Rel: May 20, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1210124

James P. Key, Jr.

v.

Warren Averett, LLC, and Warren Averett Companies, LLC

Appeal from Shelby Circuit Court
(CV-18-900942)

MENDHEIM, Justice.

James P. Key, Jr., appeals from the Shelby Circuit Court's order denying his motion to compel arbitration of his claims against Warren

Averett, LLC, and Warren Averett Companies, LLC (collectively referred to as "WA"). We reverse and remand.

I. Facts

On October 5, 2018, Key filed a complaint in the Shelby Circuit Court seeking a declaratory judgment against WA. Key alleged that he was a certified public accountant who had been employed by WA for 25 years and had been a member of WA for 15 years; that he had executed a personal-services agreement ("PSA") with WA on February 26, 2018, that included a noncompete clause; and that WA had sent him a letter on September 28, 2018, terminating his employment effective October 28, 2018. Key sought a judgment declaring "that the Non-Compete Clause and the financial penalty provision contained in the PSA is not applicable to Key and is an unlawful restraint of Key's ability to serve his clients as a professional."

On November 2, 2018, Key filed his "First Amended Complaint." In that amended complaint, Key named three individual defendants in addition to WA: Mary Elliot, WA's chief executive officer ("CEO"); April Harry, WA's chief operating officer; and William Dow, a WA member. Key's first amended complaint alleged that Elliot, Harry, and

Dow had negotiated an allegedly exorbitant retirement package for WA's former CEO, James W. Cunningham. In addition to his original count for a declaratory judgment, Key asserted a count on his own behalf against WA alleging minority-shareholder oppression and a derivative-liability count "on behalf of WA and its members" against Elliott, Harry, and Dow based on their allegedly "secret, unapproved deal with ... Cunningham regarding his retirement compensation and [their] obligating the members of WA ... without properly obtaining authorization of [WA's] executive committee."

On November 6, 2018, WA filed a "Motion to Compel Arbitration, and To Dismiss or Stay This Action." WA moved for arbitration on the basis of Section 16 of the PSA, which, in pertinent part, provided:

> "16. DISPUTE RESOLUTION. All controversies, claims, issues and other disputes arising out of or relating to this Agreement for breach thereof (collectively, the 'Disputes') shall be subject to the applicable provisions of this Section.
>
> "....
>
> "(b) Arbitration. Except as provided in Section 16(a) hereof,[1] all Disputes shall be settled by arbitration in the state where the Member's primary office is located at the time of the execution hereof in accordance with the Commercial

[1]The parties agree that Section 16(a) of the PSA does not apply in this case.

> Arbitration Rules of the American Arbitration Association. Any disagreement as to whether a particular Dispute is subject to arbitration under this Section 16 shall be decided by arbitration in accordance with the provisions of this Section 16. Judgment upon any award rendered by the arbitrator in any such arbitration may be entered in any court having jurisdiction thereof. The arbitrator(s) shall have the power to grant all legal and equitable relief and remedies and award compensatory damages as provided for by law but shall not award any damages other than, or in excess of, compensatory damages. In the event that the amount in question of such arbitration is over $200,000, … WA, in its sole discretion, may require a panel of three independent arbitrators."

(Emphasis added.)

Also on November 6, 2018, WA filed an "Answer to First Amended Complaint and Counterclaims." WA asserted counterclaims against Key alleging breach of contract and seeking injunctive relief. The counterclaims alleged that Key's first amended complaint had violated the confidentiality provisions of the PSA. WA insisted that Key had "publicly disclosed confidential information concerning internal [WA] governance, finances, compensation arrangements with members, compensation negotiations, and compensation agreements concerning another [WA] employee," i.e., Cunningham. Along with its answer and counterclaims, WA filed a "Motion for Preliminary Injunction" against Key in which WA asked the court to stop Key from violating the

confidentiality provisions of the PSA. Additionally, on November 6, 2018, WA filed a "Motion to Seal First Amended Complaint" based on its aforementioned allegation that Key's first amended complaint contained confidential information.

On November 19, 2018, Key filed his response to WA's motion requesting that the first amended complaint be sealed in which he argued that the motion should be denied because, he said, the information included in the first amended complaint was not statutorily protected from disclosure and the information did not need to be kept confidential to protect a third party. Also on November 19, 2018, Key filed an "Objection to Warren Averett's Motion for a Preliminary Injunction," in which he contended that WA's request did not meet all four elements necessary for the issuance of a preliminary injunction.

On November 19, 2018, Key also filed a response to WA's motion to compel arbitration. In that response, Key asserted:

> "2. While [Key] does not object to this Court entering an Order sending the above-styled action to arbitration, [Key] does object to the use of the American Arbitration Association ('AAA') and does not consent to the jurisdiction of the AAA.
>
> "3. [Key] respectfully requests this Court to use any and all equitable powers available to it to provide the Parties with an alternative arbitration panel selection methodology to

> select three independent and qualified arbitrators and grant them the authority and powers enumerated in Ala. Code § 6-6-1 through § 6-6-16."[2]

On December 3, 2018, Elliot, Harry, and Dow filed a motion to dismiss Key's first amended complaint. In that motion, they argued that Key lacked "standing" under Rule 23.1, Ala. R. Civ. P., to assert derivative claims against them because Key was not a shareholder in WA at the time he commenced the action.[3] On the same date, Elliot, Harry,

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[2]Section 6-6-1, Ala. Code 1975, provides: "It is the duty of all courts to encourage the settlement of controversies pending before them by a reference thereof to arbitrators chosen by the parties or their attorneys and, on motion of the parties, must make such order and continue the case for award." Section 6-6-16, Ala. Code 1975, provides: "Nothing contained in [§ 6-6-1 through § 6-6-16] shall prevent any person or persons from settling any matters of controversy by a reference to arbitration at common law."

[3]In Ex parte 4tdd.com, Inc., 306 So. 3d 8, 16 (Ala. 2020), this Court explained:

> "[I]n light of this Court's decision in Ex parte BAC Home Loans Servicing[, LP], [159 So. 3d 31 (Ala. 2013),] questions pertaining to the heightened pleading requirements of Rule 23.1 do not invoke the plaintiff's standing to bring the substantive claims and do not implicate the trial court's subject-matter jurisdiction; rather, Rule 23.1 imposes a procedural bar on a derivative action when the plaintiff fails to allege in the complaint that a sufficient director demand has been made or fails to demonstrate that making such a demand would be futile."

and Dow filed a motion to seal Key's first amended complaint in which they joined the arguments set forth in WA's motion to seal that complaint. On December 12, 2018, WA filed a reply in favor of its motion to seal Key's first amended complaint.

On February 6, 2019, Judge Patrick Kennedy entered an order recusing himself from this case. The case was reassigned to Judge Lara M. Alvis. On May 28, 2019, the circuit court held a hearing on all currently pending motions. In that hearing, WA's counsel reiterated that WA believed that the claims against it should be arbitrated, but WA's counsel also stated that WA was fine with deferring any ruling on its motion to compel arbitration until there was a resolution of the motion to dismiss Key's claims against Elliot, Harry, and Dow:

> "MR. WELLS [WA's counsel]: Your Honor, Trey Wells for Warren Averett Companies, LLC and Warren Averett, LLC. Also defendants are a few of the executives for that company, Mary Elliot, April Harry and William Dow and Augusta and Curtis represent them. We filed a motion to compel arbitration, we being the company defendants. The response was basically we don't object to arbitration, we just don't want to do it with the Triple A. So from the [companies'] standpoint we are open to that concept but I understand the individual [defendants] have a motion to dismiss pending and have not moved to compel arbitration at this point. So from the [companies'] standpoint on the arbitration issue we are fine with the Court deferring that ruling.

> "....
>
> "THE COURT: Okay. I will tell you this, and as far as -- no one disagrees that the case goes to arbitration, correct, after the motion to dismiss ruling?
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> "MR. WELLS [WA's counsel]: Correct. And what I was thinking just from efficiency standpoint is we got three individual defendants that may or may not be going with everybody to arbitration. So it seems to me we figure out where they are, once we know that then all the parties can get together and figure out where to specifically arbitrate. From [WA's] standpoint we are open to the concept of … using the Triple A rules but picking some private non Triple A affiliated arbitrator but I don't want to make that concession or statement right now without knowing what the status of the three individual defendants are because they haven't filed a motion and we haven't really come to a consensus on that.
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> "THE COURT: Fair enough."

On the same date, May 28, 2019, the circuit court entered an order granting in part the defendants' motions to seal the first amended complaint, ordering that the case be coded as confidential by the circuit clerk. That order postponed ruling on Elliot, Harry, and Dow's motion to dismiss pending further submissions of authority. Consistent with WA's expressed position, the order also indicated that the circuit court would defer ruling on WA's motion to compel arbitration until resolution of that motion to dismiss.

On June 6, 2019, Key filed a "Second Amended Verified Complaint." In his second amended complaint, Key named two additional individual defendants, former CEO Cunningham and Thomas R. Averett. Key also asserted new counts of derivative and demand futility, breach of contract, breach of fiduciary duty, fraud/misrepresentation/suppression, conspiracy, and unjust enrichment. The second amended complaint contained many new and detailed allegations regarding the period leading up to WA's termination of Key's employment, which, Key alleged, was directly related to Key's objections to certain policies and decisions made by WA leadership, including WA's allocation of profits earned from work related to the 2010 British Petroleum ("BP") oil spill in the Gulf of Mexico and the retirement package negotiated for Cunningham by Elliott, Harry, Dow, and Averett. Specifically, Key alleged that WA and the individual defendants -- Elliot, Harry, Dow, Cunningham, and Averett -- had deprived Key and other members of WA deferred retirement compensation in favor of compensating WA officers, especially CEO Cunningham. Key further alleged that much of the compensation used for Cunningham's retirement package and the additional compensation for other officers came from BP oil-spill settlement funds.

On June 11, 2019, WA and all the individual defendants filed a "Joint Motion to Strike Second Amended Complaint" in which they argued that the second amended complaint was filed well after Key "was in possession of the facts necessary to file" it. On June 14, 2019, Key filed his response in opposition to the joint motion to strike. Key argued that the defendants had failed to demonstrate that allowing the second amended complaint would cause actual prejudice or unduly delay the trial of the case.

Following a hearing on June 14, 2019, the circuit court entered an order dismissing with prejudice individual defendants Elliot, Harry, and Dow from Key's action. The circuit court concluded that Key did not fulfill a requirement of Rule 23.1, Ala. R. Civ. P., because he was not a shareholder of WA at the time he filed his derivative claim. Also on June 14, 2019, the circuit court entered an order granting the joint motion to strike the second amended complaint. On July 25, 2019, Key filed a petition for a writ of mandamus with this Court, requesting that this Court direct the circuit court to set aside the orders granting the motion to strike and the motion to dismiss that effectively eliminated the individual defendants from Key's action. On August 29, 2019, this Court

denied the petition without ordering answers and briefs. Ex parte Key (No. 1180840, Aug. 29, 2019).

On December 4, 2019, Key submitted to WA's counsel a "Demand for Arbitration and Statement of Claim" in which he sought arbitration of his claims against WA pursuant to the arbitration provision in the PSA. That arbitration demand was not filed with the circuit court at that time or with an arbitration tribunal.

On January 9, 2020, WA filed in the circuit court a "Notice of Withdrawal of [Its] Motion to Compel Arbitration." WA asserted:

> "As this case has been made confidential and the parties have been appropriately cleaned up by the Court, [WA] hereby withdraws its motion to compel arbitration, which has not been ruled upon by the Court. [WA] desires to avoid the expense involved in arbitration, and is confident this Court will protect against [Key's] efforts to improperly disclose confidential information through public filings in this matter. As [Key] disregarded the arbitration clause and filed this action in this Court, [Key] has clearly evidenced his intent to waive arbitration in favor [of] a judicial resolution. ...
>
> "[WA] has discussed this issue with [Key's] counsel, who opposes continuing to litigate in this Court. In other words, [Key], after having received adverse rulings from this Court, now wishes to move this case to arbitration instead of proceeding in this forum in which [Key] elected to file his action.

> "WHEREFORE, PREMISES CONSIDERED, [WA] hereby withdraws its previously filed motion to compel arbitration, and stands ready to litigate this matter before this Court."

On January 13, 2020, Key filed a response in opposition to WA's notice of withdrawal of its motion to compel arbitration. In that response, Key asserted that he had never opposed arbitration of his claims against WA and that he had not waived his right to compel arbitration by substantially invoking the litigation process with respect to his claims against WA. Key attached to his response his "Demand for Arbitration and Statement of Claim" that he had filed with WA on December 4, 2019.

Following a long delay in this case due to the interruption of judicial proceedings caused by COVID-19, on August 27, 2021, the circuit court held a virtual hearing, using videoconferencing technology, concerning WA's withdrawal of its demand for arbitration. In that hearing, the circuit court suggested that Key file a formal motion to compel arbitration. On August 31, 2021, Key filed a "Motion to Compel Arbitration and Stay Proceedings." Along with that motion, Key again attached his "Demand for Arbitration and Statement of Claim." On September 15, 2021, WA filed a "Response to [Key's] Motion to Compel Arbitration and Stay Proceedings." In that response, WA argued that Key

had substantially invoked the litigation process and thereby had waived his right to compel arbitration of his claims against WA. WA attached to that response an affidavit from its counsel stating that WA had incurred over $50,000 in legal fees for more than 200 hours of legal work on the proceedings to date.

On November 17, 2021, the circuit court entered an order denying Key's motion to compel arbitration and setting the case for a bench trial. The order did not provide a rationale for the circuit court's decision. Key appealed that judgment two days later.

II. Standard of Review

The primary issue debated by the parties in this appeal is whether Key substantially invoked the litigation process and thereby waived his right to compel arbitration of this dispute.

> "The appropriate test for determining whether a party has waived its right to arbitration has two prongs: '[(1)] whether the party's actions as a whole have substantially invoked the litigation process and [(2)] whether the party opposing arbitration would be prejudiced if forced to submit its claims to arbitration subsequent to the other party's actions invoking the litigation process.' Hoover General [Contractors-Homewood, Inc. v. Key], 201 So. 3d [550,] 553 [(Ala. 2016)]. Waiver must be determined '"based on the particular facts of each case."' Voyager Life Ins. Co. v. Hughes, 841 So. 2d 1216, 1219 (Ala. 2001) (quoting

> Companion Life Ins. Co. v. Whitesell Mfg., Inc., 670 So. 2d 897, 899 (Ala. 1995)). Thus, 'the trial judge's determinations [as to waiver] should be given substantial weight upon review.' Id. Nevertheless, Alabama law also makes it clear that, because there is such a strong federal policy favoring arbitration, '"a waiver of the right to compel arbitration will not be lightly inferred, and, therefore, that one seeking to prove waiver has a heavy burden."' Id. (quoting Mutual Assurance, Inc. v. Wilson, 716 So. 2d 1160, 1164 (Ala. 1998))."

Health Care Auth. for Baptist Health v. Dickson, 330 So. 3d 805, 809 (Ala. 2021). But see Bridgestone Americas Tire Operations, LLC v. Adams, 264 So. 3d 833, 839 (Ala. 2018) ("Adams argues that, by participating in litigation, Bridgestone waived any right it had to arbitrate. That issue is subject to de novo review.").

III. Analysis

Key first contends that WA should be equitably estopped from opposing his motion to compel arbitration because WA had maintained throughout the litigation -- until it filed its notice of withdrawal of intent to arbitrate -- that Key's claims against it should be arbitrated. Key argues that he relied upon WA's representation that his claims must be arbitrated and that he will be harmed by allowing WA to repudiate that position. However, Key did not present any argument in the circuit court addressing the elements of equitable estoppel. "It is well settled that an

appellate court may not hold a trial court in error in regard to theories or issues not presented to that court." Allsopp v. Bolding, 86 So. 3d 952, 962 (Ala. 2011). Because Key's theory of equitable estoppel is a new argument presented for the first time on appeal, we cannot consider it. See, e.g., Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) ("This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.").

Key also contends that he did not substantially invoke the litigation process in this case because, in his response to WA's motion to compel arbitration -- which Key filed a little over a month after initiating the action -- Key agreed with WA that his claims against WA were subject to the arbitration provision in the PSA and he never changed that position. Key also argues that there has not been a substantial invocation of the litigation process because most of the filings in this action pertained to his claims against the individual defendants -- claims that were not subject to the PSA's arbitration provision -- and no discovery has occurred in the case.

Conversely, WA contends that Key clearly invoked the litigation process because he initiated this action by filing a complaint in circuit court rather than by filing an arbitration demand with the American Arbitration Association as Section 16 of the PSA dictates. WA also cites as evidence of Key's substantial invocation of the litigation process the facts that Key filed two amended complaints and that he filed a petition for a writ of mandamus in this action. WA further argues that it would be substantially prejudiced by having to arbitrate the dispute at this juncture because it has already expended considerable time and resources responding to Key's filings in the circuit court. As evidence of this, WA cites the affidavit from its counsel stating that WA has already incurred over $50,000 in legal fees for more than 200 hours of legal work on the proceedings to date.

The parties have exerted considerable mental gymnastics with respect to their positions on arbitration in this case. WA, which for three years demanded arbitration of the claims asserted against it, is now professing that it will be substantially prejudiced by the submission of this case to arbitration. Key, who initiated this action in circuit court and followed his original complaint with two amended complaints, is now

professing that he intended all along to arbitrate his claims against WA. Amidst this inversion of legal positions, the parties relegate to an afterthought what the language of the arbitration provision of the PSA requires.

Section 16 of the PSA states: "[A]ll Disputes shall be settled by arbitration … in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Any disagreement as to whether a particular Dispute is subject to arbitration under this Section 16 shall be decided by arbitration in accordance with the provisions of this Section 16." Both sides, at one point or another in this litigation, have summarized the meaning of the foregoing language in the arbitration provision. In its motion to compel arbitration, WA argued:

> "The arbitration provision here provides: 'Any disagreement over whether a particular Dispute is subject to arbitration under this Section 16 shall be decided by arbitration in accordance with the provisions of this Section 16.' ... Furthermore, the arbitration provision incorporates the Commercial Arbitration Rules of the American Arbitration Association (the AAA). ... The Alabama Supreme Court has 'consistently reiterated the holding that questions of arbitrability must be decided by an arbitrator when the parties have executed a contract containing an arbitration provision incorporating the AAA commercial arbitration rules.' Eickhoff Corp. v. Warrior Met Coal, LLC, [265 So. 3d 216, 222 (Ala. 2018)].

> "As such, any question as to the scope of the clause, whether it applies to a particular dispute, whether it is enforceable against [Key], or other threshold issues of arbitrability are to be decided by the arbitrator, rather than the Court."

(Emphasis added.) Similarly, in his appellate brief, Key states:

> "The unambiguous terms of this arbitration provision in the PSA show that any disagreement of whether a dispute should be arbitrated is the arbitrator's decision to make, not the Trial Court['s]. Id.; see also, Federal Ins. Co. v. Reedstrom, 197 So. 3d 971, 974-75 ... (Ala. 2015) (while a trial court should resolve waiver issues, the arbitration [agreement] may effectively move this decision to the arbitrator if the arbitration [provision] 'clearly and unmistakably indicates' the issue should instead be submitted to the arbitrator); Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., 35 So. 3d 601, 607 (Ala. 2009)."

Key's brief, pp. 42-43 (emphasis added).

The parties are correct: by both its plain language and its incorporation of the American Arbitration Association's Commercial Arbitration Rules, Section 16 of the PSA requires that issues of arbitrability -- including whether Key has waived his right to compel arbitration by substantially invoking the litigation process -- must be decided by the arbitrator, not the court.

> "'"[T]he issue whether a party has waived the right to arbitration by its conduct during litigation is a question for the court and not the arbitrator."

> Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6, 14 (Ala. 2006). However, the general rule that the court and not the arbitrator decides whether a party has waived the right to arbitration has an exception: issues typically decided by the court will be decided by the arbitrator instead when there is '"clear and unmistakable evidence"' of such an agreement in the arbitration provision. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (quoting AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) (alterations omitted)); see also Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 14 (1st Cir. 2005) (citing First Options).'
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> "Anderton v. The Practice-Monroeville, P.C., 164 So. 3d 1094, 1098 (Ala. 2014) (footnote omitted and emphasis added). In Anderton, this Court determined that the incorporation into the arbitration provision of the commercial arbitration rules of the American Arbitration Association ('the AAA') constituted clear and unmistakable evidence of the parties' intent to submit issues of arbitrability to the arbitrator."

Bugs "R" Us, LLC v. McCants, 223 So. 3d 913, 918-19 (Ala. 2016).

In short, whether Key's claims against WA must be arbitrated is a threshold issue that should not have been decided by the circuit court; nor is it appropriate for this Court to settle the issue in this appeal. Accordingly, the circuit court's order is reversed, and the cause is remanded for the circuit court to enter an order sending the case to

arbitration for a determination of the threshold issue of arbitrability and staying proceedings in the circuit court during the pendency of the arbitration proceedings.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Mitchell, J., concurs specially, with opinion.

MITCHELL, Justice (concurring specially).

I join the Court's opinion because it correctly analyzes the issues on appeal and faithfully applies our precedents. I write separately to explain why I have concerns about two of the precedents mentioned in the main opinion: Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 44 (Ala. 2013) ("BAC"), and Andrews v. Merritt Oil Co., 612 So. 2d 409 (Ala. 1992).

I.

I begin with BAC. The main opinion quotes a case that relies on BAC for the proposition that a plaintiff's failure to satisfy the heightened pleading requirements of Rule 23.1, Ala. R. Civ. P., warrants a dismissal on the merits rather than a dismissal for lack of "standing" (which is a component of subject-matter jurisdiction). See ___ So. 3d at ___ n.3 (quoting Ex parte 4tdd.com, Inc., 306 So. 3d 8, 16 (Ala. 2020), which, in turn, discusses BAC). That narrow proposition is correct: Rule 23.1 limits the right to bring a derivative suit to plaintiffs who meet specified criteria, even if the plaintiffs have otherwise satisfied the constitutional components of standing to sue (injury in fact, causation, and redressability, see Ex parte HealthSouth Corp., 974 So.2d 288, 293

(Ala.2007)). But the holding in BAC swept far more broadly, decreeing that the "concept of standing" as a requirement of subject-matter jurisdiction has "no necessary role to play in respect to private-law actions" at all. BAC, 159 So. 3d at 44.

In holding that jurisdictional standing analysis never has a place in private-law cases, BAC reasoned that "private-law actions," unlike public-law actions, already "come with established elements that define an adversarial relationship," including an actual "injury." Id. at 44. Thus, BAC states, in a private-law action "the concept of standing is already embodied in the various elements prescribed, including the common requirement of proof of a sufficient existing or threatened injury," such that a plaintiff's failure to satisfy those elements can always be described as a merits defect, thereby obviating the need for any jurisdictional "standing" analysis. Id.[4]

[4]The distinction between a dismissal for lack of subject-matter jurisdiction and a dismissal on the merits often has practical consequences. For one thing, dismissals for lack of subject-matter jurisdiction are subject to different waiver and preservation rules than dismissals on the merits, compare Rule 12(h)(2), Ala. R. Civ. P., with Rule 12(h)(3), Ala. R. Civ. P., and have different res judicata consequences, see Havis v. Marshall Cnty., 802 So. 2d 1101, 1103 n.2 (Ala. Civ. App. 2001) (noting that Rule 12(b)(6), Ala. R. Civ. P., dismissals ordinarily "operate as adjudications on the merits" under Rule 41(b), Ala. R. Civ. P.). For

BAC's reasoning on this point seems to have presumed a fixed set of private-law causes of action, all of which require, as an element, that the plaintiff suffer a particularized injury caused by the defendant's conduct (equivalent to the "injury in fact" and "causation" requirements in standing doctrine). That presumption holds up well when it comes to common-law tort and contract actions -- and even most civil-law private actions -- but it does not always hold true. Legislative bodies can and have enacted private causes of action with elements that do not necessarily import an "adversarial relationship," "injury," or "controversy" of the sort ordinarily required "to justify judicial intervention." BAC, 159 So. 3d at 44.

Suppose, for example, that the Legislature decided to pass a law allowing anyone to sue companies that maintain inaccurate records, even if the inaccurate records are never disseminated to a third party and even if their existence never causes any harm to the plaintiff. Would courts really be powerless to dismiss a suit brought under that law for want of

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another, aggrieved litigants are generally eligible for mandamus review on questions of subject-matter jurisdiction, but often are not eligible for such review on merits questions. See Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1064-65 (Ala. 2014) (describing the "well recognized situations" in which this Court has held mandamus review appropriate).

standing? The example may sound implausible, but Congress actually did enact such a law, and it was the subject of a United States Supreme Court opinion just last year. See TransUnion LLC v. Ramirez, ___ U.S., ___, ___, 141 S. Ct. 2190, 2200 (2021) (discussing the Fair Credit Reporting Act, 15 U.S.C. § 1681). The Court in TransUnion held that several plaintiffs who sued a credit-reporting agency under the Act were not "concrete[ly] harm[ed]" by the defendant's maintenance of inaccurate records and therefore lacked standing to sue, even though Congress had expressly granted them a private-law right of action. ___ U.S. at ___, 141 S. Ct. at 2212.

One can imagine other private laws that might spawn suits in which the plaintiff could satisfy the statutory merits elements but flunk constitutional standing analysis. What if, for instance, the Legislature modified the common law of contract by allowing individuals who are neither parties to nor beneficiaries of a contract to sue for breach? Or enacted a statute that effectively outsourced criminal prosecutions to the public? Despite what BAC held, there is a clear consensus that these sorts of laws cannot, by themselves, confer standing to sue. See 13A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal

Practice and Procedure § 3531 (3d ed. 2008 & Supp. 2021) ("Wright & Miller").[5] And while there is room for debate about why such laws are

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[5]When BAC held that standing analysis cannot play a legitimate role in private-law cases, it characterized that result as consistent with United States Supreme Court precedent and the Wright & Miller treatise. See 159 So. 3d at 40-46 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); and 13A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice & Procedure §§ 3531, 3531.6 (3d ed. 2008)). But, as the most current version of § 3531 illustrates, neither the United States Supreme Court nor Wright & Miller endorse BAC's categorical rule that standing can never play a legitimate role in private-law actions. On the contrary, the United States Supreme Court has held, and the Wright & Miller treatise has acknowledged, that even private-law plaintiffs must satisfy the components of standing to invoke a court's subject-matter jurisdiction. See, e.g., TransUnion, ___ U.S. at ___, 141 S. Ct. at 2205 (explaining that the Court has long "rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right' " (citation omitted)); ___ U.S. at ___, 141 S. Ct. at 2209-14 (holding that the plaintiffs lacked standing to sue a credit-reporting agency even though the agency had violated the plaintiffs' statutorily conferred private rights); Lujan, 504 U.S. at 576-77 (emphasizing that Congress cannot confer standing simply by passing a law that "permits all citizens" or "a subclass of citizens who suffer no distinctive concrete harm" to sue); 13A Wright & Miller § 3531 (observing that standing is "ordinarily" not an issue in claims alleging "private wrongdoing" but declining to state a categorical rule); id. § 3531.6 (similar); 13B Wright & Miller § 3531.13 (explaining that the United States Supreme Court "continues to impose [standing] limits on congressional authority to create new legal rights supported by private remedies," but expressing doubt about the wisdom and historical pedigree of that rule). I am not aware of any other jurisdiction, state or federal, that has adopted BAC's categorical prohibition on applying standing principles to private-law causes of action.

insufficient, see, e.g., Sierra v. City of Hallandale Beach, Fla., 996 F.3d 1110, 1115-40 (11th Cir. 2021) (Newsom, J., concurring) (arguing that principles of executive power, rather than judicial power, prohibit legislatures from enabling "private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large"), I think the consensus view may be correct, at least in broad outline. The separation-of-powers framework embodied in both our Federal and State Constitutions likely prevents the legislative branches from empowering private plaintiffs to sue defendants for conduct that did not affect the plaintiffs personally. Such laws risk impugning both the judicial power (by requiring courts to adjudicate generalized grievances) and the executive power (by transferring the executive's enforcement authority to private parties).

In sum, BAC apparently did not anticipate the existence of private laws that authorize recovery in the absence of a particularized injury, and it may have announced an overbroad rule as a result. If called to do so in a future case, I would be willing to reevaluate that decision.

II.

I next turn to Andrews. The main opinion quotes Andrews for the proposition that this Court " 'cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.' " ___ So. 3d at ___ (quoting Andrews, 612 So. 2d at 410) (emphasis added). Courts frequently cite this language, and I have relied on it myself, see Wiggins v. City of Evergreen, 295 So. 3d 43, 49 (Ala. 2019), but I've come to believe that it misstates the preservation principles generally applied by this Court and other courts of review. As some of our other, more carefully worded precedents have explained, the "rule of issue preservation" typically prevents appellants from raising new "issues, questions, or theories" on review, but does not prohibit them from invoking "new arguments or authorities" in support of existing issues, questions, or theories. See Ex parte City of Gulf Shores, [Ms. 1200366, Sept. 30, 2021] ___ So. 3d ___ (Ala. 2021) (Mitchell, J., dissenting) (collecting cases). The line between issues, questions, and theories, on the one hand, and arguments, on the other, is not always easy to draw, but a good rule of thumb is that an argument involves a "specific," often singular, point of contention,

whereas an issue, question, or theory typically is broad enough to encompass multiple supporting arguments. Ex parte Jenkins, 26 So. 3d 464, 473 n.7 (Ala. 2009).

Andrews's statement that parties cannot raise new "arguments" on appeal is dictum -- both in Andrews itself and as quoted in this case -- because in both instances the appellant failed to preserve a broad issue or theory, rather than simply an individual argument in support of an issue or theory. See Andrews, 612 So. 2d at 410 (noting that the appellant had failed to raise a discrete statutory "issue" -- namely, whether her termination violated the Employee Polygraph Protection Act of 1988); ___ So. 3d at ___, (describing the defense of equitable estoppel as a "theory" that Key failed to preserve). Nevertheless, because of its potential to lead litigants and lower courts astray, I believe we should reconsider Andrews's preservation language in a suitable case.

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While I concur in the main opinion, which is sound regardless of whether BAC and Andrews were correct, I believe we should reevaluate both decisions in the future.