

MISSISSIPPI COURT OF APPEALS DECISIONS – APRIL 12, 2022**COURT OF APPEALS - CIVIL CASES****DEVINE V. CARDINAL HEALTH 110, LLC****CIVIL - CONTRACT**

CIVIL PROCEDURE - SUMMARY JUDGMENT - GENUINE ISSUE OF MATERIAL FACT - Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite

SECURED TRANSACTIONS - CLAIMS - DEFAULT - Pursuant to Miss. Code Ann. § 75-9-601(a)(1), a secured party may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure if a party has defaulted

SECURED TRANSACTIONS - CLAIMS - MITIGATION - A secured creditor does not have to mitigate damages by re-taking collateral to satisfy a debt it is owed before trying to obtain the money owed through judicial proceedings

CIVIL PROCEDURE - PLEADINGS - AFFIRMATIVE DEFENSES - Pursuant to Miss. R. Civ. P. 8, in pleading to a preceding party, a party shall set forth affirmatively fraud or other affirmative defenses; a party's failure to raise an affirmative defense in his or her answer constitutes a waiver of that defense

CIVIL PROCEDURE - PLEADINGS - FRAUD - Miss. R. Civ. P. 9(b) states that in all averments of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity

FACTS

In July 2007, Stanley Devine and Roger Beardain, owners of PharmNet Inc. (“PharmNet”), entered into a contract with Cardinal Health 110 LLC (“Cardinal Health”) on behalf of PharmNet for the purchase of products and medicines to sell to the public. Devine sent Cardinal Health a credit application that both he and Beardain signed. The credit application included a guaranty that Devine and Beardain would be personally liable for the debts of PharmNet in relation to purchases from Cardinal Health if PharmNet could no longer make payments. In October 2017, PharmNet filed for Chapter 7 bankruptcy. After the filing, Cardinal Health made a demand to Devine and Beardain for the debt owed by PharmNet. After Devine and Beardain refused to pay, Cardinal Health filed a complaint against Devine and Beardain for breach of contract, alleging that they breached the guaranty between the parties and further owed Cardinal Health \$259,490.68. Cardinal Health attached a copy of the contract to the complaint as Exhibit A, but it was almost entirely illegible. Devine and Beardain denied Cardinal Health's claims about the guaranty in their answer. In September 2018, Cardinal Health filed a motion for summary judgment and attached to the motion the same executed agreement in Exhibit A. Cardinal Health also attached an unexecuted version of their standard credit application, which contained the same terms as a legible version of the language. They also included an affidavit from a credit manager for Cardinal Health, Phelton Woods, stating that he had personal knowledge that Exhibit A was a true and accurate copy of the Credit Application and that Devine and Beardain had executed and delivered a written guaranty to Cardinal Health. Woods also stated that he had personal knowledge that the Devine and Beardain irrevocably and unconditionally guaranteed the prompt and full payment and performance of PharmNet's financial obligations to Cardinal Health. Devine responded to the motion for summary judgment and argued that Cardinal Health committed fraud by making misrepresentations to him and PharmNet. He also stated that he and PharmNet would not have entered into the contract but for the fraudulent conduct of Cardinal Health. Devine also attached his own affidavit stating that he signed the wholesale contract with Cardinal Health in his capacity as President of PharmNet. Beardain filed a separate response with no attached affidavits to the motion for summary judgment wherein he argued that the motion should be denied because Cardinal Health failed to establish the existence of a valid and binding contract and that even if the document attached to the complaint was a proper contract, it was largely illegible and should have been given to the jury to

determine whether it said what Cardinal Health alleged. In August 2020, a summary judgment hearing was held. Cardinal Health argued that Devine and Beardain signed a valid contract and should be required to adhere to the contract's provisions and that Cardinal Health did not have a duty to retrieve collateral from PharmNet before pursuing Devine and Beardain. Beardain argued that the motion should have been dismissed because the complaint referenced a contract from 2017 instead of the actual contract from 2007, and this was not a scrivener's error. He also argued that the contract attached to the complaint was mostly illegible and the supplement did not clarify the language of the contract between the parties. Devine argued that Cardinal Health had a duty to collect collateral from PharmNet before it pursued Devine or Beardain. The court granted the motion for summary judgment, finding that Devine and Beardain signed and agreed to personally guarantee a credit application to Cardinal Health on behalf of their company PharmNet and that Devine and Beardain jointly and severally assumed all the obligations and responsibilities for all debts of PharmNet in connection with their purchases from Cardinal Health. Devine and Beardain appealed.

ISSUES

Whether there were genuine issues of material fact concerning whether (1) Devine and Beardain were legally liable under the guaranty; (2) Cardinal Health had a duty to mitigate before demanding Devine and Beardain pay the money owed by PharmNet; and (3) Cardinal Health made misrepresentations to Devine to encourage him to enter into an agreement with Cardinal Health on behalf of PharmNet.

HOLDING

(1) Because Devine and Beardain failed to refute with their own affidavit or sworn testimony Woods's claim attached to Cardinal Health's motion summary judgment, there was no genuine issue of material fact as to whether the guaranty was signed. (2) Because there is no duty imposed on a secured creditor to mitigate damages by re-taking collateral before entering judicial proceedings, Cardinal Health had no duty to mitigate before demanding Devine and Beardain pay the money owed by PharmNet and there was no genuine issue of material fact. (3) Because Devine's failure to raise the affirmative defense of fraud in his original answer constituted a waiver of that defense, and because Devine did not plead fraud with particularity, Devine's allegations of fraud did not create a genuine issue of material fact that the guaranty should be enforced. Therefore, the Court of Appeals affirmed the judgment of the Montgomery County Circuit Court.

Affirmed - 2020-CA-01101-COA (Apr. 12, 2022)

Opinion by Judge Lawrence

Hon. George M. Mitchell Jr. (Montgomery County Circuit Court)

A. E. (Rusty) Harlow Jr., Roger Adam Kirk, Kathi Crestman Wilson, & Morgan Kay Jackson for Appellants - Jonathan S. Masters for Appellee

Briefed by [Cade Perry Barlow](#)

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COURT OF APPEALS - CRIMINAL CASES

BARNES V. STATE

CRIMINAL - FELONY

EVIDENCE - EXPERT TESTIMONY - PROFESSIONAL EXPERIENCE - Testimony found to be neither expert opinion nor lay opinion is admissible if it is based on the perceptions of the witness from their professional experience

CRIMINAL PROCEDURE - DISCOVERY - PREVIOUSLY UNDISCLOSED EVIDENCE - The trial court should give the defendant a reasonable opportunity to become familiar with the evidence; if the defendant thereafter believes he or she may be prejudiced by admission of the evidence because of lack of opportunity to prepare to meet it, a continuance must be requested; and should the defendant fail to request a continuance, the issue is waived

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - *STRICKLAND TEST* -

Unless the defendant makes a showing that (1) counsel's performance was deficient such that errors so serious were made that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) the deficient performance prejudiced the defense with that counsel's errors were so serious as to deprive the defendant of a fair and reliable trial, it cannot be said that the conviction resulted from a breakdown in the adversary process and the claim of ineffective assistance of counsel fails

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL STRATEGY - The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy and counsel's choice of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy

FACTS

D.W. was a senior at Provine High School ("Provine") when two alleged sexual encounters occurred between her and Reginald Barnes, a teacher at Provine. Prior to D.W.'s attendance at Provine, she attended J.J. McClain High School ("McClain") (now Holmes County Central High School), where she first met Barnes. Barnes was the vo-tech principal at McClain. D.W. encountered Barnes at McClain in the office before class where he told her that her "underwear were too small." At Provine, the first alleged encounter with Barnes occurred in August 2018. D.W. was not one of Barnes's students at Provine, but on the day of the alleged incident, she entered Barnes's empty classroom to "cool down" from an altercation with another student. When Barnes returned to his classroom, he and D.W. talked for a moment before he asked her to "do it for him." D.W. replied, "Sure." During the State's case-in-chief, D.W. testified that Barnes was asking her to give him oral sex. According to D.W.'s testimony, Barnes unzipped his pants, she got on her knees and performed oral sex on him. Barnes recounted the matter differently in a written statement to investigators but did not testify at trial. The first time Barnes was asked by investigators if D.W. pulled his penis out, Barnes said no and that he immediately stopped the encounter. However, later in the investigators' interview, Barnes stated that D.W. did unzip his pants and pull his penis out, but that he then backed away from her and asked her to leave. The second incident, in September 2018, also occurred in Barnes's classroom. According to D.W.'s testimony, she was behind a desk, on the floor, when Barnes came into the classroom and closed the door. Then, Barnes pushed her onto the floor, forced his hand into her pants, fingered her, and then put his hands in her mouth. Barnes's written statement reflects a different account of the events. In Barnes's version, D.W. took his hand, placed it on her genitalia, and asked him to stick his finger inside her. After this incident, Barnes stated he made her leave his classroom and did not permit her to come back. In October 2018, D.W. recorded two conversations between herself and Barnes. Both recordings were played for the jury at trial over the defense's objection. On October 12, 2018, D.W. and two other female students reported Barnes to the office manager, Debra Sawyer-Lawson. Sawyer-Lawson had the girls write separate statements and then contacted the assistant principal, Erica Gee-Bradley. Gee-Bradley listened to D.W.'s audio recordings twice and verified the voice in the recordings was Barnes. Campus law enforcement was informed, and Jackson Public School ("JPS") Police Investigators Shalonda Hiley and William Waples took over the investigation. The investigators interviewed Barnes and took his written statement. In late October 2018, Barnes was indicted on two counts of sexual battery. At trial in November 2020, a jury found Barnes not guilty of sexual battery, but guilty of two counts of the lesser offense of fondling. Barnes was sentenced to fifteen years in the custody of the Mississippi Department of Corrections, with three years suspended and twelve to serve. The sentences were ordered to run concurrently. An amended sentencing order was entered in December 2020 which contained an error that mistakenly stated that Barnes was found guilty of sexual battery. In February 2021, Barnes filed a "Motion for Judgment Notwithstanding the Verdict or, Alternately, Motion for New Trial." The motion was denied. Barnes appealed.

ISSUES

Whether (1) the trial court erred in giving Jury Instruction 11, which stated, "the unsubstantiated and uncorroborated testimony of a sex crime is sufficient to support a guilty verdict if their testimony is not discredited or contradicted by other credible evidence;" (2) the trial court erred in allowing Investigator Hiley to give expert testimony even though the State did not properly qualify her as an expert witness pursuant to Miss. R. Evid. 702; (3) the trial court erred in allowing alleged inadmissible hearsay evidence from D.W.'s stepmother at trial; (4) the trial court erred in allowing alleged inadmissible hearsay evidence from Sawyer-Lawson and Gee-Bradley at trial; (5) the testimony of Gee-Bradley that other female students had complaints regarding Barnes violated Miss. R. Evid. 404(b); (6) the trial court erred in

admitting the second recording of the alleged conversations between D.W. and Barnes; (7) Barnes was entitled to a new trial as a result of the admission of a handwritten statement he purportedly gave to a JPS Investigator; (8) Barnes received ineffective assistance of counsel at trial due to counsel's failure to object to Jury Instruction 11, object to Investigator Hiley's expert testimony, object to inadmissible hearsay admitted through the testimony of Sawyer-Lawson and Gee-Bradley, object to Rule 404(b) testimony given by Gee-Bradley, ascertain that Barnes gave a handwritten statement to Investigator Waples, and follow the rules regarding the alleged victim's sexual history which resulted in the exclusion of testimony from defense witnesses; and (9) the evidence was legally insufficient to support the convictions or were the verdicts against the weight of the evidence.

HOLDING

(1) Because Barnes's counsel did not make a contemporaneous objection to Jury Instruction 11 and because Jury Instruction 13 clearly stated that the jurors were "the sole and exclusive judges of the credibility of each of the witnesses," the trial court did not err in giving Jury Instruction 11. (2) Because Barnes did not make a contemporaneous objection to Hiley's testimony at trial and because Hiley testified based on her professional experience as an investigator and not as an expert witness, the trial court did not err in admitting Hiley's testimony. (3) Because D.W. testified in detail at trial concerning the statements made to her by Barnes, and because Barnes was not prejudiced by admission of the testimony, the trial court did not err in admitting the testimony of D.W.'s stepmother. (4) Because there was no contemporaneous objection to Sawyer-Lawson's or Gee-Bradley's testimonies and because the evidence was offered to show the information upon which the school initiated its investigation of the matter, not the truth of the matter asserted, the trial court did not err in admitting the testimony of Sawyer-Lawson and Gee-Bradley. (5) Because there was no contemporaneous objection, and because the other female students approached Sawyer-Lawson at the same time to make a report, the testimony of Gee-Bradley did not violate Miss. R. Evid. 404(b) and the issue was waived on appeal. (6) Because Barnes merely sought to exclude the evidence, and because defense counsel did not request additional time or a continuance to prepare for the second recording, the trial court did not err in admitting the second recording, and the issue was waived on appeal. (7) Because Barnes's handwritten statement was produced by the state to defense counsel, there was no discovery violation and the trial court did not abuse its discretion in admitting the statement. (8) Because Jury Instruction 11 was properly given, because Hiley's testimony was not expert testimony, because counsel's failure to request a limiting instruction rightly can be considered trial strategy, because counsel's decision not to raise an objection or unduly highlight such brief testimony falls within the ambit of trial strategy, because defense counsel was familiar with the contents of the handwritten statement, and because counsel's failure to comply with the requirements of Miss. R. Evid. 412 does not constitute deficient performance, Barnes's claims that he received ineffective assistance of counsel were without merit. (9) Because the State presented sufficient evidence that any reasonable trier of fact could have found each element of Miss. Code Ann. § 97-5-23 beyond a reasonable doubt, and because the jury's verdict gave greater weight and credibility to D.W.'s testimony and the evidence that supported her claims, the evidence was legally sufficient to support the verdicts and the jury's verdicts were supported by the evidence and the testimony given at trial. Therefore, the Court of Appeals affirmed and remanded the judgment of the Hinds County Circuit Court.

Affirmed & Remanded - 2021-KA-00404-COA (Apr. 12, 2022)

Opinion by Judge Emfinger

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

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Briefed by [Elise Tucker](#)

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