BriefServ℠

Weekly Newsletter

Mississippi Cases Editor: Greyson Young

MISSISSIPPI SUPREME COURT DECISIONS – JULY 22, 2021

SUPREME COURT - CIVIL CASES

ANDREACCHIO V. COLEMAN

CIVIL - ELECTION CONTEST

GENERAL ELECTIONS - QUALIFICATIONS - CHALLENGES - The procedures of Miss. Code Ann. § 23-15-951 cannot be used to challenge a candidate's qualifications

GENERAL ELECTIONS - QUALIFICATIONS - CHALLENGES - The appropriate mechanism to challenge a candidate's qualifications, Miss. Code Ann. § 23-15-961, requires that a challenge be asserted prior to the general election and within ten days of the qualifying deadline

FACTS

Richard Todd Andreacchio and Stacy Rae Andreacchio brought an election contest under Miss. Code Ann. § 23-15-951 against Kassie Ann Coleman following her November 2019 election as district attorney. The Andreacchios conceded that Coleman won her election but argued that she had not been qualified for the position because she failed to properly establish her domicile in the district. Coleman filed a motion to dismiss, asserting that the factual dispute of her residence was not relevant. The trial judge agreed and dismissed the Andreacchios' complaint for failing to state a claim upon which relief could be granted. The Andreacchios appealed.

ISSUE

Whether the Andreacchios' complaint stated a claim upon which relief could be granted.

HOLDING

Because the Andreacchios' complaint did not challenge the determination that Coleman received more legal votes in the election, and because they waited until after the general election to file their complaint, the Andreacchios did not have a viable claim under either Miss. Code Ann. §§ 23-15-951 or 23-15-961. Therefore, the Supreme Court affirmed the judgment of the Kemper County Circuit Court.

DISSENT

Presiding Justice King argued that the Court had already interpreted Miss. Code Ann. § 23-15-961 to find that a candidate's qualifications could be challenged outside of the ten days after the qualification deadline. Therefore, the majority improperly overruled precedent without substantively addressing it.

Affirmed - 2020-EC-00502-SCT (July 22, 2021)
En Banc Opinion by Justice Maxwell - Dissent by Presiding Justice King
Hon. Frank G. Vollor (Kemper County Circuit Court)
Gregory Malta & Jared Frank Evans for Appellants - William C. Hammack & Ronnie L. Walton for Appellee
Briefed by Rachel Gholson

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MURRAY V. GRAY

CIVIL - PROPERTY DAMAGE

EVIDENCE - HEARSAY - RECORD OF REGULAR ACTIVITY EXCEPTION - Pursuant to Miss. R. Evid. 803(6), an act, event, condition, opinion, or diagnosis is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, if: the record was made at or near the time by, or from information transmitted by, someone with knowledge; the record was kept in the course of a regularly conducted activity of an occupation; and the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness8

EVIDENCE - HEARSAY - PUBLIC OFFICE EXCEPTION - Pursuant to Miss. R. Evid. 803(8), a record or statement of a public office is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, if it sets out a matter observed while under a legal duty to report, a matter observed by law enforcement personnel, or factual findings from a legally authorized investigation, and the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness

EVIDENCE - ADMISSIBILITY - POLICE REPORTS - Under *Rebelwood*, the Supreme Court determined that a party was allowed to cross-examine an expert witness using a police report when not doing so would "violate the purpose and construction" of the rules of evidence and would deny the party a "fundamentally fair opportunity to cross-examine" the expert witness

EVIDENCE - WITNESS TESTIMONY - REFRESHING MEMORY - Pursuant to Miss. R. Evid. 612(a), an adverse party may use a writing, recording, or object to refresh memory while the witness is testifying

FACTS

In April 2014, Stacie Murray and Kevin Parker were travelling in opposite directions on Highway 35 in Scott County when their vehicles collided. Parker was driving a fully loaded log truck as an employee of Gray Trucking ("Gray"). Murray sued Parker and Gray, alleging personal injuries and property damage due to Parker's negligence. Murray testified that her vehicle was entirely in the northbound lane when the collision occurred. However, on cross-examination she admitted that she could not be certain of this. Parker testified that he was driving entirely in the southbound lane when Murray crossed the center line and collided with his truck head-on. Parker said that, in an attempt to avoid Murray, he swerved four to six feet off the side of the highway before bringing his truck to a stop on the side of the highway. James Hannah testified as an accident reconstruction expert for Murray. Hannah opined that a gouge mark he found when he visited the scene of the accident two months later indicated that the collision occurred in the center of the road in the southbound lane. Parker and Gray filed a pre-trial motion to exclude Hannah's testimony about the gouge mark on the grounds that it was irrelevant and unreliable. The trial court denied the motion, and at trial Hannah opined that Murray's car crossed into Parker's southbound lane before the collision. He also testified that he found no evidence of Parker being on the side of the highway, but accepted Parker's testimony about swerving as true, and determined that the swerve must have started in Murray's northbound lane. Hannah admitted that he was not certain that the gouge mark was caused by the collision, that he did not photograph the gouge mark, and that when he visited the scene two years later the mark had been paved over. Ultimately, Hannah testified that Parker was at fault. During cross-examination Parker and Gray's counsel questioned Hannah about parts of the Uniform Crash Report ("UCR") that stated the responding officer's opinion of what happened at the scene. While doing so, counsel read from the narrative section of the UCR which contained the officer's opinions. Murray's counsel objected, but the objection was overruled. Parker and Gray's counsel also questioned Hannah about an adverse ruling in federal court, and two other cases that Hannah testified in, reading directly from one of the judicial opinions. Parker and Gray's counsel stated that they were asking Hannah to read from the opinion to refresh his memory, but never asked him to testify whether doing so actually refreshed his memory or not. They then called the responding officer, Trooper Lucas, to testify. They did not attempt to qualify Lucas as an expert witness and admitted in a pre-trial hearing that they believed his opinions in the narrative portion of the UCR were inadmissible without such qualification. During his testimony, Lucas stated that he interviewed both Murray and Parker at the scene of the collision. Parker told him that the collision was due to Murray crossing the center line, while Murray told Lucas that she did not know what happened to cause the collision. Murray's counsel objected to this testimony as hearsay, but the objection was overruled. Lucas opined that the accident occurred in the southbound lane, and that Murray was at fault. Lucas's photographs, a diagram depicting his opinions of the event, as well as the entire UCR were admitted into evidence. The jury ruled in favor of Parker and Gray. Murray filed an appeal, and the Court of Appeals reversed and remanded the case for a new trial, finding that Murray's hearsay objection should

have been sustained, the UCR should not have been admitted into evidence or read directly from during the cross-examination of Hannah, and that Hannah should not have been questioned about judicial opinions and evidence from other cases. Parker and Gray petitioned for writ of certiorari.

ISSUES

Whether the trial court abused its discretion by (1) allowing Parker and Gray to cross-examine Hannah with the UCR; (2) allowing Parker and Gray to cross-examine Hannah about a judicial opinion in another case; and (3) finding that Murray was entitled to a new trial based on the cumulative effect of the errors.

HOLDING

(1) Because Parker and Gray used the narrative and diagram of the UCR to cross-examine Hannah about inadmissible opinions of a non-expert, and because Hannah's testimony did not otherwise mislead the jury, the portions of the UCR containing Lucas' opinions did not meet the standards to hearsay exceptions as set in *Rebelwood* or Miss. R. Evid. 803(6) and 803(8), and thus the trial court abused its discretion by allowing Parker and Gray to cross-examine Hannah in this manner. (2) Because Miss. R. Evid. 612(a) does not allow counsel to ask an expert witness to read from prior judicial opinions, the trial court abused its discretion by allowing Hannah to be cross-examined in this manner. (3) Because the weight of the evidence in favor of Parker and Gray was not overwhelming, the errors made by the trial court could not be considered harmless and thus the Court of Appeals did not abuse its discretion by granting Murray a new trial. Therefore, the Supreme Court affirmed the judgment of the Court of Appeals and reversed and remanded the judgment of the Scott County Circuit Court.

The Judgment of the Court of Appeals is Affirmed. The Judgment of the Scott County Circuit Court is Reversed & Remanded - 2018-CT-01550-SCT (July 22, 2021)
En Banc Opinion by Justice Griffis
Hon. Mark Sheldon Duncan (Scott County Circuit Court)
S. Malcolm Harrison for Appellant - Michael E. Phillips & Claire K. Robinett for Appellees
Briefed by Kelsey Davis

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MISSISSIPPI COURT OF APPEALS DECISIONS – JULY 20, 2021

COURT OF APPEALS - CIVIL CASES

COLEMAN V. COLEMAN

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - *FERGUSON* FACTORS - Under the *Ferguson* factors, to divide the parties' marital assets equitably, the chancellor must consider substantial contribution to the accumulation of the property; the degree to which each spouse has expended, withdrawn, or otherwise disposed of marital assets; "the value of assets not ordinarily subject to such distribution; and the needs of the parties for financial security
FAMILY LAW - DIVORCE - ALIMONY - Alimony is considered only after the marital property has been equitably divided and the chancellor determines one spouse has suffered a deficit
FAMILY LAW - DIVORCE - ATTORNEY'S FEES - Determining whether to award attorney's fees in a divorce action is a matter largely entrusted to the discretion of the chancellor; the parties have the burden of proving an inability to pay attorney's fees

FACTS

Donald and Gwendolyn Coleman separated and consented to an irreconcilable differences divorce, submitting the issues of equitable division of the property, alimony, and attorney's fees to the court. Both Donald and Gwendolyn received monthly income. Throughout the marriage, Donald received multiple lump-sum payments, including a fire-insurance

payment, and contributed that money to the marital home. Gwendolyn likewise used her paychecks and student loan money to pay marital bills and buy construction materials for the marital home. After separating from Donald, Gwendolyn bought a second home, and though Donald's name was on the initial deed due to a bank requirement, he quitclaimed his interest to Gwendolyn before the trial and did not contribute any money to the purchase of the home. The chancellor determined the marital assets and divided them between Donald and Gwendolyn, allowing Donald exclusively to own the marital home should he purchase Gwendolyn's interest. The chancellor denied Donald's request for alimony from Gwendolyn, finding that the equitable division of marital property provided for Donald's future needs adequately. The chancellor also denied Donald's request for attorney's fees, finding that Donald failed to show a financial inability to pay. Donald appealed.

ISSUES

Whether the chancellor erred in (1) considering the *Ferguson* factors; (2) addressing alimony; and (3) denying attorney's fees.

HOLDING

(1) Because Donald failed to present evidence that he contributed his lump sum from the fire insurance proceeds to the construction of the marital home, because Gwendolyn purchased and maintained a second home after the point of demarcation with her own income, and because the chancellor considered the needs and financial security of both Donald and Gwendolyn, the chancellor correctly considered the *Ferguson* factors. (2) Because the chancellor was within his discretion to find that the equitable division of marital assets adequately provided for Donald's future income needs, the chancellor did not err by denying Donald's request for alimony. (3) Because Donald had the burden of proving his inability to pay his attorney's fees, and because he failed to meet that burden, the chancellor correctly denied attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the Clay County Chancery Court.

Affirmed - 2020-CA-00429-COA (July 20, 2021)
Opinion by Judge Smith
Hon. Joseph N. Studdard (Clay County Chancery Court)
Krisi Allen & Ronald Warren Smith for Appellant - Angela Turner Ford for Appellee
Briefed by Cade Perry Barlow

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CRONEY V. SOLANGI

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - MODIFICATION - At trial, the parent seeking custody modification must show that: (1) a substantial change in circumstances has occurred since the issuance of the custody decree that adversely affects the child's welfare and (2) the child's best interest mandates a change of custody

FAMILY LAW - CUSTODY - *ALBRIGHT* FACTORS - The *Albright* factors are as follows: (1) the age, health, and sex of the child; (2) which parent has had continuity of care; (3) the parties' parenting skills; (4) the parties' willingness and capacities to provide primary child care; (5) the parties' employment responsibilities; (6) the parties' physical and mental health and age; (7) the emotional ties of parent and child; (8) the parties' moral fitness; (9) the home, school and community records of the child; (10) the child's preference, if the child is at least twelve years old; (11) the stability of the home environment and employment of each party; and (12) any other factors relevant to the parent-child relationship or the child's best interest

FACTS

Kacey Croney and Tashfeen Solangi never married but had one child, C.S., together. After Croney and Solangi separated, C.S. lived with Croney but saw his father often. In 2009, the chancery court awarded physical custody to Croney and legal custody to both parents. Solangi also received liberal visitation rights. Solangi appealed, and the Court of Appeals affirmed the chancery court's decision. In April 2017, Amanda Heitmuller was appointed C.S.'s counselor. Heitmuller

noted C.S.'s deteriorating mental state and recommended that Solangi be granted physical custody. In July 2017, Solangi filed another complaint requesting custody modification, citing material changes in the circumstances based on Heitmuller's report and recommendations. In August 2017, the chancery court appointed a guardian ad litem, who agreed with Heitmuller's findings. In March 2018, Solangi filed an amended complaint for custody modification, citing the guardian ad litem's report and claiming that Croney continued to interfere with his relationship with C.S. The chancellor considered the testimony of C.S.'s counselor and guardian ad litem, as well as the *Riley* test and *Albright* factors, during a new trial. In June 2018, when C.S. was thirteen years old, the chancellor found it best for C.S. to live with Solangi and entered an order accordingly. Croney filed a motion for reconsideration and asked the chancery court to reopen the record. The chancery court granted the reopening but ultimately denied Croney's motion for reconsideration. Croney appealed.

ISSUE

Whether the chancellor incorrectly applied the *Riley* test in modifying custody and awarding Solangi custody of C.S.

HOLDING

Because the existing custodial arrangement was detrimental to C.S.'s physical and mental well-being and represented a material change in the circumstances since the previous custody award, and because the best interest of the child required a change of custody, the chancellor correctly applied the *Riley* test. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Chancery Court.

SPECIAL CONCURRENCE

Judge Westbrooks agreed with the application of the *Riley* test. She argued that the chancery court should have also considered Croney's violation of a former court order that granted Solangi liberal visitation rights while making their decision.

Affirmed - 2019-CA-00905-COA (July 20, 2021)
Opinion by Judge Lawrence - Special Concurrence by Judge Westbrooks
Hon. Susan Rhea Sheldon (Pearl River County Chancery Court)
Nancy E. Steen for Appellant - Jeffrey Birl Rimes, Renee M. Porter, & Sarah-Lindsey Hammons for Appellee
Briefed by Allyson Avant

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HUDNALL V. MISS. DEP'T OF EMP. SEC.

CIVIL - STATE BOARDS & AGENCIES

APPELLATE PROCEDURE - NOTICE OF APPEAL - TIMELINESS - Miss. R. App. P. 4(a) provides that an appeal must be filed within thirty days following entry of the judgment from which the appeal is taken
APPELLATE PROCEDURE - JURISDICTION - DISMISSAL - If a notice of appeal is not timely filed, the appeal will be dismissed for lack of jurisdiction

FACTS

Brenda Hudnall worked at Regency Hospital, which was owned by Select Employment Services Inc. ("Employer"). Following an incident in which a patient died, Hudnall was discharged from her job. She filed a claim for unemployment benefits. The Mississippi Department of Employment Security ("MDES") found that Hudnall was eligible to receive unemployment benefits because Employer had not proved misconduct. Employer appealed to an administrative law judge ("ALJ") who reversed the MDES's decision. Hudnall then appealed to the MDES Board of Review, which affirmed the ALJ's decision. Hudnall appealed to the circuit court, which affirmed the MDES Board of Review decision. Hudnall appealed.

ISSUE

Whether the appellate court had jurisdiction to review the underlying judgment.

HOLDING

Because Hudnall filed the notice of appeal thirty-one days following the entry of judgment, one day beyond the time specified under Miss. R. App. P. 4(a), the appeal was untimely, and the court lacked jurisdiction. Therefore, the Court of Appeals dismissed the appeal.

Appeal Dismissed - 2020-CC-00626-COA (July 20, 2021)
Opinion by Judge Greenlee
Hon. Charles W. Wright Jr. (Lauderdale County Circuit Court)
Gale Nelson Walker & Clayton Matthew Giles for Appellant - Albert B. White & James Randall Bush for Appellees
Briefed by Abbey Bufkin

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IN RE GUARDIANSHIP OF T.D. V. AUSTIN

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - BEST INTEREST OF CHILD - The polestar consideration in a child custody case is the best interest of the child
FAMILY LAW - CUSTODY - NATURAL-PARENT PRESUMPTION - When deciding custody issues between a natural parent and a third party, it is presumed that remaining with the natural parent is in the child's best interest
FAMILY LAW - CUSTODY - NATURAL-PARENT REBUTTAL - In order for a third party to gain custody, he or she must rebut the natural-parent presumption by a clear showing of (1) abandonment, (2) desertion, (3) immoral conduct detrimental to the child, or (4) unfitness
FAMILY LAW - CUSTODY - *ALBRIGHT* FACTORS - The court must determine what is in the best interest of the child by considering the *Albright* factors: (1) the age, sex, and health of the child; (2) the continuity of care prior to the separation; (3) the parenting skills of each parent; (4) the willingness and capacity to provide primary child care; (5) the employment of the parents and the responsibilities of that employment; (6) the physical and mental health and age of the parents; (7) emotional ties of the parent and the child; (8) the moral fitness of each parent; (9) the home, school, and community record of the child; (10) the preference of the child; (11) the stability of the home environment; and (12) other factors relevant to the parent-child relationship

FACTS

In 2002, Pierre D'Anjou and Stephanie Austin had a daughter together. In July 2005, D'Anjou and Stephanie married and had a son later that month. In June 2010, they were granted a divorce. Afterward, Stephanie and D'Anjou had two more children. Stephanie, D'Anjou, and the four children lived in a home that Stephanie had purchased in Byram. In February 2019, Stephanie died. Afterward, D'Anjou lived in the house with the children and, in March 2019, the trial court appointed D'Anjou as guardian of the four minor children. A few days later, Stephanie's mother, Valeria Austin, filed a motion to intervene and appoint a substitute guardian. The chancellor found that it was in the best interest of the children to appoint a guardian ad litem ("GAL") because Valeria alleged neglect. Two third-year law students were appointed as co-guardians ad litem. In July 2019, temporary custody of one child was granted to Valeria. The next month, Valeria was granted visitation with the other three children. Valeria filed an emergency motion for modification and custody in August 2019, and a hearing was held in November 2019. During the hearing, the chancellor heard testimony from Valeria, D'Anjou, one child, the GALs, and the GALs' supervisor. The GALs produced a detailed report that included the children's interactions with D'Anjou, D'Anjou's drug use, a history of paranoid schizophrenia, and interviews that indicated D'Anjou had sometimes left the children for months at a time. The trial court ruled in favor of Valeria. D'Anjou appealed.

ISSUES

Whether the chancellor erred by (1) finding that the natural-parent presumption was rebutted by clear and convincing evidence; (2) finding that the *Albright* factors favored Valeria; and (3) not setting a specific visitation schedule.

HOLDING

(1) Because D'Anjou had long periods of absence from the home, had continued drug use, and failed to take medication for his mental illness, the natural-parent presumption was sufficiently rebutted. (2) Because four *Albright* factors were neutral and the remaining eight factors favored Valeria, the chancellor properly found that the *Albright* factors favored Valeria. (3) Because D'Anjou did not provide any legal support or argument showing how the visitation schedule was erroneous, the issue was waived. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Chancery Court.

Affirmed - 2020-CA-00080-COA (July 20, 2021)
Opinion by Judge Lawrence
Hon. Denise Owens (Hinds County Chancery Court, First Judicial Dist.)
Nickita Shanta Banks for Appellant - S. Malcom O. Harrison for Appellee
Briefed by Christian Eaves

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LaCroix v. Newsom

Civil - Personal Injury

PROPERTY - NUISANCE - MATERIALITY - To establish nuisance, a plaintiff must prove that his enjoyment of life and property is rendered materially uncomfortable and annoying by the interference
TORTS - NEGLIGENCE - DAMAGES - Proof that the plaintiff has suffered actual loss or damage is an essential element of a claim for negligence
TORTS - REMEDIES - INJUNCTIVE RELIEF - A permanent injunction is a remedy potentially available only after a plaintiff can make a showing that some independent legal right is being infringed

FACTS

Debra Newsom and Steve LaCroix were neighbors in rural Marshall County. Their properties were 368 yards apart and separated by a wooded area. Newsom operated a dog kennel/breeding business for several years without a special exemption, which was required to operate a business in a residential area under county zoning ordinances. In September 2018, LaCroix and other neighbors complained about the noise of Newsom's barking dogs in a petition to the county, asking the county to enforce its zoning laws and shut down Newsom's dog kennel. After the county declined to take action, LaCroix filed suit against Newsom in chancery court, asking the court to enjoin Newsom from continuing her kennel operation. In response to the suit, Newsom obtained a special exception to operate her kennel from the Board of Supervisors. LaCroix appealed the Board's decision to the circuit court. In September 2019, the circuit court reversed the Board's decision and ordered Newsom to cease and desist all activities regarding the operation of the kennel. After the circuit court ruled, LaCroix filed an amended complaint in chancery court, asserting nuisance and negligence claims and seeking injunctive relief and compensatory and punitive damages. A bench trial was held in May 2020. At trial, LaCroix testified that the barking dogs were more of an issue for his wife than for him because of his hearing issues and stated that he could hear the dogs if he was outside and not distracted by other things. Newsom testified, among other things, that following the circuit court's ruling, she downsized her kennel to become a hobby breeder. The chancellor ruled from the bench and found that Newsom was no longer in violation of the zoning ordinance because she ceased operating a business and was merely a hobby breeder. Additionally, the chancellor found that LaCroix had failed to prove the kennel was a nuisance or that he had suffered any damages. LaCroix appealed.

ISSUES

Whether the chancery court erred in finding that LaCroix (1) failed to prove Newsom's dogs were a nuisance or caused him any damages and (2) was not entitled to injunctive relief.

HOLDING

(1) Because LaCroix testified that he could only hear the dogs if he was outside and not distracted by other things, and because LaCroix acknowledged that the dogs were a bigger issue for his wife than for him, the chancellor's finding was supported by substantial evidence. (2) Because the chancellor found that LaCroix failed to prove Newsom's dogs were a nuisance, LaCroix's claim provided no basis for injunctive relief. Therefore, the Court of Appeals affirmed the judgment of the Marshall County Chancery Court.

Affirmed - 2020-CP-00590-COA (July 20, 2021)
Opinion by Presiding Judge Wilson
Hon. Robert Q. Whitwell (Marshall County Chancery Court)
Pro se for Appellant - William F. Schneller Jr. for Appellee
Briefed by Dallas Martin

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MAYES V. MISS. DEP'T OF EMP. SEC.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE REVIEW - APPELLATE REVIEW - AGENCY CONCLUSIONS - An appellate court will affirm the decision of the lower court(s) or government agency unless the decision: (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 constitutional rights

UNEMPLOYMENT COMPENSATION - CAUSE OF UNEMPLOYMENT - MISCONDUCT - Miss. Code Ann. § 71-5-513(A)(1)(b) states that a person may not receive unemployment benefits if he was discharged for misconduct connected with his work

UNEMPLOYMENT COMPENSATION - CAUSE OF UNEMPLOYMENT - MISCONDUCT - The Supreme Court has defined "misconduct" as conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee

FACTS

Quentin Mayes worked as an engineer for the Jackson Marriott and was terminated after an investigation by the hotel manager for violating the hotel's employment policy. The Mississippi Department of Employment Security ("MDES") denied Mayes unemployment benefits on the basis that Mayes was fired for work-related misconduct. An administrative law judge conducted a telephonic hearing in which he heard testimony from Mayes and the hotel manager regarding the incident that led to the investigation and decision to fire Mayes. Based on the record and testimony, the administrative law judge determined that Mayes's behavior rose to the level of misconduct, which disqualified him from receiving unemployment benefits. The MDES Board of Review adopted and affirmed the decision to deny benefits. Mayes then appealed to the Hinds County Circuit Court, which also affirmed the decision. Mayes appealed.

ISSUES

Whether MDES erred in (1) determining the behavior for which Mayes was fired constituted misconduct, despite the fact that he was a hotel guest at the time the incident occurred and (2) finding that Mayes's behavior amounted to misconduct and therefore disqualified him from unemployment benefits.

HOLDING

(1) Because misconduct can occur even when an employee is off-duty and off-premises, Mayes's argument that he was wrongfully terminated for his behavior while being a guest at the hotel where he worked was correctly rejected. (2) Because substantial evidence of Mayes's use of vulgar and threatening language towards his coworker supported the MDES's finding that his behavior amounted to misconduct, Mayes was not entitled to unemployment benefits. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2020-CC-01074-COA (July 20, 2021)
Opinion by Judge McCarty
Hon. David Anthony Chandler (Hinds County Circuit Court, First Judicial Dist.)
Pro se for Appellant - Albert B. White for Appellee
Briefed by Elise Tucker

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MYERS V. MYERS

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - BEST INTEREST OF CHILD - The polestar consideration in a child custody case is the best interest of the child
FAMILY LAW - CUSTODY - MODIFICATION - At trial, the parent seeking custody modification must show: (1) a material change in circumstances occurred since the issuance of the decree sought to be modified; (2) that the material change adversely affected the minor child; and (3) that it would be in the child's best interest for custody to change
EVIDENCE - TESTIMONY - HEARSAY - Testimony is not hearsay and is thus admissible if it is offered for some purpose other than to prove the truth of the matter asserted

FACTS

Dena and Chris Myers divorced in 2016. Dena was given physical custody of their children, and Chris was given visitation. Before the divorce, their son began seeing a professional counselor and alleged that Chris had shaken and slapped him. The counselor filed a report with the Mississippi Department of Child Protection Services ("CPS") claiming that Chris emotionally and physically abused his son. CPS found these claims unsubstantiated. After the divorce, Dena and the son reported the physical abuse to law enforcement. Another CPS report filed concluded the claims were unsubstantiated. Chris filed a CPS report alleging that Dena exploited their son and emotionally and physically neglected their children. These allegations were unsubstantiated. Dena filed a Petition for Emergency Modification of Visitation based on the counselor's report, and the court suspended visitation between Chris and the son. Chris filed another CPS report asserting Dena physically and emotionally neglected their son, but the claims were unsubstantiated. The court ordered Chris's visitation be supervised and appointed a guardian ad litem ("GAL"). Dena filed a CPS report and law enforcement report that Chris was sexually abusing one of their daughters. Upon conducting interviews, the Kids Hub Child Advocacy Center found that one of the daughters' was inconclusive and that no abuse was disclosed. Chris filed a Petition for Modification of Final Judgment of Divorce and Dissolution of Order on Petition for Emergency Modification of Visitation claiming Dena was mentally unfit to parent and requested physical custody of the children, or joint physical custody and unsupervised visitation. Chris was subsequently allowed supervised visitation. Dena filed a Motion for Emergency Temporary Relief to which the court suspended Chris's visitation but allowed phone calls and facetimes. After a psychological evaluation, the court allowed Chris to resume his supervised visits. Dena filed another CPS report alleging abuse, but the allegations were unsubstantiated. After several more reports and investigations, a trial was held in 2020. The chancellor held that there had not been a material change in circumstances adverse to the son's best interest and ordered Chris to complete at least twelve counseling sessions with the son to mend their relationship before he could petition the court to reconsider visitation. Dena appealed.

ISSUES

Whether the court erred by (1) granting Chris visitation with his daughters and ordering counseling with his son; (2) failing to consider a hospital report; (3) allowing misplaced and wrongly marked exhibits into evidence; (4) excluding the counselor's letter from evidence; and (5) excluding a phone recording of one of the daughters from evidence.

HOLDING

(1) Because substantial, credible evidence supported the chancellor's decision to allow visitation with his daughters and to order counselling between Chris and his son, the issue was without merit. (2) Because the hospital report was admitted into evidence, and because the chancellor stated she would review all the exhibits, the issue was without merit. (3)

Because Dena did not show how the exhibits were misplaced or wrongly marked, and because, for the exhibits not initially listed on the exhibit list, the trial court corrected the exhibit list and admitted both into evidence, the issue was without merit. (4) Because the letter was hearsay, and because the counselor was not a witness at trial, the issue was without merit. (5) Because the recording was hearsay and did not meet any exceptions, the trial court did not err in excluding it. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Chancery Court.

Affirmed - 2020-CA-00490-COA (July 20, 2021)
Opinion by Judge Greenlee
Hon. Susan Rhea Sheldon (Lamar County Chancery Court)
Abby Gale Robinson for Appellant - Michael Adelman for Appellee
Briefed by Katie Lee Crockett

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COURT OF APPEALS - POST-CONVICTION RELIEF

HALEY V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - For a guilty plea to be voluntary, knowing, and intelligent, the defendant must be advised regarding the nature of the charge against him and the consequences of his plea
CIVIL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Thompson*, a claimant of ineffective assistance of counsel bears the burden of proving (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense
CRIMINAL PROCEDURE - POST-RELEASE SUPERVISION - CONDITIONS - Under *Necaise*, a trial court may prohibit a released defendant from participating in a legal act as long as it bears a nexus to his convicted crime, and he is given adequate notice

FACTS

In October 2015, Russell Haley was indicted on two counts of child exploitation. The State offered Haley a plea bargain of forty years with thirty-five years suspended and five years to serve. At his plea hearing, Haley asked the court to defer sentencing. Upon request from the State, the court informed Haley of its policy to only defer sentencing when a defendant enters an open guilty plea. Haley then consulted with his attorney to confirm his understanding of the court's policy and subsequently entered an open guilty plea. Consequently, Haley was sentenced to forty years, with thirty years suspended and ten years to serve. Haley filed a post-conviction relief motion claiming that his plea was involuntary, he received ineffective assistance of counsel, and the court's post-release supervision condition was improper. The trial court denied the motion, finding Haley's claims meritless. Haley appealed.

ISSUES

Whether the trial court erred in (1) ruling that Haley's plea was voluntary; (2) determining that Haley received effective assistance of counsel; and (3) issuing a post-release supervision condition that forbade Haley from visiting casinos.

HOLDING

(1) Because the record reflected that the trial court judge merely informed Haley of his plea options irrespective of plea-bargain negotiations, because the trial court judge did not make any empty promises to Haley, because Haley had adequate time to consider the open plea offer, and because Haley failed to prove that he did not receive a presentence investigation report or any subsequent prejudice, the trial court did not err in determining Haley's plea was voluntary. (2) Because Haley's sworn statements from his plea hearing showed that his counsel's assistance was proper, and because Haley failed to prove otherwise, the trial court did not err in finding that Haley received effective assistance of counsel.

(3) Because Haley committed his crimes at a casino while using its internet services, the trial court did not err in conditioning Haley's post-release supervision. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2020-CP-00105-COA (July 20, 2021)
Opinion by Judge Greenlee
Hon. M. James Chaney Jr. (Warren County Circuit Court)
Pro se for Appellant - Brittney Sharae Eakins (Att'y Gen. Office) for Appellee
Briefed by Mary Anna Brand

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