

MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 12, 2019**SUPREME COURT - CIVIL CASES****CHEN V. SHOPE****CIVIL - MEDICAL MALPRACTICE**

CIVIL PROCEDURE - VENUE - PERMISSIBILITY - The plaintiff selects among the permissible venues, and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue

CIVIL PROCEDURE - VENUE – MEDICAL MALPRACTICE - Miss. Code Ann. § 11-11-3(3) provides that venue in an alleged medical-malpractice action filed against a physician is only proper in the county in which the alleged act or omission occurred

EVIDENCE - AFFIDAVITS - HEARSAY - Portions of affidavits that contain inadmissible testimony or allegations that are not based on personal knowledge must be struck and cannot be considered

FACTS

Daniel Shope filed his original complaint against Dr. Timothy Chen in the County Court of Hinds County, alleging that Chen medically aided and contributed to Shope's opioid drug dependency by prescribing Shope hydrocodone-acetaminophen and tramadol after he was hospitalized for an opioid overdose. In his complaint, Shope admitted that a separate doctor was the initial tortfeasor and that Chen had exacerbated Shope's injuries. Chen moved to transfer venue to the County Court of Madison County. In support of that motion, Chen filed an affidavit stating that he only treated Shope at his practice located in Madison County. Shope filed a responsive affidavit alleging Chen, over the telephone, directed an unnamed staffer at the Hinds County hospital where Shope was being treated to give Shope the additional exacerbating painkillers. Chen moved to strike Shope's affidavit because of numerous legal deficiencies: (1) it was not made on personal knowledge; (2) it was predicated on inadmissible hearsay; (3) it was void of supporting foundational facts; and (4) it was void of evidence that Shope was competent to testify on the matters stated. The trial court denied Chen's motion to transfer venue and motion to strike. Chen appealed.

ISSUES

Whether the trial court erred by (1) denying Chen's motion to strike Shope's affidavit and (2) denying Chen's motion to transfer venue.

HOLDING

(1) Because Shope's statements in his affidavit were hearsay, were not based on personal knowledge, and were not supported by material facts, the trial court abused its discretion in denying Chen's motion to strike. (2) Because the record evidence, besides Shope's affidavit, did not show that Chen committed an act or omission in Hinds County, the trial court erred in denying Chen's motion to transfer venue. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Court with instructions to transfer venue to the County Court of Madison County.

Reversed & Remanded - 2018-IA-01421-SCT (Sept. 12, 2019)

Opinion by Chief Justice Randolph

Hon. Larita M. Cooper-Stokes (Hinds County County Court)

Rex Morris Shannon III & Eugene Randolph Naylor for Appellant - Abby Gale Robinson for Appellee

Briefed by [Michael Stirgus](#)

[Click here to view the full opinion](#)

DALON V. MS HUD OCEAN SPRINGS LLC

CIVIL - WRONGFUL DEATH

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION - ARBITRABILITY - Under the Federal Arbitration Act, courts employ a two-part test to evaluate the enforceability of arbitration agreements: (1) whether the parties intended to arbitrate the dispute and (2) whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION - DEFENSES - If an arbitration agreement is found to be unconscionable, meaning a signer lacked knowledge, the agreement was signed involuntarily, the agreement was one-sided whereby depriving one party of all the agreement's benefits or leaving one party without a remedy for another party's nonperformance or breach, then it may be invalidated without offending the Federal Arbitration Act

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION - FORUM SELECTION - When the forum selected in an arbitration agreement is unavailable, the agreement to arbitrate is unenforceable

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION - COMMERCIAL DISPUTE RESOLUTION PROCEDURES - When an arbitration agreement states that the dispute shall be administered by the American Arbitration Association's most recent version of its Commercial Dispute Resolution Procedures, "most recent" means the procedures in effect at the time the dispute arose, not the procedures in effect when the arbitration agreement was signed

FACTS

Carol Dalon lived in a nursing home but was transferred to MS HUD Ocean Springs LLC d/b/a Ocean Springs Health and Rehabilitation Center ("OSHRC") after sustaining injuries. Prior to admission at OSHRC, Carol granted her son, Emile Dalon, a General Durable Power of Attorney and a Power of Attorney for Health Care, which together gave Emile the power to execute contracts and to make healthcare decisions on Carol's behalf. The Power of Attorney agreements were in effect when E. Dalon signed OSHRC's admission agreement on C. Dalon's behalf. The admission agreement included an arbitration agreement. The arbitration agreement was a separate agreement with its own signature lines, gave Emile the right to seek legal counsel concerning the arbitration agreement, granted both parties the same rights, and required that any dispute be settled exclusively by binding arbitration administered by the American Arbitration Association ("AAA") under its most recent version of its Commercial Dispute Resolution Procedures. Approximately four years later, Carol fell, broke her leg, and subsequently died. Carol's estate and Emile, a wrongful death beneficiary, sued OSHRC and Linda Cosio for negligence and wrongful death, alleging OSHRC and its employees negligently caused Carol's death. OSHRC and Cosio moved to dismiss or, in the alternative, to stay proceedings and compel arbitration. The Jackson County Circuit Court denied the motion to dismiss but granted the motion to stay proceedings and compel arbitration. Emile and Carol's estate appealed.

ISSUES

Whether (1) the Jackson County Circuit Court erred by granting the motion to compel arbitration; (2) whether Emile lacked authority to execute the arbitration agreement; (3) whether arbitration was unconscionable; and (4) whether the arbitration agreement's chosen forum, the American Arbitration Association, was available.

HOLDING

(1) Because of the following reasons, both parties intended to arbitrate, no external legal constraints foreclosed the arbitration, and the Jackson County Circuit Court therefore did not err by granting the motion to compel arbitration. (2) Because Emile had both a General Power of Attorney and a Healthcare Power of Attorney at the time he signed the arbitration agreement, which gave Emile the power to sign the arbitration agreement and to make healthcare decisions, including arbitration agreements, on Carol's behalf, Emile did not lack authority to execute the arbitration agreement. (3) Because the arbitration agreement was conspicuous, because Emile presented no evidence that he lacked the opportunity to study the arbitration agreement and inquire about its terms, because the agreement explained that Emile had the right to seek legal counsel concerning the arbitration agreement, because Emile could have chosen to transfer

Carol to another nursing home, and because both parties were guaranteed the same rights by the agreement, the arbitration agreement was conscionable. (4) Because the Jackson County Circuit Court enforced the arbitration agreement, which listed the AAA as the chosen forum, and because the arbitration would have been governed by the AAA's procedures in effect at the time the dispute arose and not by a 2003 AAA policy which would have rendered the forum unavailable, the forum was available. Therefore, the Supreme Court affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2018-IA-00594-SCT (Sept. 12, 2019)

Opinion by Justice Ishee

Hon. Kathy King Jackson (Jackson County Circuit Court)

Douglas Lamont Tynes Jr. & Courtney Parker Wilson for Appellants - Lynda Clowder Carter & Ashley W. Gunn for Appellees

Briefed by [Elena Mosby Peters](#)

[Click here to view the full opinion](#)

DESOTO CNTY. V. STANDARD CONSTR. CO.

CIVIL - STATE BOARDS & AGENCIES

CIVIL PROCEDURE - APPEALS - FINAL JUDGMENT - A final, appealable, judgment is one that adjudicates the merits of the controversy and settles all the issues as to all the parties and requires no further action by the lower court

CIVIL PROCEDURE - MOTION PRACTICE - AMEND OR ALTER JUDGMENT - In order to succeed on a Miss. R. Civ. P. 59(e) motion, the movant must show: (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice

CIVIL PROCEDURE - MOTION PRACTICE - MOTION FOR APPEAL - In order to succeed on a Miss. R. Civ. P. 60(b) motion, the movant must show: (1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the judgment.

FACTS

The DeSoto County Board of Supervisors ("the Board") denied Standard Construction Company's application for a condition use permit to mine sand and gravel. Standard Construction appealed the decision to the circuit court, which entered an order reversing the Board on September 29, 2017. On October 10, 2017, DeSoto County filed a motion for rehearing under Miss. R. App. P. 40. On December 22, 2017, the circuit court denied the motion for rehearing. On January 3, 2018, DeSoto County filed a notice of appeal of the "final judgment entered in this case on September 29, 2017, and the denial of the Motion for Rehearing by order entered on December 22, 2017." The court ordered that the motion to dismiss be passed for consideration with the merits of the appeal and assigned the case to the Mississippi Court of Appeals. The Court of Appeals determined that it lacked jurisdiction and dismissed the entire appeal as untimely. DeSoto County petitioned for a writ of certiorari.

ISSUE

Whether the Court of Appeals erred by dismissing the entire appeal.

HOLDING

(1) Because a Rule 40 motion is not viable when the decision is handed down by a circuit court sitting as an appellate court, the motion must be analyzed as if it had been filed under the Mississippi Rules of Civil Procedure meaning DeSoto County's motion for rehearing was properly dismissed by the Court of Appeals under Rule 60(b) due to the motion being untimely, but DeSoto County's notice of appeal with respect to the order of December 22, 2017 was properly before the Court of Appeals due to it being less than thirty days apart from the January 3, 2018 motion.

Therefore, the Supreme Court affirmed in part and reversed in part the judgment of the Court of Appeals and affirmed the judgment of the DeSoto County Circuit Court.

The Judgment of the Court of Appeals is Affirmed in Part & Reversed in Part. The Judgment of the DeSoto County Circuit Court is Affirmed- 2018-CT-00027-SCT (Sept. 12, 2019)

En Banc Opinion by Justice Coleman

Hon. Gerald W. Chatham, Sr. (DeSoto County Circuit Court)

Robert Quimby & Anthony Nowak for Appellant - William P. Myers for Appellee

Briefed by [Daniel Bond](#)

[Click here to view the full opinion](#)

SUPREME COURT – ORDERS

HURNS V. STATE

COURT ORDER

ORDER

Victor Hurns filed an application for leave seeking post-conviction relief (“PCR”) following the Miss. Supreme Court’s confirmation of his murder conviction and life sentence in 1993. He has filed at least thirteen applications for leave since 1993. In this application, Hurns claimed that trial and appellate counsel rendered ineffective assistance, the State failed to meet its burden of proof, an autopsy report and eyewitnesses’ testimonies were inconsistent, and the trial court erred by granting instruction S-5. The Supreme Court denied Hurns’s motions. It found that his ineffective assistance of counsel claim did not have an arguable basis, and therefore did not constitute an exception to the time, waiver, and successive-writ bars. Hurns’s other claims also did not meet any recognized exception or provide any arguable basis to constitute waiving the procedural bars. The Supreme Court also found that Hurns’s filing was frivolous and restricted him from filing further applications for PCR that are related to his conviction and sentence in forma pauperis.

OBJECTION

Presiding Justice King objected to the order restricting Hurns from filing further petitions for PCR in forma pauperis. He stated that restricting Hurns from further applications is a violation of his state constitutional right to access to the courts. He argued that Miss. Code Ann. § 99-39-7 provides that actions under the Uniform Post-Conviction Collateral Relief Act are civil actions, and the Mississippi State Constitution grants unfettered access in civil causes to any tribunal in the state. Presiding Justice King also argued that cutting off an indigent defendant’s right to proceed in forma pauperis is a violation of that defendant’s fundamental right to vindicate his constitutional rights.

Denied - 2018-M-0063 (Sept. 11, 2019)

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

Briefed by [Reid Hudson](#)

[Click here to view the full opinion](#)

SUPREME COURT - CRIMINAL CASES

MOORE V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL RIGHTS - FIFTH AMENDMENT - INVOCATION - When an officer asks a suspect if they wish to give a statement and the suspect gives an ambiguous response, the officer may continue to question the suspect for clarification until they either agree to give a statement or unambiguously invoke their right to silence

CAPITAL SENTENCING - JUVENILES - MISS. CODE ANN. § 99-19-101(1) - Miss. Code Ann. § 99-19-101(1) entitles minors who are convicted of capital murder (post-*Miller*) to a jury sentencing proceeding for their initial sentencing

CAPITAL SENTENCING - MITIGATION - EXPERT ASSISTANCE - The Court weighs on a case-by-case basis whether the denial of expert assistance for an accused is prejudicial to the assurance of a fair trial and will grant relief only where the accused demonstrates that the trial court's abuse of discretion is so egregious as to deny him due process and where his trial was thereby rendered fundamentally unfair

FACTS

Gerome Moore, a minor, acted as the driver in an armed robbery during which Carolyn Temple was murdered by an accomplice. Moore was interviewed by detectives and was informed of his *Miranda* rights both verbally and via a written waiver which was initialed and signed by Moore. When asked by detectives if he wanted to give a statement, Moore replied "No, sir. I ain't, I ain't do nothin'." When asked a second time by detectives, Moore replied by twice shaking his head negatively. When asked a third time, Moore replied, "No, sir. I'll talk to y'all, but" and then signed the waiver form. Moore admitted to planning and participating in the robbery during his subsequent questioning by detectives. Moore filed pretrial motions to suppress this interview on grounds that he was under duress and did not voluntarily waive his constitutional right to silence, but his motion was denied. These statements were used as evidence in the Hinds County Circuit Court trial which found him guilty of capital murder. For sentencing, Moore filed a motion for funds for expert assistance in the field of mitigation, and he filed a motion to receive either a bar on a life without parole sentence or a sentencing before a jury. These motions were denied by the trial court and Moore was sentenced to life imprisonment without the possibility of parole. Moore appealed.

ISSUES

Whether the trial court erred in (1) denying Moore's motion to suppress his statement with law enforcement, (2) denying Moore's request for a jury sentencing, and (3) denying Moore's motion for funds.

HOLDING

(1) Because Moore's responses were ambiguous and he did not unambiguously invoke his right to silence before giving the statement, the trial court did not commit plain error in denying Moore's motion to suppress his statement. (2) Because Moore was a minor convicted of capital murder post-*Miller* and was seeking his initial sentencing, the trial court erred in denying Moore's request for a jury sentencing under Miss. Code Ann. § 99-19-101(1). (3) Because the trial court did not abuse its discretion, the trial court did not err in denying Moore's motion for funds. Therefore, the Supreme Court affirmed in part, vacated & remanded in part the judgment of the Hinds County Circuit Court.

DISSENT

Presiding Justice King argued that all three of Moore's responses to the detectives were unambiguous invocations of his Fifth Amendment right to silence. Therefore, the statement was inadmissible evidence against Moore and the conviction should be reversed and remanded for a new trial.

Affirmed in Part; Vacated & Remanded in Part - 2017-KA-00379-SCT (Sept. 12, 2019)

En Banc Opinion by Justice Chamberlin - Dissent by Presiding Justice King

Hon. Jeff Weill, Sr. (Hinds County Circuit Court)

Jacob W. Howard & Phillip W. Broadhead (Pub. Def. Office) for Appellant - Joe Hemleben & Katy Taylor Gerber (Att'y Gen. Office) for Appellee

Briefed by [Eli Scott](#)

[Click here to view the full opinion](#)

MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 10, 2019
COURT OF APPEALS - CIVIL CASES

DIAZ V. DEP'T OF HUMAN SERVS.

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - NOTARIES - PROCEDURE - Although Miss. Code Ann. § 25-33-5 requires a notary public to keep a fair register of all his official acts, it does not indicate that a notarization not properly recorded in the notary's log book is void, nor does it indicate that the notarized document is rendered defectively acknowledged due to the recordation failure

FAMILY LAW - PARENT & CHILD - PATERNITY - A court shall not set aside the paternity determination or child support order if the legal father executed a simple acknowledgment of paternity and failed to withdraw his acknowledgement within the time provided for in Miss. Code Ann. §§ 93-9-9 and 93-9-28, unless he can prove fraud, duress or material mistake of fact

FACTS

Lora Ledet was eight or nine months pregnant when she began dating Spencer Diaz. Shortly after the start of their relationship, Ledet gave birth to a child ("John") whose last name was listed as "Ledet" on his birth certificate, with no father listed. Subsequently, Diaz and Ledet began living with each other, and Diaz provided financial support for Ledet and her children. Around four years later, Diaz executed a simple acknowledgement of paternity, stating that he was John's father. Thereafter, the Department of Vital Records issued an amended birth certificate, which listed John's last name as "Diaz" and Diaz as John's father. After Diaz and Ledet ended their relationship, the Mississippi Department of Human Services filed a complaint against Diaz in Hancock County Chancery Court, requesting the court to order Diaz to provide child and medical support for John. Diaz then filed a complaint to disestablish his paternity of John, alleging that his signature on the acknowledgement was a forgery and that the notary failed to have both parties sign the logbook recording the event. The court denied Diaz's petition for disestablishment of paternity and termination of parental rights. Diaz appealed.

ISSUES

Whether the chancery court erred in (1) admitting the birth certificate and acknowledgement; (2) ruling that forgery had not been proven by clear and convincing evidence; and (3) refusing to disestablish paternity.

HOLDINGS

(1) Because lack of logbook entry does not deem an acknowledgment void, and because the court followed the statutory procedures for admitting the documents into evidence, the court did not err in admitting both the acknowledgment and birth certificate. (2) Because no expert witness was called to verify the authenticity of Diaz's signature, and the chancellor is charged with weighing the testimony and credibility of witnesses, the court did not err in finding that forgery was not proven by clear and convincing evidence. (3) Because Diaz executed a simple acknowledgement of paternity and failed to withdraw his acknowledgment within the statutory time period, the court did not err in refusing to disestablish paternity after finding Diaz's testimony unpersuasive at trial. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Chancery Court.

Affirmed - 2018-CA-00417-COA (Sept. 10, 2019)

Opinion by Judge Westbrook

Hon. Jennifer T. Schloegel (Hancock County Chancery Court)

Nita Louise Chase for Appellant - Matthew Garrett Clark, Melanie Ann Smith, & Lora M. Ledet (*Pro se*) for Appellees

Briefed by [Breland Parker](#)

[Click here to view the full opinion](#)

HAYES V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BARS - DISMISSAL - A dismissal or denial of a post-conviction relief motion is a final judgment that bars a second or successive motion

POST-CONVICTION RELIEF - PROCEDURAL BARS - EXCEPTIONS - There are four fundamental rights exceptions which have been found to survive procedural bars: (1) the right against double jeopardy; (2) the right to be free from an illegal sentence; (3) the right to due process at sentencing; and (4) the right not to be subject to ex post facto laws

POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - Merely asserting a violation of a constitutional right or a claim of ineffective assistance fails to qualify for an exception to a procedural bar

FACTS

In December of 2012, Wendell Hayes pled guilty to one count of child exploitation and was sentenced to twenty-five years in prison. A year and a half later, Hayes filed his first post-conviction relief (“PCR”) motion. This motion was denied by the trial court, and the Miss. Court of Appeals affirmed this denial. In early 2017, Hayes filed his second PCR motion, in which he asserted that his guilty plea was involuntary and that his attorney rendered ineffective assistance. The circuit court dismissed Hayes’s PCR motion as successive. Hayes appealed.

ISSUES

Whether the circuit court erred (1) by dismissing Hayes’s second PCR motion as successive and (2) by failing to apply an exception to procedural bars.

HOLDING

(1) Because Hayes filed the present PCR motion outside of the three-year statute of limitations, and because he previously filed an unsuccessful PCR motion, Hayes’s motion was both time and procedurally barred. (2) Because Hayes only offered mere assertions of an involuntary plea and ineffective assistance, he failed to prove that any fundamental-rights exception applied. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2018-CP-01228-COA (Sep. 10, 2019)

Opinion by Judge Tindell

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, Second Judicial Dist.)

Pro se for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Bryant Carlton](#)

[Click here to view the full opinion](#)

IN RE ESTATE OF GREEN

CIVIL - WILLS, TRUSTS, & ESTATES

WILLS & ESTATES - CONVEYANCES - ELEMENTS IN GENERAL - Under Miss. law, for there to be a valid conveyance of real property, there must be delivery and acceptance of a valid deed

WILLS & ESTATES - CONVEYANCES - DELIVERY - Delivery constitutes a transfer of a deed from the grantor to the grantee or his agent, or to some third person for the grantee’s use, in such manner as to deprive the grantor of the right to recall it at his option, and with intent to convey title

WILLS & ESTATES - CONVEYANCES - ACCEPTANCE - Under Miss. law, acceptance by the grantee is essential to the validity of a deed; his intent to accept the deed is manifested by his words, acts and the circumstances surrounding the transaction

FACTS

On December 31, 2003, Harry Green had his attorney draft eight deeds that conveyed the following properties to his sister Shirley: (1) 1201 Nixon Drive, Tupelo, MS; (2) The “Main Street Warehouse,” Shannon, MS; (3) The Monroe County Land, Nettleton, MS; (4) The “Shannon Lot”; (5) Temple Circle, Shannon, MS; (6) The “White Lane Property,” Nettleton, MS; (7) The “Two Houses and Green Valley Lab,” Shannon, MS ; and (8) The Summit. After the deeds were properly acknowledged before a notary public, Harry did not deliver the deeds to Shirley, nor did he file them in the county clerk’s office. Shirley signed the following warranty deeds on January 15, 2004: (1) 1201 Nixon Drive; (2) the Main Street Warehouse; (3) the Monroe County Land; (4) the Shannon Lot; (5) Temple Circle; and (6) the Beauty Shop and House in Monroe County. The warranty deeds signed on January 15 were never properly acknowledged or filed. Harry took the deeds with him when he left, and those deeds were never found. On November 26, 2004, Harry conveyed, by quitclaim deed, the Plantersville property to Shirley. On December 3, 2004, Harry delivered all of the December 31, 2003 warranty deeds and the November 26, 2004 quitclaim deed to Shirley. On December 4, 2004, the December 31, 2003 deeds were recorded, except for the Monroe County properties (White Lane and the Monroe County land). Shirley actually filed the White Lane property and the Monroe County land warranty deeds after Harry’s death in 2010. Harry continued to pay taxes on the properties, do routine maintenance, and collect rent. On July 6, 2010, Harry died. In 2007, Harry updated his will to devise all of his property to his wife Cristina and his grandchildren. Because Shirley took control of the properties after Harry’s death, Cristina filed a complaint for an accounting of the estate and a declaratory judgment as to the owner of the property at issue. The trial court found that Harry intended for Shirley to possess the properties, thus rendering her the rightful owner of the eight properties in dispute. Cristina appealed.

ISSUES

Whether the trial court erred in (1) awarding all eight properties to Shirley, because Harry had properly accepted the deeds signed on January 15, 2004 and (2) failing to find that a constructive trust was created when Shirley took possession of the properties, thus distributing the properties as dictated in Harry’s will.

HOLDING

(1) Because Harry did not intend to, and thus did not accept, the conveyance of the properties, and because the chancellor found that Harry intended the properties in question to be transferred to Shirley, the trial court did not err in awarding all eight properties to Shirley. (2) Because Shirley was the rightful owner of the properties in question, the trial court did not err in failing to find that a constructive trust was created when Shirley took possession of the properties. Therefore, the Court of Appeals affirmed the judgment of the Lee County Chancery Court.

DISSENT

Judge Wilson argued that Harry accepted the signed warranty deeds, which reconveyed the original six properties back to him. Additionally, he argued that since Harry paid the taxes and insurance on the properties, made improvements and repairs, collected rent and devised the properties at will, Harry demonstrated his intent for the original six properties to be his. Therefore, the need for a constructive trust is unnecessary for those six properties. But, Judge Wilson would affirm the denial of a constructive trust as to the remaining two properties, because there is no evidence that Shirley signed a warranty deed conveying either of those properties back to Harry.

Affirmed - 2017-CA-01641-COA (Sept. 10, 2019)

Opinion by Judge Lawrence - Dissent by Presiding Judge J. Wilson

Hon. C. Michael Malski (Lee County Chancery Court)

Mark Nolan Halbert & Cynthia Tranell Lee for Appellant - Christopher G. Evans for Appellees

Briefed by [Sarah Schofield](#)

[Click here to view the full opinion](#)

MARTIN V. TRUSTMARK CORP.

CIVIL - PERSONAL INJURY

TORTS - PREMISES LIABILITY - CLASSIFICATIONS - An injured party on the premises of another should be classified as an invitee, licensee, or trespasser in order to determine the level of duty owed to such injured party

TORTS - PREMISES LIABILITY - DANGEROUS CONDITIONS - Common architectural conditions in a building are not considered unreasonably dangerous conditions

FACTS

Wilda Ann Martin sued Trustmark Corporation after she tripped over a threshold in the doorway of a women's restroom in the Trustmark building. Martin was out shopping with her daughter, Kim Neyland, when they arrived at the Trustmark building. They asked an employee in the coffee shop in the building's lobby if they could use the restroom to which the employee responded in the affirmative. The employee's affirmative answer is disputed as to whether he gave them permission to use the facility or if he simply answered Martin's question if there was a restroom. Once Martin reached the restroom, she tripped over a one and one-eighth inched raised threshold in the doorway, sustaining serious injuries to her shoulder. The circuit court granted Trustmark's motion for summary judgment. Martin appealed.

ISSUES

Whether (1) the threshold is not a dangerous condition and (2) whether Martin was an invitee or licensee when she ventured into a part of the building that was not open to the public.

HOLDING

(1) Because a raised threshold is a common architectural condition that customers must expect to encounter in a place of business, it is not considered an unreasonably dangerous condition. (2) Because an invitee's and licensee's premises liability claim both require proof of a dangerous condition, this court need not address the parties' arguments about Martin's status at the time of her fall. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

DISSENT

Judge Westbrooks argued the vast majority of supporting cases involve thresholds raised above the outdoor sidewalk or places of entry into a building and do not extend the "open and obvious" rule to unexpected internal thresholds. Since the placement of the threshold in this case is not necessarily usual and where customers normally expect to encounter it on the business premises, the "open and obvious" rule used by the majority should not apply here. Further, Judge Westbrooks argued that there is a genuine issue of material fact regarding the physical description of the threshold; thus, the issue of it being a "dangerous condition" should be left to a jury.

Affirmed - 2018-CA-00156-COA (Sept. 10, 2019)

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

Hon. Tomie T. Green (Hinds County Circuit Court, First Judicial Dist.)

Matthew Thompson & Gregory J. Bosseler for Appellant - James D. Holland for Appellee

Briefed by [Robert Rhea](#)

[Click here to view the full opinion](#)

PAGE V. GRAVES

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DOMESTIC RELATIONS - CUSTODY - A modification of custody is warranted when the moving parent successfully shows (1) that a material change of circumstances has occurred in the custodial home since the most recent custody decree, (2) that the change adversely affects the child, and (3) that modification is in the best interest of the child

FAMILY LAW - DOMESTIC RELATIONS - CUSTODY - A change in circumstances is a change in the overall living conditions in which the child is found

FAMILY LAW - DOMESTIC RELATIONS - CUSTODY - When determining a change in circumstances, the totality of the circumstances must be considered

FACTS

Sherry and Bryan Graves married in 2004 and had two daughters: Anna in 2007 and Sarah in 2010, who were both diagnosed with autism and have special needs. On October 18, 2013, Sherry and Bryan constructively separated. They entered a joint motion consenting to a trial and a divorce on the grounds of irreconcilable differences and agreed to allow the court to decide child support, child custody, alimony, guardian ad litem (“GAL”) fees, property division, and payment of debts. In the judgment of divorce, the chancellor ordered that Bryan would have legal and physical custody of the minor children subject to Sherry’s reasonable visitation, which would take place in the city where the children resided and be supervised by Bryan or a member of Bryan’s family or someone approved by Bryan. After the judgment of divorce, Sherry moved to Virginia and married David Page. Bryan moved Anna and Sarah to Monroe, Louisiana. Less than a year later, Sherry and Bryan entered into an agreed order of visitation which granted Sherry unsupervised visitation with the children and lifted the requirement that visitation occur in Monroe. The order provided Sherry with approximately three months for summer visitation. From May through August 2015, the children lived with Sherry and David in Virginia. Bryan and Sherry agreed that the children would remain in Virginia with Sherry indefinitely, which lasted until September 2017. Bryan moved from Monroe to Clinton, Mississippi, where he lived with a friend for approximately one year before moving to the home of his girlfriend, Stacy, who also lived in Clinton. After a vacation trip in August 2017, Bryan refused to let the girls return to Virginia; instead, he moved the children in to live with him and Stacy and enrolled them in a school in Clinton. When Brian and Stacy broke up approximately one month later, Bryan and the children moved out of Stacy’s house and into an apartment, which was in a different school district. On October 3, 2017, Sherry filed a motion for modification of child custody, alleging a material change in circumstances adversely affecting the children had occurred. At trial, it was established that the children did not adapt well to change. The autism teacher in Clinton also testified that she had several conversations with Bryan and Stacy regarding her concerns over the children’s health and hygiene, but she never called the Department of Health Services (“DHS”). The chancellor granted Bryan’s motion to dismiss the case and dismissed Sherry’s motion for modification with prejudice. Sherry appealed.

ISSUE

Whether the chancellor erred by dismissing the case, despite the fact that Sherry presented sufficient evidence on every required element for custody modification.

HOLDING

Because there was evidence of a substantial deviation from the original custody order which adversely affected Anna and Sarah, and because the chancellor failed to consider the totality of the circumstances, the chancellor erred by dismissing the case. Therefore, the Court of Appeals reversed and remanded the judgment of the Rankin County Chancery Court.

DISSENT

Judge Westbrook argued that the chancellor’s decision to dismiss Sherry’s motion for modification of child custody should be affirmed because it was supported by substantial evidence. The children’s circumstances at the time of the divorce were very similar to what existed at the time of the modification hearing. Further, there was no testimony that the girls were being abused, harmed or neglected while in the custody of Bryan, and Bryan retrieved Anna and Sarah and elected to keep them pursuant to the custody order that was already in effect. Therefore, Judge Westbrook believed the chancellor had sufficient evidence, and his decision should have been affirmed.

Reversed & Remanded - 2018-CA-00140-COA (Sept. 10, 2019)

Opinion by Presiding Judge Carlton - Dissent by Judge Westbrook

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

John Samuel Grant IV & Connie Marie Smith for Appellant - Christopher Tabb & Bryan Edward Graves (*Pro se*) for Appellee

Briefed by [Jordan Thomas](#)

[Click here to view the full opinion](#)

BESTER V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE - SENTENCING - POST-CONVICTION RELIEF - A Rule 60(b) motion will be denied where the petitioner is merely attempting to relitigate his case

CRIMINAL PROCEDURE - APPEALS - SUCCESSIVE WRIT - A court shall apply the plain meaning of statutory language when determining if sentencing was within judge's discretion

CRIMINAL PROCEDURE - SENTENCING - JURY RECOMMENDATION - A trial judge may sentence a defendant to a term within their discretion without a jury recommendation if the defendant voluntarily agrees to a plea deal

FACTS

Charles Bester pled guilty to robbery and rape on August 31, 1992. The circuit court found that Bester's plea was "freely, voluntarily, and intelligently" made. As part of his plea bargain, Bester was sentenced to serve seven years for robbery and to life imprisonment for rape, with both sentences to run concurrently. On May 2, 2006, almost fourteen years after entering his guilty plea, Bester filed an unsuccessful petition to vacate, set aside, or correct his sentence claiming that he had not been properly advised of his right to testify or not testify, and the right to be informed of the maximum and minimum penalties of the crimes alleged against him. The court dismissed his claim finding that his post-conviction-relief ("PCR") petition was time-barred. Bester filed a PCR petition on September 14, 2012, arguing that he was unlawfully sentenced to life imprisonment because that sentence had not been recommended to a jury. The court found that because he knowingly and voluntarily entered a guilty plea, he waived his right to empanel a jury for sentencing. The Miss. Supreme Court affirmed this decision on April 14, 2016. On January 30, 2018, Bester filed a third PCR petition, under Miss. R. Civ. P. 60(b), to vacate the circuit court's judgment. The circuit court denied the motion finding that it was an attempt to relitigate issues that had properly been decided by the Supreme Court in its April 14, 2016 opinion. Bester appealed.

ISSUES

Whether the trial judge erred in (1) denying Bester's motion under Miss. R. Civ. P. 60(b) and (2) denying Bester's motion was barred as a successive writ.

HOLDING

(1) Because Bester's motion was an attempt to relitigate issues that had already been decided by the Supreme Court, his Rule 60(b) motion was properly treated as a PCR petition governed by the Uniform Post-Conviction Collateral Relief Act ("UPCCRA") and was time-barred. (2) Because the Supreme Court found that the plain language of the Miss. Code. Ann. § 97-3-65(2) authorized a judge to sentence to imprisonment for any term it may determine in its discretion, Bester did not meet one of the exceptions to overcome the procedural bar of a successive writ. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2018-CP-00486-COA (Sept. 10, 2019)

Opinion by Judge Tindell

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

Pro se for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [John Forrest Kelly](#)

[Click here to view the full opinion](#)

ANDERSON V. STATE

CRIMINAL - FELONY

EVIDENCE - SEXUAL OFFENSES - SIMILAR VICTIMS - Evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which the accused is on trial may be admitted if it satisfies Miss. R. Evid. 404(b), filtered through Miss. R. Evid. 403, and is accompanied by an appropriately-drafted limiting or cautionary instruction to the jury

CRIMINAL PROCEDURE - INDICTMENTS - DATES - One of the items required for a legally sufficient indictment is the date on which the alleged crime occurred, but a specific date in a child sexual abuse case is not required so long as the defendant is fully and fairly advised of the charge against him

CRIMINAL LAW - SUFFICIENCY OF EVIDENCE - STANDARD OF REVIEW - When assessing the legal sufficiency of the evidence, the critical inquiry is whether the evidence, taken in the light most favorable to the State, shows beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed

EVIDENCE - TESTIMONY - SEQUESTRATION - Because the purpose of witness sequestration is to (1) restrain witnesses from tailoring their testimony to that of earlier witnesses and (2) to aid in detecting testimony that is less than candid, reversal is not justified unless there is a showing of prejudice sufficient to constitute abuse of discretion on the part of the trial judge in not ordering a mistrial or not excluding testimony based on an alleged sequestration violation

FACTS

Billy Carol Anderson was indicted on seven counts of touching-of-a-child-for-lustful-purposes. The indictment alleged that between 2010 and 2012, Anderson, on several occasions, lustfully touched his daughter's vagina with his hand at a time when she was under the age of sixteen. During the trial, the court allowed two of Anderson's other daughters to testify that Anderson improperly touched them when they were around the same age. The jury found Anderson guilty of the charges, and the trial court sentenced him to seven consecutive fifteen-year terms and imposed a \$500 fine for each conviction. Anderson appealed.

ISSUES

Whether the trial court erred by (1) admitting prior-bad-acts evidence against Anderson; (2) convicting Anderson based on a defective indictment which contained identically-worded counts and did not include specific dates of the offenses; (3) sustaining the jury's guilty verdict which was based on insufficient evidence; (4) failing to allow a jury instruction on the lesser-included offense of simple assault; (5) failing to swear in the jury; (6) failing to sua sponte order a mistrial due to two violations of the sequestration rule; and (7) using improper factors in sentencing Anderson.

HOLDING

(1) Because the trial court properly evaluated the prior-bad-acts evidence under Miss. R. Evid. 404(b), filtered it through Miss. R. Evid. 403, admitted it for permissible, non-character purposes, and also gave an appropriately drafted limiting instruction with respect to the testimony admitted, the court did not err in admitting the evidence. (2) Because each count in Anderson's indictment contained specific time frames within which the alleged acts occurred, the counts were not identical and, because the date ranges in the indictment were sufficient to apprise Anderson of the charges against him and were narrow enough to provide notice and allow him to defend himself against the charges, the indictment was not defective. (3) Because the facts, taken in the light most favorable to the State, showed that a rational juror could have found that Anderson acted with lustful intent and committed the crime charged during the time periods set forth in the indictment, the evidence was not legally insufficient and does not rise to the level of plain error. (4) Because simple assault is not a lesser-included offense of fondling, Anderson was not entitled to a jury instruction on simple assault. (5) Because Anderson failed to provide sufficient evidence to rebut the presumption that the trial court swore in the jury, his assignment of error was without merit. (6) Because the trial court firmly handled alleged violations of the sequestration rule by witnesses, and because Anderson was not prejudiced, the court did not abuse its discretion when it did not sua sponte order a mistrial. (7) Because Anderson's sentences were within the limits prescribed by statute, the

trial court did not abuse its discretion in its sentencing. Therefore, the Court of Appeals affirmed the judgment of the George County Circuit Court.

Affirmed - 2018-KA-00312-COA (Sept. 10, 2019)

Opinion by Presiding Judge Carlton

Hon. Robert P. Krebs (George County Circuit Court)

Billy Carol Anderson (*Pro se*), Erin Elizabeth Briggs & George T. Holmes (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth (Att’y Gen. Office) for Appellee

Briefed by [Charity Karanja](#)

[Click here to view the full opinion](#)

GRACE V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - ADMISSIBLE EVIDENCE - IDENTIFICATION TESTIMONY - A defendant’s failure to object to identification evidence will result in a procedural bar from review on appeal

CRIMINAL PROCEDURE - APPEALS - INEFFECTIVE ASSISTANCE OF COUNSEL - Generally, a defendant will not be heard to complain on appeal of ineffective assistance of counsel if the defendant declines appointed counsel and represents himself with appointed counsel only standing by to provide assistance upon request

CRIMINAL PROCEDURE - APPEALS - DIRECT APPEAL - Due to the fact-specific nature of any claim for ineffectiveness, any claim based on the theory of ineffective assistance of counsel is better developed through a petition for postconviction relief rather than on direct appeal

FACTS

Shortly before a robbery occurred at Citizen’s Bank in Scooba, Mississippi, LaBrandon Grace and his nephew were seen in a vehicle outside of the bank. After a series of local tips implicating their involvement in the robbery, Grace and his nephew were apprehended following a high-speed police pursuit and chase on foot. Upon apprehension, officials found a blue latex glove and a mask in Grace’s car. Officials also located the gun used in the crime and the stolen bank money from a field near where Grace was arrested. Law enforcement provided one bank teller with a photograph of Grace and his nephew and another teller with a photograph of just Grace. Both bank tellers recognized Grace because he was in the bank the day before the robbery. However, Grace’s use of a disguise prevented both tellers from identifying Grace as the individual who committed the robbery. A jury convicted Grace of two counts of armed robbery and one count of felon in possession of a firearm. Grace was sentenced as a non-violent habitual offender to life imprisonment on both armed robbery convictions and to ten years on the felon-in-possession conviction. Grace appealed.

ISSUES

Whether (1) the trial court erred in admitting out-of-court identification testimony and (2) Grace’s trial counsel was ineffective in failing to request a circumstantial-evidence jury instruction.

HOLDING

Because Grace failed to object to the identification evidence, and because the witnesses only testified as to the undisputed fact of having seen Grace at the bank the day before the robbery, the out-of-court identification was not admitted in error. Because the appellate court is limited to the record on direct appeal, Grace’s ineffective-assistance-of-counsel claim would be better raised in a petition for postconviction relief. Therefore, the Court of Appeals affirmed the judgment of the Kemper County Circuit Court.

Affirmed - 2018-KA-00712-COA (Sept. 10, 2019)

Opinion by Judge McCarty

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

George T. Holmes & Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Katie T. Gerber & Jason L. Davis (Att’y Gen. Office) for Appellee

Briefed by [Charles Matranga](#)

[Click here to view the full opinion](#)

MISSISSIPPI CASES EDITOR
KATIE HUMPHRIES

ASSOCIATE CASES EDITORS
JAMES ADAMOLI
JON-PAUL BUSHNELL
ZACHARY FLOWERS
BAXTER GEDDIE
BRANDON WILSON

Thank you for supporting the Mississippi Law Journal.

Questions or comments: Katie Humphries, newsletter@mississippilawjournal.org

All subscribers to BriefServ traditionally receive access to our website with archived case briefs since January 2007. Currently, our digital database is under construction. Requests for previous editions of the Newsletter can be made to Katie Humphries, newsletter@mississippilawjournal.org. If you have questions about accessing or using the BriefServ website, please contact us at support@mississippilawjournal.org or support@mississippilawjournal.org