



MISSISSIPPI COURT OF APPEALS DECISIONS – NOVEMBER 21, 2023

COURT OF APPEALS - CIVIL CASES

BURNS V. BANCORPSOUTH BANK

CIVIL - CONTRACT

CONTRACT LAW - UNIFORM COMMERCIAL CODE - NEGOTIABLE INSTRUMENTS - The UCC governs checks as negotiable instruments at the time they are presented to a bank for deposit

CONTRACT LAW - UNIFORM COMMERCIAL CODE - STATUTE OF LIMITATIONS - Under Miss. Code Ann. § 75-3-118(g), an action for conversion of an instrument, for money had and received, or like action based on conversion, for breach of warranty, or to enforce an obligation, duty, or right arising under this chapter must be commenced within three years after the cause of action accrues

CONTRACT LAW - STATUTE OF LIMITATIONS - ACCRUAL - A cause of action accrues when it comes into existence as an enforceable claim

CONTRACT LAW - STATUTE OF LIMITATIONS - DISCOVERY RULE - Under Miss. Code Ann. § 15-1-49(1)-(2), all actions for which no other period of limitation is prescribed shall be commenced within three years after next after the cause of such action accrued, and not after

FACTS

During her tenure as a caregiver for Katheryn Burns in 2017 and 2018, Helen Patrick allegedly stole large sums of money from Katheryn's accounts at Trustmark Corporation ("Trustmark") and BancorpSouth bank ("BancorpSouth"). Patrick allegedly withdrew amounts from BancorpSouth between December 29, 2017, and January 11, 2018, and from Trustmark between December 4, 2017, and February 26, 2018. Katheryn's beneficiaries and joint owners of her accounts, Erin Burns and Shaun Burns (collectively "the Burns"), and Erin individually, filed suit against Trustmark and BancorpSouth on March 18, 2021. The Burns filed a complaint against Trustmark and BancorpSouth on March 18, 2021, alleging breach of contract, breach of fiduciary duty, negligence, negligent hiring, and negligent supervision. Trustmark and BancorpSouth filed a motion to dismiss, alleging the statute of limitations had run. The trial court granted the motions to dismiss all claims against BancorpSouth and Trustmark, finding that the cause of actions accrued at the time the transactions occurred and that the claims were time-barred by the Uniform Commercial Code ("UCC") or, alternatively, Miss. Code Ann. § 15-1-49. The Burns appealed.

ISSUES

Whether the trial court erred by (1) finding the Burns's claims time-barred and (2) converting Trustmark and BancorpSouth's motions to dismiss into motions for summary judgment without providing proper notice to the Burns.

HOLDING

(1) Because the UCC applied and the breach of contract claim accrued once Patrick presented the checks to Trustmark and BancorpSouth, because the Burns failed to file their lawsuit within three years after Patrick presented the checks to Trustmark and BancorpSouth and after Katheryn received each bank statement, and because the catch-all discovery statute also prescribed the Burns file their lawsuits within three years after Patrick presented the checks to Trustmark and BancorpSouth, the Burns's claims were time-barred. (2) Because Trustmark and BancorpSouth styled their motions to include the phrase "summary judgment," and because the Burns were not entitled to any additional notice from the trial court before considering matters outside the pleadings since Trustmark and BancorpSouth's initial motions to dismiss were clear they were alternatively requesting summary judgment, the trial court did not err by converting

Trustmark and BancorpSouth's motions to dismiss into motions for summary judgment without providing proper notice to the Burns. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2022-CA-00404-COA (Nov. 21, 2023)

Opinion by Judge Lawrence

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

Mark K. Tullos for Appellants - L. Clark Hicks Jr., William "Trey" Jones III, Christopher Ray Fontan, & William Dement
Drinkwater for Appellees

Briefed by [Robert "Duncan" Jones](#)

Edited by [Kayla Tran](#) & [Ashley House](#)

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CLEARMAN V. PIPESTONE PROP. SERVS., LLC

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - DISCOVERY RULE - Under Miss. Code Ann. § 15-1-49(2), the discovery rule requires a latent injury, meaning it must be undiscoverable by reasonable methods, and a cause of action under such rule accrues upon discovery of the injury, not the discovery of the injury and its cause

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - SAVINGS STATUTE - Under Miss. Code Ann. § 15-1-69, the savings statute only applies if an action was duly commenced within the time allowed according to the statute of limitations

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - EQUITABLE TOLLING - Equitable Tolling only applies when a plaintiff's delay in filing is because of the defendant's misrepresentation

FACTS

On January 6, 2017, Curtis Clearman slipped and fell on ice outside of Kroger and was subsequently injured. Clearman's attorney was notified that Kroger had contracted with Pipestone Property Services LLC ("Pipestone") to provide snow and ice removal and that Pipestone had subcontracted these services to Mississippi Commercial Landscaping LLC ("MCL"). Despite this, Clearman filed suit against Kroger only, not including the other two parties in the complaint, on September 18, 2019, in federal court. On January 6, 2020, Clearman filed a motion for leave to amend his complaint to add Pipestone and MCL as defendants; however, on March 2, 2020, Clearman withdrew his motion to amend his complaint. On March 19, 2020, Clearman voluntarily dismissed his federal lawsuit. On March 26, 2020, Clearman filed suit against Kroger, Pipeline, and MCL in the Yazoo County Circuit Court. The defendants answered the complaint and filed motions to dismiss, arguing that Clearman's claims were barred by the applicable three-year statute of limitations. The circuit court granted Pipestone and MCL's motions to dismiss based on the statute of limitations but denied Kroger's motion. The court then entered a final judgment dismissing Clearman's claims against Pipestone and MCL. Clearman appealed.

ISSUES

Whether the trial court erred in barring Clearman's claims (1) by holding that the "discovery rule" did not apply; (2) by holding that the "savings statute" did not apply; and (3) by holding that the statute of limitations was not subject to equitable tolling.

HOLDING

(1) Because Clearman received the information that Pipestone and MCL had contracted and subcontracted more than a year before he made a deliberate decision to file suit in federal court against Kroger alone, because the cause of action accrued at the time that he was made aware of his injury, and because Clearman knew he had been injured when he slipped and fell, making his injury not latent, as there was nothing secretive or undiscoverable about the injury, the trial court did not err by holding that the "discovery rule" did not apply. (2) Because Clearman's claims against Pipestone and MCL were never duly commenced within the time allowed, because Clearman unilaterally and voluntarily withdrew

his motion to amend his federal complaint, because Pipestone and MCL were never made parties to the federal action and the federal action was never duly commenced against either of them, and because Clearman failed to sue Pipestone and MCL within the statute of limitations, the trial court did not err by holding that the “savings statute” did not apply. (3) Because Clearman’s delay in filing suit against Pipestone and MCL was not caused by any misrepresentation by any defendant and because Clearman still had over sixteen months in which to file suit against Pipestone and MCL within the statute of limitations and failed to do so, instead filing suit in federal court against Kroger alone, the trial court did not err by holding that the statute of limitations was not subject to equitable tolling. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2022-CA-00651-COA (Nov. 21, 2023)

Opinion by Presiding Judge Wilson

Hon. Barry W. Ford (Rankin County Circuit Court)

Toby Justin Gammill, Megan Elizabeth Timbs, Adam Anthony Bollaert, & Derek L. Hall for Appellant - Joseph Walter Gill & Mark Edward Norton for Appellees

Briefed by [Margaret Gardner](#)

Edited by [Doug Reynolds](#) & [Mason Scioneaux](#)

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EVANS V. UNKNOWN HEIRS OF ARBUTHNOT

CIVIL - REAL PROPERTY

CIVIL PROCEDURE - TRIAL - INVOLUNTARY DISMISSAL - Under Miss. R. Civ. P. 41(b), involuntary dismissal occurs after the plaintiff’s presentation of evidence, when no right to relief is established based on the facts and the law; applies in actions tried by the court without a jury, where the judge is also the fact-finder

PROPERTY - CONVEYANCE - STRANGER TO THE TITLE - An individual who is a stranger to the title and records a deed effectively constitutes an ouster of all co-tenants; in order for the deed to constitute an ouster, the grantee must have had no interest whatsoever in the land prior to the execution of the deed, either as a cotenant by deed or as a cotenant by inheritance; to oust cotenants, the execution of the deed purporting to convey the entire interest in fee simple to one than a stranger to the title, the recording of the deed, and the entry of the grantee claiming title to the entire interest in the property must occur concurrently

CIVIL PROCEDURE - JOINDER - UNKNOWN HEIRS - Unknown heirs named defendants in any proceeding, upon affidavit that the names of such heirs are unknown, be summons by publication by the plaintiff; proceedings shall be in all respects authorized in the case of a nonresident defendant; when the parties in interest are unknown, and an affidavit of that fact be filed, parties can be joined by publication as unknown parties in interest

FACTS

In June 2006, Patricia L. Rogers Evans sought confirmation of her title to a tract of land (“subject property”) on a warranty deed executed by Shavone Wells. Evans claimed ownership via adverse possession since that same date. The subject property’s history traces back to Dan A. Arbuthnot, who gained title in June 1985, from the heirs of Arbuthnot, who died in 1979. Arbuthnot held the title until his death in 2002. His daughter Wells was the only heir. Marydia Breckinridge and Kevin Smith (collectively “defendants”) contested Evans’s claim in chancery court. A trial took place in October 2021, where Evans decided to proceed solely on her adverse possession claim. Evans detailed her history with the property. She and her father had owned adjacent land since 1983. After Jessie’s death, she bought the land from Wells for \$38,000 and subsequently demolished a house on it. She then made various improvements to indicate private ownership. Evans maintained the property, paid its taxes, and let certain individuals and hunters access it. Evans’ caretaker, Clyde Brown, confirmed her account. After Evans presented her case-in-chief, the defendants moved to dismiss Evans’ claim for failure to plead and prove the required element of ouster of co-tenants. The chancery court took this under advisement. The defendants renewed their motion to dismiss after Evans testified in rebuttal. The chancery court again took the motion under advisement. Both sides were asked to submit briefs. In February 2022, the chancery court found that Evans and the defendants were co-tenants and that because Evans failed to plead and prove

ouster, she failed to establish her claim of adverse possession. The chancery court granted the defendants' motion to dismiss. Evans appealed.

ISSUES

Whether the chancery court erred in finding that Evans (1) adversely possessed the subject property and (2) failed to properly join the unknown parties.

HOLDING

(1) Because Evans had no interest in the property by deed or inheritance when she received the warranty deed from Wells, because Evans was a stranger to the title, because the recording of the deed was sufficient to constitute an ouster of all co-tenants, and because Evans made entered the subject property claiming sole ownership of it, the chancery court erred in finding that Evans failed to prove claim title to the subject property by adverse possession. (2) Because Evans joined and issued a summons for all unknown heirs with legal or equitable interest in the subject property, the chancery court erred in finding that Evans failed to properly join the unknown parties. Therefore, the Court of Appeals reversed, rendered, and remanded the judgment of the Wilkinson County Chancery Court.

Reversed, Rendered & Remanded - 2022-CA-00215-COA (Oct. 24, 2023)

Opinion by Judge Emfinger

Hon. E. Vincent Davis (Wilkinson County Chancery Court)

Sheldon G. Alston & Margaret K. Duff for Appellant - Wayne Dowdy for Appellees

Briefed by [Hayward Gordon](#)

Edited by [Nivory Gordon](#) & [Ashley House](#)

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HOGAN V. HATTIESBURG CLINIC, P.A.

CIVIL - MEDICAL MALPRACTICE

CIVIL PROCEDURE - SUMMARY JUDGMENT - POSTPONEMENT OF SUMMARY JUDGEMENT -

Miss. R. Civ. P. 56(f) protects against improvident or premature grants of summary judgment and is to be applied liberally; the party opposing summary judgment may not rely on vague assertions that discovery will produce needed, but unspecified, facts; the party opposing summary judgment must specifically demonstrate how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact

CIVIL PROCEDURE - MEDICAL MALPRACTICE - EXPERT TESTIMONY - To succeed on a claim of medical malpractice, the plaintiff must demonstrate through medical expert testimony that the alleged breach was the proximate cause or the proximate contributing cause of the alleged injuries; negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof

FACTS

Debra and David Hogan ("the Hogans") filed a medical malpractice suit against Dr. Charles Brent, South Mississippi Neurological Services PLLC, and Hattiesburg Clinic P.A. ("Hattiesburg Clinic") after Debra suffered serious medical complications following a craniotomy brain biopsy Dr. Brent performed. The Hogans alleged that Dr. John Hrom with Hattiesburg Clinic breached the standard of care by encouraging Debra to have the craniotomy and brain biopsy before seeking a second opinion. Hattiesburg Clinic filed a motion for summary judgment. Hattiesburg Clinic argued that the Hogans failed to provide any expert witnesses or expert opinions that set forth the required standard of care that Dr. Hrom owed to Debra, or how Dr. Hrom deviated from the standard of care. The Hogans moved for a continuance under Miss. R. Civ. P. 56(f), seeking additional time to conduct discovery to obtain documentation from Hattiesburg Clinic and to conduct depositions from parties to the complaint. The Hogans also filed an affidavit from Dr. Phillip Jay Beron, a board-certified radiation oncologist, that stated that Dr. Hrom's decision to immediately proceed with a biopsy,

while discouraging the Hogans from a second opinion, was a deviation from the standard of care of a reasonably competent and prudent oncologist. The trial court denied Hogan’s motion and granted Hattiesburg Clinic’s motion for summary judgment. Hogan appealed.

ISSUE

Whether the trial court erred by denying the Hogans’s Miss. R. Civ. P. 56(f) motion.

HOLDING

Because the Hogans’s motion made no mention of a need to obtain additional expert opinions and merely asserted that the Hogans needed to obtain documentation from Hattiesburg Clinic to conduct depositions from parties to the complaint, because Dr. Beron’s affidavit filed by the Hogans did not state that the craniotomy and brain biopsy were unnecessary, and because the Hogans failed to demonstrate with any specificity how further expert opinion would have established that Dr. Hrom’s alleged breach proximately caused the injuries suffered by Debra, the trial court did not err by denying the Hogan’s motion. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2022-CA-00650-COA (Nov. 21, 2023)

Opinion by Chief Judge Barnes

Hon. Forrest A. Johnson Jr. (Forrest County Circuit Court)

Mary Lee Holmes, Paul Hardin Holmes, & Marcus Alan McLelland for Appellants - J. Robert Ramsay, Romney Hastings Entreklin, Peeler Grayson Lacey Jr., & Benjamin Blue Morgan for Appellee

Briefed by [Emily Phillips](#)

Edited by [Nivory Gordon](#) & [Ashley House](#)

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RAWLINGS V. RAWLINGS

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - ALIMONY AGREEMENT - ENFORCEMENT - An alimony agreement that states that one is entitled to attorney’s fees for having to enforce the agreement is not applicable if a trial takes place only to discuss a modification of the agreement

DOMESTIC RELATIONS - ALIMONY AGREEMENT - BREACH - Filing an action seeking a modification of one’s obligation to pay alimony is not a breach of the alimony agreement

FACTS

Ron and Denise Rawlings were divorced in 2006. Since the divorce, Ron has paid alimony to Denise. The alimony agreement required that Ron pay Denise (a) \$1,000 per month until Denise refinanced or sold the marital home and paid Ron \$3,000 toward a credit card debt; (b) then \$1,200 per month until August 2008; and (c) then \$1,500 per month until Denise died, remarried, or obtained income of \$45,000 per year. In addition to these provisions, there was a section of the agreement that required that, should any disputes arise out of the agreement, the law of the State of Tennessee should govern the dispute and that any prevailing party in litigation arising from the agreement would be entitled to attorney’s fees. Ron earned approximately \$100,000 per year at the time of the divorce, and between 2006 and 2022, Ron never missed an alimony payment. Ron lost his job in 2020, and, in response, he requested a modification of alimony in the DeSoto County Chancery Court. Ron alleged that his job had been eliminated in corporate restructuring, that he was unemployed, and that his income was insufficient to pay the alimony. Ron’s claim led to a trial, during which Denise attempted to testify regarding her attorney’s fees. Ron objected to this testimony because she had not requested attorney’s fees. The chancellor sustained Ron’s objection after confirming that Denise had not made such a request. Denise filed a post-trial motion to amend her answer to add a request for attorney’s fees. Before a hearing was held for her motion, however, the chancellor entered an order denying Ron’s request to modify alimony. Denise appealed.

ISSUE

Whether the chancery court (1) erred by denying Denise’s request for attorney’s fees pursuant to a provision of the parties’ 2006 marital dissolution agreement.

HOLDING

(1) Because Denise was not required to bring or defend an action to enforce the parties’ agreement, because Ron never breached or threatened to breach any provision of the agreement by seeking a modification of alimony, and because after a final divorce is entered, issues such as child support and alimony have lost their contractual nature and become a judgment of the court, Denise was not entitled to attorney’s fees under the parties’ agreement. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Chancery Court.

Affirmed - 2022-CA-00919-COA (Nov. 21, 2023)

Opinion by Presiding Judge Wilson

Hon. Mitchell M. Lundy Jr. (Desoto County Chancery Court)

Bradley Wayne Eskins & Brie Danielle Wallace for Appellant - Steven Glen Roberts for Appellee

Briefed by [Minnie Blackman](#)

Edited by [Emilee Crocker](#) & [Mason Scioneaux](#)

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SCOTT V. UNITEDHEALTHCARE OF MISS. INC.

CIVIL - INSURANCE

CIVIL PROCEDURE - DISMISSAL - WANT OF PROSECUTION - Miss. R. Civ. P. 41(d) authorizes the trial court to dismiss an action involuntarily for want of prosecution as a penalty for dilatoriness

CIVIL PROCEDURE - FAILURE TO PROSECUTE - ACTION OF RECORD - To avoid involuntary dismissal for failure to prosecute, the plaintiff must take an “action of record” that advances the case to judgment, such as filing of a pleading, discovery request, or deposition notice

CIVIL PROCEDURE - DISMISSAL - REACTIONARY ACTION - In deciding whether to involuntarily dismiss a suit, a court may consider whether action taken by the plaintiff was reactionary to a threat of dismissal or whether the activity was an effort to proceed in the litigation

CIVIL PROCEDURE - DISMISSAL - INHERENT POWER - The power to dismiss for failure to prosecute is an inherent power in any court of law or equity and has been regarded as a means necessary to control the court’s docket and promote the orderly expedition of justice

CIVIL PROCEDURE - DISMISSAL - DILATORY CONDUCT - Where the record shows that a plaintiff has been guilty of dilatory or contumacious conduct, or has repeatedly disregarded the procedural directives of the court, dismissal for want of prosecution is likely to be upheld

FACTS

In November 2017, Gary Scott filed a complaint against UnitedHealthcare of Mississippi Inc. (“UHC”), alleging that he had entered into a contract with UHC to provide healthcare coverage and UHC failed to pay certain benefits under that contract. In May 2019, the trial court filed a “Notice of Intent to Dismiss as Stale” pursuant to Miss. R. Civ. P. 41 because there had been no action in the suit in the preceding twelve months. The notice provided that the case would be dismissed for want of prosecution on June 21, 2019, unless good cause was shown as to why it should continue as a pending case. On June 19, 2019, Scott filed a “Motion for a Rule 16 Scheduling Conference & Trial Setting.” On July 18, 2019, UHC filed its answers and defenses. Notice and service of discovery was filed on December 12, 2019. No other action of record was taken until the circuit clerk issued a second Rule 41 notice on June 14, 2022. This notice warned that the case would be dismissed for want of prosecution on July 18, 2022. On July 17, 2022, Scott filed a “Motion to Leave Case on the Docket,” on the basis that a motion for trial setting was pending. Scott did not set this motion for hearing or attach an affidavit or other documentation further supporting his basis for requesting the court to not dismiss his complaint. UHC filed its opposition on July 18, 2022, asserting that no action had been taken in almost five years since the case was filed. On July 25, 2022, the trial court dismissed Scott’s case for failure to prosecute

due to the Court's inherent power and control over its own docket as well as the authority granted it by Rule 41(d). Subsequently, Scott filed a motion seeking reconsideration pursuant to Miss R. Civ. P. 59 and 60, mentioning for the first time complications involving COVID-19. The trial court observed that Scott's showing of good cause to leave his case on the docket was a pending motion for trial setting and noted that the case remained dormant for over two years after Scott filed that motion. The court further stated that Scott was not interested in trying his case. Based on this reasoning, the trial court found that Scott failed to meet the burden under Rule 59 or 60 to justify reconsideration. Scott appealed.

ISSUES

Whether the trial court erred by (1) dismissing Scott's case for failure to prosecute pursuant to Rule 41(d) and (2) dismissing Scott's case for failure to prosecute pursuant to its inherent power and control over its own docket.

HOLDING

(1) Because the plain language of Scott's motion was no more than a "request to remain active on the court's docket," because the motion was not a pleading, because the motion was filed as a reaction to the second Rule 41 notice and was not an action of record that advanced the case to judgment, because despite Scott's counsel's hesitancy to try the case amid Covid-19, the Supreme Court recognized trial judges' discretionary authority with respect to deadlines, hearings and trials, because Scott offered no explanation by affidavit or other documentation, and because Scott did not set his motion for reconsideration for a hearing, Scott did not show good cause, and the trial court did not err in dismissing the case. (2) Because the case was pending for more than five years, because the clerk filed two Rule 41 notices, because Scott's activities were made only in reaction to notices of intent to dismiss for failure to prosecute, because Scott did not heed the warning of the first Rule 41 notice and displayed "dilatory conduct," and because the trial court allowed the case to proceed despite prior delays, the trial court did not err in dismissing the case. Therefore, the Court of Appeals affirmed the judgment of the Lee County Circuit Court.

Affirmed - 2022-CA-00963-COA (Nov. 21, 2023)

Opinion by Presiding Judge Carlton

Hon. Paul S. Funderburk (Lee County Circuit Court)

Richard D. Underwood for Appellant - Donald Alan Windham for Appellee

Briefed by [Dane Norvell](#)

Edited by [Kayla Tran](#) & [Mason Scioneaux](#)

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COURT OF APPEALS - CRIMINAL CASES

AGEE V. STATE

CRIMINAL - FELONY

CRIMINAL - PROCEDURE - POST-TRIAL MOTION - A motion for a judgment notwithstanding the verdict is subject to the same time limit as a motion for a new trial; a motion for a new trial must be made within ten days after the entry of judgment

CRIMINAL - RESTITUTION - IMPOSITION - When a person is convicted of criminal activities which result in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim; to determine the amount, the court must consider the financial resources of defendant, the ability of the defendant to pay, and the rehabilitative effect on the defendant

CRIMINAL - RESTITUTION - OPPORTUNITY - If a defendant objects to the imposition, amount, or distribution of the restitution, the court shall, at the time of the sentencing give the defendant an opportunity to be

heard on the issue; if the defendant fails to object at the time of sentencing, the defendant waives any objection to the imposition, amount, or distribution of restitution

FACTS

Justin Agee was indicted in 2020 for the aggravated assault of Seneca Keyes. Keyes was the cousin of Agee’s girlfriend, Latina Barnes. Keyes claimed Agee had accused him of breaking into Barnes home. Agee confronted Keyes and said he had video evidence of the break-in. Agee asked Keyes if he wanted to see the video and Keyes agreed to enter Agee’s vehicle. On the way to Barnes’s house, Agee pointed a gun at Keyes and accused Keyes of burglarizing Barnes’s home, saying the video would prove it. Once the two arrived at the Barnes’s home, Barnes was standing in the doorway. As Keyes and Agee got out of the car, Barnes told Agee, “Not in front of the children.” Agee pointed the gun at Keyes and fired shots. A bullet grazed Keyes thigh and he was shot in the foot. Later in the hospital, Keyes was interviewed by Captain Vince Williams of the Jones County Sherriff’s Department. Keyes named “Monkey” as the shooter. “Monkey” was later identified as Agee. Agee turned himself in two weeks later. Agee denied shooting Keyes but later admitted he heard shots during the encounter. Barnes went back in the house before the shooting and also admitted to hearing shots. Agee was convicted of aggravated assault and sentenced to twenty years in prison, with three years suspended and three years in post-release supervision. The circuit court also ordered Agee to pay \$437.50 in court costs and \$15,000 in restitution to cover Keyes’s remaining state hospital bills. Agee appealed.

ISSUES

Whether (1) Agee’s motion for judgment notwithstanding the verdict and appeal were timely; (2) Agee was afforded an opportunity to object to restitution; and (3) Agee waived his objection to the imposition, amount, or distribution of restitution.

HOLDING

(1) Because Agee’s post-trial motion was not filed within the ten-day period required under Miss. R. Crim. P. 25.1(c), because the filing of the post-trial motion did not toll the time for filing a notice of appeal, because the Court of Appeals suspended the rule requirements in the interest of justice, and because the State did not take issue with the timeliness of Agee’s appeal, neither the motion nor notice of appeal was timely, but the Court of Appeals addressed Agee’s assignment of error. (2) Because, during the sentencing hearing, the circuit court stated it would consider the \$15,000 restitution request from the State that Agee pay Keyes’s state medical bills and because the circuit court asked defense counsel for any comment on the restitution request, Agee was afforded an opportunity to object to the restitution imposition and amount. (3) Because Agee took no issue with the proposed amount of restitution during the sentencing hearing, the issue of restitution was waived. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2022-KA-00994-COA (Nov. 21, 2023)

Opinion by Judge Greenlee

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

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Taylor Davis](#)

Edited by [Kara Edwards](#) & [Mason Scioneaux](#)

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GALVAN V. STATE

CRIMINAL - FELONY

EVIDENCE - WITNESSES - INTERPRETER - When a party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel, a court interpreter shall be appointed, when necessary, when the judge determines, after. An examination of a party

CRIMINAL PROCEDURE - MIRANDA RIGHTS - WAIVER - A waiver of *Miranda* rights must be made voluntarily, intelligently, and knowingly as the product of a free and deliberate choice rather than intimidation, coercion, or deception and is made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it

EVIDENCE - HEARSAY - UNAVAILABLE DECLARANT - An out-of-court statement is ‘testimonial’ in nature, the statement is generally not admissible unless the declarant is unavailable to testify in court, and the defendant is unavailable to testify in court, and the defendant has had a prior opportunity to cross-examine him or her, but the court can refuse to review such a claim absent timely, specific objection

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - STRICKLAND TEST - To prevail on a claim of ineffective assistance, the defendant must show both (1) that counsel’s performance was deficient by making errors so serious that counsel was not function as the ‘counsel’ guaranteed the defendant by the Sixth Amendment and (2) that he was prejudiced as a result since counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable; counsel has a choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy and cannot give rise to an ineffective assistance of counsel claim

FACTS

In January 2021, M.D. was living with her father Gustavo Galvan in Neshoba County. M.D. attempted to exchange phone numbers with a boy. Galvan confiscated her cell phone as a result. When they returned home, M.D. told Galvan that she would do anything to get her phone back. Galvan told M.D. to pull her breast out of her shirt and proceed to suck on her breast, leaving “hickeys.” Galvan then inserted two fingers into M.D.’s vagina. Finally, he penetrated M.D.’s vagina with his penis, telling M.D. to “shut up and be quiet” while he raped her. M.D. told one of her friends what Galvan had done to her. The friend's mother picked up M.D. and called law enforcement. A rape kit was performed on M.D. and the forensic interview was conducted a few days later. In his initial interview, Galvan confessed and signed a written confession. Several days later, Galvan again waived his *Miranda* rights, confessed again, and signed a second written confession. A grand jury indicted Galvan for Statutory rape, sexual battery, gratification of lust, and incest. Following a jury trial, Galvan was convicted of all counts. The circuit court sentenced Galvan to concurrent terms in the custody of the Department of Corrections for twenty-five years. Galvan filed a motion for a new trial and the circuit court denied his motion. Galvan appealed.

ISSUES

Whether the circuit court erred by (1) failing to appoint Galvan an interpreter; (2) admitting Galvan’s statements to law enforcement; (3) violating Galvan’s right to confront witnesses against him; (4) finding sufficient evidence to support Galvan’s incest conviction; (5) denying Galvan’s motion for a directed verdict; and (6) violating double jeopardy through Galvan’s convictions.

HOLDING

(1) Because the circuit court held a hearing on Galvan’s motion for an interpreter and determined that none of the witnesses spoke Spanish since they were able to communicate with Galvan in English, because the circuit court questioned Galvan in English and found that an interpreter would not be necessary, and because substantial evidence supported the finding and was not clearly erroneous, the circuit court did not err by failing to appoint Galvan an interpreter. (2) Because Galvan spoke in English that he understood his *Miranda* rights and voluntarily waived those rights, and because the witness testified to Galvan’s ability to comprehend and communicate in English, there was substantial evidence to support the trial court’s finding that Galvan’s *Miranda* waivers and confessions were given knowingly, intelligently, and voluntarily and the circuit court did not err by denying Galvan’s motion to suppress. (3) Because Galvan failed to object to any testimony offered on the ground that it violated his right to confrontation, the issue was procedurally barred. (4) Because M.D. testified that Galvan was her father, because Galvan acknowledged to law enforcement and signed statements that M.D. was his daughter, there was ample evidence to support Galvan’s conviction of incest. (5) Because the rape kit could have only helped Galvan’s case, because when Adkins began to testify about a statement M.D. made during the interview, Galvan’s trial counsel promptly objected and moved for mistrial, and because the circuit court warned the State not to get into any hearsay statements that were made during the interview, the circuit court properly denied the motion for directed verdict. (6) Because each crime Galvan committed required proof of at least one unique element, Galvan’s convictions did not violate double jeopardy and

Galvan's trial counsel did not provide ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

Affirmed - 2022-KA-00655-COA (Nov. 21, 2023)

Opinion by Presiding Judge Wilson

Hon. Caleb Elias May (Neshoba County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) & *Pro se* for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Jarius Colley](#)

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