DOCKET NO. 1210010

IN THE SUPREME COURT OF ALABAMA

WARREN AVERETT COMPANIES, LLC

Petitioner.

(GERRIANN FAGAN,
Plaintiff,

v.

WARREN AVERETT COMPANIES, LLC and APRIL HARRY,
Defendants.)

On Appeal from the Circuit Court of Jefferson County, Alabama
Case No.: CV-2019-901956

REPLY BRIEF OF PETITIONER WARREN AVERETT COMPANIES, LLC

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SUMMARY OF THE ARGUMENT

The language of the jury waiver provision at issue is clear and broad. Under the terms of the contract, Warren Averett's default under the arbitration provision does not bar enforcement of the jury waiver provision. The plain language of the parties' agreement shows their intent to waive a jury trial if a claim is not arbitrated and instead proceeds to court, as is the situation here. Additionally, the broad language of the jury waiver applies to each and every one of Fagan's claims (including those against April Harry, as explained on pp. 25-26 of Warren Averett's Petition). Finally, Warren Averett is not barred from enforcing the jury waiver under the doctrine of laches because there has not been an inexcusable delay that prejudiced Fagan, and Fagan's conclusory statement that she was prejudiced fails to meet this Court's requirements for a proper argument. For these reasons, and those detailed in Warren Averett's Petition, this Court should issue a writ of mandamus directing the trial court to vacate its order denying Warren Averett's Motion to Strike Jury Demand and to enter an order striking Fagan's jury demand in this case.

ARGUMENT

I. Default of the Arbitration Provision Does Not Prevent Warren Averett From Enforcing the Other Provisions.

Fagan's argument that Warren Averett's default under the arbitration provision prevents the application of the jury waiver is contradictory to the plain language of the jury waiver and the general principle of contract law that a plaintiff may not "pick and choose" the provisions that she wishes to enforce. *Delta Constr. Corp. v. Gooden*, 714 So. 2d 975, 981 (Ala. 1998).

A. The Jury Waiver Provision Is Still Enforceable.

Fagan argues the default of the arbitration provision prevents enforcement of the jury waiver provision because the contract does not have a severability clause. However, "this Court has frequently excised void or illegal provisions in a contract, even in the absence of a severability clause, and enforced the remainder of the contract." *Ex parte Celtic Life Ins. Co.*, 834 So. 2d 766, 769 (Ala. 2002) (citations omitted). Fagan seemingly ignores "this Court's stated policy that it will preserve as much of a contract as can survive its invalid provisions." *Bessemer Water Servs. v. Lake Cyrus Dev. Co., Inc.*, 959 So. 2d 643, 652 (Ala. 2006) (citing *Ex parte Celtic Life Ins. Co.*, 834 So. 2d 766, 769 (Ala. 2002)).

Under the plain language of the PSA, the jury waiver provision is the "*functional equivalent of a severability clause*" specifically tailored to the arbitration clause in this contract. *See Sloan So. Homes, LLC v. McQueen*, 955 So. 2d 401, 404 (Ala. 2006). In *McQueen*, the parties agreed to arbitrate pursuant to the rules of the Better Business Bureau, "or in the event the services of the Better Business Bureau are unavailable, the arbitration shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." *Id.* at 402. This Court held the provision incorporating the BBB rules was void, but that the inclusion of a secondary option operated as a severability provision because the "clause provides, in effect, that, if arbitration cannot be conducted according to the BBB rules, then it must nevertheless be conducted pursuant to the rules of the AAA." *Id.* at 404.

Here, the parties agreed to arbitrate their claims. The PSA also states that, even if the arbitration clause is not enforced "for any reason," the parties nevertheless agreed to waive the right to trial by jury for any Dispute. Like the alternative in *Sloan Southern Homes, LLC v. McQueen*, this alternative to the arbitration clause operates as a

severability provision to sever the arbitration clause and still hold the secondary clause—the jury waiver provision—enforceable.

B. Fagan Cannot Pick and Choose the Provisions She Wishes to Enforce.

Fagan's argument also runs counter to basic principles of Alabama contract law. For example, Fagan premises her entire lawsuit on the existence, validity, and enforceability of the PSA. But "[a] plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions." *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1134 (Ala. 2000). This Court has often stated this principle when faced with the claims of a nonsignatory that are premised on the existence of contract between two other parties that contains an arbitration or choice-of-law provision. *See, e.g, Custom Performance, Inc. v. Dawson*, 57 So. 3d 90, 97-98 (Ala. 2010); *see also MTA, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 114 So. 3d 27, 31 (Ala. 2012) ("This exception is referred to as the equitable-estoppel exception because of the inequity that would result if a party were allowed to simultaneously claim the benefits of a contract while repudiating its burdens and conditions."). The same principle applies to the parties to the contract itself. As one of the cases cited by Fagan recognizes, "a person cannot

merely pick and choose the provisions in a contract that he wants to apply." *Delta Constr. Corp. v. Gooden*, 714 So. 2d 975, 981 (Ala. 1998). Fagan's attempt to "pick and choose between the provisions in the contract that [are] advantageous" to her and the provisions that are not is unavailing and unsupported by Alabama law. *Id.*

II. The Plain Language of the Contract Establishes the Enforceability and Applicability of the Jury Waiver Provision.

> Under general Alabama rules of contract interpretation, the intent of the contracting parties is discerned from the whole of the contract. Where there is no indication that the terms of the contract are used in a special or technical sense, they will be given their ordinary, plain, and natural meaning. If the court determines that the terms are unambiguous (susceptible of only one reasonable meaning), then the court will presume that the parties intended what they stated and will enforce the contract as written.

Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000) (citations omitted). "It is not a function of the courts to make new contracts for the parties, or raise doubts where none exist." *Commercial Union Ins. Co. v. Rose's Stores*, 411 So. 2d 122, 124 (Ala. 1982).

Read as a whole, and putting aside the semantic gymnastics employed by Fagan, the intent of the parties is clear. They intended to

arbitrate all disputes involving the PSA. But if for whatever reason such a dispute went to court, the parties intended to waive a jury trial.

A. The Plain Meaning of "Unenforceable" Encompasses the Situation in this Case.

As an initial matter, although Fagan does not use these words, she appears to premise her argument on the assumption that a finding of "unenforceability" is a condition precedent to the jury waiver. Fagan Br. at 13 (arguing the jury waiver is "contingent" on a declaration of unenforceability and "it is ONLY in the event that the arbitration provision itself is declared unenforceable" that the jury waiver could apply). This argument is a non-starter, as conditions precedent are strongly disfavored and the plain language of the agreement does not evidence a condition precedent. *See, e.g., Lemoine Co. of Alabama v. HLH Constructors, Inc.*, 62 So. 3d 1020, 1025 (Ala. 2010) ("'[I]t is well-established that condition precedents are not favored in contract law, and will not be upheld unless there is clear language to support them.'") (quoting *Federal Ins. Co. v. I. Kruger, Inc.*, 829 So. 2d 732, 740 (Ala. 2002)).

The provision provides:

> **Waiver of Jury Trial.** The parties desire to avoid the time and expense related to a jury trial of any Dispute in the event that the arbitration provisions of Section 19(b) hereof are declared by a court of law to be unenforceable for any reason. **Therefore, the parties, for themselves and their successors and assigns, hereby waive trial by jury of any Dispute**.

Petition, Ex. 1 at §19(c) (emphasis added). Read as a whole, the PSA states that parties intend to arbitrate all disputes, and also states their intent that if a case does go to court that they "desire to avoid the time and expense related to a jury trial." But it is the second sentence quoted above that actually waives a jury trial, and the parties explicitly agreed to "waive trial by jury of any Dispute." The only limitation of this waiver is the definition of the term "Dispute," which as explained further below plainly encompasses all claims in this case. Therefore, Fagan's argument can be rejected without turning to Fagan's strained interpretation of the word "unenforceable."

In any event, Fagan's argument that the arbitration provision was "never declared unenforceable by any court" is unpersuasive. In contradictory fashion, Fagan admits that Warren Averett was "precluded" from enforcing the contract as a result of this Court's holding, but that this holding "is not a declaration that *the provision is*

unenforceable." This argument is illogical and ignores the plain meaning of the word "unenforceable."

As noted in Warren Averett's Petition, Black's Law Dictionary defines "unenforceable" as "(Of a contract) valid but incapable of being enforced." UNENFORCEABLE, Black's Law Dictionary (11th ed. 2019). The result of this Court's prior decision is that Warren Averett is incapable of enforcing the arbitration provision in this case. The plain language of the parties' agreement shows that the parties intended for the jury waiver provision to apply in any case where a court held that the arbitration provision could not be enforced such that the case would proceed in court as opposed to arbitration.

Fagan appears to contend only a finding of unconscionability would render the arbitration provision "unenforceable." Fagan Br. at 15-16. It would be odd indeed for someone to choose the words "unenforceable for any reason" if what they really meant was "unenforceable for only one reason." Unconscionability is one of a number of reasons a contract can be found to be unenforceable. *See Salter v. Green Tree Servicing, LLC*, No. CIV.A. 12-631-N, 2013 WL 1073482, at *3 (S.D. Ala. Mar. 14, 2013) ("A valid distinction might be drawn between claims that the contract

was void, as would be raised in a fraud in the inducement or unconscionability claim, and that it became unenforceable by operation of law with the passage of time."); 1 Williston on Contracts § 1:21 (4th ed.) ("Some contracts are unenforceable because they arise out of illegal bargains which are neither wholly void nor voidable. See Comments *b-d* to § 178; §§ 183- 84; Comment *b* to § 197. Others are unenforceable because of laws relating primarily to remedies, such as the Statute of Frauds (see Chapter 5) or Statute of Limitations.").

Fagan also argues that the fact that the arbitration provision "arguably would still have been enforceable by Fagan" means that the provision was not "unenforceable." Tellingly, Fagan cites no authority for this proposition—likely because there is none.[1] Take the example of the Statute of Frauds, the violation of which this Court has repeatedly held renders the contract "unenforceable."[2] There are often situations

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[1] *See, e.g., Braden Furniture Co. v. Union State Bank*, 109 So. 3d 625, 631 (Ala. 2012) ("it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.") (internal quotation marks and citation omitted).

[2] *See, e.g., Dixieland Food Stores, Inc. v. Geddert*, 505 So. 2d 371, 373-74 (Ala. 1987); *Brindley Constr. Co. v. Byco Plastics, Inc.*, 456 So. 2d 269, 272 (Ala. 1984).

where such a contract is unenforceable by one party, yet enforceable by the other. More specifically, Alabama's Statute of Frauds only requires a signature of the "party to be charged." *Anselmo Meat Co. v. Riley*, 533 So. 2d 552, 556 (Ala. 1988). So if one party did not sign the contract, he may still be able to enforce it if the other party did. But flipping the situation, the contract is unenforceable if the signing party is attempting to seek enforcement against the one that did not sign.

As explained in the Restatement (Second) of Contracts regarding unenforceable contracts:

> Just as a contract may be voidable by one party or by either party, **so it may be enforceable by one and not by the other or it may be unenforceable by either**. Similarly, one party to an unenforceable contract may have a power to make the contract enforceable by all the usual remedies, and both voidable and unenforceable contracts may have collateral consequences.

Restatement (Second) of Contracts § 8 cmt. a (1981) (emphasis added). The fact that Fagan could have waived this breach and continued to enforce the arbitration provision does not change the fact that Warren Averett is precluded from enforcing the provision, and therefore the provision is "unenforceable" in the present case.

B. Strict Construction Provides No Help to Fagan.

Fagan argues that the jury waiver must be "narrowly and strictly construed." But that only means that the Court should not expand the provision beyond its plain language. The plain language of the jury waiver states simply: "the parties, for themselves and their successors and assigns, hereby waive trial by jury of *any* Dispute." PSA § 19(c) (emphasis added). Given this explicit and unambiguous language, this Court should "presume that the parties intended what they stated and ... enforce the contract as written." *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746 (Ala. 2000) (citing *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33, 36 (Ala. 1998)).

C. The Jury Waiver Applies to All of Fagan's Claims.

Fagan argues that the jury waiver does not apply to all of her claims. In doing so, she ignores both the plain language of the jury waiver provision and this Court's decisions interpreting the phrase "arising out of or relating to." *See Ex parte AIG Baker Orange Beach Wharf, LLC*, 4 So. 3d 1198, 1201 (Ala. 2010) (holding that "a provision applying to claims 'arising out of or relating to' a contract" has a broad application that encompasses associated tort claims). The jury waiver at issue applies to

any "Dispute," which is defined in the PSA as "[a]ll controversies, claims, issues and other disputes arising out of or relating to" the PSA. PSA § 19. As explained in Warren Averett's Petition (pp. 23-26), *all* of Fagan's tort claims relate to the PSA, and they are therefore covered by the jury waiver provision. This includes her claims against April Harry, all of which are premised on the underlying theory that Fagan was not compensated as allegedly promised in her PSA.

D. The Plain Language is Unambiguous, So There Is No Need to Construe the Agreement Against the Drafter.

The rule of *contra proferentem* is a rule of last resort. *See Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746 (Ala. 2000) ("Last, if all other rules of contract construction fail to resolve the ambiguity, then, under the rule of contra proferentem, any ambiguity must be construed against the drafter of the contract.") (citation omitted); *Alabama Psychiatric Servs., P.C. v. Lazenby*, 292 So. 3d 295, 308 (Ala. 2019) ("the rule of contra proferentem is 'triggered only after a court determines that it cannot discern the intent of the parties'") (emphasis in original and quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417, 203 L. Ed. 2d 636 (2019)). It can hardly be said the intent of the parties is impossible

to determine based on the language at issue, and this Court therefore need not engage in this analysis.

III. Fagan's Laches Argument Fails to Satisfy the Requirements of Rule 28(a)(10) of the Alabama Rules of Appellate Procedure.

Fagan's argument that Warren Averett is barred from striking the jury demand under the doctrine of laches is legally insufficient. The entirety of her argument is three sentences, explaining that Warren Averett "failed to move to strike the jury demand until almost two years after the filing of the Complaint," then simply stating "[s]uch a delay is prejudicial to Fagan." This is followed by a string citation to three cases, including a special concurrence by Chief Justice Moore and a Texas Supreme Court case. Fagan does not attempt to explain why or how this delay was prejudicial, or whether the delay was excusable. *Ex parte Grubbs*, 542 So. 2d 927, 929 (Ala. 1989) (explaining that prejudice and the absence of excuse are necessary elements of laches). This failure to comply with *Alabama Rule of Appellate Procedure* 28(a)(10) is fatal to Fagan's argument. *See* ALA. R. APP. P. 28(a)(10); *see also Magers v. Ala. Women's Center Reproductive Alternatives, LLC*, 325 So. 3d 788, 790 (Ala. 2020) ("It is not the responsibility of this Court to construct arguments

for a party or to fill in gaps from string citations offered in lieu of arguments."). "A conclusory statement followed by a string citation does not" satisfy the party's responsibility "to make arguments accompanied by analysis, supported by relevant authority and citations to the record." *Magers*, 3235 So. 3d at 790.

In any event, as explained in Warren Averett's Petition (pp. 26-29), the "delay" cited by Fagan was due to this case originally being compelled to arbitration by the trial court and the time that decision was on appeal to this Court. It was only after this Court determined the case would not be arbitrated that a trial of any sort was at issue. Warren Averett promptly moved to strike the jury demand after this Court's decision that this case would, indeed, proceed in the courts. Fagan cites no evidence or authority supporting a finding of laches in these circumstances.

CONCLUSION

The plain language of the parties' agreement establishes a valid and enforceable jury waiver that applies to the claims at issue in this case. Therefore, Warren Averett respectfully requests a writ of mandamus directing the trial court to vacate its order denying Warren Averett's Motion to Strike Jury Demand and to enter an order striking

Fagan's jury demand as to all claims asserted in her First Amended Complaint.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28 because it contains 2,997 words, excluding the parts of the brief exempted by Ala. R. App. P. 32(b)(5)(c), as counted by the word count function of Microsoft Word processing software.

2. This brief complies with the typeface requirement of Ala. R. App. P. 32 because it has been prepared in a proportionately spaced typeface using the Microsoft Word word-processing software in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I do hereby certify that on January 20, 2022, I electronically filed the foregoing with the Alabama Supreme Court and sent electronic notification of such filing to the following via e-mail and also certify that a copy of the Reply Brief of Petitioner Warren Averett Companies, LLC was served via U.S. Mail:

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