Rel: June 17, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1210010

Ex parte Warren Averett Companies, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Gerriann Fagan

v.

Warren Averett Companies, LLC, and April Harry)

(Jefferson Circuit Court, CV-19-901956)

BOLIN, Justice.

Warren Averett Companies, LLC, seeks a writ of mandamus directing the Jefferson Circuit Court to vacate its order denying Warren

Averett's motion to strike the jury demand asserted by Gerriann Fagan and to enter an order granting the motion to strike the jury demand.

Facts and Procedural History

This is the second time these parties have been before this Court in this litigation involving a salary dispute. As we explained in Fagan v. Warren Averett Cos., 325 So. 3d 778, 779 (Ala. 2020),

> "Fagan alleged that, from February 2001 to March 2015, she was the owner of The Prism Group, LLC, a human-resources consulting firm. Fagan also alleged that, in February 2015, Warren Averett approached her and asked her to join Warren Averett and to build a human-resources consulting practice for it and that, in February 2015, she agreed to join Warren Averett. Fagan and Warren Averett entered into a 'Transaction Agreement' effective April 1, 2015, which provided that Fagan would wind down the operations of The Prism Group; that Fagan would become a member of Warren Averett; that Warren Averett would purchase The Prism Group's equipment and furniture; that Warren Averett would assume responsibility for The Prism Group's leases; and that Warren Averett would assume The Prism Group's membership in Career Partners International, LLC. The Transaction Agreement further provided that Fagan would enter into a 'Standard Personal Service Agreement' ('the PSA') with Warren Averett; that Fagan's title would be president of Warren Averett Workplace; and that Fagan would be paid in accordance with the compensation schedule outlined in the PSA."

The "Standard Personal Service Agreement" ("the PSA") entered into by Fagan and Warren Averett drafted by Warren Averett included, in pertinent part, the following dispute-resolution section:

> "19. DISPUTE RESOLUTION. All controversies, claims, issues and other disputes arising out of or relating to this Agreement or the breach thereof (collectively, the 'Disputes') shall be subject to the applicable provisions of this section 19.
>
> "(a) Equitable Relief.
>
> "....
>
> "(b) Arbitration. Except as provided in Section 19(a) hereof, all Disputes shall be settled by arbitration in Birmingham, Alabama 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 § 19 shall be decided by arbitration in accordance with the provisions of this Section 19. 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, [Warren

> Averett], in its sole discretion, may require a panel of three independent arbitrators.
>
> "(c) 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. The parties acknowledge that this waiver is knowingly, freely, and voluntarily given, is desired by all parties and is the best interests of all parties.
>
> "(d) Costs and Fees. The parties shall bear their respective costs in connection with the dispute resolution procedures described in this Section 19 except that the parties share equally the fees and expenses of any arbitrator(s) and the costs of any facility used in connection with the dispute resolution procedures."

Fagan resigned from Warren Averett after a salary dispute, and, on February 28, 2019, Fagan filed a demand for arbitration with the American Arbitration Association ("AAA"). The AAA determined that, under its rules, Fagan owed $300 and Warren Averett owed $1,900. The AAA also stated that any dispute regarding the filing fees should be raised before the arbitrator for a determination once all the filing

requirements, including payment of the fees, had been satisfied. Warren Averett refused to pay its share of the filing fees as requested by the AAA, and the AAA closed the file in the matter.

On April 30, 2019, Fagan sued Warren Averett and April Harry, its chief financial officer, in the Jefferson Circuit Court. In her complaint, Fagan alleged claims of breach of contract, misrepresentation, unjust enrichment/restitution, minority shareholder oppression, breach of fiduciary duty, and fraudulent suppression. Fagan demanded a jury trial. On June 5, 2019, Warren Averett and Harry each filed a motion to dismiss the claims. That same day, Warren Averett filed a motion to compel arbitration.

On July 31, 2019, Fagan filed her first amended complaint, asserting the same claims and including a jury demand. The trial court dismissed Fagan's minority-shareholder-oppression claim but denied the motions to dismiss the remaining claims. The trial court granted Warren Averett's motion to compel arbitration. Fagan filed a motion to reconsider the order granting Warren Averett's motion to compel

arbitration, arguing that Warren Averett had waived its right to arbitration by failing to pay its portion of the arbitration filing fees. Fagan also argued that she had been prejudiced by Warren Averett's actions because her claims against Harry were still pending in the trial court, resulting in her being forced to prosecute her claims in two separate forums, and that, because the trial court had placed the entire case on the administrative docket after granting the motion to compel arbitration, that result was "inefficient, duplicative, and cost-prohibitive." The trial court denied the motion to reconsider. Fagan then appealed from the trial court's order granting the motion to compel arbitration.

On appeal, Warren Averett argued that Fagan was actually the party in default under § 19 of the PSA. In arguing that it was not in default, Warren Averett asserted that it was merely insisting that the parties equally share in the costs of arbitration, as agreed upon in § 19(d) of the PSA. This Court held that the AAA's "Commercial Arbitration Rules" in place at the time Fagan filed her request for arbitration

differentiated between administrative fees charged by the AAA, the expenses of the arbitrator, and the compensation of the arbitrator. Fagan, 325 So. 3d at 786. This Court further held that the PSA did not specifically state that the parties will equally share all the costs of arbitration, but, rather, that § 19(d) provided only that the parties will equally share "the fees and expenses of any arbitrator(s)" as well as the costs for the use of any facility. Id. When reading the AAA's Commercial Arbitration Rules in conjunction with § 19 of the PSA, this Court determined, each party was to pay its own costs associated with the arbitration, including filing fees. Id. This Court held that Warren Averett's failure to pay its portion of the filing fees constituted a breach under § 19 of the PSA. Id. at 787. On October 23, 2020, we reversed the trial court's order compelling arbitration. Id. A certificate of judgment was issued on November 10, 2020.

On remand, the trial court set a scheduling conference for March 29, 2021. On March 23, 2021, Warren Averett filed a motion to continue the scheduling conference. On April 19, 2021, Warren Averett filed a

motion to strike Fagan's demand for a jury trial.[1] Warren Averett argued that, under the dispute-resolution provisions of the PSA (specifically, § 19(c)), the parties had agreed to waive the right to a jury trial. On April 28, 2021, Fagan filed a response to Warren Averett's motion, arguing, among other things, that Warren Averett's motion was barred by the doctrine of laches. Fagan cited Ex parte First Exchange Bank, 150 So. 3d 1010 (Ala. 2013), in support of her position. The trial court held a hearing on the motion, and, on August 27, 2021, the trial court denied Warren Averett's motion to strike. On October 7, 2021, Warren Averett filed its petition for a writ of mandamus.

Standard of Review

> "'The standard governing our review of an issue presented in a petition for the writ of mandamus is well established:
>
> > "'"[M]andamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought: (2)

[1]Harry, who is represented by separate counsel, did not join the motion to strike. She is also not a party to this mandamus proceeding.

> an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."'
>
> "'Ex parte Edgar, 543 So. 2d 682, 684 (Ala. 1989).
>
> "'Mandamus is an appropriate remedy where the availability of a jury trial is at issue, as it is in this case. Ex parte Merchants Nat'l Bank of Mobile, 257 Ala. 663, 665, 60 So. 2d 684, 686 (1952).'
>
> "Ex parte Cupps, 782 So. 2d 772, 774-75 (Ala. 2000)."

Ex parte BancorpSouth Bank, 109 So. 3d 163, 166 (Ala. 2012).

Discussion

In Gaylord Department Stores of Alabama, Inc. v. Stephens, 404 So. 2d 586, 588 (Ala. 1981), this Court articulated three factors to consider in evaluating whether to enforce a contractual waiver of the right to trial by jury: (1) whether the waiver is buried deep in a long contract; (2) whether the bargaining power of the parties is equal; and (3) whether the waiver was intelligently and knowingly made.

In Ex parte BancorpSouth Bank, supra, this Court addressed the factors to be considered in contractual jury-trial waivers and how to construe the language used in the waivers.

> "The right to a jury trial is a significant right in our jurisprudence. 'Public policy, the Alabama Rules of Civil Procedure, and the Alabama Constitution all express a preference for trial by jury.' Ex parte AIG Baker Orange Beach Wharf, L.L.C., 49 So. 3d 1198, 1200-01 (Ala. 2010) (citing Ex parte Cupps, 782 So. 2d [772,] 775 [(Ala. 2000)]. Nevertheless, the right to a jury trial is not absolute in that 'no constitutional or statutory provision prohibits a person from waiving his or her right to trial by jury.' Mall, Inc. v. Robbins, 412 So. 2d 1197, 1199 (Ala. 1982).
>
> "….
>
> "In Ex parte AIG Baker Orange Beach Wharf, L.L.C., supra, this Court enforced broad jury-trial waiver language in a contract and ordered the trial court to grant the petitioner's motion to strike the jury demand. This Court recognized a distinction between contractual jury waivers that are limited to claims 'arising from' the agreement, which are to be narrowly construe[d] and which exclude claims that do not require a reference to or construction of the underlying contract for resolution, and broader waiver provisions that cover claims 'arising out of or relating to' a contract. The AIG Baker Court relied upon analogous cases dealing with arbitration clauses, such as Selma Medical Center v. Manayan, 733 So. 2d 382 (Ala. 1999) (holding that arbitration clause covering any dispute 'concerning any aspect of' agreement between doctor and hospital required arbitration

> of fraudulent-inducement claim); Beaver Construction Co. v. Lakehouse, L.L.C., 742 So. 2d 159, 165 (Ala. 1999) (noting that '"relating-to" language has been held to constitute a relatively broad arbitration provision'); General Motors Corp. v. Stokes, 850 So. 2d 1239 (Ala. 2002) (broadly interpreting provision in dealer-relocation agreement calling for arbitration of claims 'arising under or relating to' agreement and negotiation thereof to include claims that manufacturer fraudulently induced dealer to enter into agreement); Ex parte Gates, 675 So. 2d 371 (Ala. 1996) (holding that clause in mobile-home sales contract providing for arbitration of claims 'arising from or relating to' the contract required arbitration of buyers' claims that defendants had misrepresented or concealed facts to induce them to enter into agreement because claims were asserted 'in connection with' contract); and Ex parte Lorance, 669 So. 2d 890 (Ala. 1995) (holding that clause in doctor's professional-services contract requiring arbitration of any controversy or claim 'arising out of or relating to' contract covered doctor's claim that he was fraudulently induced to enter into agreement)."

Warren Averett argues that the jury-waiver provision in the PSA is enforceable based on the factors first set out in Gaylord and addressed in BancorpSouth. We agree that, taking into consideration the Gaylord factors, the jury-waiver provision is enforceable. First, the PSA is not an unduly long contract. It is 19-pages long, with additional attachments. The jury-waiver provision appears in the section entitled "19. DISPUTE RESOLUTION" and is set out as "(c) Waiver of Jury

Trial." The jury-waiver provision is not inconspicuous. As to the second factor, the parties' bargaining power was not unequal. Fagan owned a human-resources firm and was hired by Warren Averett to build a human-resource consulting business for it. Although Fagan proposed changes to the PSA that were not accepted by Warren Averett, that fact does not mean that the parties had unequal bargaining power. In BancorpSouth, supra, the plaintiff, Thomas Busby, argued that he had lacked bargaining power because he had been unable to make any changes to the defendant bank's form contract. This Court rejected Busby's argument, stating:

> "If we accepted Busby's argument, however, every form contract drafted and presented by a business institution and signed by an individual, no matter how educated the individual was, would be subject to being disavowed by the signatory on the basis of 'unequal bargaining power.' Busby and the Bank contracted with each other for Busby to guarantee the Sims loan, and each party clearly had equal bargaining power in entering into that contract. We will not rewrite the contract for either party."

BancorpSouth, 109 So. 3d at 167. As to the third factor, the jury-waiver provision expressly provides that the parties to the PSA acknowledge

that the jury-trial waiver "is knowingly, freely, and voluntarily given ...." Ordinarily, the best evidence of the intent of the parties is the written contract itself. Black Diamond Dev., Inc. v. Thompson, 979 So. 2d 47, 52 (Ala. 2007).

Next, Warren Averett argues that the jury-waiver provision was triggered when this Court held that Warren Averett had breached § 19 of the PSA by failing to pay its share of the filing fees owed to the AAA. Fagan argues that Warren Averett's breach excused her from pursuing arbitration because, she says, a substantial breach by one party excuses further performance by the other. She further argues that because Warren Averett breached the arbitration and costs-and-fees provisions of § 19, the dispute-resolution section of the PSA, Warren Averett can no longer require Fagan to comply with the jury-waiver provision, which is in § 19. Fagan notes that there is no severability clause in the PSA.

Section 19 of the PSA addresses dispute resolution. Section 19(b) concerns arbitration, § 19(c) concerns the jury-trial waiver, and § 19(d) concerns the costs of dispute resolution, including the fees for arbitration.

The parties agreed to arbitrate their claims. The jury-waiver provision of the PSA provides that, if the arbitration provision is not enforced "for any reason," the parties agree to waive the right to trial by jury.

In Sloan Southern Homes, LLC v. McQueen, 955 So. 2d 401, 402 (Ala. 2006), the parties agreed to arbitrate their claims pursuant to the Better Business Bureau ("BBB") rules or, "'in the event the services of the Better Business Bureau are unavailable, … in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, as last revised.'" (Emphasis omitted.) This Court determined that "the AAA option [was] the functional equivalent of a severability clause specifically tailored to the arbitrability of [the] contract. Id. at 404 (emphasis omitted). Like a standard severability provision, the arbitration clause in Sloan Southern provided, in effect, that, if arbitration could not be conducted according to the BBB rules, then it would nevertheless be conducted pursuant to the rules of the AAA. In other words, this Court held, "the parties expressly agreed that the

unavailability of the BBB would not void the overall right to arbitrate." Id. (emphasis omitted).

In the present case, the parties' expressed intent, not only in the language of the jury-waiver provision, but also in having two separate provisions addressing arbitration and jury waiver, is contrary to Fagan's argument that Warren Averett's breach of the arbitration and the costs-and-fees provisions prevented its ability to enforce the jury-waiver provision. Also, like in Sloan Southern, supra, in which this Court determined that "the AAA option" was "the functional equivalent of a severability clause," 955 So. 2d at 404 (emphasis omitted), in this case the jury-waiver provision is the functional equivalent to a severability clause with respect to the dispute-resolution provisions of § 19 of the PSA.

Next, Warren Averett argues that this Court's holding in Fagan that it breached the arbitration provision in section 19(b) of the PSA made the arbitration provision "unenforceable," as contemplated by the language in the jury-waiver provision in section 19(c). Fagan argues that this Court did not declare the arbitration provision "unenforceable" and

that the applicability of the jury-trial waiver is expressly contingent upon a court's declaring that the arbitration provision is "unenforceable." Fagan argues that the express language of the jury-waiver provision does not provide that the jury-trial waiver applies regardless of the cause but, rather, that it applies only in the event that the arbitration provision itself is declared "unenforceable" by a court. Fagan asserts that she could have insisted on enforcing arbitration after Warren Averett's breach had she wanted to do so.

> "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. On the other hand, if the court determines that the terms are ambiguous (susceptible of more than one reasonable meaning), then the court must use established rules of contract construction to resolve the ambiguity. See [Voyager Life Ins. Co. v.] Whitson, 703 So. 2d [944,] 948 [(Ala. 1997)]. Under those established rules of contract construction, where there is a choice between a valid construction and an invalid construction the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that

> will give effect and meaning to all of its terms. See id. at 948-49; Sullivan, Long & Hagerty v. Southern Elec. Generating Co., 667 So. 2d 722, 725 (Ala. 1995)."

Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000) (some citations omitted).

The jury-waiver provision provides, in pertinent part:

> "(c) 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."

The parties did not define "unenforceable" in the PSA, nor was there a need to do so. The plain meaning of "unenforceable" includes the breach of the arbitration provision committed by Warren Averett. Black's Law Dictionary defines "unenforceable" as "(Of a contract) valid but incapable of being enforced." Black's Law Dictionary 1839 (11th ed. 2019). The plain language of the PSA shows that the parties intended for the jury-waiver provision to apply in any case in which a court holds that the arbitration provision cannot be enforced and that, under such

circumstances, the case would proceed in court, without a jury, as opposed to arbitration.

Warren Averett argues that all of Fagan's claims, including her tort claims, are subject to the jury-waiver provision. Fagan argues that her misrepresentation, fraudulent-suppression, and breach-of-fiduciary-duty claims are not subject to the jury-waiver provision. Section 19 of the PSA defines "disputes" as "[a]ll controversies, claims, issues, and other disputes arising out of or relating to this Agreement or the breach thereof." This Court has held that the language used in the PSA is sufficiently broad to reach Fagan's tort claims. See Ex parte AIG Baker Orange Beach Wharf, L.L.C., 49 So. 3d 1198, 1201 (Ala. 2010) (explaining that provisions applying to claims "arising out of or related to" a contract are broader in scope than those applying to claims "arising from" or "arising under" the contract such that the plaintiffs' fraud claims arising out of a lease were subject to the jury-waiver provision).

Last, Warren Averett argues that its motion to strike Fagan's demand for a jury trial is not barred by the doctrine of laches. Fagan

argues that Warren Averett did not file its motion to strike until almost two years after she had filed her first amended complaint, which included her jury demand, and that she was prejudiced by the delay.

Rule 38(b), Ala. R. Civ. P., requires a party seeking a trial by jury on an issue to make that demand "not later than thirty (30) days after the service of the last pleading directed to such issue." Rule 39(a), Ala. R. Civ. P., provides:

> "(a) By Jury. When trial by jury has been demanded as provided in Rule 38, [Ala. R. Civ. P.,] the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state."

Rule 39(a) does not set out a time limit for filing a motion to strike a jury demand. Fagan asserts that the doctrine of laches applies.

> "The doctrine of laches is a creature of courts of equity and rests upon the idea that nothing can quicken into exercise the activities of a court of equity but conscience, good faith, and reasonable diligence, and is founded principally upon the maxims that 'he who seeks equity must do equity, he who

> comes into equity must come with clean hands,' and 'equity serves the vigilant and not those who sleep over their rights,' and is based on considerations of public policy. Its object is in general to exact of the complainant fair dealing with his adversary. Gilmer v. Morris, 80 Ala. 78, 60 Am. Rep. 85 [(1885)]; Comans v. Tapley, 101 Miss. 203, 57 So. 567, Ann. Cas. 1914B, 307 [(1911)]. This doctrine was never intended to aid a complainant who, upon the very threshold of the court, has conceded the rights of the defendant to defeat those rights."

Hamilton v. Watson, 215 Ala. 550, 551-52, 112 So. 115, 116 (1927). "'"'Laches' is defined as neglect to assert a right or a claim that, taken together with a lapse of time and other circumstances causing disadvantage or prejudice to the adverse party, operates as a bar." Ex parte Grubbs, 542 So. 2d 927, 928 (Ala. 1989) (citing Black's Law Dictionary 787 (5th ed. 1979)).'" Oak Grove Res., LLC v. White, 86 So. 3d 963, 971 (Ala. 2011) (quoting Elliott v. Navistar, Inc., 65 So. 3d 379, 386 (Ala. 2010)).

In this case, Fagan has not shown prejudice by the almost two-year delay between the filing of Fagan's amended complaint and the filing of Warren Averett's motion to strike the jury demand. In a special writing to a no-opinion denial of a writ of mandamus, Chief Justice Moore

addressed a delay in filing a motion to strike a jury demand. Ex parte First Exchange Bank, 150 So. 3d 1010 (Ala. 2013). In that case, the motion to strike the jury demand was filed over a year and a half after the filing of the complaint containing the jury demand and three months before the scheduled trial date. The plaintiffs argued that the delay had caused them needless expense because the case could have been heard much sooner had it been placed on the nonjury case track. Chief Justice Moore recognized that

> "Rule 39(a) [, Ala. R. Civ. P.,] does not provide a time limit for making a motion to strike a jury demand. See Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 225 (3d Cir. 2007) (noting that 'a party may file a motion to strike a jury demand at any time under [federal] Rule 39(a)'); 8 Moore's Federal Practice § 39.13[2][c] (3d. ed. 2013) ('Parties have a great deal of latitude on the timing of motions to strike a jury demand.'). Some federal courts have granted motions to strike jury demands up to the time of trial. See, e.g., Tracinda Corp., 502 F.3d at 226-27 (upholding trial court's striking of jury demand even though motion to strike came approximately three years after original jury demand, after the close of discovery, and about six weeks before trial); Jones-Hailey v. Corporation of TVA, 660 F. Supp. 551, 553 (E.D. Tenn. 1987) (striking jury demand 'even though TVA waited until one month before the scheduled trial date to move the Court to strike the jury demand').

"Other courts, however, have invoked both the delay and prejudice prongs of the doctrine of laches to deny a late filed motion to strike a jury demand. See United States v. 79.36 Acres of Land, 951 F.2d 364 (9th Cir. 1991) (table) (unpublished opinion) (reversing trial court's striking of jury-trial demand because delay in moving to strike was inexcusable and 'defendant had organized its trial strategy contemplating that the case would be tried to a jury rather than the judge'); Burton v. General Motors Corp. (1:95CV1054DFH-TAB, Aug. 15, 2008) (S.D. Ind. 2008) (not reported in F. Supp. 2d) (holding that the court 'has the discretion to deny the defendant's motion to strike the demand for a jury because the motion was filed so late' and because the opposing party would be prejudiced by disruption of its trial preparations); Rivercenter Assocs. v. Rivera, 858 S.W.2d 366 (Tex. 1993) (denying petition for writ of mandamus seeking to reverse denial of motion to strike jury demand because of unjustified delay in asserting contractual jury waiver).

"Over a year and a half after the complaint in this case was filed, and three months before the scheduled trial date, the petitioners' motion to strike the Henrys' jury demand came before the trial court for a hearing. The Henrys argued that this delay caused them needless expense because the case could have been heard much sooner had it been placed on the nonjury track. Henrys' brief, at 14-15, 18-19. At the June 7, 2012, motion hearing, counsel for the Henrys noted that '[w]e're on the jury trial docket for September ... and now ninety days before trial under a scheduling docket, they want to say, "You waived your right to a jury demand."' Henrys' brief, App. D., at 7-8. Under these circumstances the trial court was within its discretion to deny the petitioners' motion to strike the Henrys' jury demand under a laches theory. See

> National Westminster Bank, U.S.A. v. Ross, 130 B.R. 656, 668 (S.D.N.Y. 1991), aff'd sub nom., Yaeger v. National Westminster Bank, U.S.A., 962 F.2d 1 (2d Cir. 1992) (table) (noting that denial of a motion to strike a jury demand was appropriate when New York courts maintained separate jury and nonjury calendars). Compare Cantiere DiPortovenere Piesse S.p.A. v. Kerwin, 739 F. Supp. 231, 235-36 (E.D. Pa. 1990) (exercising discretion to deny withdrawal of jury demand on eve of trial '"to effectuate a more speedy, efficient judicial determination of the case"' (quoting 5 J. Moore & J. Wicker, Moore's Federal Practice ¶ 39.09 (2d ed. 1988)))."

150 So. 3d at 1013-14 (Moore, C.J., concurring specially)(footnote omitted).

In the present case, Fagan has not shown that Warren Averett's delay was unjustified. The trial court granted Warren Averett's motion to compel arbitration, and Fagan sought review of that decision. We reversed that decision; on remand, the trial court set a scheduling conference, and Warren Averett filed its motion to strike Fagan's jury demand. Although there was a delay between the time that Fagan demanded a jury and the time that Warren Averett sought to strike that demand, Fagan has not shown that she was prejudiced by that passage of time.

Based on the foregoing, we grant Warren Averett's petition and issue a writ of mandamus directing the trial court to vacate its order denying Warren Averett's motion to strike Fagan's jury demand and to enter an order granting that motion.

PETITION GRANTED; WRIT ISSUED.

Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Mitchell, J., concurs specially, with opinion.

Shaw and Bryan, JJ., concur in the result.

Parker, C.J., dissents, with opinion.

MITCHELL, Justice (concurring specially).

I join the Court's opinion in full. I write separately to address one of the cases discussed in the main opinion, Gaylord Department Stores of Alabama, Inc. v. Stephens, 404 So. 2d 586 (Ala. 1981).

In Gaylord, this Court affirmed a trial court's decision not to enforce a contractual provision waiving the right to a jury trial. 404 So. 2d at 588. In reaching that judgment, the Court relied on National Equipment Rental Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977), in which the United States Court of Appeals for the Second Circuit held that a jury-trial waiver was ineffective "where it was buried in the eleventh paragraph, and there appeared gross inequality in bargaining power between the parties, and it did not appear that the waiver was knowingly and intentionally made." Gaylord, 404 So. 2d at 588 (describing Hendrix). The Gaylord Court then made a similar holding because "[t]he jury waiver provision is buried in paragraph thirty-four in a contract containing forty-six paragraphs; the equality of the bargaining power of

the parties is questionable; and it does not appear that the waiver by Stephens was intelligently or knowingly made." Id.

This Court has since applied Gaylord as if it set forth a definitive list of factors for deciding whether a jury-trial-waiver provision is enforceable. See, e.g., Mall, Inc. v. Robinson, 412 So. 2d 1197, 1199 (Ala. 1982) ("This Court recently enunciated three factors in determining whether to enforce a contractual waiver of the right to trial by jury: (1) whether the waiver is buried deep in a long contract; (2) whether the bargaining power of the parties is equal; and (3) whether the waiver was intelligently and knowingly made."); Ex parte BancorpSouth Bank, 109 So. 3d 163, 167 (Ala. 2012) (reviewing "the three Gaylord factors" when analyzing whether a jury-trial waiver was enforceable). But it is apparent to me that neither the Hendrix court nor the Gaylord Court articulated a fully formed test to be applied when the validity of a jury-trial waiver was at issue. Rather, those courts seem to have been

discussing some of the circumstances in the cases before them that bore on whether a party had intentionally waived its right to a jury trial.[2]

Additionally, I have concerns about two of the Gaylord factors. With regard to the first, the suggestion that a jury-trial waiver should not be enforced because it is located within a long contract seems out of step with the rest of our caselaw standing for the well-established principle that parties are bound by the terms of the contracts they sign. See, e.g., Carraway v. Beverly Enters. Alabama, Inc., 978 So. 2d 27, 32 (Ala. 2007) ("'"'[O]rdinarily when a competent adult, having the ability to read and understand an instrument, signs a contract, he will be held to be on notice of all the provisions contained in that contract and will be

[2]It is evident that courts within the Second Circuit do not read Hendrix as articulating the definitive list of factors to be considered when deciding whether a jury-trial waiver is enforceable; in fact, district courts bound to follow Hendrix have considered other factors even while citing it. See, e.g., Sullivan v. Ajax Navigation Corp., 881 F. Supp. 906, 911 (S.D.N.Y. 1995) (citing Hendrix, 565 F.2d at 258) ("In addressing jury waiver clauses, courts have consistently examined the following factors: negotiability of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision.").

bound thereby.'"'" (citations omitted)). Other courts have expressly applied this principle to jury-trial waivers. For example, in Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014), the Supreme Court of South Carolina held that, "although the right to a trial by jury is a substantial right, and we 'strictly construe' such waivers, '[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it.'" (Citations omitted.) And the Supreme Court of Wisconsin has explained that when the terms of a contract are clear and unambiguous, a defendant seeking to enforce a jury-trial waiver "does not need to offer additional proof that [the plaintiffs] knowingly and voluntarily agreed to this waiver." Parsons v. Associated Banc-Corp, 374 Wis. 2d 513, 534, 893 N.W.2d 212, 222 (2017). I believe these courts have the correct view.

The third Gaylord factor -- whether a jury-trial waiver was intelligently and knowingly made -- presents a different problem. Put simply, whether a party intelligently and knowingly waived its right to a jury trial is not a "factor" to be considered in any test we could formulate

-- it is the entire point of the test. That is, a court considers relevant factors to help it determine whether a party intelligently and knowingly waived its right to a jury trial. See, e.g., Hergenreder v. Bickford Senior Living Grp., LLC, 656 F.3d 411, 420 (6th Cir. 2011) ("This court uses the following factors to determine whether a waiver of the right to a jury trial has been knowing and voluntary …."); Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 118 Nev. 92, 101, 40 P.3d 405, 410-11 (2002) ("'The factors to consider in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily include ….'" (citation omitted)); Malan Realty Invs., Inc. v. Harris, 953 S.W.2d 624, 627 (Mo. 1997) ("Those jurisdictions that have considered the validity of a contractual waiver of a jury trial have required that the waiver be knowingly and voluntarily made."). Considering whether a party intelligently and knowingly waived its right to a jury trial as one step of a process to determine whether that party intelligently and knowingly waived its right to a jury trial is nonsensical.

In an appropriate future case where a party puts the issue before us, I would be open to revising our framework for determining whether a contractual jury-trial-waiver provision has been waived, based on the concerns I outline above.

PARKER, Chief Justice (dissenting).

Because trial by jury is a constitutional right, this Court construes contractual jury waivers narrowly. In this case, this bulwark against inadvertent waivers means that we should not read our previous decision in this litigation as declaring the arbitration provision "unenforceable," such that it triggered the jury-waiver provision.

The Alabama Constitution guarantees that "the right of trial by jury shall remain inviolate," Art. I, § 11, Ala. Const. 1901 (Off. Recomp.), and a party who demands a jury is normally entitled to one, see Rule 38, Ala. R. Civ. P. The main opinion recognizes this guarantee by noting that "'"[p]ublic policy, the Alabama Rules of Civil Procedure, and the Alabama Constitution all express a preference for trial by jury,"'" ___ So. 3d at ___ (citations omitted), and that jury waivers should be narrowly construed, id.; see Ex parte Cupps, 782 So. 2d 772, 775 (Ala. 2000) (noting that this principle of narrow construction is "in deference to the constitutional guarantee of the right to a jury trial"). However, the

opinion fails to enforce the constitution's guarantee because it fails to construe the jury-waiver provision narrowly.

The jury-waiver provision stated that

> "[t]he 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."

Assuming that the first sentence functions as a limitation on the waiver,[3] this jury-waiver provision conditions the waiver on the fact that a court has declared the arbitration provision "unenforceable."

In the proceedings leading to the prior appeal, Gerriann Fagan initiated arbitration, but Warren Averett Companies, LLC, refused to

[3]Warren Averett, in its mandamus petition, assumes that the first sentence limits the waiver and is not just a preamble. See Petition at p. 17 (stating that the intent of the parties "was to waive a jury trial in the event the arbitration provision was not enforced"). In Warren Averett's reply brief, it argues for the first time that the first sentence does not limit the waiver. See Reply Brief at pp. 6-7. Arguments raised for the first time in a reply brief are waived and will not be considered. Ex parte Burkes Mech., Inc., 306 So. 3d 1, 7 (Ala. 2019). Thus, that belated argument cannot be a basis for granting the petition.

pay its share of the fees. The arbitration provider therefore closed its file, and Fagan sued Warren Averett. Warren Averett then turned around and moved to compel Fagan to arbitrate. We held that Warren Averett could not force Fagan to arbitrate because it had refused to pay the fees in the first arbitration proceeding and thus had been "in default" under a provision of the Federal Arbitration Act, 9 U.S.C. § 3. Fagan v. Warren Averett Cos., 325 So. 3d 778, 788 (Ala. 2020). Effectively, we held that Warren Averett's earlier default precluded it from later enforcing the arbitration provision. We did not hold that the arbitration provision was unenforceable by Fagan or that it was absolutely unenforceable. Fagan's argument on this point as well as our discussion focused on Warren Averett's conduct, not any defect in the arbitration provision. Indeed, our reasoning that Warren Averett was obliged to comply with the associated "Costs and Fees" provision implicitly assumed that the arbitration provision was legally binding. Therefore, keeping in mind that jury waivers must be construed narrowly, the jury-waiver provision's

limitation -- that a court must first find the arbitration provision "unenforceable" -- was not met here.

Finally, under the main opinion's approach, our two decisions in this case have a remarkable combined effect: Warren Averett could contractually agree to arbitrate, refuse to comply with a condition of arbitration, and then use its own noncompliance to deprive Fagan of her right to a jury trial. That result flies in the face of our practice of narrowly construing jury-trial waivers to protect this treasured constitutional right.