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**MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 9, 2023**

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***SUPREME COURT - ORDERS*****GODBOLT V. STATE****EN BANC ORDER****ORDER**

Willie Cory Godbolt filed a motion to make oral arguments in his death penalty case. The Supreme Court found the motion not well taken. Therefore, the Supreme Court denied Godbolt's motion to make oral arguments.

**OBJECTION**

Presiding Justice King would grant Godbolt's motion to make oral arguments. He argued that Godbolt should have had the opportunity to present his oral argument because he had the right to be heard under Miss. Const. art. 3, § 26, and under death penalty appellate rights pursuant to Miss. Code Ann. § 99-19-105.

**Denied - 2020-DP-00440-SCT (Nov. 3, 2023)**

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

Briefed by [E. Forrest Carman IV](#)

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

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***SUPREME COURT - POST-CONVICTION RELIEF***

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**HATHORNE V. STATE****CIVIL - POST-CONVICTION RELIEF**

**CRIMINAL PROCEDURE - DEFECTIVE INDICTMENT - CONTROLLED SUBSTANCE** - An indictment for possession of a Schedule 1 controlled substance will be defective if the stated drug is not a listed substance or does not contain one of the enumerated substances

**CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT** - Although the Uniform Post-Conviction Collateral Relief Act does not allow substantive fundamental-rights claims to circumvent the Act's statutory bars, the court will allow other arguments that attack the constitutionality of the bars to be raised in a post-conviction relief action

**INDICTMENT - SUBSTANTIVE DEFECT - WAIVER** - An indictment's failure to charge the essential elements of a criminal offense is a substantive defect that affects a person's fundamental rights and therefore can be raised at any time and cannot be waived or barred

**POST-CONVICTION RELIEF - DEFECTIVE INDICTMENT - TIMELY FILING** - The timely filing of post-conviction relief, and whether or not a defendant has filed multiple previous post-conviction relief petitions, are factors the court may consider when determining whether or not the Uniform Post-Conviction Collateral Relief Act statutory bars should apply

## **FACTS**

In 2015, Kelton Hathorne was arrested for possession of ethylene, a Schedule 1 controlled substance; he was sentenced to thirty years in prison. Hathorne filed for post-conviction relief (“PCR”) on the grounds that the indictment did not sufficiently charge a crime. The trial court denied the petition, to which Hathorne appealed. Although the Court of Appeals determined that the indictment was in fact defective, it nonetheless denied relief because the petition was procedurally barred by the Uniform Post-Conviction Collateral Relief Act (“UPCCRA”). Under the UPCCRA, Hathorne’s claim failed because the issue he raised was capable of determination at trial or on direct appeal. Hathorne petitioned for writ of certiorari.

## **ISSUES**

Whether (1) the indictment was defective and (2) the Court of Appeals erred by denying relief on the grounds that the claim was procedurally barred by the UPCCRA.

## **HOLDING**

(1) Because ethylene was not listed as a Schedule 1 controlled substance and because the prosecutor failed to connect the drug to an enumerated controlled substance in court, the indictment was defective. (2) Because this was Hathorne’s first PCR motion, because the PCR motion was timely filed, and because Hathorne was challenging the validity of the UPCCRA statutory bars through the substantive defects in his indictment, his claim had not been waived, the bars were vitiated, and relief should have been granted. Therefore, the Supreme Court reversed and rendered the judgment of the Court of Appeals and the Forrest County Circuit Court.

### **Reversed & Rendered - 2021-CT-00306-SCT (Nov. 9, 2023)**

En Banc Opinion by Justice Griffis

Hon. Robert B. Helfrich (Forrest County Circuit Court)

Sanford E. Knott for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Benjamin Duddy](#)

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

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## **MISSISSIPPI COURT OF APPEALS DECISIONS – NOVEMBER 7, 2023**

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

## **CHAMBLISS V. CHAMBLISS**

### **CIVIL - DOMESTIC RELATIONS**

**FAMILY LAW - MARITAL PROPERTY - EQUITABLE DISTRIBUTION** - To conduct an equitable distribution pursuant to a divorce proceeding, the chancery court must first characterize the parties’ assets as marital or non-marital and second, divide the marital property according to the guidelines set forth in *Ferguson v. Ferguson*

**FAMILY LAW - MARITAL PROPERTY - COURT’S DISCRETION** - Chancellors are afforded wide latitude in fashioning equitable remedies in domestic relations matters, and their decision will not be reversed if the findings of fact are supported by substantial credible evidence in the record

**FAMILY LAW - MARITAL PROPERTY - ALIMONY** - In the case of a claimed inadequacy or outright denial of alimony, appellate courts will interfere only where the decision is seen as so oppressive, unjust, or grossly inadequate as to evidence an abuse of discretion; alimony should be considered only if, after the parties’ assets are equitably divided, there are not sufficient assets to provide for both parties, and one party is left with a deficit; where there are sufficient marital assets, which when equitably divided and considered with each spouse’s non-marital assets, will adequately provide for both parties, no more need be done

**FAMILY LAW - MARITAL PROPERTY - ATTORNEY'S FEES** - An award of attorney's fees may be sufficient in a simple matter before the court where the award is based on the court's experience and observation

### **FACTS**

Chad Chambliss and Laura Chambliss married in August 1987 and divorced after nine years based on irreconcilable differences, but began to live together again two months later. Then in 2011, Chad and Laura remarried in order for Laura to get on Chad's health insurance. During the marriage, Chad provided the primary source of income for the family and made some investments. From 1996 to 2011, Chad created and contributed to two sperate retirement accounts with AIG and BankcorpSouth. After they were remarried, Chad created and contributed to another retirement account with Merrill Lynch. Meanwhile, Laura was primarily responsible for maintaining the home, taking care of the children, and tending to the farm animals they owned. In 2005, Laura attempted to return to school, but never graduated and incurred approximately \$17,000 in student loan debt. Laura testified that in 2008, she was employed and that Chad did not allow her to have a job. On the contrary, Chad testified that he had tried to get her to work after the children were grown, but she refused. Laura cited that because of several medical impairments and four surgeries, she was not able to work, but there was no testimony to support such claim, and she did not qualify for disability of any kind. Laura admitted that she used marijuana for her pain, which Chad testified that her use contributed to difficulties in their marriage. In January 2022, the court granted Laura's filing for divorce on the ground of adultery. In June 2022, the trial court entered a temporary order for the demarcation for the estate assets, ordering Chad to pay Laura \$1,200 monthly in spousal support, her health and car insurance. Laura and Chad were also ordered to divide their checking and savings accounts and, thus, the court declined to award Laura alimony. In the court's final judgment, the court acknowledged that Chad admitted to adultery and Laura's dissipation of assets due to her marijuana use and the problems it caused in the marriage. As a result, the court awarded Laura thirty percent of Chad's retirement account, \$1,800 per year for twelve years in order to allow her to purchase health insurance, and \$3,500 for attorney's fees. In November 2022, Laura filed a "Motion to Reconsider, Alter or Amend Final Judgment," which the court denied. Laura appealed.

### **ISSUES**

Whether the chancery court erred (1) by not awarding Laura any portion of Chad's AIG and BankcorpSouth IRA account; (2) in awarding Laura only thirty percent of the Merrill Lynch retirement account; (3) by declining to award her alimony; and (4) by awarding her insufficient attorney's fees.

### **HOLDING**

Because there was no support for the assertion that cohabitation vested martial rights in parties previously married, because there was no law suggesting that if the divorce was revoked or set aside to nullify the divorce decree or relate back to the end of the first marriage, because the chancery court found the parties willingly and knowingly lived together without the benefit of marriage, and because the AIG and BankcorpSouth retirement accounts were created and contributed to during this period of cohabitation, the court did not err in holding that Laura was not entitled to an equitable division of non-marital accounts. (2) Because the chancery court found that Laura dissipated the martial assets by buying marijuana four to five times a week and because there was testimony from Chad that it was not true that Laura was not physically able to work, but that she simply refused, the court acted within its discretion in coming to this conclusion. (3) Because Laura failed to introduce any credible evidence to prove that she was unable to work, because not all jobs require physical labor, because there was no evidence in the record showing that she had attempted to apply for disability benefits, and because Laura refused to get a job despite Chad's urging her to do so, the trial court acted within its discretion in declining to award alimony. (4) Because cohabitation did not vest marital rights in parties who were previously married and because there was no law to support equitable division of the non-marital assets at issue, the award was reasonable and well within the court's discretion. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Chancery Court.

**Affirmed - 2023-CA-00087-COA (Nov. 7, 2023)**

Opinion by Judge Westbrook

Hon. Deborah J. Gambrell (Lamar County Chancery Court)

William E. Andrews III for Appellant - Shawn M. Lowrey for Appellee

Briefed by [Zylan Coleman](#)

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

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## FOX V. FOX

### CIVIL - CUSTODY

**FAMILY LAW - CUSTODY - MODIFICATION** - When determining whether custody modification is warranted, there must be a material change in circumstances of the custodial parent that has arisen after entry of the first custody order; then, the moving party must prove that the change in circumstances has an adverse effect on the minor child, and the modification must be in the minor child's best interest

**FAMILY LAW - CUSTODY - TOTALITY OF THE CIRCUMSTANCES** - When analyzing whether a material change of circumstances has occurred, the chancellor must consider the totality of the circumstances

**CIVIL PROCEDURE - MOTION PRACTICE - INVOLUNTARY DISMISSAL** - When considering a Miss. R. Civ. P. 41(b) motion to dismiss, the chancellor should review the evidence fairly, and not in the light most favorable to the plaintiff

### FACTS

Tai Curry Fox ("Curry") and John Fox III ("Fox") divorced in 2012. The couple had previously been awarded joint legal and physical custody of their minor child, G.F., on a week-to-week basis. Curry began to work periodically as an emergency room veterinarian in Florida. Curry started to work full-time at the veterinarian clinic because of the higher salary and eventually moved full time to Florida but kept her apartment in Rankin County. Curry eventually received an opportunity to buy the veterinary practice in Florida, but this would require Curry to be in Florida full time. Curry filed a complaint for modification of the custody agreement, requesting sole custody of G.F. At the custody modification hearing, Curry testified to the new work opportunity in Florida as full-time and thus the week-to-week custody would be impracticable. G.F., who turned twelve years old on the day of the hearing, expressed his desire to live with Curry in Florida and executed a "Child's Election Affidavit" stating his preference to live with Curry. At the close of Curry's case-in-chief, Fox moved to dismiss Curry's complaint pursuant to Miss. R. Civ. P. 41(b), which the chancellor ultimately granted. Curry appealed.

### ISSUES

Whether the chancery court erred in (1) determining that Curry had not met her burden of proving that a material change in circumstances had occurred in the custodial home since the most recent custodial decree; (2) failing to consider the totality of the circumstances in determining whether a material change in circumstances had occurred; and (3) granting Fox's motion to dismiss.

### HOLDING

(1) Because Curry's testimony demonstrated that the parties' week-to-week custody arrangement would become impracticable and difficult for Curry to maintain due to the move to Florida, Curry met her burden of proof that there was a material change in circumstances warranting a modification in custody. (2) Because the chancery court's ruling did not make any express findings as to how Curry's full-time residence in Florida would affect G.F. and because the record reflected that, under the totality of the circumstances, Curry's move would render the current joint custody arrangement unworkable, the chancery court erred in finding no material change in circumstances. (3) Because the record reflected that Curry presented sufficient evidence of a material change in circumstances adverse to G.F., the chancery court erred in granting Fox's motion to dismiss Curry's complaint. Therefore, the Court of Appeals reversed and remanded the judgment of the Rankin County Chancery Court.

### Reversed & Remanded - 2022-CA-00918-COA (Nov. 7, 2023)

Opinion by Judge Carlton

Hon. John C. McLaurin Jr. (Rankin County Chancery Court)

Robert Russell Williard for Appellant - Christopher A. Tabb for Appellee

Briefed by [Maggie Crain](#)

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

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## GREGORY MERIDIAN ACQ., LLC v. MCFARLAND

### CIVIL - CONTRACT

**CONTRACT LAW - ARBITRATION AGREEMENTS - VALIDITY** - In order to determine whether a party is bound to arbitration it must be determined whether (1) there is a valid arbitration agreement and (2) the parties' dispute is in the scope of the agreement

**CONTRACT LAW - CONTRACT FORMATION - ELEMENTS** - The elements necessary to form a contract are (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with the legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contract formation

**CIVIL PROCEDURE - MOTIONS FOR RECONSIDERATION - FACTORS** - A party may obtain relief upon a motion for reconsideration upon showing (1) an intervening change in controlling law; (2) availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice

### FACTS

In the Fall of 2019, Frances McFarland decided to purchase a vehicle. McFarland contacted Babs Hairston, a salesperson with Gregory Meridian Acquisition, LLC ("BMW"), who found a used Mercedes-Benz for McFarland. McFarland decided to purchase the vehicle. McFarland told Hairston that she would be going out of the state for surgery soon and would be spending time in rehabilitation there. So, the next day, Hairston presented purchase documents to McFarland at her home. Additionally, Hairston told McFarland there were other documents that she would take care of herself. McFarland did not receive any copies of the documents and the documents were allegedly signed by a dealership representative who had passed away after signing. The vehicle was not delivered to McFarland. However, Hairston told McFarland that the vehicle was being serviced and would remain at the dealership until McFarland returned home. After one month, McFarland returned home and found the vehicle had still not been delivered. McFarland continued to make payments. In January 2020, McFarland stopped paying for the vehicle and contacted the Attorney General and the Clarke County Sheriff. The sheriff's office investigated and found the vehicle at Hairston's residence. McFarland filed a complaint against BMW and Hairston. BMW filed a motion to dismiss or, as an alternative, to compel arbitration. Hairston joined, requesting that the trial court stay proceedings because of her indictment and arraignment for motor vehicle theft. McFarland responded to the motion arguing that the arbitration agreement was not signed by her, thus, arbitration could not be compelled. In McFarland's response, she attached an affidavit stating that multiple documents regarding the purchase of the vehicle were not signed by her. The trial court denied BMW and Hairston's motion, holding that BMW and Hairston failed to prove that an arbitration agreement existed. BMW filed a motion to reconsider with the trial court and another hearing was held. The motion was denied. BMW and Hairston appealed.

### ISSUES

Whether the trial court erred in (1) determining whether an arbitration agreement existed and (2) denying BMW and Hairston's motion for reconsideration.

### HOLDING

(1) Because BMW failed to provide evidence that McFarland signed the arbitration agreement thereby creating a meeting of the minds, the trial court did not abuse its discretion in determining that McFarland had not signed the arbitration agreement. (2) Because there was no intervening change in controlling law, because BMW knew that MacFarland argued the signature was forged but declined to attempt to present a handwriting analysis expert until after the trial court denied its motion to compel arbitration, and because the death of the sales manager and the indictment on Hairston had no bearing on whether BMW could contest McFarland's forgery claim with a handwriting analysis expert, the trial court did not err in denying BMW and Hairston's motion for reconsideration requesting limited discovery. Therefore, the Court of Appeals affirmed and remanded the judgment of the Clarke County Circuit Court.

**Affirmed & Remanded - 2022-CA-00580-COA (Nov. 7, 2023)**

Opinion by Judge Lawrence

Hon. Charles W. Wright Jr. (Clarke County Circuit Court)

J. Richard Barry, George Ellis Abdo III, Robert William Arledge, Mark C. Carroll, & Rimen Brar Singh for Appellants - William C. Hammack, Christopher Michael Falgout, & Kate Sprabery Davis for Appellee

Briefed by [Selena Houston](#)

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

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## MOORE V. MISS. FARM BUREAU CAS. INS. CO.

### CIVIL - PERSONAL INJURY

**CIVIL PROCEDURE - MOTIONS IN LIMINE - ELEMENTS** - When granting a motion in limine, the court must find that (1) the material or evidence in question will be inadmissible at a trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury

**EVIDENCE - PREJUDICE - EXCLUSION OF INSURER** - In *Heflin*, the court held that they may exclude an insurer as a defendant since it would potentially prejudice the jury

**CIVIL PROCEDURE - JUDICIAL ESTOPPEL - ELEMENTS** - The three elements for judicial estoppel are: (1) the party asserts a legal position inconsistent with a previous one taken during litigation, (2) the court accepted the previous position, and (3) there was no inadvertence in taking the inconsistent position

**CIVIL PROCEDURE - LAW OF CASE DOCTRINE - REQUIREMENTS** - The doctrine of the law of the case relates entirely to questions of law, is confined in its operation to subsequent proceedings in the case, and requires a dispositive, final ruling on a question of law

**TORTS - UNDERINSURED BENEFITS DISCLOSURE - FAULT & DAMAGES** - The plaintiff must prove fault and damages against the tortfeasors before it can be known whether or to what extent underinsured benefits are due to the plaintiff

### FACTS

In June 2018, Larry Moore's vehicle collided with Rosie Kellum's vehicle. Each party claimed that the other proximately caused the accident. The vehicle driven by Kellum was owned by Cynthia Louis, who had liability coverage of \$25,000. Kellum had liability insurance with limits up to \$100,000. Larry and his wife Nina (collectively "the Moores") had a policy with Farm Bureau Insurance Company ("Farm Bureau") for \$250,000 in stacked uninsured motorist ("UM") coverage, which entitled Farm Bureau to offset any amount paid to the Moores under the other liability policies. Farm Bureau paid the Moores for the damages suffered in the crash. In December 2018, Farm Bureau filed a complaint against Kellum, asserting Kellum negligently operated her vehicle. Farm Bureau received a subrogation payment, which led to the lawsuit's dismissal and an express agreement between both parties that the payment was not an admission of liability and that the released party denied liability. In March 2020, the Moores filed a complaint against Louis and Kellum, alleging Kellum's vehicle negligently crossed over into the Moores's lane, which caused the accident and, therefore, entitled the Moores to damages. In May 2020, Kellum and Louis filed an answer and affirmative defense, denying liability. In January 2021, the Moores's attorney sent two letters to Farm Bureau that claimed the total damages suffered by the Moores totaled enough to request UM benefits under their policy, which Farm Bureau responded to, stating that it would not make any UM benefit payments since it did not believe the Moores's damage claims exceeded the underlying \$125,000 in liability limits. In response, the Moores amended their complaint, adding Farm Bureau as a defendant. In May 2021, a stipulation for partial settlement with Kellum was filed, which stated (1) all claims between the Moores and Louis were fully settled and dismissed without prejudice, on the issue of liability; (2) in the event of a trial on the issue of liability, Kellum, and if necessary, Farm Bureau would be entitled to \$25,000 in credit towards any future settlement or jury verdict; and (3) clarified that the settlement was not an admission of liability by Kellum and was not to be disclosed to the jury at trial. In September 2021, a deposition of Farm Bureau's claim adjuster was conducted in which the adjuster recognized some potential for comparative fault in the accident based on new information. In November 2021, Farm Bureau filed a motion in limine asserting that the only issues for trial were liability for the accident and the value of the Moores's damage claims. Additionally, Farm Bureau argued that its identity as a defendant and as the Moores's UM carrier was irrelevant, and the value of including it as a defendant was outweighed

by the danger of unfair prejudice and confused the issues. In January 2022, the circuit court granted Farm Bureau's motion in limine to exclude them as a defendant. The Moores filed a motion to reconsider, which was denied. Before the proceedings, the Moores's attorney sought to make an offer of proof that Farm Bureau took an opposing position on the liability issue in its former lawsuit against Kellum. The circuit court refused to alter its prior order because it found Farm Bureau's position in the other case was irrelevant to whether Kellum was negligent. The jury unanimously ruled that Kellum was not liable. In the posttrial motion, the Moores claimed the circuit court should grant them a judgment notwithstanding the verdict because they were unable to cross-examine Farm Bureau on liability and fault. The circuit court denied the motion. The Moores appealed.

## **ISSUES**

Whether (1) *Heflin* was applicable to the facts of the Moores's case; (2) the doctrine of judicial estoppel prevented Farm Bureau from taking a contrary position on the issue of liability for the accident; (3) the circuit court's ruling judicially eliminated the Moores's claim for breach of contract against Farm Bureau; and (4) the circuit court's evidentiary ruling negatively impacted UM statutes.

## **HOLDING**

(1) Because there was no language in *Heflin* that limited its holding to specific instances where liability was admitted, because Farm Bureau's role as a defendant and as the Moores's UM insurer was substantially outweighed by the risk of confusing the jury, and because Farm Bureau stipulated that its UM coverage would be applicable to satisfy judgments over the available policy limits not exceeding the available UM coverage limits and subject to offsets or credits, Farm Bureau's stipulation was consistent with the stipulation by Nationwide in *Heflin*. (2) Because the prior suit was settled and dismissed with prejudice which meant that the circuit court did not accept that Kellum was liable for the accident, and because no final and dispositive ruling existed as to Kellum's negligence in the prior suit, there was no merit to the Moores's argument that judicial estoppel prevented Farm Bureau from taking a contrary position on the issue of liability for the accident. (3) Because Farm Bureau's presence would not have made it more or less likely that Kellum did or did not cause the accident, because the jury unanimously concluded that Kellum was not liable for the accident, and because the Moores cited no relevant authority to support their argument that the circuit court prejudiced their right to a fair trial or misled the jury, the Moores's UM policy benefits with Farm Bureau were never implicated and rendered any potential claim for breach of contract against Farm Bureau moot. (4) Because *Heflin* was decided under the current UM statutory framework, because the Moores's right to assert their claims against Farm Bureau for UM benefits was protected, and because the jury's verdict finding Kellum not liable precluded recovery under their UM coverage with Farm Bureau, there was no merit to the Moores's claim. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

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

Judge Westbrook argued that the circuit court's exclusion of Farm Bureau's identity from the jury presented a problem because the decision to exclude the identity of a party to the proceeding was a procedural matter, not an evidentiary one. She argued that the jury was misled because the attorneys had filed motions on behalf of Farm Bureau but participated in the trial like they represented Kellum. She argued that even accepting that the exclusion of the Moores's insurance company was an evidentiary matter, the facts were distinguishable from *Heflin*. Therefore, given the distinguishing facts, the circuit court erred by excluding the Farm Bureau's identity because their identity was relevant and excluding Farm Bureau's identity resulted in an unfair trial.

### **Affirmed - 2022-CA-00555-COA (Nov. 07, 2023)**

En Banc Opinion by Chief Judge Barnes - Concurrence in Part & Dissent in Part by Judge Westbrook

Hon. W. Ashley Hines (Washington County Circuit Court)

R. Brittain Virden for Appellants - Jenessa Jo Carter Hicks, Dale Gibson Russell, Michael Todd Bartley, & William Buckley Stewart for Appellees

Briefed by [Zachary Perez](#)

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

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## SCHAUBHUT V. SCHAUBHUT

### CIVIL - DOMESTIC RELATIONS

**CIVIL PROCEDURE - SERVICE OF PROCESS - SUMMONS & COMPLAINTS** - Under Miss. R. Civ. P. 4, a summons and complaint must be served by any person who is not a party and is not less than eighteen years of age; a process server may effect personal service on a competent adult by delivering a copy of the summons and complaint to him personally

**CIVIL PROCEDURE - DEFAULT JUDGMENTS - MOTIONS TO SET ASIDE** - A trial court may grant relief under Miss. R. Civ. P. 60(b) based on a sufficient showing of fraud, mistake, or other justifiable reason

**FAMILY LAW - UNCONTESTED DIVORCES - PROOF OF ALLEGATIONS** - There must be sufficient and corroborated proof presented at an uncontested divorce hearing; a divorce complainant must prove the allegations of his or her complaint even when the defendant has failed to answer

**APPELLATE PROCEDURE - PROCEEDING TRANSCRIPTS - LACK OF TRANSCRIPTS** - Under Miss. R. App. P. 10(c), where a party complains about the absence of a transcript of the proceedings, the appellant is to prepare a statement of the evidence or proceeding from the best available means and if there is any conflict as to what occurred at the hearing, the matter is submitted to the chancellor for decision

**FAMILY LAW - GROUNDS FOR DIVORCE - ADULTERY** - An individual seeking a divorce on the grounds of adulterous activity must show by clear and convincing evidence both an adulterous inclination and a reasonable opportunity to satisfy that inclination

### FACTS

In October 1995, Brenda and Emanuel Schaubhut married and lived together until March 2022, when Brenda stated that Emanuel deserted the home. Brenda filed for divorce on the grounds of adultery and habitual cruel and inhuman treatment or, alternatively, irreconcilable differences. Brenda asked that she be awarded alimony, reasonable attorney's fees, and ownership of the marital residences and all vehicles classified as marital property. Brenda filed with the chancery court clerk proof of service to show that Emanuel was personally served with a copy of the divorce complaint and summons pursuant to Miss. R. Civ. P. 4 by hand delivering them to him at the hospital. Brenda had video-recorded Emanuel being served with process. The summons stated that his response was to be mailed within thirty days of delivery, or a judgment by default would be entered against him. Two months later, the chancery court held a hearing on Brenda's divorce complaint, which Emanuel had failed to respond to or appear for the hearing. The chancery court entered a final judgment on the same day as the hearing. The chancery court found that Emanuel had been personally served with the divorce complaint and summons in March 2022 and was fully competent when he received them. The chancery court found that said complaint and summons were also properly filed in the chancery court's record. Despite being properly served, Emanuel failed to file a response or enter an appearance. The chancery court was shown a Facebook post of Emanuel and his alleged girlfriend fishing together on the day of the hearing. The chancery court also found substantial and corroborating evidence of Emanuel's adulterous conduct from the presented documents and video evidence. The chancery court awarded Brenda \$1,200 a month in permanent alimony after considering evidence regarding Emanuel and Brenda's annual gross income, the length of their marriage, and proof of Emanuel's adultery. In May 2022, Emanuel filed a motion under Miss. R. Civ. P. 59 and Miss. R. Civ. P. 60 to set aside the final divorce judgment, or alternatively, for a new trial. Emanuel did not dispute that he was recovering in the hospital but claimed his mental faculties were impaired at the time of service. Emanuel claimed he saw the papers but did not think they were important because there was no court date on them. Emanuel asserted his motion was timely filed and challenged the sufficiency of evidence to prove adultery and the adequacy of the chancery court's findings with regard to the distribution of marital assets and award of permanent alimony. After conjuring Emanuel's post-trial motion, the chancery court concluded that the findings for distributing marital assets and awarding alimony were proper and denied Emanuel's motion. Emanuel appealed.

### ISSUES

Whether (1) Emanuel was improperly served with process; (2) Brenda misrepresented facts and committed fraud on the chancery court to obtain an inequitable distribution of marital assets; and (3) there was insufficient evidence to prove Emanuel's adultery.



## **HOLDING**

(1) Because Emanuel was personally served process by a non-party adult, because Emanuel failed to cite relevant case law to support his claims that Brenda should not have been present when he was served or that he lacked mental capacity when he was served in the hospital, because the chancery court determined that Emanuel was fully competent after it reviewed the video recording of Emanuel being served with process, and because Brenda did not need to notify Emanuel of the exact date of the hearing, Emanuel was properly served with process. (2) Because Brenda substantiated her claims by providing testimony and evidence, and because Emanuel failed to create a record on appeal under Miss. R. App. P. 10(c) to demonstrate that Brenda improperly obtained the divorce judgment, there was insufficient record to hold that Brenda misrepresented facts or committed fraud on the chancery court to obtain her distribution of the material assets. (3) Because Emanuel failed to create a record for appeal, because the chancery court found that Brenda established her right to divorce Emanuel based on adultery by clear and convincing evidence, and because Emanuel failed to overcome the presumption that there was sufficient evidence, there was sufficient evidence to prove Emanuel's adultery. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Chancery Court.

**Affirmed - 2022-CA-00881-COA (Nov. 7, 2023)**

Opinion by Judge Smith

Hon. Sheila Havard Smallwood (Pearl River County Chancery Court)

Anna Kathleen Rush for Appellant - Steven J. Irwin for Appellee

Briefed by [Emily Kaplan](#)

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

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## **SMITH V. FORD**

### **CIVIL - INSURANCE**

**INSURANCE - DAMAGES - COLLATERAL SOURCE RULE** - A defendant tortfeasor is not entitled to have damages for which he is liable reduced by reason of the fact that the plaintiff has received compensation for his injury by and through a totally independent source, separate and apart from the defendant tortfeasor

**INSURANCE - DAMAGES - COLLATERAL SOURCE RULE** - Treating payments made as the result of plaintiff's decision to purchase optional underinsured motorist coverage as subject to the collateral source rule is more consistent with the policy justifications underlying the collateral source rule

**CIVIL PROCEDURE - JUDICIAL ESTOPPEL - REQUIREMENTS** - A party will be judicially estopped from taking a subsequent position if (1) the position is inconsistent with one previously taken during litigation, (2) a court accepted the previous position, and (3) the party did not inadvertently take the inconsistent positions

### **FACTS**

While driving down Highway 25 in Rankin County, Smith rear-ended Ford, causing Ford bodily injury. Smith possessed a liability policy with \$25,000 coverage with United Services Automobile Association (USAA). Ford had an underinsured motorist policy through Allstate with \$100,000 coverage. Ford's attorney issued a formal demand to USAA for \$500,000 or policy limits, whichever was less. Three days after the offer expired, USAA tendered its policy limit of \$25,000. Ford's attorney responded, informing USAA that the previous offer had been withdrawn, and issued a new demand for \$450,000. Simultaneously, Ford's attorney also issued a demand letter to Allstate, requesting that they provide any available uninsured motorist benefits to offset the inadequacy of Smith's policy limits and requested that Allstate waive any subrogation against Smith. Allstate complied. Roughly one month later, Ford filed a complaint in the Rankin County Circuit Court, alleging negligence and seeking damages for personal injury, medical expenses, pain and suffering, and mental anguish. At trial a jury awarded Ford \$302,968.92 in damages. Smith filed a motion to amend under Miss. R. Civ. P. 59, arguing that she was entitled to an offset for the monies paid to Ford under the two insurance policies (\$25,000 from USAA and \$75,000 from Allstate); also arguing that because Ford had assigned \$75,000 of her claim to Allstate, she could not be compensated for the same bodily injuries in the final judgement. Ford replied

requesting that the trial court deny Smith's motion to the extent it requested the judgment be offset by the amount her Allstate coverage paid, but because USAA issued Ford a check for \$25,000, Ford filed a "Notice of Satisfaction of Partial Judgment" and agreed the judgment should be amended to \$277,968.92. The court denied Smith's motion. Smith appealed.

### **ISSUES**

Whether (1) the collateral-source rule encompasses uninsured/underinsured motorist benefits and (2) Ford should be judicially estopped from asserting that Allstate had waived subrogation.

### **HOLDING**

(1) Because treating payments made as a result of plaintiff's decision to purchase optional underinsured motorist coverage as subject to the collateral source rule was consistent with the policy justifications underlying the collateral source rule, the proceeds from Ford's UM coverage constituted a collateral source. (2) Because Ford's demand letters for insurance benefits do not constitute judicial proceedings or litigation, the doctrine of judicial estoppel did not apply. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

**Affirmed - 2022-CA-00255-COA (Nov. 7, 2023)**

Opinion by Chief Judge Barnes

Hon. Dewey Key Arthur (Rankin County Circuit Court)

Edward C. Taylor & Katie Ryan Van Camp for Appellant - Michael Saltaformaggio & Sharon Algena Spencer for Appellee

Briefed by [Andrew "Blake" Huffman](#)

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

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## **WHITTINGTON V. WHITTINGTON**

### **CIVIL - DOMESTIC RELATIONS**

**FAMILY LAW - DIVORCE - SEPARATE PROPERTY** - Separate property is not subject to equitable division in divorce proceedings

**FAMILY LAW - DIVORCE - REMEDIAL AWARDS** - Remedial awards may be proper in divorce proceedings because the supporting spouse's sacrifices would have been rewarded if the marriage had lasted

**FAMILY LAW - DIVORCE - REIMBURSEMENT ALIMONY** - When one spouse had paid for the other's educational expenses, the payor spouse must present proper proof to show that the contribution substantially increased the recipient's future earning capacity for reimbursement to be ordered

### **FACTS**

Benjamin Whittington ("Ben") and Lacey Whittington ("Lacey") consented to divorce. Years before the divorce, Ben liquidated a pre-marital settlement annuity and used the proceeds to pay off Lacey's student loans. During the divorce proceedings, the trial court deemed this annuity to be Ben's separate property rather than marital property and ordered Lacey to reimburse Ben for the entire amount he paid toward her student loans. Lacey appealed.

### **ISSUE**

Whether the trial court erred by ordering Lacey to reimburse Ben for his previous payment of her student loans.

### **HOLDING**

Because Ben's annuity would have not been subject to equitable division had he not sold it and his payment contributed to Lacey's education and increased earning capacity, the trial court did not err by ordering Lacey to reimburse Ben for his previous payment of her student loans. Therefore, the Court of Appeals affirmed the judgment of the Copiah County Chancery Court.

### **DISSENT**

Judge McCarty argued that the entire family realized a higher standard of living. Therefore, the trial court abused its discretion by requiring Lacey to reimburse Ben for the entire amount he paid toward her student loans.

**Affirmed - 2022-CA-00300-COA (Nov. 7, 2023)**

En Banc Opinion by Presiding Judge Wilson - Dissent by Judge McCarty

Hon. Joseph Preston Durr (Copiah County Chancery Court)

Robert S. Addison, Matthew Thompson, & Chad Kenneth King for Appellant - Kelley Mitchell Berry for Appellee

Briefed by [Caroline Byrd](#)

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

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

### **BINGHAM V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - THEORIES OF A CASE** - A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in another instruction, or is without foundation in the evidence

**CRIMINAL LAW - THEORIES OF A CASE - IMPERFECT SELF-DEFENSE** - Imperfect self-defense is a theory of the case that allows the jury to consider a killing as mitigated to manslaughter if the killing is done without malice but under a bona fide, but unfounded, belief that it was necessary to prevent death or great bodily harm; to be entitled to an imperfect self-defense instruction, one must act without malice

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSE** - To be entitled to a lesser-included offense instruction, the defendant must point to evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser-included offense

#### **FACTS**

In March 2018, Willie James Bingham shot and killed David Nelson at a grocery. Bingham and Nelson had a history of altercations. Bingham and Nelson previously worked together. Bingham claimed Nelson threatened him for two years leading up to the shooting. Nelson's girlfriend, Latoya German, testified the altercations started because of an affair she had with Bingham. Another witness testified to a prior incident where Nelson and Bingham drew guns on each other. Another witness described three incidents at a car wash where Nelson came looking for Bingham, once supposedly with a gun. The night of the shooting, Bingham was purchasing cigarettes and other items when Nelson instigated an altercation with him. Bingham left and forgot his cigarettes. Bingham returned shortly after for the cigarettes. While Bingham attempted to enter the parking lot, Nelson's vehicle was in the middle of the entrance. Nelson refused to move his vehicle to allow Bingham to go around. Bingham maneuvered his vehicle very close to Nelson's. Bingham rolled down his window and exchanged heated words. Nelson and Bingham then parked, exited their vehicles, and exchanged more heated words. According to Bingham, Nelson backed up to his vehicle and reached inside to grab a gun. Bingham further testified that Nelson then pointed a gun at him. Bingham feared for his life and shot Nelson. On cross-examination, Bingham added that Nelson tried to shoot first, but Nelson's gun jammed. German testified that Nelson's gun was in Nelson's vehicle, but Nelson did not use it during the altercation. German claimed that when Bingham pointed the gun at Nelson during the confrontation Nelson told Bingham to shoot him, which he did. Before the police arrived, German threw Nelson's gun into the ditch because she feared it being in her car. Another witness, a customer of the store, testified that Nelson was saying crazy things but did not have a gun. Surveillance video, which the jury viewed, showed Bingham parked his vehicle, got out, and waited for Nelson. Nelson then parked and exited his vehicle.

Nelson and Bingham then came face-to-face, and Bingham pushed Nelson. Nelson then backed up to his vehicle. The video showed Bingham aiming his gun and firing at Nelson. The video did not show Nelson with a gun during the altercation. Bingham was indicted by a grand jury for first-degree murder, as well as for possession of a stolen firearm. At trial, the jury was presented with witness testimonies, surveillance footage, and forensic evidence from the bullet. The circuit court instructed the jury on first-degree murder, second-degree murder, and self-defense, but declined Bingham's proposed imperfect self-defense instruction. After deliberation, the jury found Bingham guilty of first-degree murder. Subsequently, Bingham filed a motion for judgment notwithstanding the verdict or a new trial, which the circuit court denied. Bingham appealed.

## **ISSUE**

Whether the circuit court erred by refusing Bingham's imperfect self-defense jury instruction.

## **HOLDING**

Because Nelson was unarmed and posed no threat to Bingham when Bingham pulled his gun, because there was no evidence supporting Bingham's claimed subjective belief that it was necessary to kill Nelson, because no witnesses testified or implied that Bingham shot Nelson in order to protect himself, because Bingham did not testify that he thought Nelson was going to retrieve a gun nor that he felt he had to shoot Nelson first, because the ongoing feud between Bingham and Nelson evidenced malice, because Nelson made no threatening action toward Bingham, and because Bingham escalated the situation by intentionally stopping to speak with Nelson, there was no evidence supporting Bingham's belief that it was necessary to kill Nelson and the circuit court properly refused the imperfect self-defense jury instruction. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

### **Affirmed - 2022-KA-01151-COA (Nov. 7, 2023)**

Opinion by Judge McDonald

Hon. Eleanor Johnson Peterson (Hinds County Circuit Court, Second Judicial Dist.)

Boty McDonald for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Stephanie Iken](#)

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

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## **LECOMPTE V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - ACCOMPLICE TESTIMONY** - An accomplice instruction should be given when the State relies solely on the accomplice's testimony and the defendant's guilt is not clearly proven

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - ACCOMPLICE TESTIMONY** - To give an accomplice instruction, the trial court must consider (1) whether the witness was in fact an accomplice and (2) whether the accomplice's testimony was corroborated; an accomplice's testimony is not corroborated when the only corroboration comes from another accomplice's testimony

**CRIMINAL LAW - ACCOMPLICES - REASONABLE INFERENCE** - If the evidence gives a reasonable inference that the person may have been a co-perpetrator or the sole perpetrator, then that person is an accomplice

## **FACTS**

Lynn Richardson, who was seventy-eight years old, hired Erica Etheridge to clean her house. Jeffrey LeCompte, Etheridge's live-in partner, went with her when she cleaned. In January 2019, Richardson's bank informed her of suspicious activity regarding checks that were written from her account. In April 2019, Richardson filed a complaint accusing LeCompte and his friend Samantha Lemieux of forging the checks. After being arrested, Lemieux admitted that she cashed two of the forged checks, but she claimed that LeCompte told her that the checks were legitimate and that he could not cash them because he did not have an ID. At trial, the State presented evidence of LeCompte's

handwriting, Richardson's testimony that she did not write or cash the forged checks, Lemieux's testimony that LeCompte told her the checks were legitimate, that Christian Newman was with her when she cashed the checks, as well as Newman's testimony that LeCompte said the checks were legitimate and that nothing bad would result from cashing them. During a jury instruction conference, LeCompte proposed a jury instruction stating that Lemieux was an admitted accomplice, but the trial court refused the jury instruction and simply stated that Lemieux and Newman did not know that cashing the checks was a wrongful act. The jury found LeCompte guilty of exploitation of a vulnerable adult. LeCompte appealed.

### ISSUE

Whether the trial court erred by refusing LeCompte's accomplice jury instruction.

### HOLDING

Because Newman was not an accomplice since Newman was unaware that a crime occurred nor did Newman benefit from the crime, because Newman's testimony corroborated Lemieux's testimony, and because the State presented evidence other than Lemieux's accomplice testimony to support LeCompte's guilt including the forged checks that contained LeCompte's fingerprints, the trial court did not err by refusing to grant LeCompte's accomplice jury instruction. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Circuit Court.

**Affirmed - 2022-KA-01245-COA (Nov. 7, 2023)**

Opinion by Judge McDonald

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

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Taylor Coe](#)

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

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## SCATES V. STATE

### CRIMINAL - FELONY

**CRIMINAL PROCEDURE - MISTRIAL - PREJUDICIAL MISCONDUCT** - Under Miss. R. Crim. P. 23.5, a mistrial may be declared if during the trial, either inside or outside the courtroom, misconduct by a party occurs resulting in substantial and irreparable prejudice to the movant's case

**EVIDENCE - ADMISSABILITY - JUROR TESTIMONY** - Under Miss. R. Evid. 606(b)(2), a juror may testify about whether extraneous prejudicial information was improperly brought to the jury's attention or whether an outside influence was improperly brought to bear on any juror

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

### FACTS

In October 2017, John Scates Jr. owed Henry Bates a balance of \$500 for the truck Bates sold to Scates earlier that year. One morning, Bates and a tow truck driver went to Scates's place of employment to repossess the truck. After repossessing the truck, Scates called Bates demanding the truck back. Later that afternoon, Bates and the tow truck driver returned to Scates's place of work. During Bates's second visit, an argument ensued between Bates and Scates after Bates indicated that he wanted more money than just the remaining \$500. As Bates was leaving, Scates shot Bates in the back. Scates was arrested and subsequently indicted for the crime of aggravated assault with a firearm enhancement. At trial, during Bates's cross-examination, Bates made a statement that defense counsel had offered to pay Bates \$35,000. As a result of this statement, defense counsel moved for a mistrial on the ground that Bates's comment strongly prejudiced the defense. The trial court subsequently denied Scates's motion for a mistrial. The jury

found Scates guilty of aggravated assault enhanced by the use of a firearm. Shortly after the jury's verdict, Scates filed a motion for an in camera examination of a juror and for a mistrial. In support of this motion, Scates attached an affidavit of a juror, who indicated that the juror's original vote was "not guilty," but after three female jurors cursed at her and threatened her, the juror changed her vote to guilty. The trial court denied Scates's motion to vacate the judgment or to grant a new trial. Scates appealed.

### ISSUES

Whether the trial court erred by (1) denying Scates's motion for a mistrial after Bates made a statement that defense counsel had offered to pay Bates \$35,000; (2) denying defense counsel's motion for a new trial due to alleged intimidation of a juror by her fellow jurors; and (3) denying Scates's motion for a new trial on the ground that the jury's verdict was against the overwhelming weight of the evidence.

### HOLDING

(1) Because Bates's statement that defense counsel had offered to pay Bates \$35,000 did not result in substantial and irreparable prejudice to Scates's case, the trial court did not err in denying Scates's motion for a mistrial. (2) Because the threshold showing of an improper outside influence or extraneous prejudicial information was absent, the trial court did not err in denying defense counsel's motion for a new trial due to alleged intimidation of a juror by her fellow jurors. (3) Because the opposing testimonies of Scates and the State's witnesses were "fully and fairly presented to a properly instructed trier of fact," the trial court did not abuse its discretion by denying Scates's motion for a new trial on the ground that the jury's verdict was against the overwhelming weight of the evidence. Therefore, the Court of Appeals affirmed the judgment of the Washington County Circuit Court.

**Affirmed - 2022-KA-00856-COA (Nov. 7, 2023)**

Opinion by Judge Lawrence

Hon. W. Ashley Hines (Washington County Circuit Court)

Jacob Michael Jenkins & A. Lee Abraham Jr. for Appellant - Casey Bonner Farmer (Att'y Gen. Office) for Appellee

Briefed by [Reynolds Ward](#)

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

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## WASHINGTON V. STATE

### CRIMINAL - FELONY

**EVIDENCE - HEARSAY EXCEPTIONS - PRESENT SENSE IMPRESSION** - A present sense impression is a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it

**EVIDENCE - HEARSAY EXCEPTIONS - EXCITED UTTERANCE** - An excited utterance is a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused; spontaneity is an essential element to admit a statement into evidence as an excited utterance

**CIVIL PROCEDURE - AWARDING RESTITUTION - FACTORS** - Under Miss. Code Ann. § 99-37-3(2), when a court determines whether to award restitution it must take into account: (a) the financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant; (b) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; and (c) the rehabilitative effect on the defendant of the payment of restitution and the method of payment

**CIVIL PROCEDURE - AWARDING RESTITUTION - NOTICE** - When ordering a person to pay a certain amount under penalty of incarceration or fine, the order must be definite and free of ambiguity so they are put on notice of what is required of them, and can follow it accordingly

### FACTS

Micah Washington fired several shots into a construction site while driving on the interstate. Several construction workers were at the site. Joshua Odom was sitting in the company truck when bullets shattered the truck's glass windows

and injured Odom's eye. Upon observing Odom's injuries, construction workers called James Latham, the construction company's safety director. When Latham arrived, he observed Odom sitting in a damaged company truck with blood over his left arm and the left side of his face. Washington was later apprehended and indicted for drive-by shooting and shooting into a motor vehicle. At trial, Latham testified that he received two phone calls about the shooting. Latham testified that he first received a phone call from a construction worker who told him that Odom had been shot in the face by a car passing by and that he was injured. Washington objected, asserting that Latham's testimony was hearsay. The circuit court allowed Latham's testimony as an exception to the hearsay rule because it was either a present sense exception or an excited utterance. Further, Latham testified that the construction worker was present at the construction site at the time of the incident and that the construction worker called him immediately after the shooting occurred. Next, Latham testified that he received a second phone call where he was told that someone had shot at them. Again, Washington objected, asserting that the testimony was hearsay. In reply, the State argued that the excited utterance exception applied. The circuit court overruled Washington's objection and allowed Latham's testimony after Latham provided that the construction worker was excited and panicked during the call and sounded scared and spoke in a higher pitch than normal. Latham also testified that during the phone call, the construction worker stated that a car shot at him. At trial, the State introduced photos of the company truck's damage that showed that the driver's side window had a bullet hole through it and that a portion of the passenger's side window was shattered. However, the State did not introduce any evidence, such as medical records, showing the costs of Odom's medical treatment. Ultimately, the jury found Washington guilty of shooting into a motor vehicle but acquitted him of a drive-by shooting. The circuit court did not assess any of the factors listed required under § Miss. Code Ann. 99-37-3(2). Washington did not object to the imposition of restitution or the amount of restitution ordered. The circuit court ordered Washington to pay both restitution of \$1,000 to the construction company for the damage to its truck and full restitution to Odom for his medical damages. Washington moved for a new trial or judgment notwithstanding the verdict and again did not raise an objection to restitution. Washington's motion was denied. Washington appealed.

### **ISSUES**

Whether the circuit court erred in (1) allowing Latham to testify regarding the first phone call he received from a construction worker; (2) allowing Latham to testify regarding the second phone call he received from a construction worker; and (3) imposing full restitution.

### **HOLDING**

(1) Because Latham's testimony regarding the first phone call Latham received described the construction worker who was at the construction site during the shooting and called Latham immediately after the shooting occurred, the circuit court did not err in allowing Latham to testify regarding the first phone call he received from a construction worker as a present-sense-impression exception to hearsay. (2) Because Latham's testimony regarding the second phone call Latham received described the construction worker who reported that he and others at the construction site had just been shot at by a passing car, and because the construction worker was still under the stress of being shot at when he called Latham, the circuit court did not err in allowing Latham to testify regarding the first phone call he received from a construction worker as an excited utterance exception to hearsay. (3) Because photos of the damage to the construction truck were introduced during the trial without objection but the victim's medical records were not introduced at trial, because the circuit court did not assess any of the factors required under Miss. Code Ann. § 99-37-3(2), and because there was proof of loss at trial but the restitution amount was unsubstantiated, the circuit court did not abuse its discretion in ordering restitution but erred in imposing full restitution. Therefore, the Court of Appeals affirmed in part and vacated and remanded in part the judgment of the Lincoln County Circuit Court.

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

Judge Emfinger agreed that Washington's conviction for shooting into a motor vehicle should have been affirmed. He argued that Washington's claim that the restitution was improperly imposed was barred on appeal because Washington failed to object to the imposition of restitution or the amount ordered.

#### **Affirmed in Part; Vacated & Remanded in Part - 2022-KA-00860-COA (Nov. 7, 2023)**

Opinion by Presiding Judge Carlton - Concurrence in Part & Dissent in Part by Judge Emfinger

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

George T. Holmes (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Joseph Muldrew](#)  
Edited by [Nivory Gordon](#) & [Ashley House](#)

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