

MISSISSIPPI SUPREME COURT DECISIONS – MARCH 28, 2024***SUPREME COURT - CIVIL CASES*****BENNETT V. MISS. BAR****CIVIL - BAR MATTERS**

BAR MATTERS - REINSTATEMENT - REQUIREMENTS - Before an attorney may be reinstated the attorney must: (1) state the cause or causes for suspension or disbarment, (2) give the name and current address of all persons, parties, firms, or legal entities who suffered pecuniary loss due to the improper conduct, (3) make full amends and restitution, (4) show that she has the necessary moral character for the practice of law, and (5) demonstrate the requisite legal education to be reinstated to the privilege of practicing law

BAR MATTERS - REINSTATEMENT - BURDEN OF PROOF - The petitioner carries the burden of proving that she has rehabilitated herself and has established the requisite moral character to entitle her to the privilege of practicing law

BAR MATTERS - AMENDS & RESTITUTION - BANKRUPTCY - There is an important distinction between a party's legal liability that can be cured by a bankruptcy discharge and a party's duty to provide full restitution as a requirement for reinstatement

FACTS

Christina Huffman Bennett filed a petition for reinstatement to the practice of law in April of 2023, following her six-month suspension for the violation of Mississippi Rules of Professional Conduct 1.4(a), 1.5. 1.15(c), 8.4(a), and 8.4(d). Bennett was hired as an associate attorney at Kirksey and Associates in 2012. Six years later, Bennett was named a partner of the firm. As cause for her suspension, Bennett described three occasions where she (1) failed to keep a client reasonably informed, (2) failed to provide a reasonable attorney's fee, (3) failed to safekeep property, (4) violated or attempted to violate the rules of professional conduct, and/or (5) engaged in conduct prejudicial to the administration of justice. In the first instance, Bennett and William Kirksey were hired to represent Christopher Toney in a criminal matter. Toney paid a nonrefundable fee of \$30,000. Bennett asserted that she and Kirksey successfully got Toney released on bond, and after Kirksey died, she assumed lead counsel responsibilities where she failed to properly communicate with Toney. Bennett admitted this failure to communicate and resolved not to repeat the conduct in the future. In the second instance, Bennie Newell hired Bennett and Kirksey to represent him in a criminal matter for \$80,000 as a "non-refundable" fee due upon the completion of the contract. Both Bennett and Kirksey signed the contract. In her deposition, Bennett admitted that Newell had paid \$60,600. Bennett further testified that, upon receipt of Newell's payments, Kirksey deposited the funds into the firm's operating account but subsequently transferred \$70,000 from the firm's account to a bank account he shared with his wife. Bennett testified that she did not obtain access to any of the firm's accounts until after Kirksey's death and that according to the records available to her, the funds had been deposited into the firm's account and spent. After Kirksey's death, Newell terminated Bennett and sought a full refund for the \$60,600 he had paid. Newell filed suit against Bennett and was awarded a default judgement in the amount of \$67,860. Bennett testified that the judgement was never paid, but that it was later discharged after she filed for bankruptcy. In the third instance, Bennett testified that after Kirksey's death, the firm's trust account ledger was not in balance with the bank account. After disbursing funds being held on Jason May's behalf, Bennett believed the remaining funds were property of the firm and withdrew \$500 for personal use without conducting a complete accounting to determine ownership of the funds. Bennett admitted that this was improper. The Bar asserted that Bennett sufficiently set forth the reasons for her suspension. The Supreme Court then considered the motion.

ISSUE

Whether Bennett satisfied the jurisdictional requirements to be reinstated to the practice of law.

HOLDING

Because Bennett failed to acknowledge any misconduct regarding her dealings with Newell, and because she asserted that no entity suffered a pecuniary loss as the result of her misconduct, Bennett did not show by clear and convincing evidence that she met the jurisdictional requirements for reinstatement. Therefore, the Supreme Court denied Bennett's petition for reinstatement to the practice of law.

Reinstatement Denied - 2023-BR-00410-SCT (Mar. 28, 2024)

En Banc Opinion by Justice Griffis

Bentley E. Conner for Petitioner - Adam B. Kilgore & Melissa S. Scott for Respondent

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

Edited by [Brandon Peterson](#) & [William Davis](#)

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ENCOMPASS HEALTH REHAB. HOSP. OF FLOWOOD, LLC. V. MISS. METHODIST HOSP. & REHAB. CTR., INC.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - PENDING APPLICATIONS - CONSIDERATION OF OTHER APPLICATIONS - For non-competing, pending certificates of need applications, the Mississippi State Health Department requires that the hearings consider the application on its own merits, and therefore parties must refrain from discussing or offering evidence concerning any other pending or yet-to-be-offered application that is not relevant to the matter at issue

ADMINISTRATIVE LAW - EVIDENCE - RELEVANCY - The rules of evidence are relaxed before administrative hearings, and a noncompeting, pending or yet-to-be-offered CON application is highly questionable in relevance as it is speculative

FACTS

The Mississippi State Department of Health ("MSDH") oversees the Certificate of Need ("CON") program and administers the State Health Plan ("SHP"), which sets standards for healthcare activities requiring CON review. Encompass Health Rehabilitation Hospital of Flowood, LLC ("Encompass") and Baptist Memorial Rehabilitation Hospital – Madison ("Baptist") submitted CON applications for new Comprehensive Medical Rehabilitation ("CMR") facilities. Initially, their applications competed as the number of requested Level I beds exceeded the SHP limit. However, Baptist and Encompass modified their applications to reduce Level I bed requests, and MSDH recommended approval for both applications. Mississippi Methodist Hospital and Rehabilitation Center, Inc. ("Methodist") sought a public hearing on both CON applications, arguing that it offered the same services in the same area. The hearing officer refused to consolidate the hearings and ruled that the applications were non-competing. Methodist was allowed to present evidence related to Baptist's CON during Encompass's hearing but not evidence directly on Baptist's application. After Encompass's hearing concluded, Methodist withdrew its objection to Baptist's CON, which MSDH granted. Methodist then moved to reopen the Encompass hearing or supplement the record with Baptist's newly granted CON but was denied. The hearing officer recommended approving Encompass's CON and found it complied with the relevant criteria. Methodist appealed to the chancery court, arguing the hearing officer failed to consider the relevance of Baptist's CON to Encompass's application. The chancery court agreed and reversed the MSDH decision. Encompass and MSDH appealed.

ISSUE

Whether the MSDH was required to admit evidence of the Baptist CON application or the Baptist CON in the Encompass CON hearing.

HOLDING

Because the MSDH hearing officer gave lengthy reasons why the Baptist CON was irrelevant, and because the MSDH decision to exclude evidence of a noncompeting, pending or yet-to-be-offered CON application was not reversible error, the chancery court erred by finding error by claiming that the MSDH failed to determine whether the Baptist CON application was relevant. Therefore, the Supreme Court vacated and remanded the case for further proceedings in the Hinds County Chancery Court.

CONCURRENCE IN PART & DISSENT IN PART

Chief Justice Randolph argued that the Court should have reversed the judgment of the chancery court and reinstated the final order entered by the MSDH officer approving Encompass’s CON application.

DISSENT

Justice Griffis argued that the majority erred in its determination that the MSDH officer considered the relevance of the Baptist CON application. He believed that the hearing officer’s findings as to relevancy did not address whether the Baptist CON application was relevant to the matter in issue, namely the Baptist CON’s impact on the need for additional services in the area and whether the approval of that application would impact the analysis of the Encompass CON application under the applicable CON criteria. Therefore, Justice Griffis argued that the chancery court’s decision should have been affirmed.

Vacated & Remanded - 2023-SA-00370-SCT (Mar. 28, 2024)

En Banc Opinion by Presiding Justice King - Concurrence in Part & Dissent in Part by Chief Justice Randolph - Dissent by Justice Griffis

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

Kathryn Russell Gilchrist, Cassandra S. Walter, Brant James Ryan, & Marc James Ayers for Appellants - Thomas L. Kirkland Jr., Allison Carter Simpson, & Matthew David Sitton for Appellee

Briefed by [Maggie Crain](#)

Edited by [Robert “Duncan” Jones](#) & [William Davis](#)

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SUPREME COURT - ORDERS

IN RE: LOCAL RULES

ORDER

ORDER

This en banc Order by the Supreme Court granted the Motion for Approval of Local Rules filed by the Judges for the Fifteenth Circuit Court District. In this Order, the Supreme Court approved the amendments to the Local Rules for the Fifteenth Circuit Court District. The amendments to the Local Rules address the needs of judicial economy and efficiency in administering justice within the Fifteenth Circuit Court District. The amendments to the Local Rules became effective upon the entry of this Order on March 21, 2024.

Exhibit A, referenced and attached to the Order, shows the amendments to the Local Rules for the Fifteenth Circuit Court District.

Ordered - 89-R-99015-SCT (Mar. 21, 2024)

En Banc Order by Justice Coleman

Briefed by [Joseph Muldrew](#)

Edited by [Summie Carlay](#) & [Emily Phillips](#)

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IN RE: UNIFORM CHANCERY COURT RULES

EN BANC ORDER

ORDER

This en banc Order by the Supreme Court was made in consideration of the Conference of Chancery Judges' ("Conference") petition to adopt revised Uniform Chancery Court Rules ("UCCR"), which was approved by the Conference in October 2019, and its amended petition to adopt the revised UCCR, which was approved by the Conference in April 2023. The petition was referred to the Court's Advisory Committee on Rules, which responded with comments, and the amended petition was posted for comment from August 2023 to September 2023. Additionally, former chancellors met with the Court's Rules Committee on Civil Practice and Procedure as a part of its review. The revisions will become effective April 18, 2024.

Exhibit A, referenced and attached to the Order, shows the revisions to the UCCR. Exhibit B, referenced and attached to the Order, shows a clean copy of the revisions.

DISSENT

Justice Griffis objected to the Order, arguing that the revisions were not ready to be finalized because the Court's Rules Committee on Civil Practice and Procedure made substantial changes that were not reviewed by the Conference. Additionally, he argued that some of the revisions were meaningless and created inconsistencies between the UCCR and the Uniform Civil Rules of Circuit and County Court Practice ("UCRCCC"). Finally, he argued that the revised UCCR contained unnecessary redundancies that should be omitted or addressed.

Ordered - 89-R-99006-SCT (Mar. 19, 2024)

En Banc Order by Justice Coleman - Dissent by Justice Griffis

Briefed by [Lydia Cates](#)

Edited by [Emily Kaplan](#) & [Emily Phillips](#)

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MISS. BAR V. MAYERS

ORDER OF DISBARMENT

ORDER

The Mississippi Bar, under Rule 14(b) of the Rules of Discipline for the Mississippi State Bar, filed a formal complaint against Urura W. Mayers, a resident of Tennessee and a member of the Mississippi Bar, after the Tennessee Supreme Court disbarred Mayers. The Tennessee Supreme Court found that Mayers withdrew funds from her client trust account at casinos in Tunica and then altered bank statements in an attempt to conceal the transactions from the Tennessee Bar's investigators. In addition to the formal complaint, the Mississippi Bar issued a Public Reprimand to Mayers in which she neither appeared nor responded. The Court imposed reciprocal discipline, permanently disbarred Mayers, and ordered reimbursement to the Mississippi Bar for costs and expenses of the proceeding.

Ordered - 2021-BD-00268-SCT (Mar. 27, 2024)

En Banc Order by Justice Ishee

Briefed by [Sydney Bailey](#)

Edited by [Emily Kaplan](#) & [William Davis](#)

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SUPREME COURT - CRIMINAL CASES

OWENS V. STATE

CRIMINAL - FELONY

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

EVIDENCE - WITNESSES - CREDIBILITY - It is within the province of the jury to determine the credibility of witnesses; the jury may believe or disbelieve, accept or reject the utterances of any witness

CRIMINAL PROCEDURE - DIRECTED VERDICT - REASONABLE DOUBT - The relevant question in determining whether a directed verdict should be granted is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

FACTS

The Clarksdale Police Department (“CPD”) responded to an alarm at Henderson Economy Drugs (“Economy Drugs”). The two responding officers reported no sign of forcible entry. Two days later, the pharmacist and owner Val Soldevila called CPD to report that the back door was unlocked, and the alarm system was disabled. Soldevila explained to the officer that they stored the narcotics in the open cabinet behind the drug counter. The narcotics cabinet was emptied. Surveillance cameras from a hospice across the street showed a person wearing a black shirt, dark pants, white shoes, and black socks exited the back door of Economy Drugs. The video showed the person’s gait, stride, upper body movements while walking, a dark bag over their right shoulder, and walking in the direction of a gas station until out of the camera view. The same person was captured on surveillance video from a gas station, which revealed the color of the bag to be red with a white logo and black on the other side. The video of him in line at the register clearly shows his facial features. That image was distributed through the police department, and CPD officer Taylor identified the person in the image as Ronald Owens. The officers executed a search warrant of Owens’ home and found a stock bottle from Economy Drugs with a label with no name and a “red X” on it. Soldevila identified the stock bottle as the kind that Economy Drugs used before individual prescriptions were filled. However, he was not able to identify what type of narcotics were in the stock bottle because he could not read the label. Officers found a duffle bag that was larger and a different color than the one in the surveillance video. However, the officers testified that it appeared to have looked like the bag Mr. Ronald Owens had in his possession at the time of the gas station video. The bag also did not match the bags Soldevila described from his office. Nevertheless, Owens was convicted of burglary of a business by a jury and sentenced to serve as a habitual offender. After the jury returned the verdict, Owens moved for a judgment notwithstanding the verdict or a new trial when both motions were denied. Owens appealed the denial of a new trial, but it was affirmed by the Court of Appeals. Owens petitioned for writ of certiorari.

ISSUE

Whether the trial court erred by denying Owens’s motion for new trial.

HOLDING

Because the jury was presented with evidence that the person on the security footage from the pharmacy matched the person in the video from the gas station, and because the jury was able to compare the facial features of the person in the video to Owens as he was sitting right in front of them, and because Owens possessed a stock bottle from the pharmacy and was neither an employee nor a customer of the pharmacy, the trial court did not err by denying Owens’s motion for a new trial. Therefore, the Supreme Court affirmed the judgment of the Coahoma County Circuit Court.

DISSENT

Justice Griffis argued that a new trial should be granted when the weight of the evidence is insufficient. The State offered no evidence that Owens stole the stock bottle nor that the bottle contained substances stolen during the burglary. Thus, mere possession of the bottle was not evidence that he stole it. Additionally, because the State did not ask Soldevila if the red and black bag in the gas station video was the same as the pharmacy bags, there was no evidence that Owens was the pharmacy bags in the video. The jury was not presented with credible evidence linking Owens to the burglary. The trial court abused its discretion in denying Owen’s motion for a new trial. Therefore, this case should be remanded to Coahoma County Circuit Court for a new trial.

Affirmed - 2021-CT-00887-SCT (Mar. 28, 2024)

En Banc Opinion by Chief Justice Randolph - Dissent by Justice Griffis

Hon. Charles E. Webster (Trial Court, Coahoma County Circuit Court)

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

Briefed by [Stephanie Iken](#)

Edited by [Katie Shaw](#) & [Emily Phillips](#)

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WAKEFIELD V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - DOUBLE JEOPARDY - SUCCESSIVE PROSECUTION - Whether a transaction results in the commission of one or more offenses is determined by whether separate and distinct acts made punishable by law have been committed

CRIMINAL LAW - ACCOMPLICE LIABILITY - ACCESSORY AFTER THE FACT - A defendant will be found guilty of accessory after the fact if he concealed, received, or relieved any felon, or aided or assisted any felon to escape or to avoid arrest, trial, conviction or punishment after the commission of a felony

CRIMINAL LAW - ACCOMPLICE LIABILITY - ACCESSORY AFTER THE FACT - For the purposes of Mississippi’s accessory after the fact statute, Miss. Code Ann. § 97-1-5, each felony committed by a principal offender constitutes a single unit of prosecution

FACTS

In May 2017, Dwan Wakefield, Byron McBride, and D’Allen Washington drove Wakefield’s aunt’s vehicle to Kroger to sell marijuana in the parking lot. While the three were waiting, Ebony Archie entered the store, leaving her car running and her six-year-old son, Kingston, asleep in the back seat. McBride then stole Archie’s car with Kingston still inside. Archer alerted authorities, and an Amber alert and “Be on the Lookout” alert were issued by authorities for Kingston, Archie’s vehicle, and Wakefield’s vehicle. McBride shot Kingston and abandoned the vehicle on the side of the road where Wakefield picked him up. During the drive, McBride informed Wakefield that he had murdered Kingston. Wakefield and McBride were apprehended shortly after arriving at their destination. At trial, the jury found Wakefield guilty of accessory after the fact to murder, accessory after the fact to kidnapping, and accessory after the fact to auto theft. Wakefield appealed and the Court of Appeals affirmed the trial court’s decision. Wakefield petitioned for writ of certiorari.

ISSUE

Whether the trial court violated the prohibition against double jeopardy by convicting Wakefield of three counts of accessory after the fact.

HOLDING

Because the State produced evidence that McBride committed the three felonies and Wakefield had knowledge of the felonies, the Court of Appeals properly concluded that Wakefield was an accessory to each felony McBride committed. Therefore, the Supreme Court affirmed the decision of the Madison County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Presiding Justice Kitchens agreed that Wakefield’s three accessory after the fact charges did not merge into a single charge simply because Wakefield performed the single act of giving McBride a ride. However, Justice Kitchens argued that because McBride’s crimes of murder and kidnapping merged into the single crime of capital murder, then Wakefield’s crimes of accessory after the fact to murder and accessory after the fact to kidnapping should have also merged into the single crime of accessory after the fact to capital murder. Therefore, Justice Kitchens believed that the trial court erred by declining to merge Wakefield’s crimes of accessory after the fact to murder and accessory after the fact to kidnapping.

Affirmed - 2021-CT-00187-SCT (Mar. 28, 2024)

En Banc Opinion by Justice Coleman - Dissent in Part by Presiding Justice Kitchens

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

George T. Holmes & Mollie Marie McMillin (Pub. Def. Office) & Robert Shuler Smith for Appellant - Allison Kay Hartman (Att’y Gen. Office) for Appellee

Briefed by [Selena Houston](#)

Edited by [Brandon Peterson](#) & [William Davis](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 26, 2024

COURT OF APPEALS - CIVIL CASES

CITY OF PASCAGOULA V. CUMBEST

CIVIL - STATE BOARDS & AGENCIES

PROPERTY - COMMUNITY WELFARE - PUBLIC MENACE HEARING - Miss. Code Ann. § 21-19-11(1) states that to determine whether property or parcel of land located within a municipality is in such a state of uncleanliness as to be a menace to the public health, safety and welfare of the community, a governing authority of any municipality shall conduct a hearing

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - An agency's conclusions must remain undisturbed unless the agency's order (1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional rights

EVIDENCE - ATTORNEY-CLIENT PRIVILEGE - MOTION TO COMPEL DOCUMENTS -

Communications do not have to contain purely legal analysis or advice in order to be privileged; if a communication between a lawyer and a client would facilitate the rendition of legal services or advice, the communication is privileged

FACTS

Anna Belle Cumbest owned property in Pascagoula where her home was destroyed by Hurricane Katrina in 2005, leaving only the concrete slab. In 2011, Cumbest entered into a Memorandum of Understanding (“MOU”) with the City of Pascagoula (“the City”) and agreed to construct a 6-foot vinyl privacy fence around the slab and to maintain it. In January 2021, the City began sending Cumbest notices that her fence was dilapidated and in disrepair, violating city codes and nonconforming to the MOU. Cumbest did not take corrective action. In April 2021, Cumbest received another notice about excessive overgrown grass and weeds on the property creating a safety hazard, but she again did not take corrective action. In July 2021, the City notified Cumbest of a hearing to determine if her property was a “menace to public health, safety and welfare” under Miss. Code Ann. § 21-19-11 which allows municipalities to clean up such properties. At an August 2021 hearing, evidence showed the fence was rickety, frequently blew over in storms, and had holes and missing sections. Evidence also showed the concrete slab was deteriorating with crumbling bricks, exposed plumbing, and vegetation growing through it. Some city council members expressed concerns about the property being an eyesore and attracting pests on a major boulevard. The city council unanimously voted to declare Cumbest’s property a public menace and ordered it cleaned up, effectively voiding the 2011 MOU. Cumbest appealed,

arguing lack of evidence, bias, and that she was denied a fair and impartial hearing. Cumbest also sought to compel production of certain pre-hearing documents prepared for the city council by the city attorney, which the circuit court ruled were protected by attorney-client privilege. The circuit court further found that the City failed to present substantial evidence that the property was a public menace to the health, safety, and welfare of the community at the time of the hearing, and therefore reversed the adjudication of the city council that the property constituted a menace pursuant to Miss. Code Ann. § 21-19-11. The City appealed, and Cumbest cross-appealed.

ISSUES

Whether the circuit court erred by (1) reversing the city council's Miss. Code Ann. § 21-19-11 adjudication and (2) refusing to compel production of certain documents which impacted Cumbest's right to present evidence of an unfair hearing.

HOLDING

(1) Because the city council's adjudication was supported by substantial evidence, was not made in an arbitrary or capricious manner, and did not violate Cumbest's basic right to enjoy her property in a lawful manner, the circuit court erred in reversing the city council's Miss. Code Ann. § 21-19-11 determination. (2) Because Cumbest did not overcome the presumption that the council members acted fairly and honestly, the assertion that the city council deprived Cumbest of a fair and impartial hearing was without merit, and because the circuit court correctly applied the rules of attorney-client privilege, it did not abuse its discretion in denying Cumbest's motion to compel. Therefore, on direct appeal, the Court of Appeals reversed and rendered the judgment of the Jackson County Circuit Court. On cross-appeal, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge McDonald agreed with the majority's reasoning regarding the issue of the City's privileged documents but disagreed with the majority's reasoning regarding the fence and its interpretation of the menace statute. She argued that the key issue was at what point in time the property should have been evaluated to determine if it was a menace, emphasizing that the evidence showed the fence was repaired and upright at the time of the August 2021 hearing. Judge McDonald also contended that the majority erroneously relied on historical evidence about the past condition of the fence rather than its condition at the specific time of the hearing as required by the menace statute.

On Direct Appeal: Reversed & Rendered. On Cross-Appeal: Affirmed - 2022-CA-00745-COA (Mar. 26, 2024)

En Banc Opinion by Presiding Judge Carlton - Concurrence in Part & Dissent in Part by Judge McDonald

Hon. Kathy King Jackson (Jackson County Circuit Court)

Michael Riley Moore for Appellant - Michael E. Whitehead & Johanna Malbrough McMullan for Appellee

Briefed by [Margaret Gardner](#) & [Madeline Crane](#)

Edited by [Sarah Schlager](#) & [William Davis](#)

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MURPHY V. WILLIAM CAREY UNIV.

CIVIL - MEDICAL MALPRACTICE

TORTS - MEDICAL MALPRACTICE - STATUTE OF LIMITATIONS - Pursuant to Miss. Code Ann. § 15-1-36(2), the statute of limitations for medical malpractice claims is two years

TORTS - MEDICAL MALPRACTICE - NOTICE - Pursuant to Miss. Code Ann. § 15-1-36(15), a plaintiff in a medical malpractice action must give a defendant notice of their intention to file suit at least sixty days before filing a complaint

CIVIL PROCEDURE - PLEADINGS - WAIVER - A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver

FACTS

In April 2013, Abigail Murphy, a student at William Carey University (“WCU”), participated in a practical skills assessment under the direction of her professor Dr. Richard Margaitis. Dr. Margaitis directed Murphy and other WCU students to pair up as partners and perform a clinical test on their partner’s lower back. After Murphy’s partner failed to perform the test, Margaitis stepped in to demonstrate the test on Murphy’s lower back. Murphy alleges that Margaitis injured her lower back during the demonstration. In July 2015, Murphy sued Margaitis, the Dean of the College, and WCU, asserting claims for negligence, negligent hiring and supervision, and breach of contract. In March 2017, WCU filed for summary judgment. In December 2017, WCU filed a supplemental motion for summary judgment, arguing that Murphy’s claims were barred by the statute of limitations. In July 2018, the circuit court granted summary judgment in favor of WCU. On appeal, this court affirmed the grant of summary judgment in part and reversed in part. Then in April 2021, the case was mandatorily remanded to the circuit court. The circuit court granted WCU’s motion for summary judgment, holding that Murphy’s claims were barred because she failed to serve pre-suit notice and filed suit after the statute of limitations period had expired. Murphy appealed.

ISSUE

Whether the trial court erred in granting WCU’s motion for summary judgment.

HOLDING

Because WCU failed to pursue the dispositive affirmative defenses of pre-suit notice and the expiration of the statute of limitations in a timely manner while actively participating in the litigation, and because WCU waived its affirmative defenses as a matter of law, the trial court erred in granting WCU’s motion for summary judgment based on those affirmative defenses. Therefore, the Court of Appeals reversed the judgment of the Forrest County Circuit Court.

SPECIAL CONCURRENCE

Judge Lawrence argued that the state legislature should amend the Miss. R. Civ. P. to clarify their instruction to attorneys that there is a possibility of waiving an affirmative defense despite having preserved the defense in an answer if they do not actively pursue the defense early in the course of litigation.

DISSENT

Judge Greenlee argued that the pre-suit notice requirement is mandatory and jurisdictional, so WCU did not need to plead or argue it as a defense. Therefore, the trial court did not abuse its discretion in granting summary judgment in favor of WCU for Murphy’s failure to provide sixty days pre-suit notice. Judge Greenlee also argued that the trial court was correct in granting summary judgment on the statute of limitations argument since Murphy’s original claim sounded in simple negligence and only after discovery was it clear that Murphy was pursuing a medical malpractice claim. Therefore, WCU had not waived its affirmative defense based on the statute of limitations when they motioned for summary judgment.

Reversed & Remanded - 2022-CA-00379-COA (Mar. 26, 2024)

En Banc Opinion by Presiding Judge Wilson - Special Concurrence by Judge Lawrence - Dissent by Judge Greenlee

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

Bradley S. Clanton & Megan Mariah Patrick for Appellant - Anderson Reid Brown, Heber S. Simmons III, & Jessica Leigh Dilmore for Appellee

Briefed by [Jack Furla](#)

Edited by [Robert “Duncan” Jones](#) & [Emily Phillips](#)

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COURT OF APPEALS - CRIMINAL CASES

FRAZIER V. STATE

CRIMINAL - FELONY

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

CRIMINAL LAW - MANSLAUGHTER - HEAT OF PASSION - Heat of passion is a state of violent and uncontrollable rage, anger, or passion engendered by a blow or certain other reasonable provocation given, which will reduce a homicide from the grade of murder to that of manslaughter; heat of passion includes an emotional state of mind characterized by anger, rage, hatred, furious resentment, or terror

CRIMINAL LAW - MURDER - MALICE AFORETHOUGHT - For purposes of murder, the terms malice aforethought and deliberate design are synonymous; malice cannot be formed at the instant of the killing but may be formed very quickly

EVIDENCE - ADMISSIBILITY - COURT'S DISCRETION - Relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused

FACTS

Ricardo Frazier placed a lien on a client's property after the client failed to pay Frazier for his construction project. The client sued Frazier for compensatory and punitive damages. After a deposition, Frazier pulled out a pistol and shot the client, killing him. Frazier was convicted of possession of a firearm by a felon and carrying a concealed weapon, but the court ordered a mistrial as to the charge of first-degree murder with a firearm enhancement. At a second jury trial, several witnesses testified to the calm nature of the deposition and the lack of a heat of passion prior to the shooting. During the jury instructions selection hearing, Frazier proposed several manslaughter instructions which were all refused by the court due to a lack of sudden provocation. Frazier was convicted of first-degree murder with a firearm enhancement and sentenced to life imprisonment. Frazier appealed.

ISSUES

Whether the court erred by (1) refusing to offer a jury instruction on manslaughter and (2) excluding testimony and exhibits contained in the proffer of a witness.

HOLDING

(1) Because there was no evidence of provocation or immediacy supporting Frazier's heat-of-passion argument, the trial court did not err in refusing to offer a jury instruction on manslaughter. (2) Because the witness's testimony and exhibits concerned the details surrounding civil litigation, the evidence was not relevant to the heat-of-passion defense and was, thus, rightly excluded as irrelevant. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2022-KA-00896-COA (Mar. 26, 2024)

Opinion by Judge Lawrence

Hon. Charles E. Webster (Coahoma County Circuit Court)

Robert Sneed Laher for Appellant - Ashley Lauren Sulser & Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [Hunter Seidler](#)

Edited by [Brandon Peterson](#) & [Emily Phillips](#)

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