ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG Kevin Reid and LaDonna Rowland, Plaintiffs, v. Robert Bethea, III d/b/a Bethea's Funeral Home, Bethea Funeral Home, LLC, d/b/a Bethea's Funeral Home, Belleville Memorial Gardens of SC, Inc. d/b/a Belleville Memorial Gardens, Belleville Memorial Gardens, LLC, Crestlawn Memorial Cemetery of SC, Inc. d/b/a Crestlawn Memorial Gardens, and Crestlawn Memorial Gardens, LCC, Defendants.	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CIVIL ACTION NO.: 2019-CP-38-00786 **ORDER DENYING DEFENDANT BELLEVILLE MEMORIAL GARDENS OF SC, INC.'S MOTIONS TO DISMISS AND COMPEL ARBITRATION**

This matter came before the Court on November 18, 2020, for a hearing on Defendant Belleville Memorial Gardens of SC, Inc.'s ("Belleville") Motion to Dismiss Under Rules 12(b)(1), (3) and (6) and Motion to Compel Arbitration. Based upon the record before the Court and the arguments made by counsel for Belleville and the Plaintiffs, Belleville's Motions are DENIED.

Statement of Facts

This action arises from events surrounding the burial of the Plaintiffs' daughter, who was tragically killed in an automobile accident on January 12, 2019. The Plaintiffs' arranged for funeral and related services for the burial of their daughter with Defendant Robert Bethea, III, d/b/a Bethea's Funeral Home and Belleville, which owns and/or operates Belleville Memorial Gardens—a cemetery located in Orangeburg, South Carolina.

On or about January 16, 2019, Plaintiff LaDonna Rowland ("Rowland") signed a "Cemetery Interment Rights, Merchandise and Services Purchase/Security Agreement"

("Interment Agreement") with Belleville.[1] The Interment Agreement contained the following arbitration provision towards the bottom-half of the one-page agreement:

> NOTICE: BY SIGNING THIS AGREEMENT, PURCHASER IS AGREEING THAT ANY CLAIM PURCHASER MAY HAVE AGAINST THE SELLER SHALL BE RESOLVED BY ARBITRATION AND PURCHASER IS GIVING UP HIS/HER RIGHT TO A COURT OR JURY TRIAL AS WELL AS HIS/HER RIGHT OF APPEAL

The above provision was in small font and buried within the very busy Interment Agreement:

	Outer Burial Container		(d) Finance Charge	— 0 —
	____ Category I*		(e) Total of Payments (c + d)	— 0 —
	____ Category II**		(f) Deferred Payment Price (a + d)	$3868.00
1	Interment and Recording Fee Sat	1595.00	Remarks: 1 Bl. Nud Olc. and Memorial Bd Sheka Punch 1/12/18	
	Processing Fee	95.00		
	Other			
	Sales Tax	126.00		
	(a) Total Cash Price (Including Sales Tax)	$3818.00		

* Definition: Category I is an outer burial container designed to resist the entrance of water or any other ground elements. No representations are made to the effect that a Category I outer burial container is airtight or waterproof or would protect the body from gravesite substances for an indefinite time.

** Definition: Category II is a nonsealing outer burial container. The only representations or warranties regarding outer burial containers are those extended by the manufacturer. See the reverse side of this Agreement for details.

ANNUAL PERCENTAGE RATE[1] The cost of your credit as a yearly rate.	FINANCE CHARGE[2] The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your down payment of $ 3868.00 (b)
0 %	(d) $ 0	(c) $ 0	(e) $ 0	(a+d) $ 3868

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due Beginning
0	$ 0	PIF
One		

NOTICE TO PURCHASER: 1. Do not sign this paper before you read it. 2. You are entitled to a copy of this paper. 3. You may prepay the unpaid balance at any time without penalty and may be entitled to receive a refund of unearned charges in accordance with law.

NOTICE: BY SIGNING THIS AGREEMENT, PURCHASER IS AGREEING THAT ANY CLAIM PURCHASER MAY HAVE AGAINST THE SELLER SHALL BE RESOLVED BY ARBITRATION AND PURCHASER IS GIVING UP HIS/HER RIGHT TO A COURT OR JURY TRIAL AS WELL AS HIS/HER RIGHT OF APPEAL.

Purchaser also hereby acknowledges that this Agreement was completed as to all essential provisions before it was signed by Purchaser and a copy thereof was delivered to Purchaser at the time this Agreement was signed.

Time 11:30 ☒ AM ☐ PM Source AH

Seller (Creditor):

Signed this 16th day of January, 2018.

The Internal Revenue Service does not require your consent to any provision of the document other than the certifications required to avoid backup withholding.

Purchaser LaDonna Rowland [redacted] Date of Birth

S.S.N. [redacted] ☐ Male ☐ Female

Accepted by: ____ Authorized Representative

Purchaser ____ Date of Birth

Counselor Tammie Widener No. ____

[1] The Interment Agreement was only signed by Plaintiff Rowland. Plaintiff Kevin Reid did not sign the Interment Agreement.

ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786
ELECTRONICALLY FILED - 2021 Mar 24 12:48 PM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

ELECTRONICALLY FILED 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

The funeral for the Plaintiffs' daughter was held at Belleville on Saturday, January 19, 2019. Robert Bethea was the funeral director for the funeral. Following the funeral service at the cemetery, Mr. Bethea drove the Plaintiffs to their church. While at the church, Plaintiffs learned that there were problems with the interment of their daughter's vault/casket. The Plaintiffs allege that Plaintiff Reid and others went to the cemetery where they observed that Plaintiffs' daughter's vault/casket had not been interred due to the fact that Belleville had failed to dig the gravesite properly. Specifically, according to the testimony of Bethea, the gravesite was not big enough to fit the casket. Additionally, Bethea testified the gravesite was not properly prepared for interment as the gravesite was filled with water. According to Plaintiffs, Belleview had attempted to inter their daughters' vault/casket despite the problems with the gravesite, leading Plaintiff Reid and other family members to observe the casket of their loved one sitting tilted at an angle within the improperly dug gravesite. When the vault/casket was eventually dislodged from the gravesite, it was discovered that the vault holding the casket was damaged. According to the Plaintiffs, because Belleview did not have proper staffing or equipment at the cemetery to inter the Plaintiffs' daughter, the vault/casket was moved to a shed for a period of time. Eventually, later that night, the casket was taken back to the funeral home. Plaintiffs' daughter was ultimately interred the following day.

The Plaintiffs brought the present action against the Defendants arising out of the above events and the manner in which the Defendants handled Plaintiffs' daughter's burial. Plaintiffs filed their Complaint on June 14, 2019, asserting a number of causes of action against the Defendants, including: (1) Breach of Contract; (2) Breach of Express and Implied Warranties; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Negligence; (5) Unfair Trade Practices;

ELECTRONICALLY FILED 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

(6) Negligent Misrepresentation; (7) Outrage/Intentional Infliction of Emotional Distress; and (8) Civil Conspiracy. Defendant Belleville filed an Answer on August 13, 2019.

As of the date of the hearing on Belleville's Motions, Belleville had engaged in both written and oral discovery. Belleville served written discovery requests on Plaintiffs on September 11, 2019. Plaintiffs served responses to these discovery requests on January 20, 2020. On February 12, 2020, counsel for Belleville served deposition notices for the depositions of the Plaintiffs. Counsel for Belleville ultimately took the depositions of Plaintiff Rowland and Plaintiff Reid on September 29, 2020 and November 5, 2020, respectively. Belleville also participated in the deposition of Defendant Bethea on August 10, 2020.

Defendant Belleville filed the present Motions to Dismiss and/or Compel Arbitration on September 30, 2020, seeking to dismiss the case, or in the alternative, stay the case and compel arbitration pursuant to the arbitration provision contained in the Interment Agreement.

Discussion

Belleville seeks to dismiss and/or compel arbitration of Plaintiff Rowland's claims[2] pursuant to the arbitration provision in the Interment Agreement. In response, Plaintiff Rowland argues that the arbitration provision is unenforceable, and that, even if it were enforceable, Belleville waived its right to compel arbitration because Belleville engaged in significant discovery to the prejudice of Plaintiffs. For the reasons set forth below, this Court agrees that the subject arbitration provision is unenforceable and that Belleville also waived any right it may have had to compel arbitration.

[2] Belleville's counsel advised the Court at the hearing that Belleville is not seeking to compel arbitration of Plaintiff Reid's claims. It is undisputed that Plaintiff Reid did not sign the Interment Agreement, and thus, his claims are not subject to the arbitration provision in the agreement.

ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

As an initial matter, the Court finds that the subject arbitration provision is not enforceable pursuant to the Federal Arbitration Act (FAA), as the Interment Agreement does not involve interstate commerce. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (noting that the FAA only applies to an arbitration agreement where the transaction at issue involves interstate commerce).[3] Therefore, the enforceability of the arbitration provision is governed exclusively by South Carolina law.

The South Carolina Uniform Arbitration Act (SCUAA) provides that a written provision contained in a contract to submit a controversy to arbitration is "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." S.C. Code Ann. § 15-48-10(a). An arbitration provision that fails to comply with the statutory requirements of the SCUAA is unenforceable under state law. *See, e.g.*, *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454 (1996). Additionally, an arbitration provision may be held unenforceable if a party can show the provision is unconscionable. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25 (2007).

Plaintiffs argue that the subject arbitration provision at issue is unconscionable, and thus, unenforceable. Plaintiffs also argue that the arbitration provision is invalid because it fails to comply with the SCUAA's notice requirements and seeks to arbitrate claims that the SCUAA exempts from arbitration. Finally, Plaintiffs maintain that Defendant waived its right to enforce the subject arbitration provision. The Court will address each of these arguments below.

[3] At the hearing on its Motions, Belleville did not argue that the Interment Agreement concerned a transaction involving interstate commerce; nor did it present any evidence that the Interment Agreement involved interstate commerce in its memorandum in support of its Motions.

ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

1. **Unconscionability**

Plaintiffs argue that the subject arbitration provision at issue is unconscionable. This Court agrees. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 24-25. Here, the purported arbitration provision is unconscionable because Plaintiff Rowland lacked a meaningful choice in entering the Interment Agreement and because the arbitration provision contains oppressive, one-sided terms.

a. Absence of a Meaningful Choice

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson,* at 25. Courts should consider the following factors when evaluating whether a party lacked a meaningful choice in agreeing to an arbitration provision:

> the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Id. at 25.

In the present case, the above factors weigh heavily in favor of finding that Plaintiff Rowland lacked a meaningful choice in agreeing to the arbitration provision. First, the injuries alleged in this case encompass personal injuries, which are non-commercial in nature. Specifically, Plaintiffs allege emotional distress resulting from the negligence, fraudulent acts and outrageous conduct of Defendant Belleville in carrying out the burial of their daughter. These types of injuries are beyond the scope of the vague and ambiguous arbitration provision, since there is no evidence that the parties anticipated such harms when entering the Interment Agreement. *See Aiken v. World*

ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

Fin. Corp., 373 S.C. 144, 149, 151 (2007) (noting that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit[,]" and "refus[ing] to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."). In fact, other courts have determined that claims involving fraud are beyond the scope of broad and vague arbitration provisions. *See, e.g.*, *Partain v. Upstate Auto. Grp.*, 386 S.C. 488 (2010) (finding that the plaintiff "cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct.").[4]

Second, Plaintiffs were not a substantial business concern to Defendant Belleville as Plaintiff Rowland's purchase for burial services was not a significant or repeated purchase to Belleville. There is no evidence Plaintiff Rowland had personally ever done business with Belleville before. In fact, Plaintiff Rowland testified that she had never met anyone she believed worked for Belleville prior to the day she met with a representative of Belleville to pick her daughter's plot.

Third, there was a clear disparity in bargaining power between Plaintiff Rowland and Belleville in entering the Interment Agreement. The Interment Agreement is a typical adhesion contract in that the Agreement is a "standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, at 26-27. Belleville acknowledges the Interment Agreement is a contract of adhesion, but argues that the agreement is not unconscionable merely

[4] Additionally, it is noteworthy that the SCUAA restricts personal injury claims from being arbitrated. *See* § 15-48-10(b)(4); *See also Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380 n.6 (2014) (noting that "the South Carolina Uniform Arbitration Act does not apply to any claims 'arising out of personal injury[, whether such claims are] based on contract or tort . . . .'"); *Osborne v. Marina Inn @ Grand Dunes, LLC*, Civil Action No. 4:08-cv-0490-TLW-TER, 2009 U.S. Dist. LEXIS 87167, at *8 (D.S.C. Aug. 31, 2009) (also noting that the SCUAA exempts personal injury claims and that arbitration claims purporting to require arbitration of such claims are unenforceable under the SCUAA). As discussed further below, the Court finds that the SCUAA's prohibition against the arbitration of claims arising out of personal injuries is a separate and distinct ground for holding that the subject arbitration provision is unenforceable.

ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

because it is an adhesion contract. While the Court agrees that not all adhesion contracts are unconscionable, *Simpson*, at 27 ("[a]dhesion contracts . . . are not per se unconscionable"), a closer look at the circumstances surrounding the execution of the Interment Agreement evidences that Rowland lacked a meaningful choice in agreeing to the arbitration provision. Rowland was an unsophisticated party compared to Belleville, which drafted the agreement and arbitration provision. The evidence before the Court suggests that Rowland was inexperienced with respect to contracts for the provision of funeral merchandise/services. Additionally, the Court finds relevant the fact that Rowland executed the Interment Agreement without an attorney present and only days after losing her daughter. Rowland, understandably grieve-stricken due to the sudden and unexpected death of her daughter, was more vulnerable than a typical contracting party. This vulnerability contributed to Rowland's lack of a meaningful choice in entering the Interment Agreement, as Rowland was faced with the choice of entering the one-sided Interment Agreement or potentially being unable to ensure the timely burial of her daughter.

Finally, the arbitration provision itself was inconspicuous and did not comply with the notice requirements set forth in the South Carolina Uniform Arbitration Act (SCUAA). The SCUAA provides that

> Notice that a contract is subject to arbitration . . . shall be ***typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract*** and unless such notice is displayed thereon the contract shall not be subject to arbitration.

S.C. Code Ann. § 15-48-10 (emphasis added). The South Carolina Supreme Court has strictly enforced this notice requirement, noting that "[n]o other variation is acceptable." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589 (2001); *see also Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454 (1996) (holding that an arbitration provision did not meet the statutory requirement where it was laser-printed and written in all capital letters on the first page of the contract).

ELECTRONICALLY FILED 2021 Jan 21 12:48 PM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

Here, the arbitration provision was not underlined; nor was it rubber-stamped prominently on the page. Instead, the arbitration provision was in small font and buried towards the bottom of the single-paged agreement. Although the provision was in all caps, it arguably blended-in with the rest of the Interment Agreement, which contained a combination of tables, check boxes and other fine print. Given that the arbitration provision was inconspicuous and did not comply with the SCUAA, it did not properly notify Plaintiff of the significance of the provision or the constitutional rights she was purportedly agreeing to forego. *See Simpson*, at 27-28 (finding an arbitration provision in "the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page[,]" was inconspicuous and supported a finding that it was unconscionable).

After considering the above factors, this Court finds that Rowland lacked a meaningful choice in entering the Interment Agreement. Thus, the Court must now consider whether the terms of the subject arbitration provision are oppressive and one-sided.

b. Oppressive and one-sided terms

Plaintiff Rowland maintains that the arbitration provision in the Interment Agreement is oppressive and one-sided. Specifically, Rowland argues the language of the provision is so vague and broad that it purports to bind Plaintiff Rowland to arbitration for "any" claim she may have against Belleville, even those unrelated to the agreement itself. Rowland further argues that the provision is so broad as to potentially preclude any statutory remedies she might have. Upon review of the arbitration provision, this Court agrees that the provision's language is so broad and vague as to be oppressive. Additionally, the provision, by its plain language, only applies to claims of Plaintiff Rowland, not to claims Belleville may have against Rowland. Thus, while the arbitration provision requires Plaintiff Rowland to waive her right to a jury trial and bind herself

ELECTRONICALLY FILED 2021 Jan 13 12:48 PM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

to arbitrate all claims, Belleville did not give up any of its judicial remedies. Although the lack of mutuality of remedy in the subject arbitration provision, on its own, does not make it unconscionable, when coupled with the provision's overly broad language, the fact that Belleville seemingly reserved **all** judicial remedies it might have while limiting **all** judicial and statutory remedies Rowland might have is oppressive and one-sided. *See Simpson*, at 32 (noting that an arbitration provision that purports to allow a defendant's judicial remedies to supersede the consumer's arbitral remedies is oppressive and one-sided).

In light of the foregoing, this Court finds that the arbitration provision in the Interment Agreement is unconscionable, and thus, unenforceable.

2. The arbitration provision does not comply with the SCUAA's notice requirements

As noted previously, the arbitration provision in the Interment Agreement did not comply with the notice requirements in the SCUAA. The Court finds that this noncompliance is an additional and separate ground for holding that the arbitration provision is unenforceable against Rowland. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580 (2001) (recognizing that arbitration provisions that do not strictly comply with the notice requirements of S.C. Code Ann. § 15-48-10(a) are unenforceable unless the contract in question is subject to the FAA).

Belleville argues that, even if the subject arbitration provision does not comply with § 15-48-10(a), the arbitration provision should not be invalidated because Plaintiff's deposition testimony establishes Rowland had "actual notice" of the provision. However, Belleville offers no direct support for this position, and this Court has been unable to find any South Carolina case where an arbitration provision that failed to meet the notice requirements of § 15-48-10(a) was otherwise held enforceable upon a showing that the party against whom the provision was being enforced had actual notice of the provision. While Belleville cites to *Zabinski*, this case seems to suggest an opposite outcome than the one Belleville seeks. In *Zabinski*, the court was faced with a

ELECTRONICALLY FILED 2021 Jan 21 1:20 PM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

partnership agreement that contained an arbitration provision that did not comply with the notice requirement in § 15-48-10(a). The party attempting to avoid arbitration was the one whose attorney drafted the defective arbitration clause. *Id.* at 586. Although not directly addressed by the *Zabinsky* Court, one can assume that the party whose attorney drafted the arbitration provision would have had actual notice of the provision. Notwithstanding this fact, the *Zabinksy* Court determined the arbitration agreement was "not enforceable under South Carolina law . . . [and that] a partner could opt out of his agreement to arbitrate by citing the lack of a notice provision under state law." *Id.* at 594.[5]

This Court finds that *Zabinski* supports the proposition that "actual notice" of a provision is immaterial to the enforceability of an arbitration provision where the provision does not comply with § 15-48-10(a) and is not subject to the FAA. *Id.* This outcome is consistent with South Carolina caselaw strictly enforcing the language of § 15-48-10(a). *See Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 457 (1996) (holding that the notice requirements in § 15-48-10(a) must be strictly construed even though such construction "'may lead to results not intended by contracting parties . . ..'" (internal citation omitted)). Accordingly, the subject arbitration provision is unenforceable because it does not comply with the notice requirements set forth in § 15-48-10(a).

3. **The SCUAA prohibits the arbitration of claims involving personal injuries**

Plaintiff argues that the subject arbitration provision is unenforceable because the SCUAA prohibits the arbitration of personal injury claims. This Court agrees.

[5] The *Zabinksy* Court did hold that the arbitration provision was still enforceable because the contract involved interstate commerce, and thus, was subject to the FAA. As previously noted, the arbitration provision here is not subject to the FAA.

ELECTRONICALLY FILED 2021 Jan 13 11:24:48 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

The SCUAA expressly excludes "[a]ny claim arising out of personal injury, based on contract or tort . . .." § 15-48-10(b)(4). Thus, a provision seeking to compel arbitration of a personal injury claim is unenforceable under South Carolina law. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380 n.6 (2014) (noting that "the South Carolina Uniform Arbitration Act does not apply to any claims 'arising out of personal injury[, whether such claims are] based on contract or tort . . . .'"). Defendant attempts to overcome this statutory prohibition by arguing that the SCUAA only prohibits the arbitration of claims involving "physical injuries," and that Plaintiff Rowland only alleges emotional distress. The Court finds this argument unpersuasive. As this Court has previously noted, South Carolina courts have strictly construed the language of the SCUAA. The language of the SCUAA expressly prohibits the arbitration of "personal injuries." Nowhere does the statute limit its scope to "physical" injuries. This Court cannot impose a limitation on the express language of the SCUAA where the statute's language is clear. *See Soil Remediation Co.*, at 457 ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). A plain reading of § 15-48-10(b)(4) indicates that the SCUAA prohibits the arbitration of personal injury claims, regardless of whether those injuries are physical. To the extent Plaintiff Rowland's various causes of action encompass claims for emotional distress, such claims "aris[e] out of personal injury" within the meaning of § 15-48-10(b)(4). Therefore, such causes of action are not subject to arbitration.

4. <u>Belleville Waived Its Right to Enforce the Purported Arbitration Provision</u>

Even if the subject arbitration provision were otherwise enforceable, this Court finds that Belleville waived its right to enforce the arbitration provision because it delayed seeking enforcement of the provision and voluntarily engaged in significant discovery—all to the prejudice and detriment of the Plaintiffs.

ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

"The right to enforce an arbitration clause . . . may be waived." *Rhodes v. Benson Chrysler-Plymouth Inc.* 374 S.C. 122, 126, (Ct. App. 2007). Although "there is no set rule as to what constitutes a waiver of the right to arbitrate," a court generally considers the following factors: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." *Id.* Here, Plaintiffs can satisfy all three factors.

"A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration." *Evans v. Accent Manufactured homes, Inc.* 352 S.C. 544, 550 (Ct. App. 2003) (internal quotation marks and citation omitted). In *Evans*, the Orangeburg County circuit court held that the defendant had waived its right to enforce an arbitration provision where it waited approximately 19 month before filing a motion to compel arbitration—even though it knew of its right to arbitrate—during which time the defendant actively engaged in written and oral discovery. *Id.* at 548–49. The trial court determined the plaintiff "suffered prejudice from [the defendant's] pursuit of discovery to which it would not have been entitled under arbitration, causing [the plaintiff] to incur 'substantial costs'." *Id.* at 549. On appeal, the South Carolina Court of Appeals affirmed the trial court's finding that the defendant had waived its right to enforce arbitration. The *Evans* Court found notable the fact that the defendant persisted to engage in discovery even after filing a motion to compel arbitration by deposing the Plaintiff. According to the *Evans* Court, "[a]s the party seeking arbitration, [defendant] bore the onus to halt discovery by seeking the court's protection," instead of "continu[ing] to engage in discovery to its benefit." *Id.* at 551. The Court of Appeals further determined that the defendant's actions had prejudiced the Plaintiff, noting that

ELECTRONICALLY FILED 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

the defendant "had availed itself of discovery tools unavailable in arbitration, thereby prejudicing [the plaintiff] by obtaining information from her it might not have been able to otherwise obtain." *Id.* The *Evans* Court further found that the defendant's failure to seek arbitration in a timelier fashion prejudiced the plaintiff by forcing plaintiff to incur discovery costs. *Id.*

The facts of the present case are very similar to those in *Evans*. Here, Belleville waited more than 13 months before filing a motion to compel arbitration. During this time, Belleville did nothing to put Plaintiffs on notice that it intended to enforce any arbitration provision. In fact, Belleville did not even assert the alleged arbitration provision as an affirmative defense in its Answer to Plaintiff's Complaint. To the contrary, for 15 months (including after filing the Motion to Dismiss/Compel Arbitration), Belleville actively engaged in the litigation process, including participating in written and oral discovery to its advantage. Belleville served interrogatories and requests for production on Plaintiffs (to which Plaintiffs responded) and took both Plaintiffs' depositions. In fact, like the defendant in *Evans*, Belleville took the deposition of Plaintiff Reid **after** filing its Motion to Dismiss/Compel Arbitration against Plaintiffs. Belleville also participated in the deposition of Defendant Bethea.[6]

Furthermore, like the defendant in *Evans*, Belleville's pursuit of discovery in this case has prejudiced Plaintiffs. "A party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration." *Evans*, at 550. By engaging in both written and oral discovery, Belleville availed itself of the full benefits of discovery, "obtaining information from [Plaintiffs] it might not have been able to otherwise obtain." *Id.* at 551. Additionally, by continuing in the discovery process instead of seeking immediate enforcement of the arbitration

[6] Belleville argues that it only engaged in discovery to the extent necessary to determine whether Plaintiff Rowland had actual notice of the arbitration provision. However, Defendant did not limit its written or oral discovery to the issue of actual notice.

ELECTRONICALLY FILED - 2021 Jan 13 11:20 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

provision, Plaintiffs incurred litigation costs it otherwise would not have incurred in arbitration. *See id.* Finally, like the defendant in *Evans*, Belleville continued to engage in discovery even after filing its Motion to compel arbitration, rather than seeking the circuit court's protection under SCRCP 26(c)(1). *Id.*

In light of Belleville's long delay in seeking to enforce the arbitration provision, its engagement in extensive discovery, and the resulting prejudice it caused the Plaintiffs, this Court finds that Belleville waived any right it had to enforce the arbitration provision.

After considering the arguments of the parties, this Court finds that the arbitration provision in the Interment Agreement is unconscionable, fails to comply with the notice requirements in the SCUAA and is unenforceable against Plaintiff Rowland. Even if the arbitration provision were valid, this Court further finds Belleville waived its right to enforce the arbitration provision against Rowland.

In light of the foregoing, Defendant Belleville's Motion to Dismiss Under Rules 12(b)(1), (3) and (6) and Motion to Compel Arbitration are denied.

NOW, THEREFORE, based upon the foregoing,

IT IS HEREBY ORDERED that Defendant Belleville's Motion to Dismiss Under Rules 12(b)(1), (3) and (6) and Motion to Compel Arbitration are denied.

AND IT IS SO ORDERED.

_____

The Honorable Edgar W. Dickson
Presiding Circuit Court Judge

December ____, 2020
Columbia, South Carolina

ELECTRONICALLY FILED 2021-Jan-13 11:20:48 AM - ORANGEBURG - COMMON PLEAS - CASE#2019CP3800786

Orangeburg Common Pleas

Case Caption: Kevin Reid , plaintiff, et al VS Robert Bethea III , defendant, et al

Case Number: 2019CP3800786

Type: Order/Other

So Ordered

s/ Edgar W. Dickson #2153