

**MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 19, 2023*****SUPREME COURT - CIVIL CASES*****HOWARD INDUS., INC. V. HAYES****CIVIL - WORKERS' COMPENSATION**

**WORKERS' COMPENSATION - SANCTIONS - SUBSTANTIAL EVIDENCE** - Appellate courts will affirm the Workers' Compensation Commission's findings of fact and order if supported by substantial evidence

**WORKERS' COMPENSATION - SANCTIONS - MISREPRESENTATION** - Sanctions are appropriate upon a finding of misrepresentation, and Miss. Code Ann. § 71-3-59(2) authorizes the Commission to impose sanctions on a party and/or its attorney

**FACTS**

Selina Hayes, a longtime Howard Industries employee, filed two workers' compensation claims related to injuries incurred during her work as a coil winder. In her job, Hayes was required to lift coiled wire above shoulder level. After medical restrictions from her second injury prevented her from doing so, Hayes was moved to the position of coil winder trainer and restricted to working forty hours a week. Coil winder trainers were required to work overtime for as much as twenty hours a week; however, the no-overtime restriction imposed on Hayes prevented her from doing so. In order for the Administrative Judge ("AJ") to determine whether Hayes suffered a loss of earning capacity, a comparison of the coil winder position and the coil winder trainer position was necessary. Howard Industries hired Peter Mills as an expert to prepare a job analysis of the position of coil winder trainer. Mills's first report indicated that coil winder trainers work approximately twenty hours per week of overtime; however, Howard Industries attorney Richard Lewis Yoder submitted a second report from Mills which was the same except it altered the time requirements to include one less workday per week and showed no overtime. At the initial administrative hearing, Mills stated that although his initial report indicated that he was retained to analyze the coil winder trainer position in general, his first report was a mistake, and he meant to evaluate Hayes's specific job. Furthermore, Mills testified that he changed the report because Yoder told him the information was incorrect. The AJ recessed the hearing to permit the parties to conduct discovery on the overtime requirements of the coil winder training job. When the hearing reconvened, Mills testified that the job evaluations he prepares in other worker's compensation cases are evaluations of the actual job rather than the accommodated job. Hayes's attorney moved to sanction Howard Industries and Yoder. The AJ found that Hayes had sustained a loss of wage-earning capacity. The AJ further sanctioned Howard Industries \$1,000 for willful delay and ordered Howard Industries to pay Hayes's attorney fees in the amount of \$1,500 incurred because of the delay. On review, the Mississippi Workers' Compensation Commission ("Commission") affirmed that Hayes sustained a loss of earning capacity but lowered the amount awarded for her permanent partial disability. Furthermore, the Commission altered the AJ's order to require Yoder to pay both the sanction and attorney's fees because Yoder submitted the report and instructed Mills to alter it. Howard Industries appealed, and Hayes cross-appealed. The Mississippi Court of Appeals affirmed the Commission. Howard Industries petitioned for writ of certiorari.

**ISSUE**

Whether the record contained substantial evidence to support the imposition of sanctions against Yoder.

**HOLDING**

Because the record contained substantial evidence that Howard Industries's expert witness's report was misleading and caused unnecessary delay and because Yoder directed Mills to make representations in his testimony and second report

that were materially false, the imposition of sanctions was supported. Therefore, the Supreme Court affirmed the judgment of the Court of Appeals.

### **DISSENT**

Justice Beam argued that the record did not support the sanction imposed by the Commission. She argued that Yoder did not offer any misleading evidence because Mills’s second report was exactly what it was intended to be — an analysis of Hayes’s job requirements. She also argued that the second report was neither untruthful nor inaccurate because all it conveyed was that Hayes was medically restricted from working overtime. Furthermore, she argued that any delay in proceedings should have been attributed to Hayes’s counsel for failing to rebut the presumption of no loss of wage-earning capacity.

#### **On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2021-CT-00694-SCT (Oct. 19, 2023)**

En Banc Opinion by Presiding Justice Kitchens - Dissent by Justice Beam

Mississippi Workers’ Compensation Commission

Robert P. Thompson & Laura Walsh Givens for Appellant - Roger K. Doolittle & Floyd E. Doolittle for Appellee

#### **Consolidated with:**

#### **On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2021-CT-00695-SCT (Oct. 19, 2023)**

Mississippi Workers’ Compensation Commission

Robert P. Thompson & Laura Walsh Givens for Appellant - Roger K. Doolittle & Floyd E. Doolittle for Appellee

Briefed by [Ramsey Thrasher](#)

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

[Click here to view the full opinion](#)

## **McINNIS ELEC. CO. V. BRASFIELD & GORRIE, LLC**

### **CIVIL - CONTRACT**

**ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION - STANDARDS** - Under the Federal Arbitration Act, the court conducts a two-prong arbitration inquiry in determining whether a claim is subject to arbitration: (1) whether the parties intended to arbitrate the dispute, and (2) if they did intend to arbitrate, whether legal constraints external to the parties’ agreement foreclosed arbitration of those claims

**ALTERNATIVE DISPUTE RESOLUTION - CONSTRUCTION - PRESUMPTION** - The Supreme Court exercises a strong presumption in favor of arbitration and liberally construes those agreements in an effort to encourage the settlement of disputes

**ALTERNATIVE DISPUTE RESOLUTION - CONSTRUCTION - INTENTION** - As with any other contract, the parties’ intentions control an arbitration agreement

**ALTERNATIVE DISPUTE RESOLUTION - EXISTENCE AND VALIDITY OF AGREEMENT - ARBITRABILITY** - An agreement to arbitrate under the American Arbitration Association (“AAA”) rules constitutes express incorporation of those rules, which constitutes clear and unmistakable evidence of the parties’ intent to delegate questions to an arbitrator, including questions regarding the validity and scope of the arbitration provision itself

### **FACTS**

In 2017, electrical contractor McInnis Electric Company (“McInnis”) signed a subcontract with construction firm Brasfield & Gorrie, LLC, (“Brasfield”) as part of Brasfield’s contract to expand the University of Mississippi Medical Center Children’s Hospital. The subcontract stated “THIS CONTRACT IS SUBJECT TO ARBITRATION” and contained a specific provision providing that all claims and disputes would be settled by arbitration. The contract further stated that the parties intended that all of McInnis’s claims would be resolved in accordance with the provisions of the subcontract and contract documents. In April 2021, McInnis filed a breach of contract suit against Brasfield for failure to provide a safe work environment amidst rising COVID-19 cases and failure to stop work once the jobsite was deemed unsafe. In September 2021, the trial court granted Brasfield’s motion to compel arbitration and to stay litigation. McInnis appealed.

## ISSUES

Whether (1) the parties entered into an agreement which required arbitration and (2) the claims raised by McInnis could be compelled under the arbitration agreement.

## HOLDING

(1) Because the subcontract binding McInnis and Brasfield was governed by the Federal Arbitration Act, because article 29 of the agreement contained a heading signifying claims and disputes were to be settled by arbitration, and because McInnis's complaint stated that the subcontract was "a binding contractual agreement," the parties entered into a binding arbitration agreement. (2) Because both parties entered into an arbitration agreement with specific terms invoking the rules of the American Arbitration Association and because reference to the American Arbitration Association rules evidenced intent to submit arbitrability issues to an arbitrator, the arbitration agreement compelled arbitration of McInnis's claims. Therefore, the Supreme Court affirmed the judgment of the Hinds County Circuit Court.

## DISSENT

Justice Kitchens argued that the claims of McInnis should not be determined by the arbitrator. The default question of arbitrability lied with the courts, and he argued the parties did not clearly and unmistakably contract to have the scope of arbitration determined by the arbitrator. He also argued that the scope of the parties' arbitration agreement did not contemplate the impact of the COVID-19 pandemic, and therefore the parties did not intend to be bound to arbitrate.

### **Affirmed - 2021-CA-01115-SCT (Oct. 19, 2023)**

En Banc Opinion by Justice Coleman - Dissent by Justice Kitchens

Hon. Winston L. Kidd (Hinds County Circuit Court)

Dennis L. Horn, R. Lane Dossett, Shirley Payne, & Leigh Kathryn Payne Horn for Appellant - Ralph B. Germany Jr., Simon Turner Bailey, & Rankin Sumner Fortenberry for Appellees

### **Consolidated with:**

### **Affirmed - 2021-CA-01300-SCT (Oct. 19, 2023)**

Hon. Winston L. Kidd (Hinds County Circuit Court)

Dennis L. Horn, Shirley Payne, R. Lane Dossett, & Leigh Kathryn Payne Horn for Appellant - Ralph B. Germany Jr., Simon Turner Bailey, & Rankin Sumner Fortenberry for Appellee

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

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

[Click here to view the full opinion](#)

---

## *SUPREME COURT - CRIMINAL CASES*

### **HARRIS V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - SENTENCES - RETROACTIVE EFFECT OF NEW LAWS** - Miss. Code Ann. § 99-19-1 establishes that the punishment for a crime is controlled by the version of the relevant criminal statute in place at the time the crime was committed, notwithstanding amendatory or repealing statutes, unless otherwise specially provided in such statutes

**CRIMINAL PROCEDURE - NEW SENTENCING STATUTES - DISCRETION TO IMPOSE LESSER PENALTIES** - When a new, separate crime is created with a lesser penalty that criminalizes the same behavior for which a defendant is being tried, the sentencing court may impose a milder punishment, but it is not required to apply a newer sentencing statute instead of the sentencing scheme in effect when a crime was committed

**CRIMINAL PROCEDURE - SECOND-DEGREE MURDER - SENTENCING** - For a second-degree murder conviction, unless a jury sentences a defendant to life imprisonment, the trial court shall fix the penalty at not less than twenty nor more than forty years in the custody of the Department of Corrections

### **FACTS**

In 2001, Charlie Harris was convicted of depraved heart murder under Miss. Code Ann. § 97-3-19(1)(b), and sentenced to life without parole which was the only sentencing option for murder at the time. In 2003, Harris appealed his conviction and his life-without-parole sentence, which the Supreme Court affirmed. In 2013, the legislature amended the depraved heart murder statute creating a new, separate crime of second-degree murder. Under the amended Miss. Code Ann. § 97-3-19(1)(b), depraved heart murder was effectively considered second-degree murder (“second-degree murder statute”). The sentencing guidelines for murder were also amended to provide the penalty for second-degree murder as twenty to forty years in prison unless the jury sentences the defendant to life imprisonment. In 2021, Harris filed his fourth motion for leave to proceed in the trial court and argued his life-without-parole sentence was illegal. In response, the State agreed that Harris should have been sentenced to no more than life imprisonment. In June 2021, the Supreme Court vacated Harris’s life-without-parole sentence and remanded the case to the trial court for resentencing. In April 2022, the trial court resentenced Harris to life imprisonment. Harris filed a motion for reconsideration of his sentence, arguing that his life sentence exceeded the current maximum sentence for a depraved heart murder conviction under the revisions to the murder statutes. Harris also argued the trial court should resentence him to twenty years with credit for time served. Harris asked the trial court to set aside his life sentence and grant him a new sentencing hearing. The trial court denied the motion, resentencing Harris to life in prison. Harris appealed.

### **ISSUES**

Whether the trial court erred by (1) sentencing Harris to life in prison and (2) denying Harris’s motion for reconsideration.

### **HOLDING**

(1) Because Miss. Code Ann. § 99-19-33 applied to Harris since the legislature reclassified depraved heart murder as second-degree murder and provided a lesser penalty for the same behavior Harris was tried, because the trial court had the discretion to impose the lesser penalty of twenty to forty years, and because the trial court properly exercised its discretion by sentencing Harris to life in prison, the trial court did not err by sentencing Harris to life in prison. (2) Because Harris corrected the trial court’s initial belief that it was required to sentence Harris to life in prison, and because the trial court reconsidered Harris’s sentence and found that Harris’s life sentence was still the appropriate sentence, the trial court did not err by denying Harris’s motion for reconsideration. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

**Affirmed - 2022-KA-01113-SCT (Oct. 19, 2023)**

Opinion by Justice Griffis

Hon. Dewey Key Arthur (Madison County Circuit Court)

Cynthia Ann Stewart for Appellant - Barbara W. Byrd (Att’y Gen. Office) for Appellee

Briefed by [Isabella Escobedo](#)

Edited by [Kennedy Gerard](#) & [Ashley House](#)

[Click here to view the full opinion](#)

## **MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 17, 2023**

### ***COURT OF APPEALS - CIVIL CASES***

**CAPOCACCIA V. CAPOCACCIA**

**CIVIL - DOMESTIC RELATIONS**

**FAMILY LAW - DIVORCE - DIVISION OF MARITAL PROPERTY** - To equitably divide marital property properly, a chancellor is required to classify the parties' assets as marital or separate, value those assets, and equitably divide the marital assets based upon the *Ferguson* factors; the absence of the *Ferguson* factors creates error

**FAMILY LAW - CHILD SUPPORT - STATUTORY GUIDELINES** - Under Miss. Code Ann. § 43-19-101, when there are three children, twenty-two percent of a parent's adjusted gross income is presumed for child support; the guidelines apply unless the court makes a written finding or a specific finding on the record that the application of the guidelines would unjust or inappropriate in a particular case

**CIVIL PROCEDURE - CONTROLLING AUTHORITY - WRITTEN JUDGMENTS** - Where the written judgment varies from the court's oral pronouncements, the written judgment controls and is presumptively the chancellor's true decision, even if the written judgment was prepared by one of the parties rather than the chancellor himself

**FAMILY LAW - CHILD SUPPORT - COLLEGE EXPENSES** - The duty to require a parent to finance their child's college education is dependent upon the child's aptitude for college, the child's relationship with the parent, and the parent's ability to pay for education without affecting his customary lifestyle

**FAMILY LAW - CHILD SUPPORT - TERMINATION OF SUPPORT** - The duty to support a child terminates upon the emancipation of the child when the child: attains the age of twenty-one years, marries, joins the military and serves on a full-time basis, or is convicted of a felony and is sentenced to two or more years for committing such felony; alternatively, courts have upheld the enforceability of parties' contractual agreements to provide post-emancipation support during the child's college attendance

**CIVIL PROCEDURE - MOTION PRACTICE - MOTION FOR CONTINUANCE** - Miss. R. Civ. P. 6(d) provides that a written motion, other than one which may be heard ex parte, and notice of the hearing shall be served not later than five days before the hearing unless a different period is fixed by the rules or by order of the court

## **FACTS**

John Capocaccia Jr. and Lucy Capocaccia filed for divorce in January 2018. At the time of the divorce, John and Lucy had three minor children. In August 2018, the chancery court entered a temporary relief order ("August Order") granting John physical custody of the minor children on a temporary basis and responsibility to pay for the custody, care, and cost of maintenance for the three minor children. The August Order specified that Lucy was not to pay child support. The chancery court emphasized that the August Order was temporary. In October 2020, John's child-support obligation was modified to \$1,500 a month, and all other provisions established in the August Order remained in effect. In January 2021, the chancery court held a hearing on John and Lucy's filings and remaining issues where both presented evidence regarding Lucy's complaint for divorce, Lucy's motion to cite John for contempt and to revise child support, and John's counter-claim for divorce. In September 2021, Lucy filed another motion for contempt against John, alleging he failed to communicate with her about the children and failed to timely pay child support. John filed a contempt motion against Lucy, alleging that Lucy interfered with his visitation with their youngest child. In December 2021, the chancery court entered an order ("December 7 Order") holding John in contempt of the August Order and directing him to reimburse Lucy \$50,118.07. The December 7 Order mandated that John pay Lucy the money or make satisfactory arrangements with Lucy within sixty days of the December 7 Order. The next day, the chancery court held a hearing on Lucy's contempt claims for John's failure to communicate with her and to pay his child support obligation, and on John's contempt claim for Lucy's interference with John's visitation rights of their youngest child. The chancery court found both John and Lucy in contempt and directed John and Lucy's attorneys to prepare contempt orders against the other. Upon John's request, the chancery court directed both John and Lucy to include a provision that agreed they would stay any motions, requests, or appeals until the final order on the divorce was issued. John and Lucy's contempt orders were entered and were made effective as of December 8 ("December 16 Contempt Orders"). However, both December 16 Contempt Orders failed to reference a stay of the filing period for motions and appeals for the other orders. The stays solely referred to each December 16 Order. The first December 16 Order held John in contempt for his failure to communicate with Lucy about the children's needs. The second December 16 Order held Lucy in contempt for her interference with John's visitation rights. In January 2022, the chancery court issued its final order granting John a divorce on the grounds of adultery, John and Lucy joint legal and physical custody of the three minor children, and ordered John and Lucy to continue alternate weekly visitation. John was ordered to pay Lucy \$500 a month per minor child, for a total of \$1,500 a month, to be reduced by \$500 as each minor child reaches the age of majority or becomes emancipated. The calculation for the child-support obligation was based on John's testimony that his income was

\$58,000 a year. The chancery court ordered John and Lucy to contribute equally to the reasonable expenses of the children attending and completing college and to necessary medical expenses of the minor children, and John to maintain health insurance for the minor children until they become ineligible. No post-emancipation agreement between John and Lucy existed on the record. The chancery court denied all other requested relief not specifically addressed in the final order. On January 24, 2022, John emailed a motion for reconsideration to the chancery court requesting the chancery court to reconsider the award of child support to Lucy, asserting that the chancery court failed to address the equitable divisions of Lucy's and John's assets and debts. John's motion for reconsideration also requested the chancery court to alter, amend, or vacate the final order. Lucy emailed the chancery court her response to the motion for reconsideration two days later. The chancery court denied John's motion for reconsideration, finding that John's motion to reconsider had not been timely filed within ten days of the entry of the final order as required under Miss. R. Civ. P. 59 and that John had failed to make a claim or offer evidence supporting relief under Miss. R. Civ. P. 60(b). John timely appealed the chancery court's final order of divorce and the order denying his motion to reconsider. In March 2022, Lucy filed another motion for contempt against John for failure to comply with the December 7 Order, alleging he failed to pay her \$50,118.07 nor discussed a satisfactory arrangement for repayment with her within sixty days of the December 7 Order. John was ordered to appear at a hearing in April 2022. John entered a motion for a continuance because John's counsel had a scheduling conflict with the hearing. On the day of the hearing, John's counsel filed his entry of appearance and other motions. John's counsel argued John's motion for continuance, requesting a continuance to allow them to complete discovery and exchange updated Rule 8.05 financial statements. The chancery court denied John's motion to continue the April 2022 hearing because John stated no valid reason for failing to file the motion to continue earlier. The chancery court held a hearing for Lucy's contempt claim against John for failure to pay the \$50,118.06 to Lucy. John testified that he did not pay the monetary judgment because he believed the final order for divorce did not incorporate that monetary judgment. The chancery court entered another contempt order, finding John in contempt for his failure to pay the monetary judgment pursuant to the December 7 Order. The chancery court ordered John to be incarcerated for thirty days or until he purged himself of contempt. John appealed.

## **ISSUES**

Whether the chancery court erred in (1) equitably dividing John and Lucy's marital property; (2) ordering child support payments in excess of the statutory guidelines; (3) holding John in contempt for failing to comply with the August Order; (4) ordering John to pay for the attendance and completion of college for the children beyond the age of majority; (5) failing to grant John a continuance for the April 2022 hearing; and (6) holding John in contempt of the December 7 Order.

## **HOLDING**

(1) Because the chancery court failed to reference or discuss John and Lucy's debts and assets using any *Ferguson* factors, there was a lack of findings regarding the equitable division of the marital estate, and the chancery court erred in dividing John and Lucy's marital property. (2) Because the chancery court's final order failed to discuss or reference John's income or the statutory guidelines for child support, because the chancery court ordered John to pay child support in excess of Miss. Code Ann. § 43-19-101's presumption without making any writing or specific findings that application of Miss. Code Ann. § 43-19-101 would be unjust or inappropriate, the chancery court erred in ordering John to pay \$1,500 a month in child support. (3) Because the December 7 Order was when the chancery court held John in contempt of the August Order, because neither December 16 Contempt Order referred to a stay of the filing period for post-trial motions and appeals related to the December 7 Order, because the chancery court's written orders never extended the deadline for filing post-trial motions and appeals related to the December 7 Order, and because John failed to file a notice of appeal for the December 7 Order within thirty days, the chancery court did not err in holding John in contempt for failing to comply with the August Order. (4) Because the chancery court provided no evidentiary support of the children's aptitude for college, the children's relationship with John, or John's ability to pay for college education without affecting his customary lifestyle, and because John and Lucy did not agree to provide post-emancipation support during the children's college attendance, the chancery court erred in ordering John to pay for the attendance and completion of college for his children. (5) Because John filed his motion to continue on the date of the hearing, because the chancery court concluded that John offered no valid reason for failing to timely file his motion for a continuance, and because John and Lucy had participated in multiple proceedings over the course of several years related to Lucy's contempt motion at issue in the April 2022 hearing, the chancery court did not abuse its discretion in denying John's motion for

a continuance for the April 2022 hearing. (6) Because John failed to provide evidence that the December 7 Order was a temporary order, because John failed to timely appeal the December 7 Order, because John admitted that he made no attempts to comply with the December 7 Order requiring him to pay Lucy \$50,118.07 and to communicate with Lucy regarding arrangements to pay the monetary judgment, and because the contempt orders were not vague or ambiguous, the chancery court did not err in holding John in contempt of the December 7 Order. Therefore, the Court of Appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part the judgment of the Bolivar County Chancery Court.

**Affirmed in Part; Reversed & Rendered in Part; Reversed & Remanded in Part - 2022-CA-00129-COA (Oct. 17, 2023)**

Opinion by Judge Smith

Hon. Willie James Perkins Sr. (Bolivar County Chancery Court, Second Judicial Dist.)

A. E. (Rusty) Harlow Jr. & Kathi Chrestman Wilson for Appellant - Charles M. Merkel Jr. & Yeager Matthews Bass for Appellee

**Consolidated with:**

**Affirmed - 2022-CA-00408-COA (Oct. 17, 2023)**

Hon. Willie James Perkins Sr. (Bolivar County Chancery Court, Second Judicial Dist.)

A. E. (Rusty) Harlow Jr. & Kathi Chrestman Wilson for Appellant - Charles M. Merkel Jr. & Yeager Matthews Bass for Appellee

Briefed by [Youssef Kishk](#)

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

[Click here to view the full opinion](#)

## MCALPIN V. ILL. CENT. R.R. CO.

### CIVIL - OTHER

**CIVIL PROCEDURE - DISCOVERY - CONTROL** - The control of discovery is a matter committed to the sound discretion of the trial judge

**CIVIL PROCEDURE - FAILURE TO COMPLY - DISMISSAL WITH PREJUDICE** - The law favors trial of issues on the merits; however, where the record shows that a plaintiff has repeatedly disregarded the procedural directives of the court, a dismissal with prejudice is likely to be upheld

**CIVIL PROCEDURE - DISMISSAL WITH PREJUDICE - APPELLATE REVIEW** - In reviewing a trial court's dismissal for discovery violations, appellate courts consider (1) whether the discovery violation resulted from willfulness or an inability to comply; (2) whether the deterrent value of Miss. R. Civ. P. 37 could not have been achieved through lesser sanctions; (3) whether the other party's trial preparation has been prejudiced; (4) whether the failure to comply is attributable to the party itself, or their attorney; and (5) whether the failure to comply was a consequence of simple confusion or a misunderstanding of the trial court's order

### FACTS

In March 2021, Lucian F. McAlpin III filed a negligence lawsuit against Illinois Central Railroad Company ("Illinois Central") alleging he was exposed to cancer-causing substances resulting in his development of head and neck cancer. In April 2021, Illinois Central answered the complaint and attached its first set of interrogatories and requests for production. Illinois Central filed a motion to compel in August 2021, pointing out that the interrogatory responses were originally due in May. Illinois Central explained that the parties agreed to an extension in May, but McAlpin failed to respond by the agreed-upon deadline. The trial court entered a consent order, in which the parties agreed that McAlpin would have fourteen days from September 7, 2021, to respond to the discovery requests. McAlpin once again missed the deadline. McAlpin argued in October 2021 that an additional fourteen days were needed due to his out-of-state counsel leaving their firm. The trial court granted another time extension, giving McAlpin until November 1, 2021, to respond; McAlpin missed this deadline. On November 2, Illinois Central moved to dismiss the case with prejudice. McAlpin responded by arguing that the discovery violation was cured by providing responses after the deadline. On December 6, the trial court held that McAlpin's discovery responses were wholly inadequate. Further, the trial court issued monetary sanctions against McAlpin and ordered that McAlpin submit complete and meaningful discovery responses within thirty days. The parties entered into a scheduling order which gave McAlpin until January 5, 2022, to

respond. On the day of the deadline, McAlpin moved to amend the scheduling order, requesting an additional thirty days or until July 2022. McAlpin argued that he could not properly answer the interrogatories because he did not have an expert's deposition testimony. In March 2022, the trial court granted Illinois Central's second motion to dismiss with prejudice for failure to comply with three separate discovery orders. McAlpin appealed.

### ISSUES

Whether the trial court erred by (1) denying McAlpin's motion for additional time to comply with the trial court's order and (2) dismissing the case with prejudice.

### HOLDING

(1) Because the trial court explained to McAlpin's counsel that there would be no more extensions and because McAlpin did not file his motion for additional time until the time to comply with the thirty-day extension had arrived, the trial court did not err by denying McAlpin's motion for additional time to comply with the trial court's order. (2) Because McAlpin did not provide any indication that another extension of the deadline would have led to compliance with the discovery orders, because McAlpin's counsel's actions depicted a repetitive disregard for the procedural directives of the trial court, and because the trial court had already shown leniency by denying the first motion to dismiss, the trial court did not err by dismissing the case with prejudice. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

**Affirmed - 2022-CA-00334-COA (Oct. 17, 2023)**

Opinion by Judge Westbrook

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

James Michael Priest Jr. for Appellant - Stephanie Camille Reifers for Appellee

Briefed by [Joshua Arias](#)

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

[Click here to view the full opinion](#)

---

## ***COURT OF APPEALS - CRIMINAL CASES***

### **RUSSELL V. STATE**

#### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - CONTEMPORANEOUS OBJECTIONS - PLAIN ERROR** - A party who fails to make a contemporaneous objection at trial must rely on plain error on appeal; plain error requires a showing that the outcome of the trial was prejudiced; prejudice is often lacking when the weight of the evidence against the defendant is overwhelming

**EVIDENCE - WITNESS NARRATION - PERMISSIBILITY** - A witness is allowed to narrate video evidence when they are simply describing what is transpiring in the video

**EVIDENCE - WITNESS NARRATION - IMPERMISSIBILITY** - A witness's video narration is impermissible if the witness attempts to put their own subjective interpretation of the events transpiring in the video based only on the witness's inspection of the contents of the videotape

**CRIMINAL PROCEDURE - TRIAL STRATEGY - COUNSEL'S DECISIONS** - Counsel's choice of whether or not to call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy

### **FACTS**

Allen Russell was charged and convicted for the first-degree murder of Bobby Gwin. Gwin checked into room 114 of a hotel ("room 114"). The day after Gwin checked in, and the day before the murder, Russell arrived at room 114. Hattiesburg officers responded to a reported shooting in room 114. When the officers arrived, they saw Gwin in the corner shot four times. Officers found vomit on the carpet next to Gwin and a hospital bill with Russell's name on it.



Lieutenant Dale Bounds, Detective Jeremy Dunaway, and Detective Chadra Daniels testified at trial. At the hotel, Lieutenant Bounds and Detective Dunaway watched the hotel surveillance footage. During Detective Dunaway's direct examination, the State did not question him about the surveillance footage. The subject of the surveillance video and what appeared on the footage did not occur until Detective Dunaway's cross-examination before it was entered into evidence. Detective Dunaway stated that Russell was seen on the surveillance video fleeing from room 114 with what appeared to be a firearm in his hand. Russell repeatedly questioned Detective Dunaway about what proof he had to support his statements and about whether the surveillance video clearly showed Russell leaving room 114 holding a firearm. On redirect, the State then asked Detective Dunaway about Russell in the surveillance video. The surveillance video and photographs taken from it were introduced into evidence during Lieutenant Bounds's direct testimony. Lieutenant Bounds testified that the surveillance footage showed a man leaving room 114 in a hurry and described what the man was wearing. Lieutenant Bounds testified that they found similar clothing to the man from the surveillance footage in Russell's apartment. After conducting testing, the DNA obtained from Russell matched the DNA from the vomit on room 114's carpet. Without objection from Russell, Lieutenant Bounds affirmatively identified Russell as the man seen on the hotel's surveillance video. Lieutenant Bounds relayed the other evidence connecting Russell to the crime scene after Russell asked if the entire case was based on the surveillance video. Further, Lieutenant Bounds testified that no one else had entered room 114 after Russell had left, and there was no evidence to suggest that someone else might have been involved in Gwin's murder. Detective Daniels was then called as a witness by the State and testified that she had reviewed the surveillance footage and created a timeline based on the footage. During Detective Daniels's testimony, Russell objected to the State reading off the document of the timeline because the surveillance footage was in evidence and did not need to be narrated. However, Russell's counsel stated that it was okay with Detective Daniels testifying what she believed the surveillance video depicted as long as the State did not. The trial court overruled Russell's objection, arguing that Detective Daniels testified regarding events not depicted in the surveillance video. Russell did not object to Detective Daniels identifying the man in the surveillance video as Russell. Instead, Russell's counsel repeatedly conceded that Russell was in room 114. In closing arguments, Russell used the surveillance video and related testimony to cast doubt that Russell shot Gwin and that the item Russell dropped after he left room 114 was not a firearm. The jury ultimately found Russell guilty of first-degree murder. The trial court denied Russell's motion for judgment notwithstanding the verdict or a new trial. Russell appealed.

## **ISSUE**

Whether the trial court erred in allowing Detective Daniels to narrate the events depicted in the surveillance video while the footage played for the jury.

## **HOLDING**

Because Russell did not object to Detective Daniels identifying Russell as the suspect in the surveillance footage at trial, because Detective Dunaway and Lieutenant Bounds had already similarly testified that Russell was the suspect seen in the surveillance video without objection from Russell, because Russell continually prompted testimony of personal observations to support the statements that Russell was the suspect seen in the surveillance video, and because Russell attempted to use the surveillance video and the testimony about it to Russell's strategic advantage, the trial court did not err nor plainly err in allowing Detective Daniels to narrate the events depicted in the surveillance video while the footage played for the jury. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

### **Affirmed - 2022-KA-00447-COA (Oct. 17, 2023)**

Opinion by Judge Smith

Hon. Jon Mark Weathers (Forrest County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Allie Zaring](#)

Edited by [Kara Edwards](#) & [Ashley House](#)

[Click here to view the full opinion](#)

**MISSISSIPPI CASES EDITORS**  
**ASHLEY HOUSE & MASON SCIONEAX**

**ASSOCIATE CASES EDITORS**  
**EMILEE “EMME” CROCKER**

**KARA EDWARDS**  
**KENNEDY GERARD**  
**DOUG REYNOLDS**  
**THOMAS SIMPSON**  
**KAYLA TRAN**

*Thank you for supporting the Mississippi Law Journal.*

Questions or comments: Ashley House & Mason Scioneaux, [newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org)

*All BriefServ subscribers traditionally receive access to our website with archived case briefs since January 2007.*

*Our BriefServ Archive is available to subscribers at <https://mississippilawjournal.org/briefserv/>. Currently, our digital database is still being updated with previous editions of the Newsletter. Requests for previous editions of the Newsletter not yet available in the BriefServ Archive can be made to Ashley House or Mason Scioneaux, [newsletter@mississippilawjournal.org](mailto:newsletter@mississippilawjournal.org). If you have questions about accessing or using the BriefServ website, please contact us at [support@mississippilawjournal.org](mailto:support@mississippilawjournal.org)*