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Weekly Newsletter

Mississippi Cases Editor: Greyson Young

HYUNDAI MOTOR AM. v. HUTTON

CIVIL - PERSONAL INJURY

EVIDENCE - SETTLEMENTS - PRIOR OFFERS - Miss. R. Evid. 408 only excludes offers when the purpose is proving the validity or invalidity of the claim or amount; an offer for another purpose may well be admissible at trial
TORTS - SETTLEMENTS - LIABILITY – Pursuant to *Smith v. Payne*, a jury is entitled to know that, prior to settlement, the plaintiff brought suit against another party claiming that party was at fault for the accident
EVIDENCE - WITNESSES - EXPERT WITNESSES - Miss. R. Evid. 702 states that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case
EVIDENCE - EXPERT WITNESS - *DAUBERT* STANDARD - Under *Daubert*, the Court must consider a list of things when considering the admissibility of an expert witness's testimony including whether the theory or technique can be and has been tested and whether it has been subjected to peer review and publication
CIVIL PROCEDURE - JURY SELECTION - HARDSHIP EXCUSES - Miss. Code Ann. 27 § 13-5-23(3)(c) states that a judge of the court for which the individual was called to jury service shall decide hardship excuses

FACTS

Derek Bell and Joyce Hutton were involved in a single-car accident involving a vehicle that Hutton had rented from Enterprise Rent-A-Car and that Bell was driving. It was reported to the police officer that the vehicle drifted into the median and Bell lost control. Both were injured. Hutton filed suit against Hyundai Motor America, Enterprise, and Bell. Hutton initially claimed that Bell failed to exercise a proper degree of care by failing to maintain the vehicle on the roadway at all times. Bell answered and denied that his negligence caused the accident; he filed a cross-claim against Hyundai and Enterprise. Enterprise also filed a cross-claim against Bell alleging negligence. Before trial, Hutton, Bell, and Enterprise settled their claims against one another. Hutton and Bell (collectively "Plaintiffs") then proceeded against Hyundai alleging that the vehicle was defectively designed. The plaintiffs' theory at trial was that the vehicle was defective due to an exposed, unprotected component of the anti-lock braking system ("ABS"). They asserted that an object struck a component, temporarily dislodging an ABS tone ring, causing the vehicle's computer to send erratic breaking signals. Plaintiffs further asserted that the alleged erratic signals in turn caused the ABS computer to assume that the front right wheel was not turning, which in turn caused braking to occur on the front left side and, ultimately, Bell to lose control of the vehicle. Neither Bell nor Hutton reported they heard any noise or ran over any object until trial. Hyundai attempted to cross-examine Hutton as to whether she previously had claimed that Bell caused the accident before she settled with Bell, but the trial court refused to permit it. Hyundai countered that the cause of the accident was that Bell over-steered to the left lane and lost control of the vehicle while passing a delivery truck, emphasizing that no "phantom object" was ever seen or identified by any party or witness. Even if the Plaintiffs' multiple-chain-reaction theory were possible, Hyundai argued that the trajectory of any object would have occurred within fifty milliseconds, which was a scientific, physical impossibility. During the initial roll call of the jury panel, Hyundai recognized several potential jurors were absent and questioned the appearance of a two-to-one female-to-male ratio. Hyundai requested a mistrial and argued that the jury venire, from a gender standpoint, did not represent a cross-section of the community, and the court administrator improperly made decisions to excuse jurors based on Miss. Code Ann. §13-5-23, which requires that decisions based on excusing jurors for physical or financial hardship were to be made by the judge, not the court

administrator. The trial court denied the request for mistrial, finding that a violation of the statute was insufficient to quash the jury venire and that Hyundai failed to establish that a distinctive representative group had been systemically excluded.

At trial, Plaintiffs designated Charles Miller and John Rinker as experts. Miller and Rinker both generated a conclusion that the ABS was defectively designed. Hyundai filed a motion in limine to exclude the testimony of both Miller and Rinker, arguing that neither were qualified to opine as to a design defect in the vehicle's ABS. The trial court denied Hyundai's motion, finding that the specific braking components were within their expertise. During his testimony, Miller testified that he first inspected the vehicle approximately one month after the accident. Miller testified that he had never seen this type of accident. Six years later, Miller inspected the vehicle again observing that the tone ring for the ABS sensor was dislodged on the right front wheel. However, a photograph taken by police immediately after the crash showed the tone ring in place. Miller testified that during the inspection he did not observe any marks on the vehicle's axle indicating an object had come in contact with the axle. However, when performing tests in preparation for his testimony by intentionally knocking a tone ring off with a hammer, physical evidence of marks was left on the vehicle's axle. Despite eyewitness testimony, and despite his own testimony that he did not observe any marks on the axle, Miller determined that Bell had run over an object in the road which caused the tone ring to become dislodged. Miller further testified that because the tone ring was not protected, the vehicle's design was defective. Miller's testimony was based on the fact that the noise Hutton allegedly heard was the tone ring being dislodged by a piece of metal which caused the vehicle to steer left when the brakes were applied. After Miller's testimony, Hyundai again moved for a mistrial. Hyundai argued that Miller was not qualified to testify about the design of an ABS and asserted that a design engineer would be necessary to give competent testimony. The trial court denied the motion for mistrial and Rinker was called to testify. In direct contrast with Miller's testimony, Rinker testified there were a series of marks in the area of the tone ring after he observed photographs taken six years after the accident. He testified that he never saw the object that he opined made the marks and provided no description of the object except that it was metal and large enough to get underneath the lower control arms. Rinker testified that the design of the vehicle was defective because an alternative design could have prevented the accident. During a break in the direct examination of Rinker, Hyundai renewed its motion for a mistrial, alleging improper testimony and evidence of subsequent remedial measures. Hyundai argued that it had stipulated in the pretrial order that the feasibility of alternative designs was not disputed. The trial court denied that motion. The jury found for the Plaintiffs. Hyundai moved for a judgment as a matter of law. Hyundai challenged the sufficiency of the evidence supporting the verdict, the reliability of Miller and Rinker's opinions, other trial errors, and concerns of the integrity of the jury. The trial court denied all posttrial motions. Hyundai appealed.

ISSUES

Whether the circuit court erred by (1) prohibiting Hyundai from cross-examining Hutton regarding her original lawsuit against Bell; (2) allowing Miller to testify as an expert; (3) allowing Rinker to testify as an expert; and (4) allowing improper venire procedures and improper conduct during voir dire.

HOLDING

(1) Because the cross-examination of Hutton was not barred by Miss. R. Evid. 408, and because the jury was entitled to know that Hutton brought suit against Bell prior to settlement claiming that Bell was at fault, the circuit court erred in refusing to allow Hyundai to cross-examine Hutton regarding her testimony in the lawsuit against Bell. (2) Because Miller lacked the qualifications as required by Miss. R. Evid. 702 to testify that the ABS was defectively designed, and because Miller's testimony was wholly speculative and contradicted facts in the record, the trial court erred by allowing his testimony. (3) Because Rinker's proffered opinion was not based on any reliable scientific principles or methods, and because he reached his opinion solely by looking at photographs, the crashed vehicle, and an exemplar vehicle, the trial court erred by allowing Rinker's expert testimony. (4) Because there was no evidence that the deputy clerk and court administrator dismissed a significant amount of the jury at the instruction of the judge, or that it was impracticable for the judge to do so themself, the circuit court erred in allowing such conduct. Therefore, the Supreme Court reversed and rendered the judgment of the Bolivar County Circuit Court.

SPECIAL CONCURRENCE

Justice Coleman specially concurred with the result and almost all of the reasoning of the majority. He argued that if Miller's testimony had a sufficient basis with the facts, then his background, training, and experience with anti-lock

brake systems would have sufficed to qualify him to offer expert opinion testimony pursuant to *Daubert*. In his view, the trial court abused its discretion by admitting Miller's testimony.

DISSENTS

Presiding Justice Kitchens argued that Miller and Rinker were qualified to testify as experts and their opinions were admissible and reliable. In his view, Miller was qualified to diagnose a displaced tone ring because that was the type of repair work he did every day and the majority erred by finding Rinker unqualified by requiring that an accident of this precise kind had occurred previously to enable its documentation in peer reviewed articles. Further, he argued that the trial court did not err by admitting the plaintiff's evidence of a subsequent remedial measure, and that the trial court's limiting of Hyundai's cross examination of Hutton about having sued Bell was not a reversible error. In his opinion, Hyundai agreed that the feasibility of the subsequent remedial measure was an issue for trial in the pretrial order. Further, he argued that because any error limiting Hyundai's cross examination of Hutton was harmless in light of the negligible prejudice suffered by Hyundai, no reversible error arose. Accordingly, he would affirm the decision of the trial court.

Presiding Justice King with Presiding Justice Kitchens that the expert witnesses were properly allowed to testify; however, he wrote separately to address concerns regarding the majority's view on the jury venire issue. He was concerned with the majority's discussion that Hyundai waived the jury venire issue by failing and finding it moot. He argued that it was inappropriate for the Court to address the issue as the majority offered no evidence that similar procedures were occurring at the time or if any judges of the Bolivar County Circuit Court were utilizing such procedures. Ultimately, he argued that the record insufficiently determined that Bolivar County failed to comply with the requirement that a judge make the decision regarding hardship exemptions.

Reversed & Rendered - 2015-CA-01013-SCT (Sept. 16, 2021)
En Banc Opinion by Chief Justice Name - Special Concurrence by Justice Coleman - Dissents by Presiding Justice Kitchens & Presiding Justice King
Hon. Johnnie E. Walls Jr. (Bolivar County Circuit Court)
J. Collins Wohner Jr., Robert William Maxwell, Thomas N. Vanderford Jr., Zachary A. Madonia, William O. Luckett Jr., & Michael James Bentley for Appellants - Ralph Edwin Chapman, Andrew M.W. Westerfield, Christopher Nicklaus Bailey, Dana J. Swan, S. David Norquist, & Warren Barksdale Bell for Appellees
Briefed by Kelsey Davis & Dallas Martin

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KD Oak Grove, LLC v. Warren & Warren Asphalt Paving, LLC

Civil - Contract

CONTRACTS - SPECIAL LIENS - LABOR, SERVICES, OR MATERIALS - Miss. Code Ann. § 85-7-403(1) states that all contractors, subcontractors, and all materialmen furnishing material for the improvements of real estate shall have a special lien on the real estate or other property for which they furnish labor, services, or materials
CONTRACTS - SPECIAL LIENS - PROCEDURAL REQUIREMENTS - Miss. Code Ann. § 85-7-405(1)(c)(i) states that to make a good lien created in Miss. Code Ann. § 85-7-403(1), a *lis pendens* notice shall be filed with the commencement of the action with a copy to the owner and the contractor
APPELLATE PROCEDURE - STATUTE - INTERPRETATION - The Supreme Court has held that because a statute includes the mandatory term "shall," the Supreme Court does not view its restriction as a suggestion, but as a mandate

FACTS

KD Oak Grove, LLC ("Oak Grove") and KP Westwood, LLC ("Westwood") entered into two separate construction contracts with Coumanis Allen ("Allen"), a general contractor who subcontracted with Warren & Warren Asphalt Paving, LLC ("Warren"). Allen did not pay Warren for its work. Subsequently, Warren filed separate construction liens on Oak Grove and Westwood's separate real property. In both payment actions, Warren admitted to failing to file its *lis pendens* notice along with its construction liens, waiting 110 days to file it. The two separate legal actions were brought

before the Lamar County Chancery Court and were assigned to two separate chancellors. Oak Grove filed motions for summary judgment and Westwood filed a motion to dissolve, on the basis that Warren failed to comply with the requirements of Miss. Code Ann. § 85-7-405. The chancellors denied the motions for summary judgment and the motion to dissolve. Oak Grove and Westwood appealed, and the cases were consolidated.

ISSUE

Whether the chancellors erred by denying Oak Grove's motions for summary judgment and Westwood's motion to dissolve.

HOLDING

Because Warren admitted that it did not comply with the mandatory requirement in Miss. Code Ann. §§ 85-7-403(1) and 405(c)(1)(i) by failing to file its *lis pendens* notices in each payment action with the commencement of its actions, and because the statutory requirement was clear and unambiguous, even without time-limiting requirements, Warren's construction liens were not good liens pursuant Miss. Code Ann. § 85-7-405(1), and the chancellors in both respective actions erred by denying Oak Grove's motions for summary judgment and Westwood's motion to dissolve. Therefore, the Supreme Court reversed and rendered the judgments of the Lamar County Chancery Court.

Reversed & Rendered - 2020-IA-00810-SCT (Sept. 16, 2021)
Opinion by Justice Coleman
Hon. Susan Rhea Sheldon (Lamar County Chancery Court)
Ron A. Yarbrough for Appellant - Ned Andrew Nelson, Samuel Denon Newman, & Mark A. Nelson for Appellee

Consolidated with:

Reversed & Rendered - 2020-IA-00840-SCT (Sept. 16, 2021)
Hon. Susan Rhea Sheldon (Lamar County Chancery Court)
Ron A. Yarbrough for Appellant - Mark A. Nelson, Ned Andrew Nelson, Samuel Denon Newman, & Roderick Mark Alexander Jr. for Appellees
Briefed by Elise Tucker

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Supreme Court - Orders

In Re: Local Rules

Order

ORDER

This en banc Order by the Supreme Court, made in consideration of the Court's own motion, vacates the current Local Rules, and approves new Local Rules of the Seventh Chancery Court District. The new Local Rules address the needs of judicial economy and efficiency in administering justice within the Seventh Chancery Court District. This approval of new Local Rules became effective upon entry of this Order on September 7, 2021.

Exhibit A, referenced and attached to the Order, shows the new Local Rules of the Seventh Chancery Court District.

Ordered - 89-R-99015-SCT (Sept. 7, 2021)
En Banc Order by Chief Justice Randolph
Briefed by Abbey Bufkin

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In Re: Rules of Civil Procedure [Miss. R. Civ. P. 29]

Order

ORDER

This en banc Order by the Supreme Court, made in consideration of the Court's own motion, amended Rule 29 of the Mississippi Rules of Civil Procedure. This amendment to the Rules becomes effective October 7, 2021. Rule 29 was amended to authorize parties to lawsuits to stipulate to extensions of time for any form of discovery without court approval unless such extension would interfere with a court-order discovery deadline, a hearing date, or trial.

Exhibit A, referenced and attached to the Order, shows the amendments to Rule 29.

Ordered - 89-R-99001-SCT (Sept. 7, 2021)
En Banc Order by Chief Justice Randolph
Briefed by Allyson Avant

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In Re: Rules of Civ. Proc. [Miss. R. Civ. P. 30]

Order

ORDER

This en banc Order by the Supreme Court, on a motion by the Supreme Court of Mississippi's Advisory Committee on Rules, amended Rule 30(c) of the Mississippi Rules of Civil Procedure. Rule 30(c) pertains to depositions upon oral examinations. The amendment requires objections to be stated concisely and non-argumentatively. It also specifies when a deponent can be instructed to not answer a question. This amendment becomes effective October 7, 2021.

Exhibit A, referenced and attached to the Order, shows the changes to Rule 30(c).

Ordered - 89-R-99001-SCT (Sept. 7, 2021)
En Banc Order by Justice Coleman
Briefed by Christian Eaves

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In Re: Rules of Civ. Proc. [Miss. R. Civ. P. 33]

Order

ORDER

This en banc Order by the Supreme Court, made in consideration of the Court's own motion, amended Rule 33(d) of the Mississippi Rules of Civil Procedure. Rule 33(d) concerns a party's choice to produce business records in response to an interrogatory. This amendment added language to Rule 33(d), requiring the responding party to specify the records from which the answer may be derived or ascertained "in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could." Apart from the additional language, there were no other amendments to Rule 33(d). This amendment becomes effective on October 8, 2021.

Exhibit A, referenced in and attached to the Order, shows the amended language of Rule 33(d) and includes a historical note.

Ordered - 89-R-99001-SCT (Sept. 8, 2021)
En Banc Order by Justice Ishee

Briefed by Mary Anna Brand

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In Re: Rules of Civ. Proc. [Miss. R. Civ. P. 34]

Order

ORDER

This en banc Order by the Supreme Court, made in consideration of the Court's Advisory Committee on Rules' motion, amended Rule 34 of the Mississippi Rules of Civil Procedure. Rule 34 pertains to production of documents and things and entry upon land for inspection and other purposes. Rule 34(b) was modified, adding subdivisions and captions. The amendment contains requirements that parties must state objections with specificity, include the basis for the objection, and signify if the party is withholding any responsive materials based upon the objection. Rule was altered to reference Rule 45. This amendment to the Rules becomes effective October 7, 2021.

Exhibit A, referenced and attached to the Order, shows the amendments to Rule 34.

Ordered - No. 89-R-99001-SCT (Sept. 7, 2021)
En Banc Order by Justice Coleman
Briefed by Katie Lee Crockett

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Mississippi Court of Appeals Decisions – September 14, 2021

Court of Appeals - Civil Cases

Fonville v. Zeid

Civil - Medical Malpractice

EVIDENCE - EXPERT TESTIMONY - *DAUBERT* HEARING - Admission of expert testimony depends on a list of reliability factors and focuses on the principles and methodology themselves rather than on the conclusions generated by those principles and methodology

TORTS - MEDICAL MALPRACTICE - EXPERT WITNESS - Providing four potential causes of injury within a reasonable degree of medical certainty is not considered providing mere possibilities and is allowed under Mississippi law; absolute certainty is not required for an expert when facts are in dispute, or the evidence is such that fairminded men may draw different inferences

EVIDENCE - HEARSAY - LEARNED-TREATISES EXCEPTION - According to Miss. R. Evid. 803(18), cross-examination of an expert witness with published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art is permitted only if such articles can be established as a reliable authority by (1) the testimony of the witness, (2) by other expert testimony, or (3) if the court takes judicial notice

FACTS

Daphane Fonville was admitted to Baptist Memorial Hospital in Southaven for labor induction due to severe preeclampsia. Dr. Zeid, Daphane's obstetrician-gynecologist, advised her that he could either use the vacuum to facilitate deliver or perform a cesarean section. Daphane chose the vacuum delivery. During the delivery, Dr. Zeid noticed that Daphane's son, Derek, had shoulder dystocia. Dr. Zeid used multiple methods to try to relieve the shoulder dystocia. Dr. Zeid delivered Derek and noticed that Derek had a limp arm and bruising on his neck and shoulder. Derek was

diagnosed with a permanent brachial plexus injury causing weakness or paralysis in parts of the arm for the rest of his life. Daphane's complaint alleged that Derek suffered injury and damages as a result of Dr. Zeid's failure to comply with the applicable standard of care. Discovery was to be completed by September 9, 2019, but the defendants supplemented discovery on October 3, 2019 with the expert opinions of two doctors. Daphane filed a motion to strike the supplemental expert opinions and filed a *Daubert* motion to limit or exclude, or in the alternative, to prevent testimony, argument, or inference of maternal forces of labor as a defense. In a *Daubert* hearing, the trial court denied Daphane's motion to strike the supplemental opinions and denied her motion to limit or exclude maternal forces of labor as a defense. The court allowed supplemental depositions to occur, so Daphane deposed the defendants' experts regarding the supplemental opinions. A week before trial, Daphane filed a motion for a continuance, alleging that the supplemental opinions substantially changed the claims and defenses for trial. The trial court denied the motion for continuance but struck portions of the supplemental opinions and prohibited one of the experts from testifying to a reasonable degree of medical probability that endogenous forces caused the injury. The jury returned a verdict in favor of the defendants. Daphane appealed.

ISSUES

Whether the trial court erred in allowing (1) the defendants' experts to render opinions regarding substantive matters not sufficiently disclosed through discovery, therefore constituting "trial by ambush"; (2) the defense's expert witness to opine on possible causes within a reasonable degree of medical probability; (3) improper questioning of the defendants' expert witnesses; (4) the defendants to use maternal forces of labor as a defense following Daphane's *Daubert* motion; and (5) the defendants to introduce administrative discipline information pertaining to Daphane's obstetrical expert witness into evidence.

HOLDING

(1) Because Daphane knew of the proffered opinions and deposed both of the defense experts, and because the defense disclosed the ACOG monograph in compliance with Miss. R. Evid. 803(18), there was no trial by ambush. (2) Because the medical expert provided four different potential causes of a brachial plexus injury within a reasonable degree of medical certainty, the trial court did not err in allowing defense expert witnesses to opine on possible causes within a reasonable degree of probability. (3) Because Daphane made no objections to the expert witnesses' hypotheticals at trial, the issue was procedurally barred. (4) Because the defendants' experts' testimonies were relevant and supported by medical literature and the 2014 ACOG monograph, the trial court did not err in overruling the *Daubert* objection concerning maternal forces of labor. (5) Because the defendants' counsel used the prior disciplinary conduct to impeach Dr. Lopez on his credibility as it relates to his supervisory committees at different hospitals and nothing more, the trial court did not err in allowing the defendants to impeach Dr. Lopez with administrative discipline information. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

Affirmed - 2020-CA-00377-COA (Sept. 14, 2021)
Opinion by Judge Lawrence
Hon. Celeste Embrey Wilson (DeSoto County Circuit Court)
Garry James Rhoden, Jonathan T. Gilbert, Ronald S. Gilbert, & Christopher Wayne Winter for Appellant - Clinton M. Guenther & Tommie G. Williams for Appellees
Briefed by Meagan Guyse

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GORDON V. DICKERSON

CIVIL - REAL PROPERTY

CIVIL PROCEDURE - APPEALS - COUNTERCLAIMS - Under Miss. R. Civ. P. 13(k), a counterclaim filed in an appeal from justice court to county court or circuit court shall be stated as an amendment to the pleading within thirty days after such appeal has been perfected or within such further time as the court may allow

CIVIL PROCEDURE - DEFAULT JUDGMENT - MOTION TO SET ASIDE - To determine whether to set aside a default judgment, the court considers (1) the nature and legitimacy of the defendant's reasons for his default, (2) whether the defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside

CIVIL PROCEDURE - AWARDS - PUNITIVE DAMAGES - Miss. Code Ann. § 11-1-65(1)(a) allows punitive damages where it is shown by clear and convincing evidence that a defendant acted with actual malice, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or committed actual fraud

FACTS

Julio Gordon leased a house to Christy Dickerson for over a decade. Under their rent-to-own agreement, Gordon was responsible for repairs to the house during the term of the agreement. The condition of the house declined to where multiple rooms were uninhabitable, pipes were leaking, and mold was growing. Dickerson requested repairs from Gordon multiple times, but he refused. The house eventually failed an inspection by the city, and the city demanded that Gordon make repairs. Ten years into their rent-to-own agreement, Dickerson asked Gordon to transfer title to her. Gordon refused and filed suit to evict Dickerson. The justice court awarded Gordon a judgment of $914 and ordered Dickerson to vacate the house. Dickerson appealed the judgment to the county court and adequately provided notice of the appeal. Dickerson filed counterclaims for breach of contract, fraudulent misrepresentation, trespass and wrongful possession, unjust enrichment, and, in the alternative, for breach of implied warranty of habitability, breach of the implied covenant of quiet enjoyment, and constructive eviction. Dickerson properly served Gordon with process, but Gordon never responded to the counterclaims. The county court entered default judgment against Gordon and awarded Dickerson $10,800 in rent offset and punitive damages of $39,200 due to Gordon's malicious and grossly negligent conduct. After the hearing, Gordon filed motions to set aside the default judgment, but the county court denied his motion. The Lee County Circuit Court affirmed the county court's judgment. Gordon appealed.

ISSUES

Whether the county court (1) had discretion to allow the counterclaims; (2) abused its discretion in finding the landlord in default for failure to answer the counterclaims; and (3) erred in ordering punitive damages.

HOLDING

(1) Because Dickerson's counterclaims were properly brought before the county court as a pleading subsequent to the complaint, albeit not in the thirty-day window, and because Miss. R. Civ. P. 13(k) allows the county court discretion to allow counterclaims as it sees fit for the resolution of all controversies between the parties in one suit and to eliminate the inordinate expense of multiple litigation, the county court did not abuse its discretion in allowing the counterclaims to proceed. (2) Because Gordon did not have a legitimate reason to default, because Gordon failed to have a colorable defense to the merits of Dickerson's counterclaims, and because Dickerson would have suffered prejudice if the default judgment were set aside, the county court was within its discretion to not set aside the default judgment. (3) Because Dickerson provided sufficient evidence of the home's condition to establish that Gordon was willful, wanton, and reckless in his conduct as a landlord, the county court's decision to award punitive damages was substantially supported by the record. Further, because neither party presented evidence of Gordon's net worth, any challenges to the amount of punitive damages awarded was waived on appeal. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

DISSENTS

Chief Judge Barnes argued that the county court's entry of a default judgment was improper because Gordon was not required to file a responsive pleading under Miss. R. Civ. P. 12(a). Therefore, the county clerk erred in not setting aside the default judgment, and the circuit court further erred in upholding the decision of the county court.

Judge Emfinger argued that the Dickerson's counterclaims in county court were not in proper form and that no response to the filing was required. Additionally, he argued that the counterclaims were not filed within the thirty-day period pursuant to Miss. R. Civ. P. 13(k) which would require leave of court to be granted before filing an amended pleading containing the counterclaims. Therefore, the county court erred in granting default judgment, and circuit court erred in affirming the county court's ruling.

Affirmed - 2020-CA-00601-COA (Sept. 14, 2021)

En Banc Opinion by Judge McCarty - Dissents by Chief Judge Barnes & Judge Emfinger
Hon. Paul S. Funderburk (Lee County Circuit Court)
Phillip Matthew Blanchard II for Appellant - Jordan Leigh Boling Hughes & Desiree Carole Hensley for Appellee
Briefed by Cade Perry Barlow

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Hammond v. Hammond

Civil - Domestic Relations

FAMILY LAW - DIVORCE - MARITAL MISCONDUCT - Marital misconduct is a viable factor entitled to be given weight by the chancellor when the misconduct places a burden on the stability and harmony of the marital and family relationship
FAMILY LAW - DIVORCE - ALIMONY - After dividing the marital estate, an alimony award should be considered if the spouse that seeks alimony is left with a deficit in sufficient resources and assets to meet his or her needs and living expenses
FAMILY LAW - DIVORCE - ATTORNEY'S FEES - An award of attorney's fees is appropriate in a divorce case where the requesting party establishes an inability to pay; the requesting party bears the burden of proving the inability to pay

FACTS

In 1991, Perry Hammond and Mary Virginia Hammond ("Jenny") got married. Perry worked in the oil industry, and Jenny was a cosmetologist. After a few years of marriage, the couple had two children, and Jenny became a stay-at-home mom. Jenny acted as the sole caregiver while Perry worked. In 2016, Jenny filed for divorce after she discovered Perry was having an affair while traveling for work. Jenny testified that she no longer worked as a cosmetologist because she developed a bulging disc in the mid-1990s that rendered her unable to work as a cosmetologist. At the time of the trial, Jenny worked at Columbia Academy as a preschool assistant. The job did not provide Jenny health insurance or retirement benefits. Jenny reported gross monthly income of $710 and net monthly income of $646 from her job. Perry was paying Jenny $2,000 per month in temporary alimony. Jenny also reported monthly living expenses of $5,500 for the mortgage, taxes, and insurance on the marital home. Jenny introduced a copy of her attorney's bill, and she testified that she could not afford to pay it. Perry reported gross monthly income of $19,593, net monthly income of $12,150, and monthly living expenses of $2,387. The marital home and the surrounding property had a mortgage of $52,000, and the Hammonds owned twenty acres near their home with several pieces of equipment to maintain their property. In December 2016, the chancellor awarded Jenny fifty-five percent of the marital estate. Jenny's award included: the marital home, all farm trucks and equipment, all personal property in her possession, her Toyota Highlander, $7,900 from Perry's bank account, and $202,500 from Perry's 401(k) account. The chancellor awarded Perry forty-five percent of the marital estate. Perry's award included: the remainder of his 401(k) account, bank accounts, other investments, his truck, all personal property in his possession, and a twenty-acre tract of land near the marital home. The chancellor ordered Perry to pay the mortgage, taxes, and insurance on the marital home until he paid off the $52,000 balance that remained, as well as the remaining debt on Jenny's sailboat and the note on her Toyota Highlander. The chancellor ordered Perry to pay $1,166.67 per month in child support plus the daughter's school tuition and health expenses. The chancellor ordered Perry to pay Jenny rehabilitative alimony of $500 per month for two years and maintain Jenny's health insurance for the same duration, however, the chancellor denied Jenny's request for attorney's fees. Jenny appealed.

ISSUES

Whether the trial court erred by (1) failing to consider Perry's adultery when determining an equitable division of the marital estate; (2) awarding Jenny an inadequate amount of rehabilitative alimony; (3) failing to order Perry pay Jenny's health insurance for more than twenty-four months; and (4) failing to order Perry to pay Jenny's attorney's fees.

HOLDING

(1) Because marital misconduct is a factor to be given weight when the misconduct impacts the harmony of the marital and family relationship, and because the evidence was uncontradicted that the parties' marriage ended because of Perry's adultery, the trial court erred in failing to consider Perry's adultery when determining an equitable division of the marital estate. (2) Because of the disparity in the parties' earning capacities, because the parties were married for over twenty-five years, twenty of which Jenny was out of the workforce as she stayed at home to care for their children, and because Perry's adultery was the cause of the parties' divorce, the trial court's award of only two years of rehabilitative alimony was grossly inadequate, and, therefore, should be reconsidered on remand. (3) Because the trial court did not abuse its discretion by limiting the duration of Perry's obligation to pay for Jenny's health insurance, the trial court did not err by failing to order Perry pay Jenny's health insurance for more than twenty-four months; however, on remand, the trial court should consider the cost of health insurance when awarding alimony. (4) Because Jenny was awarded funds sufficient to pay the amount owed to her attorney, the trial court did not err by denying Jenny's request for attorney's fees; however, the trial court may revisit the issue on remand in light of any changes to the property division or additional alimony awarded. Therefore, the Court of Appeals reversed and remanded the judgment of the Marion County Chancery Court.

Reversed & Remanded - 2020-CA-00324-COA (Sept. 14, 2021)
Opinion by Presiding Judge Wilson
Hon. Susan Rhea Sheldon (Marion County Chancery Court)
S. Christopher Farris for Appellant - Elizabeth L. Porter for Appellee
Briefed by Chase Baker

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Parks v. State

Civil - Post-Conviction Relief

CRIMINAL PROCEDURE - INDICTMENT - ESSENTIAL ELEMENTS - When an indictment provides the essential elements of the crime, the statutory subsection under which the defendant was charged need not be specified
CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - AFFIDAVITS - When the defendant fails to attach any supporting affidavits and relies solely on his own sworn motion, his ineffective-assistance claim must fail
CRIMINAL PROCEDURE - SPEEDY TRIAL - PLEA - Generally, the entry of a plea waives the issue of whether a defendant received a speedy trial

FACTS

In May 2018, a female worker at a Subway restaurant saw a man exposing and fondling his penis while watching her through the restaurant's windows. The female worker told the man to leave and contacted the police. The female worker described the man to the police, who then showed her a photo of Eddie Parks Jr. Upon seeing the photo, the female worker identified Parks as the man she saw outside the restaurant. The police arrested Parks who, when interviewed, admitted to the incident. In July 2018, Parks was indicted on two counts of voyeurism under Miss. Code Ann. § 97-29-61. Count 1 was for a similar incident that occurred in April 2018 and Count 2 was for the Subway incident. In October 2019, Parks entered a guilty plea to Count 2 as a habitual offender under Miss. Code Ann. § 99-19-81. Parks was sentenced to five years without eligibility for parole or probation and ordered to pay a fine. In September 2020, Parks filed a motion for post-conviction relief ("PCR"). In his PCR motion, Parks alleged three causes of ineffective assistance of counsel. The circuit court found Parks's claims were without merit and dismissed the PCR motion. Parks appealed.

ISSUES

Whether Parks received ineffective assistance of counsel when his attorney failed to (1) challenge the indictment; (2) conduct a pre-trial investigation; and (3) assert Parks's constitutional right to a speedy trial.

HOLDING

(1) Because the indictment properly tracked the language of Miss. Code Ann. § 97-29-61 (1)(a), included the essential elements of that crime, and sufficiently informed Parks of the charges against him, the defense attorney's failure to object to the indictment did not constitute ineffective assistance of counsel. (2) Because Parks raised vague assertions and did not substantiate this claim with any supporting affidavits or facts, the circuit court found no merit to Parks's argument. (3) Because Parks acknowledged that he was giving up his right to a speedy trial by pleading guilty, and because Parks did not plead any specific facts demonstrating any deficiency by counsel, Parks's counsel was not deficient. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

Affirmed - 2020-CP-01250-COA (Sept. 14, 2021)
Opinion by Chief Judge Barnes
Hon. Lee Sorrels Coleman (Oktibbeha County Circuit Court)
Pro se for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee
Briefed by Chatham M. DeProspo

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