RECEIVED
Apr 23 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2019-CP-38-00786

Appellate Case No. 2021-000336

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, LLC, Defendants,

Of which LaDonna Rowland is the Respondent and Belleville Memorial Gardens of SC, Inc. d/b/a Belleville Memorial Gardens, LLC is the Appellant.

BRIEF OF APPELLANT

Stephen Porter, Esq.
Kevin Maroney, Esq.
Rogers Lewis Jackson Mann & Quinn
P.O. Box 11803
Columbia, SC 29211
(803) 256-1268 (Stephen Porter)
(803) 978-2832 (Kevin Maroney)
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Sources

STATEMENT OF ISSUES ON APPEAL

1. Adhesion contracts are not per se unreasonable in South Carolina. The Appellant's adhesion contract does not mandate the waiver of statutory remedies. South Carolina Appellate Courts have upheld similar adhesion contracts. Is Appellant's adhesion contract unconscionable under South Carolina law?
2. The Respondent read and understood the Notice of Arbitration provision in the internment contract—despite a lack of underlining—before signing it. She knew and expected that she would proceed to Arbitration if a dispute arose between her and Appellant. Can the absence of underlining mean that Respondent did not have adequate notice about the requirement of pursuing claims in arbitration, even though she had actual notice of this requirement?
3. The South Carolina Uniform Arbitration Act ("SCUAA") excludes personal injury claims based on contract or tort. The lower Court ruled that this exception includes claims that seek damages caused by nonphysical injuries. If "[a]ny claim arising from personal injury" is not limited to claims that seek damages caused by physical injury, then there is no claim in South Carolina that is subject to arbitration under SCUAA. Given such a result, can the lower Court's interpretation be affirmed?
4. Appellant filed a motion to compel arbitration as soon as possible after Covid-19 struck. Appellant engaged in limited discovery, in part, to learn whether Respondent alleged a physical injury and had actual notice. The parties only availed themselves of the Court's assistance when establishing a scheduling order. And Respondent is not prejudiced. Did Appellant waive its right to enforce the arbitration provision.

STATEMENT OF THE CASE

LaDonna Rowland and Kevin Reid ("Plaintiffs") commenced an action against Belleville Memorial Gardens of SC, Inc. d/b/a Belleville Memorial Gardens, LLC ("Belleville") and other Defendants on June 14, 2019. Order, p. 3. In their lawsuit, Plaintiffs alleged eight causes of action against Belleville, including (1) breach of contract, (2) breach of express and implied warranties, (3) breach of contract accompanied by a fraudulent act, (4) negligence, (5) South Carolina Uniform Unfair Trade Practices Act violations, (6) negligent misrepresentation, (7) intentional infliction of emotional distress, and (8) civil conspiracy. Id., pp. 2-3. All these causes of action arose from the internment of Plaintiffs' daughter on January 19, 2019. Id., pp. 1-4. Belleville filed an Answer, denying liability.

Prior to the internment of her daughter, LaDonna Rowland ("Respondent") and Belleville entered a sales contract for internment merchandise and services. This internment contract contains the following arbitration provision. Id., pp. 1-2. "**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.**" Memorandum in Support of Motion to Dismiss and Compel Arbitration, Exhibit A, Internment Contract (emphasis and upper-case letters in original).

Belleville filed a motion to dismiss and compel arbitration on September 30, 2020. The Honorable Edgar W. Dickson heard the motion on November 18, 2020. Order, p. 1. His Honor filed the Order denying Belleville's motion on January 13, 2021.

The Order contained four rulings. First, the Court determined that the internment contract, in particular the arbitration provision within it, is unconscionable. Order, pp. 6-10. Second, the Court ruled that the arbitration provision does not comply with the South Carolina Uniform Arbitration Act's ("SCUAA") notice requirements. Id., pp. 10-11. Third, the Court ruled that the arbitration provision fell within the "personal injury" exception of the Arbitration Act, prohibiting arbitration. And finally, the Court determined that Belleville had waived its right to enforce the arbitration provision. Id., pp. 12-15.

Belleville timely filed a Motion to Reconsider on January 25, 2021. In its motion, Belleville asked to correct several factual errors and to address multiple legal arguments that had been omitted from the Court's order. Motion to Reconsider, pp. 2-4. Belleville received notice of the Form 4 denial of its Motion to Reconsider on March 3, 2021. Belleville filed its Notice of Appeal in this Court on March 24, 2021.

STANDARD OF REVIEW

An Order that denies a motion to compel arbitration is immediately appealable. S.C. Code Ann. §15-48-200(a)(1); Towles v. United HealthCare Corp., 338 S.C. 29, 35, 524 S.E.2d 839, 842 (Ct. App. 1999). "Arbitrability determinations are subject to de novo review." Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016) (citation omitted). But a circuit Court's factual findings will nevertheless remain undisturbed if there is any evidence to support them. Id. (citation omitted); Deloitte & Touche, LLP v. Unisys Corp., 358 S.C. 179, 182, 594 S.E.2d 523, 525 (Ct. App. 2004).

ARGUMENT

I. The Internment Contract Is Not Unconscionable.

The lower Court made a few unsupported factual assertions on its way to ruling that the internment contract is unconscionable. First, the lower Court stated that "[t]he evidence before the court suggests that Rowland was inexperienced with respect to contracts for the provision of funeral merchandise/services." Order, p. 8. But this assertion is contradicted by one of Plaintiff's own exhibits, an excerpt from her deposition. "Q: Have you ever been involved with planning a funeral with a funeral director prior to that of your daughter? A: Yes ... A: My mother.... Rule 59(e) Motion to Reconsider, p. 2 (citing Plaintiff's Memorandum opposing Belleville's Motion to Compel, Exhibit F, Deposition of LaDonna Rowland, p. 27, lines 12-17. 2). Second, the lower Court's Order stated the following:

> Rowland, understandably grieve-stricken [sic] 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 Internment agreement, as Rowland was faced with the choice of entering the one-sided Internment Agreement or potentially being unable to ensure the timely burial of her daughter.

Order, p. 8.

But not one of Plaintiff's Exhibits includes evidence of her increased vulnerability. The excerpt from Plaintiff's deposition shows that she was upset when she chose Mr. Bethea, not that she was vulnerable while signing the internment contract. And there is no evidence of an alleged inability to "timely" bury her daughter in the absence of signing an agreement with Belleville. Third, the lower Court stated that "the arbitration provision was in small font and buried towards the bottom of the single-paged [sic] document." But the font is not small; the font is in fact bigger than the font in other parts of the internment contract and is in bolded, all capital letters. Order, p. 2; Memorandum in Support of Motion to Dismiss and Compel Arbitration, Exhibit A.

Belleville does not deny that the Internment Contract was a contract of adhesion, i.e., it was given on a "take it or leave it" basis. One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 61, 791 S.E.2d 286, 291 (Ct. App. 2016). Most consumer contracts are. "However, our supreme court has made clear that adhesion contracts are not per se unconscionable." Id., 418 S.C. 51, 63, 791 S.E.2d 286, 293. Once the contract of adhesion determination is made, this Court "turn[s] to the second prong of the unconscionability analysis to determine whether no reasonable person would make or accept any oppressive or one-sided terms within the arbitration agreement." Id.

While ruling that the internment contract is oppressive and one-sided, the lower Court stated that the arbitration provision is broad and vague and, therefore, oppressive. Order, p. 9. The lower Court did not cite any cases that make these characterizations relevant, however. Id. All arbitration provisions are broad. That is the point: make every claim go to arbitration. Given that the provision is in a contract related to internment merchandise and services, it would be unreasonable to apply the provision to completely unrelated claims. Putting this to the side, this

Court is more focused on whether "the arbitration provision facilitates an unbiased decision by a neutral decisionmaker in the event of a dispute." One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64–65, 791 S.E.2d 286, 294. In this case, Respondent did not argue that the arbitration provision would facilitate a biased decision by a partisan decisionmaker, and the lower Court did not issue such a ruling. Order, pp. 9-10. The lower Court did not address the neutrality of arbitral decisionmaker at all. Instead, the lower Court stated the following: "[W]hile the arbitration provision requires Plaintiff Rowland to waive her right to a jury trial and bind herself to arbitrate all claims, Belleville did not give up any of its judicial remedies." Order, pp. 9-10. Although the lower Court acknowledged that a lack of mutuality of remedy does not make an arbitration provision unconscionable, it then stated, "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." Id., p. 10. The lower Court's statement indicates a misapprehension concerning the term "lack of mutuality of remedy". Respondent's judicial and statutory remedies are not limited at all. She can pursue all her claims in arbitration, including her South Carolina Unfair Trade Practices claim and the sough-after treble damages that the statute provides. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30, 644 S.E.2d 663, 671 (2007) (finding that a provision that prohibits double and treble damages is oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decisionmaker); One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 65, 791 S.E.2d 286, 294 (finding that an arbitration provision that allows for adjudication of all a consumer's claims did not unduly limit a purchaser's right to a meaningful legal proceeding).

Based on these errors, this Court should reverse the lower court's ruling.

II. Respondent Had Actual Notice, Making The Lack Of Underlining Irrelevant.

The South Carolina Uniform Arbitration Act states:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter 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(a).

The South Carolina Supreme Court has strictly construed the notice requirements of section 15-48-10(a), invalidating arbitration provisions that do not comply with them. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 588–89, 553 S.E.2d 110, 114 (2001) (providing examples of invalidated arbitration provisions, including provisions that were not underlined but were capitalized and on the first page). The Court also has refused to apply the doctrine of equitable estoppel against a party who opposed arbitration because of inadequate notice, even when that party prepared the inadequate arbitration provision, because "the knowledge of both parties [was] equal and nothing [was] done by one to mislead the other." Id., 346 S.C. 580, 589–90, 553 S.E.2d 110, 114–15 (citing Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000)).

But the Court has not addressed whether the absence of underlining invalidates a notice provision if the party opposing arbitrability both read and understood the provision and was not prejudiced. "Notice" has been defined as follows:

> Notice, generally, may be defined as that which imparts information of the fact to the one to be notified, and in its broadest significance, the term includes any means whereby intelligence or knowledge is communicated. More specifically, notice may be defined as

> information, an advisement, or a written warning, in more or less formal shape, intended to apprise a person of some proceeding in which that person's interests are involved, or informing him or her of some fact which it is his or her right to know and the duty of the notifying party to communicate.

66 C.J.S. Notice § 1

In a situation "[w]here a party receives inadequate notice, he must demonstrate prejudice resulting from the insufficient notice." See Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 14, 577 S.E.2d 190, 197 (2003) (concerning amendments to the 1995 Setoff Debt Collection Act and statutory notice procedures); Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261, 272, 831 S.E.2d 406, 411 (2019) (discussing the "notice-prejudice rule", which is applied to notice clauses in insurance contracts when third parties are involved).

Plaintiff cannot establish that she received "inadequate notice" from the provision or that she was prejudiced by the provision. Plaintiff admits that she read and understood the meaning of the arbitration provision before signing the internment contract. Memorandum in Support of Motion to Dismiss and Compel Arbitration, Exhibit B, Plaintiff's Depo., p. 34, lines 3-9; p. 60, lines 22-25 cont. p. 61, lines 1-7. Plaintiff admits, therefore, that the arbitration provision gave her "actual notice", i.e., knowledge, that a dispute would be resolved through arbitration. Blind Tiger, LLC v. City of Charleston, 366 S.C. 182, 186, 621 S.E.2d 361, 363 (Ct. App. 2005) ("Actual notice is synonymous with knowledge."); Memorandum in Support of Motion to Dismiss and Compel Arbitration, Exhibit B, Plaintiff's Depo., p. 34, lines 3-9; p. 60, lines 22-25 cont. p. 61, lines 1-7. "When a person knows of a thing [she] has 'notice' thereof, as no one needs notice of what [she] already knows." Walker v. Preacher, 185 S.C. 462, 194 S.E. 868, 870 (1938) (citation omitted); see also First Presbyterian Church of York v. York Depository, 203 S.C. 410, 27 S.E.2d 573, 576 (1943) (if a person has actual notice of any outstanding lease or other instrument, he will be bound

by such notice, regardless of whether the instrument complies with the recording statute). And because she understood the meaning of the arbitration provision, Plaintiff expected to proceed to arbitration if a dispute arose between her and Belleville. Complying with Plaintiff's reasonable expectations should not result in prejudice.

Plaintiff should not be able to avoid arbitration because of a "technical escape-hatch". See Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261, 272, 831 S.E.2d 406, 411("The driving force behind the notice-prejudice rule is that there is "no sound reason...to permit a mere technical noncompliance to...provide a 'technical escape-hatch'..."). A party opposing arbitration is required to show "actual prejudice" before a waiver is found. Derrick v. Moore, 426 S.C. 531, 537, 828 S.E.2d 68, 72 (Ct. App. 2019), cert. granted (Sept. 18, 2019). The same should be true when a technical omission in the notice of arbitration provision exists, but the party opposing arbitration understood the provision's meaning. It should be true, that is, if South Carolina's policy really does favor arbitration. Masters v. KOL, Inc., 431 S.C. 28, 37, 846 S.E.2d 893, 897 (2020).

The lower Court ruled against this conclusion. The lower Court first stated that Belleville had not cited a case that directly supports its argument. Order, p. 10. This is a red herring. Belleville made clear that no case had directly decided whether actual notice overcomes the absence of underlining in a notice of arbitration provision. "[W]e acknowledge that no court has directly addressed this point [and] [w]e would not be making it if [a] [C]ourt had addressed it and ruled against us." Hearing Transcript, p. 23, lines 19-21. But "we think that if it had been argued and considered by [a] [C]ourt, then [a ruling] may come down on our side, given how notice provisions are treated elsewhere in circumstances analogous to ours." Id., p. 23, lines 24-25 cont. p. 24, lines 1-2.

The lower Court then stated: "While Belleville cites to *Zabinski*, this case seems to suggest an opposite outcome than the one Belleville seeks." Order, p. 10. This statement is misleading. Belleville did not cite Zabinski in support of its argument. Memorandum in Support of Motion to Dismiss and Compel Arbitration, p. 3. Belleville cited Zabinski to show that Courts strictly construe the notice provisions of section 15-48-10(a). Id.

When the lower Court described Zabinski, it made much of the fact that the party opposing arbitration had drafted the provision through its attorney. Order, p. 11. "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." Id. Based on this assumption, the lower Court found "that *Zabinsky* 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)." Id.

The lower Court's assumption is wrong: Notice to agent is only constructive notice to principal, not actual notice to principal. Hearing Transcript, p. 7, lines 18- 25 (citing Indep. Nat. Bank v. Buncombe Prof'l Park, LLC, 411 S.C. 605, 769 S.E.2d 663 (2015) ("The rule is that a principal has constructive notice of all the material facts which its agent, while acting in the scope of his authority, receives notice.")); Rule 59(e) Motion to Reconsider, p. 4. The lower Court's ruling is, therefore, based on a false assumption and is invalid.

III. The Personal Injury Exception Of SCUAA Requires A Physical Injury.

Respondent alleged eight causes of action, including breach of contract based on express and implied warranties, breach of contract accompanied by a fraudulent act, negligence, unfair trade practices, negligent misrepresentation, civil conspiracy, and intentional infliction of emotional distress. Respondent does not allege a physical injury in connection with any of these

causes of action. Respondent's Answers to Interrogatories, pp. 5-6. Respondent argued that the "physical injury" exception in SCUAA barred the arbitrability of her claims. The lower Court agreed, concluding that section 15-48-10(b)(4) "prohibits the arbitration of personal injury claims, regardless of whether those injuries are physical." Order p. 12. In addition, the lower Court ruled that, "[t]o 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 section 15-48-10(b)(4) [and] such causes of action are not subject to arbitration." Id.

The lower Court is mistaken. First, if the phrase "[a]ny claim arising out of personal injury" means a cause of action that seek damages, whether the damages stem from physical or nonphysical injuries, then no cause of action is arbitrable under SCUAA. That result would be absurd and defeat the plain legislative intention of facilitating the arbitration of disputes. "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Matter of Care & Treatment of Oxner, 430 S.C. 555, 562, 846 S.E.2d 365, 369 (Ct. App. 2020), reh'g denied (Aug. 24, 2020). Second, the exception should be interpreted to apply no farther than it was intended to apply. Walden v. Harrelson Nissan, Inc., 399 S.C. 205, 210, 731 S.E.2d 324, 326 (Ct. App. 2012) ("we reject [an] expansive interpretation of the statute and conclude the General Assembly...intended to apply [the arbitration exception of section 15–48–10(b)(4), specifically the portion related to insurance] directly to an insurance contract.").

Finally, although not directly on point, the case of Dean v. Heritage Healthcare provides additional support for Belleville's interpretation. In the Dean v. Heritage Healthcare case, the court made the following comment about Timms v. Greene: "The *Timms* Court could not compel arbitration under state law because 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....'" Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 380 n. 6, 759 S.E.2d 727, 732 n. 6 (2014) (citing S.C. Code Ann. § 15–48–10(b)(4) (2005 & Supp.2012)). Timms v. Greene involved a negligence claim for physical injuries. Timms v. Greene, 310 S.C. 469, 470, 427 S.E.2d 642, 642 (1993) ("the respondent commenced this negligence action in the Greenwood County Circuit Court in August of 1990 seeking damages for injuries to her head and ears which she alleged occurred while left unattended under a hair dryer...."), overruled in part by Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013), and overruled on other grounds by Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727. Dean v. Heritage Healthcare and Timms v. Greene indicate that section 15-48-10(b)(4) applies to claims that seek damages for physical injuries. Belleville has not found a case that indicates the "personal injury" exception also applies to claims that seek damages for nonphysical injuries.

IV. Belleville Did Not Waive Its Right To Arbitrate This Dispute.

As this Court has explained, there is no set rule that determines what constitutes a waiver of the right to arbitrate, and the question depends on the facts of each case. Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013). The factors that this Court considers include (1) the length of time between the commencement of the action and the motion to compel arbitration, (2) the extent of discovery undertaken by the party requesting arbitration, and (3) the prejudice, if any, incurred by the non-moving party because of the delay. Id. (citation omitted). This Court also considers the extent to which the parties have availed themselves of the lower Court's assistance. Id. To show prejudice, Respondent must show more than just mere inconvenience. Id. (citation omitted).

In this case, other than a scheduling order, the parties did not avail themselves of the lower Court. Regarding the length of time, the summons and complaint was filed in June of 2019. The summons and complaint did not clearly indicate that the Plaintiff was not alleging a physical injury. Belleville served Requests for Production and Interrogatories in September of 2019. Belleville received the responses on January 20, 2020. Right afterward COVID-19 spread and shutdown the world. Respondent's deposition was taken, in part, on September 29 because Belleville needed to learn whether she had actual notice of the meaning of the arbitration provision, given the technical issue concerning the lack of underlining. Belleville filed a motion to compel arbitration the very next day.

In all, then, discovery in this case consists of a deposition of Respondent, 11 Interrogatories, and six Requests for Production. And one of the interrogatories was used to learn whether Respondent was alleging a physical injury. Respondent's Answers to Interrogatories, pp. 5-6. Although depositions of Plaintiff Kevin Reid and Co-Defendant Robert Bethea were taken, these should not count against Belleville when determining the extent of discovery employed against Respondent. See Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 258, 743 S.E.2d 868, 872–73 (refusing to count discovery taken by the same parties in other cases, even though the cases are similar). In the case of Bethea, Belleville did not even serve notice his deposition. But if Kevin Reid's deposition is counted, the total number of discovery actions taken by Belleville is four (two depositions, one set of Requests for Production, and one set of Interrogatories). Again, Belleville did not take Bethea's deposition.

Finally, Respondent cannot show prejudice. Although the lower Court likened the use of discovery in this case to the situation in Evans v. Accent Manufactured Homes, Inc., Evans is distinguishable. In that case, the party seeking arbitration did "not contest that it knew about its

right to arbitrate under the agreement throughout the entire course of litigation and discovery [] but failed to exercise its right until approximately nineteen months after [Plaintiff] commenced litigation." Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 549–50, 575 S.E.2d 74, 76 (Ct. App. 2003). As explained above, Belleville did not know whether Respondent had actual notice of the arbitration provision or whether she was alleging a physical injury until after the completion of some discovery. Unlike the party in Evans, Belleville was not and is not using arbitration as a means of extending or furthering delays. Id., 352 S.C. 544, 550, 575 S.E.2d 74, 76. And Belleville was not "unjustifiably slow" in seeking arbitration either. Id. ("A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration.") (citation omitted). Belleville moved as quickly as it could, given the need to conduct some discovery and the unprecedented constraints created by the Covid pandemic.

One last point requires clarification. The lower Court's order states, in a footnote, the following: "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." Order, p. 14 n. 6. This is untrue. Belleville never stated that it "*only* engaged in discovery to the extent necessary to determine whether Plaintiff Rowland had actual notice of the arbitration provision." Id. (emphasis added). Here is an example of what Belleville actually said: "The extent of discovery is determined on the facts of each case. We think that we needed to engage in some discovery to determine actual notice and [to determine] whether physical injury was manifested before the motion for arbitration could be made." Hearing Transcript, p. 26, lines 3-7. Belleville argued that it did not engage in extensive discovery. Belleville did not argue that it only engaged in discovery to determine whether Plaintiff

Rowland had actual notice of the arbitration provision. Belleville's Rule 59(e) Motion for Reconsideration provides greater details. Rule 59(e) Motion to Reconsider, pp. 3-4.

Given the need to conduct some discovery to assess the viability of a motion to compel arbitration and given the difficulties created by the Covid pandemic, the facts of this case should not constitute a waiver of Belleville's right to arbitrate.

CONCLUSION

The internment contract is not unconscionable. Respondent had actual notice regarding arbitration, making the lack of underlining irrelevant. The "personal injury" exception only applies to causes of action that seek damages caused by physical injuries. And Belleville did not waive its right to arbitrate. This Court should reverse the order of the lower Court and remand with instructions that compel Respondent to pursue all her claims in the arbitral forum.

Respectfully submitted,

Stephen Porter, Esq., Bar No. 16609
Kevin Maroney, Esq., Bar No. 102545
Rogers Lewis Jackson Mann & Quinn, LLC
P.O. Box 11803
Columbia, SC 29211
(803) 256-1268 (Stephen Porter)
(803) 978-2832 (Kevin Maroney)
Attorneys for Appellant,
Belleville

April 23, 2021