

MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 3, 2023**COURT OF APPEALS - CIVIL CASES****CORNELL V. MISS. DEP'T OF HUM. SERVS.****CIVIL - PERSONAL INJURY**

CIVIL PROCEDURE - LICENSING - IMMUNITY - Immunity under Miss. Code. Ann. § 43-15-125 extends to MDHS's inspections and investigations of a foster home for the purposes of licensing the home and thereby the foster parent

CIVIL PROCEDURE - NEGLIGENCE - CAUSATION - For a particular damage to be recoverable in a negligence action, the plaintiff must show that the damage was proximately caused by the negligence; in order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage

FACTS

In 1998, Andrew Cornell was placed in the custody of the Mississippi Department of Human Services ("MDHS") and the Hancock County Department of Human Services. In 2000, Cornell was placed in the home of foster parents Ricky and Melissa Faulkner. In 2004, the Faulkners formally adopted Cornell. In 2009, Ricky was convicted of seven felonies regarding the molestation of Cornell and other children in the Faulkners' home. In 2015, Cornell filed a negligence suit against MDHS and others. Cornell argued MDHS failed to screen the foster home before the placement, MDHS's employee's failure to report allegations was a cause in fact and legal cause of Cornell's continued sexual abuse, and MDHS's breach of its duty to conduct its required visits with Cornell was a proximate cause of Ricky's repeated sexual abuse of Cornell. MDHS moved for summary judgment, arguing that it was entitled to immunity from Cornell's claims regarding the investigation and licensing of the Faulkners' home and that the record was devoid of evidence supporting Cornell's allegations. The circuit court granted summary judgment in favor of MDHS, finding that MDHS was entitled to judgment as a matter of law because Cornell did not establish any genuine issue of material fact. Cornell appealed.

ISSUES

Whether (1) the circuit court erred in granting summary judgment on the negligence claim related to licensing of the Faulkners' home; (2) the circuit court erred in finding no causal relationship between an MDHS employee's failure to report an allegation that Ricky was physically abusing his foster children and Ricky's continued sexual abuse of Cornell; and (3) MDHS's failure to maintain the required contact with Cornell while he was in MDHS custody was the cause in fact of his injuries.

HOLDING

(1) Because MDHS was entitled to immunity from Cornell's allegations regarding the investigation and licensing of the Faulkners' home, and because no genuine issue of material fact remained, MDHS was entitled to summary judgment as a matter of law on the negligence claim relating to licensing. (2) Because the evidence supported a reasonable inference that Cornell would have been removed from the home if the MDHS employee had properly reported and investigated the allegations, because it was reasonably foreseeable that a failure to report allegations of abuse against two children would result in the continued abuse of another child still living in the home in which the alleged abuse occurred, and because Cornell presented sufficient evidence to create a jury question as to whether the failure to report allegations of abuse was a cause in fact and legal cause of Cornell's continued sexual abuse, the circuit court erred in granting summary judgment in favor of MDHS. (3) Because Cornell produced sufficient evidence that MDHS's breach of its duty to conduct its required visits with Cornell was a proximate cause of Ricky's repeated sexual abuse of Cornell, the circuit

court erred in granting summary judgment in favor of MDHS. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Hancock County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Presiding Judge Wilson argued that summary judgment based on MDHS's failure to maintain minimum face-to-face contacts with Cornell while he was in foster care should have been affirmed. He argued that there was no evidence to suggest Cornell would have disclosed Ricky's abuse to the MDHS employees if they had complied with agency policy because Cornell had numerous face-to-face contacts with MDHS and never disclosed that Ricky was sexually abusing him. Therefore, he noted sufficient evidence was not present to support a finding that MDHS's negligence was the cause in fact and legal cause of the injury.

Affirmed in Part; Reversed & Remanded in Part - 2021-SA-00784-COA (Jan. 3, 2023)

Opinion by Presiding Judge Carlton - Concurrence in Part & Dissent in Part by Presiding Judge Wilson

Hon. Christopher Louis Schmidt (Hancock County Circuit Court)

Edward Gibson for Appellant - Trace D. McRaney for Appellee

Briefed by [Jack Surber](#)

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MORELAND V. SPEARS

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - MODIFICATION - When determining whether custody modification is warranted, there must be a material change in circumstances of the custodial parent that has arisen after entry of the first custody order; then the moving party must prove that the change in circumstances has an adverse effect on the minor child, and the modification must be in the minor child's best interest

FAMILY LAW - CUSTODY - VISITATION - Barring extraordinary circumstances, non-custodial parents are entitled to broad authority and discretion with respect to their visitation; there must be evidence presented that a particular restriction on visitation is necessary to avoid harm to the child before a chancery court may properly impose the restriction

CIVIL PROCEDURE - CONTEMPT - CONDUCT - A citation for contempt is proper where a party has willfully and deliberately ignored the order of the court

FACTS

Following Kenneth Moreland and Brandy Spears's divorce in 2012, their divorce agreement provided that they would have joint legal custody of their minor child, L.M. According to the agreement, Spears had primary physical custody subject to Moreland's visitation rights. In 2019, Spears petitioned for a modification of the agreement seeking sole legal custody and restricting Moreland's visitation. Moreland counterclaimed, seeking sole legal and physical custody of L.M., and requested that Spears be held in contempt for refusing some of his scheduled visitation. L.M.'s teacher testified that L.M. would cry at school, noting that the instances corresponded to L.M.'s visitations with Moreland. Another teacher testified that L.M. wrote a letter for the class's gratitude box that expressed that she was stronger because her father was abusive. The teacher further testified that her homework was never finished after visitations and that there were many instances where L.M. would cry, shake, or act withdrawn after visitations with Moreland. L.M.'s teacher further testified that when she asked L.M. why she was upset, L.M. disclosed that Moreland had verbally abused her. L.M.'s principal testified that when L.M. was confronted about not eating food while at school, she said it was because of discomfort surrounding eating around others and that her father made her eat expired food. L.M. also testified that Moreland was controlling and required her to be very ritualistic at his house. She further stated that he controlled the way she dressed, when she went to the bathroom, and would also stand outside the bathroom when she bathed to give instructions on how she should do so. L.M. also testified about Moreland having dangerous driving habits and living conditions. She stated that he would take her on long trips without notice and take her on 6-hour trips to Walmart. Both Spears and L.M.'s therapist, Dr. Brawley, testified that Moreland was uncooperative. Dr. Brawley also testified that Moreland's

rituals and behaviors were a stress factor for L.M. and that the environment was negatively impacting L.M. Moreland testified that he was unaware of many of the issues, but gave assurances that he would improve. The chancery court held that overnight visitation was detrimentally affecting L.M. and subsequently restricted overnight visitation. Further, the chancery court found that a material change of circumstances had occurred that was adversely affecting L.M. and that granting Spears full legal custody was in the best interest of L.M. The chancery court also denied the request to hold Spears in contempt. Moreland filed a motion to reconsider, which was denied. Moreland appealed.

ISSUES

Whether the chancery court erred by (1) awarding Spears sole legal custody of L.M.; (2) reducing and restricting his visitation with L.M.; and (3) finding Spears not in contempt and declining to award Moreland attorney's fees.

HOLDING

(1) Because there was no error in the chancery court using Moreland's decrease in work as justification in its totality-of-the-circumstances analysis, because it was not error for the chancery court to have used lack of cooperation in its judgment, because there was evidence to support that L.M. had been socially isolated, and because Moreland failed to address his worsening behavior, there was substantial evidence to support the chancery court's decision to award Spears full legal custody. (2) Because witnesses testified about L.M.'s abnormal behavior before and after her overnight visitations, because Dr. Brawley testified that stopping overnight visitation would be beneficial, and because Moreland presented no evidence to rebut Dr. Brawley's expert testimony that L.M. was suffering serious emotional harm, there was substantial evidence supporting the chancery court's decision. (3) Because Spears was advised not to file an emergency motion at the time, and because Moreland did have telephonic visitation and was able to see L.M. occasionally, the chancery court did not abuse its discretion by failing to find Spears in contempt and by declining to award attorney's fees. Therefore, the Court of Appeals affirmed the judgment of the Adams County Chancery Court.

Affirmed - 2021-CA-00714-COA (Jan. 3, 2023)

Opinion by Judge Greenlee

Hon. George Ward (Adams County Chancery Court)

Robert Eugene Jones II & Michael J. Malouf for Appellant - Kimberly Courtney King & Connie Marie Smith for Appellee

Briefed by [Arreyah Whitlock](#)

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YARBOROUGH V. SINGING RIVER HEALTH SYS.

CIVIL - PERSONAL INJURY

TORTS - NEGLIGENCE - COMMON CARRIERS - A common carrier by motor owes the duty to its passengers to exercise the highest degree of care and precaution for their safety that is consistent with the practical conduct of its business, but because people are under the highest duty of care applicable does not mean they are the absolute insurers of their passengers or held strictly liable for their passenger's injuries

TORTS - LIABILITY - UNAVOIDABLE ACCIDENT - An unavoidable accident is an occurrence which was not intended, and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions

CIVIL PROCEDURE - JUDICIAL CONDUCT - RECUSAL - If a reasonable person, knowing all the circumstances, would question a judge's impartiality, the judge must recuse himself

CIVIL PROCEDURE - JUDICIAL CONDUCT - RECUSAL - Pursuant to Miss. Unif. Cir. & Cnty. Ct. R. 1.15, a party is required to submit a motion for recusal within thirty days after the filing party could reasonably discover the facts underlying the grounds asserted

FACTS

In December 2018, Norma Yarborough's mother, Donna Scott, fell from steps on a Singing River Health Systems ("Singing River") bus, causing injury. Scott used the Singing River transportation service three days a week for her

dialysis appointments. On the date of her injury, Scott waited for her scheduled pickup outside her home and her designation did not require the lift system. When the Singing River driver pulled up, he noticed Scott walking without a cane or walker. The Singing River driver offered to assist Scott in boarding the bus after Scott reached the first step, but when Scott handed the driver her bag and took a second step, she fell backward and hit her head on the pavement. Scott filed suit alleging Singing River was vicariously liable for the driver's failure to park the bus in the correct location, failure to properly assist and secure Scott into the vehicle, and failure to take reasonable steps to ensure Scott's safety. Scott passed away shortly after filing the complaint, and Yarborough pursued the negligence suit. The trial court held a one-day bench trial in February 2021. During the bench trial, expert testimony introduced by Yarborough asserted that Singing River's driver owed Scott a duty to walk outside the bus and stand behind Scott as she walked up, but the trial court found this standard to be unreasonable under the circumstances. Yarborough also argued that Singing River admitted that Scott was disabled on the Daily Ridership Forms and testimony from a Singing River representative. The representative later asserted during testimony that the disabled designation did not necessarily mean that a passenger required assistance. Yarborough also introduced testimony from a doctor who examined and treated Scott in January 2019, but the doctor did not review, assess, or treat Scott prior to her fall or testify to the extent of her ability on the date of injury. Further, the trial court prohibited the use of evidence of the driver's prior tardiness as irrelevant. Additionally, the trial court judge made a comment about needing assistance as she stepped down from the bench during recess. The trial court judge claimed the comment referenced her back pain and that the comment was not made to mock a disabled individual. In March 2021, the trial court entered a judgment in favor of Singing River, finding that Singing River was not liable under a negligence theory. Yarborough filed a motion for judgment notwithstanding the verdict or alternatively for a new trial and a motion for recusal. During the post-trial motions hearing, the trial judge commented, "Sometimes accidents happen, and it's nobody's fault." Both post-trial motions were denied. Yarborough appealed.

ISSUES

Whether the trial court (1) failed to apply the highest standard of care for common carriers or for-hire carriers; (2) was manifestly wrong because the ruling was against the overwhelming weight of the evidence; (3) applied the wrong legal standard in finding the expert's testimony called for strict liability; (4) erred by refusing to allow testimony regarding evidence of the driver's habit of tardiness; (5) erred by finding the injury was the result of an unavoidable accident; and (6) judge was biased against Yarborough and prejudged the case.

HOLDING

(1) Because there was no hidden dangerous condition, because there was no evidence that Singing River or the driver failed to keep the bus steps reasonably safe, and because there was no evidence that the driver was alerted to any dangerous condition because of Scott's allegedly impaired mobility, the trial court correctly determined that the requirement for the driver to walk outside the vehicle and stand behind Scott as she walked up went beyond the reasonable care that was owed. (2) Because the overwhelming evidence presented at trial was that Scott had no trouble walking on the day of the incident, and because the trial court stated it fully read and considered the doctor's testimony and provided reasons for why the testimony was unpersuasive, there was no manifest error in the trial court's finding relating to the weight of the evidence. (3) Because the trial court did not find that the expert was articulating a strict liability standard of care but rather explained the expert's duty was not the correct one to apply, the assertion that the trial court misinterpreted the expert's testimony lacked merit. (4) Because there was no evidence presented that the driver was late on the date of injury, and because there was no evidence to show that the driver's tardiness caused Scott to hurry on the bus, the driver's prior tardiness was irrelevant. (5) Because the trial court judge's statement did not mean the same thing as the accident was unavoidable, and because it was obvious that the true meaning was that not all accidents have a liable party, the trial court did not err. (6) Because Yarborough's motion for recusal failed to meet the time requirement, the claim was waived; however, because the comment did not involve any legal claim, because the trial court judge addressed the allegations during the post-trial motions hearing and explained that the comment was not directed at the plaintiff but at herself due to back pain, and because she stated that she would never make fun of a disabled person, an objective person, given all the circumstances, would not have found the judge to be biased and the issue lacked merit. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2021-CA-00668-COA (Jan. 3, 2023)

Opinion by Judge Greenlee

Hon. Kathy King Jackson (Jackson County Circuit Court)
Ryan Joseph Canon for Appellant - Brett K. Williams & William Roberts Norman for Appellee
Briefed by [Thomas Simpson](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

MALLARD V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - RIGHT TO SPEEDY TRIAL - TWO-HUNDRED-SEVENTY-DAY RULE - Pursuant to Miss. Code Ann. § 99-17-1, unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy days after the accused has been arraigned

CRIMINAL PROCEDURE - RIGHT TO SPEEDY TRIAL - CALENDAR - If a defendant waives arraignment, that date is considered day one on the speedy trial calendar

CRIMINAL PROCEDURE - RIGHT TO SPEEDY TRIAL - DEFENDANT'S DELAYS - Delays attributed to the defendant, including when a defendant requests a continuance or agreed orders of continuance, do not count toward the 270-day total

CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER - A guilty plea waives the right to a speedy trial, whether that right is of constitutional or statutory origin

FACTS

Ace Joe Mallard was indicted for the first-degree murder of his girlfriend, Tracey Brown. He waived his arraignment on November 5, 2019. His trial was set for June 1, 2020, which was 209 days after his waiver of arraignment. The trial was continued twice: once by an agreed order and once at Mallard's sole request. A new trial date was set. Before the trial began, Mallard pled guilty to the charge of second-degree murder. Under oath, Mallard responded affirmatively when asked if he understood that a guilty plea would waive many of his rights, including his right to a speedy trial objection. At the sentencing hearing, the circuit court twice announced a forty-year sentence for Mallard. He subsequently signed the order of conviction and sentence, which reflected the forty-year sentence. However, the transcript incorrectly stated twenty years instead of forty years for both circuit court announcements. Mallard filed a post-conviction relief motion alleging two claims for relief: (1) his statutory speedy trial right under Miss. Code Ann. § 99-17-1 was violated; and (2) the order, which listed a forty-year sentence, should have been changed to reflect the sentence that the sentencing hearing transcript listed: a twenty-year sentence. At the evidentiary hearing, the State presented an audio recording of the sentencing hearing where "forty" was clearly discernible. The State also produced an affidavit from the court reporter. In the affidavit, she stated that in both places where twenty years was transcribed, forty years was the correct language. She submitted an amended transcript with the corrections. Additionally, the circuit court judge recalled sentencing Mallard to forty years and seeing Mallard sign the order that stated the forty-year sentence. Mallard very briefly brought up his speedy-trial claim at the evidentiary hearing. The circuit court found that Mallard waived objections to speedy trial violations when he entered his guilty plea and that there was no ambiguity or conflict between the oral pronouncement and the written order of the sentence. For those reasons, the circuit court denied the motion. Mallard appealed.

ISSUE

Whether (1) Mallard's right to a speedy trial was violated and (2) his sentence should have been changed to reflect the twenty-year sentence shown on the sentencing transcript.

HOLDING

(1) Because the continuances that pushed Mallard’s trial past the 270-day window were attributable to Mallard himself, because Mallard explicitly waived any speedy trial claim from the date of the continuance order’s issuance and the trial date, and because Mallard’s guilty plea waived his right to a speedy trial, Mallard’s right to a speedy trial was not violated. (2) Because the court reporter reviewed her recording and submitted an affidavit affirming forty years as the correct sentence, because the judge recalled sentencing Mallard to forty years, and because the evidence established the twenty-year sentence as a mere scrivener’s error subject to correction, the circuit court did not err in upholding the forty-year sentence. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

Affirmed - 2022-CA-00152-COA (Jan. 3, 2023)

Opinion by Judge Westbrook

Hon. Claiborne McDonald (Lamar County Circuit Court)

Michael Adelman for Appellant - Casey Bonner Farmer (Att’y Gen. Office) for Appellee

Briefed by [Katherine Hancock](#)

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