No. 23-_____

In The
Supreme Court of the United States

McINNIS ELECTRIC COMPANY,

Petitioner,

v.

BRASFIELD & GORRIE, LLC,
and JAMES MAPP,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Federal Arbitration Act allow use of the rules of an arbitral association in the text of a boilerplate, or form, arbitration agreement to prove that the non-drafting party had delegated away to arbitration, all of its rights to judicial determination of the scope of the agreement or other aspects of the arbitrability of all claims between the parties?

2. When there is a dispute over the delegation of arbitrability, particularly one arising from a boilerplate arbitration agreement, is a "clear manifestation of intent" by the non-drafting, non-demanding party to be considered by a court as a burden of proof, or is it a legal standard that can be met by the writing in the agreement alone, and which party would have the burden of proof?

PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The Petitioner (Plaintiff-Appellant below), is McInnis Electric Company, a privately held corporation, incorporated and headquartered in the State of Mississippi. It has no parent company. No publicly held company owns 10% or more of its stock.

The Respondent (Defendant-Appellee below), Brasfield & Gorrie, LLC, is incorporated and headquartered in the State of Alabama.

Respondent (also Defendant-Appellee below), James Mapp, is a natural person who was an employee of Brasfield & Gorrie, LLC.

STATEMENT OF RELATED PROCEEDINGS

This case is related to proceedings in:

The Circuit Court of Hinds County, Mississippi, First Judicial District, in which this case was *McInnis Electric Company v. Brasfield & Gorrie, LLC, and James Mapp*, No. 25CI1:21-cv-00190-WLK. Final judgment, by Order Granting Defendants' Motion to Compel Arbitration and for Stay, was entered on September 13, 2021. App. 21.

The Supreme Court of Mississippi, styled *McInnis Electric Company v. Brasfield & Gorrie, LLC, and James Mapp*, No. 2021-CA-01115-SCT, consolidated with No. 2021-TS-01300-SCT. Judgment was entered

STATEMENT OF RELATED PROCEEDINGS – Continued

on October 19, 2023, App. 1, and rehearing denied on December 14, 2023. App. 27.

On January 2, 2024, the Supreme Court of Mississippi granted Appellant McInnis's Motion for Stay Pending Petition for Writ of Certiorari until April 1, 2024. App. 25.

On March 18, 2024, the Supreme Court of Mississippi extended Appellant McInnis's Motion for Stay Pending Petition for Writ of Certiorari until April 15, 2024.

The United States District Court for the Southern District of Mississippi, in which is pending but stayed *Brasfield & Gorrie, L.L.C. v. The Hanover Insurance Company*, No. 3:23-cv-00085-DPJ-ASH. That action was stayed on January 8, 2024, pending resolution of the state appeal and the Petition now before this Court. App. 41.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, McInnis Electric Company, respectfully petitions for a writ of certiorari to review the decision of the Mississippi Supreme Court.

OPINIONS BELOW

The Supreme Court of Mississippi's opinions are not yet reported but are available at 2023 WL 6889119 and at 2023 Miss. LEXIS 284, at *1 (Coleman, J.) and at *5 (Kitchens, J.). The opinions are reproduced at App. 1 and 13.

The final order of the Seventh Circuit Court District of Mississippi, Circuit Court of the First Judicial District of Hinds County, Mississippi, (Kidd, J.), is unpublished and is reproduced at App. 21.

JURISDICTION

The Supreme Court of Mississippi entered judgment on October 19, 2023. App. 1. It denied rehearing on December 14, 2023. App. 27.

On March 1, 2024, Circuit Justice for the Fifth Circuit, the Honorable Samuel A. Alito, Jr., granted Rule 22.3 Application 23A804, to extend the time to file this petition for writ of certiorari until and including April 15, 2024.

This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. CONSTITUTIONAL PROVISIONS

The Fifth Amendment Due Process Clause

No person shall be. . . . deprived of life, liberty, or property, without due process of law. . . .

The Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment Due Process Clause

[N]or shall any State deprive any person of life, liberty, or property, without due process of law, ...

B. STATUTORY PROVISIONS

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq*., which is reprinted in whole in the Appendix. App. 44.

INTRODUCTION

A century ago, the Federal Arbitration Act guaranteed businesses had access to fast, secret, but reliable resort to expert, disinterested, and qualified third parties to settle their arguments. The FAA ensured properly arbitrated settlements would be enforced in federal courts. The basis for that propriety was the disputants' *choice* for private dispute resolution over the courtroom.

Starting during the New Deal, industrial-labor arbitration proved useful during the vast industrial realignments of World War II. And, it seemed a permanent fixture when a million GIs returned to the civilian workforce.

The consumer revolution, mass markets, and the Internet turned arbitration from a balance between equals to a form of aggregated risk management. Along that way, it gained the risk of exploitation. More arbitral agreements were bundled into pre-printed retail contracts, and doubts of the fairness of the veiled system grew.

Today, consumers and small companies fear arbitration's costs and the risk of being an outsider playing an insider's game. And, well they might; there are always a few tricks available to the best lawyers and the highly skilled negotiators.

This case brings, again, to the Court one of those tricks, which is the subtle capture of future choices to arbitrate particular claims in an arbitration

agreement. Fundamental and substantive rights can unknowingly be lost when a party agrees to a boilerplate agreement that delegates arbitrability through a reference to arbitral rules. Often the trick is innocent, or the parties clever, and no harm follows. Yet in this case, as in many others, such an outcome is hardly true.

STATEMENT OF THE CASE

Building a Clinic for the Children of Mississippi

On May 31, 2017, Mississippi Children's Hospital, a division of the University of Mississippi Medical Center in Jackson, Mississippi, awarded a prime construction contract to dramatically expand the hospital. Its $180 million price was raised from both state funds and private gifts.

The prime contractor, global construction firm Brasfield & Gorrie, LLC, ("B&G") committed to build the seven-story, 340,000 square-foot tower, to break ground on December 4, 2017, and to complete work in August 2020. *See* Ground-Breaking Kicks Off Construction of Pediatrics Tower: $180 Million Project Partially Funded Through Private Giving (Dec. 4, 2017) online at https://www.umfoundation.com/2017/12/05/groundbreaking-kicks-off-construction-of-pediatrics-tower/ (last visited April 9, 2024).

B&G drafted and negotiated the prime contract that the University of Mississippi awarded, and B&G included the terms of the subcontracts that B&G

would later issue in response to its bidding process in each construction specialty. B&G entered into Subcontract 17134026-01, with McInnis Electric Company ("McInnis Electric" or "McInnis"), for all required electrical installations, at a price of $17.228 million.

Other than price, labor, and time, no terms were open to negotiation between the parties. B&G had specified all other terms in advance, in the prime contract, and these terms were unalterable. See App. 28.

The Subcontract is an archetype of boilerplate. Twenty-four unrelenting pages of small print, including 33 articles that incorporate 138 paragraphs. A summary page at the top and seven tables at the bottom are the few pages that contained all terms specific to McInnis Electric, the electrical work, or even the Children's Hospital. The two dozen pages of boilerplate in the middle had first been printed two years earlier. Id.

Despite print so fine its pages are crammed near to darkness, the Subcontract's cover sheet is nearly a white field of emptiness. Among its few occupants is a single sentence in large font:

"THIS CONTRACT IS SUBJECT TO ARBITRATION."

Twelve pages later, ARTICLE 29–CLAIMS AND DISPUTES: ARBITRATION comprises at least eight distinct agreements, including a predicate claims procedure and provisions for civil litigation. Paragraph 29.4 contains most of the terms related to arbitration, and it is

referred to in Paragraph 29.5 as "the agreement to arbitrate set forth in Paragraph 29.4." App. 32-34.

Though several issues later arose between the parties from Paragraph 29.4, in the posture of the case now before this Court, only one sentence is in issue: a sentence which happens awkwardly to fall in the Subcontract on the turn from page 13 to page 14:

> "Except as provided in Paragraph 29.5, any disputes between Contractor and Sub-contractor not resolved under Paragraph 29.2, including any disputes in which Subcontractor has a claim against another subcontractor, shall be finally determined by binding arbitration in accordance with the current Construction Industry Rules of the American Arbitration Association by one or more arbitrators selected in accordance with said Rules."

App. 32. To ease your reading of the rest of this Petition, we will call that sentence the "Delegation Sentence."

Paragraph 29.4 continues; it is 543 words long. It creates contingent obligations that unilaterally burden the Subcontractor as well as powers held only by the Contractor, who may exercise them later in its sole discretion. These and other detailed conditions were printed as being agreed by the Subcontractor to have been valued by the Subcontractor as if the Subcontractor sought their burdens, or would have considered seeking them. App. 32-34.

The various powers, agreements, and obligations printed in paragraph 29.4's boilerplate specifics, and the other seven paragraphs of Article 29, might have been relevant to the merits of the disputes between the parties. But, as will be seen in the next section of this Statement, the parties have yet to resolve their disputes.

Everything Falls Apart

The project did not have a promising start.

Time of performance was one of the few terms actually negotiated in the contract. B&G and McInnis had agreed McInnis would commence work on-site on February 15, 2018. App. 4, 111. B&G, however, directed McInnis not to report to the project site until June 4. Owing to additional delays, B&G did not allow McInnis to begin work until July 23, 2018. Id.

The first stage of McInnis's work, however, began well, with the successful construction of a complex, underground web of conduits. Or, it would have been successful but the concrete subcontractor damaged the electrical installations, requiring repairs and causing more delays. App. 4-5, 1112-113.

By August 1, 2019, construction was six months behind the contracted schedule. By fall 2019, nearly a thousand RFIs and related queries had issued, which among other problems suggested that there were problems with the plan's drawings. App. 4-5, 112.

Through the winter of 2019-20, McInnis claims its work was complicated and further delayed by B&G's failure to coordinate the work of other contractors properly so that the electrical installations could be completed, essentially, after the necessary precedents by other trades. App. 4-5, 112.

Then the real problems started.

On March 11, 2020, COVID-19 was reported in Mississippi. App. 5, 115.

Five days later, the National Electrical Contractors Association and the National Electrical Union announced their national disease emergency response agreement. McInnis is a union shop, and it informed B&G of the notice. Further, on March 24, 2020, McInnis presented B&G with a list of COVID-19 related concerns for workplace safety. Id.

Far from implementing health and safety measures, B&G "squeezed" McInnis's schedule and required McInnis to replace workers lost to the disease with workers who had been let go from another job site, recently shut by COVID-19. The temporary replacement workers' close proximity to McInnis's team increased the potential for infection. App. 5-6, 116-117.

As the project's timeline deteriorated, a B&G supervisor, Respondent James Mapp, is alleged to have expressed his dissatisfaction with McInnis's work by destroying McInnis's supplies stored on the job site. App. 113.

On April 1, 2020, Mississippi Governor Tate Reeves instituted a shelter in place order which required nonessential businesses to close, and recommended social distancing to slow spread of the virus. His Executive Order 1463 provided that building and construction should halt, except for essential maintenance of preexisting infrastructure. Building the new wing of the children's hospital was not exempted from the state's orders. App. 6.

By May 8, 2020, approximately 40 percent of McInnis's workforce tested positive for COVID-19. Even so, B&G refused to excuse McInnis from immediate performance under the subcontract obligation. McInnis took measures to continue the work, including paying workers $94,000 in hazard pay to keep them onsite. Despite such efforts, and perhaps encouraged by McInnis's efforts to protect the workers, on May 13, 2020, B&G terminated McInnis's subcontract, claiming McInnis had breached its obligations to provide timely work of sufficient quality and to supply adequate material. App. 6-7, 117-119.

The Teams Try to Play, but They Want Different Umpires

Following B&G's termination of McInnis, the parties began to negotiate their claims. During the negotiation, McInnis determined that B&G was preparing an imminent demand for arbitration. McInnis filed this action to forestall such a demand. App. 7.

McInnis argued that its suit raises issues beyond the scope of the arbitration agreement in the subcontract, which McInnis did not consent to arbitrate and are therefore not arbitrable. App. 119-123.

McInnis argued that the suit sought to enforce the subcontract and to recover damages from harm it claims to have suffered from B&G, particularly through its alleged breaches of its express and implied duties thereunder. However, the suit also complained of B&G's demands for work outside the scope of the contract, in violation of law and public policy. And, the complaint further alleged intentional torts by B&G through its employee Mapp, whom it also alleged committed intentional torts and crimes by trespass to chattel and the conversion of a pallet of steel conduit that McInnis had stored at the job site. Id.

Most particularly, McInnis demanded that the issues of arbitrability be determined in the first instance by a court of law, and not by arbitration. App. 7, 144-166.

The circuit court held an initial hearing on the arbitration issues on August 23, 2021, and on August 25, 2021 granted McInnis a temporary stay. App. 23. However, on September 13, 2021, the trial judge granted B&G's motion in an order to stay the case while remanding for arbitration. App. 21.

The trial court's analysis and findings amounted to a half page holding two conclusions: it found "a valid and enforceable arbitration agreement exists between the parties" and it found "disputed subject matter falls

within the scope of the arbitration agreement." Accordingly, "all procedural issues related to the scope of the agreement shall be determined by the Arbitrator." Id.

Thus the Court merged the questions of delegation and arbitrability into the question of the existence of an arbitration agreement, which was seemingly without any limit in its scope. It ignored all facts but the text of the subcontract, mainly the Delegation Sentence.

McInnis appealed.

The Mississippi Court's Muddle

Owing to the procedural setting of the appeal of the denial of the stay of arbitration, which was merged with the appeal of the order as a final appeal, the Mississippi Supreme Court rightly adopted the facts as McInnis had pled them, to be the facts that were then subject to appellate review.

The majority's analysis commences by citing Mississippi precedent for resolving disputes over arbitration disputes under the FAA and the state common law of arbitration. *Scruggs v. Wyatt*, 60 So. 3d 758 (Miss. 2011), requires courts to determine "first, whether the parties intended to arbitrate the dispute, and second, if they did intend to arbitrate, 'whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.'" *Scruggs*, 60 So. 3d at 766 (¶ 17). App. 10.

Accordingly, the Court found that the written agreement was sufficient to prove the parties "intended to arbitrate" *the* dispute, whichever one that was. The Court then analyzed not, in fact, one of the alleged legal constraints against arbitration of the question of arbitrability, but one of the arguments to find arbitrability.

The legal constraint the Court considered? Whether the Delegation Sentence's reference to the AAA's rules was sufficient evidence that the parties "had manifested their intent to be bound by such rules and the assignment of the scope of arbitrability as determined under the group's rules. Agreeing to the American Arbitration Association rules is tantamount to agreeing to delegate scope questions to the arbitrators." Id. at 10-11.

The Court does not appear to have read the AAA rule in question, much less to have analyzed that rule in any further context. It cited the AAA rules in general from their web site, and recited a truncation of that rule, quoted in an earlier opinion, *Arnold v. Homeaway Inc.*, 890 F.3d 546, 552 (5th Cir. 2018), by a Fifth Circuit panel that likewise did not appear to have read, much less studied, the rule. The *Arnold* court quoted an earlier panel's reading of the rule instead. *Id.*, quoting *Petrofac, Inc. v. Dyn-McDermott Petroleum Operations Co.*, 687 F.3d 671, 674-75 (5th Cir. 2012). (The majority would rely on the rule again in summation, this time quoting a more paraphrased form, also cited by a Fifth Circuit panel, in *Green Tree Servicing, L.L.C. v. House*, 890 F.3d 493, 503 (5th Cir. 2018).)

Concluding its analysis of the law that applies to McInnis's subcontract, the court then relied on a case decided several months after B&G and McInnnis had signed their subcontract, *Nethery v. CapitalSouth Partners Fund II, L.P.*, 257 So. 3d 270, 273 (¶ 17) (Miss. 2018), without apparently considering whether it was appropriate to assess the intent of the makers of a contract with a legal standard not yet known in their jurisdiction. The parties' contract had, in fact, adopted the law of the state where the construction was taking place, *i.e.,* Mississippi. The *Nethery* court adopted a holding of the Delaware Supreme Court that adopted "the majority federal view that reference to the [American Arbitration Association] rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." Id., citing *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006), at 80. App. &&&&.

Following several repetitions and variations on this formula, the majority of the Mississippi Supreme Court concluded: "Because both parties entered into an arbitration agreement with specific terms invoking the rules of the American Arbitration Association and because it is within the specific bailiwick of that association to determine arbitrability, we affirm the trial court's decision to compel arbitration." App. 13.

Justice Coleman's opinion was joined by five other members of the Court.

Two justices dissented. Presiding Justice Kitchens, joined by Presiding Justice King wrote,

> Our courts have the prerogative to determine the scope of an arbitration agreement unless the parties clearly and unmistakably contract otherwise, which they did not do here. Further, parties are bound to arbitrate only those matters they intended to be bound to arbitrate. Here, the unforeseen and unavoidable impact of the COVID-19 pandemic on the parties' ability to perform a construction contract was not within the contemplated scope of the arbitration agreement – an agreement that did not contain a force majeure clause. Therefore, I would hold that the trial court erred by granting the defendants' motion to compel arbitration.

App. 13-14.

The dissent's analysis then considered the Delegation Sentence and found very little there. "[T]he arbitration agreement between McInnis and Brasfield & Gorrie (B & G) is devoid of any clear and unmistakable provision." This was not only a question of fact but of law, and the dissent noted that the Texas courts and the Mississippi federal courts had read similar clauses to be inconclusive of any delegation. Id., quoting *Jody James Farms, JV v. Altman Grp, Inc.,* 547 S.W.3d. 624, 632 (Tex. 2018); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, No. 2:12-CV-114-KS-MTP, 2012 WL 12863150 at * 15 (S.D. Miss. Oct. 24, 2012), and *Mem'l Hermann Health Sys. v. Blue Cross Blue Shield of Tex.*, No. H-17-2661, 2017 WL 5593523, at *8 (S.D. Tex. Nov. 17, 2017). Id. at 15-18.

Separately, the dissent raised one of the more obvious "legal constraints external to the parties" required to be considered in Mississippi law, that the 2020 global pandemic and its dramatic effects on a large construction site were clearly beyond the scope of the underlying contract, its arbitration agreement, or the potential delegation agreement that any party could have intended in 2018. The resulting gubernatorial orders and union requirements, not to mention the sickness and loss of workers and supply chain support, were surely constraints external to the parties, regardless of the initial citation to AAA rules in their arbitration agreement. App. 18-20.

The Present Petition

Now – given the facts and legal process as they have unfolded – the parties' efforts fairly to resolve their disputes have run aground upon the rocks of arbitral delegation.

The mist shrouding those rocks emanates from the Delegation Sentence.

The Mississippi courts relied upon that sentence to the exclusion of all other evidence. Indeed, that sentence – coupled with Mississippi's treatment of the sentence's reference to the AAA rules – was immune to even a blithe acknowledgment of the unforeseeability of the underlying issues or to the requirements of Mississippi's general contracts law.

The Mississippi analysis amounts to an irrebuttable presumption that any written agreement, no matter how uninvolved one or both parties were in its drafting, is conclusive – regardless of evidence to the contrary – that a non-drafting party intended to arbitrate everything.

Further, Mississippi includes (within that irrebuttable presumption) a second irrebuttable presumption. If the drafter of the boilerplate even mentions the rules of an arbitral association – in particular if it refers to the American Arbitration Association's rules as those of the arbitration – then the drafter will have captured all issues of delegation for determination by the arbitrator.[1]

Moreover, the drafter will have captured the non-drafter's Constitutional right of access to the courts of law and, in the federal system and some states, the right to a civil jury. Best of all, the non-drafting party will not be warned of any of these difficulties without consulting a lawyer who is highly experienced in the practice of arbitration law.

The analysis of these issues under the Federal Arbitration Act appears to the Petitioner to be a decision by a state court on an important question of federal law in a way that conflicts with relevant decisions of this Court. Further research suggests that the issue

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[1] The perils and promises of boilerplate contracts are explored in Margaret Jean Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013).)

among the lower courts has not been, but should be, settled by this Court.

Therefore, the Petitioner has been hard pressed to accept the legal determinations of the Mississippi courts and considers three issues under the Federal Arbitration Act to be in doubt in this case and to have significant implications to federal law:

Did the Delegation Sentence amount to a Delegation Agreement between B&G and McInnis, by which McInnis knowingly delegated to arbitration any later dispute over the arbitrability or adjudicability of any and every legal issue that might arise over the years between the parties?

By signing an adhesive contract with its boilerplate Delegation Sentence, did McInnis voluntarily and clearly manifest its intent to surrender its Constitutional rights, or later, to ask a court of law whether it had given up to B&G its rights to a judicial or jury trial on the merits of the claims McInnis had, by then, accrued against B&G?

The substantive claims in issue include more than McInnis's claims about interpretation of the subcontract, about its performance by B&G's employees and other subcontractors, and what both McInnis and B&G claim were breaches of the underlying subcontract. Are these issues of tort and policy somehow subsumed into any delegation of questions of arbitrability of unforeseeable issues arising under or related to the contract?

We note, to avoid confusion later, that McInnis would not later argue that the underlying subcontract was anything but valid and enforceable. McInnis would note, however, that under Mississippi law, claims it later asserted over B&G's later acts were not foreseen in the making of the contract and that, as intentional torts, unlawful acts, and threats to the life and health of McInnis's employees, they would not be subject to arbitration even if the claims under the subcontract would be.

REASONS TO GRANT THE PETITION

I. The Circuit Courts and State Courts Present Many and Varied Conflicts in their Analyses of the Questions Presented.

Mississippi's opinion illustrates the persistent confusion and variation among the state and circuit courts in analyzing the delegation of arbitrability.

There are splits among the Circuits and the States in each of the discrete steps in this analysis: the interpretation of the arbitration and delegation contracts as a matter of state contract law, the application of policies under the FAA, and the determination of whether there is sufficient, clear evidence that the non-demanding party has voluntarily consented to delegate each issue in dispute and each essential aspect of the dispute to the arbitrators for decision, based on reference to arbitral rules alone.

For example *Richardson v. Coverall North America, Inc*., 811 Fed.Appx. 100 (3d Cir., 2020), *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020), and *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022), treated references to the AAA rules as evidence that non-demanding parties actually knew the issues that would later arise and voluntarily agreed to delegate their arbitrability to an arbitrator and surrender their rights to trial by a judge and jury. On the other hand, *American Institute for Foreign Study, Inc. v. Fernandez-Jimenez*, 6 F.4th 120 (2021), *Doctor's Associates, Inc. v. Alemayehu*, 934 F.3d 245 (2d Cir. 2019), *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021), and *Catamaran Corporation v. Towncrest Pharmacy*, 946 F.3d 1020 (8th Cir. 2020), were each much more circumspect as to reference to the AAA rules.

Many courts, like Mississippi, now consider the drafting party's reference to the AAA rules as utterly conclusive of the non-drafting party's voluntary delegation of the issue of arbitrability. See, e.g., *Bossé v. N.Y. Life Ins. Co.*, 992 F.3d 20 (1st Cir. 2021). While other courts require the legal and factual inquiries essential to understanding the intention of both parties in entering an arbitration agreement and an assessment of the contract under the general contract law of the relevant sate. See, e.g., *OTO, LLC v. Kho*, 8 Cal. 5th 111 (2019).

Perhaps the most balanced recent circuit analysis of disputed arbitrability delegation came from the Fifth Circuit, which found a valid delegation

agreement between the parties not owing to slavish recitation of AAA references but resulting from specific evidence that satisfied the appropriate state standard of meeting of the minds in the formation of the delegation agreement. *See Bowles v. OneMain Financial Group, L.L.C.*, 954 F.3d 722, 728 (2020).

A preliminary study of delegation of arbitrability among state courts suggests there are myriad splits among them along similar lines. Compare the Mississippi case in issue here (*McInnis v. B&G*, App. 1) to the conclusory use of AAA rules in *AirBNB, Inc. v. Doe*, 336 So.3d 698 (Fla. 2022) and *Beco v. Fast Auto Loans, Inc.*, 86 Cal.App.5th 292 (Cal. Ct. App., 4th Dist, Div.3, 2022), with *Gandhi-Kapoor v. Hone Capital, et al.*, 307 A.3d 328 (Ct. Ch. Delaware 2023), and *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W. 3d 432 (Mo. 2020), each of which considered evidence specific to the non-demanding party to determine that there was insufficient evidence that the non-demanding party knowingly and voluntarily agreed to delegate essential issues of arbitrability to the arbitrator.

II. The Mississippi Supreme Court Wrongly Analyzed and Applied both its own Law and Federal Law in Applying the FAA.

A. The Mississippi Analysis Violates this Court's Requirements.

The Mississippi Supreme Court's analysis and conclusion are wrong. It patently failed to follow this Court's guidance in *Stolt-Nielsen S.A. v. Animal Feeds*

International Corp., 559 U.S. 662, 675 (2010), that an analysis of a disputed delegation clause should be clearly divided between issues of ordinary contract law to be decided under state law, and issues of federal policy that apply under the Federal Arbitration Act, (FAA), 9 U.S.C. § 1, et seq. See *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015).

Instead, the Mississippi Supreme Court merged its analysis of state contract law with FAA policies, distorting each, in an analysis that failed to assess whether the party who was not demanding arbitration, McInnis, had clearly agreed to arbitrate the various issues in dispute.

> A party may not be compelled under the FAA to [a particular abitration] unless there is a contractual basis for concluding that the party agreed to do so. Stolt-Nielsen S. A., 559 U.S. at 684, citing Lamps Plus v. Varela, 587 U.S., 497, (2019); Epic Systems Corp. v. Lewis, 584 U.S., 407, 506 (2018); AT&T Mobility LLC v. Concepcion, 563 U.S. 533 (2011).

Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 651 (2022), reh'g denied, 143 S. Ct. 60, 213 L. Ed. 2d 1145 (2022).

Furthermore, the Mississippi Court elevated the mere reference to the rules of an arbitration association (whose rules allow an arbitrator to determine issues of arbitrability that have been voluntarily delegated by each party to that arbitrator for resolution) from an interpretative tool of contract law to

federal policy to favor arbitration. Judicial reliance on mysterious references to vaguely applicable rules in an arbitration agreement's delegation agreement cannot substitute for evidence of the non-demanding party's having clearly intended that the arbitrability of the issues in question be delegated to the arbitrator.

This reference to a mysterious document outside the four corners of a boilerplate arbitration agreement is the type of "special, arbitration-preferring procedural rule . . . " that is not allowed under the FAA. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).

B. The Mississippi Result Risks Fundamental Values Protected by the FAA.

The business leaders who encouraged the FAA, and the drafters who created it realized that a balance was necessary to protect both freedom of contract in making an arbitration agreement and the liberties protected by rights to due process, to access to the Courts, and most fundamentally, recourse to the federal jury. The exacting procedures for managing issues of arbitrability that are written into the procedures for federal courts in FAA's sections 4-10 – including the mandatory language related to a jury demand – are strong evidence of the Congressional policy to ensure scrutiny of any claim that a party was compelled to arbitrate a claim against their will.[2] This is a substantive

[2] The careful and thorough histories of Professor Szalai leave no doubts on these scores. See Imre Szalai, *An Annotated*

aspect of the FAA that must, at least, set a high standard for considering the proof necessary to demonstrate a person surrendered their Constitutional rights. That standard is as binding in the state courts as its procedural manifestation is in the federal courts.

Yet, if it were the law of the land, the Mississippi approach would allow numerous subtle drafter's tricks to destroy a non-drafter's Seventh Amendment right to a civil jury trial.

One consequence of judicial acquiescence in this sort of erosion of rights by reference goes beyond diluting this Court's persistent requirement of sufficient proof of the voluntary entry of parties into arbitration. More fundamentally, it creates a moral hazard for the arbitrator.

By shifting the duty to determine the arbitrability of a dispute from a court of law to an arbitrator (or panel of arbitrators), the drafting party has indirectly forced the arbitrator to become a judge with an interest in the outcome of the adjudication. Many private arbitrators rightly command fees for their services that can run hundreds of dollars an hour and thousands of dollars a day. If an arbitrator opens an arbitration and finds plenty of evidence of effective delegation of arbitrability to arbitration, then the arbitrator may enjoy weeks of such compensation. If the

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Legislative Record of the Federal Arbitration Act (2021); –, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013).

arbitrator finds insufficient evidence, the arbitrator loses the job.

In such a fashion are moral hazards made. Oddly, the following statement is not an example of moral hazard, because its incentive is moral and legal, rather than personal and fiscal.

This Court need not consider Mississippi's risks to Congressional policies nor the potential violation of the Petitioner's Constitutional rights, if this Court determines it should grant relief to the Petitioner under the FAA. See, e.g., *Parsons v. Bedford*, 28 U.S. 433 (1830) (Story, J.); *U.S. v. Hansen*, No. 22-179, ___ U.S. ___, ___, 143 S. Ct. 1932, 1946 (2022) (Barrett, J.).

C. Mississippi's Flawed Reliance on Precedents Alone and the AAA Rules to Prove Delegation Is Error.

Neither referring nor incorporating the AAA rules into an arbitration agreement gives notice to a non-drafting party that the party would be delegating issues of arbitrability to the arbitrator.

Many courts have held that when parties use the AAA Rules for arbitration, the parties clearly manifest their intent to delegate issues of arbitrability to arbitration. See, i.e., Pet. 19, *supra*. They were wrong.

The basis for all of these rulings, whether a given court reads the rules or not, is in AAA Rule R-9, in any of the sector-specific rulebooks:

> R-9 Jurisdiction.
>
> (a) The arbitrator shall have the **power** to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.
>
> (b) The arbitrator shall have the **power** to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party **must object** to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

American Arbitration Association, *Construction Industry Arbitration Rules and Mediation Procedures, Including Procedures for Large, Complex Disputes* (2015), online at https://www.adr.org/sites/default/files/ConstructionRules.pdf (Last visited April 9, 2024) (emphasis added).

Judges and lawyers might be told these rules require parties to the arbitration to arbitrate their issues of arbitrability. Yet, the words of the rules do not say

this. Rules R-9-a and R-9-b are structural, not compulsory. They empower the arbitrator to rule on questions of contractual validity or issue arbitrability, but there is no language there saying the parties have already agreed to arbitrate all such issues they may have. The only burdens on a party are in R-9-c: if (the non-demanding party) raises such an issue, it must be timely.

Few lawyers, on their first reading of AAA Rule 9, would discern any commitment of a party, or any requirement on a party, to submit all claims related to that rule to arbitration. Rather, they would properly read the rule like most rules in a set of procedural rules. That is sensible because the AAA rules are, mainly, procedural rules. It is up to the parties to create their own substantive rules.

Of course, some procedural rules have substantive components. It is for an arbitral association to require parties who use their rules or their services to delegate some issues, such as arbitrability, to that arbitration.

For example, the rules of JAMS, the rebranded form of the Judicial Arbitration and Mediation Services, do exactly that, with a rule that is both substantive and procedural. JAMS's Rule 11 clearly states that a party to an arbitration agreement, who refers an arbitration to JAMS, would – if all parties unconditionally accept the rules, thereby delegate all issues of arbitrability to the arbitrator.

JAMS Rule 11(b), *Interpretation of Rules and Jurisdictional Challenges*, provides:

> [A]rbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, **shall be submitted** to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

JAMS Comprehensive Arbitration Rules & Procedures (2021) (emphasis added).

Obviously, the rule expressed in JAMS Rule 11(b)'s first sentence requires that all issues raised by the parties as to arbitrability or scope shall be submitted by the parties to the arbitrator. That rule is directed toward the parties and puts them on notice of their duties.

On the other hand, JAMS Rule 11b's second sentence does not direct the parties to do anything. It is procedural, authorizing (or, empowering) the arbitrator to perform the work that the first sentence required the parties to submit to arbitration.

Thus, the second sentence of JAMS Rule 11b performs the same function as AAA Rule R9-a or b. Both establish the power of the arbitrator to rule on a matter of arbitrability, and neither appears to amount to a delegation of a dispute, in the way that JAMS Rule 11b's first sentence does.

Thus, it is hard to see how a drafting party's reference to the AAA rules would alert any non-drafting

party to suspect they had surrendered their rights of access to a judge or jury, because of the text of Rule 9-a.

But, there is a greater reason to doubt that any reference to such rules—whether AAAs' or JAMS's—can fairly ascribe such intent to a non-drafting party. It is best seen by analogy.

Imagine that two parties are about to sign some sort of agreement. The party who wrote it tells the other that, if they ever have a dispute in the future, it would go to a federal civil process, governed by the Federal Rules of Civil Procedure. They both then sign, and, afterwards, the second party takes the necessary time to read all 87 Rules.

Now, imagine the two parties meet later, and the second party wants to rescind the agreement. The first party refuses to consent and informs the other that they have, of course, agreed that any disagreement like that will be heard by a Magistrate Judge. True or false?

The same logic by which a non-drafting party intends to delegate all issues of arbitrability to arbitration by accepting the AAA Rules or any other arbitral association's would also sustain the surprising "mutual consent" to submit a dispute to a Magistrate Judge under Rule 73, which is printed in full in this Petition's front matter. One just has to imagine that the mutual consent was had in advance.

The more important point of the analogy is that it is unfair to expect a non-drafting party to spot the trap

in the AAA rule alluded to by the drafter's reference to them all.

The FAA requires more evidence than an adhesive contract's boilerplate clause's reference or incorporation of an arbitration association's rules, to "clearly manifest the intent" of a non-drafting party's agreement to delegate to arbitration not only each specific issue later arising between the parties but also to delegate the issue of arbitrability per se.

The more appropriate requirement is that, under the FAA, the party demanding arbitration bears the burdens of persuasion and of proof by clear evidence that the non-demanding party knowingly and voluntarily consented to delegate to an arbitrator each cause of action subject to the demand, as well as arbitrability. This approach would not mean a boilerplate agreement cannot be the basis of a valid delegation, but it does require the party who demands its enforcement to prove it is deserved.

III. The Questions Presented Are Critically Important, and this Case Presents an Ideal Vehicle to Clarify the Muddle Over Arbitrability in the Courts Below.

A. Certiorari in this Matter Is Appropriate Because the Question in this Case Presents Anew the Critical Question Left Open in the *Henry Schein* Case.

In *Henry Schein v. Archer & White Sales, Inc.*, 139 U.S. 524, 531 (2019), this Court had before it a case

remarkably similar to this one. A boilerplate forum selection and arbitration clause specified:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.

Id., at 528.

In that case, the Fifth Circuit found that the clause was insufficient to justify the arbitration, using the now discredited "wholly groundless" rule. The Court, rejecting the lower court's analysis, did not resolve the question of whether a putative delegation clause based entirely in the implication of a reference or incorporation of an arbitral association's rules could amount to a delegation of all or some issues in dispute between the parties to the underlying agreement.

> We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 514

> U.S., at 944, 115 S.Ct. 1920 (alterations omitted).

Id. at 531.

There would be great utility in clarifying this issue, and this case presents it squarely before the Court.

B. This Case Could Restore the FAA's Presumption That Initial Issues of Arbitrability Be Heard in a Court of Law, Enshrining Congress's Original Balance Between the Rights of Parties to Benefit from Their Voluntary Contracts and Their Rights to Due Process of Law and a Civil Jury Trial, Which Balance Was—and Remains—in its Text.

This case is the ideal vehicle to synthesize the Court's recent FAA jurisprudence and to restore the Court's original analysis of the presumption of arbitrability in *United Steelworkers of America, v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).

Original research to prepare this Petition may have located the source of the non-statutory yet hearty vision of arbitration that would force reluctant disputants into arbitration on the slimmest of evidence. That vision took many forms, particularly in the often quoted yet never verified claim that the FAA represented Congress's policy to "favor" arbitration.

The idea that federal law favored arbitration over adjudication was never actually intended to be a part

of America's arbitration law. It entered FAA jurisprudence through an infelicitous transition from *dicta* in one of Justice Douglas's influential *Steelworker Trilogy*: *United Steelworkers of America, v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).

Justice Douglas's opinion in *Warrior and Gulf Navigation* declared that, at the close of evidence in a hearing concerning the scope of an arbitral agreement, any doubts that remained as to the contract's scope of delegation should be "resolved in favor of coverage." That is a line that seems very familiar. Yet as he wrote it, he also wrote an essential and balancing *caveat*. Id. at 583.

Four terms later, the second Justice Harlan cited *Warrior and Gulf Navigation Co.* for the same point, that if there are doubts about the scope of an arbitration contract, questions remaining about the issues in question should be resolved in favor of arbitration. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 659 (1965).

Be that as it may, the *Republic Steel* opinion omitted a footnote from the portion of Justice Douglas's opinion it cited, and that note held the essential caveat: when the party who demands arbitration claims "that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose." Id. at 583 n.7, citing Archibald Cox,

Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508-1509 (1959).

This lost footnote is the key, not only to understanding the skew in judicial analysis of many hundreds of disputed arbitration agreements, but also to one of this Court's most well considered opinions on the appropriate means for assessing questions of delegation and arbitrability. Its restoration is long overdue.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2021-CA-01115-SCT

McINNIS ELECTRIC COMPANY

v.

BRASFIELD & GORRIE, LLC, AND JAMES MAPP

DATE OF JUDGMENT:	09/13/2021
TRIAL JUDGE:	HON. WINSTON L. KIDD
TRIAL COURT ATTORNEYS:	SHIRLEY PAYNE CYNTHIA ANN STEWART DENNIS L. HORN R. LANE DOSSETT RALPH B. GERMANY, JR. SIMON TURNER BAILEY
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DENNIS L. HORN R. LANE DOSSETT SHIRLEY PAYNE LEIGH KATHRYN PAYNE HORN
ATTORNEYS FOR APPELLEES	RALPH B. GERMANY, JR. SIMON TURNER BAILEY RANKIN SUMNER FORTENBERRY
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	AFFIRMED - 10/19/2023
MOTION FOR REHEARING FILED:	

CONSOLIDATED WITH

NO. 2021-CA-01300-SCT

McINNIS ELECTRIC COMPANY

v.

BRASFIELD & GORRIE, LLC, AND JAMES MAPP

DATE OF JUDGMENT:	09/13/2021
TRIAL JUDGE:	HON. WINSTON L. KIDD
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NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	AFFIRMED - 10/19/2023
MOTION FOR REHEARING FILED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. The instant matter stems from disagreements and a broken contract between a contractor and subcontractor allegedly brought on by the COVID-19 pandemic. They contest whether arbitration is appropriate

to settle their disputes. The trial court compelled arbitration, and we affirm.

FACTS

¶2. Construction firm Brasfield & Gorrie, LLC, received the prime contract to expand the University of Mississippi Medical Center Children's Hospital in 2017. Electrical contractor McInnis Electric Company secured the winning bid to install the electrical and low voltage systems package for the project and subsequently signed a subcontract with Brasfield & Gorrie. Terms of the subcontract incorporated the prime contract, which were related to the same project by reference.

¶3. The subcontract signed by both parties states, "THIS CONTRACT IS SUBJECT TO ARBITRATION." It also provides a specific provision regarding "CLAIMS AND DISPUTES; ARBITRATION." There, the parties stipulated that they "intend[ed] that all claims of Subcontractor (McInnis) shall be resolved in accordance with the provisions of the Contract Documents and this Subcontract. . . ." Later in the same article, the process for all claims handled and resolved under a dispute resolution process with the owner, *i.e.*, the children's hospital, is outlined. It further provides as follows:

> any disputes between Contractor and Subcontractor not resolved under Paragraph 29.2, including any disputes in which Subcontractor has a claim against another subcontractor,

> shall be finally determined by binding arbitration in accordance with the current Construction Industry Rules of the American Arbitration Association by one or more arbitrators selected in accordance with said Rules. The parties acknowledge that this Subcontract evidences a transaction involving interstate commerce and that this agreement to arbitrate is enforceable under 9 U.S.C. §§ 1, et seq.[1]

¶4. Additionally, the terms of the contract provided that work was set to begin on the project on February 15, 2018. However, McInnis, was directed not to report on site until June 4, 2018, and, due to delays, was unable to begin until July 23, 2018. McInnis's work began with underground construction of a complex web of conduits, which were successfully installed, with the exception of damage caused by the concrete contractor. As work progressed, the schedule allegedly became delayed as a result of Brasfield & Gorrie's failure to coordinate the work of the various subcontractors. By August 1, 2019, scheduled construction was six months behind. By fall 2019, nearly a thousand Requests for Information and Construction Products Regulation had been issued, revealing significant issues with contractual documents and drawings.

¶5. McInnis avers that Brasfield & Gorrie's failure to coordinate and facilitate the work of the various subcontractors worsened as the project progressed, and

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[1] 9 U.S.C. §§ 1-16 is commonly referred to as the Federal Arbitration Act.

Brasfield & Gorrie experienced turnover in management. For example, the sheetrock contractor and the plumbing contractor were required to complete the patient rooms of the upper floors in specific sequence coordinated with all trades, but allegedly no attempt was made for sequencing. Additionally, there were instances in which patient room electrical conduit installations were delayed because windows and headwalls had not yet been installed by other subcontractors. The failure of these and other predecessor activities allegedly delayed McInnis's work, which was not on the path toward completion, supposedly through no fault of its own.

¶6. Construction issues were amplified when on March 11, 2020, Mississippi experienced its first reported case of COVID-19. Five days later, the National Electrical Contractors Association announced a national disease emergency response agreement with the National Electrical Union. McInnis received such notice and informed Brasfield & Gorrie. On March 24, 2020, McInnis notified Brasfield & Gorrie of workplace safety concerns related to COVID-19, but these concerns were supposedly ignored. Brasfield & Gorrie, realizing that the predecessor activities had resulted in substantial delays, sought to make up for lost time by "squeezing" McInnis. As the threat of the pandemic increased, Brasfield & Gorrie declined to implement additional health and safety measures[2] and instead

[2] In March 2020, the secretary of the United States Department of Health and Human Services issued a declaration

increased contribution to McInnis's workforce through workforce contractor workers from an outside workforce management group. The intermingling of new employees from a job site that had been shut down due to COVID-19 created fear among some workers. As the project and its timeline deteriorated, one of Brasfield & Gorrie's supervisors, Defendant James Mapp, allegedly destroyed McInnis's materials on the job site, evidencing the growing animosity between the companies.

¶7. On April 1, 2020, Governor Tate Reeves instituted a shelter in place order in response to the ongoing pandemic, requiring certain nonessential businesses to close and recommending social distancing to reduce the spread of the coronavirus in Mississippi. Executive Order Number 1463 provided that building and construction should be halted during the ongoing pandemic except for maintaining essential preexisting infrastructure. The children's hospital was not classified as an existing infrastructure as it was a nonoperational work in progress and thus was not subject to the executive order's exception to the governmental shutdowns.

¶8. By May 8, 2020, McInnis had suffered an approximately 40 percent loss in its workforce due to employees testing positive for COVID-19. Despite the decrease in the available workforce, Brasfield & Gorrie demanded McInnis perform under its contractual

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regarding COVID-19 pandemic, requiring counter measures such as N95 respirators/face shields and an infection control program.

obligation. McInnis took measures to continue the work, including making $94,000 in hazard payments to incentivize its workers to remain on site. McInnis also requested a ten-day suspension of the work as an accommodation to finish the work safely.

¶9. On May 13, 2020, Brasfield & Gorrie responded to McInnis's requests by stating that when any worker tested positive for COVID-19, that worker should self-quarantine. The same day, Brasfield & Gorrie issued a detailed response to McInnis's other requests for additional pandemic relief with a letter denying all of McInnis's allegations of potential harm, ignoring Brasfield & Gorrie's expert's directive for added safety precautions, denying the scope of illness in the McInnis workforce, and demanding that McInnis continue to perform or face expulsion from the project. Brasfield & Gorrie further declined requests for accommodation and instead terminated McInnis on May 13, 2020.

¶10. After McInnis's supposed default, the parties conferred. On April 5, 2021, while conferral was ongoing and believing that a demand for arbitration was imminent, McInnis filed the underlying lawsuit. It then amended its complaint. McInnis's complaint attached the prime contract and referenced the subcontract throughout, including allegations that Brasfield & Gorrie committed breach of contract by failing to provide a safe work environment under article 10 of the prime contract and by failing to "stop work . . . once the job site was deemed unsafe" under article 17 of the subcontract. Each count in the complaint, including tort claims, referenced the subcontract.

¶11. Brasfield & Gorrie argues in its brief that in an apparent attempt to defeat diversity jurisdiction and removal, McInnis joined Brasfield & Gorrie Superintendent James Mapp, alleging that he was a Mississippi resident. McInnis alleged that Mapp disposed of a pallet of steel conduit that McInnis left at the job site, claiming that Mapp committed conversion and trespass to chattel. The subcontract required McInnis to keep the job site clean and authorized Brasfield & Gorrie to clean up if McInnis failed to do so. Brasfield & Gorrie ratified and embraced the cleanup work Mapp did on its behalf.

¶12. The circuit court held the initial hearing on the arbitration issue on August 23, 2021, and granted McInnis's motion to temporarily enjoin arbitration in an Order Granting Temporary Restraining Order for fourteen days to "allow the Court to issue an opinion and order." On September 13, 2021, in his final order, the trial judge granted Brasfield & Gorrie's motion to compel arbitration and to stay litigation.

¶13. On October 1, 2021, McInnis petitioned for interlocutory appeal. Since that time, the Mississippi Supreme Court has entered numerous orders. First, on November 30, 2021, we held that McInnis's petition for interlocutory appeal should be deemed a notice of appeal and that the appeal of the matter should proceed under Mississippi Rule of Appellate Procedure 3. A panel of this Court then granted McInnis's motion to stay. Third, the panel passed for consideration along with the merits the motion to dismiss the appeal filed by Defendants. The motion to dismiss was then

withdrawn. On January 20, 2022, the Court ordered the consolidation of McInnis's interlocutory appeal with the appeal of the underlying trial court order. We denied Brasfield & Gorrie's "Motion to Suspend Rules [to] Expedite Appeal."

¶14. On appeal is the trial court's granting of Brasfield & Gorrie's motion to compel arbitration and stay litigation arising from McInnis's original complaint, addressed here in a two-part analysis. First, whether the parties entered into an agreement which requires arbitration, and, second, whether the claims raised by Mcinnis may be compelled under the arbitration agreement.

STANDARD OF REVIEW

¶15. The Mississippi Supreme Court applies "a de novo standard of review to denials of motions to compel" arbitration. ***Covenant Health & Rehab. of Picayune, LP v. Est. of Moulds ex rel. Braddock***, 14 So. 3d 695, 701 (¶ 18) (Miss. 2009) (internal quotation marks omitted) (quoting ***Covenant Health Rehab of Picayune, L.P. v. Brown***, 949 So. 2d 732, 736 (¶ 8) (Miss. 2007), *overruled on other grounds by* ***Est of Moulds***, 14 So. 3d at 702 (¶ 20)). "In reviewing an appeal of an order compelling arbitration, we review the trial judge's factual findings under an abuse-of-discretion standard[.]" ***Virgil v. Sw. Miss. Elec. Power Ass'n***, 296 So. 3d 53, 59 (¶ 11) (Miss. 2020) (internal quotation mark omitted) (quoting ***Smith v. Express***

Check Advance of Miss., LLC, 153 So. 3d 601, 605-06 (¶ 8) (Miss. 2014)).

DISCUSSION

¶16. In analyzing cases in which our court would compel arbitration under the Federal Arbitration Act, as is the case here, we proceed under a two-prong analysis as established in ***Scruggs v. Wyatt***, 60 So. 3d 758 (Miss. 2011). Pursuant to the test, we must determine the following: "first, whether the parties intended to arbitrate the dispute, and second, if they did intend to arbitrate, 'whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.'" ***Scruggs***, 60 So. 3d at 766 (¶ 17).

I. Whether the parties entered into a binding arbitration agreement.

¶17. The United States Supreme Court has held that "[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." ***Howsam v. Dean Witter Reynolds, Inc.***, 537 U.S. 79, 84 (2002). In determining the validity of an arbitration agreement, we look to the parties' intentions. ***Pedigo v. Robertson***, 237 So. 3d 1263, 1267 (¶ 13) (Miss. 2017) (citing ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.***, 473 U.S. 614, 626 (1985)). Here, it is clear that the subcontract binding McInnis and Brasfield & Gorrie is governed by the Federal Arbitration Act and arbitration in general. The agreement is

clearly marked by article 29, which has a heading written in all caps and bold font that states "CLAIMS AND DISPUTES; ARBITRATION[.]" Mcinnis's own complaint states that the subcontract is "a binding contractual agreement."

¶18. Thus, we hold that the parties entered into a binding arbitration agreement as evidenced by their intentions. The terms must now be analyzed for arbitrability.

II. Whether claims raised by McInnis may be compelled under the arbitration agreement.

¶19. McInnis contends that even if the agreement between it and Brasfield & Gorrie is binding and does compel arbitration, the scope of the claims it raises falls outside of the ambit of arbitration. We hold, however, that the scope of arbitration covers all claims, including those brought by McInnis.

¶20. Persuasive case law indicates that parties to an agreement to arbitrate are free to delegate scope questions to arbitrators and "stipulating that the [American Arbitration Association] Rules will govern the arbitration of disputes constitutes such 'clear and unmistakable' evidence" of an intent to delegate. ***Arnold v. Homeaway Inc.***, 890 F.3d 546, 552 (5th Cir. 2018) (quoting ***Petrofac, Inc. v.Dyn-McDermott Petroleum Operations Co.***, 687 F.3d 671, 674-75 (5th Cir. 2012)). In ***Nethery v. CapitalSouth Partners Fund II, L.P.***, 257 So. 3d 270, 273 (¶ 17) (Miss. 2018), we favorably cited a Delaware case, ***James & Jackson,***

LLC v. Willie Gary, LLC, 906 A.2d 76 (Del. 2006). The ***Willie Gary*** Court wrote, "As a matter of policy, we adopt the majority federal view that reference to the [American Arbitration Associartion] rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." ***Willie Gary, LLC***, 906 A.2d at 80. Here, reference to the invocation of the rules of the American Arbitration Association is undisputed.

¶21. McInnis and Brasfield & Gorrie agreed that disputes would be determined "in accordance with the current Construction Industry Rules of the American Arbitration Association by one or more arbitrators selected in accordance with said Rules." There, American Arbitration Association rules[3] expressly "state that arbitrators have power to rule on questions of arbitrability[.]" ***Green Tree Servicing, L.L.C. v. House***, 890 F.3d 493, 503 (5th Cir. 2018).

¶22. When both parties agreed to terms that expressly invoked the rules of the American Arbitration Association, they manifested their intent to be bound by such rules and the assignment of the scope of arbitrability as determined under the group's rules. Agreeing to the American Arbitration Association rules is tantamount to agreeing to delegate scope questions to the arbitrators. ***Arnold***, 890 F.3d at 551- 52 (citing ***First Options of Chicago, Inc. v. Kaplan***, 514 U.S. 938, 944 (1995)). As to scope, we have held that it is

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[3] American Arbitration Association, *Construction Industry Arbitration Rules and Mediation Procedures* (effective July 1, 2015), https://www.adr.org/sites/default/files/Construction_Rules_Web.pdf.

well established that parties may agree on the scope of arbitration in any way they desire. ***B.C. Rogers Poultry, Inc. v. Wedgeworth***, 911 So. 2d 483, 491 (¶ 24) (Miss. 2005). Once that scope is delegated, the Federal Arbitration Act and United States Supreme Court interpretive decisions are "controlling law on the subject," even in state courts. ***MS Credit Ctr., Inc. v. Horton***, 926 So. 2d 167, 173 (¶ 14) (Miss. 2006).

¶23. Because both parties entered into an arbitration agreement with specific terms invoking the rules of the American Arbitration Association and because it is within the specific bailiwick of that association to determine arbitrability, we affirm the trial court's decision to compel arbitration.

¶24. **AFFIRMED.**

MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J. RANDOLPH, CJ., NOT PARTICIPATING.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶25. Respectfully, I dissent. I disagree with the majority's holding that the arbitrability of the claims of McInnis Electric Co. (McInnis) should be determined by the arbitrator. *See* Maj. Op. ¶ 21. Our courts have the prerogative to determine the scope of an

arbitration agreement unless the parties clearly and unmistakably contract otherwise, which they did not do here. Further, parties are bound to arbitrate only those matters they intended to be bound to arbitrate. Here, the unforeseen and unavoidable impact of the COVID-19 pandemic on the parties' ability to perform a construction contract was not within the contemplated scope of the arbitration agreement—an agreement that did not contain a *force majeure* clause. Therefore, I would hold that the trial court erred by granting the defendant's motion to compel arbitration.

I. The default question of arbitrability lies with the courts; here, the parties did not clearly and unmistakably contract to have the scope of arbitration determined by the arbitrator.

¶26. The "presumption in favor of arbitration does not apply to the question of who should decide arbitrability[.]" ***Greater Canton Ford Mercury, Inc. v. Ables***, 948 So. 2d 417, 422 (Miss. 2007) (quoting ***First Options of Chicago, Inc. v. Kaplan***, 415 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d (1995)). This Court has acknowledged that "the general practice of allowing courts to determine the issue of arbitrability is super[s]eded by the contractual terms of an arbitration provision which provide that arbitrability will be decided by an arbitrator." ***Id.*** However, "[w]hether a party is bound by an arbitration agreement is generally considered an issue for the courts, not the arbitrator, *'[u]nless the parties clearly and unmistakably*

provide otherwise.'" ***Id.*** at 422 (second alteration in original) (quoting ***AT & T Techs. v. Commc'ns Workers of Am.***, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

¶27. Applying this test, the Court found in ***Greater Canton*** that the parties did clearly and unmistakably intend to place interpretation of the agreement with the arbtitrator when the arbitration provision stated that arbitrable "claims include, but are not limited to the following: . . . (2) *claims regarding the interpretation, scope or validity of this clause or arbitrabiltiy of any issue. . . .*" ***Id.*** (second alteration in original).

¶28. But here, the arbitration agreement between McInnis and Brasfield & Gorrie (B & G) is devoid of any clear and unmistakable provision. While the agreement places arbitrable claims under the rules of the American Arbitration Association (AAA), general application of the Federal Arbitration Act (FAA) does not obviate the courts' authority to determine the threshold question of arbitrability because "the purpose of the FAA was to make arbitration agreements as enforceable as other contracts, not more so[.]" ***Id.*** at 421 (quoting ***Kaplan***, 514 U.S. at 945). Like multiple other courts and consistent with our current precedent, we should apply a presumption favoring judicial determination of arbitrability. *See* ***Jody James Farms, JV v. Altman Grp, Inc.***, 547 S.W.3d. 624, 632 (Tex. 2018). In ***Jody James Farms***, the Texas Supreme Court held:

> Texas courts differ about whether an arbitration agreement's mere incorporation of the AAA rules shows clear intent to arbitrate arbitrability. We hold it does not. Even when the party resisting arbitration is a signatory to an arbitration agreement, questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator.

Id. Mere "incorporation by reference of rules giving an arbitrator power to rule on his own jurisdiction" is not enough "to show that the parties clearly and unmistakably agreed to arbitrate arbitrability." ***Mem'l Hermann Health Sys. v. Blue Cross Blue Shield of Tex.***, No. H-17-2661, 2017 WL 5593523, at *8 (S.D. Tex. Nov. 17, 2017).

¶29. I agree with McInnis's argument that the agreement's reference to the arbitration rules "is directed solely to the terms of the contract, and as such, maintains the power of the court to determine the question of arbitrability." The United States District Court for the Southern District of Mississippi analyzed an arbitration agreement similar to the one at hand and determined that the contract language did not clearly and unmistakably place arbitrability under the purview of the arbitrator. That court's helpful analysis was as follows:

> In the Court's opinion, the contract does not unmistakably provide that the arbitrator must determine the scope of the arbitration provision. The pertinent sentence is: "Any and

> all disputes in connection with or arising out of the Provider Agreement will be exclusively settled by arbitrator in accordance with the Rules of the American Arbitration Association." Defendants focus on the phrase "in accordance with the Rules of the American Arbitration Association," but that phrase modifies "[a]ny and all disputes in connection with or arising out of the Provider Agreement." In other words, the contract first gives the arbitrator jurisdiction over "disputes in connection with or arising out of the Provider Agreement," and then it provides that the arbitrator will settle those disputes in accordance with the AAA Rules. Accordingly, the Court must determine whether the present dispute is "in connection with" or "aris[es] out of the Provider Agreement."

Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., No. 2:12-CV-114-KS-MTP, 2012 WL 12863150 at * 15 (S.D. Miss. Oct. 24, 2012) (alterations in original).[4]

¶30. As this Court has established, the presumption favoring arbitration does not apply to the stage of determining arbitrability. ***Greater Canton***, 948 So. 2d at

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[4] In ***Mississippi State Port Authority at Gulfport v. Southern Industrial Contractors LLC***, 271 So. 3d 742, 746 (Miss. Ct. App. 2013), our Court of Appeals reversed the trial court's grant of the defendant's motion to compel arbitration when the agreement contemplated terminating a contract by arbitration, negotiation, or litigation, similar to the provisions at issue here. Presiding in that case was the same circuit judge as in the instant case.

422. Applying the applicable presumption favoring judicial determination, I would find that the trial court erred by ordering that "all procedural issues related to the scope of the agreement shall be determined by the Arbitrator[.]" Mere incorporation by reference to AAA rules permitting an arbitrator to determine the scope of an arbitration agreement is not sufficient to establish a clear and unmistakable intent to deprive the courts of the prerogative to determine whether an arbitration agreement is enforceable with respect to the claims at hand.

II. The scope of the parties' arbitration agreement did not contemplate the impact of the COVID-19 pandemic.

¶31. With the question of arbitrability where it belongs—with our courts—I would find that the contract did not contemplate the impact of the COVID-19 pandemic on the parties ability to perform the construction contract. This position is consistent with our longstanding precedent that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." ***Keyes v. Dollar Gen. Corp.***, 240 So. 3d 373, 376-77 (Miss. 2018) (internal quotation marks omitted) (quoting ***Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney***, 950 So. 2d 170, 176 (Miss. 2007)). "[T]he parties' intentions control." ***Pedigo v. Robertson***, 237 So. 3d 1263, 1267 (Miss. 2017) (citing ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.***, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985))

"[E]ven broad clauses have their limits." ***Doe v. Hallmark Partners, LP***, 227 So. 3d 1052, 1054 (Miss. 2017) (internal quotation mark omitted) (quoting ***Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd.***, 139 F.3d 1061, 1067 n.8 (5th Cir. 1998).

¶32. When asking whether the parties' dispute is within the scope of an arbitration agreement pursuant to the FAA, "the United States Supreme Court has stated the question is 'whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.'" ***E. Ford, Inc., v. Taylor***, 826 So. 2d 709, 713 (Miss. 2002) (quoting ***Mitsubishi Motors Corp.***, 473 U.S. at 626). This "includes the consideration of applicable contract defenses available under state contract law which may invalidate the arbitration agreement." ***Sanderson Farms, Inc. v. Gatlin***, 848 So. 2d 828, 834 (Miss. 2003) (citing ***Taylor***, 826 So. 2d at 713). Defenses such as impossibility are highly relevant to this case. *See* ***Hendrick v. Green***, 618 So. 2d 76 (Miss. 1993).[5]

¶33. Common sense supports a finding that the unforseen crisis of the pandemic is outside the contemplated scope of the agreement's arbitration clause. The sudden loss of 40 percent of a workforce (among other serious difficulties) due to widespread illness is not a normal situation. The parties faced external constraints related to the necessity of and responsibility

[5] This is especially—though I would suggest not dispositively—true given the absence of a *force majeure* provision in the parties' contract.

for implementing health safety measures, including the observance of quarantine policies for sick workers.

¶34. Whether McInnis can succeed on the argument that the impact of COVID-19 was a defense to contract performance is a question to be litigated in the trial court. Where, as here, a natural force as novel and disruptive as COVID-19 emerges, the development of the common law should occur in our courts. I agree with McInnis's argument that "[d]etermination of the applicability of the COVID-19 pandemic to *force majeure* [precedents], as well as whether *force majeure* conditions are contractually contemplated within an arbitration provision in the absence of an express provision, are both novel issues of first impression best suited for development through Mississippi common law, not guessed at by arbitrators."

¶35. Therefore, I dissent.

KING, P.J., JOINS THIS OPINION.

**IN THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL CIRCUIT**

MCINNIS ELECTRIC COMPANY	**PLAINTIFF**
V.	**CIVIL ACTION NO.: 251-21-190**
BRASFIELD & GORRIE, LLC AND JAMES MAPP	**DEFENDANTS**

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND FOR STAY

(Filed Sep. 13, 2021)

THIS CAUSE, having come before the Court on the Defendants' Motion to Compel Arbitration and for a Stay. The Court, having reviewed the pleadings and other submissions, having heard arguments of the parties and being otherwise advised in the premises, finds that a valid and enforceable arbitration agreement exists between the parties. The Court also finds that the herein disputed subject matter falls within the scope of the arbitration agreement. Thus, all procedural issues related to the scope of the agreement shall be determined by the Arbitrator. Accordingly, the motion to compel arbitration should be granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Defendant's Motion to Compel Arbitration is granted.

IT IS FURTHER ORDERED AND ADJUDGED that this litigation shall be stayed until the Arbitration is completed.

SO ORDERED AND ADJUDGED this the 13th day of September, 2021.

/s/ Winston L. Kidd
WINSTON L. KIDD
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI FIRST JUDICIAL CIRCUIT

MCINNIS ELECTRIC COMPANY	**PLAINTIFF**
V.	**CIVIL ACTION NO.: 251-21-190**
BRASFIELD & GORRIE, LLC AND JAMES MAPP	**DEFENDANTS**

ORDER GRANTING TEMPORARY RESTRAINING ORDER

(Filed Aug. 26, 2021)

THIS CAUSE, coming before the Court on the Amended Motion for a Temporary Restraining Order for a Preliminary Injunction [Doc. 23] of Plaintiff McInnis Electric Company. The Court is in the process of reviewing the parties' submissions and arguments on the related Motion to Compel Arbitration and for Stay [Doc.11] and requires more time to do so. The Court is advised that an arbitration proceeding is moving ahead before a panel of the American Arbitration Association. Not wanting the parties to expend time and resources on the arbitration before the Court has an opportunity to rule on the Motion to Compel Arbitration and for Stay, the Court finds that the arbitration should be stayed for fourteen (14) days to allow the Court to issue an opinion and order. The Court further finds that the requirement of bond is waived.

IT IS THEREFORE, ORDERED AND ADJUDGED, that the arbitration proceeding pending

before the American Arbitration Association styled *Brasfield & Gorrie, LLC and James Mapp v. The Hanover Insurance Company v. McInnis Electric Co.* (Case No. 01-21-0004-0141) is hereby stayed fourteen (14) days from and after August 23, 2021.

SO ORDERDERED AND ADJUDGED this the 25th day August, 2021.

/s/ Winston L. Kidd
WINSTON L. KIDD
CIRCUIT COURT JUDGE

Serial: 250048

IN THE SUPREME COURT OF MISSISSIPPI

No. 2021-CA-01115-SCT

MCINNIS ELECTRIC COMPANY ***Appellant***

v.

BRASFIELD & GORRIE, LLC AND JAMES MAPP ***Appellees***

Consolidated with: 2021-CA-01300-SCT

MCINNIS ELECTRIC COMPANY ***Appellant***

v.

BRASFIELD & GORRIE, LLC AND JAMES MAPP ***Appellees***

ORDER

(Filed Jan. 2, 2024)

Before the undersigned Justice are McInnis Electric Company's Motion for Stay Pending Petition for Writ of Certiorari; Brasfield & Gorrie, LLC's Response to Motion for Stay Pending Petition for Writ of Certiorari; and McInnis Electric Company's Rebuttal In Support of Appellant's Motion for Stay Pending Petition for Writ of Certiorari. McInnis Electric Company asks the Court to stay the mandate so it can petition for a writ of certiorari with the United States Supreme Court. Upon motion, and with reasonable notice to all parties, the Court may grant "[a] stay of the mandate pending application to the United States Supreme Court for a writ of certiorari." M.R.A.P. 41(c). Unless good cause is

shown, the stay must not exceed 90 days. *Id.* After due consideration, the undersigned Justice finds the motion should be granted.

IT IS, THEREFORE, ORDERED that McInnis Electric Company's Motion for Stay Pending Petition for Writ of Certiorari is hereby granted. The mandate shall be stayed for 90 days.

SO ORDERED.

DIGITAL SIGNATURE
Order#: 250048
Sig Serial: 100008020
Org: SC
Date: 01/02/2024

/s/ J D Coleman
Josiah Dennis Coleman, Justice

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi
39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi
39201-1082
e-mail:
sctclerk@courts.ms.gov

December 14, 2023

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 14th day of December, 2023.

McInnis Electric Company v.
Brasfield & Gorrie, LLC and James Mapp
Supreme Court Case # 2021-CA-01115-SCT
Trial Court Case # 25CI1:21-cv-00190-WLK

Consolidated with:

McInnis Electric Company v.
Brasfield & Gorrie, LLC and James Mapp
Supreme Court Case # 2021-CA-01300-SCT
Trial Court Case # 25CI1:21-cv-00190-WLK

The motion for rehearing filed by the appellant is denied. Kitchens and King, P.JJ., would grant.

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BRASFIELD & GORRIE
GENERAL CONTRACTORS

SUBCONTRACT AGREEMENT

CONTRACTOR: ("Contractor")

BRASFIELD & GORRIE, L.L.C.
3021 7th Avenue South
Birmingham, AL 35233
Phone: 205-328-4000 **Fax:** 205-251-1304

SUBCONTRACTOR: ("Subcontractor")

MCINNIS ELECTRIC CO
Glade McInnis
5475 1-55 S P.O. Box 720790 (39272-0790)
Byram, MS 39272-0790
Phone: 601-372-2014 ext. 242
Fax: 601-373-6302
Email: glade@mcinnisco.com

WORK: ("Work")

Electrical and Low Voltage Systems Package

PROJECT: ("Project")

UMMC CHILDREN'S HOSPITAL EXPANSION & CLINIC ADDITION
2001 Peachtree Street, Jackson, MS 39216

OWNER: ("Owner")

UNIVERSITY OF MS MEDICAL CENTER
2500 North State Street, Apt B,
Jackson, MS 39216

ARCHITECT – ENGINEER ("Architect")

HDR ARCHITECTURE INC
1100 Peachtree Street NW, Suite 400,
Atlanta, GA 30309

PRIME CONTRACT: ("Contract")

dated 5/31/2017

SUBCONTRACT PRICE: ("Price")

Seventeen million two hundred twenty eight thousand and 00/100 Dollars ($ 17,228,000.00) Dollars

MONTHLY BILLING DATE: ("Monthly Billing Date")

Due 20th day of each month – Email copy acceptable with visible notary seal

MONTHLY BILLING MAILED TO:
(1 Original 0 Copies)

Brasfield & Gorrie. L.L.C.
2001 Peachtree Street
Jackson, MS 39216

SUBMIT BILLING ELECTRONICALLY TO:

ashelt@brasfieldgorrie.com

RETAINED PERCENTAGE ("Retained Percentage")

5.00%

DEFAULT PROTECTION

X SDP ____ P & P Bonds ____ Waived

(The above terms are incorporated by reference and are more fully explained below.)

On this 2/16/2018 ("Contract Date"), Contractor and Subcontractor, with offices at the addresses shown above, agree for themselves, their successors and assigns as follows:

* * *

ARTICLE 29 – CLAIMS AND DISPUTES; ARBITRATION

29.1 The parties hereto intend that all claims of Subcontractor shall be resolved in accordance with the provisions of the Contract Documents and this Subcontract, including Articles 8, 9, and this Article 29, and that Subcontractor's recoveries on its claims, if any, shall be limited to Subcontractor's portion of the relief Contractor receives from Owner as a result of such claims.

29.2 In case of any dispute between Contractor and Subcontractor, in any way relating to or arising from any act or omission of the Owner or involving the Contract Documents, Subcontractor agrees to be bound to Contractor to the same extent that Contractor is bound to the Owner, by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, hoard, or court so authorized in the Contract Documents or by law, whether or not Subcontractor is a party to such proceedings. In case of such dispute, Subcontractor will comply with all provisions of the Contract Documents, allowing a reasonable time for Contractor to analyze and forward to the Owner any required communications or documentation. Contractor agrees to make a good faith effort to have Owner honor any just claim presented by Subcontractor.

Subcontractor shall be responsible for the prosecution and presentation of any claim against or to Owner and shall pay all expenses of said prosecution or presentation, including without limitation, attorneys' fees. It shall be Subcontractor's obligation to give Contractor adequate notice to ensure that Contractor can give all notices required by the Contract Documents with respect to such claim in a timely manner. In addition to the other provisions of this Subcontract dealing with payment, Change Orders, or notice requirements, Subcontractor understands and agrees that Subcontractor waives all right to and has no right to payment for any claim or request for additional compensation of any kind that is submitted more than thirty (30) calendar days after the completion of the Work. Except as provided in Paragraph 29.3 hereof, Subcontractor agrees to be bound by the determination of Owner or Architect with respect to all claims.

29.3 If an appeal or legal proceeding is specifically permitted by the Contract Documents, and if requested in writing by Subcontractor, Contractor will, in its name and on Subcontractor's behalf, appeal any decision of Owner or Architect or institute a legal proceeding against Owner based on any just claim by Subcontractor involving the Work. In such event, Subcontractor shall pay all costs and expenses, including Contractor's expenses, arbitration costs, and attorneys' fees, attributable thereto (and, if requested, shall make an advance deposit for such costs) and shall render all assistance requested by Contractor. If claims on behalf of other subcontractors are involved in such an appeal

or legal proceeding, Subcontractor shall pay only its proportionate share (as determined by the ratio of the face amount of its claim to the total of all claims) of the costs and expenses. Subcontractor shall be bound by the determination rendered on such an appeal or in such legal proceeding and shall be entitled only to its proportionate share of any actual net recovery from Owner, less Contractor's overhead and profit.

29.4 Except as provided in Paragraph 29.5, any disputes between Contractor and Subcontractor not resolved under Paragraph 29.2, including any disputes in which Subcontractor has a claim against another subcontractor, shall be finally determined by binding arbitration in accordance with the current Construction Industry Rules of the American Arbitration Association by one or more arbitrators selected in accordance with said Rules. The parties acknowledge that this Subcontract evidences a transaction involving interstate commerce and that this agreement to arbitrate is enforceable under 9 U.S.C. §§ 1, et seq. The place of arbitration shall he the location of the Project, unless the Contractor, in a writing to he issued at its sole discretion at a later date, elects to have the arbitration in another locale. Subcontractor shall not stop, hinder, or delay the Work in any way during the pendency of arbitration. Upon its request, Contractor shall be entitled to consolidation or joinder of any arbitration involving Subcontractor with related arbitrations involving other parties, In the event Subcontractor has a claim against another subcontractor subject to this Paragraph 29.4, Subcontractor shall be responsible for

all expenses associated with pursuing such a claim, including any expenses (including attorneys' fees and costs) incurred by Contractor, which Contractor shall be entitled to deduct from any recovery by Subcontractor. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court of competent jurisdiction. If Contractor notifies Subcontractor that Contractor contends that any arbitration (or lawsuit against Contractor's payment bond surety under the federal Miller Act or similar state laws) involves a controversy within the scope of Paragraphs 29.2, 29.3, or 29.5, the disputes process shell be stayed until the procedures or proceedings under Paragraphs 29.2, 29.3, or 29.5 arc completed. Contractor's sureties shall be entitled to the stay of any such arbitration or lawsuit, whether or not such right is expressly provided in any surety bond.

In the event of any dispute subject to arbitration under this Paragraph 29.4, Contractor and Subcontractor mutually and voluntarily agree to the following Limits on discovery. Each party shall have the right to lake no more than two (2) depositions of potential witnesses, each of which shall be limited to one (I) eight-hour business day, and each party shall have the right to serve no more than one (1) set of interrogatories, neither of which shall include more than five (5) interrogatories, which shall not include subsets nor be subdivided into parts, and one set of requests for production of Documents, which shall contain no more than five (5) document requests, which shall not

include subsets nor be subdivided into parts. For all claims less than one million dollars ($1 million), the parties agree that no electronic discovery, or discovery involving electronically stored information ("ESI"), shall be conducted. For claims over one million dollars ($1 million), any electronic or ESI discovery conducted shall be paid for by the requesting party. These limits may only be extended or modified by mutual agreement of the parties. All such discovery must be completed within ninety (90) days following the selection of the arbitrator or arbitrators, unless this period of time is extended by the arbitrator for good cause or by mutual agreement of the parties.

29.5 Regardless of the agreement to arbitrate set forth in Paragraph 29.4, Subcontractor hereby agrees that upon Contractor's request, Subcontractor will consent to becoming a party to any legal proceeding involving the Project and Subcontractor's Work and to the jurisdiction of any court or other forum in which the proceeding is pending. Subcontractor acknowledges that this provision is intended to permit Contractor to cause Subcontractor to be a third party defendant to claims by Owner, other subcontractors, or third parties against Contractor.

29.6 Pending final resolution of a claim, including arbitration, unless otherwise agreed in writing, the Subcontractor shall proceed diligently with performance of the Contract and the Contractor shall continue to make payments in accordance with the terms of this Subcontract.

29.7 In the event the arbitration language set forth in Paragraph 29.4 is declared to be unconscionable or otherwise invalid, or under the circumstances described in Paragraph 29.5, then the parties, to the greatest extent permitted by law, hereby waive any right to a trial by jury on any dispute not resolved by arbitration or otherwise. The parties agree that either of them may file a copy of this Subcontract with any court as written evidence of the knowing, voluntary, and bargained agreement between the parties irrevocably to waive a trial by jury, and that any dispute or controversy whatsoever between them that is not resolved by arbitration shall instead be tried in a court of competent jurisdiction by a judge sitting without a jury. Contractor and Subcontractor specifically acknowledge that their execution of this waiver of jury trial is a material inducement for entering into this Subcontract.

29.8 Subcontractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty, or otherwise, and whether in arbitration or in litigation, against Contractor, or any other subcontractor, arising out of or related to the Subcontract in any case not more than one (1) year after the date of Substantial Completion of the Work. Subcontractor hereby waives all claims and causes of action not commenced in accordance with this Paragraph 29.8.

* * *

33.5 Governing Law. The validity, interpretation, and performance of this Subcontract shall be governed by the law of state where the Project is located[.]

* * *

2016
Subcontract Agreement

U.S. District Court
Southern District of Mississippi
(Northern (Jackson))
CIVIL DOCKET FOR CASE #:
3:23-cv-00085-DPJ-FKB

Brasfield & Gorrie, L.L.C. v. The Hanover Insurance Company
Assigned to: Chief District Judge Daniel P. Jordan, III
Referred to: Magistrate Judge F. Keith Ball
Cause: 09:1 U.S. Arbitration Act

Date Filed: 02/01/2023
Jury Demand: None
Nature of Suit: 896 Other Statutes: Arbitration
Jurisdiction: Diversity

Plaintiff **Brasfield & Gorrie, L.L.C.**

represented by

Ralph B. Germany, Jr.
BRADLEY ARANT BOULT CUMMINGS, LLP – Jackson
P.O. Box 1789
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rankin Sumner Fortenberry
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Defendant **The Hanover Insurance Company**

represented by

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ATTORNEY TO BE NOTICED

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* * *

01/08/2024	20	ORDER denying without prejudice 14 Motion to Compel; denying without prejudice 14 Motion to Strike 14 Motion to Compel; denying without prejudice 14 Motion for Discovery as set out in the Order. The case is stayed pending the final resolution of the McInnis appeal to the Mississippi Supreme Court resolving whether McInnis must be compelled to arbitrate its claims against B&G. The Court directs the parties to notify it promptly (via email to chambers) if either (1) the 90-day period passes and no petition for writ of certiorari is filed or (2) proceedings in the United States Supreme Court on such a petition are resolved. Likewise, if the parties resolve their dispute during the stay, the parties must notify the Court

		that the case can be dismissed. Signed by Chief District Judge Daniel P. Jordan III on January 8, 2024. (SP) (Entered: 01/08/2024)
01/08/2024		TEXT ONLY ORDER STAYING CASE: Pursuant to Order **20** entered this date, this matter is stayed pending the final resolution of the McInnis appeal to the Mississippi Supreme Court resolving whether McInnis must be compelled to arbitrate its claims against B&G. NO FURTHER WRITTEN ORDER SHALL ISSUE FROM THE COURT. Signed by Chief District Judge Daniel P. Jordan III on January 8, 2024.(SP) (Entered: 01/08/2024)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

BRASFIELD & GORRIE, L.L.C.	PLAINTIFF
V.	CIVIL ACTION NO. 3:23-CV-85-DPJ-FKB
THE HANOVER INSURANCE COMPANY	DEFENDANT

ORDER

(Filed Jan. 8, 2024)

Plaintiff Brasfield & Gorrie, L.L.C. (B&G) sued the Hanover Insurance Company to compel arbitration and has a pending motion seeking that relief. *See* Pl.'s Mot. [14]. The dispute relates to a construction project awarded to B&G. B&G subcontracted part of that work to McInnis Electric Company, which purchased a surety bond from Hanover. The arbitration agreement B&G hopes to enforce against Hanover is between B&G and McInnis, not Hanover. As for B&G and McInnis, those parties are now litigating the arbitration issue in state court.

In Hanover's response [17] to B&G's motion to compel arbitration, it noted that a Mississippi court had ordered McInnis to arbitrate with B&G and that the decision was then on appeal before the Mississippi Supreme Court. Because the cases are related, Hanover suggested staying this action until the Mississippi Supreme Court acts. And while B&G disagreed, it ultimately stated that "if this Court wishes to stay its

hand while the Mississippi Supreme Court deliberates, B&G would not object." Pl.'s Reply [19] at 10.

Since that time, the Mississippi Supreme Court has denied McInnis's appeal. *McInnis Elec. Co. v. Brasfield & Gorrie, LLC*, No. 2021-CA-01115-SCT (Miss. Oct. 19, 2023), *reh'g denied* (Miss. Dec. 14, 2023). But on January 2, 2024, that court also granted McInnis a 90-day stay of the mandate pending McInnis's application to the United States Supreme Court for a writ of certiorari.

"District courts . . . ordinarily have authority to issue stays, where such . . . stay[s are] a proper exercise of discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). The Court's "broad discretion to stay proceedings [allows it] to 'control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Mott's LLP v. Commercializadora Eloro, S.A.*, 507 F. Supp. 3d 780, 784 (W.D. Tex. 2020) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "The power [to stay a case] is best accomplished by the `exercise of judgment, which must weigh competing interests and maintain an even balance.'" *Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 541 (S.D. Miss. 2006) (quoting *Landis*, 299 U.S. at 254-55).

Given the overlap between the two cases and the possibility that the state-court case may moot this one, a stay is appropriate. B&G's Motion [14] is denied without prejudice to refiling. The case is stayed pending the final resolution of the McInnis appeal to the

Mississippi Supreme Court resolving whether McInnis must be compelled to arbitrate its claims against B&G. The Court directs the parties to notify it promptly (via email to chambers) if either (1) the 90-day period passes and no petition for writ of certiorari is filed or (2) proceedings in the United States Supreme Court on such a petition are resolved. Likewise, if the parties resolve their dispute during the stay, the parties must notify the Court that the case can be dismissed.

SO ORDERED AND ADJUDGED this the 8th day of January, 2024.

s/ *Daniel P. Jordan III*
CHIEF UNITED STATES DISTRICT JUDGE

United States Code, Title 9, Arbitration

CHAPTER 1—GENERAL PROVISIONS

Sec.

15. Inapplicability of the Act of State doctrine.

16. Appeals.

Editorial Notes
Amendments

1990—Pub. L. 101–650, title III, §325(a)(2), Dec. 1, 1990, 104 Stat. 5120, added item 15 "Inapplicability of the Act of State doctrine" and redesignated former item 15 "Appeals" as 16.

1988—Pub. L. 100–702, title X, §1019(b), Nov. 19, 1988, 102 Stat. 4671, added item 15 relating to appeals.

1970—Pub. L. 91–368, §3, July 31, 1970, 84 Stat. 693, designated existing sections 1 through 14 as "Chapter 1 " and added heading for Chapter 1.

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of

seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)

Derivation

Act Feb. 12, 1925, ch. 213, §1, 43 Stat. 883.

Statutory Notes and Related Subsidiaries

Short Title of 2022 Amendment

Pub. L. 117–90, §1, Mar. 3, 2022, 136 Stat. 26, provided that: "This Act [enacting chapter 4 of this title, amending sections 2, 208, and 307 of this title, and enacting provisions set out as a note under section 401 of this title] may be cited as the 'Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021'."

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

(July 30, 1947, ch. 392, 61 Stat. 670; Pub. L. 117–90, §2(b)(1)(A), Mar. 3, 2022, 136 Stat. 27.)

Derivation

Act Feb. 12, 1925, ch. 213, §2, 43 Stat. 883.

Editorial Notes
Amendments

2022—Pub. L. 117–90 inserted "or as otherwise provided in chapter 4" before period at end.

Statutory Notes and Related Subsidiaries

Effective Date of 2022 Amendment

Amendment by Pub. L. 117–90 applicable with respect to any dispute or claim that arises or accrues on or after Mar. 3, 2022, see section 3 of Pub. L. 117–90, set out as an Effective Date note under section 401 of this title.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

Derivation

Act Feb. 12, 1925, ch. 213, §3, 43 Stat. 883.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases

of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, §19, 68 Stat. 1233.)

Derivation

Act Feb. 12, 1925, ch. 213, §4, 43 Stat. 883.

Editorial Notes
References in Text

Federal Rules of Civil Procedure, referred to in text, are set out in Appendix to Title 28, Judiciary and Judicial Procedure.

Amendments

1954—Act Sept. 3, 1954, brought section into conformity with present terms and practice.

§5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

Derivation

Act Feb. 12, 1925, ch. 213, §5, 43 Stat. 884.

§6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, ch. 392, 61 Stat. 671.)

Derivation

Act Feb. 12, 1925, ch. 213, §6, 43 Stat. 884.

§7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(July 30, 1947, ch. 392, 61 Stat. 672; Oct. 31, 1951, ch. 655, §14, 65 Stat. 715.)

Derivation

Act Feb. 12, 1925, ch. 213, §7, 43 Stat. 884.

Editorial Notes
Amendments

1951—Act Oct. 31, 1951, substituted "United States district court for" for "United States court in and for", and "by law for" for "on February 12, 1925, for".

§8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

Derivation

Act Feb. 12, 1925, ch. 213, §8, 43 Stat 884.

§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award,

and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

Derivation

Act Feb. 12, 1925, ch. 213, §9, 43 Stat. 885.

§10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101–552, §5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–354, §5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107–169, §1, May 7, 2002, 116 Stat. 132.)

Derivation

Act Feb. 12, 1925, ch. 213, §10, 43 Stat. 885.

Editorial Notes
Amendments

2002—Subsec. (a)(1) to (4). Pub. L. 107–169, §1(1)–(3), substituted "where" for "Where" and realigned margins in pars. (1) to (4), and substituted a semicolon for period at end in pars. (1) and (2) and "; or" for the period at end in par. (3).

Subsec. (a)(5). Pub. L. 107–169, §1(5), substituted "If an award" for "Where an award", inserted a comma after "expired", and redesignated par. (5) as subsec. (b).

Subsec. (b). Pub. L. 107–169, §1(4), (5), redesignated subsec. (a)(5) as (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 107–169, §1(4), redesignated subsec. (b) as (c).

1992—Subsec. (b). Pub. L. 102–354 substituted "section 580" for "section 590" and "section 572" for "section 582".

1990—Pub. L. 101–552 designated existing provisions as subsec. (a), in introductory provisions substituted "In any" for "In either", redesignated former subsecs. (a) to (e) as pars. (1) to (5), respectively, and added subsec. (b) which read as follows: "The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly

inconsistent with the factors set forth in section 572 of title 5."

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §11, 43 Stat. 885.

§12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §12, 43 Stat. 885.

§13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application. The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §13, 43 Stat. 886.

§14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

(July 30, 1947, ch. 392, 61 Stat. 674.)

Derivation

Act Feb. 12, 1925, ch. 213, §15, 43 Stat. 886.

Editorial Notes
Prior Provisions

Act Feb. 12, 1925, ch. 213, §14, 43 Stat. 886, former provisions of section 14 of this title relating to "short title" is not now covered.

§15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

(Added Pub. L. 100–669, §1, Nov. 16, 1988, 102 Stat. 3969.)

Editorial Notes
Codification

Another section 15 of this title was renumbered section 16 of this title.

§16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub. L. 100–702, title X, §1019(a), Nov. 19, 1988, 102 Stat. 4670, §15; renumbered §16, Pub. L. 101–650, title III, §325(a)(1), Dec. 1, 1990, 104 Stat. 5120.)

Editorial Notes
Amendments

1990—Pub. L. 101–650 renumbered the second section 15 of this title as this section.

The United States Arbitration Act
Sixty-Eighth Congress.
Sess. II, ch. 213, Feb. 12, 1925,
43 Stat. 883-885, Pub. L. 401.

CHAP. 213.—An Act To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

Be it enacted by the Senate and House of Representatives of the United States of America Congress assembled, That "maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements, relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged m foreign or interstate commerce.

SEC. 2. That a written. provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy

thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be. valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

SEC. 3. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing; for such arbitration, the court m which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

SEC. 4. That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding

is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided*, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

SEC. 5. That if in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

SEC. 6. That any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

SEC. 7. That the arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them and shall be directed to the said person

and shall be served in the same manner as subpoenas to appear and testify before the court; if any person. or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

SEC. 8. That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

SEC. 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the

parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

SEC. 10. That in either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

SEC. 11. That in either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

SEC. 12. That notice of a motion to vacate, modify, or correct an award must be served upon the adverse

party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

SEC. 13. That the party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

SEC. 14. That this Act may be referred to as "The United States Arbitration Act."

SEC. 15. That all Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.

Approved, February 12, 1925.

[CHAPTER 392]

AN ACT

To codify and enact into positive law, title 9 of the United States Code, entitled "Arbitration".

Pub. L. 80–282, Act of 80th Congress, Sess. I, July 30, 1947, ch. 392; 61 Stat. 669–674.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 9 of the United States Code, entitled "Arbitration", is codified and enacted into positive law and may be cited as "9 U. S. C., § —", as follows:

TITLE 9—ARBITRATION

"MARITIME TRANSACTIONS" AND "COMMERCE" DEFINED; EXCEPTIONS TO OPERATION OF TITLE

§ 1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

VALIDITY, IRREVOCABILITY, AND ENFORCEMENT OF AGREEMENTS TO ARBITRATE

§ 2. A written provision in any maritime transaction or a contract evidencing a transaction involving

commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION

§ 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

FAILURE TO ARBITRATE UNDER AGREEMENT; PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION; NOTICE AND SERVICE THEREOF; HEARING AND DETERMINATION

§ 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would

have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed. in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or

that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court, shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

APPOINTMENT OF ARBITRATORS OR UMPIRE

§ 5. If in the agreement provision be made for a method of naming. or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

APPLICATION HEARD AS MOTION

§ 6. Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

WITNESSES BEFORE ARBITRATORS; FEES; COMPELLING ATTENDANCE

§ 7. The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided on February 12, 1925, for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

PROCEEDINGS BEGUN BY LIBEL IN ADMIRALTY AND SEIZURE OF VESSEL OR PROPERTY

§ 8. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then,

notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

AWARD OF ARBITRATORS; CONFIRMATION; JURISDICTION; PROCEDURE

§ 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same

court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

SAME; VACATION; GROUNDS; REHEARING

§ 10. In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators. or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be

made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

SAME; MODIFICATION OR CORRECTION; GROUNDS; ORDER

§ 11. In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

NOTICE OF MOTIONS TO VACATE OR MODIFY; SERVICE; STAY OF PROCEEDINGS

§ 12. Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is

filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the portion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

PAPERS FILED WITH ORDER ON MOTIONS; JUDGMENT; DOCKETING; FORCE AND EFFECT; ENFORCEMENT

§ 13. The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the

award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

CONTRACTS NOT AFFECTED

§ 14. This title shall not apply to contracts made prior to January 1, 1926.

Public Law 248 CHAPTER 655

AN ACT

To amend certain titles of the United States Code, and for other purposes.

Pub. L. 248, ch. 655, Oct. 31, 1951 [65 Stat. 655], ch. 655, § 14 (9 USC § 7 amended to clarify Summons under Fed.R.Civ.Pro.), 65 Stat. 715.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ...

SEC. 14. The third sentence of section 7 of Title 9, United States Code, entitled "Arbitration", is amended to read as follows: "Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.".

Public Law 779 CHAPTER 1263

Act of Sept. 3, 1954, ch. 1263, § 19
(9 USC § 4 amended to refer to U.S. district courts and Fed.R.Civ.Pro.), 68 Stat. 1233.

AN ACT

To amend various statutes and certain titles of the United States Code, for the purpose of correcting obsolete references, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ...

SEC. 19. Section 4 of Title 9, United States Code, entitled "Arbitration", is amended (1) by striking out, in the first sentence, "court of the United States" and in lieu thereof inserting "United States district court"; (2) by striking out, in the first sentence, "the judicial code at law, in equity,", and in lieu thereof inserting "Title 28, in a civil action"; (3) by striking out, in the third sentence, "law for the service of summons in the jurisdiction in which the proceeding is brought", and in lieu thereof inserting "the Federal Rules of Civil Procedure"; and (4) by striking out, in the eighth sentence, "law for referring to a jury issues in an equity action", and in lieu thereof inserting "the Federal Rules of Civil Procedure", so that such section, exclusive of the section heading thereto, will read as follows:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United

States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for ark order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made

or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.".

Public Law 91-368

AN ACT

To implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

Be it enacted by the Senate and House of Representatives of the United States of Americas in Congress assembled, That title 9, United States Code, is amended by adding :

"Chapter 2.—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

"Sec.

"§ 201. Enforcement of Convention

"The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

"§ 202. Agreement or award falling under the Convention

"An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls wader the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

"§ 203. Jurisdiction ; amount in controversy

"An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount. in controversy.

"§ 204. Venue

"An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding

with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

"§ 205. Removal of cases from State courts

"Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided bylaw shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

"§ 206. Order to compel arbitration ; appointment of arbitrators

"A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

"§ 207. Award of arbitrators ; confirmation ; jurisdiction ; proceeding

"Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

"§ 208. Chapter 1 ; residual application

"Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

SEC. 2. Title 9, United States Code, is further amended by inserting at the beginning :

SEC. 3. Sections 1 through 14 of title 9, United States Code, are designated "Chapter 1" and the following heading is added immediately preceding the analysis of sections 1 through 14 :

"Chapter 1.—GENERAL PROVISIONS"

SEC. 4. This Act shall be effective upon the entry into farce of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States.

Approved July 31, 1970.

Public Law 91-369

AN ACT

To authorize the Public Printer to grant time off as compensation for overtime worked by certain employees of the Government Printing Office, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 305 of title 44, United States Code, is amended—

(1) by inserting "(a)" immediately before "The Public Printer may employ journeymen"; and

(2) by adding at the end thereof the following new subsection :

"(b) The Public Printer may grant an employee paid on an annual basis compensatory time off from duty instead of overtime pay for overtime work."

Approved July 31, 1970.

Public Law 100-669
100th Congress

An Act

To implement the Inter-American Convention on International Commercial Arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new section:

"§ 15. Inapplicability of the Act of State doctrine

"Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.".

SEC. 2. Section 1605(a) of title 28, United States Code, is amended by—

(1) striking out "or" at the end of paragraph (4);

(2) striking out the period at the end of paragraph (5) and inserting in lieu thereof "; or"; and

(3) adding at the end thereof the following:

"(6) in which the action is brought, either to enforce an agreement made by the foreign State with or for the benefit of a private

party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.".

SEC. 3. Section 1610(a) of title 28, United States Code, is amended by—

(1) striking out the period at the end of paragraph (5) and inserting in lieu thereof ", or"; and

(2) adding at the end thereof the following:

"(6) the judgment is based on an order confirming an arbitral award rendered against the foreign State, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.".

Approved November 16, 1988.

SEC. 1019. APPEALS UNDER TITLE 9, UNITED STATES CODE.

Judicial Improvements and Access to Justice Act, Pub. L. 100–702, title X, § 1019, Appeals Under Title 9, United States Code, Nov. 19, 1988, 102 Stat. 4670.

(a) IN GENERAL.—Chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new section:

"§ 15. Appeals

"(a) An appeal may be taken from—

"(1) an order—

"(A) refusing a stay of any action under section 3 of this title,

"(B) denying a petition under section 4 of this title to order arbitration to proceed,

"(C) denying an application under section 206 of this title to compel arbitration,

"(D) confirming or denying confirmation of an award or partial award, or

"(E) modifying, correcting, or vacating an award;

"(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

"(3) a final decision with respect to an arbitration that is subject to this title.

"(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

"(1) granting a stay of any action under section 3 of this title;

"(2) directing arbitration to proceed under section 4 of this title;

"(3) compelling arbitration under section 206 of this title; or

"(4) refusing to enjoin an arbitration that is subject to this title."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"15. Appeals.".

Public Law 101–369
101st Congress

An Act

To implement the Inter-American Convention on International Commercial Arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENT TO TITLE 9, UNITED STATES CODE.

Title 9, United States Code, is amended by adding at the end the following:

"CHAPTER 3. INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

"Sec.

"§ 301. Enforcement of Convention

"The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

"§ 302. Incorporation by reference

"Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter 'the Convention' shall mean the Inter-American Convention.

"§ 303. Order to compel arbitration; appointment of arbitrators; locale

"(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

"(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

"§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

"Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

"§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

"When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

> "(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.
>
> "(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

"§ 306. Applicable rules of Inter-American Commercial Arbitration Commission

"(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

"(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

"§ 307. Chapter 1; residual application

"Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.".

SEC. 2. CLERICAL AMENDMENT.

The table of chapters at the beginning of title 9, United States Code, is further amended by adding at the end the following new item:

"3. Inter-American Convention on International Commercial Arbitration .....301".

SEC. 3. EFFECTIVE DATE.

This Act shall take effect upon the entry into force of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, with respect to the United States.

Approved August 15, 1990.

Public Law 101-650
101st Congress

An Act

To provide for the appointment of additional Federal circuit and district judges, and for other purposes.

Pub. L. 101–650, title III, § 325(a)(1)
(Title 9 USC § 15 Appeals redesignated as § 16.).
Dec. 1, 1990, 104 Stat. 5120.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ...

SEC. 325. MISCELLANEOUS TECHNICAL AMENDMENTS.

(a) TITLE 9, UNITED STATES CODE.—

(1) The section 15 of title 9, United States Code, that is designated "Appeals" is amended by redesignating such section as section 16.

(2) The table of sections at the beginning of chapter 1 of title 9, United States Code, is amended by striking out

"15. Appeals"

and inserting in lieu thereof

"15. Inapplicability of the Act of State doctrine.

"16. Appeals.".

Public Law 102–354
102d Congress

An Act

To make technical corrections to chapter 5 of title 5, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Administrative Procedure Technical Amendments Act of 1991".

SEC. 2. REDESIGNATION OF SUBCHAPTER III.

* * *

(4) Section 10(b) of title 9, United States Code (as added by section 5 of the Administrative Dispute Resolution Act (Public Law 101-552; 104 Stat. 2745)), is amended—

(A) by striking "590" and inserting "580"; and

(B) by striking "582" and inserting "572".

* * *

Public Law 107–169
107th Congress

An Act

To make technical amendments to section 10 of title 9, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. VACATION OF AWARDS.

Section 10 of title 9, United States Code, is amended—

(1) by indenting the margin of paragraphs (1) through (4) of subsection (a) 2 ems;

(2) by striking "Where" in such paragraphs and inserting "where";

(3) by striking the period at the end of paragraphs (1), (2), and (3) of subsection (a) and inserting a semicolon and by adding "or" at the end of paragraph (3);

(4) by redesignating subsection (b) as subsection (c); and

(5) in paragraph (5), by striking "Where an award" and inserting "If an award", by inserting a comma after "expired", and by redesignating the paragraph as subsection (b).

Approved May 7, 2002.

Public Law 117–90
117th Congress

An Act

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021".

SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

"§ 401. Definitions

"In this chapter:

"(1) PREDISPUTE ARBITRATION AGREEMENT.—The term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

"(2) PREDISPUTE JOINT-ACTION WAIVER.—The term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"(3) SEXUAL ASSAULT DISPUTE.—The term 'sexual assault dispute' means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

"(4) SEXUAL HARASSMENT DISPUTE.—The term 'sexual harassment dispute' means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

"§ 402. No validity or enforceability

"(a) IN GENERAL.—Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging

such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

"(b) DETERMINATION OF APPLICABILITY.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting "or as otherwise provided in chapter 4" before the period at the end;

(B) in section 208—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4."; and

(C) in section 307—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4.".

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

"208. Application.".

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following:

"4. Arbitration of disputes involving sexual assault and sexual harassment .....401".

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

Approved March 3, 2022.

IN THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

MCINNIS ELECTRIC CO.	PLAINTIFF
vs.	CIVIL ACTION NO. 21-190
BRASFIELD & GORRIE, L.L.C. and JAMES MAPP	DEFENDANTS

FIRST AMENDED COMPLAINT FOR DAMAGES

(Filed Apr. 19, 2021)

Plaintiff, McInnis Electric Co., files this First Amended Complaint for Damages against Brasfield & Gorrie, LLC, as follows:

PARTIES AND VENUE

1. Plaintiff, McInnis Electric Co. (hereafter "McInnis"), is a Mississippi for profit corporation, authorized and existing under the laws of the state of Mississippi.

2. Defendant, Brasfield & Gorrie, L.L.C. (hereafter "B & G"), is believed to be a foreign limited liability company formed in Delaware with a principal place of business in Alabama, and it may be served through its registered agent, CT Corporation System at 645 Lakeland East Dr., Ste. 101, Flowood, MS 39232 or at its principal addresses of 729 South 30th Street Birmingham, AL 35233 or 3021 7th Avenue South, Birmingham, AL 35233.

3. Defendant, James Mapp, is believed to be an adult resident citizen of the state of Mississippi, and he may be personally served wherever he may be found, such as 101 Fairdale Place, Brandon, MS 39042.

4. Venue and jurisdiction are proper in the Circuit Court of the First Judicial District of Hinds County, Mississippi pursuant to Miss. Code Ann. § 11-11-3, as this court has original jurisdiction over this complaint for damages, which is in excess of the jurisdictional minimum. The case concerns substantial alleged tortious acts and omissions that occurred in the First Judicial District of Hinds County, Mississippi. This case also concerns substantial events giving rise to damages that occurred in the First Judicial District of Hinds County, Mississippi, including but not limited to the breach of a construction subcontract agreement.

FACTS

5. On or about May 31, 2017, B & G entered into an approximately $180 million cost-plus contract agreement with the University of Mississippi Medical Center (hereafter "UMMC") for the performance of construction management services for a project commonly referred to as the "CMAR-Children's of Mississippi Expansion." UMMC and B & G's duties and obligations are set forth in the agreement annexed hereto and incorporated herein by reference as Exhibit "A." Under the agreement, B & G was to receive an approximately $4 million fee for its services, minus certain potential deductions.

6. The contract documents set forth the details of the project for the children's wing of the teaching hospital, which included an approximately 370,000 square foot, seven-story expansion, 92-bed NICU, 32-Bed PICU, 10 operating rooms, ambulatory services, outpatient clinic, and a five-level parking garage.

7. McInnis is a skilled electrical contractor with more than 43 years of experience in the field of electrical construction.

8. On or about December 19, 2017, McInnis placed a bid on the electrical portion of Phase 2 of the work, with only one other competing bid being submitted by McInnis competitor, a joint venture between Moses Electric and Marathon Electric. The bid documents required the prices to be held for a certain period of time.

9. Before the bid was accepted or rejected by B & G, the Trump administration threatened tariffs which drastically increased the price of steel, adding approximately $200,000.00 in costs to work described in the bid.

10. On or about February 7, 2018, B & G, who had not been communicating with McInnis, informed McInnis that it was being awarded the bid. Discussions then occurred, over increase in the costs of steel, with the project manager, Phil Anderson, ultimately threatening McInnis with legal action over the $4 million difference in the bids if McInnis did not enter into a subcontract. While B & G ultimately allowed a $156,000.00 adjustment for the costs, the prototypical

prime contractor bullying foreshadowed the remainder of the parties' working experience. B & G and McInnis have successfully worked on other large projects together, albeit with other B & G managers that were both cooperative, professional, and skilled.

11. On or about February 16, 2018, B & G and McInnis entered into a certain subcontract agreement (hereby "agreement") whereby McInnis was to perform the electrical and low voltage construction of the work for approximately $17.3 million, as set forth in Exhibit "B," annexed hereto and incorporated herein by reference.

12. The contract scheduled work to begin on or about February 15, 2018. McInnis was directed to not report on site until June 4, 2018, and was unable to begin due to delays until July 23, 2018.

13. McInnis's work began with underground construction of a complex web of conduits, which were successfully installed with the exception of damage caused by the concrete contractor. McInnis submitted a timely claim for the damage, which was ignored by B & G and has never been acknowledged.

14. After the bid and the agreement was executed, the Phase 1 electrical contractor was permitted to reroute sixty large conduits, elongating the path and creating additional costs for McInnis's installation of the feeder wire. McInnis submitted a timely claim for the increased costs, which was ignored by B & G and has never been acknowledged.

15. McInnis brought this and other similar items to B & G's attention through its project manager, Daryl Frey, who screamed in response "Get the f--- out of my meeting" and stormed off.

16. B & G utilized building information modeling ("BIM") for construction scheduling and design. As with any new construction, efficiency is dependent upon the structural envelope, with a concrete building of interlocking parts having particular challenges. The BIM for the construction and construction schedule as a whole were consistently different from the field because the corridors were inadequate for the systems design and project management failed in the RFI process. Both the BIM and the concrete pours, for example, were finished six months after the initial scheduled date. Despite request, McInnis was not allowed construction delays.

17. There were numerous workmanship errors with the concrete that B & G failed to properly supervise, resulting in increased costs and damages to McInnis. The observable results of the concrete pours revealed measured distances between the floor and the decks above that varied across each floor by up to 4 inches. These variances caused the BIM models to be out of tolerance, and with no enforcement of upper level work it pushed the electrical work at the lowest level down and created rework across all floors. The elevator shafts were out of line and had to be cut to allow proper alignment and operation causing long delays in the construction of two central electrical closets, with cascading effects on sequencing and efficiencies.

18. As the work moved to interior construction, B & G's harassment and discord increased. Frey regularly redirected McInnis workers to engage in work out of the flow of the schedule and directed the mechanical contractor to proceed in front of McInnis in ways that interfered with McInnis's work. Ultimately, but long after damage to McInnis, the assistant superintendent over the concrete work was fired and his supervisor, Frey, quit to avoid being fired.

19. The actions of B & G's management team caused hostility in the workplace atmosphere and directly damaged the progress of the construction project. As an example, B & G superintendent James Mapp approached a McInnis employee on May 31, 2019 and asked him to relocate pipes near the loading dock. McInnis promptly relocated the pipes. On June 3, 2019, McInnis attempted to locate a pallet of shrink wrapped GRC 90 elbows. Mapp was asked about the location of the elbows, and he admitted to McInnis that he had thrown the pallet in the trash, Mapp's action clearly constitutes negligence, gross negligence, and the torts of conversion and trespass to chattels.

20. As the project progressed, the construction schedule became more and more delayed as a result of B & G's failure to coordinate the trades. By August 1, 2019, the schedule was off by months, and B & G's failure to coordinate the trades detrimentally affected the work, as set forth in McInnis's correspondence annexed hereto and incorporated herein by reference as Exhibit "C."

21. By the fall of 2019, nearly a thousand RFIs and CPRs had been issued in the prior six months, revealing major problems with the contract documents and defects in the drawings. B & G was slow to act on a number of major purchases, and responses by engineers were slow and often raised more questions. B & G quibbled about all price submissions and required many changes to be priced multiple times over an extended period.

22. By January of 2020, B & G recognized the schedules were hopeless. Although McInnis met with B & G at B & G's request to attempt to reestablish a workable schedule, the project was again immediately derailed.

23. B & G's failure to coordinate the trades worsened as the project progressed. As just one example, the sheet rock contractor and the plumbing contractor were required to complete the patient rooms of the upper floors in specific sequence, coordinated with all trades, but no attempt was ever made for sequencing. To install the conduits in the patient rooms, windows had to be installed, which were always behind schedule. Headwalls had to be installed for the wall structures to be completed, which were always behind schedule. The sheet rock ceilings had to be framed for conduits to be completed inside and run outside of the room, which were always behind schedule. The plumbers piping, which had to be sweated, required McInnis to halt electrical piping, and no attempt was ever made to coordinate these trades.

24. On March 11, 2020, McInnis submitted a written request for an equitable adjustment to the agreement in accordance with the provisions. B & G failed to follow the provisions set forth within the agreement for an adjustment, breaching the agreement. McInnis outlined change orders that had been ignored by B & G and requested $3 million in other adjustments. (See Exhibit "D" annexed hereto and incorporated herein by reference.)

25. Also on March 11, 2020, Mississippi experienced its first presumptive case of Covid-19, with understandable fear quickly settling in among McInnis's employees and other workers, as they were working at a hospital.

26. On March 16, 2020, the National Electrical Contractors Association announced a national disease emergency response agreement with the national electrical union, which stated that employers could furlough their employees and remove individuals that were suspected or confirmed to have Covid. The memo also announced employees may absent themselves from job sites with no adverse consequences should they believe they are being placed at risk. Additionally, on March 16, 2020, B & G employee Anthony Bosner issued a memo requesting notification of disruptions and employee names that were positive. The memo also stated that employees who were exposed or positive were "not to return until further notice."

27. On March 24, 2020, McInnis e-mailed Andrew Temple at B & G and notified him of workplace

safety concerns (see Exhibit "E" annexed hereto and incorporated herein by reference). Notable, B & G's response was late and inadequate, sanitation on the jobsite was extremely poor, and there was fear among older workers of infection. McInnis requested reasonable accommodations and safety measures, including temperature screening and better sanitation.

28. Instead of offering reasonable accommodations and workplace safety, B & G pressed forward harder than ever and began supplementing McInnis's workforce with Marathon workers. The Marathon workers had been dismissed from work at a data center in Alabama that was shut down as a result of the Covid pandemic. The intermingling of these new employees arriving from a jobsite that had already been shutdown due to Covid created more fear among the workers.

29. B & G's modus operandi began to reveal itself even clearer. As a relatively large project, B & G, as the construction management at risk (CMAR), wielded power over the trade subcontractors, which it negligently mishandled and applied in bad faith. Ordinarily, CMAR acts in good faith in a spirit of cooperation with mutual respect and tolerance. As the project became further and further behind schedule and was ultimately impacted by Covid, B & G's good faith disintegrated. Although the construction schedule was never able to be followed, B & G wielded its power through the construction schedule and the supplementation clause of the subcontract. Despite McInnis's providing all of the manpower B & G projected for the

project, in an extremely tight national labor market, and McInnis's working 40% overtime above the projections, B & G still supplemented McInnis's workforce at McInnis's expense in an effort to make up time in the schedule that B & G had failed to follow.

30. On April 1, 2020, B & G was again informed through McInnis's legal counsel that the workplace was run like a sweatshop and that it was filthy, with no hand sanitization stations on the jobsite or hand washing stations at or near the toilets (see Exhibit "F" annexed hereto and incorporated herein by reference). There was also concern over social distancing, as the workplace was extremely crowded, with men physically touching, and no opportunity for adequate spacing. McInnis noted that it had already lost nearly one-third of its work force as a result of the workers legally walking off the job due to the unsanitary conditions and fear of the virus. Their fear was well founded.

31. As March and April passed, B & G failed to make timely progress payments that were due and owed under the subcontract, with said sums to be determined and still due and owing. McInnis was never allowed to submit a May pay request.

32. On April 23, 2020, Swisslog employee(s) on the jobsite tested positive for Covid. They had been on the jobsite on April 16, 2020. On April 25, 220, Thyseen Krupp employee(s) tested positive for Covid. They were last on the jobsite on April 23, 2020.

33. On April 28, 2020, McInnis's first employee tested positive. The following day two more Thyssen

Krupp employees tested positive and a Daca employee tested positive.

34. On May 4, 2020, McInnis was down from 105 employees to approximately 74, with 7 of those employees testing positive for Covid.

35. By May 8, 2020, McInnis had 32 employees who had tested positive for Covid. McInnis emailed B & G informing it that the workplace conditions and safety had not improved, despite repeated requests, and that it was unable to return to the jobsite until conditions improved (see Exhibit "G" annexed hereto and incorporated herein by reference). B & G had refused to implement CDC guidelines, and Covid was running rampant as a result. McInnis expressed its desire to continue the work. McInnis did everything reasonably possible to continue the work until it became evident it was impossible, including making $94,000 in hazard payments to encourage its workers. McInnis again requested reasonable accommodations to accomplish the work safely, such as 10-day suspension. McInnis further requested removal of B & G's project manager, who had completely mishandled the jobsite and management. The request and effort were for naught.

36. The Covid pandemic and B & G's actions in failing to make the workplace safe rendered performance of the subcontract commercially impossible and impractical. The unsafe workplace and unforeseen pandemic resulted in numerous sick employees and employees that abandoned their employment, causing

a shutdown of the employee service supply chain and the overall frustration of purpose of the agreement. Notwithstanding B & G's actions in causing an unsafe workplace, McInnis's performance of the agreement as expressed by the opinion of epidemiologist Rathel "Skip" Nolan, M.D. (see Exhibit "H" annexed hereto and incorporated herein by reference), was excused due to danger to the health and life of its employees from the Covid pandemic and outbreak on the construction site. McInnis also was following said March 24, 2020 directive of B & G that employees who were exposed or tested positive were to leave work and "not return until further notice."

37. Instead of working with McInnis, B & G breached its own safety directives and its contract by terminating McInnis without just cause and in bad faith on May 20, 2020, when B & G well knew that it was commercially impossible for McInnis to continue working until the Covid outbreak on the construction site abated. (See May 13, 2020 letter, annexed hereto and incorporated herein by reference as Exhibit "I.")

COUNTS I AN II
BREACH OF CONTRACT AND
INTENTIONAL BREACH OF CONTRACT

38. B & G and McInnis formed a binding contractual agreement as set forth above (Exhibit "B" hereto).

39. B & G committed numerous material breaches and intentional breaches of the parties' agreement, as

set forth above, causing damage to McInnis in an amount to be determined by a jury. B & G's actions constituting material and intentional breaches include but are not limited to the following:

a. failure to timely make progress payments under Article 3.3 and other provisions of the agreement;

b. failure to approve and pay for price and time adjustments under Article 9 and other provisions of the agreement;

c. failure to approve and pay for change orders under Article 3.3 and other provisions of the agreement;

d. failure to provide a safe work environment under Article 10 of the UMMC – B & G Agreement;

e. failure to supervise other trades, creation of work interruptions, and increased overhead and remobilization expenses;

f. failure to adhere to construction schedules, creating delay damages; and

g. failing to stop work under Article 17 and other provisions of the agreement once the jobsite was deemed unsafe.

40. B & G's actions were willful, malicious, intentional, and committed with such indifference to McInnis's rights that McInnis is entitled to an award of attorney's fees and punitive damages.

COUNT III
BREACH OF CONTRACT FOR COMMERCIAL IMPOSSIBILITY

41. With the Covid outbreak it was commercially impossible for McInnis to continue working on the project until the Covid outbreak subsided and the workplace was safe from further infection of Covid-19. Instead of complying with its own March 24, 2020 directive that sick employees be excused from work, B & G cancelled McInnis's contract.

COUNT IV
BREACH OF DUTIES OF GOOD FAITH AND FAIR DEALING

42. Every contract executed and performed within the state of Mississippi carries with it the inherent duties of good faith and fair dealing.

43. B & G's actions, as described above, were in bad faith and constitute breaches of the duties of good faith and fair dealing, entitling McInnis to an award of damages in an amount to be determined by a jury.

COUNTS V AND VI
NEGLIGENCE AND GROSS NEGLIGENCE

44. B & G had duties under both the subcontract and law to act with reasonable care in the performance of its CMAR duties. B & G also assumed certain duties, including assumption of the duty to provide a safe workplace.

45. B & G's actions breached these duties by acts of negligence and gross negligence, as described above, causing damage to McInnis in an amount to be determined by a jury.

46. B & G's grossly negligent and reckless conduct rises to the level of actions that is willful and wanton and supports an award of punitive damages and attorney's fees.

COUNT VII
DECLARATORY JUDGMENT

47. B & G has made certain accusations and claims against McInnis, including claims that McInnis breached the parties' agreement, abandoned the agreement and the performance of the work. These allegations are false.

48. McInnis seeks declarative relief in the form of an adjudication confirming that B & G breached the parties' agreement for the reasons set forth above, and that McInnis was released from its obligations under the agreement, with performance excused based upon the following findings and more to be shown at trial:

a. the workplace was unsafe as a result of B & G's actions and the Covid pandemic, creating reasonable fear of serious bodily injury, harm, and death;

b. the workplace was unsafe as a result of B & G's actions and the Covid pandemic, rending performance of the agreement commercially impossible;

c. the workplace was unsafe as a result of B & G's actions and the Covid pandemic, rending performance of the agreement commercially impracticable;

d. the workplace was unsafe as a result of B & G's actions and the Covid pandemic, frustrating the purpose of the agreement;

e. there was no duty to perform the agreement due to the difficulty created by injury and risk of injury under Mississippi common law (*Starkville v. 4-County*, 819 So.3d 1216 (Miss. 2002); *Baptist v. Lambert*, 157 So.3d 109 (Miss. App. 2015)). The Covid pandemic constitutes *force majeure.*

g. Continuing work was commercially impossible.

COUNTS VIII AND IX
CONVERSION AND TRESPASS TO CHATTELS

49. Mapp's actions, as described above, in moving and destroying McInnis's supplies constitute the torts of conversion and trespass to chattels.

50. Mapp's actions caused damage to McInnis, entitling it to an award against Mapp in an amount to be determined by a jury.

DAMAGES

51. As a result of the causes of action set forth above, McInnis requests the court to enter and an appropriate judgment after trial by jury for the following:

a. compensatory and incidental damages;

b. pre and post judgment interest;

c. attorneys' fees;

d. punitive damages;

e. costs of court; and

f. declaratory judgment.

52. In terminating the contract because McInnis was following reasonable health advice of its own epidemiologist and following the directive of the March 24, 2020 letter that employees exposed to or testing positive for Covid-19 leave the workplace until further notice and, instead, cancelling the contract was done willfully, maliciously, in reckless disregard to the rights of McInnis, giving McInnis the right to punitive damages. As part of punitive damages, McInnis also is entitled to its reasonable attorneys' fees and expenses.

WHEREFORE Plaintiff, McInnis Electric Co., requests judgment of and from Defendants, Brasfield & Gorrie, L.L.C. and James Mapp, in an amount determined by a jury.

RESPECTFULLY SUBMITTED, this the 19th day of April, 2021.

/s/ Dennis L. Horn
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IN THE SUPREME COURT OF MISSISSIPPI

No. 2021-CA-01115-SCT

McInnis Electric Company — Appellant

v.

Brasfield & Gorrie, LLC and
James Mapp — Appellees

consolidated with

No. 2021-CA-01300-SCT

McInnis Electric Company — Appellant

v.

Brasfield & Gorrie, LLC and
James Mapp — Appellees

On Appeal from the Circuit Court of the
First Judicial District of Hinds County, Mississippi
(Cause No. 21-190)

BRIEF OF APPELLANT

(Filed Nov. 14, 2022)

ORAL ARGUMENT REQUESTED

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Attorneys for Appellant

[ii] **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. McInnis Electric Company (McInnis) is the Plaintiff below and Appellant herein, seeking at this point to invalidate arbitration proceedings inappropriate to issues arising from the COVID-19 *force majeure* and the Defendant-Appellees' tortious imposition of unsafe working conditions which led directly to infections and healthcare risks for the McInnis Electric Company workers at the new construction site at the University of Mississippi Medical Center.

2. Brasfield & Gorrie, LLC (B&G) is the Defendant-Appellee which brought in workers from a construction site which had been forced to shut down because of a COVID-19 outbreak there.

3. James Mapp, Defendant-Appellee, is a B&G employee/supervisor who is charged with destroying McInnis's conduit materials on the job site,

evidencing the growing animosity between the companies.

4. Dennis L. Horn, Shirley Payne, Leigh Horn, and Horn & Payne, PLLC, counsel for McInnis Electric Company.

5. R. Lane Dossett and Hicks Law Firm, PLLC, counsel for McInnis Electric Company.

6. Ralph B. Germany, Jr., Simon T. Bailey, and Bradley Arant Boult Cummings LLP, counsel for Brasfield & Gorrie, LLC (B&G) and James Mapp.

7. Hon. Winston L. Kidd, Circuit Court Judge, Circuit Court of Hinds County, Mississippi, First Judicial District.

Respectfully submitted,

/s/ Dennis L. Horn
Dennis L. Horn,
Attorney of Record for the Appellant

[iii] **TABLE OF CONTENTS**

[iv] **TABLE OF AUTHORITIES**

CASES

STATUTES

OTHER SOURCES

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[1] STATEMENT OF THE ISSUES

1. Whether the trial court erred in finding that this case, based on tortious causes of action arising from violations of COVID-19 safety measures, is within the scope of arbitration?

2. Whether Defendants can compel arbitration where it was their default which ended the contract they now seek to use to enforce arbitration?

3. Whether overriding public policy issues require adjudication by the court rather than by private arbitrators guessing at Mississippi law on the novel issues raised herein?

4. Whether the trial court erred in finding that the terms of the subcontract require arbitration between McInnis and B&G instead of only joinder in arbitrated disputes between B&G and the owner?

STATEMENT OF ASSIGNMENT

Pursuant to Rule 28 (a)(4), assignment of this case must be to the Mississippi Supreme Court on the basis

of Rule 16 (d)(1) that this is a case of first impression, and 16 (d)(2) that this case involves fundamental or urgent issues of broad public importance that require a prompt or ultimate determination by the Supreme Court.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument on this important pandemic related case, particularly to be able to articulate issues from newly evolving case law dealing with the impact of the COVID-19 pandemic.

[2] **BRIEF OF APPELLANT**

STATEMENT OF THE CASE

Nature of the Case

On May 31, 2017, B&G entered into an approximately $180 million cost-plus contract agreement with the University of Mississippi Medical Center (hereafter "UMMC") for construction management services for a project, commonly referred to as the "CMAR-Children's of Mississippi Expansion." The contract documents set forth the details of the project for the children's wing of the teaching hospital, which included an approximately 370,000 square foot, seven-story expansion, 92 bed Neonatal Intensive Care Unit, 32 Bed Pediatric Intensive Care Unit, 10 operating rooms, ambulatory services, outpatient client and a five-level parking garage. [CP-171.]

B&G and McInnis entered into a subcontract agreement whereby McInnis agreed to perform the electrical and low voltage construction of the work on February 16, 2018. While the subcontract contained a limited arbitration provision for only certain disputes that are not covered in this case, it did not contain a *force majeure* clause.

The COVID-19 pandemic hit with force. McInnis requested reasonable health and safety accommodations, which B&G rejected, ultimately resulting in the loss of 40% of McInnis's workforce. B&G exacerbated the unsafe worksite by supplementing the workforce with a contractor from another jobsite that had been shutdown due to COVID-19. As the conditions worsened, B&G terminated McInnis. In turn, McInnis filed this lawsuit in the Hinds County Circuit Court for B&G's tortious, wrongful conduct in exposing McInnis's employees to an unsafe work environment and the unlawful termination. McInnis likewise sought adjudication that it was excused from performance as a result of the pandemic under the historical law of *force majeure* and commercial impossibility.

[3] Determination of the applicability of the COVID-19 pandemic to *force majeure* precedence, as well as whether *force majeure* conditions are contractually contemplated within an arbitration provision in the absence of an express provision, are both novel issues of first impression best suited for development through Mississippi common law, not guessed at by arbitrators. The Court should reverse the trial court and deny arbitration under the well settled law that torts

claims are not contemplated under arbitration provisions.

Course of the Proceedings and Disposition of the Case Below

This case is on appeal from an order directing arbitration over cessation of construction work caused by no fault of McInnis, but the impact of illness, quarantining, and government orders.

McInnis Electric Company filed its Complaint for Damages in this action on April 5, 2021, while the COVID-19 pandemic remained in full swing [CP-9], and its First Amended Complaint for Damages with exhibits on April 19, 2021. [CP-156.] The Defendants, Brasfield & Gorrie, LLC and James Mapp, filed their Answer, Affirmative Defenses, and Counterclaim on May 12, 2021 [CP-487.] The Plaintiff, McInnis, opposed arbitration and moved for an injunction. [CP-502, 505, 508, 534.]

The Circuit Court of Hinds County, Mississippi, Judge Winston L. Kidd, held the initial hearing on the arbitration issue August 23, 2021, and granted the Plaintiff's Motion by Order Granting Temporary Restraining Order. [CP-709, R 9.] Judge Kidd declared in open court that day that he would enjoin the arbitration and signed the Court's Order Granting Temporary Restraining Order on August 25, 2021 (entered on August 26, 2021). [CP-709, R 9.] Judge Kidd then entered an order enforcing arbitration on September 13, 2021,

Order Granting Defendants' Motion to Compel Arbitration and for Stay. [CP-713, R 10.]

This appeal followed on October 1, 2021. [CP-714, 963, R 11-13.]

[4] There were early skirmishes over the timing and elements of appeal, *e.g.*, [CP-940-963], but all those have been decided by the Order of this Court entered on August 2, 2022, acknowledging Defendants/Appellees' Notice of Withdrawal of Motion to Dismiss the appeal based on timing of the Notice(s) of appeal.

The Mississippi Supreme Court has issued five orders maintaining this appeal by McInnis. First, on November 30, 2021 [CP-975-976, R 14-15], this Court held that McInnis's Petition for Interlocutory Appeal should be deemed a notice of appeal and that the appeal of this matter should proceed under MRAP 3. The Court's panel then held that McInnis's Motion to Stay should be granted. Third, that same panel found that the Motion to Dismiss Appeal should be passed for consideration on the merits of the appeal. This Motion to Dismiss for Defendants, however, was subsequently withdrawn, as recited above. On January 20, 2022, the Court ordered that McInnis's Motion to Consolidate the interlocutory appeal with the appeal of the same underlying trial Court's order should be granted. [CP-977, R 16.] Also on January 20, 2022, the Court denied the Defendants' Motion to Suspend Rules and Expedite Appeal. [CP-978, R 17.]

This case was extensively briefed to this Court by McInnis's Petition for Interlocutory Appeal by

Permission, filed October 1, 2021, which McInnis adopts herein *in toto*. [Motion #2021-2811.]

STATEMENT OF FACTS

COVID-19 is the number one fact in this case. It was COVID-19 that reduced the McInnis workforce to impractical levels, and that caused ongoing health and safety threats that were deliberately ignored by the B&G and James Mapp (Mapp was a B&G superintendent). [First Amended Complaint at 5, CP-160.]

B&G and McInnis entered into a subcontract agreement [CP-253] whereby McInnis was [5] to perform electrical and low voltage construction for the subject hospital construction project. The contract scheduled work to begin on or about February 15, 2018. McInnis was directed to not report on site until June 4, 2018, and, due to delays, was unable to begin until July 23, 2018. McInnis's work began with underground construction of a complex web of conduits, which were successfully installed with the exception of damage caused by the concrete contractor. As the project progressed, the construction schedule became more and more delayed as a result of B&G's failure to coordinate predecessor trades. [CP-166.] By August 1, 2019, the schedule was off by months. *Id.* By the fall of 2019, nearly a thousand RFIs and CPRs had been issued in six months, revealing major problems with the contract documents and defects in the drawings. *Id.*

B&G's failure to coordinate the trades worsened as the project progressed and B&G experienced

management turnover. [CP-161.] For example, the sheet rock contractor and the plumbing contractor were required to complete the patient rooms of the upper floors in specific sequence, coordinated with all trades, but no attempt was made for sequencing. *Id.* To install the electrical conduits in the patient rooms, windows had to be installed, which were always behind schedule. *Id.* Headwalls had to be installed for the wall structures to be completed, which was always behind schedule. *Id.* The sheetrock ceilings had to be framed for conduits to be completed inside and run outside of the room, which was always behind schedule. *Id.* The plumbers piping, which had to be sweated, required McInnis to halt electrical piping, as no attempt was ever made to coordinate these trades. *Id.*

Efficiency of McInnis's personnel/workforce exceeded other trades, including mechanical and plumbing, which were planned to precede McInnis' work. The failure of these and other predecessor activities delayed McInnis's work, which was not on the critical path toward completion, through no fault of its own. These problems were soon to be multiplied by the COVID-19 pandemic. [CP-279, R 18-22.]

[6] On March 11, 2020, Mississippi experienced its first reported presumptive case of COVID-19. [CP-16 1.] Within five days, on March 16, 2020, the National Electrical Contractors Association announced a national disease emergency response agreement with the National Electrical Union. *Id*. McInnis was both a recipient of this notice and a source who provided access to said notice to B&G.

On March 24, 2020, McInnis notified B&G of workplace safety concerns especially including exposure to Covid, which were ignored. [CP-287, R 26-27.] B&G, realizing now that the predecessor activities had resulted in substantial delays on the backend, sought to make up for lost time by "squeezing" McInnis. Approaching the height of the pandemic, B&G not only declined reasonable health and safety measures, but stated that it was ramping up the project by supplementing McInnis's workforce with the replacement Marathon workers. [CP-162.] The Marathon workers had been dismissed from work at a data center in Alabama that was shut down as a result of the COVID-19 pandemic. [CP-162.] The intermingling of these new employees arriving from a jobsite that had already been shut down due to COVID-19 created fear among the workers and likely resulted in the spread of COVID-19 throughout the UMMC project. *Id.* As the project deteriorated, one of B&G's supervisors, Defendant James Mapp, illegally destroyed McInnis materials on the jobsite, evidencing the growing animosity between the companies. [CP-160.]

In March of 2020 the HHS Secretary issued a declaration regarding COVID-19 pandemic. This order required counter measures including COVID-19 safety measures such as N95 respirators/face shields and an infection control program.

On April 1, 2020, Tate Reeves, the governor of Mississippi, entered a shelter-in-place order due to the COVID-19 pandemic. The order required certain non-essential businesses to close and recommended social

distancing, to reduce the spread of the coronavirus in Mississippi. [7] *Osby v. Janes*, 323 So. 3d 1084, 1085-86 (Miss. 2021). This order, number 1463, provided that building and construction should be halted during Covid except for maintaining essential pre-existing infrastructure. Note order 1463 specifically applied to pre-existing infrastructure. The Children's Hospital was not an existing infrastructure. It was a work in progress and was not yet in operation. Thus, it was not subject to the 1463 exception to the governmental shutdowns mandated for COVID-19.

By May 8, 2020, McInnis had suffered approximately 40% loss in its workforce due to employees testing positive for COVID-19, which was substantially higher than the population average at that time. [CP-163.] B&G, who was well aware that COVID-19 was running rampant on the project, not only ignored the workers' health and safety, but continued to demand McInnis perform in life threatening conditions by threatening termination. McInnis did everything possible to reasonably continue the work, including making $94,000.00 in hazard payments to encourage its workers. McInnis again requested reasonable accommodations to accomplish the work safely, such as 10 day suspension of the work. [CP-292, R 31-32.] Instead of working with McInnis, B&G breached its own safety directives and its contract by terminating McInnis without just cause and in bad faith on May 13, 2020. [CP-297, R 36-38.]

B&G had issued McInnis an order that when any worker tested positive for COVID-19, that worker

must self-quarantine. McInnis's expert, Dr. Skip Nolan, affirmed B&G's mandate for quarantine and held that such mandate was medically necessary. [CP-294, R 33-35]

On May 13, 2020, B&G wrote a detailed response to McInnis's demand for pandemic relief [CP-297, R-36-38] with a strongly worded letter denying all of McInnis's allegations, ignoring the directive from B&G's expert and protecting the workplace from COVID-19 with quarantine, denied the scope of illness of McInnis's workforce, and demanded that McInnis's men continue to remain on the job and perform work even in the middle of the pandemic which [8] had sickened approximately 40% of McInnis's workforce or McInnis would be expelled from the project. [CP-151]

As pointed out *supra*, when McInnis did not comply with B&G's demand, B&G declared the contract abandoned and expelled McInnis from the project without any negotiations about workforce conditions on the project which continued to promote COVID-19 infections.

In summary, both B&G's epidemiologist and McInnis's epidemiologist, Dr. Skip Nolan, directed that if anyone obtained the COVID-19 infection that person must be quarantined. And, instead of enforcing their own expert's directive, B&G declared the contract void and ran McInnis and its workers off the project. McInnis's workers were replaced with workers from Alabama who had left a project north of Birmingham which was shut down because of COVID-19 infection.

Although the parties (excluding Mapp) entered into a subcontract that contains an arbitration provision, the claims in this case are outside the scope of the agreement for the reasons set forth below.

SUMMARY OF ARGUMENT

This Court is called upon, in this case of first impression, to adjudicate a limited exception to arbitration for tortious claims arising out of the COVID-19 pandemic, as other states have recently done. *Maglana v. Celebrity Cruises, Inc.*, 2022 U.S. App. LEXIS 21662, 2022 WL 3134373, at *1 (11th Cir. Aug. 5, 2022). Contractor B&G terminated subcontractor McInnis after B&G forced its workers into an unsafe sweatshop, resulting in prolific illness and loss of 40% of its workforce, a *force majeure* condition. The tortious claims asserted in this case were not contemplated for arbitration and are not within the express scope of the arbitration provision, requiring the trial court's order compelling arbitration to be reversed and this case remanded for a jury trial.

[9] STANDARD OF REVIEW

This Court reviews *de novo* the granting of a motion to compel arbitration. *S. Central Heating, Inc. v. Clarke Constr. Inc.*, 2022 Miss. App. LEXIS, *8, P16, 2022 WL 2312877 (Ct. App. Miss. June 28, 2022), and reviews the factual findings of the trial court under an abuse of discretion standard. *Wilson v. Lexington*

Manor Senior Care, LLC, 2022 Miss. App. LEXIS 294, *12, 710 (August 30, 2022).

ARGUMENT

I. This Court, not the Arbitrator, must decide arbitrability.

The party seeking to compel arbitration bears the burden of establishing that the parties to the contract entered a binding arbitration agreement. *KPMG, LLP v. Singing River Health System*, 2018 WL 5291088 (Miss. 2018); *Mississippi State Port Authority at Gulfport v. Southern Industrial Contractors LLC*, 271 So. 3d 742 (Miss. App. 2018).

The Mississippi Court of Appeals has recently reaffirmed the standard on determining arbitration: "[g]enerally, the question of whether a particular dispute is subject to arbitration is considered an issue for the courts, not the arbitrator . . . " *Protect Your Home v. Thomas*, 331 So. 3d 537 (Miss. App. 2021). "A gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); *Janvey v. Alguire*, 847 F.3d 231, 244 n. 12 (5th Cir. 2017); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974) (stating, "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."); s*ee also* Pl.'s Resp. Memo. in Opp. to Def.'s Mot. to Cmpl.

Arbtrn. [CP511-12.] Thus, the law compels a party to submit his grievance to arbitration only if he has contracted to do so. In determining the validity of an arbitration agreement, the parties' [10] intentions control. *McKee v. Home Buyers Warranty Corp.*, 45 F.3d 981, 984 (5th Cir. 1995).

Disputes over arbitration are for the trial court to resolve. *See Matthews v. Gucci*, CV 21-434-KSM, 2022 WL 462406, at *3 (E.D. Pa. Feb. 15, 2022), stating:

> [I]f the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then the parties should be entitled to discovery on the question of arbitrability, after which the court should consider the motion under the Rule 56 summary judgment standard. *Id.* In the event that summary judgment is not warranted because the party opposing arbitration can demonstrate . . . that there is a genuine dispute as to the enforceability of the arbitration clause, the court may then proceed summarily to a trial regarding the making of the arbitration agreement or the failure, neglect, or refusal to perform the same, as Section 4 of the FAA envisions.

Under 16(a)(1) of the Federal Arbitration Act, the scope of the agreement regarding what issues are arbitrable is determined solely by agreement of the parties. The Act merely allows parties to contract for

arbitration and have their contract enforced; it does not entitle a party to immunity from suit. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994); *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 909 n.3 (5th Cir. 2011).

Although the Federal Arbitration Act favors arbitration in rare instances, the scope of the agreement regarding what issues are arbitrable is determined by the agreement of the parties. There is no policy favoring arbitration when determining the scope of the agreement. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 688–89 (5th Cir. 2018) (stating, "because the validity of the agreement is a matter of contract, at this stage, the strong federal policy favoring arbitration does not apply.") Likewise, there is no presumption in favor of arbitration when determining whether there is a valid agreement to arbitrate between the parties. *Karelis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 160 (3d Cir. 2009). Juxtaposed against the absence of favorability is the important rights of the party (McInnis) seeking to litigate in the court system and avoid arbitration: "[o]nly in the rarest of circumstances, and with caution, should we shackle a citizen [11] to an agreement of others that strips the citizen of his or her constitutional right to a trial by jury."[1] *Olshan Found. Repair Co. of Jackson, LLC v. Moore*, 251 So. 3d 725,

[1] McInnis respectfully submits that preserving the right to a jury trial is of paramount importance to public policy in disputes such as here, where a jury would determine the novel issues of the applicability of the pandemic, the jury itself experienced, to *force majeure*.

728 (Miss. 2018) (citing Miss. Const. Art. 3, § 31; *Pinnacle Trust Co., L.L.C. v. McTaggart*, 152 So. 3d 1123, 1127 (Miss. 2014)).

II. Tort claims are not bound to arbitration.

Generally, courts have held that intentional tort claims are not subject to arbitration. *Maglana v. Celebrity Cruises, Inc.*, 2022 U.S. App. LEXIS 21662, 2022 WL 3134373, at *1 (11th Cir. Aug. 5, 2022). In considering whether a dispute is within the scope of an arbitration provision, the Court should consider whether it was anticipated in the formation of the agreement and intended to be covered. "[A]s with any other contract, the parties' intentions control." *Pedigo v. Robertson*, 237 So. 3d 1263, 1267 (Miss. 2017).

In *Maglana*, the plaintiffs sued Celebrity Cruises as a result of being quarantined against their will and subjected them to dangerous conditions on a cruise ship during the COVID-19 pandemic. Celebrity moved to compel arbitration because the plaintiff signed an employment agreement in which the plaintiffs agreed to arbitrate all disputes arising from, related to, or connected with employment. The district court granted Celebrity's motion to compel arbitration of the tort claims. The 11th Circuit, however, reversed, finding that intentional torts were outside the scope of arbitration agreements. The Court of Appeals in *Maglana* noted the distinction of arbitrable claims and non-arbitrable claims:

> The cruise line's alleged treatment of Maglana and Bugayong—keeping them onboard for weeks under miserable conditions and "draconian rules"—was unconnected to the plaintiffs' duties as beverage handlers. Doc. 19 at 28–29. There were no passengers to serve, and the cruise line was not operating any cruises. Underscoring the distinction between [12] arbitrable claims related to the employment agreements and the intentional tort claims is the relief plaintiffs sought. Whereas back wages and repatriation are available forms of relief under the employment agreements, the tort claims seek instead compensatory damages for Maglana and Bugayong's "mental anguish."

Maglana, supra at *14.

Mississippi Courts have followed a similar logic. For example, in *Franklin Corp. v. Tedford*, 18 So. 3d 215, 238-39 (Miss. 2009) the Mississippi Supreme Court held that "In order to establish that an intentional tort was committed by Defendant, Franklin Corporation, Plaintiffs must prove that, more likely than not, Defendant, Franklin Corporation either desired to cause the consequences of its acts, or believed that the consequences were substantially certain to result from it." Said another way, if Franklin Corp. knew that the consequences were certain, or substantially certain, to result from its acts, and still went ahead, such a defendant is treated by the law as if it had in fact desired to produce the result. *Id.*

"Miserable conditions" and "draconian rules" cited in *Maglana* certainly apply to this case, where B&G subjected McInnis to an unsafe Covid-infested work environment that resulted in the loss of 40% of its workforce. *See* Complaint [CP-163-64] for the factual conditions forming the basis of the claims in this case. As in *Maglana*, B&G's intentional tortious actions are outside of the scope of arbitration. *See* Complaint alleging intentional breach of contract [CP-165], breach of duties of good faith and fair dealing [CP-166], gross negligence [CP-166], conversion [CP-168], and trespass to chattels [CP-168.] McInnis urges the Court to adopt the reasoning and ruling of *Maglana* in this case.

Relatedly, the Southern District of Mississippi has determined that exposing inmates to COVID-19 is a tort claim for which a legal remedy may be pursued. *U.S. v. Brooks*, 3:11-CR-67-DPJ-LGI, 2021 WL 797109, at *2 (S.D. Miss. 2021). The court in *Brooks* stated that a tort claim regarding such issues is the correct arena to air such grievances.

[13] In *Hebbronville Lone Star Rentals, LLC v. Sunbelt Rentals Indus. Services, LLC*, 1:16-CV-856-RP, 2017 WL 1026019, at *1 (W.D. Tex. 2017), report and recommendation adopted, 1:16-CV-856-RP, 2017 WL 3634190 (W.D. Tex. 2017), aff'd and remanded *sub nom*. *Hebbronville Lone Star Rentals, L.L.C. v. Sunbelt Rentals Indus. Services, L.L.C.*, 898 F.3d 629 (5th Cir. 2018) both parties to the Agreement were sophisticated businesses. The court held that if the parties had agreed to arbitrate technical legal issues, such as mutual mistake, it is unlikely they would have chosen an

accountant to arbitrate those issues. Rather, the fact that they contracted for an accountant to be the arbitrator was consistent with Lone Star's position that the only issues reserved for arbitration were accounting issues, not legal ones. Numerous courts have relied on this very same aspect of an arbitration agreement to reach the same conclusion.

Numerous Mississippi courts have determined that illegal acts and unanticipated disputes are not covered by arbitration.

In *Doe v. Hallmark Partners, LP*, 227 So. 3d 1052, 1054 (Miss. 2017), a tenant, who allegedly was kidnapped, assaulted, and raped in an apartment complex's parking lot near the leasing office, brought a premises liability action against the landlord and security contractor, alleging that they were negligent in their duty to keep the complex reasonably safe. 227 So.3d at 1054. The court began its analysis by first acknowledging that "even broad clauses have their limits." *Id.* at 1058. The court further noted that the "arbitration agreement at hand does not mention negligence." *Id.* at 1059. This was important because the court reasoned that, "[i]n the end, **perhaps just as telling as what language [the] arbitration clause includes is what the arbitration clause leaves out.** . . . the arbitration clause here makes no mention of agreeing to arbitrate **tort, negligence**, personal injury, or other common-law claims." (Emphasis added.) *Id.* Similarly, in this case, the arbitration clause does not mention any agreement to arbitrate common-law claims, negligence claims or other torts.

[14] In *Pedigo v. Robertson*, 237 So. 3d 1263, 1268 (Miss. 2017) the plaintiff entered into a rental agreement for the lease of a TV. 237 So.3d at 1265. The defendant rental company filed a police report alleging that Pedigo pawned the TV, constituting theft of rental property. *Id.* Pedigo was indicted, but the criminal charges were later dismissed, and he filed a civil suit for malicious prosecution. *Id.* The defendant argued that the claims were covered by the broad provisions of the arbitration agreement and that the matter should be stayed pending arbitration. *Id.* The Mississippi Supreme Court addressed whether the claims were included within the scope of the arbitration on appeal. When considering the scope, the court noted that it focused on the "factual allegations in the complaint rather than the legal causes of action asserted." *Id.* at 1267. In finding the claims were unanticipated and beyond the scope of the arbitration, the Court stated,

> Like our rulings in *Doe* and *Smith*, today we find that the claims in question are beyond the scope of the parties' arbitration agreement. Here, the agreement **did not contemplate the possibility** that RAC would file a criminal complaint against a signatory/lessor, causing him to suffer the pains of a criminal indictment, subsequent imprisonment, and eventual release without prosecution. The CAA provisions are sufficiently broad, and the agreement shows the intent and mutual agreement by the parties to arbitrate all civil matters related to the lease of the television;

> though, **notably absent from the CAA is the parties' agreement to arbitrate civil matters related to a potential criminal indictment.** (Emphasis added.)

Id. at 1268. Similar to *Pedigo*, McInnis did not contemplate, at the time of entering into the subcontract, that the Covid pandemic would occur and B&G would seek to force McInnis to perform in a dangerous and illegal enviroment, in violation of CDC and OSHA guidelines. Further like *Pedigo*, notably absent from the arbitration provision was any agreement to arbitrate tort claims issues arising as a result of *force majeure*.

In *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170 (Miss. 2007) the plaintiff, who bought a sport utility vehicle (SUV), brought an action for breach of warranty, [15] invasion of privacy, civil fraud, and other claims against the automobile dealership, alleging that he never received title to the SUV, that he was having mechanical problems with the SUV, and that stolen vehicles had been sold with his name used on forged vehicle titles and bills of sale. 950 So.2d 172. The defendants argued that the issues presented fell squarely within that arbitration agreement. *Id.* at 173. On the other hand, the plaintiff contended that, while the claims asserted by him are not within the scope of the arbitration agreement. *Id.* The court noted that the language of the arbitration was broadly written and included "all claims, demands, disputes or controversies." *Id.* at 176. Although broad, plaintiff argued "**no consumer in an arms-length negotiation, absent duress, would contract away his**

constitutional rights to judicial redress and a jury trial when making a purchase if he believed it gave the merchant the green light to commit fraud, forgery, and identity theft, while at the same time precluding the consumer from having his day in court." *Id.* The Mississippi Supreme Court agreed, by stating that "While [plaintiff] no doubt agreed to arbitrate claims that originated from the sale of the vehicle or related to the sale of the vehicle, **no reasonable person would agree to submit to arbitration any claims . . . which [plaintiff] was presumedly totally unaware at the time of the execution of the documents** in question, including the arbitration agreement. *Id.* at 177-78.

Similarly, in this case, no one in an arms-length construction contract would contract away the right to judicial redress for claims arising out of being subjected to workplace infested at the time of the outbreak of the Covid virus, resulting in the loss of 40% of their workforce, which is a situation wholly unanticipated at the time of the of the contract formation on February 16, 2018.

In *Smith ex rel. Smith v. Captain D's, LLC*, 963 So. 2d 1116 (Miss. 2007), a seventeen-year-old employee through her parent, sued the minor's employer for negligent hiring, [16] supervision, and retention following an alleged rape by a supervisor. *Id.* The defendant argued that the claim was covered by the arbitration provision contained in the employment agreement. *Id.* The court found that "while recognizing the breadth of the language in the arbitration

provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment." *Id.* at 1121.

See also Niolet v. Rice, 20 So. 3d 31 (Miss. App. 2009) (holding that a former employee's allegations of assault and battery against a supervisor were not subject to the arbitration clause).

Even though an arbitration provision may be written "broad" and "capable of expansive reach," an arbitration provision only covers "contemplated" disputes. *Pedigo v. Robertson*, 237 So. 3d 1263, 1267 (Miss. 2017). Claims that are not "contemplated" include tort claims and claims based on illegal or criminal acts pled as civil claims.

The FAA merely allows parties to contract for arbitration and have their contract enforced; it does not "entitl[e] a party to immunity from suit." *Digital Equip.*, 511 U.S. at 878. *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 909 n.3 (5th Cir. 2011)

A majority of courts have now held that plaintiffs may bring state-law tort claims based on alleged failure to use pandemic counter-measures, such as the federal Public Readiness and Emergency Preparedness Act. *Lilly v. SSC Houston Southwest Operating Co., LLC*, 2022 U.S. Dist. LEXIS 879 (S. Dist. Tex. 2022). If the impact of COVID-19 has faded from the Court's memory, the Court in *Lilly* reflected that "[i]n the early part of 2020, the COVID-19 pandemic quickly overwhelmed American society. We experienced a public health nightmare, faced unprecedented lockdowns,

and witnessed widespread business failures. Thousands upon thousands of our fellow citizens died from this dreaded virus." *Id.* at *3. The Court then stated that "[t]he majority of courts considering this issue have held that the PREP Act does not prohibit plaintiffs from bringing state-law tort claims based on alleged failures to use covered [17] countermeasures or failures to implement appropriate safety protocols related to COVID-19, including failures to provide adequate levels of staffing and training to staff." *Id*. at *3. These same type of claims are asserted by McInnis here.

As a very recent case has recognized, "Accordingly, as a result of the COVID-19 Pandemic and Executive Orders, the Lease is terminated and also rescinded by the legal doctrines of frustration of performance and impossibility of performance. *Fitness v. Retrofitness*, No. 20-CV-699 (PKC) (LB), 2021 U.S. Dist. LEXIS 34057, at *4 n.3 (E.D.N.Y. 2021). COVID-19, a *force majeure* event, was not written into the agreement to arbitrate, and was not anticipated at the time of the arbitration agreement. As time goes on, numerous cases are arising every day holding that COVID-19 was an unexpected event constituting *force majeure*, *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262, at *7 (S.D.N.Y. Dec. 2020) ("The COVID-19 pandemic and the attendant government-imposed restrictions on business operations permitted Phillips to invoke the Termination Provision. The pandemic and the regulations that accompanied it fall squarely under the ambit of Paragraph 12(a)'s force

majeure clause . . . It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster.") Other courts have already determined that the COVID-19 pandemic qualifies as a natural disaster. *See*, *e.g.*, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370 (2020) ("We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster."). *Easom v. US Well Services, Inc.*, CV H-20-2995, 2021 WL 1092344, at *8 (S.D. Tex. 2021) ("COVID-19 qualifies as a disaster under the WARN Act. COVID-19 is clearly a 'disaster.' "); *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, No. 20-CV-0310, 2020 WL 7024929, at *58 (Del. Ch. 2020) ("The COVID-19 pandemic arguably fits this definition [of natural disaster]" under a purchase and sale agreement); *Friends of Danny De Vito v. Wolf*, 227 A.3d 872, 889 (2020); *1600 Walnut Corp. v. Cole Haan Co. Store*, CV 20-4223, 2021 WL [18] 1193100, at *3 (E.D. Pa. 2021) ("The COVID-19 pandemic, however, is within the defined force majeure events of the lease. The pandemic is in the same category as the other life-altering national events listed, such as war, riots, and insurrection.").

If COVID-19 is consistent with unexpected, life-altering events like war, riots and insurrection, surely this Court will agree that there is no distinction between the pandemic and the other unexpected events not contemplated to be covered by arbitration.

McInnis did not agree to arbitrate tort claims. McInnis did not agree to arbitrate COVID-19 related

issues. McInnis did not agree to arbitrate *force majeure.*

III. Public policy favors a jury trial of the novel issues raised in this case.

The COVID-19 pandemic and the malignant actions of B&G and James Mapp rendered the contract between the parties in default and unenforceable, including that portion of the contract that called for arbitration.

The world-wide pandemic was unexpected, but more particularly in this case where the parties subcontract did not contain a *force majeure* clause defining such events nor detailing the results in the event one occurred. This is a novel issue of first impression under Mississippi law, requiring this case be decided by a court of law, not guessed at by an arbitrator. Historically, there has been found to be no duty to perform an agreement due to the difficulty created by injury and risk under Mississippi law. *Starkville v. 4-County*, 819 So.2d 1216 (Miss. 2002) (acknowledging defenses of frustration of purpose, impossibility and impracticability); *Baptist v. Lambert*, 157 So.3d 109 (Miss. App. 2015) (acknowledging impracticability voids contracts due to illness). Common law development and expansion based on the modern issues of the pandemic are essential.

This case has none of the qualities of an arbitrable decision. The purpose of arbitration is variously described; but none of those offered purposes apply here.

One idea is that arbitration [19] can serve as bringing their own experience and acquired expectation to the proceedings as expert jurors constructive malgamus, a principal attraction of arbitration is the expertise of those who decide the controversy. Theoretically informal, speedy, and an inexpensive process, arbitration may be freely chosen by parties. Moreover, a principal attraction of arbitration is the expertise of those who decide the controversy. *Lummus Glob. Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F. Supp. 2d 594, 599 (S.D. Tex. 2002). When expertise is missing due to lack of developed law, the Court should find that there is a strong public policy favoring adjudication in a court of law.

Arbitration is sometimes proclaimed as a shortcut method, providing speed and informality. *Saipem Am., Inc. v. Wellington Underwriting Agencies Ltd.*, Civil Action No. H-07-3080, 2008 U.S. Dist. LEXIS 108267, at *18 (S.D. Tex. 2008). The trend in conflict management of the resolution of a broad spectrum of claims through arbitration, with limited judicial review, has become increasing suspect when, in cases such as this, novel issues are presented. Where a party, such as here, raises a legal claim that the courts themselves have never addressed, an arbitrator is not constrained in decision making, likely resulting in a decision that is inconsistent with what a public court would decide. Arbitration further deprives the courts of the opportunity to flesh out important issues, such as in this case. The issues of public policy favoring an expedited adjudication concerning this novel case

arising out of the pandemic is not within the normal category of disputes arbitrated.

One of the earliest, and weightiest, cases to address COVID-19 was the Delaware court's *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, No. 2020-03 10-JTL, 2020 WL 7024929, 2020 Del. Ch. LEXIS 353, at *152 (Del. Ch. 2020), affirmed by *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2021 Del. LEXIS 386 (Del., 2021). There, in a decision rendered November 30, 2020, the court found COVID-19 difficulties to have erased a duty to [20] arbitrate existing under the challenged contract.

In reviewing dictionary definitions of "natural disaster" the court held that "[b]y any measure, the COVID-19 pandemic fits those definitions," and that it could not "be seriously disputed that the COVID-19 pandemic is a natural disaster" in the context of an insurance policy's force majeure provision); *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, No. 2020-0310-JTL,2020 Del. Ch. LEXIS 353, at *152 (Del. Ch. 2020) ("[t]he COVID-19 pandemic arguably fits this.) *See also*, McInnis's Response, [CP-512 -521.]

The events leading to the vacating of the arbitration agreement in this Delaware decision parallel events in the case presented here. Just as Mississippi encountered its first COVID-19 cases in early March 2020, the parties to the Delaware case, during those same critical days, observed that financial markers began gyrating as concern spread about COVID-19. *Id.* at * 97. The pandemic led to massive changes in the

business of the companies. The parties' business performance continued to plummet. *Id.* at *109. The situation caused low demand as well as governmental orders. *Id.* Citing to the Restatement Second of Contracts, *Id.* at 197, the court ruled that common law principles required that when conditions prevented the contract from going forward in the ordinary course of business, that contract failed, and the buyer there (paralleling McInnis here) was not obligated to close. *Id.*, at 132. Further, relying on impossibility of performance and impracticability, the Delaware Court held the Restatement likewise recognizes that if compliance with a contractual obligation is made impracticable by having to comply with a domestic or foreign governmental regulation or order, then the obligation is discharged. *Id.*

Myriad additional cases have continued to apply reasoning of the Delaware decision. For example, one law review article noted, recent court decisions confirm application of the doctrine of frustration to contracts impacted by the current pandemic. Department: Practice Tips: [21] COVID-19-Impacted Contracts Post Shutdown, 44 Los Angeles Lawyer 13,*15 (Sept. 2021) (collecting cases on impossibility of performance and frustration of purpose.) This Delaware decision has a backdrop in Mississippi law. Mississippi is one of the few states to recognize the right of employee to refuse work that could endanger their lives. Refusing Work to Avoid Serious Injury or Death: An Empirical Study of Legal Protections Before and During COVID-19, 49 Pepp. L. Rev. 1 (2022). The case cited there was

Mississippi Employment Security Commission v. Phillips, 562 So.2d. 115 (Miss. 1990), where the Mississippi Supreme Court ruled for an oil field worker that he had the right not to work near a potential explosion. COVID-19, especially at its outbreak, was similarly dangerous.

Further, the Mississippi Supreme Court, in *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828 (Miss. 2003) held:

> A two-prong inquiry is used when determining whether a motion to compel arbitration should be granted. The first prong has two components: (1) Whether there is a valid arbitration agreement; and (2) whether the parties' dispute is within the scope of the arbitration agreement. The second prong concerns whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. This second prong includes the consideration of applicable contract defenses available under state contract law which may invalidate the arbitration agreement.

The majority opinion backed up its ruling that there was no arbitration where the employer had obliterated its enforcement of the arbitration agreement by its own failure of performance, just as B&G failed to perform its part of the contract in this case. There the Mississippi Supreme Court ruled:

> This Court has always had the authority to review the enforceability of contract

> provisions, including arbitration provisions. Such an argument is frivolous and flies in the fact of the Courts equitable power. Furthermore, by statute, this Court is vested with the power to determine contract unconscionability and any assertion that such right is limited by the language of Sanderson Farms arbitration provision is contrary to law. Miss. Code Ann. § 75-2-302(1) (Rev. 2002).

[22] *Sanderson*, supra, at fn 2.

The United States Supreme Court has agreed in determining the validity of an arbitration agreement, the "parties' intentions control." *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374, 94 S. Ct. 629, 38 L. Ed. 2d 583 (1974). This Court has held, while we recognize the federal policy favoring arbitration, "we will not construe arbitration agreements so broadly as to encompass claims and parties that were not intended by the original contract." *Smith ex rel. Smith v. Captain D's, LLC*, 963 So. 2d 1116, 1119 (Miss. 2007) (internal citations omitted). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Rogers-Dabbs*, 950 So. 2d at 176 (quoting *EquiFirst Corp. v. Jackson*, 920 So. 2d 458, 461 (Miss. 2006) (internal citations omitted)). "Based on what is before us, we find that the parties did not agree to submit to arbitration, and we will not require parties to arbitrate when they did not agree to do so." *Driver Pipeline Co. v. Williams Transp., LLC*, 104 So. 3d 845, 850 (Miss. 2012).

When balancing the equities of the public policy considerations, this case is not for arbitration. The parties did not agree to arbitrate *force majeure* events, which should be developed under Mississippi common law.

IV. The express terms of the arbitration agreement do not include McInnis's claims.

The arbitration provisions here in issue create significant ambiguities which must be construed against the drafter, B&G. *Roberts Contracting, Inc. v. Mersino Dewatering, Inc.* 270 So. 3d 994 (Miss. App. 2018). Section 29.8 of the Arbitration Agreement specifically leaves the door open for a subcontractor to choose to enforce rights under the contract either through arbitration or litigation. The language of the subcontract in this case limits arbitration to issues arising between the contractor, here B&G, and the owner, here UMMC.

As stated above, a party will not be required to submit to arbitration on any issue that he [23] or she has not previously agreed to. *Doe v. Hallmark Partners*, LP, 227 So. 3d 1052, 1056 (Miss. 2017). Upon reviewing the arbitration provision of the subcontract in this case, the court will see that the claims in this case are not covered by the express, limited terms of the subcontract. Excerpted provisions of the subcontract provide as follows,

> 29.2 In case of any dispute between Contractor and Subcontractor, **in any way related to or arising from any act**

> **or omission of the Owner or involving the Contract Documents**, Subcontractor agrees to be bound to Contractor to the same extent that Contractor is bound to the Owner, by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, board, or court so authorized in the Contract Documents or by law, whether or not Subcontractor is a party to such proceedings . . .
>
> ***
>
> 29.4 Except as provided in Paragraph 29.5, any disputes between Contractor and Subcontractor **not resolved under Paragraph 29.2**, including any disputes in which Subcontractor has a claim against another subcontractor, **shall be finally determined by binding arbitration** . . .

[CP265-266.]

The specific grant of arbitration is limited to the subcontractor submitting to arbitration proceedings in disputes between B&G and the owner; that is McInnis would be required to participate in arbitration between B&G and the hospital, but not otherwise. Paragraph 29.4 is the only portion of the subcontract addressing the scope of arbitration, which it limits to claims that are unresolved under Paragraph 29.2. Paragraph 29.2 contains a dispute resolution mechanism

for claims arising between Contractor and Subcontractor related to "**any act or omission of the Owner or involving the Contract Documents.**" This is further confirmed by a sentence in Paragraph 29.4 which states that "If Contractor notifies Subcontractor that Contractor contends that **any arbitration** . . . involves a controversy **within the scope of Paragraphs 29.2**, 29.3, or 29.5, the dispute process shall be stayed until the procedures or procedures under Paragraphs 29.2, 29.3, or 29.5 are completed." Claims arising between the Contractor and Subcontractor as [24] a result of actions or claims with the Owner are to proceed under Paragraph 29.2, 29.3 and 29.5, but if unsuccessful and not resolved, they thereafter proceed to arbitration. All other claims that do not arise out of claims with the Owner, Contract Documents, or between other subcontractors, are not governed by Paragraphs 29.2, 29.3, and 29.5 dispute resolution mechanism or arbitration.

Indeed, Paragraph 29.8 anticipates litigation in court without required arbitration. Paragraph 29.8 states:

> *Subcontractor shall commence all claims* and causes of action, whether in contract, tort, breach of warranty, or otherwise, and whether in arbitration or **in litigation**, against Contractor or any other subcontractor, arising out of or related to the Subcontract . . . (emphasis added)

[CP-266.] This provision clearly sanctions litigation and in no way limits a subcontractor to arbitration.

The claims in this case are against B&G for its tortious actions and breach of the subcontract. These claims are not subject to the arbitration provision because they are not identified or defined as being subject to arbitration in Paragraph 29.2. At a minimum, the "not resolved under Paragraph 29.2," language, when expounded upon and clarified by Paragraphs 29.4 and 29.8, creates unenforceable ambiguity. When the terms of a contract are vague or ambiguous, they are always to be construed against the drafter. *Roberts Contracting, Inc.* 270 So.3d at 1005.

Additionally and separately, McInnis has sued Mapp, an individual employee of B&G that caused additional disruption by disposing of conduit necessary for McInnis's work. This conversion of McInnis's property is not subject to arbitration under existing precedent in Mississippi and especially because McInnis has no arbitration agreement with Mapp.

[25] **CONCLUSION**

Based on the now established precedent emerging from the pandemic difficulties, this Court must deny arbitration and order this case to trial.

Respectfully submitted, this the 14th day of November, 2022.

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[26] **CERTIFICATE OF SERVICE**

I, Dennis L. Horn, hereby certify that I have this date electronically filed the above and foregoing *Brief of Appellant* with the Clerk of this Court using the MEC system, which sent notification of such filing to the following:

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I, Dennis L. Horn, further certify that I have this date served, by electronic mailing and by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellant* on the following:

Hon. Winston L. Kidd
Hinds County Circuit Judge
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wkidd@co.hinds.ms.us

This the 14th day of November, 2022.

/s/ Dennis L. Horn
Dennis L. Horn, Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

No. 2021-CA-01115-SCT

McInnis Electric Company — Appellant

v.

Brasfield & Gorrie, LLC and
James Mapp — Appellees

consolidated with

No. 2021-CA-01300-SCT

McInnis Electric Company — Appellant

v.

Brasfield & Gorrie, LLC and
James Mapp — Appellees

On Appeal from the Circuit Court of the
First Judicial District of Hinds County, Mississippi
(Cause No. 21-190)

APPELLANT'S REPLY BRIEF

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[1] **APPELLANT'S REPLY BRIEF**

INTRODUCTION

As the worksite at the Children's Hospital exploded with COVID-19, McInnis sent a letter to B&G documenting the virus danger, the lack of sanitation, and failure of required precautions. Exhibit "F" to First Amended Complaint, CP 289-291. Along with this warning of the COVID-19 infections, this letter outlined the legal failure of B&G:

> Brasfield & Gorrie and its three supervisors who created the filth are liable in tort for outrage. *Mississippi Printing Co. v. Maris, West & Baker, Inc.*, 492 So. 2d 977 (Miss. 1986). *See also Franklin Corp. v. Tedford*, 18 So. 3d 215 (Miss. 2009) holding that intentionally subjecting employees to glue fumes, a neurotoxin, without proper ventilation allowed the employees to bypass worker's compensation and sue the employer individually in tort. Brasfield & Gorrie is liable both to McInnis and injured McInnis employees.
>
> Brasfield & Gorrie purposely has rendered impossible McInnis's successful completion of the project. "No one doubts that it is unjust for the plaintiff to make performance impossible and then complain of it." Corbin on Contracts, § 1323. Brasfield & Gorrie and its agents have objectively and intentionally made performance of the contract impossible, rendering the company liable for McInnis's damages. *Id.*

> Reasonable danger to life or health excuses continuing performance. Restatement of Contracts § 465, Comment a. This rule applies where there is reasonable harm to the promissor and to others. *Id.*, Comment f.

Id. Nothing McInnis could do would overcome the obstacles to performance built against it by B&G and its agents. These succinct precedents are valid and controlling in this case.

ARGUMENT

I. There Are Flaws with Appellees' Statement of the Facts.

While B&G/Mapp argue that other electrical workers were brought in because McInnis was behind, there is compelling evidence that the foreign Marathon workers were, instead, brought in by B&G because of its sequencing failures with predecessor trades that led to delays. The Marathon workers were available because their other job had been shut down by COVID-19 infections. CP 162-163. What is vital, here, is that B&G admits it brought in the foreign workers. [2] CP 493. Saying that McInnis then abandoned the project, Brief of Appellees, ¶ 3, tries to make it seem that McInnis simply decided to mosey off to take a walk in the park. Instead, McInnis was shut down because of COVID-19 illnesses and quarantining, directly resulting from the imported workers.

B&G then disputes "all of McInnis's characterization of health and safety protocols," Appellees' Brief, ¶ 3, without offering any glimmer of an explanation.

B&G then claims that McInnis was the only subcontractor who abandoned this or any other B&G job, *id.*, p. 3, without any basis from the record whatsoever. B&G, at fn. 1, ¶ 3, basically admits that there was a series of executive orders and regulations that were implemented to contain the COVID-19 spread, without arguing that it had satisfied any of those safety precautions.

B&G/Mapp, on p. 4, then admit there are "tort" counts in McInnis's Complaint and admit that Mapp was ratified by B&G in his actions, effectively aligning B&G as respondent superior with Mapp in his tort actions. These admissions undermine several of their later arguments.

B&G's claim that it was B&G's "expectations" at issue, not its intentional importation of COVID-19 contagion into the workplace, *id.* at p. 7, is simply unsupportable by the record before this Court.

II. Arbitration Arises under Contract Law.

By citing to *Adams Cmty. Care Ctr., LLC v. Reed*, 37 So. 3d 1155 (Miss. 2010), B&G/Mapp acknowledge that arbitration cases rely on contract law. Appellee's Brief, p. 6. The Federal Arbitration Act itself and numerous United States Supreme Court decisions set that standard. *See*, *e.g.*, *New Prime, Inc. v. Oliveira*, 139

S. Ct. 532, 202 L. Ed. 2d 536 (2019), holding that, for an independent contractor transportation worker, a court—rather than an arbitrator—must determine [3] whether § 1 of the FAA applies before a court may compel arbitration.[1]

III. The Question of Arbitration Is Decided by the Courts.

In *First Options of Chi, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), the Court reiterated that it is critical that parties are not sent to arbitration against their will: "[w]here the party has agreed to arbitrate, he or she, in effect, has relinquished much of . . . the practical value [of the right to a court's decision about the merits of its dispute]." *Id.* ("Hence, who – court or arbitrator – has the primary authority to decide whether a

[1] Although focusing on transportation workers and not technically on point, the statutory interpretation is important. Justice Gorsuch focused on the statutory language in stating that the FAA states that "nothing" in the act "shall apply" to "contracts and employment of . . . any other class of workers engaged in foreign or interstate commerce." This language means that even if the contract has a delegation clause delegating arbitrability questions to the arbitrator, a court should first decide whether the § 1 "contracts of employment" exclusion applies. In other words, a court must decide if § 1 applies before it has authority to use its statutory powers in §§ 3 and 4 to enforce arbitration. At the same time, the opinion hearkens back to the text as it was understood at the FAA's enactment in 1925 to hold that "employment" should include independent contractors. Specifically, the Court reasoned that "employment" as a synonym for "work" would have been understood to include independent contractors in 1925 and did not have the "term of art" meaning of today that implies an employer-employee relationship. *Id.*

party has agreed to arbitrate can make a critical difference to a party resisting arbitration."). ARTICLE: LIBERAL JUSTICE AND THE CREEPING PRIVATIZATION OF STATE POWER, 67 Drake L. Rev. 561, 593 (2019).

Following Fifth Circuit law, arbitrators designated under the AAA rules can determine questions of the contract interpretation, but the arbitrators cannot determine the question of arbitrability unless that power is clearly delegated to them under express terms of the agreement between the parties. Here, under the language of the subcontract between B&G and McInnis, there is power delegated to the arbitrators solely to determine questions of the contract's enforcement, not the questions of arbitrability. Hence, the question of whether to enforce arbitration is solely for the court to decide.

[4] B&G/Mapp acknowledge that there is current and controlling law that the question of arbitration not be sent to the arbitrators but be decided by the courts, paragraph 2, p. 6 of Appellees' Brief. B&G/Mapp acknowledge that McInnis has set forth case law requiring the courts to decide the arbitration issues, but fails to dispute or distinguish those cases.

B&G/Mapp overstate the holding of *Prima Paint*, leaving out the Supreme Court's reliance on § 4 of the Federal Arbitration Act on deciding that when the making of the arbitration clause is in issue, "court[s] may proceed to adjudicate it." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

Pursuant to §§ 2 and 4 of the Federal Arbitration Act, and the precedent handed down in *Prima Paint* and *Buckeye v. Cardegna Check Cashing, Inc.*, 546 U.S. 440, at 444-45 (2006), only courts will have authority to hear challenges to the arbitration agreement itself.

The Fifth Circuit uses the following analysis: "(1) did the parties unmistakably intend to delegate the power to decide arbitrability to an arbitrator, and if so, (2) is the assertion of arbitrability wholly groundless." *Agere Sys. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009) (quoting *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006)). Mississippi Federal Judge Hon. Keith Starrett applied that analysis as follows:

> In the Court's opinion, the contract does not unmistakably provide that the arbitrator must determine the scope of the arbitration provision. The pertinent sentence is: "Any and all disputes in connection with or arising out of the Provider Agreement will be exclusively settled by arbitrator in accordance with the Rules of the American Arbitration Association." Defendants focus on the phrase "in accordance with the Rules of the American Arbitration Association," but that phrase modifies "[a]ny and all disputes in connection with or arising out of the Provider Agreement." In other words, the contract first gives the arbitrator jurisdiction over "disputes in connection with or arising out of the Provider Agreement," and then it provides that the arbitrator will settle *those* disputes in

> accordance with the AAA Rules. Accordingly, the Court must determine whether the present dispute is "in connection with" or "aris[es] out of the Provider Agreement."

[5] *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, No. 2:12-CV-114-KS-MTP, 2012 U.S. Dist. LEXIS 191046, at *49-50 (S.D. Miss. Oct. 24, 2012).[2]

In the present case, the reference to the AAA rules is directed solely to the terms of the contract, and as such, maintains the power of the court to determine the question of arbitrability. The parties' subcontract, at Article 29- Claims and Disputes; Arbitration, directs that arbitration applies to "disputes . . . involving the Contract Documents" 29.2. Therefore, it is clear that this Court must decide the question of whether to arbitrate, not the arbitrators. CP 264-265.[3]

In another Mississippi case, there was also a controlling analogous paragraph 29 in the parties' contract which adopted citations to specific contract provisions. *Mississippi State Port Authority at Gulfport v. Southern Industrial Contractors LLC*, 271 So. 3d 742 (Miss. App. 2018). Just as in the present case, those provisions referred to provisions for terminating the

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[2] Later affirmed by *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 262 (5th Cir. 2014). "Ordinarily, whether a claim is subject to arbitration is a question for a court."

[3] Section 29 of the contract must also be discerned by the Court to provide for various levels of court decisions, plainly taking the present case outside of arbitration altogether. See Section IV of the McInnis opening brief.

contract by arbitration, negotiation, or litigation. *Id.* at 746, ¶ 6. There, the order for arbitration was reversed.[4]

The *Mississippi State Port Authority* decision held that the courts must decide whether the parties' dispute is within the scope of the arbitration agreement. Following United States Court precedent, the *Mississippi State Port Authority* case instructed that the courts must decide whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. Here, the impact of the COVID-19 pandemic was a constraint external to the parties' agreement. [6] COVID-19, therefore, forecloses arbitration in this case.

Mississippi State Port Authority also held that, although Mississippi courts recognize a liberal federal policy favoring arbitration, the courts will not construe arbitration agreements so broadly as to encompass claims that were not intended by the original contract. This is because arbitration is a matter of contract and a party cannot be required to submit to arbitrate any dispute which he has not agreed to so submit. *Id.* at 742, 13.

Further, *Mississippi State Port Authority* explains that the Mississippi Supreme Court, "traditionally has viewed arbitration agreements as tantamount to a settlement between the parties where the arbitration agreement would be the exclusive source of rights and

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[4] The circuit court opinion reversed by *Mississippi State Port Authority* had been issued by Circuit Judge Hon. Winston L. Kidd, the trial judge below in the present case.

liabilities of the parties," citing *Robinson v. Henne*, 115 S. 3d 797, 802, 1115 (Miss. 2013). *Id.*

Additionally, when parties agree to binding arbitration, they waive their rights to litigate. *Mississippi State Port Authority*, citing *Storm Reconstruction Sevs, Inc. v. Kellogg Brown & Root Services, Inc.*, 2007 U.S. Dist. LEXIS 81294, 2007 WL 1611987 (S.D. Miss. 2007). The parties in the present case did not waive their right to litigate in Section 29 of the subcontract. The agreement between the parties here, therefore, did not make arbitration mandatory and exclusive. Following this clear precedent, arbitration in the present case is not required.

IV. Despite Deficiencies to the AAA Arbitration Clause, the Courts Must Determine Clear and Unmistakable Intent to Delegate the Question of Arbitrability to the Arbitrators.

Despite the various cases that may seem to suggest that the mere existence of a delegation clause precludes a determination of that clause's scope, court decisions find the AAA's Commercial Rules as to some claims does not end the inquiry into whether the claims Defendants seek to arbitrate are covered by that delegation clause. *J2 Res., LLC v. Wood River Pipe Lines, LLC*, 2020 U.S. Dist. LEXIS 130594, at *24-25, 2020 WL 4227424 (S.D. Tex. July 23, 2020) requires this Court to distinguish between "validity" or "enforceability" challenges and [7] "formation" or

"existence" challenges, citing *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018). *id.* at *8, holding further that determining whether there is a valid arbitration agreement is a question of state contract law and is for the courts. *Id.*

Other state courts support the presumption favoring judicial resolution absent the clear and unmistakable evidence to the contrary. "What might seem like a chicken-and-egg problem is resolved by application of the presumption favoring a judicial determination." *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 632 (Tex. 2018). Likewise, our conclusion in this case gives weight to every word in the arbitration provision of Section 29.2, including "such" which qualifies and limits which disputes shall be submitted to arbitration, and therefore also qualifies "the" arbitration that will be conducted according to the AAA rules.[5] *See Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 206 (Tex. App. Houston [1st Dist.] 2016).

Federal law compels the same conclusion. In *Memorial Hermann*, the court construed one agreement which incorporated the AAA rules. *Meml. Hermann Health System v. Blue Cross Blue Shield of Texas*, 2017 U.S. Dist. LEXIS 190412, at *3, 2017 WL 5593523 (S.D. Tex. Nov. 17, 2017). As in this matter, the incorporation of the AAA rules failed to demonstrate "clear and unmistakable" intent to delegate arbitrability. *Id.* at 8.

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[5] Those being *only* disputes in any way related to or arising from any act or omission of the Owner or involving the Contract Documents.

The court agreed and concluded that the insurer failed to carry its burden to demonstrate that the dispute at issue fell within the scope of the arbitration provision. "Moreover, defendant has not cited and the court has not found any authority holding that a narrow arbitration agreement coupled with incorporation by reference of rules giving an arbitrator power to rule on his own jurisdiction is enough to show that the parties clearly and unmistakably agreed to arbitrate arbitrability." *Id.*

[8] B&G/Mapp cite *Arnold v. HomeAway, Inc.*, 890 F.3d 546 (5th Cir. 2018) and its predecessor cases as though AAA rules decide all issues on arbitration. However, *Arnold* and its kindred have been distinguished. *Arnold* itself holds open the door to the court's decision on arbitrability when it states "[t]he mere fact that no arbitration provision does not apply to every possible claim does not render the parties' intent to delegate threshold questions about that provision less clear." *Id.* at 557. All cases cited by B&G/Mapp have been curtailed by more recent developments, particularly *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. 2017); cert. granted, 138 S. Ct. 2678, 201 L. Ed. 2d 1071 (2018); vacated by, remanded by 139 S. Ct. 524, 202 L. Ed. 2d 480; 935 F.3d 274 (5th Cir. 2019); writ of certiorari granted, 141 S. Ct. 107, 207 L. Ed. 2d 1050 (2020); dismissed as improvidently granted, 141 S. Ct. 656, 208 L. Ed. 2d 512 (2021), and *Allcapcorp. Ltd. v. Sloan*, No. 05-20-00200-CV, 2020 Tex. App. LEXIS 8129, at *13-16, 2020 WL 6054339 (Tex. App. Oct. 14, 2020).

These more recent cases maintain the controlling precedent that applies the "clear and unmistakable" test and leaves the decision on arbitrability for the courts to decide.

V. McInnis Did Plead an Intentional Tort.

B&G also asserts that McInnis did not plead an intentional tort in its complaint. Not so. The Complaint begins on its page 1 stating that the "case concerns substantial alleged tortious acts and omissions."

McInnis brought intentional tort claims for causing the illness of its employees which made their performance impossible—causing termination and the damages occurred after and because of termination.

Notwithstanding, intentional torts are not required for a dispute to be found outside of the agreement. *Doe v. Hallmark Partners, LP*, 227 So. 3d 1052, 1057 (Miss. 2017). Rather, arbitration provisions only cover "contemplated" disputes. *Pedigo v. Robertson*, 237 So. 3d 1263, [9] 1267 (Miss. 2017). Claims that are not "contemplated" include such claims as those pled in this case arising out of the unexpected, *force majeure* condition created by COVID-19 and B&G's exacerbation of the effects of the disease, all of which no one anticipated at the time of contract formation.

VI. Defendant James Mapp Committed Torts Which Were Adopted by B&G.

The allegations against Defendant James Mapp are also allegations against B&G under established Mississippi law. The doctrine of respondent superior imputes vicarious liability from an employee to an employer when the employer's act was within the scope of the authority conferred. *RGH Enters. v. Ghafarianpoor*, 329 So. 3d 447 (Miss. 2021). The Mississippi Supreme Court there adopted the Second Restatement of Agency's articulation of the scope of employment:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) It is of the kind he is employed to perform;
>
> (b) It occurs substantially within the authorized time and space limits;
>
> (c) It is actuated, at least in part, by a purpose to serve the master, and
>
> (d) If force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

RGH Enters. at 449, ¶ 9.

B&G has expressly stated that Mapp met all these criteria. Appellees' Brief at 20. B&G is therefore liable for Mapp's intentional tortious acts.

McInnis could not have contemplated that Mapp and B&G would act to endanger the health and safety of their workers. These dangers, these torts, are not subject to arbitration.

Section 29.8 of the parties' contract here provides that "subcontractor shall commence all claims . . . in . . . tort . . . in litigation." Section 29.2 also describes any "dispute" as "involving the [10] Contract." Torts are not covered by the contract and therefore fall outside arbitration.

The Mississippi Supreme Court recently applied these rules about tort actions to similar arbitration agreements in *Pedigo v. Robertson, supra, Doe v. Hallmark Partners, LP, supra*, and *Smith ex rel. Smith v. Captain D's, LLC*, 963 So. 2d 1116 (Miss. 2007). In *Smith*, the Mississippi Supreme Court held that the plaintiff s rape-based tort claims were "unquestionably" beyond the scope of the arbitration agreement, as they were unrelated to her employment. *Id.* at 1121.

B&G/Mapp cites to *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998), to avoid the Court's decision against arbitration, but *IP Timberlands* essentially enforced § 2 of the Federal Arbitration Act, 9 U.S.C. § 2, which expressly provides:

> . . . an agreement in writing to submit to controversy arising out of such a contract,

> transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2 (1976).

Id. at 107.

McInnis is not simply suing for a wrongful termination; it is suing for the torts committed by Mapp at B&G's behest and the willful endangerment of the McInnis workforce. A wrongful termination, such as in *Pedigo, supra*, also sounds in tort. *See also*, *Warnock Eng'g., LLC v. Utilities*, 2020 U.S. Dist. LEXIS 263303 at *36, n. 4. 2020 WL 13260650 (S.D. Miss. March 2, 2020) (wrongful discharge claim considered as a tort).

In *Doe v. Hallmark Partners, LP, supra*, the Mississippi court determined that "the parties simply did not contemplate arbitrating Jane's assault- and rape-based lawsuit predicated upon a tort theory of common-law negligence, unrelated to the rights and obligations of the lease." *Doe*, 227 So. 3d at 1056. Therefore, this court held that Doe's claims did not arise under or relate to her "occupancy and leasing of the [apartment]," and Doe was free to pursue her claims against Hallmark through litigation. *Id.* at 1059-60.

[11] The controlling language from *Pedigo v. Robertson*, 237 So. 3d 1263 (Miss. 2017) provides that the tort there alleged (malicious prosecution) was an action between the parties that their "agreement did not contemplate." *Id.* at 1268, ¶ 16. The court found Pedigo's claim to be beyond the scope of the arbitration

agreement. This is a binding precedent that forecloses arbitration in the present case.

VII. B&G's Effort to Rebut Impossibility of Performance Fails.

B&G/Mapp simply refuse to accept impossibility of performance and the unanticipated, unexpected nature of the *force majeure* COVID-19 pandemic. By all legal accounts, an act of God is unanticipated. Because McInnis could not foresee the COVID-19 imposed impossibility arising from B&G/Mapp's tortious conduct, actions endangering McInnis workers, it could not have agreed to arbitrate those issues. *Maglana v. Celebrity Cruises, Inc.*, 2022 U.S. App. LEXIS 21662, at *1, 2022 WL 3134373 (11th Cir. Aug. 5, 2022).

Arbitration is thereby foreclosed.

VIII. B&G/Mapp Fail to Distinguish the *AB Stable* Decision.

In the *AB Stable* Delaware case, once the litigation was initiated, the parties' arbitration agreement was ordered ineffective. This order was initially entered as an agreed order, but as the litigation progressed, the court entered findings that upheld the unenforceability of the parties' contract, effectively affirming the order that enjoined arbitration. *AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC*, 268 A.3d 198, 206 (Del. 2021).

> The *AB Stable* court scheduled a hearing on the parties' TRO question. The court approved and entered an order stating:
>
> 1. Upon the Court's entry of this Temporary Restraining Order, Petitioners . . . and each of Petitioners' respective officers, managers, agents, servants, employees, attorneys, and persons in active concert or participation with Petitioners, are enjoined and restrained, pending further Order of this Court, from:
>
> [12] a. Purporting to arbitrate any dispute.

Id. at 79.

Restatement (Second) of Contracts § 264 Cmt. a. notes that Section 264 was interpreted in *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, to be useful in COVID-19 cases. *Obsidian Fin. Grp. Ltd. Liab. Co. v. Identity Theft Guard Sols., Inc.*, 2021 Del. Ch. LEXIS 74, at *14 n.57, 2021 WL 1578201 (Del. Ch. Apr. 22, 2021)[6] adopted *AB Stable.*

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[6] In *AB Stable*, Vice Chancellor Laster explained that while the concept of impracticability could prevent a buyer from seeking relief for breach of governmental restrictions arising from COVID-19, it prevented a seller from complying with its contractual obligations to operate in the ordinary course, so the seller could not rely on government restrictions to force the buyer to close if the risk of the condition to operate in the ordinary course was not met. *Id.* In other words, the seller assumed the risk of the condition's non-occurrence, and the failure of that condition relieved the buyer of its obligation to close. That outcome makes perfect sense; the concept of impracticability does not apply under

In *AB Stable*, the buyer proved that due to the COVID-19 pandemic, the seller made extensive changes to the business. Because of those changes, its business was not conducted in the ordinary course of business, consistent with past practice in all material respects. The Covenant Compliance Condition therefore failed, relieving the Buyer of its obligation to close. *Id.* at 218.

In *AB Stable*, the court also recognized that COVID-19 was a natural disaster. *Id.* at *5. McInnis has cited a plethora of cases not for their holdings on every point, but simply to point out that numerous courts have found COVID-19 to have been a natural disaster.[7]

IX. The Actions of B&G and James Mapp Were Unconscionable.

The actions of B&G/Mapp were unconscionable, as argued by McInnis in its opening [13] Brief of Appellant, pp. 18 through 21. This issue is not waived; McInnis previously has relied on *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828 (Miss. 2003), where the court held: "Furthermore, by statute, this Court is vested with the power to determine contract

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Section 264 where, as here, "[n]o one is [being] required to comply with an illegal contract and no one [is] receiv[ing] damages based on a breach of an unenforceable obligation." *Id.*

[7] For example, *Easom v. US Well Services, Inc.*, 37 F.4th 238 (5th Cir. 2022) reached a different conclusion on the WARN Act but made no clinically based distinction on whether COVID-19 was a disaster.

unconscionability and any assertion that such right is limited by the language of Sanderson Farms' arbitration provision is contrary to law." Miss. Code Ann. § 75-2-302(1). *Id.* at fn. 2. Unconscionability remains a viable defense to enforcement of an arbitration agreement. *See*, ARTICLE: ARBITRATION IN THE AGE OF COVID: EXAMINING ARBITRATION'S MOVE ONLINE, 22 Cardozo J. Conflict Resol. 245, 277.

McInnis waived nothing.

X. As a Basic Concept, the Standard for Review Must Take the McInnis Pleadings as True.

The Court is to "accept as true the factual allegations in the complaint and draw all reasonable inferences in favor of the party opposing arbitration." *MXM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 395 (3d Cir. 2020) (citing *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764 at 772 (3d Cir. 2013)). *Passion for Rests., Inc. v. Villa Pizza, LLC*, 2022 U.S. Dist. LEXIS 233644, at *11 n.8, 2022 WL 18024209 (D.N.J. Dec. 30, 2022).

CONCLUSION

For these reasons, arbitration in this case must be denied, and the case should be remanded for trial.

Respectfully submitted, this the 1st day of February, 2023.

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CERTIFICATE OF SERVICE

I, Dennis L. Horn, hereby certify that I have this date electronically filed the above and foregoing *Appellant's Reply Brief* with the Clerk of this Court using the MEC system, which sent notification of such filing to the following:

Hon. Ralph B. Germany, Jr.
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I, Dennis L. Horn, further certify that I have this date served, by electronic mailing and by U.S. Mail,

postage prepaid, a true and correct copy of the above and foregoing *Appellant's Reply Brief* on the following:

Hon. Winston L. Kidd
Hinds County Circuit Judge
P. O. Box 327
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wkidd@co.hinds.ms.us

This the 1st day of February, 2023.

/s/ Dennis L. Horn
Dennis L. Horn, Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

No. 2021-CA-01115-SCT

McInnis Electric Company — Appellant

v.

Brasfield & Gorrie, LLC and
James Mapp — Appellees

consolidated with

No. 2021-TS-01300-SCT

McInnis Electric Company — Appellant

v.

Brasfield & Gorrie, LLC and
James Mapp — Appellees

Re: *McInnis Electric Co. v. Brasfield & Gorrie, L.L.C. and James Mapp*, In the Circuit Court of Hinds County, Mississippi, Cause No. 21-190

On Appeal from the Circuit Court of
Hinds County, Mississippi
(Cause No. 21-190)

MOTION FOR REHEARING

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[i] **TABLE OF AUTHORITIES**

TABLE OF CASES

STATUTES RELIED UPON

OTHER SOURCES CITED

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[1] IN THE SUPREME COURT OF MISSISSIPPI

No. 2021-CA-01115-SCT

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MOTION FOR REHEARING

THE MAJORITY OPINION EFFECTIVELY OVERRULES ESTABLISHED PRECEDENT BY THROWING

THE ARBITRATION OF CRIMINAL ACTS BACK TO THE ARBITRATORS.

The Court held that criminal law and the COVID-19 pandemic, including emergency orders, are part of the construction contract: "Agreeing to the American Arbitration Association rules is tantamount to agreeing to delegate scope questions to the arbitrators." Opinion, page 11, ¶ 22. That is not the meaning of the FAA[1] and established Mississippi law. The first question is [2] whether there is an agreement at all. That question is for the court. But the court's duties cannot end there. The court retains the duty to decide when law other than the FAA interposes its control. While the parties may have agreed to arbitrate manifestations of their performance under the FAA, such an agreement does not negate other law. Those other laws, including criminal laws, must be observed and enforced not by the arbitrators but by the courts. *See*, *Archer White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 494 (5th Cir. 2017): "It is not the case that any mention of the parties' contract of the AAA [American Arbitration Association] Rules trumps all other contract language."

The arbitration agreement cannot require the parties to arbitrate issues of criminal conduct. Mississippi case law has affirmatively construed the duties of the courts to address issues such as Defendant Mapp's having "destroyed McInnis's materials on the job site," Opinion, page 5, ¶ 6, constituting "conversion and

[1] Federal Arbitration Act, 9 U.S.C. § 551, *et seq*.

trespass to chattel." Opinion, page 7, ¶ 11. Established law has required the courts, not the arbitrators, to construe and enforce criminal law.

In its Brief of Appellant [at p. 14], McInnis cited *Pedigo v. Robertson*, 237 So. 3d 1263, 1268 (Miss. 2007) for its holding that the arbitration agreement at issue, as with the arbitration agreement construed herein, "did not contemplate the possibility . . . [of arbitrating] civil matters related to a potential criminal indictment." *Id.* at 1267. *See also*, *Niolet v. Rice*, 20 So. 3d 31 (Miss. App. 2009), holding that a former employee's allegations of criminal assault and battery against a supervisor were not subject to the arbitration clause. Brief of Appellant, p. 16. The Court's decision here, subject to motion for rehearing, has overlooked and fails to address established precedent that civil matters related to potential crimes are not subject to arbitration.

[3] Further, the majority opinion of this Court did not address the related and also fully briefed dispositive and settled issue that a tort created by an underlying criminal act is not subject to arbitration. A case cited by the majority on another proposition, *Scruggs v. Wyatt*, 60 So. 3d 758, 772-73 (Miss. 2011), does acknowledge that criminal conduct or implementation of the clean hands doctrine could bar enforcement of an arbitration agreement. Opinion, p. 8. ¶ 16.

On appeal, the Supreme Court majority found that Brasfield & Gorrie sought to gain unfair advantage by "squeezing" McInnis. Opinion, p. 4, ¶ 6. "As the project and its timeline deteriorated, one of Brasfield &

Gorrie's supervisors, Defendant James Mapp, allegedly destroyed McInnis's materials on the job site, evidencing the growing animosity between the companies." Opinion, p. 5, ¶ 6. Specifically, " . . . Mapp disposed of a pallet of steel conduit that McInnis left at the job site." Disposing of the pallet of steel conduit constituted conversion and trespass to chattel. Opinion, p. 7, ¶ 11. The Court also noted "Brasfield & Gorrie ratified and embraced the cleanup work Mapp did on its behalf." Opinion, p. 7, ¶ 11.

Mapp's destruction of McInnis's property on the job site constituted, *inter alia*, conversion [larceny] by willfully and maliciously trespassing upon the personal property of McInnis, a crime under § 97-17-87 of the Mississippi Code Annotated of 1972 (Supp. 2001). The "conversion" also constitutes the crime of larceny either as a felony found at § 97-17-41 of the Mississippi Code Annotated of 1972 (Supp. 2014) or a misdemeanor found at § 97-17-43 of the Mississippi Code Annotated of 1972 (Supp. 2014) by "taking or carrying away property of another."

The germane point is that, by ratifying and embracing the actions that Mapp did himself, Brasfield & Gorrie became, along with Mapp, a principal in the crimes of trespass and larceny.

[4] *State v. Labelle*, 232 So. 2d 354, 355 (1970) holds that "all who aid, incite, participate or abet the commission of [a misdemeanor] as well as those who perpetrate same are guilty as principals." Aiding and abetting the commission of a felony creating criminal

liability on the part of the principal is codified as § 97-1-3 of the Mississippi Code Annotated of 1972 (Supp. 1995). The aiding and abetting principal also applies to misdemeanors. *Labelle, supra.*

As held in *Jefferson v. State*, 977 So. 2d 431 (Miss. 2008), Brasfield & Gorrie was either a principle or aider or abetter of trespass. It matters not if Brasfield & Gorrie was present when the crime was committed. *Sales v. State*, 552 So. 2d 1383, 1389 (Miss. 1989) holds that the primary distinction between being an accessory before the fact and one who aids and abets a crime is the actual or constructive presence on the property. Aiding and abetting requires actual or constructive presence on the property. If presence does not exist, the person is guilty as a principle as an accessory before the fact. The concept of accessory before the fact involves some participation in the criminal act, some conduct which facilitated the consummation of the principal crime. As stated *supra*, the presence at the crime scene is not necessary. *Clemons v. State*, 482 So. 2d 1102, 1105 (Miss. 1985). Brasfield & Gorrie and Mapp both are guilty of trespass and larceny itself. The Court ratified Mapp's crime.

The Governor's emergency order shutting down nonessential construction, such as the construction here in issue, was issued pursuant to the Mississippi Constitution of 1890 and Mississippi Code Annotated § 33-15-11(b)(17) (Supp. 2014). See, for example, Executive Order No. 101575 regarding the COVID-19 pandemic, holding that it was issued pursuant to said Constitution of the State of Mississippi and

Mississippi Code Annotated § 33-15-11(b)(17) (Supp. 2014). Then the following Order was issued:

> [5] On April 1, 2020, Governor Tate Reeves instituted a shelter in place order in response to the ongoing pandemic, requiring certain nonessential businesses to close and recommending social distancing to reduce the spread of coronarius in Mississippi. Executive Order Number 1463 provided that building and construction should be halted during the ongoing pandemic except for maintaining essential preexisting infrastructure. The children's hospital was not classified as an existing infrastructure as it was a nonoperational work in progress and thus was not subject to the executive order's exception to the governmental shutdowns.

Opinion, p. 5, ¶ 7.

McInnis and Brasfield & Gorrie/Mapp cannot avoid the Governor's directive that "Executive Order Number 1463 provided that building and construction should be halted during the ongoing pandemic. . . ." Opinion, page 5, ¶ 7.

Brasfield & Gorrie ignored that executive order. Opinion, p. 5, ¶ 7. Brasfield & Gorrie refused to shut down the project, refused to allow McInnis's workmen to recover from COVID-19, refused to grant a ten-day delay, and, instead, immediately terminated McInnis from work at the children's hospital. In ignoring the emergency shutdown, Brasfield & Gorrie violated the criminal statute found at § 33-15-43 of the Mississippi

Code Annotated of 1972 (Supp. 2018) which states that "[a]ny person violating any provision of this article or any rule, order, or regulation made pursuant to this article, shall, upon conviction thereof, be punishable by a fine not exceeding Five Hundred Dollars ($500.00) or imprisonment for not exceeding six (6) months or both."

The majority totally ignores the *force majeure* events tied to COVID-19. A *force majeure* event will excuse performance where it has caused the prevention of performance of a contract. 17B C.J.S. Contracts Sec. 590 (updated 2021). For example, if the stay-at-home orders, business shutdowns, and supply shortages caused by COVID-19 resulted in a party's failure to perform, [6] and their contract does not address these circumstances, that nonperforming party may be excused. See, Rothstein, Kenya, "How Parties Can Use COVID-19 to Excuse Performance of Contracts," 22 U.C. Davis Bus. L. J. 297 (Spring 2022), page 3 of 37. Here, McInnis and its performance of the construction at issue were impacted by the pandemic order to cease construction issued by Governor Tate Reeves, as well as the loss of employees to illness.

As the United States Supreme Court has noted, there are two types of challenges to the validity of an arbitration clause: (1) challenges to the enforceability of the contract as a whole and (2) challenges only to the validity of the precise arbitration clause at issue. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). While the former challenges are delegable to the arbitrator to determine whether the arbitration clause survives the

challenge to the enforceability of the overall contract, the latter are reserved to the court to first evaluate the validity of the clause before ordering the parties to proceed with arbitration in accordance with that clause. *Id.* at 71 (opining that "[t]o immunize an arbitration agreement from judicial challenge on the ground of [a valid defense to that specific provision] would be to elevate it over other forms of contract" (quoting *Prima Palm Corp. v. Flood & Conklin Mfg. Co.*, 188 U.S. 395, 404, n. 12 (1967)); *see also Doyle & Russell*, 213 Va. at 494, 193 S.E.2d at 666 (opining that a party "cannot be compelled to arbitrate a question which, under [its] agreement, is not arbitrable").

The cases cited by the majority opinion have nothing to do with impossibility of performance. The majority's cases do not deal with crimes, torts, failure of clean hands, or decisions that address unconscionability. The majority opinion cites solely the question of whether or not there was a mention of any FAA assignment clause or not. Those cases do not address the problems arising from this majority's decision being in direct conflict with existing [7] precedent from this and other courts. The majority opinion ignores the unique dangers erupting from the COVID-19 pandemic.

But also significant is the decision's omission of criminal activity as outside of arbitration. The fact that Brasfield & Gorrie aided and abetted conversion and trespass to chattels as part of its "squeezing" McInnis, Opinion, p. 4, made Brasfield & Gorrie a principal to the crime. McInnis has extensively briefed the

requirement of judicial adjudication for criminal activity in its opening brief before this Court.

The courts have held that a criminal cannot arbitrate away responsibility for its illegal actions.

This Court's majority opinion recognizes other mandates that must be enforced by the courts, not the arbitrators. When McInnis and Brasfield & Gorrie agreed to arbitration, they agreed that certain "disputes would be determined 'in accordance with the current Construction Industry Rules of the American Arbitration Association.'" Opinion, page 10, ¶ 21. Such rules of the construction industry are not modified to include the non-contemplated COVID-19 disease or death. These rules cannot retract the national disease emergency response agreement with the National Electrical Contractors Association and the National Electrical Union, Opinion, page 4, ¶ 6. These rules of the construction industry do not include the additional health and safety measures declared by the United States Health and Human Services, Opinion, page 5, ¶ 6, including also the requirement that any worker who tested positive for COVID-19 should self-quarantine, Opinion, page 6, ¶ 9. Brasfield & Gorrie's own expert's directive for added safety precautions, Opinion, page 6, ¶ 9, was absent. These rules cannot overcome the impact of 40 percent loss in the workforce due to employees testing positive for COVID-19, Opinion, page 5, [8] ¶ 8. Importantly, these rules did not address Brasfield & Gorrie's responsibility for such dangerous disease resulting from its bringing infected workers onto the work site "through workforce contractor

workers . . . from a job site that had been shut down due to COVID-19," Opinion, page 5, ¶ 8. These issues were unknown at the time of the contract formation and must be recognized through the court, not through arbitration.

The dissent from Justice Kitchens clearly states these objections: "Here, the unforeseen and unavoidable impact of the COVID-19 pandemic on the parties' ability to perform a construction contract was not within the contemplated scope of the arbitration agreement – an agreement that did not contain a *force majeure* clause." Dissent, page 12, ¶ 25.

The dissent embraced the ruling of Mississippi Federal District Judge Keith Starrett as follows:

> In the Court's opinion, the contract does not unmistakably provide that the arbitrator must determine the scope of the arbitration provision. The pertinent sentence is: "Any and all disputes in connection with or arising out of the Provider Agreement will be exclusively settled by arbitrator in accordance with the Rules of the American Arbitration Association." Defendants focus on the phrase "in accordance with the Rules of the American Arbitration Association," but that phrase modifies [a]ny and all disputes in connection with or arising out of the Provider Agreement." In other words, the contract first gives the arbitrator jurisdiction over "disputes in connection with or arising out of the Provider Agreement," and then it provides that the arbitrator will settle *those* disputes in

> accordance with the AAA Rules. Accordingly, the Court must determine whether the present dispute is "in connection with" or "aris[es] out of the Provider Agreement."

Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., No. 2:12-CV-114-KS-MTP, 2012 U.S. Dist. LEXIS 191046, at *49-50 (S.D. Miss. 2012). Later affirmed by *Crawford Prof'l* [9] *Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 262 (5th Cir. 2014): "Ordinarily, whether a claim is subject to arbitration is a question for the court." See, Appellant's Reply Brief, pp. 4-5.

Commentators have noted, "It is important to stress that FAA section 2 is unequivocal, a tribunal may not compel parties to arbitrate a dispute unless a disagreement arose out of a written contract that contains an arbitration provision." Article: Courts Gone "Irrationally Biased" in Favor of the Federal Arbitration Act?–Enforcing Arbitration Provisions in Standardized Applications and Marginalizing Consumer Protection, Antidiscrimination, and States' Contract Laws: A 1925-2014 Legal and Empirical Analysis, 5 Wm. & Mary Bus. L. Rev. 405, 472. Crimes and COVID-19 did not arise out of the construction contract here.

The decision in *Partain v. Upstate Auto Group*, 386 S.C. 488 (S.C. 2010) held that even if a claim is encompassed by language of the arbitration clause, the clause does not apply because the alleged actions of Upstate Auto constitute "illegal and outrageous acts" unforeseeable to a reasonable consumer in the context of normal business dealings. In *Aiken v. World Finance*,

373 S.C. 144 (2007), 644 S.E.2d at 209, the court agreed, "[b]ecause even the most broadly worded arbitration agreements still have limits founded in general principles of contract, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforseeable to a reasonable consumer in the context of normal business dealings," providing that such torts from "[t]he scope of arbitration . . . related to the performance of the contract, are legally distinct from, the contractual relationship between the parties." *Id.* at 152, 644 S.E. 2d at 709. After all, arbitration is a matter of contract and a party cannot be required to submit to arbitration "any dispute which he has not agreed to submit." *Aiken v. World Finance*, 373 S.C. 144 (2007), 644 [10] S.E.2d at 708, citing *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596-97 (2001), 553 S.E.2d at 118-19.

Aiken involved a tort action based on the theft of the plaintiff's personal information by employees of a consumer finance company. *Id.* at 146, 644 S.E.2d at 706. The company sought to enforce a broadly-worded arbitration clause to which plaintiff had agreed in applying for a loan. *Id.* at 147, 644 S.E.2d at 707. The plaintiff submitted the information in applying for loans and paid off the last of the loans in 2000. *Id.* at 146, 644 S.E.2d at 707. The misuse forming the basis for the claim occurred over two years later. *Id.* at 147, 644 S.E.2d at 707. The court there held that the theft of personal information was "outrageous conduct that [plaintiff] could not possibly have foreseen when he agreed to do business with the [finance company]." *Id.*

at 151, 644 S.E.2d at 709. Consequently, the plaintiff could not have intended to submit the dispute to arbitration. *Id.*

Similarly, the plaintiff Partain cannot be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase. Moreover, Partain cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct.

These decisions are closely analogous to *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002), a very similar Mississippi decision finding arbitration unconscionable, where East Ford sold Taylor a used truck it represented to be new. Arbitration was denied.

For further example, in *Mahamoud Khattab M.D. v. Ibrahim*, 2021 Cal. Super. LEXIS 141893, *17, it was held that "[b]y signing the employment agreement, [the plaintiff] did not intend to arbitrate crimes committed by its employees, and nothing in the employment agreements [11] states that criminal conduct, fraud, conversion, theft, or embezzlement are to be arbitrated or somehow within the definition of 'arising under or in connection with' the . . . agreement."

Citing multiple cases for authority, one court has explicitly held: "However inviolable the teaching that courts keep their hands off arbitration, they are not edicts proclaimed by divine right. Arbitrators are creatures of contract. They are no more above public law than the parties from whom they derive their powers."

International Union of Electrical, R&M Workers v. Otis Elevator Co., 201 F. Supp. 213, 218 (S.D. N.Y. 1962). An "agreement may well give an arbitrator power to dispense his own brand of industrial justice, but the contract, and his power under it, are limited by, and must yield to, overriding public policy." *Id.* at 218. Where a ruling "clashes with that policy, it indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability." *Id.* Such a decision is, "therefore, void and unenforceable." *Id.*, citing *Black v. Critter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1956); *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 92 L.Ed. 1187 (1948); *Matter of Western Union Tel. Co.* 299 N.Y. 177, 86 N.E.2d 162 (1949); *Avco Corp v. Preteska*, 22 Conn. Sup. 475, 174 A.2d 684 (June 30, 1961, Conn. Superior Ct., Fairfield County).

CRIMES ARE, ONE BRANCH OF VIOLATION OF PUBLIC POLICY

The question of whether an arbitration provision violates public policy requires *de novo* judicial review. *Schoonmaker v. Cummings & Lockwood, P.C.*, 252 Conn. 416, 426, 747 A.2d 1017, 1024 (S.Ct. Conn. 2000). "The public policy exception applies only when the award is clearly illegal or clearly violative of a strong public policy." *Garrity v. McCaskey*, 223 Conn. 1, 7 (S.Ct. Conn. 1992). A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot expect an "arbitral award approving conduct which is illegal or [12] contrary to public policy

to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them." *Stamford v. Stamford Police Assn.*, 14 Conn. App. 257, 259, 540 A.2d 400, 401 (1988). As another example, consider *Soo v. Lorex Corp.*, 2020 U.S. Dist. LEXIS 164664 (N.D. Calif. 2020), where violation of numerous public policies and state law claims precluded arbitration.[2] *See also*, *Johnston v. Westlake Portfolio Mgmt., LLC*, 2020 U.S. Dist. LEXIS 168438 (M.D. Fla. 2000), where a plaintiff's claim for trespass as to chattel was not subject to arbitration.

Mississippi has issued orders denying arbitration on similar public policy considerations and has specifically overruled arbitration for crimes. Mississippi has explicitly held that criminal acts constituting criminal torts are not subject to arbitration. *Niolet v. Rice*, 20

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[2] Gerald Soo and Matthew Lauinger (collectively, "Plaintiffs") bring this putative class action against Lorex Corporation ("Lorex") and Dahua Technology USA Inc. ("Dahua") (collectively, "Defendants") alleging violations of various state common law claims, violations of California's Unfair Competition Law ("UCL"), Business & Professionals Code § 16299 *et seq.*, New York's Consumer Protection Act ("CPA"), General Business Law § 349, and New York's false advertising law ("FAL"), General Business Law § 350. Defendants' motion to compel arbitration and stay discovery is now pending before the Court, as well as Defendants' motion to dismiss Plaintiffs' first amended complaint ("FAC"). After careful consideration of the parties' briefing, and having had the benefit of oral argument on July 23, 2020 regarding both motions, the Court DENIES the motion to compel arbitration and stay discovery.

So.3d 31 (Miss. App. 2009). In that case allegations of assault, battery, malicious interference and interference with employment were brought by an individual under an employment contract. The decision to compel arbitration was reversed and rendered by the Mississippi Court of Appeals. *Id.* [13] There the court had stated: "Therefore, the only remaining issue to be discussed is whether Niolet's claims for assault and battery are within the scope of the arbitration agreement. . . . We find that a claim for assault and battery in no way touches upon the matters covered by the agreement." *Id.* at 33-34.

CONCLUSION

Just as the claims of illegal assault and battery were not subject to arbitration under Mississippi law, so too the illegal actions of Defendants Brasfield & Gorrie and Mapp are not subject to arbitration.

This Court must reverse its order to arbitrate such claims and order that the parties herein proceed to trial.

Respectfully submitted, this the 2nd day of November, 2023.

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[14] **CERTIFICATE OF SERVICE**

I, Dennis L. Horn, do hereby certify that I have this day filed a copy of the above and foregoing *Motion for Rehearing* with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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sbailey@bradley.com

I, Dennis L. Horn, do further certify that I have this day served, by United States Mail, postage pre-paid, and by electronic mailing, a true and correct copy of the above and foregoing *Motion for Rehearing* upon the following:

Hon. Winston L. Kidd
Hinds County Circuit Judge
P. O. Box 327
Jackson, MS 39205-0327
wkidd@co.hinds.ms.us

This the 2nd day of November, 2023.

/s/ Dennis L. Horn
Dennis L. Horn