IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0912

FIREWATER RESTORATION, INC.,

Plaintiff Below,
Petitioner,

v.

TONY L. MARONI, JR.,

Defendant Below,
Respondent.

RESPONDENT TONY L. MARONI, JR.'S BRIEF IN RESPONSE TO PETITIONER FIREWATER RESTORATION, INC.'S APPEAL BRIEF

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I. STATEMENT OF THE CASE

A. Factual Background

On or about the 11th day of March, 2017, the Petitioner, (Plaintiff below), Firewater Restoration, Inc. (hereinafter referred to as "Firewater"), and the Respondent (Defendant below), Tony Maroni, Jr., (hereinafter referred to as "Respondent" or "Maroni") entered into a contract titled "Work Authorization Agreement.". *See – Petitioner's Appendix Record (P.A.R.) pg. 5-6.* Said contract was entered into for Firewater to perform certain home improvements to the Defendant's real estate. *See – P.A.R. pg.3.*

Despite Petitioner's assertion to the contrary, on or about the 11th day of May, 2017, Respondent Maroni fired the Petitioner for failing to timely complete the work and for failing to perform the work in a workmanlike manner. At that time, two months had passed since the signing of the contract, and Petitioner had failed to complete the work. On multiple occasions, a worker of Petitioner's would show for an hour or two and then leave without having completed the work promised to be completed that day. Despite having contracted with Petitioner to have Petitioner perform all of the restoration services, Respondent Maroni had to remove the kitchen appliances, redo a portion of the kitchen ceiling and drywall, remove all of the existing cabinets, perform all of the painting, install the new dishwasher, install a majority of the new cabinetry in both the bathroom and the kitchen, and had to redo the wiring of the light fixtures as said work performed by Petitioner was faulty.

B. Procedural Background

On or about the 23rd of February, 2018, Firewater filed its Complaint in the Ohio County Circuit Court pursuant to the work authorization agreement/contract, and was given the present case number of 18-C-48. *See – P.A.R. pgs. 3-6.* In said Complaint, Firewater alleged that

Defendant Maroni "breached said contract by wrongfully terminating Plaintiff's work and failing to pay Plaintiff sums due them under said contract." *Id.* Firewater also attached a copy of the contract to its Complaint as Exhibit A. *See – P.A.R. pgs 5-6.* On the 2nd page of the contract, under numbered paragraph 9, the contract contains a forum-selection clause which states,

> **VENUE**: This contract is deemed executed at the place of business headquarters of Firewater Response 365, Inc. currently at 1714 Sidney Street Pittsburgh, PA 15203 in Allegheny County, Pennsylvania. The owner and Firewater Response 365, Inc. **expressly agree that any dispute** arising hereunder by virtue of the service rendered by us to you **shall be resolved** through the **Magisterial District of the business headquarters of Firewater Response 365, Inc. or in the Court of Common Pleas of Allegheny County, Pennsylvania.** You and we each **mutually agree** that **venue for any dispute shall be solely and exclusively in either such Magisterial District of Court of Common Pleas**.
>
> (emphasis added) *See – P.A.R. pg 6.*

On that same page, under numbered paragraph 8, the contract states that,

> **WAIVER:** A party's **failure to insist on compliance or enforcement** of any provision of this Agreement **shall not affect the validity or enforceability or constitute a waiver of future enforcement of that provision** or of any other provision of this Agreement by the party or any other party.

(emphasis added) *See – Id.*

On the 1st day of November, 2021, counsel for the Respondent entered his Notice of Appearance. On that same date, counsel filed a Motion to Dismiss on behalf of the Respondent pursuant to the above contractual language that had been drafted by the Petitioner.

On the 3rd day of November, 2021, Petitioner filed his response to said Motion to Dismiss and argued three points. First, Petitioner argued that the Respondent failed to meet the lower court's deadline for dispositive motions. Second, the Petitioner argued that Respondent failed to meet the deadline under Rule 12 of the West Virginia Rules of Civil Procedure for improper venue. Finally, the Petitioner argued that the Defendant failed to insist on compliance with the contract's

forum-selection clause, despite the language of the contract specifically stating that failing to insist on said language does not constitute a waiver of the same.

On that same date, Respondent filed his reply to Petitioner's response to the Motion to Dismiss.

On the 4th day of November, 2021, the Court granted Respondent's Motion to Dismiss by entering an order which included findings of fact and conclusions of law.

III. SUMMARY OF ARGUMENT

Essentially, the Petitioner is asking this Court to provide it with a life preserver because the Petitioner failed to read and/or understand its own contract and abide by the terms expressly agreed to therein. Contrary to Petitioner's argument, the circuit court conducted a full analysis of the forum-selection clause of the contract at issue pursuant to the test established in *Caperton*. The circuit court properly found that the forum-selection clause had reasonably been communicated to the Petitioner, as the Petitioner is the party that drafted the contract, including its company logo at the top. The circuit court properly found that the forum-selection clause of the contract is mandatory by the contract's use of the word "shall." Furthermore, the circuit court properly found that the forum-selection clause covers the claims and parties of the suit as the same parties to the contract are the ones involved in the suit that was filed pursuant to a breach of contract claim. Finally, the circuit properly found that enforcing the forum-selection clause was not unjust or unreasonable because the forum-selection clause was drafted by the Petitioner for the Petitioner's sole benefit. Further, the circuit court did not find the clause to be unjust or unreasonable, because the contract contained a provision that specifically allowed for a party to insist on enforcement of any contractual provision at a later date and that failure to insist previously did not constitute a waiver.

Additionally, pursuant to the contract, the Respondent's failure to insist on enforcement previously did not constitute a waiver of the forum selection clause and the parties expressly agreed that a party may seek enforcement of any provision of the contract at a later time.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, the Respondent believes that this Court's decisional process would not be aided by oral argument and that the facts and arguments provided through the parties' briefs and the appendix are sufficient for this Court to make a decision. Thus, Respondent asserts that oral argument is unnecessary and waives said argument before this Court.

V. ARGUMENT

A. Standard of Review

The applicability and enforceability of a forum-selection clause is a question of law, and thus the standard of review is *de novo*. *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W. Va. 128 (W. Va. 2009).

B. The circuit court properly applied the test for determining the enforceability of a forum-selection clause and properly found that the enforcement of said clause was not unjust or unreasonable.

Although the *Caperton* test involves a four (4)-part inquiry, based upon the Petitioner's brief the Petitioner has only challenged the circuit court's analysis involving the fourth and final inquiry of the test - whether the Petitioner has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement of forum-selection clause would be unreasonable and unjust. *Id.* Therefore, the Respondent can only assume that the Petitioner does not challenge the circuit court's findings that the other three (3) inquiries pursuant to *Caperton* have been satisfied and will thus, only focus on this fourth inquiry.

i. This Court Must Not Consider the Petitioner's Argument Regarding the Fourth Inquiry of *Caperton* Because the First Time Petitioner Raises Said Argument is on Appeal.

First and foremost, this Court has "long held that theories raised for the first time on appeal are not considered." *Clint Hurt & Assoc. v. Rare Earth Energy, Inc.*, 198 W.Va. 320, 329, 480 S.E.2d 529, 538 (1996). "The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal ." *Id.* "[T]here is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom." *Id.*

In the present action, the argument that enforcement of the forum-selection clause contained within the contract, drafted by the Petitioner, is unreasonable and unjust is only now being raised for the first time. On November 3, 2021, the Petitioner filed its Response to Maroni's motion to dismiss. In its response, the Petitioner made three (3) separate arguments in resisting Maroni's motion. *See – P.A.R. 23-28.*

First, Petitioner argued that Maroni failed to meet the deadline for filing dispositive motions. *Id.* This argument was made pursuant to Petitioner's belief that Maroni violated the circuit court's scheduling order. While the Petitioner maintains this argument in its appeal brief, Maroni will address it under its proper subheading later on.

Second, the Petitioner argued that Maroni failed to timely raise the defense of improper venue pursuant to Rule 12 of the West Virginia Rules of Civil Procedure. *Id.* Similar to the argument about the violation of the circuit court's scheduling order, Maroni will address this argument later in his response.

Lastly, the Petitioner argued that Maroni failed to insist on enforcement of the forum-selection clause. *Id.* However, Maroni both in his initial motion to dismiss and in his reply to the

Petitioner's response, referenced the circuit court to Paragraph 8 of the contract (*See – P.A.R. pg 6)* which states that,

> **WAIVER:** A party's failure to insist on compliance or enforcement of any provision of this Agreement shall not affect the validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this Agreement by the party or any other party.

Thus, Maroni's failure to insist on enforcement of the forum-selection clause prior to his filing of the motion to dismiss is irrelevant. By the terms of the contract, which were expressly agreed upon by both parties and more importantly drafted by the Petitioner itself, Maroni's failure to insist on enforcement previously did not constitute a waiver of the forum-selection clause.

As this Court can plainly see, at no point prior to appeal did the Petitioner address the inquiries of *Caperton*, despite its opportunity to do so in its response to Maroni's motion to dismiss. In fact, the Petitioner has only raised this issue, for the first time on appeal, because only after the circuit court dismissed the case did the Petitioner realize that it had missed the statute of limitations for a breach of contract claim in its chosen forum, Pennsylvania. Only then did the Petitioner decide suddenly that enforcement of the forum-selection clause was unjust and unreasonable.

Wherefore, pursuant to long standing West Virginia case law, this Court must not consider the Petitioner's argument that enforcement of the forum-selection clause of its own contract is now unreasonable and unjust, as the Petitioner failed to raise this issue previously and only now raises it for the first time on appeal.

ii. Alternatively, Should This Honorable Court Consider the Petitioner's Argument, Enforcement of the Forum-Selection Clause is Not Unreasonable or Unjust Because It is Through the Petitioner's Own Fault and Negligence That it is Deprived of a Remedy.

According to West Virginia law, and federal law, forum-selection clauses are generally enforceable so long as they are not unfair or unreasonable. *Caperton* at 335. Mandatory forum-selection clauses, if properly communicated to the party resisting enforcement, are even presumptively enforceable. *Id.* See also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991). "[A] forum clause should control absent a strong showing that it should be set aside." *Atlantic Marin Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 134 S. Ct. 568, 701 F. 3d 736 (2013). "[A] valid forum selection clause should be given controlling weight in all but the most exceptional cases." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

In this case, the Petitioner requests this Court throw it a life preserver as it drowns in the consequences of its own mistakes and negligence. Petitioner argues that the "fundamental unfairness of the chosen law may deprive the plaintiff of a remedy." *Caperton* at pg. 148, 348 citing in part *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996). This argument references the fact that the statute of limitations for a breach of contract in Pennsylvania is four (4) years as opposed to West Virginia's ten (10) year statute of limitations for the same.[1] However, this argument ignores the fact that it was the Petitioner who chose the forum and law that deprives it of a remedy, not Maroni.

In the present action, the entire contract (including the forum-selection clause and the waiver clause) were drafted solely by the Petitioner in this matter for its sole benefit. Pursuant to West Virginia law, a contract expresses the intent of the parties in plain

[1] 42 Pa. Stat. and Cons. Stat. Ann. §5525.

language and the contract must be enforced according to its terms. See Syl. Pt. 1, *Sally-Mike Props. v. Yokum*, 175 W.Va. 296, 332 S.E.2d 597 (1985). The forum-selection clause at issue states that,

> **VENUE**: This contract is deemed executed at the place of business headquarters of Firewater Response 365, Inc. currently at 1714 Sidney Street Pittsburgh, PA 15203 in Allegheny County, Pennsylvania. The owner and Firewater Response 365, Inc. **expressly agree that any dispute** arising hereunder by virtue of the service rendered by us to you **shall be resolved** through the **Magisterial District of the business headquarters of Firewater Response 365, Inc. or in the Court of Common Pleas of Allegheny County, Pennsylvania.** You and we each **mutually agree** that **venue for any dispute shall be solely and exclusively in either such Magisterial District or Court of Common Pleas.**
>
> (emphasis added).

This contract provision is crystal clear. The Petitioner's headquarters is located within its chosen forum that the parties expressly and specifically agreed to. Given that the Respondent in case is a former resident of Ohio County, West Virginia (now currently resides in the State of Ohio), it is obvious that this provision was inserted into the contract for the sole benefit of the Petitioner to provide home-field advantage.

Ironically, the Petitioner filed suit against Maroni because it claims Maroni breached the contract agreed to by the parties, yet now seeks to have this Court ignore not one but two provisions of the contract that the Petitioner doesn't like. The Petitioner, by including the above forum-selection clause into its form contracts, knew or should have known of Pennsylvania's statute of limitations for breach of contract claims. The fact that the Petitioner failed to read and/or abide by the terms of its own contract and missed the applicable statute of limitations does not suddenly create a situation where the forum-selection clause is unreasonable or unjust.

The Petitioner further argues that had the Respondent pointed out the Petitioner's failings sooner, it would not have missed the statute of limitations in Pennsylvania and thus, it is the

Respondent's fault it missed the statute. Counsel for Maroni cannot opine as to why or why not Maroni did not seek dismissal of the Ohio County case sooner. On the day that counsel entered his Notice of Appearance, the motion to dismiss at issue was filed. The Petitioner was afforded the opportunity to respond to said motion and took advantage of said opportunity, and Maroni replied. The circuit court timely addressed Maroni's motion. Yet, Petitioner places the blame for missing the Pennsylvania statute of limitations solely at the feet of Maroni.

However, the same logic used by the Petitioner is applicable to the Petitioner's own actions. For nearly four (4) years, Petitioner failed to read the terms and provisions of its own contract. For nearly four (4) years, Petitioner had the opportunity to realize it had filed suit in the wrong jurisdiction, seek to have the matter dismissed without prejudice, and file the matter in the proper jurisdiction. For four (4) years, the Petitioner engaged in discovery, referred to the contract on countless occasions, and yet did nothing. For four (4) years, the Petitioner ignored the forum-selection clause and hoped it would not be brought to light before the circuit court.

Wherefore, for these reasons, the Petitioner has failed to rebut the presumption of enforceability of the forum-selection clause. Because the Petitioner chose the forum and the law that now deprives it of a remedy, because the Petitioner ignored the provisions that it drafted in its own contract, and because a valid forum-selection clause should be given controlling weight in all but the most exceptional cases, of which this case is not one, this Court must affirm the circuit court's order dismissing this case.

C. Under Rule 16 of the West Virginia Rules of Civil Procedure, Circuit Courts are Vested With the Discretion to Modify the Scheduling Order and by Virtue of the Court's Granting of the Motion to Dismiss, the Circuit Court Found the Respondent Did Not Violate the Court's Scheduling Order.

It is well settled West Virginia law that circuit courts are vested with the discretion to modify their own scheduling orders and to control their own dockets. *State ex rel. State Farm Fire*

Cas. Co. v. Madden, 192 W. Va. 155, 161, 451 S.E.2d 721, 727 (1994). In the case at hand, the Petitioner addressed this very issue in its response to Maroni's motion to dismiss before the circuit court. However, unlike in its current brief, the Petitioner only objected to the circuit court considering Maroni's motion to dismiss outside of the scheduling order but did not cite to Rule 16 of the West Virginia Rules of Civil Procedure. Much like the Petitioner's previous argument, Petitioner now presents its argument on appeal for the first time, though admittedly not as drastic as Petitioner's previous argument.

Similarly, the Petitioner attempts to shift blame for its own failings onto Maroni in this matter. According to the Petitioner, had Maroni only presented his argument prior to when he did, the Petitioner would not have missed the statute of limitations in its contractually chosen forum, Pennsylvania. Of course, it is not the Petitioner's fault for missing the statute of limitations for its chosen forum, in its home state, the statute of which it knew or should have been aware of. It must be the Respondent's fault that the Petitioner failed to read and adhere to its own chosen forum.

Thus, the Petitioner blames the Respondent for an outcome that it states, "in no way corresponds with the principal of fairness that is one of the paramount considerations of a scheduling order." Therefore, according to the Petitioner, the circuit court should have considered the statute of limitations in another jurisdiction when determining the fairness of its scheduling order. However, it is not for the circuit court to determine if a plaintiff should be relieved of its contractual duties solely because it missed the statute of limitations of a forum it contractually obligated itself to. Instead, the circuit court properly considered the contractual obligations of the parties, whether the forum-selection clause was proper and enforceable according to *Caperton*, and then issued an order. Furthermore, it is important to note that the Petitioner in this matter never argued to the circuit court that it had missed the statute of limitations and that the circuit

court need throw it a lifeline for its failures. Based on its failure to present this argument to the circuit court, the Petitioner is now prohibited from presenting said argument for the first time on appeal.

Lastly, even if Maroni had filed his motion to dismiss outside the scheduling order provided by the circuit court, the Petitioner was provided with an opportunity to respond to Maroni's motion, which it did. Furthermore, the Petitioner argued to the circuit court that the motion to dismiss was filed outside of the circuit court's previously entered scheduling order regarding dispositive motions. Nevertheless, the circuit court considered the Petitioner's argument and ultimately rejected it and found, properly, that the Petitioner was contractually obligated to seek redress solely in either the Magistrate Court or Court of Common Pleas of Allegheny County, Pennsylvania.

Wherefore, because the Petitioner presented its argument to the circuit court, because the Petitioner was not deprived of its opportunity to be heard and because the circuit court heard and rejected the same, because the Petitioner now presents arguments to this Court for the time on appeal, this Court must affirm the ruling of the Ohio County circuit court dismissing this matter.

D. Respondent Timely Filed His Motion to Dismiss Pursuant to the Contract Between the Parties and Rule 12 of the West Virginia Rules of Civil Procedure.

i. Pursuant to the Waiver Clause of the Expressly Agreed Upon Contract Drafted by the Petitioner, the Petitioner is Prohibited From Arguing that Maroni's Enforcement of the Forum-Selection Clause is Untimely.

As previously stated (and quoted) above, the contract at issue between the parties contained a waiver provision that states,

> **WAIVER:** A party's failure to insist on compliance or enforcement of any provision of this Agreement shall not affect the validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this Agreement by the party or any other party.

Thus, according to this provision of the contract, Maroni's failure to insist on compliance or enforcement of the forum-selection clause previously does not affect the validity or enforceability of the provision, nor does it constitute a waiver of future enforcement of that provision. In fact, based on this provision, the Petitioner is contractually prevented from arguing that Maroni untimely filed his motion to dismiss as the Petitioner has already agreed that a party may raise any provision of the contract, including the forum-selection clause, at any time.

For this reason alone, the Court must affirm the circuit court's order dismissing the case.

ii. A Motion Pursuant to Improper Venue is No Longer the Proper Method of Seeking Enforcement of a Forum-Selection Clause, but a Motion For Failure to State a Claim Is Acceptable, Thus Maroni's Motion to Dismiss was Timely.

However, out of an abundance of caution, Maroni will address the Petitioner's argument, even though the Petitioner is contractually prevented from making said argument, especially given that the forum-selection clause was drafted by the Petitioner for its benefit. The Petitioner, in its brief, cites to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure, for its argument that Maroni failed to timely raise the defense of improper venue and further argues that for this reason, Maroni's motion to dismiss should not have been considered by the circuit court.

It appears that Petitioner never actually read Maroni's motion to dismiss because Maroni did not file his motion pursuant to Rule 12(b)(3), improper venue, but instead filed his motion pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, or alternatively, as a motion for judgment on the pleadings pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure. Nevertheless, both in its response to the original motion to dismiss and in its brief to this Court, the Petitioner focused its argument solely on Rule 12(b)(3) dealing with improper venue.

Maroni is cognizant of this Court's previous ruling *Caperton,* where this Court quoted the late Justice Cleckley in saying "Courts generally consider a motion to dismiss, based upon a forum-selection clause, as a motion to dismiss for improper venue." Franklin D. Cleckley, Robin J. Davis, Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(3)[5] at 376 (2d ed. 2006). However, since this Court's decision in 2006, the United States Supreme Court has made clear that a motion pursuant to Rule 12(b)(3) for improper venue is not the correct method for seeking a dismissal pursuant to a forum-selection clause. In *Atlantic Marine,* the United States Supreme Court ruled that "Rule 12(b)(3) allow[s for] dismissal only when venue is 'wrong' or 'improper.'" It is important to note here that although the United States Supreme Court was dealing with the Federal Rules of Civil Procedure and not the West Virginia Rules of Civil Procedure, 12(b)(3) is identical in each set of the rules.

Instead, the United States Supreme Court ruled that the federal statute for *forum non conveniens* is a more applicable method of having a case transferred to the proper forum. However, *Atlantic Marine* left unanswered the question of whether a defendant may also use Rule 12(b)(6) to enforce forum-selection clause. *Id.* In fact, the U.S. Supreme Court in *Atlantic Marine* pointedly declined to consider whether a defendant in a breach-of-contract action could obtain dismissal under Rule 12(b)(6) if the plaintiff files suit in a district other than the one specified in a forum-selection clause. *Id.* The Court nonetheless hastened to add, in a footnote, that Rule 12(b)(6) motions, contrary to section 1404(a) motions or the *forum non conveniens* doctrine, "may lead to a jury trial on venue if issues of material fact relating to the validity of the forum-selection clause arise." *Id.* Therefore, courts across the country have permitted the use of a Rule 12(b)(6) motion to obtain a dismissal pursuant to a forum-selection clause.

For example, the First Circuit Court of Appeals stated, "we treat a motion to dismiss based on a forum-selection clause as a motion alleging the failure to state a claim for which relief can be granted under Rule 12(b)(6)." *Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir.2009). The court in *Rivera* went on further to say that, "[w]hen ... a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." *Id.*

In the present case, the Ohio County circuit court considered Maroni's motion pursuant to a Rule 12(b)(6) consideration. First, in addressing the Petitioner's argument on timeliness, pursuant to Rule 12(h)(2) of the West Virginia Rules of Civil Procedure, "a defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Given that Maroni's motion was made prior to the bench trial scheduled in this matter and was made pursuant to both Rule 12(b)(6) and pursuant to a judgment on the pleadings, Maroni's motion to dismiss was timely.

Second, the circuit court considered the parties pleadings in this matter, including the contract that Petitioner attached to its initial complaint. Even when considering all the Petitioner's allegations as true, and reviewing the contract attached to the complaint, there is but one conclusion that can be drawn, that the forum-selection clause in the contract is mandatory and controlling. When coupled with the waiver clause of the contract which states that either party may insist on enforcement of any provision of the contract at any time and failure to do so previously does not constitute a waiver, the only course of action was for the circuit court to dismiss the Petitioner's complaint.

Wherefore, for the foregoing reasons, this Court must affirm the circuit court's order granting Maroni's motion to dismiss. Because the U. S. Supreme Court has ruled that Rule 12(b)(3) is not the proper avenue for seeking the enforcement of a forum-selection clause, because the U.S. Supreme Court did not foreclose seeking the enforcement of a forum-selection clause through a motion to dismiss for failure to state a claim, and because Maroni filed his motion pursuant to Rule 12(b)(6), not Rule 12(b)(3), Maroni's motion to dismiss was timely filed and the circuit court properly considered it.

VI. CONCLUSION

Petitioner has come before this Court seeking a lifeline to preserve a breach of contract suit that it filed in the wrong court, in the wrong state, because it failed to read and abide by the terms of its own contract. Had Petitioner taken but a few moments to read its own contract, the parties would not be before this Court because the Petitioner would have sought redress in the Court of Common Pleas in Allegheny County, its home jurisdiction. Instead, Petitioner argues that the circuit court's dismissal of the case, by holding it accountable to the terms of its own contract, is unjust and unfair. Yet, the Supreme Court of the United States has addressed this very issue when it stated "[i]n all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain." *Atl. Marine*, 571 U.S. at 66. That's what Maroni is asking this Honorable Court to do, hold the parties to their bargain.

The contract in this case was drafted by the Petitioner. At the top of the contract, normally in bold colors of red and blue (black and white in the appendix) is the Petitioner's logo showing that this is the Petitioner's form contract. The forum-selection clause, which includes the Petitioner's address for its headquarters, clearly demonstrates that the forum-selection clause is meant for the benefit of the Petitioner. The contract further contains a waiver clause that permits

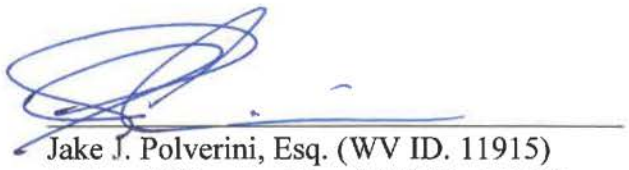
either party to enforce any provision of the contract (including the forum-selection clause) at any time and clearly states that failure to insist previously does not constitute a waiver. This clause makes it abundantly clear that the parties foresaw a situation where a party may fail to insist on enforcement of a provision, like the Petitioner argues Maroni did with the forum-selection clause, and that said failure does not preclude said party from seeking enforcement of it later. Therefore, the Petitioner should not be entitled to have its cake and eat it too. To maintain a lawsuit for a breach of a contract, yet only enforce the provisions that benefit the Petitioner and erase the portions that are at this moment against it, would be absurd and unjust. [2]

Wherefore, for the foregoing reasons, Respondent Tony Maroni, Jr. respectfully requests that this Honorable Court affirm the order of the circuit court granting Respondent's motion to dismiss.

Respectfully Submitted,

TONY L. MARONI, JR.

By POLVERINI AND NORMAN, PLLC



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[2] Counsel for Maroni has performed an exhaustive search of case law on the issue of forum-selection clauses and would point out to this Court that counsel could find no cases wherein the party objecting to a forum-selection clause is the party that actually drafted the contract and included said clause for its own benefit.

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DOCKET NO. 21-0912

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Plaintiff Below,
Petitioner,

v.

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Defendant Below,
Respondent.

CERTIFICATE OF SERVICE

I, Jake J. Polverini, hereby certify that a copy of the foregoing **RESPONDENT TONY L. MARONI, JR.'S BRIEF IN RESPONSE TO PETITIONER FIREWATER RESTORATION, INC.'S APPEAL BRIEF** was served via U.S. Mail, postage prepaid, this 21st day of January, 2022, to the following:

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