Supreme Court affirmed the judgment of the Neshoba County Circuit Court.

### **SPECIAL CONCURRENCE**

Justice Maxwell argued that the State's jury instruction S-8 was correct because the State was not required to prove that alcohol impaired Jenkins's ability to drive because she was charged with a common law DUI rather than a statutory DUI. He agreed with Jenkins's DUI conviction but suggested a clearer course than the State's jury instruction S-8 to reduce confusion for future common law DUI cases.

### **DISSENT**

Presiding Justice Kitchens argued that the jury was misinformed by the State's jury instruction S-8 and the jury instruction misled the jurors. He argued it was error for the trial court to deny a jury instruction that accurately defined "under the influence." Without the proper definition, the jury likely lowered the burden of proof the State was required to prove. Further, he argued that there was no cure for the confusion created by the State's jury instruction, and the jury instruction prohibited Jenkins from asserting her defense.

**Affirmed - 2022-KA-00754-SCT (Sept. 21, 2023)**

En Banc Opinion by Chief Justice Randolph - Special Concurrence by Justice Maxwell - Dissent by Presiding Justice Kitchens  
Hon. Caleb Elias May (Neshoba County Circuit Court)  
George T. Holmes (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee  
Briefed by [Sydney Bailey](#)  
Edited by [Doug Reynolds](#) & [Ashley House](#)

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## **MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 19, 2023**

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

#### **BAILEY V. JEFFERSON CNTY. BD. OF SUPERVISORS**

#### **CIVIL - OTHER**

**APPELLATE PROCEDURE - BRIEF FILINGS - APPELLEE'S FAILURE TO FILE A BRIEF** - When an appellee fails to file a brief, the court may find the appellee's failure constitutes a confession of error and reverse the trial court's judgment

**CIVIL PROCEDURE - APPROPRIATE REMEDIES - COMPENSATORY DAMAGES** - Compensatory damages are an appropriate remedy when other relief, such as injunctive relief, is unavailable at the time damages are awarded, thereby rendering compensatory damages the only remedy for the legal wrong

### FACTS

Carl Bailey served as constable for the western district of Jefferson County. In 2016, Bailey moved out of his district. In November 2016, the Jefferson County Board of Supervisors (“the Board”) sent Bailey a letter informing him that his move had violated election laws and requested his appearance at a December 2016 board meeting. In September 2017, the Board filed for writ of quo warranto in circuit court, alleging that Bailey had continued to serve as constable and prevented the Board from filling the position or calling a special election. In March 2018, the circuit court dismissed the Board’s complaint, finding the complaint not brought by a proper party. In May 2018, the Board voted to remove Bailey as constable. Bailey challenged his removal as unlawful and violating his due process rights. In August 2018, Bailey filed for a temporary restraining order and a preliminary injunction to prevent the Board from filling his position. Bailey also sought relief for damages and costs sustained over the course of his challenges. In August 2019, the circuit court found that Bailey’s challenge was filed untimely under Miss. Code Ann. § 11-51-75. On appeal, the Court of Appeals remanded the case to the circuit court, finding the dismissal was improper since the Board had failed to provide Bailey sufficient notice of the proceeding. On remand, the circuit court found that the Board did not present sufficient evidence to support its removal of Bailey from his position. However, the circuit court declined Bailey’s challenge for damages, finding any claim for relief or damages no longer viable. Bailey appealed.

### ISSUE

Whether the circuit court erred in finding Bailey not entitled to damages.

### HOLDING

Because the Board’s failure to file an appellee’s brief was considered a confession of error with regard to its decision to remove Bailey as a constable, because the circuit court found that the Board’s decision to remove Bailey as a constable was not supported by substantial evidence, and because Bailey was entitled to the amount of compensation he would have received as a constable had the Board not improperly removed him from the office, the circuit court erred in finding that Bailey was not entitled to damages. Therefore, the Court of Appeals reversed, rendered, and remanded the judgment of the Jefferson County Circuit Court.

### **Reversed, Rendered, & Remanded - 2022-CP-00950-COA (Sept. 19, 2023)**

Opinion by Chief Judge Barnes

Hon. Forrest A. Johnson Jr. (Jefferson County Circuit Court)

*Pro se* for Appellant - Nickita Shanta Banks for Appellees

Briefed by [Forrest Carman](#)

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

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## **J&A EXCAVATION, INC. V. CITY OF ELLISVILLE**

### **CIVIL - OTHER**

**PUBLIC CONTRACTS - CONSTRUCTION BIDS - LOWEST & BEST BID** - In determining the lowest and best bid, a public board may take into consideration factors such as the bidder’s honesty and integrity, the bidder’s skill and business judgment, the bidder’s experience and facilities for carrying out the contract, the bidder’s conduct under previous contracts, and the quality of work previously done by the bidder

**PUBLIC CONTRACTS - ACCEPTING BIDS - CONSIDERATION REQUIREMENTS** - If a public board accepts a bid other than the lowest bid submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and the best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid



**PUBLIC CONTRACTS - GOVERNING BOARDS - DISCRETION** - A governing board is vested with a sound discretion in making a determination as to who is the lowest bidder and best bidder supported with substantial evidence but may not act arbitrarily

### **FACTS**

The City of Ellisville (“the City”) and Jones County (“County”) published advertisements for bids for a National Resources Conservation Service (“NRCS”) watershed protection project. For both projects, J&A Excavation, Inc. (“J&A”) submitted the lowest bid, and TM Productions, LLC (“TM”) submitted the next lowest bid. Before choosing a bid for the City’s project, the project engineer, Wiley Pickering, sent an email to NRCS supervisory engineer Norman Patterson about J&M’s bid on the City’s and County’s NRCS projects. Pickering asked Patterson if J&M was in “good standing” with the NRCS and if J&A’s work on similar NRCS projects had been “acceptable.” No mention or inquiry was made of TM. Patterson’s response mentioned multiple NRCS projects awarded to J&A that did not meet minimal acceptance standards. The next day, Pickering sent a letter to the City’s Mayor, recommending TM’s bid as the lower and best bid with no information regarding TM, its standing with NRCS, or its performance on other projects. The City’s Board of Aldermen (“the City’s Board”) voted to accept TM’s bid. The City Board’s minutes acknowledged J&A’s lowest bid, but based on poor performance on previous NRCS projects, the project was awarded to TM. The NRCS watershed project bid award ended similarly in Jones County. The County’s Board of Supervisors (“County’s Board”) accepted TM’s bid and provided the same reasons that the City’s Board chose TM over J&A. J&A filed a notice of appeal in the Jones County Circuit Court pursuant to Miss. Code Ann. § 11-51-75 for both bids. As required by Miss. Code Ann. § 11-51-75(a)(iii), J&A included a designation of the record in each of its notices of appeal. However, neither the municipal clerk, nor County’s Board, assembled a record of the proceedings or delivered a record to the circuit clerk. The circuit court held back-to-back hearings in the cases, starting with the City’s case. The City suggested that Pickering should testify regarding what he told the City’s Board prior to its vote to accept TM’s bid. J&A objected, arguing that the record of the meeting should be limited to the City’s Board’s minutes and attachments, which included the email exchange between Pickering and Patterson and Pickering’s letter to the Mayor. The circuit court ruled that Pickering would testify. Pickering acknowledged that he did not tell the City’s Board anything about TM or its bid other than it was the best bid and recommended TM was awarded the project. In County’s case, Pickering testified that he discussed Patterson’s negative feedback regarding J&A but did not provide County’s Board with details beyond what Patterson stated in his email and that he advised County’s Board that Patterson did not provide concurrence in awarding the project to J&A. The circuit court entered similar opinions affirming the decisions of the City’s Board and County’s Board (“the Boards”). The circuit court held that substantial evidence supported the decisions based on information received from Patterson, on behalf of NRCS, and Pickering’s recommendations based on experience with J&A. J&A appealed.

### **ISSUE**

Whether the circuit court erred in affirming the decisions of the Boards.

### **HOLDING**

Because TM was not the lowest bidder, because neither the Boards’ minutes nor the record explained or demonstrated how TM’s bids were better than J&A’s bids, because the record provided no evidence that the Boards received or considered any information regarding TM’s qualifications, reputation, or capabilities, and because the Boards’ decisions to award the construction contracts to TM were not supported by substantial evidence, the Boards’ decisions to award TM the construction contracts were arbitrary and capricious, and the circuit court erred in affirming the decisions of the Boards to reject J&A’s bids. Therefore, the Court of Appeals reversed and remanded the judgment of the Jones County Circuit Court.

#### **Reversed & Remanded - 2022-CA-00533-COA (Sept. 19, 2023)**

Opinion by Presiding Judge Wilson

Hon. Dal Williamson (Jones County Circuit Court, First Judicial Dist.)

David Bonds Ellis & Nicholas James Toca for Appellant - Randy P. Laird for Appellee

#### **Consolidated with:**

#### **Reversed & Remanded - 2022-CA-00547-COA (Sept. 19, 2023)**

Hon. Dal Williamson (Jones County Circuit Court, Second Judicial Dist.)

David Bonds Ellis & Nicholas James Toca for Appellant - Danielle Ashley for Appellee  
Briefed by [Zachary Perez](#)  
Edited [Kennedy Gerard](#) & [Ashley House](#)

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## MOORE V. JACKSON PUB. SCH. SYS.

### CIVIL - PERSONAL INJURY

**CIVIL PROCEDURE - SUMMARY JUDGMENT - SUA SPONTE** - A court cannot grant summary judgment sua sponte for an issue not raised in the moving party’s motion because the opposing party is entitled to receive notice of the issue and an opportunity to argue it

**CIVIL PROCEDURE - SUMMARY JUDGMENT - SUFFICIENCY OF EVIDENCE** - If the party requesting summary judgment does not challenge the sufficiency of opposing party’s evidence on any essential element(s) of their claim, then the opposing party has no obligation to produce evidence in response to the motion for summary judgment

### FACTS

Sharon Moore’s son, A.T., was a special needs student who attended Rowan Middle School (“Rowan”), which is a part of the Jackson Public School District (“JPS”). In February 2017, A.T. was riding a school bus when he was assaulted by two eleventh-grade students and sustained several bruises and contusions. Later in March, a counselor at Rowan informed Moore of the incident and that another child had threatened that he was “going to get” A.T. in the future. The next day, A.T. was assaulted again at the school by other eleventh graders; this time A.T. suffered a broken leg and ankle, which required surgery. Moore sued JPS alleging that they breached their ministerial duties and that their negligence repeatedly allowed for A.T. to be assaulted while under their care. Specifically, Moore filed claims for negligence, negligence per se, and negligent infliction of emotional distress. JPS answered by denying liability and asserted multiple affirmative defenses. Moore and JPS both filed motions for summary judgment. JPS argued that Moore’s claims failed as a matter of law for three reasons: a purported breach of a statute does not create a cause of action, sovereign immunity cannot be waived, and Moore’s claims are barred under the Mississippi Tort Claims Act. The trial court denied both motions for a lack of supporting evidence, but JPS filed a motion to amend the judgment in which they argued that the court lacked subject matter jurisdiction due to sovereign immunity. Although the court rejected this argument, it found that Moore failed to present any evidence demonstrating a triable issue of fact and, therefore, granted summary judgment sua sponte for JPS. Moore appealed.

### ISSUE

Whether the trial court erred by granting summary judgment for JPS on a ground that was not raised in their summary judgment motion.

### HOLDING

Because an opposing party was entitled to notice and an opportunity to respond to every argument raised on summary judgment and because JPS never argued that Moore failed to provide evidence that demonstrated a triable issue of fact, the court erred in granting summary judgment sua sponte for JPS. Therefore, the Court of Appeals reversed and remanded the judgment of the trial court.

### DISSENT

Presiding Judge Carlton argued that the Court of Appeals erred in reversing and remanding the trial court’s decision. Although the majority applied the correct rule of law for disallowing the grant of summary judgment sua sponte, Moore received notice and was afforded an opportunity to respond to the issue of probative evidence during the summary judgment hearing. Therefore, the trial court’s judgment should have been affirmed.

### Reversed & Remanded - 2022-CA-00595-COA (Sept. 19, 2023)

En Banc Opinion by Presiding Judge Wilson - Dissent by Presiding Judge Carlton  
Hon. Eleanor Johnson Peterson (Hinds County Circuit Court, First Judicial Dist.)

William Scott Mullenix for Appellant - Steven Lloyd Lacey & Allison Perry Fry for Appellee  
Briefed by [Benjamin Duddy](#)  
Edited by [Kayla Tran](#) & [Mason Scioneaux](#)

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

### **LOVE V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - MISTRIAL - PREJUDICE** - A mistrial should only be declared when there is an error in the proceedings that results in prejudice to the defendant's case that is substantial and irreparable

**CRIMINAL PROCEDURE - INDICTMENT - CAPITAL MURDER** - Capital murder indictments that do not identify the victim of the underlying crime are legally sufficient because the identity of the victim of the underlying crime is not an element of capital murder

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - CONSTRUCTIVE AMENDMENT OF INDICTMENT** - An indictment is constructively amended when the jury instructions broaden the grounds that a defendant may be charged on so that the defendant may be convicted without proof of all the elements in the indictment

**CONSTITUTIONAL LAW - DOUBLE JEOPARDY - SEPARATE VICTIMS** - Multiple convictions of the same felony for separate victims do not violate the Double Jeopardy Clause

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR** - If jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found

#### **FACTS**

After losing a dice game at a local club, Demantreas Love and three others returned at closing time to reclaim their lost money. Violence followed as Love and the others demanded money from people inside the club. Numerous shots were fired, killing one man, Vernardo Washington, and injuring another. Love was charged with capital murder, aggravated assault, and three counts of armed robbery for the robberies of Washington, the club owner, and the winner of the dice game. In a pre-trial hearing, Love filed a motion to sever that was denied, and there was no transcript of this hearing made a part of the record. During voir dire examination, Love wore wrist restraints because he could not walk in shackles. The restraints were covered prior to the venire entering the courtroom; however, when Love needed a restroom break, the bailiff began to free Love of the restraints in the presence of the venire. During trial, no evidence was presented to show Love took property from Washington's person. Love was convicted on all counts. The conviction for the armed robbery of the club owner was merged with the capital murder conviction as the underlying felony. Although the indictment for capital murder did not name the victim of the armed robbery, the jury instructions at trial did name the victim. Additionally, the indictment for the armed robbery of Washington stated that property was taken from Washington's person, but the jury instructions added "from the presence" of Washington. The jury instructions submitted by the State also omitted the last paragraph of the required *Milano* instructions on aiding and abetting, which was a summary paragraph of the preceding information that had been included in the instructions. Love appealed.

#### **ISSUES**

Whether the circuit court erred by (1) denying Love's motion to sever; (2) denying Love's motion for a mistrial; (3) allowing the instruction naming the armed robbery victim; (4) convicting Love of armed robbery of Washington; (5) convicting Love on multiple counts of armed robbery; and (6) refusing Love's additional *Milano* jury instruction.

#### **HOLDING**

(1) Because the appellate record did not contain a transcript of the pre-trial hearing on the motion, the circuit court did not err by denying Love’s motion to sever. (2) Because substantial and irreparable prejudice did not result from the venire’s knowledge of the restraints, the circuit court did not err by denying Love’s motion for a mistrial. (3) Because the indictment was legally sufficient and the jury instruction did not constructively amend it, the circuit court did not err by allowing the instruction naming the armed robbery victim. (4) Because there was no evidence from which the jury could have found that any of the victim’s property was taken from his person and the indictment did not state “from the presence,” the circuit court erred by convicting Love of armed robbery of Washington. (5) Because each count was for a separate victim, the circuit court did not err by convicting Love on multiple counts of armed robbery. (6) Because the State’s jury instructions properly instructed the jury, the circuit court did not err in refusing Love’s additional *Milano* jury instruction. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Holmes County Circuit Court.

**Affirmed in Part; Reversed & Rendered in Part - 2021-KA-01014-COA (Sept. 19, 2023)**

Opinion by Judge Emfinger

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

Justin T. Cook (Pub. Def. Office) for Appellant - Barbara Byrd (Att’y Gen. Office) for Appellee

Briefed by [Caroline Byrd](#)

Edited by [Doug Reynolds](#) & [Mason Scioneaux](#)

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