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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2025-2026

SC-2025-0296

**Ex parte Vestavia Hills, Ltd.; Judith A. Chance; Karen McEllriott;
Frank A. Virgadamo; Connie Virgadamo; B. Renee Barnard;
Jack L. Rowe; and IPG Holding, Inc.**

PETITION FOR WRIT OF MANDAMUS

(In re: Commonwealth Assisted Living, LLC, Series E

v.

**Vestavia Hills, Ltd.; Judith A. Chance; Karen McEllriott; Frank A.
Virgadamo; Connie Virgadamo; B. Renee Barnard; Jack L.
Rowe; and IPG Holding, Inc.)**

(Jefferson Circuit Court: CV-18-390)

MENDHEIM, Justice.

Based on the materials before us, Commonwealth Assisted Living, LLC, Series E ("Commonwealth"), a Delaware series limited-liability company, initiated an action in the Jefferson Circuit Court against Vestavia Hills, Ltd. ("VHL"), an Alabama limited partnership; IPG Holding, Inc. ("IPG"), a California corporation that is the general partner of VHL; and the following limited partners of VHL: Judith A. Chance, Karen McElliott, Frank A. Virgadamo, Connie Virgadamo, B. Renee Barnard, and Jack L. Rowe ("the limited partners"), in their individual capacities and as trustees of various family trusts (the Chance Survivor's Trust and the Chance Family Trust under Declaration of Trust dated February 16, 1988; Trust A and Non-exempt Trust C under the Ronald Joseph and Karen L. McElliott 1984 Family Trust; the Virgadamo Family Trust; the Barnard Living Trust; and the Jack and Barbara Rowe Family Trust). VHL, IPG, and the limited partners seek a writ of mandamus directing the circuit court to submit to a jury the issue of the prevailing party's reasonable attorneys' fees and expenses, as provided in an agreement between VHL and Commonwealth. We deny the petition.

VHL owned real property in Jefferson County, on which it operated a facility known as Mount Royal Towers ("the property"). In March 2018, Commonwealth and VHL entered into an agreement for VHL to sell the property to Commonwealth ("the agreement").¹ In conjunction with the agreement, the limited partners guaranteed certain obligations of VHL under the agreement. The agreement was amended several times, and, in the fall of 2018, a dispute arose between Commonwealth and VHL regarding whether Commonwealth had satisfied conditions for extending the closing date for the sale. Thereafter, VHL notified Commonwealth that the agreement was terminated.

On November 21, 2018, Commonwealth initiated an action in the circuit court against VHL, IPG, and the limited partners.² Commonwealth's complaint included a request for a judgment declaring the parties' rights and obligations under the agreement and claims of

¹In conjunction with the sale of the property to Commonwealth, VHL was to lease back a skilled-nursing facility that was part of Mount Royal Towers.

²Commonwealth also named as a defendant Charles Barnard, in his individual capacity and as a trustee. He is a limited partner in VHL and a guarantor, but he is not a party to the petition.

breach of contract and for specific performance of the agreement, the latter of which was omitted in a subsequent amendment to the complaint.³ Commonwealth requested a "trial by jury of all claims so triable."

The parties filed respective motions for a summary judgment regarding Commonwealth's claims and regarding counterclaims that had been filed against Commonwealth by VHL, IPG, and the limited partners. The circuit court held a hearing on those motions. On July 23, 2024, the circuit court entered an order determining that VHL had breached the agreement, as amended, by wrongly repudiating it in November 2018 and that a trial would be held regarding Commonwealth's damages. The circuit court also entered an order denying the motion for a summary judgment that had been filed by VHL, IPG, and the limited partners.

A jury trial regarding Commonwealth's damages was scheduled to be held on December 2, 2024. On October 24, 2024, Commonwealth filed

³VHL filed for Chapter 11 bankruptcy, and, pursuant to a bankruptcy-court order, VHL sold the property to a third party in October 2021. Also, the bankruptcy court entered an order lifting the automatic stay in bankruptcy and authorizing Commonwealth to proceed with its claims against VHL, IPG, and the limited partners.

a motion requesting that the circuit court grant Commonwealth leave to prove its attorneys' fees and expenses "incurred ... in prosecuting this lawsuit" after the trial and the determination of any posttrial motions. Commonwealth's motion expressly referenced § 19.17 of the agreement, which stated that "[i]f either of [VHL] or [Commonwealth] ... file suit to enforce the obligations of the other party under this Agreement, the prevailing party shall be entitled to recover the reasonable fees and expenses of its attorneys and court costs." According to Commonwealth, the circuit court had determined Commonwealth's contractual "right to an award of its reasonable attorneys' fees and expenses" based on the rulings on the respective motions for a summary judgment. Commonwealth argued that the issue of the amount of such fees and expenses was a matter for the circuit court to determine, after the jury trial regarding Commonwealth's damages.

VHL, IPG, and the limited partners filed a response in opposition to Commonwealth's motion for leave to prove its attorneys' fees and expenses after trial. The response requested that Commonwealth be prohibited from presenting any evidence regarding attorneys' fees and expenses because, according to VHL, IPG, and the limited partners,

Commonwealth had failed to identify an expert witness regarding those matters on or before the expert-witness-disclosure deadline established in the circuit court's scheduling order. Also, VHL, IPG, and the limited partners contended that Commonwealth was required to present its claim for attorneys' fees and expenses to the jury, whether those fees and expenses related to transaction costs incurred by Commonwealth, as described in § 14.2 of the agreement, or to Commonwealth's status as a prevailing party in the litigation, as described in § 19.17 of the agreement.⁴

Commonwealth filed a reply to the response in opposition. Commonwealth conceded that the issue of reasonable attorneys' fees associated with its transaction costs was a question for the jury but argued that the determination of its reasonable attorneys' fees and expenses as a prevailing party was a posttrial decision for the circuit

⁴Section 14.2 of the agreement stated that, provided certain conditions were satisfied, VHL would "reimburse [Commonwealth] for all actual, out-of-pocket costs and expenses (including due diligence costs and reasonable attorneys' and consultant's fees) incurred by [Commonwealth] in connection with pursuing the transaction."

court, not the jury.⁵ Commonwealth further argued that there was no dispute that the agreement provided for the recovery of attorneys' fees by a prevailing party, that there was no constitutional right to a jury trial regarding the issue of the amount of a prevailing party's attorneys' fees, and that no expert testimony was required to establish the reasonableness of its attorneys' fees and expenses.

The trial date was rescheduled, and, on February 24, 2025, the circuit court held a pretrial conference, at which the parties presented arguments regarding pending motions, including Commonwealth's motion regarding attorneys' fees and expenses. The materials before us do not include a transcript from that conference. After the pretrial

⁵The materials before us include Commonwealth's October 2022 supplemental responses to VHL's second set of interrogatories. Regarding Commonwealth's alleged damages, the responses include an itemization of Commonwealth's "[c]ompensatory damages for [its] transaction costs," which included, in part, compensation for "consultants, architects, contractors, attorneys, and service providers, in connection with [the agreement]" and were "presently believed to be approximately \$1,144,752." As a separate item from its transaction costs, Commonwealth also claimed that it was entitled to "[c]osts of the lawsuit, including recovery of Commonwealth's litigation costs for experts or other consultants" and "[a]ttorneys' fees (in an amount to be determined by the Court as reasonable under the circumstances) incurred as a result of Defendants' breach of [the agreement] and to enforce and protect Commonwealth's rights."

conference, the circuit court entered an order again resetting the trial date. On March 26, 2025, the circuit court entered an order that stated that "[Commonwealth's] motion for leave to prove its attorneys' fees and expenses after the jury trial in this matter ... is granted. The issue of post-breach recoverable attorneys' fees is for the court to determine after the trial on damages has been completed."

VHL, IPG, and the limited partners filed a motion requesting that the circuit court vacate or modify the March 2025 order. They argued, in part, that the issue of the reasonableness of a prevailing party's attorneys' fees must be presented to a jury unless the parties have waived the right to a jury trial or have agreed that the issue of attorneys' fees due to the prevailing party would be resolved by the court, neither of which had occurred. The circuit court entered an order denying the motion. VHL, IPG, and the limited partners timely filed a petition for writ of mandamus with this Court.

VHL, IPG, and the limited partners argue that the circuit court has exceeded its discretion. They request that we issue a writ of mandamus directing the circuit court to set aside the March 2025 order and to enter an order requiring that any claim for postbreach attorneys' fees be

presented to a jury. VHL, IPG, and the limited partners also request that we make clear to the circuit court that expert testimony is required for a jury to determine the reasonableness of any attorneys' fees and expenses. However, because the circuit court declined their request for a jury trial and never addressed the expert-testimony issue, we cannot conclude that it has exceeded its discretion regarding that issue, assuming VHL, IPG, and the limited partners otherwise establish their entitlement to a writ of mandamus. We will limit our discussion to the issue whether VHL, IPG, and the limited partners are entitled to a jury trial regarding Commonwealth's claim for reasonable attorneys' fees and expenses pursuant to § 19.17 of the agreement (the prevailing-party provision), which was the subject of Commonwealth's motion that was granted by the March 2025 order.⁶

⁶Commonwealth's attorneys' fees incurred as part of its transaction costs were not the subject of the motion that was granted by the March 2025 order, and Commonwealth did not dispute that the attorneys' fees it allegedly had incurred as part of its transaction costs were to be submitted to the jury in relation to its damages for the breach of the agreement. See generally Restatement (Second) of Contracts, § 344 (A.L.I. 1981) (discussing the difference between types of remedies for breach of contract, including those based on "reliance interests," which attempt to place a party in the position the party would have been in had the agreement not been made; those based on "expectation interests," which attempt to place a party "in as good a position as [that party] would

Our standard of review is well settled.

"Mandamus 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) 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."

have been in had the contract been performed"; and those based on "restitution interests," which require a party who has received a benefit to disgorge that benefit to a party who changed position in reliance on their agreement and conferred that benefit. Id. at cmt. a). Unlike a provision authorizing the recovery of attorneys' fees by a prevailing party, which might apply in the context of a claim asserting any of the remedial interests described in comment a. to § 344, the attorneys' fees associated with Commonwealth's transaction costs may be considered part of its reliance interests. See, id. at illus. 2. A provision for the recovery of attorneys' fees by a prevailing party is simply an additional remedy crafted by the parties. See id. at § 356 cmt. d. And while a provision for the payment of a prevailing party's attorneys' fees and expenses may discourage a party from breaching a contract, the relevant precondition for enforcement is not a breach of contract but prevailing in litigation between the parties. For example, based on the language of § 19.17 of the agreement, the precondition for payment is prevailing in litigation regarding the parties' obligations under the agreement, whether the opposing party was in breach or not. Thus, that language would support an attorneys' fee award to VHL if it successfully defended against Commonwealth's action by showing that it had not breached the agreement. This Court has described such a contractual provision as being in the nature of an indemnity provision. See Twickenham Station, Inc. v. Beddingfield, 404 So. 2d 43, 47 (Ala. 1981) (quoting Kennedy v. Sorsby, 209 Ala. 188, 191, 95 So. 891, 893 (1923)). See generally Black's Law Dictionary 915 (12th ed. 2024) (defining "indemnity" as "[a] duty to make good any loss, damage, or liability incurred by another" and defining "contractual indemnity" as an "[i]ndemnity that is expressly provided for in an agreement").

Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). The burden of showing entitlement to the writ of mandamus is on the petitioner. See, e.g., Ex parte Cassimus, [Ms. SC-2024-0284, Mar. 7, 2025] __ So. 3d __, __ (Ala. 2025). The denial of a demand for a jury trial is reviewable by way of a petition for a writ of mandamus. See, e.g., Ex parte North Am. Adjusters, Inc., 205 So. 3d 1215, 1216 (Ala. 2016).

Commonwealth requested a jury trial in its complaint, as amended, without limitation as to issues. See Rule 38(c), Ala. R. Civ. P. (stating that a party's jury-trial demand "shall be deemed to have demanded trial by jury for all the issues so triable" unless the party specifies the issues for which it requests a jury trial). Rule 38(d) states that "[a] demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties except where an opposing party is in default under Rule 55(a)[, Ala. R. Civ. P.]" No default is at issue in the present case. Thus, VHL, IPG, and the limited partners had a right to rely on Commonwealth's jury-trial demand. See Ex parte North Am. Adjusters, Inc., 205 So. 3d at 1216. Nevertheless, Rule 38 presumes that there is an underlying statutory or constitutional right to a jury trial on the issues for which such request is made. See Rule 39(a), Ala. R. Civ. P. (stating

that, when a party has demanded a jury trial pursuant to Rule 38, "[t]he trial of all issues so demanded shall be by jury, unless ... (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"); Committee Comments on 1973 Adoption of Rule 39; see also Van Hoof v. Van Hoof, 997 So. 2d 278, 287 (Ala. 2007) ("Rule 38(d)[, Ala. R. Civ. P.,] ... cannot be construed to require a jury trial on an equitable claim for which a jury trial was not historically permitted, even if a jury trial was previously demanded and not all the parties in the action consent to the withdrawal of that jury demand."). See, generally, 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2331 (4th ed. 2020) ("The issue, not the action, is the basic unit for determining jury triability.").

Based on the foregoing, the issue before us is whether VHL, IPG, and the limited partners have established in the circuit court and in this Court that a prevailing party's contractual right to attorneys' fees and expenses is triable by jury as a matter of constitutional right or statutory

right.⁷ Neither side argued to the circuit court that a statutory right to a jury trial exists in the present case, so we need not address that issue.⁸

Instead, Commonwealth argued to the circuit court, and has argued in

⁷Regarding the merits of the attorneys' fee issue, "the general rule is there can be no recovery as damages of the expenses of litigation or attorney's fees paid by the opposing party, in the absence of a contractual or statutory duty, other than in a few recognized grounds of equity principles authorizing such liability." Hartford Accident & Indem. Co. v. Cosby, 277 Ala. 596, 607, 173 So. 2d 585, 595 (1965); see also Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-65 (1939). See generally Jenelle Mims Marsh, Alabama Law of Damages § 9.2 (6th ed. 2012) ("The cost for services of an attorney in an action for breach of contract is not recoverable as damages unless provided for in the contract or by statute.").

The present case involves a claim at law and, specifically, a claim for monetary relief created by the agreement of the parties. No claim created by the legislature or equitable claim is at issue. Thus, as to the issue of awarding attorneys' fees to a prevailing party, we are not addressing a claim involving the inherent power of a court of equity, see Reynolds v. First Alabama Bank of Montgomery, N.A., 471 So. 2d 1238, 1243 (Ala. 1985), or the taxing power of the court based on legislative authority. See Northern v. Hanners, 121 Ala. 587, 588-89, 25 So. 817, 817 (1899) (discussing the nature and origin of cost and fee awards).

⁸Likewise, the limited power of a trial court to order a jury trial when the issue is not triable of right by a jury is not at issue. See Rule 39(c), Ala. R. Civ. P. ("The court upon motion or of its own initiative may try with an advisory jury any issue not triable of right by a jury or for which a jury trial has been waived, or, in any case with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.").

its answer to the petition for a writ of mandamus, that no constitutional right to a jury trial exists regarding the issue before us. VHL, IPG, and the limited partners argue to the contrary in their reply to Commonwealth's answer to the petition. However, their argument on the constitutional-right issue is limited, and the materials before us do not reflect their having made any express argument to the circuit court that they had a constitutional right to a jury trial regarding a prevailing party's contractual right to attorneys' fees. Instead, they relied on certain precedents from our courts that discuss a right to have a jury decide the issue of a prevailing party's attorneys' fees but that provide no discussion of the basis for that right. They have discussed those precedents in their petition, specifically Hill v. Premier Builders & Realty, LLC, 56 So. 3d 669 (Ala. Civ App. 2010), and Goodwin v. Household Finance Corp. of Montgomery, 45 Ala. App. 442, 231 So. 2d 766 (1970), which, in turn, relied on Sheffield Chamber of Commerce v. Hatch, 220 Ala. 601, 127 So. 173 (1930).

In Hill, Gary Dwayne Hill entered into an agreement with Premier Builders and Realty, LLC ("Premier"), regarding the construction of a house. Their agreement provided that, in any enforcement action or

action to collect damages for breach, "'the prevailing party in such action, whether plaintiff or defendant, shall be entitled to an allowance for reasonable attorney fees, in addition to cost of suit.'" 56 So. 3d at 672 (emphasis omitted). Hill allegedly breached their agreement, and Premier commenced an action seeking compensatory damages, reasonable attorneys' fees, and costs. Hill filed an answer and a counterclaim, and he requested a jury trial.

"[T]he action proceeded to trial before a jury. During the trial, Premier did not introduce any evidence regarding its claim for a reasonable attorney fee. At the close of all the evidence, the trial court granted Premier's motion for a judgment as a matter of law ('JML') with respect to Hill's counterclaim. During the discussion regarding jury charges, counsel for Premier indicated that it was Premier's position that the judge could award Premier a reasonable attorney fee after the trial if the jury returned a verdict in favor of Premier. Hill's counsel asserted that Hill was entitled to a jury trial with respect to Premier's claim for a reasonable attorney fee. Thereafter, the trial court submitted Premier's breach-of-contract claim to the jury but did not charge the jury with respect to Premier's claim for a reasonable attorney fee. Premier's counsel did not object to the trial court's failure to charge the jury with respect to Premier's claim for a reasonable attorney fee. The jury returned a verdict in favor of Premier and awarded Premier damages in the amount of \$19,032.33. On June 17, 2009, the trial court entered a judgment on the jury verdict. On July 13, 2009, Premier applied to the trial court for an award of a reasonable attorney fee and costs and submitted affidavits and documentary evidence in support of its application. On August 4, 2009, without conducting a hearing regarding Premier's application

for a reasonable attorney fee and costs, the trial court entered an amended judgment that awarded Premier an attorney fee in the amount of \$24,425.45 and costs in the amount of \$2,263.75 as well as the \$19,032.33 in damages awarded by the jury.

"On September 1, 2009, Hill filed a postjudgment motion challenging the judgment, as amended, on the grounds, among others, that he was entitled to a jury trial with respect to Premier's claim for a reasonable attorney fee On October 20, 2009, the trial court denied Hill's postjudgment motion. Hill then timely appealed."

56 So. 3d at 673-74.

On appeal, Hill argued that "he was entitled to have a jury decide whether Premier was entitled to recover a reasonable attorney fee and, if so, the amount of that fee." Id. at 674. Relying on Goodwin, which, in turn, relied on Sheffield Chamber of Commerce, the Court of Civil Appeals reversed the judgment, concluding, in pertinent part, that "the issue of how much money constitutes a reasonable attorney fee is a question of fact that must be determined by a jury" and that "the trial court erred insofar as it deprived Hill of a jury trial with respect to the issue of how much money constituted a reasonable attorney fee." 56 So. 3d at 676. In addition, the Court of Civil Appeals stated that, because the attorneys' fee issue was one for the jury to decide, Premier had waived its claim for reasonable attorneys' fees because it had failed to object "to

the trial court's jury charge, which did not include instructions regarding Premier's claim for a reasonable attorney fee." Id.

In Hill, beyond discussing Goodwin, which in turn referenced Sheffield Chamber of Commerce, the Court of Civil Appeals did not discuss the basis for its conclusion that Hill had a right to a jury trial regarding the issue of attorneys' fees due to the prevailing party and the amount of such fees. No constitutional right to jury trial was mentioned in that case.

Turning our attention to Goodwin, that case involved a defendant's jury demand in an action brought against him for a sum due under a promissory note, plus reasonable attorneys' fees.

"After presentation of evidence, the case was submitted to the jury. A verdict was returned in favor of plaintiff and against defendant for the sum of \$426.24. The jury requested instructions from the judge as to whether their verdict should include an amount for attorney's fee. Counsel for plaintiff stated during the trial, and again at this time, that he did not choose to offer evidence as to a reasonable attorney's fee, as that was to be assessed by the court and not by the jury. His stated reason for this action was that the note specified that a reasonable attorney's fee for collection of the note was to be determined by the 'Court.' (Quotation marks supplied.)

"Whereupon, the judge accepted the jury's verdict, which verdict did not include any amount for a reasonable attorney's fee. He commented upon the wording of the note, and that usually the term 'the court' refers to the judge, but

that this was a jury case. We quote from the statement of the judge, 'If the court is sure that this meant to be determined by the court, that is, the judge of this court, then the court can fix the fee without any testimony or evidence in support of the same. There is a Supreme Court of Alabama case on that point. Lady and gentlemen, you are discharged.'

"The judge then proceeded to determine that he had the right under the wording of the note to fix an attorney fee in favor of plaintiff. Without taking any evidence he set a fee of \$125. The defendant excepted to the court's ruling on the grounds that no evidence was taken by the judge in setting the fee, and that the action of the court was wrong, in that the setting of such fee was for the jury. Defendant contended there was no provision for the judge to add to the verdict of the jury a sum for attorney's fee.

"Judgment was entered in accordance with the jury's verdict, and a separate judgment entry was made fixing the sum of \$125 as a reasonable attorney fee to the jury's verdict, making a total of \$551.24, together with costs."

45 Ala. App. at 443-44, 231 So. 2d at 767.

On appeal in Goodwin, the Court of Appeals reasoned as follows:

"In this case there was a demand for trial by jury filed by the defendant in accordance with [Ala. Code 1940, (1958 Recomp.)] Title 7, Section 260. There was no withdrawal or waiver of that demand. It thus became mandatory for the court to submit issues of fact to the jury for their consideration and verdict.^[9] In a jury trial there can be no judgment without

⁹Goodwin was decided before the adoption of the Alabama Rules of Civil Procedure. When Goodwin was decided, "§ 265, Title 7, Code of 1940 [(1958 Recomp.)], ... [provided that] where either party has demanded a trial by jury, neither party shall have the right to withdraw such demand without the consent of the opposite party." Ex parte Parker, 265 Ala. 20,

a verdict of the jury. Wilkes v. Stacy Williams Co., 235 Ala. 343, 179 So. 245 [(1938)].^[10]

"The issues involving the recovery of a reasonable attorney's fee by plaintiff included, not only how much, but if any. The wording of the clause in the note as to recovery of a reasonable attorney fee is as follows: 'The amount of any judgment hereon in favor of the holder may include the holder's actual and reasonable attorney's fees as determined by the court.' (Emphasis ours.)

"This states that a judgment on the note may include actual and reasonable attorney fees. There is nothing mandatory about this part of the contract. It further requires such fees to be determined upon proof of actual and reasonableness of such fees. Thus, there are at least two issues of fact for determination: 1. Whether plaintiff is entitled to any attorney's fee, and 2. What actual and reasonable fees are due plaintiff.

"The proposition upon which plaintiff's attorney and the trial judge removed this issue from decision by the jury[] was

22, 89 So. 2d 67, 68 (1956); see also Ex parte Florida Nursery & Trading Co., 201 Ala. 97, 98-99, 77 So. 391, 392-93 (1917).

¹⁰In Wilkes v. Stacy Williams Co., 235 Ala. 343, 179 So. 245 (1938), the defendant presented no evidence at trial, but the trial court gave an affirmative charge directing the jury to find for the defendant on the basis of the Statute of Frauds, after which the trial court entered a judgment for the defendant. On appeal, this Court concluded that it was error to give the affirmative charge based on the state of the evidence presented at trial. The plaintiff requested that this Court render a judgment in his favor, but we noted that the parties had not mutually requested a directed verdict, only the defendant had, and that, "[u]nless the case was withdrawn from the jury expressly or impliedly, the trial court could not render a judgment without a verdict," and neither could the appellate court. 235 Ala. at 347, 179 So. at 249.

that the note stated such fees were to be determined by the 'court' and the 'court' was the judge. Even if such meaning could be read into the wording of the note, it would have no legal standing in a trial by jury. We do not interpret the word 'court' in this instance to be limited to, or synonymous with[,] the word judge. ...

"....

"Title 1, Section 2, 1940 Code of Alabama [(1958 Recomp.)], is quoted in part as follows: 'The words "jury" or "juries" include courts or judges in all cases when a jury trial is waived, or when the court or judge is authorized to ascertain and determine the facts as well as the law.'

"We believe the converse to be true, that is, the word 'court' includes the word 'jury' in all cases in which a trial by jury is authorized, demanded, and not waived.

"We find the judge below erred in removing the question of the right to, and amount of[,] a reasonable attorney's fee from the consideration of the jury and entering separate judgment for attorney's fee without basis of a jury verdict.

"We think sufficient reason and authority has already been given, but in addition, we cite the following from Sheffield Chamber of Commerce v. Hatch, 220 Ala. 601, 127 So. 173 [(1930)]: '... the question of what was reasonable to be allowed as attorney's fee was for the jury, though the expert testimony in respect thereto was undisputed, it was merely advisory and not conclusive.'"

45 Ala. App. at 444-45, 231 So. 2d at 768-69.

Goodwin is distinguishable from the present case because the Court of Appeals in Goodwin construed the promissory note at issue as

reflecting the parties' agreement that the issue of a prevailing party's attorneys' fees would be submitted to the jury. No such agreement exists in the present case, except to the extent that it could possibly be implied from the nature of the right to "recover" reasonable attorneys' fees as a prevailing party in litigation and the underlying nature of the claim as arising from a contract, which begs the question before us. More importantly, the Goodwin court, like the Hill court, did not discuss the issue whether any party had a constitutional right to a jury trial. Thus, that issue was not decided in Goodwin.

Sheffield Chamber of Commerce also involved an action on a promissory note that included a provision for the payment of attorneys' fees. In Sheffield Chamber of Commerce,

"[a]t the conclusion of the evidence, the court, on request of the plaintiff, in writing gave the following charge: 'If you believe the evidence in this case you will find for the plaintiff for \$4,931.55.' In giving this charge the court committed error. The evidence, in its most favorable view to the plaintiff, shows that the balance due on the note, with interest to the time of the trial, was \$4,431.55, and plaintiff proved by a reputable attorney that a reasonable fee for the prosecution of the suit was \$500, yet the plaintiffs only claimed \$400 as a reasonable attorney's fee in their complaint, and they were entitled to recover no more than the amount claimed, while the charge directed a verdict for amount due on the note together with the attorney's fee of \$500.

"Moreover, the question of what was reasonable to be allowed as attorney's fee was for the jury, though the expert testimony in respect thereto was undisputed, it was merely advisory and not conclusive."

220 Ala. at 604, 127 So. at 175-76.

Sheffield Chamber of Commerce does not discuss the exact language of the promissory note. Also Sheffield Chamber of Commerce provides no indication of who demanded a jury trial or that any party objected to a jury trial.¹¹ And, like Hill and Goodwin, Sheffield Chamber of Commerce did not discuss the issue whether either party had a constitutional right to a jury trial. Thus, that issue was not decided in Sheffield Chamber of Commerce.

Based on the foregoing, the respective courts in Hill, Goodwin, and Sheffield Chamber of Commerce concluded that there was a right to a

¹¹This Court decided Sheffield Chamber of Commerce in 1930. At that time, pursuant to Act No. 722, Ala. Acts 1915, "[a]ll civil cases at law" were to be "tried and determined by the court, without a jury" unless a demand for a jury trial was made. See also Ala. Code 1940 (1958 Recomp.), tit. 7, § 260. As discussed in the note at the beginning of the annotations to § 260, Ala. Code 1940 (1958 Recomp.), Act No. 722 "practically reversed" the long-standing practice under prior law, which had provided for trial by the court "in a civil case" when the parties had waived a jury trial. See, e.g., Ala. Code 1907, § 5359; Ala. Code 1887, § 2743; see also Ala. Code 1843, § 162.

jury trial based on the existence of an issue of fact regarding the reasonable attorneys' fees to be awarded pursuant to the agreements at issue. However, those cases provide no insight into why the need to resolve an issue of fact as to the amount of a prevailing party's attorneys' fees would entitle a party to a jury trial as a matter of constitutional right. For example, it is possible that Goodwin and Sheffield Chamber of Commerce were merely referring to a procedural right when discussing the right to present the issue to the jury. If so, that procedural right now is governed by Rule 39, but we need not speculate about such issues given the limited arguments made by the parties.

The right to a jury trial is acknowledged and protected by the Alabama Constitution and may be extended further by statute. See Gilbreath v. Wallace, 292 Ala. 267, 269, 292 So. 2d 651, 652 (1974); see also Ala. Const. 2022, Art. 1, § 11 (declaring "[t]hat the right of trial by jury shall remain inviolate"). Section 11 remains unchanged from the 1901 Alabama Constitution, which applied when Hill, Goodwin, and Sheffield Chamber of Commerce were decided. In discussing § 11, this Court has stated that "[w]hile the Federal Constitution, as interpreted by the United States Supreme Court, establishes minimum standards,

the states have the power and are free to provide greater safeguards and to extend this protection through their own organic law -- the State Constitutions." Gilbreath, 292 Ala. at 271, 292 So. 2d at 654-55. "Unlike the Federal Constitution which preserves the right to jury trial as of 1791, Alabama's Constitution effected a 'freezing' of the right to jury trial as of 1901. Section 11 did not extend the right to cases in which it did not exist at that time." 292 Ala. at 269, 292 So. 2d at 652 (footnote omitted). Specifically, in Alabama, "the guaranty of trial by jury extends only to causes existing either at common law or under statutory law at the time of the adoption of the 1901 Constitution." 292 Ala. at 269, 292 So. 2d at 653; see also, e.g., In re One Chevrolet Auto., 205 Ala. 337, 338, 87 So. 592, 592 (1921) ("Section 11 of the Constitution of 1901, preserving the right of trial by jury, does not extend to causes unknown to the common law or to the statutory law as it existed at the time of the adoption of the Constitution. This provision extends only to those cases in which the right existed at the time of the adoption of same.").¹²

¹²As noted above, the 2022 Alabama Constitution made no change to the 1901 version of § 11. Because VHL, IPG, and the limited partners did not assert that they had a right to a jury trial based on an existing statute when the 2022 Alabama Constitution was adopted, we need not consider the issue whether the 2022 Alabama Constitution may have

Based on the materials before us, VHL, IPG, and the limited partners made no argument to the circuit court, and they have made no argument to this court, that Alabama statutory law, as it existed at the time of the adoption of the 1901 Constitution, established a right to a jury trial regarding a prevailing party's contractual right to attorneys' fees. Thus, we will not consider the issue whether such a statutory right may have been constitutionalized upon the adoption of the 1901 Alabama Constitution. VHL, IPG, and the limited partners likewise made no express argument to the circuit court that the common law had included a right to a jury trial regarding a prevailing party's contractual right to reasonable attorneys' fees and expenses. Instead, when Commonwealth raised the constitutional issue before the circuit court, VHL, IPG, and the limited partners relied on Hill and Goodwin, quoting Sheffield Chamber of Commerce, none of which address whether a constitutional right to a jury trial existed at common law regarding a prevailing party's contractual right to reasonable attorneys' fees and expenses. Further, VHL, IPG, and the limited partners made no argument in their petition

constitutionalized some statutory right to a jury trial that existed at that time.

to this Court regarding any constitutional basis for their alleged right to a jury trial; they merely discussed Hill, Goodwin, and Sheffield Chamber of Commerce. Only after Commonwealth argued in its answer to the petition that there was no constitutional right to a jury trial on the issue did VHL, IPG, and the limited partners discuss the matter in their reply brief. And, even then, they dismiss the constitutional issue as essentially irrelevant and contend as follows:

"The fees claimed here are under a contract provision -- they are part of the contract damages. And there is a Seventh Amendment right to a jury on damages for breach of contract. See, e.g., Taurus IP, LLC v. DaimlerChrysler Corp., 726 F.3d 1306, 1341-42 (Fed. Cir. 2013) (holding that although 'a party has a Seventh Amendment right to a jury trial on damages in a breach of contract case,' a party did not have a right to a jury determination on attorneys' fees claimed under a Texas statute (emphasis in original))."¹³

¹³VHL's, IPG's, and the limited partners' reliance on Taurus IP, LLC v. DaimlerChrysler Corp., 726 F.3d 1306 (Fed. Cir. 2013), is misplaced:

"Although Orion and Spangenberg are correct that a party has a Seventh Amendment right to a jury trial on damages in a breach of contract case, a party is not entitled to a jury trial on attorney fees assessed after trial. Compare Ross v. Bernhard, 396 U.S. 531, 542, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970) (stockholders entitled to a jury trial where the complaint included allegations of breach of contract and sought damages) with Resolution Trust [Corp. v. Marshall], 939 F.2d [274,] 279 [(5th Cir. 1991)] ('Since there is no common law right to recover attorneys fees, the Seventh

Reply brief at 5-6. Thus, arguably the issue has been waived. See Lloyd Noland Hosp. v. Durham, 906 So. 2d 157, 173 (Ala. 2005) (rejecting an argument in a reply brief that was raised for the first time and should have been addressed in the initial brief, even though the appellant was responding to an argument made by the appellee).

Even if we were to consider the argument made by VHL, IPG, and the limited partners regarding any common-law right to a jury trial, they still have not focused on the controlling law, which is § 11 and Alabama precedents regarding the common law. Instead, both they and Commonwealth have spent the vast majority of their constitutional

Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys fees.');

see also McGuire [v. Russell Miller, Inc.], 1 F.3d [1306,] 1313-15 [(2d Cir. 1993)] (finding that a jury right exists to assess whether attorney fees should be paid but that a jury right does not exist to determine the amount of the fee award). The amount now at issue was awarded not as damages for breach, but as, in the words of the district court, '"traditional" attorneys fees.' [Taurus IP, LLC v. DaimlerChrysler Corp.], 559 F. Supp. 2d [947,] 962 [(W.D. Wis. 2008)] ('Aside from the attorney fees available as damages, defendants seek the "traditional" attorney fees available to prevailing parties in Texas breach of contract suits.'). Thus, Orion and Spangenberg did not have a Seventh Amendment right to a jury on that award."

726 F.3d at 1341-42.

arguments discussing the Seventh Amendment to the United States Constitution, federal precedents, or precedents from other states. In that regard, the vast weight of authority is against the conclusion that a common-law right to a jury trial existed regarding a prevailing party's right to attorneys' fees and expenses. Compare, e.g., United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC, 813 N.W.2d 49 (Minn. 2012), with id. at 67 (Dietzen, J., joined by Gildea, C.J., dissenting) (referencing federal and state precedents and stating that the Minnesota Supreme Court "is the only court in the country that recognizes a constitutional right to a jury trial under these circumstances"). But that is not surprising because, after the passage of the Statute of Gloucester (1278), costs could be awarded to a prevailing party in litigation, and costs came to include attorneys' fees, which were addressed and taxed by the court. See Arthur L. Goodhart, Costs 38 Yale L.J. 849, 856 (1929); see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the

prevailing party."). Thus, it is questionable whether, for centuries before the founding of the United States, any need existed in England for a contractual provision for the payment of a prevailing party's attorneys' fees or what the effect of such a provision would have been. And we have been cited to no pertinent case in that regard or discussing the treatment of a prevailing party's claim to attorneys' fees before the establishment of the statutory cost system in England. Instead, VHL, IPG, and the limited partners have made the above-quoted conclusory argument regarding contract damages being triable by a jury. That argument is simply inadequate, see Rule 21(a)(1)(E), Ala. R. App. P.; Rule 28(a)(10), Ala. R. App. P., and we will not hold the circuit court in error under such circumstances. The issue whether Hill, Goodwin, and Sheffield Chamber of Commerce might have been based on the existence of constitutional right to a jury trial regarding a prevailing party's contractual right to attorneys' fees and expenses must await resolution in a case in which adequate arguments are presented regarding the basis for that right.

PETITION DENIED.

Stewart, C.J., and Shaw, Wise, Sellers, Cook, McCool, and Parker, JJ., concur.

Bryan, J., concurs in the result.