IN THE SUPREME COURT OF MISSISSIPPI
NO. 2015-TS-01658

PAIGE ELECTRIC COMPANY, LLC **APPELLANT**

vs.

DAVIS & FEDER, P.A. **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE, DAVIS & FEDER, P.A.

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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

1. Paige Electric, LLC, Appellant
2. Jerry W. Paige, sole member of Paige Electric, LLC
3. Davis & Feder, P.A., Appellee
4. Mark Davis, Esq., principal of Davis & Feder, P.A.
5. Blewett Thomas, Esq., attorney for Appellant
6. James G. Wyly, III, Esq., attorney for Appellee
7. Kyle S. Moran, Esq., attorney for Appellee
8. William Larry Latham, Esq., Arbitrator
9. Honorable Lisa Dodson, Circuit Court Judge

SO CERTIFIED, this the 14th day of July, 2016.

s/ Kyle S. Moran
KYLE S. MORAN

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INTRODUCTION

This appeal involves an improper attempt to invalidate an arbitration agreement and arbitration award after both parties to the proceeding knowingly and voluntarily agreed to arbitration and then participated in a three-day arbitration. Taking into consideration that "every reasonable presumption will be indulged in favor of the validity of arbitration proceedings," the issue is whether the Circuit Court of Harrison County's confirmation of the arbitrator's ruling "manifestly wrong, clearly erroneous or [was] an erroneous legal standard was applied?"[1]

The answer is unequivocally "no." This Court need not read past this Introduction to affirm the Circuit Court. The "Arbitrator did not provide a detailed Award explaining the bases for his decision because Paige Electric did not want to incur the expense."[2] Any attack on why the arbitrator ruled the way he did is impermissible speculation. For example, Davis & Feder raised an affirmative defense that the applicable legal malpractice statute of limitations had expired.[3] Evidence was presented at the arbitration that Davis & Feder formally terminated the attorney-client relationship on January 29, 2009.[4] This action was not commenced until nearly six years later on January 16, 2014.[5] A three-year statute of limitations applies to legal malpractice claims.[6] It is "reasonable" to "presume" that the arbitrator found that Paige Electric knew or should have known of Davis & Feder's alleged malpractice at or before the time the

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[1] *See Wilson v. Greyhound Bus Lines, Inc.*, 830 So. 2d 1151, 1155 (Miss. 2002).

[2] R. 266; see also T. 43, l. 3-13. Citations to the Record will be keyed as "R," to the Transcript as "T," and to Davis & Feder's Record Excerpts as "DFRE."

[3] R. 35, Second Affirmative Defense.

[4] R. 56.

[5] R. 13.

[6] *Channel v. Loyacono*, 954 So. 2d 415, 420 (Miss. 2007); Miss. Code Ann. § 15-1-49.

attorney-client relationship ended. Or the arbitrator could have concluded that Paige Electric did not meet the elements of its claims. Or the arbitrator simply could have concluded that there were no recoverable damages. Davis & Feder asserted multiple defenses, any one of which would justify the Award in light of the "extremely limited" review permitted here. The Circuit Court's refusal to vacate the Award and declare the Arbitration clause invalid must be affirmed on this basis alone.[7]

STATEMENT OF THE ISSUES[8]

1. Whether the Circuit Court committed reversible error by denying Paige Electric's motion to vacate the arbitration award.

2. Whether the Circuit Court committed reversible error by finding that Paige Electric had waived its right to challenge the arbitration proceedings.

3. Whether the Circuit Court committed reversible error by failing to invalidate the arbitration agreement.

4. Whether the Circuit Court committed reversible error by failing to sever Paige Electric's statutory lien claims from the arbitration award and set those claims for trial.

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[7] See also T. 81-82, DFRE 20-21.

[8] The Statement of the Issues in Paige Electric's Brief significantly diverges from the Statement of Issues Paige Electric previously filed in the Circuit Court and in this Court. (R. 393-94, 400-01). Paige Electric's Statement of Issues also is contrary to Miss. R. App. P. 28(a)(3) in that "[e]ach issue present for review shall be separately numbered in the statement. No issue not distinctly identified shall be argued by counsel, except upon request of the court…"

STATEMENT OF THE CASE

Nature of the Case. This is an appeal of the Circuit Court's refusal to invalidate an Arbitration Award pursuant to Miss. Code Ann. §11-15-23and the underlying arbitration agreement after the parties agreed to and participated in a three-day mediation, after which the Arbitrator ruled against Paige Electric.[9]

Course of Proceedings. Paige Electric filed its Complaint on January 16, 2014.[10] The Complaint was amended on April 16, 2014.[11] Paige Electric sought leave to file a second Amended Complaint on April 6, 2014. On June 9, 2014, the Circuit Court entered an Agreed Order referring the case to arbitration.[12] Two days later, Paige Electric filed its second Amended Complaint.[13]

The parties agreed to the appointment of William Larry Latham as both Arbitrator and as a Special Master for purposes of presiding over third party discovery.[14] Following discovery, the Arbitrator presided over a three-day arbitration on May 27-29, 2015 and published his award on July 23, 2015.[15] Davis & Feder subsequently moved to confirm the Award and enter a Final Judgment.[16] Paige Electric objected to Davis & Feder's motions and sought additional time to respond.[17]

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[9] R. 400.
[10] R. 4.
[11] R. 5.
[12] R. 46.
[13] R. 6.
[14] R. 96.
[15] R. 97-102, DFRE 1-2.
[16] *Id.*; R. 108- 113.
[17] R. 114-17.

After oral argument on September 25, 2015, the Circuit Court continued consideration of the Davis & Feder's motions to confirm the Award and for Final Judgment and Paige Electric's motion to set aside the award and arbitration agreement until October 30, 2013.[18] During this time, the parties were allowed to submit additional briefing on the motions.

Following oral argument on October 30, 2015, the Circuit Court announced its rulings from the bench.[19] The Circuit Court subsequently entered an order confirming the Arbitrator's Award,[20] an Order denying Paige Electric's motions to declare arbitration clause invalid, to sever certain claims and to vacate the award[21] and also entered a Final Judgment.[22] Paige Electric then filed its Notice of Appeal.[23]

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[18] T. 28-30.
[19] T. 80-104, DFRE 19-43.
[20] R. 396-97.
[21] R. 398-99.
[22] R. 395.
[23] R. 393-94.

STATEMENT OF THE FACTS[24]

i. The Underlying SCS Litigation

In 2005, Paige Electric agreed to perform construction work for Southern Construction Services, Inc. ("SCS") on a Bay St. Louis hotel.[25] SCS was the general contractor and Paige Electric was a subcontractor.[26] Paige Electric allegedly was not paid in full for the work it performed on the project and retained Davis & Feder to prosecute a claim against SCS and/or its principal, Domingo Castro.[27] Davis & Feder filed suit on Paige Electric's behalf against SCS (the "SCS Litigation"). David Brisolara, a senior attorney at Davis & Feder, was responsible for the overall handling of the Paige Electric's case. Mr. Brisolara's work on the file was not merely adequate – Paige Electric actually prevailed on all claims. Indeed, on November 7, 2007, Paige Electric was awarded a Judgment against SCS for the entire amount

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[24] Contrary to Miss. R. App. P. 28(a)(4), Paige Electric's "Statement of the Case" and "Statement of the Facts" contain woefully inadequate citations to the Record. Indeed, only fourteen citations to "facts" are included in more than fifteen pages. "It is not the obligation of this Court [nor the appellee] to independently search the record front to back to ferret out those facts that would bear on the issue. It is the duty of the appellant to point with particularity to those facts in the record that impact on the issues of law he would have the Court consider, and follow that up with argument that is persuasive in its own inherent logic, or supported by citations to authority, making the case as to why the appellant's position should prevail." *Little v. State*, 744 So. 2d 339, 346 (Miss. Ct. App. 1999) (failure to properly cite to the record in the appellant's brief resulted in the dismissal of uncited factual claims); *accord*, *Layton v. Layton*, 181 So. 3d 275, 283 (Miss. Ct. App. 2015) ("This Court should not be in the business of combing a 1,000–plus–page transcript for possible errors based on a single-page argument that no alimony should have been awarded.").

Because the record generally goes uncited in Paige Electric's Brief, the appeal should be dismissed consistent with *Little* and *Layton.* Notwithstanding this, none of the fifteen-plus pages of "facts" are relevant to the "extremely limited" scope of judicial review. *Wilson v. Greyhound Bus Lines, Inc.*, 830 So. 2d at 1155. "The scope of judicial review of an arbitration award is quite narrow, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings." *Id.* (internal citations omitted).

[25] R. 47.

[26] *Id.*

[27] R. 51-52.

it alleged it was owed, along with its attorney fees and interest.[28] Unfortunately, the Judgment proved to be uncollectible.

ii. The Legal Malpractice Lawsuit, the Arbitration Agreement and the Arbitrator's Award

More than six years after obtaining the Judgment against SCS, Paige Electric filed suit against its former attorneys, asserting that Davis & Feder should have "done more" to pursue its claims in the SCS Litigation.[29] The Retainer Agreement between Paige Electric and Davis & Feder contained an arbitration agreement, which:

> shall apply to any dispute between the parties which arises from, or is related to, a claimed breach of this agreement, the professional legal services rendered by Davis & Feder, P.A. or any claim for legal and or professional malpractice, or any claim or disagreement between the parties of any kind, nature, type or description regardless of the facts or the legal theories which may be involved or asserted. … You are specifically agreeing to waive your right to a trial by jury regarding any claims or disputes you may have arising from this Agreement.[30]

The record is clear that Paige Electric continually maintained without reservation (at least until the arbitration did not go its way) that the agreement was binding for all claims it had against Davis & Feder.

On June 12, 2013, over seven months prior to filing this lawsuit, Paige Electric's attorney wrote to Mark Davis, the managing partner of Davis & Feder, to give notice of Paige Electric's claim. In that letter, Paige Electric's attorney alleged:

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[28] R. 94-95. Davis and Feder, along with Florida counsel, attempted to collect the judgment but were unsuccessful. Mr. Brisolara subsequently left Davis & Feder, and David & Feder terminated its attorney-client relationship with Paige Electric. Paige Electric and its Florida counsel continued to attempt to collect the judgment against SCS. *See*, Brief of Appellant, p. 15. The success of these later collection attempts is unknown.

[29] R. 13, 19-20.

[30] R. 276.

> Mr. Paige recently contacted my office concerning the collection of the judgment that was entered in this case. Upon investigating the underlying facts, it was discovered that David Brisolara failed to undertake necessary and appropriate action to both protect the claim and lien of Paige Electric and to file suit against all necessary parties involved in this case.
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> * * * *
>
> … Additionally, Mr. Paige advises me that his contract with Davis and Feder requires all disputes with clients be arbitrated. There is no objection to this procedure, and I request that appropriate steps be taken at this time to arrange for the arbitration of this claim….[31]

On January 16, 2014, Paige Electric filed its complaint alleging, among other claims, that Davis & Feder failed to prosecute certain lien claims in the SCS Litigation.[32]

On May 2, 2014, counsel for Davis & Feder e-mailed Paige Electric's counsel a proposed scheduling order for entry in the Circuit Court.[33] On May 12, 2014, in response to Davis & Feder's proposed scheduling order, Paige Electric proposed arbitration:

> I will email you the client contract later today. After the hearing last month, I asked Mr. Paige to see if he had additional documents; that's when the contract was located. I [sic] contains an arbitration provision, and as I mentioned to Mark Davis last year, I have no objections to arbitrating this case. With arbitration, we're not constrained by Judge Dodson's trial docket and the case can be heard sooner. If we stay in circuit court, a jury will make the final determination. Either option is acceptable to me. Let me know your client's preference.[34]

On June 9, 2014, the Circuit Court entered an agreed Order referring this case to arbitration.[35] The Order did not exempt any claims from the scope of arbitration. Two days

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[31] R. 278, DFRE 3 (emphasis added).
[32] R. 13, 16, 18-19.
[33] R. 283, DFRE 5.
[34] *Id.* (emphasis added).
[35] R. 46.

later, on June 11, 2014, Paige Electric filed its second Amended Complaint, which also included lien-related claims related to the SCS Litigation.[36]

By September 12, 2014, Paige Electric agreed, in writing, that William Larry Latham, Esq., would serve as the Arbitrator.[37] By January 7, 2015, Mr. Latham provided the parties his estimate of fees and expenses for the arbitration.[38]

On May 27, 2015, on the morning the arbitration began, and almost two years after it first proposed arbitration, Paige Electric and its attorney again confirmed they had no objection to arbitrating the claims.[39]

On July 23, 2015, after the parties had submitted their respective post-arbitration briefs, the arbitrator issued his Award, dismissing with prejudice all claims against Davis & Feder.[40] The following day, on July 24, 2015 and for the very first time, Paige Electric objected to the arbitration on the basis of Miss. Code Ann. § 11-15-23(a)-(d) and refused to pay its share of the Arbitrator's fees.[41] Paige Electric still had not objected to the validity of the Arbitration Agreement at this time. It is undisputed that from June 2013 through at least July 2015, Paige Electric had no objection to arbitrating all of its claims against Davis & Feder.

iii. Paige Electric's Challenge and the Circuit Court's Confirmation of the Award

Aggrieved with the Award, Paige Electric moved the Circuit Court to invalidate the arbitration clause as unconscionable, to vacate the Award as beyond the scope of the arbitration

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[36] R. 47. Such claims were known to Paige Electric's counsel at least by May 6, 2014 when the proposed Second Amended Complaint was attached to its Motion for Leave to Amend. Rec. 5.

[37] R. 286-89, DFRE 7-10.

[38] R. 290.

[39] R. 291, 316-19, DFRE 11, 15-18.

[40] R. 100-101, DFRE 1-2.

[41] R. 294.

agreement[42] and for "grounds enumerated in both Miss. Code Ann. § 11-15-23 (a-d) and 9 U.S.C. § 10(a)(1-4)."[43] On October 30, 2016, the Circuit Court heard oral argument on Paige Electric's two motions and Davis & Feder's motions to confirm the Award and for Final Judgment. The Court issued its findings from the bench, denied Paige Electric's various motions and granted Judgment in favor of Davis & Feder.[44] Paige Electric now appeals.

SUMMARY OF THE ARGUMENT

Paige Electric's appeal should be denied and the Circuit Court should be affirmed for at least three reasons.

First, the Circuit Court was not manifestly wrong, clearly erroneous nor did it apply an erroneous legal standard when it refused vacate the award pursuant to Mississippi Code Section 11-15-23(a-d).[45] As the Supreme Court recently recognized in *Painter v. Regions Ins., Inc.*, "[t]he level of review afforded the decision of an arbitrator is quite narrow and provided by statute."[46] Here, neither the arbitration award nor the Circuit Court's rulings should be disturbed.

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[42] R. 132-246; see specifically, R. 163.
[43] Rec. 178.
[44] T. 80-100, DFRE 19-40.
[45] *Id.* at 80-88, DFRE 19-27.
[46] 181 So. 3d 970, 973 (Miss. 2015) (*quoting Robinson v. Henne*, 115 So. 3d 797, 799 (Miss. 2013)). The limited scope of review in arbitration awards dates back over a century:

> It is not legitimate, therefore, in exceptions to the award, to inquire into the original merits in favor of one party or the other, or to show that in the evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all the facts and circumstances, was unjust.

Hutto v. Jordan, 36 So.2d 809, 811 (1948); *Jenkins v. Meagher*, 46 Miss. 84, 93 (1871).

Second, the Circuit Court was not manifestly wrong, clearly erroneous nor did it apply an erroneous legal standard when it refused to find the arbitration agreement was unconscionable. The Mississippi Supreme Court has upheld arbitration agreements between attorneys and their clients.[47] Here, the arbitration agreement is conspicuous, clear and broad.[48] And Paige Electric has waived any right to assert otherwise.[49]

Third, the Circuit Court was not manifestly wrong, clearly erroneous nor did it apply an erroneous legal standard when it refused to sever certain claims from the arbitration proceeding. The arbitration agreement broadly covers all claims asserted by Paige Electric in its complaints, as amended.[50] There is no evidence to suggest the existence of a "second retainer agreement" between Paige Electric and Davis & Feder that modifies their agreement to arbitrate all claims between them.[51] And Paige Electric has waived any right to assert otherwise.[52]

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[47] *See generally, Slater-Moore v. Goeldner*, 113 So. 3d 521 (Miss. 2013).
[48] R. 106.
[49] T. 88-89, DFRE 27-28.
[50] R. 106.
[51] R. 152.
[52] T. 92-98, DFRE 31-37.

ARGUMENT

A. The standard of review on appeal carries an extremely high burden.

With "every reasonable presumption . . . indulged in favor of the validity of arbitration proceedings," was the Circuit Court's confirmation of the arbitrator's award "manifestly wrong, clearly erroneous or [was] an erroneous legal standard was applied[?]"[53] As explained very recently by the Court of Appeals,

> The Mississippi Supreme Court traditionally has viewed arbitration agreements as tantamount to a settlement between the parties where the arbitration agreement would be the exclusive source of rights and liabilities of the parties. Therefore, judicial review of [an] arbitration award is narrowly limited, and a motion to vacate, modify, or correct an arbitration award is not an opportunity to relitigate issues decided in the arbitration.[54]

"Mississippi Code Section 11–15–23, 'provides the only bases for refusal to enforce an arbitration award.'"[55]

B. The Award is binding and final and the Circuit Court did not err in refusing to vacate the award pursuant to Mississippi Code Section 11-15-23.

Paige Electric asserts in its Appeal Brief that the Circuit Court erred in refusing to set aside the Award pursuant to Mississippi Code Section 11-15-23. Mississippi Code Section 11-15-23 enumerates four grounds for vacating an arbitration award:

(a) That such award was procured by corruption, fraud, or undue means;

(b) That there was evident partiality or corruption on the part of the arbitrators, or any one of them;

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[53] *Wilson v. Greyhound Bus Lines, Inc.*, 830 So. 2d at 1155.

[54] *The City of Hattiesburg, Miss. v. Precision Construction, LLC*, No. 2014-CA-01671-COA, ¶27 (Miss. Ct. App. May 17, 2016) (internal citations omitted.

[55] *Painter v. Regions Ins., Inc.*, 181 So. 3d at 973 (citing *Wilson*, 830 So.2d at 1156); *see also*, Brief of Appellant, p. 17.

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

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

Although Paige Electric argues that the Award was due to be vacated pursuant to subsections (a) and (b), separately, the general theme to that position is that the arbitrator first "exceeded his authority," and second, "refused to hear evidence relevant to the claims."[56]

The Supreme Court recently recognized in *Painter v. Regions Ins., Inc.*, "[t]he level of review afforded the decision of an arbitrator is quite narrow and provided by statute."[57] "If there be any type of arbitration award we should be loathe to disturb, it should be that between private contracting parties respecting a matter of interest only to themselves and their respective pocket books."[58] Indeed, the Circuit Court previously held that it "doesn't see anything that supports <u>any of the factors</u> in this record."[59]

The purpose of a motion to vacate is not to revisit the basis for the Arbitrator's findings. A reviewing court "is not allowed to substitute its own judgment on the merits of the

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[56] Brief of Appellants, pp. 31-47.
[57] 181 So. 3d at 973.
[58] *Id.*, *quoting Craig v. Barber*, 524 So. 2d 974, 977 (Miss. 1988).
[59] T. 83, DFRE 22 (emphasis added).

controversy for that of the arbitrator but is instead constrained to determine whether the award fails [an] analysis under [section] 11–15–23."[60]

As explained by the trial court:

> …this is not like a de novo review of the opinions. The court cannot go behind the award to say, well, this is the law I would have applied or this is the weight I would have given to the proof, here's how I would have decided it, those sorts of things.[61]

Even if the Arbitrator had "proceed[ed] altogether on views of what was right and just between the parties without following either the rules that would govern a court of law or equity in circumstances" his ruling must be confirmed and enforced under Mississippi law.[62]

i. The Arbitrator did not exceed his powers under Miss. Code Section 11-15-23(d)

In Paige Electric's own words, "[t]he crux of Paige Electric's claim under Miss. Code Ann. § 11-15-23(d) is that the arbitrator was contractually bound to apply governing law to the evidence received at trial."[63] This argument is premised on the misguided view that David Brisolara, an attorney associated with Davis & Feder, admitted that he was negligent as a matter of law.[64] But he did not. Nonetheless, "[t]o plead legal malpractice, a plaintiff must provide sufficient facts to establish three elements: (1) an attorney-client relationship; (2) the attorney's negligence in handling the client's affairs; and (3) proximate cause of the injury."[65]

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[60] *Wells Fargo Advisors, LLC v. Runnels*, 126 So. 3d 137, 143 (Miss. Ct. App. 2013) (*citing Margerum v. Bud's Mobile Homes, Inc.*, 823 So. 2d 1167, 1173 (Miss. 2002)).

[61] T. 80-81, DFRE 19-20.

[62] *Robinson v. Henne*, 115 So. 3d at 800-02 (also rejecting any notion that Mississippi should adopt the "Doctrine of Manifest Disregard").

[63] Brief of Appellant, p. 37; *see also*, R. 187.

[64] Brief of Appellant, p. 43.

[65] *Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So. 3d 420, 424 (Miss. 2012).

"As to the third essential ingredient, the plaintiff must show that, but for their attorney's negligence, he would have been successful in the prosecution or defense of the underlying action."[66] Even if Brisolara was negligent, which he was not, the arbitrator still could have found Paige Electric suffered no damages and therefore was not entitled to recovery from Davis & Feder. Indeed, the undisputed evidence at arbitration indicated that Hancock Hotels (the party against whom Paige Electric asserts Davis & Feder should have pursued a lien action) had overpaid SCS.[67]

Of course, Brisolara made no such admission. When asked why he did not file suit against the property owner based on the lien, Brisolara testified that he was told by Jerry Paige that Hancock Hotels fully paid SCS, (which it did) and thus there could be no lien claim against Hancock Hotels.[68] Paige Electric ignores Davis & Feder's factual defenses to the legal malpractice claims and the expert evidence that Paige Electric had no lien rights here, and even if it did, a judgment on the lien would have been uncollectible.[69] Paige Electric's interpretation of Mr. Brisolara's testimony is just that – its interpretation. As the fact finder, the Arbitrator was the one charged with the responsibility to weigh all the evidence in arriving at his Award.

With respect to Section 11-15-23(d) Paige Electric also argues that the parties "did not grant the arbitrator the authority to render a decision in disregard for the undisputed facts and applicable case law."[70] The Arbitrator obviously did not disregard the facts or law. But even if

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[66] *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1215 (Miss. 1996).
[67] R. 298-99, DFRE 13-14.
[68] R. 266.
[69] R. 300-09.
[70] Brief of Appellant, p. 31.

he had done so, Paige Electric's view is not the law. In *Robinson*, the Supreme Court explained:

> Even if the arbitrator reached the wrong conclusion of law in his failure to consider the condition precedent, the Court has held that a mistake of law or of fact is not sufficient reason to overturn an arbitrator's decision. [T]he general rule is that [arbitrators] are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either. The only basis recognized for reversal of an arbitrator's decision is a violation of the appropriate statute.
> …
> To vacate the judgment of an arbitrator, there must be a violation of the arbitration statute. **However, time and again, this Court has found that errors of fact and law do not constitute a violation of either subsections (a) or (d) of Mississippi Code Section 11–15–23**.[71]

Paige Electric's theories of reversing the Award under subsection (d) are premised upon an argument that the arbitrator did not find Davis & Feder's agent negligent as a matter of law.[72] Specifically, Paige Electric argues that Mr. David Brisolara, an attorney associated with the Davis & Feder firm, breached duties to Paige Electric.[73] Again, he did not, but for purposes of review under subsection (d), it would be irrelevant if he did.

> In short, we consistently have held that a mistake of law, a mistake of fact, or a decision lacking an evidentiary basis is insufficient to constitute a violation of any of the four statutory categories that permit the vacatur of an arbitrator's decision. Nothing in the record or the briefs indicates that the arbitrator resorted to "nefarious means"[74] to reach his decision, or that he in

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[71] 115 So. 3d at 803.

[72] Brief of Appellant, p. 37-38.

[73] *Id.*

[74] "Nefarious" is defined as "flagrantly wicked or impious." Webster's, COLLEGIATE DICTIONARY, 775 (10th Ed. 2002). Paige Electric has never produced any evidence or authority that the Arbitrator resorted to "nefarious means" to reach his decision, or that the Arbitrator exceeded his authority in any way recognized by statute or case law. Paige Electric falls woefully short of alleging such misconduct, much less supporting such an allegation with authority or evidence.

> any way recognized by statute or caselaw exceeded his authority as arbitrator. Absent such a showing, and despite errors of law or fact by the arbitrator, if any, we must and do affirm.[75]

In a last ditch effort to save its argument that the Arbitrator must have exceeded his authority, Paige Electric resorts to a trivial critique of the Arbitrator's bill to hypothesize that the Arbitrator gave no weight to fact witness testimony and documentary evidence, but instead only focused on expert evidence – which in Paige Electric's view, was inappropriate.[76] Notwithstanding that a legal malpractice claim requires expert testimony, counsel for Paige Electric must have overlooked the Arbitrator's entries of June 11, 12 and 14, 2015 indicating that the Arbitrator spent hours reviewing the witness testimony and documentary evidence.[77]

ii. The Arbitration Award was not procured by corruption, fraud or undue means under Miss. Code Section 11-15-23(a)

Paige Electric also argues, without any reference to specific facts, evidence or authority, that the award was procured by corruption, fraud, or undue means in violation of Miss. Code Ann. § 11-15-23(a).[78] Paige Electric instead argues "undue means" exists by parsing out cherry-picked words from the applicable standard of review, then relying on synonyms of those

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[75] *Robinson v. Henne*, 115 So. 3d at 802; see also, *Painter v. Regions Ins., Inc.*, 181 So. 3d 970 (arbitrator did not exceed his powers by awarding specific performance as opposed to liquidated damages, despite expressly excluding "equity" claims from arbitration); *D'Angelo v. Hometown Concepts, Inc.*, 791 So. 2d 270, 272 (claims of "evident miscalculation," even if true, do not amount to an arbitrator exceeding his powers); *J.H. Leavenworth & Son v. Kimble*, 128 So. 354 (1930) (an arbitrator's conclusion that may exceed what the parties intended, does not mean the arbitrator exceeded his powers).

[76] Brief of Appellant, p. 43.

[77] R. 199-201.

[78] Brief of Appellant, p. 44. Paige Electric mistakenly refers to subsection (c) while it argues "undue means," which is a term found in subsection (a).

words.[79] This is done in an improper effort to allow this Court the opportunity to review evidence in support of finding a violation of subsection (a). Words mean what they mean and "abuse of discretion" does not mean "corruption." This argument is without merit.

Paige Electric argues the Arbitrator exhibited malfeasance in his ruling because, in Paige Electric's view, the Arbitrator (a) failed to give sufficient evidentiary weight to testimony supportive of its cause; (b) relied too heavily on Davis & Feder's legal authority; and (c) failed to apply Paige Electric's valuations of its claims.[80] Again, this type of evidence is not reviewable. There is no legal basis to vacate an arbitrator's award on the basis of credibility of testimony, application of legal authority or the weight of evidence.[81] But even if it was reviewable, Paige Electric conveniently fails to cite any number of contrary evidentiary materials that rebut each of these allegations. The Circuit Court appropriately acknowledged that "the Court certainly can't go into the substance of [the ruling] or second guess what the arbitrator does. That's the whole point in having an arbitrator."[82] There is absolutely no basis to declare any of the Arbitrator's actions as "malfeasance," under Section 11-15-23(a). This argument also must fail and the Circuit Court should be affirmed.

Paige Electric further questions, rather obliquely, the arbitrator's "record" of prior challenges to other awards.[83] The reference stands in stark contradiction to the Transcript, in that Paige Electric stated to the Circuit Court: "we're not alleg[ing] that there was moral

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[79] Paige Electric argues "corruption" mean "corrupt gain" which means "abuse of discretion" and "undue means" equates to "intentional malfeasance" which means "unjust performance." *Id.* at 44-45.

[80] Brief of Appellant, pp. 45-46.

[81] *See generally*, *Painter*, 181 So. 3d 970.

[82] Rec. 340-41, p. 20-21.

[83] Brief of Appellant, p. 45.

corruption or bribery."[84] This is just another example of Paige Electric's willingness to assert outlandish statements not based in fact for purposes of distracting this Court from the reality that Paige Electric was unable to carry its burden of proof.

iii. There was no evident partiality or corruption on the part of the Arbitrator under Miss. Code Section 11-15-23(b)

Paige Electric also has asserted the award should be vacated because of "evident partiality or corruption by the Arbitrator."[85] As evidence of this "corruption," Paige Electric argues that the Arbitrator (a) refused to "review cited case law;" (b) relied too much on expert testimony; (c) afforded Davis & Feder's expert more credibility than Paige Electric's expert; (d) gave Paige Electric's expert too little consideration; and (e) did not focus on testimony and evidence supportive of Paige Electric's positions.[86] But Paige Electric fails to cite a single reference to the record or even one legal authority to support these arguments. There is no logical relationship to these five allegations and a claim of corruption, and this argument merits no further response.

iv. Paige Electric fails to allege any facts supportive of vacatur under 11-15-23(c)

Paige Electric devotes three sentences in its forty-eight page brief arguing that the arbitrator violated Section 11-15-23(c).[87] The argument, which lacks merit, goes like this:

> *Because Paige Electric made the allegation that the arbitrator was guilty of misconduct under subsection (d), the Award should be set aside under subsection (c).*

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[84] T. 80, DFRE 19.
[85] Brief of Appellant, pp. 46-47.
[86] *Id.*
[87] Brief of Appellant, p. 44.

The Circuit Court correctly found that no malfeasance was "substantiated in the record."[88] Moreover, the Court found that:

> With regard to Subsection C of the statute, which is that the arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or refusing to hear evidence pertinent or material to the controversy or other misbehavior by which the rights of the parties have been prejudiced, there's nothing in this record to indicate that any of that occurred.[89]

Paige Electric has failed to cite any evidence in the record or supporting legal authority for a position that the Circuit Court's ruling was in error.

C. The Circuit Court did not err in refusing to find the Arbitration Agreement unconscionable.

i. Paige Electric has waived any right to object to the terms of the Arbitration Agreement.

On June 12, 2013, Paige Electric notified Davis & Feder's managing partner by letter that Paige Electric intended to pursue a claim against the law firm.[90] In the e-mail, it was represented that Paige Electric's principal, Jerry Paige, was aware "that his contract with Davis & Feder requires all disputes with clients be arbitrated. There is no objection to this procedure, and [Paige Electric] request[s] that appropriate steps be taken at this time to arrange for the arbitration of this claim…"[91]

On no less than five instances over the course of more than two years, Paige Electric had no objection to arbitrating its claims against Davis & Feder and, generally was the party requesting arbitration.[92] Indeed, until the Award was issued (and even immediately after),

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[88] T. 84, DFRE 23.
[89] *Id.* at p. 86, DFRE 25.
[90] R. 278-79, DFRE 3-4.
[91] *Id.* (emphasis added).
[92] *Supra*, pp. 5-8; *see also*, R. 46, 47, 285-91, 316-19, DFRE 7-12, 15-18.

Paige Electric consistently, and without reservation or objection, represented that the arbitration agreement was binding, agreed that Mr. Latham would serve as arbitrator, and fully participated in the arbitration through conclusion. Even after the Arbitrator rendered the Award, Paige Electric's original "objections" had nothing to do with the enforceability of the arbitration agreement. Instead, Paige Electric only complained that the Award violated Miss. Code § 11-15-23.[93]

The record is clear and unmistakable that Paige Electric agreed it was bound by the arbitration clause. Davis & Feder has identified no authority, in any jurisdiction, that would support Paige Electric's unfounded argument that Paige Electric has not waived its ability to challenge the arbitration clause's validity.

Although Paige Electric cites *Titan Indemnity Co. v. Hood*[94] for the premise it did not waive its right to challenge the arbitration proceedings, that case has nothing to do with arbitration clauses. *Titan Indemnity* involves waiver of a venue provision in an insurance policy. But even if it was applicable to arbitration clauses, *Titan Indemnity* would require a finding that Paige Electric did waive its rights to challenge the agreement to arbitrate its claims against Davis & Feder. "Waiver presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right."[95] The record is clear that multiple times leading up to and including the first day of arbitration, Paige Electric, in writing, agreed to arbitrate all its claims against Davis & Feder.[96]

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[93] R. 294.
[94] 895 So.2d 138 (Miss. 2004).
[95] *Id.* at 150.
[96] Rec. 286-89, 291-92, DFRE 7-12..

While it does not appear that Mississippi Courts have considered whether the entire arbitration may be set aside on the basis of unconscionability, post-arbitration, a majority of jurisdictions appear to clearly hold that participating in arbitration without moving to stay the proceedings or otherwise objecting is a waiver of the right to subsequently object to the arbitrability of the dispute.[97]

The Circuit Court correctly declined to find the Arbitration Award unconscionable on the basis of waiver.[98] The Circuit Court's ruling from the bench was well-reasoned and consistent with the controlling legal standards:

> Now, with regard to the arbitration itself, the claim that the arbitration clause is unconscionable, et cetera…first of all, those would be arguments that should have been made prior to this matter being referred for arbitration.
>
> Challenge to the arbitration clause itself should have been made, if at all, prior to the referral for arbitration.
>
> It is undisputed in this record that Mr. Paige had the arbitration agreement before he agreed to the arbitration. His attorney had the arbitration agreement before he agreed to the arbitration. He

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[97] *See Opals on Ice Lingerie v. Body Lines Inc*., 320 F.3d 362 (2d Cir. 2003) (if a party participates in arbitration proceedings without making a timely objection to the submission of the dispute to arbitration, that party may be found to have waived its right to object to the arbitration); *Olsen v. U.S. ex rel. U.S. Dept. of Agriculture*, 546 F. Supp. 2d 1122 (E.D. Wash. 2008) (a party who has voluntarily participated in arbitration waives any challenge he or she may have had to the arbitrator's authority); *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093 (Colo. App. 2009), *cert. granted*, 2010 WL 893907 (Colo. 2010) (if a party willingly allows an issue to be submitted to arbitration, it cannot await the outcome and later argue that the arbitrator lacked authority to decide the matter); *Fairman v. District of Columbia*, 934 A.2d 438 (D.C. 2007) (participation in the arbitration proceeding without objection waives any claim that the award is void because there was no agreement to arbitrate); *Advocate Financial Group v. Poulos*, 8 N.E.3d 598 (App. Ct. 2d Dist. 2014) (a timely objection might save the time and expense of an unwarranted arbitration; a party cannot sit silent, wait until an adverse award is issued, and then first argue that the arbitrator did not have the authority even to hear the claim); *Duemer v. Edward T. Joyce and Associates, P.C.*, 995 N.E.2d 321 (Ill. App. Ct. 1st Dist. 2013) (law firm waived claim that dispute with clients over fees from insurance coverage suit was not subject to arbitration by participating in the arbitration proceedings without raising an objection to the arbitrability of the clients' claims until after the arbitrator's award was issued).

[98] *See Wilson v. Greyhound Bus Lines, Inc.*, 830 So. 2d at 1155.

> did not raise any issue at that time with regard to the fact that he didn't understand it, that it hadn't been explained to him, that he was in any way coerced or misled in signing it, nothing such as that that would lead this court to have, at that time, determined that there would be no arbitration.
>
> That would have been the time to raise it. That would have been the time to argue it if in fact it existed…
>
> …looking back first at [the] letter of June 12, 2013, to Mr. Mark W. Davis. That letter, at the end, and I'm reading the letter, says, 'additionally Mr. Paige advises me that his contract with Davis & Feder requires all disputes with clients be arbitrated. There is no objection to this procedure, and I request that appropriate steps be taken at this time to arrange for the arbitration of this claim…'
>
> Clearly Mr. Paige knew about the arbitration agreement, understood that it applied to his claims in this case, and requested…'that appropriate steps be taken at this time to arrange for an arbitration.'
>
> …By June 9 [2014, a year later,] the parties apparently had agreed to arbitrate this matter. And they so presented an agreed order to this court referring this case for arbitration.
>
> At that point any objection that Paige Electric had to the arbitration had, in [the] court's opinion, been waived. And certainly by the time of the arbitrator's decision, any of those objections had been waived.[99]

These findings were not manifestly wrong, clearly erroneous nor an application of an erroneous legal standard, and the Circuit Court's refusal to find the arbitration clause unconscionable on the basis of waiver should be affirmed.

ii. The Arbitration Agreement is not unconscionable.

Notwithstanding that Paige Electric waived any objection to the arbitration agreement after fully participating in arbitration without objection, the agreement is neither procedurally

[99] T. 88-92, DFRE 27-31.

or substantively unconscionable. Procedural unconscionability is "an attack on the formation of the contract generally, not an attack on the arbitration clause itself."[100]

In *Russell v. Performance Toyota, Inc*., the Mississippi Supreme Court recognized that procedural unconscionability is an issue for the arbitrator to determine.[101] Because Paige Electric did not object to the arbitration of its claims until *after* the arbitrator issued his award, the question of procedural unconscionability was not presented to the arbitrator (and is therefore inappropriate for consideration on appeal). Nevertheless, neither the underlying Retainer Agreement nor the arbitration clause contained in it evidences procedural unconscionability. Here, as in *Russell*, the arbitration agreement is preceded with "boldface and capitalized headings and was almost immediately succeeded by the signature line."[102]

Any assertion that the terms of the Retainer Agreement were "boilerplate" also is unsupported by the record. The terms were plainly negotiated prior to execution. The Retainer Agreement contains multiple, hand-written and initialed strikethroughs.[103] Two numbered sections of the contract were deleted.[104] There also is no evidence to suggest Paige Electric was coerced into executing the Retainer Agreement. Under Mississippi law, "a person is charged with knowing the contents of any document that he executes."[105] Had he not wished to agree to arbitration, Mr. Paige "could have walked away and gone to another [law firm]."[106]

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[100] *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 725 (Miss. 2002).

[101] *Id*. at 723.

[102] 826 So. 2d at 726.

[103] Rec. 147-48.

[104] Rec. 149 (Sections 8 and 9 of the Retainer Agreement are omitted).

[105] *Id.* Here, Mr. Page admits he "read the Retainer Agreement." R.157, at ¶ 8; *see also*, R.73, at ¶ 11.

[106] *Id*. at 726; *compare* R. 276.

Paige Electric's analogy of *Caplin Enterprises, Inc. v. Arrington* to support procedural unconscionability is equally misplaced.[107] The Court of Appeals' determination of procedural unconscionability were based on the use of "much smaller print than many of the agreement's other terms" and "found wedged in the midst of other non-distinguishable, non-labeled provisions."[108] The arbitration agreement at issue here is written in the same type-font as all other provision and in contained in its own "section" with a bold, all-caps underlined heading stating "**ARBITRATION OF DISPUTES**."[109] In fact, the arbitration hearing contains the first words on that page.[110]

Paige Electric's reliance on *East Ford v. Taylor*[111] also is flawed. The arbitration clause at issue there was nothing like the arbitration clause in the Retainer Agreement here. In *East Ford*, "[t]he arbitration clause is not in boldface and it appears less than one third the size of many other terms in the document. As a matter of fact, every detail that is inserted onto the agreement concerning the vehicle Plaintiff purchases is in boldface print. However, the arbitration clause along with the additional terms and status and compensation clause are all in very fine print and regular typing font."[112] The arbitration clause in *East Ford* was "clearly one-sided."[113] The arbitration clause here is neither inconspicuous nor one-sided.

Similarly, Paige Electric's argument that the Arbitration Agreement is substantively unconscionable also must fail. "Substantive unconscionability may be found when the terms of

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[107] 145 So. 3d 675 (Miss. App. 2013), *overturned in part on other grounds*, 145 So. 3d 608 (Miss. 2014).

[108] 145 So. 3d at 683.

[109] Rec. 150.

[110] *Id.*

[111] 826 So. 2d 709 (Miss. 2002).

[112] *Id.* at 715.

[113] *Id.*

the contract are of such an oppressive character as to be unconscionable."[114] As with procedural unconscionability, this issue was raised for the first time *after* the arbitrator issued the Award (and, thus, has been waived).[115] As in *Russell*, "the arbitration agreement pertains to claims of either party and does not benefit [Davis & Feder] only. It is equally binding upon [Davis & Feder] and [Paige Electric]."[116] Additionally, the cases cited by Paige Electric do not support its claim of substantive unconscionability:

- Paige Electric's reliance on *Trinity Mission Health & Rehab of Holly Springs, LLC v. Lawrence*[117] to argue the burden of the existence of an arbitration agreement resting on the party seeking to invoke it is unconvincing. First, Paige Electric was the first party to invoke arbitration. Second, *Lawrence* concerned whether a wife's signature to an arbitration agreement could be binding on her husband's claims.[118] It is undisputed Mr. Paige had authority to bind Paige Electric when he signed the Retainer Agreement.
- Paige Electric cites *Noble Real Estate, Inc. v. Seder*[119] to argue parties can agree to arbitrate some claims and not others, but Paige Electric ignores the fact that it agreed to arbitrate "any dispute arising from or relating to [Davis & Feder's promise to represent it], including [Davis & Feder's] professional legal services rendered to or on [Paige Electric's] behalf…[and] shall apply to any dispute between the parties

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[114] *Id.* at 725.

[115] In this regard, Paige Electric's affidavit, executed months *after* the issuance of the arbitrator's award, alleges facts that were well-known to it prior to executing the Agreed Order referring the case to arbitration. R. 156-59.

[116] 826 So. 2d at 726.

[117] 19 So.3d 647 (Miss. 2009).

[118] *Id.* at 648.

[119] 101 So.3d 197 (Miss. Ct. App. 2012).

which arises from, or is related to,...the professional services rendered by Davis & Feder, P.A…."[120] All claims against Davis & Feder relate to professional services rendered to Paige Electric and are within the scope of the arbitration agreement.

- *Covenant Health & Rehab. of Picayune v. Estate of Moulds*[121] is cited to argue that contracts of adhesion ease a party's burden to prove substantive unconscionability and render facially oppressive terms presumptively invalid. The Retainer Agreement here is not a contract of adhesion (*e.g.*, Paige Electric could have gone elsewhere) and Paige Electric fails to identify any "facially oppressive term."
- Paige Electric cites *York v. Georgia-Pacific*[122] to argue that an "oppressive" term may invalidate a contract. *York* has nothing to do with the enforceability of arbitration clauses. Instead, *York* simply holds that a term is unconscionable if is "so one-sided that it is unconscionable under the circumstances existing at the time the contract was made."[123] Here, the arbitration clause is as equally binding on Davis & Feder as it is on Paige Electric.
- *Smith v. Express Check Advance of Mississippi, LLC*[124] is cited to argue that substantive unconscionability may be evidenced by showing that a contract is one of adhesion, with such contracts usually being prepared in printed form. However, the *Smith* Court found that a pre-printed arbitration form was binding, and not

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[120] R. 150
[121] 14 So. 3d 695 (Miss. 2009).
[122] 858 F.Supp. 1265 (N.D. Miss. 1984).
[123] *Id.* at 1278.
[124] 153 So. 3d 601 (Miss. 2014)

oppressive, and that the trial court did not err in enforcing the arbitration agreement against the parties.[125] *Smith* requires that the arbitration agreement here be upheld.

- *Pridgen v. Green Tree Financial Servicing Corp.*[126] is cited to argue that if an arbitration agreement necessarily operates in such a way as to have a unconscionable effect, then it is unconscionable. However, *Pridgen* upheld a motion to compel arbitration *even though the agreement was "one-sided."*[127] Here, the agreement to arbitrate is not one-sided and nothing in *Pridgen* supports a reversal of the trial court's rulings.
- Paige Electric argues that *Union Planter Bank, N.A. v. Rogers*[128] requires more than implied consent for an arbitration agreement to be enforceable. The plaintiff in *Rogers* signed an arbitration agreement with one bank, which later merged with a different bank and changed its name. The appeals court upheld the trial court's refusal to enforce the arbitration agreement because the plaintiff had not signed an agreement with the newly formed bank. Here, Paige Electric *expressly* consented to arbitrate its claims against Davis & Feder, not any predecessor entity.
- *McCreary v. Liberty Nat'l Life*[129] merely holds that arbitration agreements in insurance policies are unenforceable unless signed by the insured. It is inapplicable to the present circumstances as the parties executed the Retainer Agreement which contained the arbitration provision. Any assertion otherwise is without merit.

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[125] *Id.* at 608-09.
[126] 88 F.Supp. 2d 655 (S.D. Miss. 2000).
[127] *Id.* at 659 (emphasis added).
[128] 912 So.2d 116 (Miss. 2005).
[129] 6 F.Supp.2d 920, 920-21 (N.D. Miss. 1998).

- The arbitration clause at issue in *Pre-Paid Legal Services, Inc. v. Battle*[130] was printed in small font, had no specific heading and never used the words "arbitrate" or "arbitration." The Court held there was no specific language agreeing to arbitration. Here, the arbitration agreement is clear and conspicious.
- *First Family Financial Services v. Fairley*[131] is cited to argue that an arbitration agreement may be found to be unconscionable when arbitration requires excessively high fees that "preclude a litigant from effectively vindicating her rights." Here, Paige Electric did vindicate its rights – it arbitrated its claims to conclusion. Further, all arbitration fees were split equally between the two parties.

Notwithstanding any issues concerning the arbitration agreement have been waived, Paige Electric lacks any basis in law or fact to set aside the arbitration agreement as being either procedurally or substantively unconscionable.

iii. Arbitration agreements are lawful in Mississippi attorney fee contracts and Paige Electric separately agreed to arbitrate its claims against Davis & Feder

Paige Electric's theory that arbitration agreements may be unlawful in the context of attorney fee agreement is equally unfounded. In *Slater-Moore v. Goeldner*, the Mississippi Supreme Court refused to adopt a rule that arbitration agreements in attorney-client contracts are *per se* improper.[132]

Paige Electric, through counsel, also agreed to arbitrate all claims arising out of the proposed Second Amended Complaint after the Second Amended Complaint had been

[130] 873 So. 2d 79, 80-81 (Miss. 2004).
[131] 173 F.Supp.2d 565, 570 (S.D. Miss. 2001).
[132] *See, Slater-Moore v. Goeldner*, 113 So. 3d 521, 529 (Miss. 2013).

presented to the Court,[133] In other words, in addition to its promises in the fee agreement, Paige Electric separately agreed to arbitrate after filing the legal malpractice lawsuit.[134]

In his May 12, 2015 e-mail, counsel for Paige Electric also expressly acknowledged that his client was waiving a jury trial, when he wrote, "[i]f we stay in circuit court, a jury will make the final determination. Either option [arbitration or circuit court] is acceptable to me. Let me know your client's preference."[135]

As to potential costs of arbitration, on September 12, 2014, Paige Electric, through counsel, executed the Arbitrator's engagement agreement, which outlined the Arbitrator's hourly rate and types of expenses to be incurred.[136] On January 7, 2015, the Arbitrator issued his Arbitration Fee Estimate of $6,525.00 per party (a total of $13,050.00) for two days of arbitration.[137] Paige Electric did not object after either notice, and paid its share of the estimate. For Paige Electric to subsequently object to arbitration costs of $17,000.00 as excessive is somewhat disingenuous. It was Paige Electric that after first requesting arbitration and acknowledging an original estimate of more than $13,000 for a two-day arbitration, expanded the arbitration to three days by calling five witnesses, in contrast to Davis & Feder calling a single witness.

Paige Electric's complaints regarding the location and "boiler plate" nature of the Retainer Agreement also are not based on facts. The Retainer Agreement has multiple hand-

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[133] R. 255, fn 9.
[134] R. 286-89, 291-92, DFRE 7-12.
[135] R. 283, DFRE 5.
[136] R. 286-89, DFRE 7-10.
[137] R. 290.

written changes and had entire sections removed.[138] Jerry Paige also readily admitted he read the Agreement[139] and was aware that it was binding on all disputes prior to agreeing to Arbitration.[140] Any suggestion that Paige Electric's agreement to arbitrate was less than informed, including Paige Electric's purported unawareness of the costs associated with arbitration or its waiver of a jury trial, is incredulous, given the repeated, well-documented instances of Paige Electric or its attorney proposing and then expressly agreeing to arbitration.

D. The Circuit Court did not err in refusing to sever certain claims.

Paige Electric generally argues that the Circuit Court erred by refusing to sever its legal malpractice claims arising based on purported lien rights from the arbitration of the legal malpractice claim arising out of the SCS Litigation.[141] There is no merit to this issue because the Circuit Court did not err in finding that Paige Electric had waived any argument regarding the scope of the arbitration agreement. Additionally, the claims are merely derivative claims arising out of the claims against SCS. The argument fails on each basis alone.

i. Severability is not appealable and has been waived

As it is primarily based on a position the arbitrator failed to consider evidence, this issue is not reviewable. There is no legal basis to vacate an arbitrator's award on the basis of credibility of testimony, application of legal authority or the weight of evidence.[142]

Paige Electric was represented by counsel when it agreed to submit this case to arbitration. Any argument that Davis & Feder failed to explain the effects of the arbitration clause, the costs associated with arbitration, or the waiver of trial by jury is specious at best.

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[138] R. 273-74; R. 276 (Sections 8 and 9 deleted).
[139] R. 157, ¶8.
[140] R. 278, DFRE 3.
[141] Brief of Appellant, pp 18-29.
[142] *See generally, Painter v. Regions Ins., Inc.*, 181 So. 3d 970.

The exact claims that Paige Electric now complains are outside the scope of the arbitration agreement were pled in the original complaint filed *before* this case was referred to arbitration and in the second amended complaint filed *after* the case was already in arbitration.[143] Paige Electric cannot now "claw back" its repeated, express consent to arbitration simply because it is dissatisfied with the Arbitration Award.

Throughout Paige Electric's Brief there is an undertone that D&F withheld documents from Paige Electric that rises to a showing of "corruption, fraud or undue means."[144] Paige Electric also passively argues that Davis & Feder's responses to written discovery somehow "substantiate a challenge" to the Award under Section 11-15-23(a).[145] This simply is untrue. In fact, were it not for certain privileges afforded to parties engaged in litigation - would be libelous. Paige Electric did not even propound written discovery to Davis & Feder until January 23, 2015, more than six months after agreeing to arbitration and more than one year after filing its Complaint.[146] Within thirty days, Davis & Feder responded to the discovery and made all responsive documents available to Paige Electric.[147]

ii. The Arbitration Agreement broadly covers all disputes between Paige Electric and Davis & Feder

Paige Electric's theory that the Award is not binding because Paige Electric did not agree to arbitrate claims related to statutory liens against Hancock Hotels, is incorrect for a number of reasons. First, Paige Electric broadly agreed to arbitrate any and all claims against Davis & Feder. The arbitration clause of the Retainer Agreement provides in relevant part:

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[143] R. 255, fn 9.
[144] Brief of Appellant, pp. 30-31.
[145] *Id*. at p. 31.
[146] R. 256.
[147] *Id.*

> You and we, as the parties to this agreement, agree that any dispute arising from or relating to this agreement, including our professional legal services rendered to or on your behalf under this agreement, shall be resolved by binding arbitration as provided under Mississippi law …
>
> This provision regarding arbitration of disputes shall apply to any dispute between the parties which arises from, or is related to, a claimed breach of this agreement, the professional legal services rendered by Davis & Feder, P.A. or any claim for legal and or professional malpractice, or any claim or disagreement between the parties of any kind, nature, type or description regardless of the facts or the legal theories which may be involved or asserted. … You are specifically agreeing to waive your right to a trial by jury regarding any claims or disputes you may have arising from this Agreement.[148]

Despite the self-serving nature of Jerry Paige's affidavit, Mr. Paige was forced to acknowledge that he "read the Retainer Agreement."[149] Plainly, Paige Electric agreed to arbitrate all claims it may have had against Davis & Feder.

Second, Paige Electric expressly agreed to arbitrate claims against Davis & Feder related to the purported statutory lien claims against Hancock Hotels. The lien-related claims were alleged in the original complaint that was filed *before* the reference to arbitration and also were alleged in the second amended complaint filed *after* arbitration was discussed and agreed.[150] For Paige Electric to now claim it did not agree to arbitrate claims arising out of a

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[148] R. 276 (emphasis added).

[149] R. 157, ¶8.

[150] For example, on May 6, 2014, Paige Electric sought leave to file its Second Amended Complaint. (R. 5). In the proposed complaint, Paige Electric sought damages from Davis & Feder for alleged malpractice in pursuing claims against Southern Construction Services, Inc., Hancock Hotels of Mississippi, Inc., Domingo Castro, and Studio Inn Biloxi, LLC, among others. (R. 47-95). In its motion to file an amended complaint, filed a month prior to agreeing to arbitration, Paige Electric sought damages from Davis & Feder for alleged malpractice in pursuing claims against Southern Construction Services, Inc., Hancock Hotels of Mississippi, Inc., Domingo Castro, and Studio Inn Biloxi, LLC, among others. *Id.* Both the Agreed Order referring the matter to arbitration and the

relationship with Hancock Hotels of Mississippi, having known the full scope of its claims before and after the case was referred to arbitration, is disingenuous.

Paige Electric asserts *Noble Real Estate, Inc. v. Seder*[151] holds that "court[s cannot] compel arbitration on issues the parties never agreed to arbitrate."[152] In *Noble*, the arbitration agreement limited arbitration to disputes "as against the Listing Broker."[153] The plaintiff's claims were against the Contractor on the project, not the Listing Broker (who coincidentally was the same individual). The Court of Appeals correctly found this was "narrow" arbitration language and limited the agreement to disputes "directed against the real estate broker." Here, there is no such limiting language. The Retainer Agreement binds Paige Electric to arbitration:

> This provision regarding arbitration of disputes shall apply to <u>any dispute</u> between the parties which arises from, or is related to, [1] a breach of this agreement, [2] the professional legal services rendered by Davis & Feder, P.A., [3] any claim for legal or professional malpractice, <u>or</u> [4] any other claim or disagreement between the parties of any kind, nature, type, or description regardless of the facts or the legal theories which may be involved or asserted.[154]

The arbitration clause at issue here is nothing like the arbitration clause in *Noble Real Estate*.

Paige Electric also incorrectly asserts that *Complaint of Hornbeck Offshore* (1984) *Corp.*[155] supports a narrow construction of the Retainer Agreement to exclude arbitration of the lien claims.[156] In *Hornbeck*, the court found "that arbitration clauses containing the 'any

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Agreed Order granting Paige Electric leave to file its Second Amended Complaint were entered on June 9, 2014. (R. 46).

[151] 101 So. 3d 197.

[152] Brief of Appellant, p. 20.

[153] 101 So. 3d at 199.

[154] R. 276 (emphasis and numbering added).

[155] 981 F.2d 752, 755 (5th Cir. 1993).

[156] Brief of Appellant, p. 21.

dispute' language" must be read broadly and the parties should be compelled[157] to arbitrate "any dispute" between them.[158] That very same language is present here:

> This provision regarding arbitration of disputes shall apply to any dispute between the parties which arises from, or is related to … the professional legal services rendered by Davis & Feder, P.A., any claim for legal or professional malpractice, or any other claim or disagreement between the parties of any kind, nature, type, or description regardless of the facts or the legal theories which may be involved or asserted.[159]

Paige Electric relies further on *Russell v. Performance Toyota, Inc.*,[160] but for the wrong principle that applies here.[161] Like the federal court in *Hornbeck*, the Mississippi Supreme Court in *Russell* held that broad terms like "arising out of or relating to" require enforcement of arbitration of all disputes between parties to an arbitration agreement.[162]

iii. The lien claim is derivative of the claims against Southern Construction Services

Any claim for a lien against property owned by Hancock Hotels is merely a derivative claim arising out of the attempts for "collections against Domingo Castro and/or Southern Construction Services, Inc."[163] The alleged lien claims against Hancock Hotels were for money owed to Domingo Castro and/or SCS by Hancock Hotels. Any lien rights afforded under Section 85-7-131 arise out "debt contracted and owing, for labor done or materials furnished" by SCS – the very claims Paige Electric agreed to arbitrate with Davis & Feder. As such, Paige

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[157] The party objecting to arbitration did so prior to the arbitration. It did not wait until after the other party sought to confirm the arbitrator's ruling as Paige Electric has done here.

[158] 981 F.2d at 754-55.

[159] R. 276 (emphasis added).

[160] 826 So. 2d 719.

[161] Brief of Appellant, pp. 22, 41.

[162] 826 So.2d at 723; *compare,* Rec. 276 ¶7 (the arbitration agreement applies to "any dispute arising from or relating to this agreement …").

[163] R. 276.

Electric expressly agreed to arbitrate any claims arising out a lien action against Hancock Hotels. Additionally, the evidence showed that Hancock Hotels did not owe SCS any money, but instead it was Hancock Hotels that was owed more than $350,000 from SCS.[164] Paige Electric's claim to $271,364.22 was significantly less that Hancock Hotels. Therefore, there could be no basis for enforcement of either lien rights or the "stop payment" statute in any event.[165]

CONCLUSION

The Record is clear both parties agreed to Arbitration. Paige Electric cannot in good faith now seek to void the arbitration agreement and vacate the Arbitration Award simply because it disagrees with the Award.

The reasons that Paige Electric asked the Circuit Court to void the arbitration agreement – that it was unaware of the expense involved with arbitration and that it did not appreciate it was waiving a jury trial (all of which are denied) – are issues that Paige Electric should have asserted before it agreed to arbitration.

The reasons Paige Electric asserts the Circuit Court should have vacated the Arbitration Award are equally specious, speculative and offensive. An arbitration award can be set aside only in the narrowest of circumstances, and a court's review is quite limited. Paige Electric has never offered or produced any credible evidence to satisfy any basis to set aside the Arbitration Award under Mississippi Code Section 11-15-23. There is no evidence or legal theory

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[164] R. 298-99, DFRE 13-14.

[165] Brief of Appellant, p. 14. Separately, the stop payment statute has been deemed unconstitutional and any alleged failure to utilize that procedure (which wasn't available anyway because Hancock Hotels was owed money by SCS) can never be the basis for a claim of legal malpractice. *See Noatex Corp. v. King Construction of Houston, LLC*, 732 F.3d 479 (5th Cir. 2013) (affirming a district court's ruling that Mississippi's "stop payment" statute was unconstitutional because it included no due process).

supportive of Paige Electric's position that the Circuit Court's rulings were manifestly wrong, clearly erroneous, or that it applied the wrong legal standard. When this Court makes all "reasonable presumptions" in favor of arbitration, Paige Electric's position is specious, at best.

The parties are entitled to finality. The Arbitration Award represents that finality. Davis & Feder, P.A. respectfully requests that this Court affirm the Circuit Court's denial of Paige Electric's Motion to Declare Arbitration Clause Invalid or Alternatively to Sever Statutory Lien Claims for Trial and denial of Paige Electric's Motion to Vacate Arbitration Award. Davis & Feder also seeks all appropriate costs and attorney fees.

Respectfully submitted, this the 14th day of July, 2016.

PAIGE ELECTRIC COMPANY, LLC

BY: *s/ Kyle S. Moran*

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CERTIFICATE OF SERVICE

I, Kyle S. Moran, one of the attorneys for Appellee, do hereby certify that I electronically filed the above and foregoing ***Brief of Appellee, Davis & Feder, P.A.*** using the Court's ECF system which sent notification of such filing to the following:

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I, also certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing ***Brief of Appellee, Davis & Feder, P.A.*** to the following:

Hon. Lisa P. Dodson
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502-1461

THIS the 14th day of July, 2016.

BY: */s/ Kyle S. Moran*

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