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.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. **Standard of Review**

2. **The Trial Court Properly Found the Purported Arbitration Provision in the Interment Agreement is Unconscionable Under South Carolina Law and is, therefore, Unenforceable.**

3. **The Trial Court Properly Found the Interment Agreement's Purported Arbitration Provision Fails to Comply with the SCUAA's Notice Provisions and is, therefore, Unenforceable.**

4. **The Trial Court Properly Found the Purported Arbitration Provision is Unenforceable Because Rowland is Bringing Personal Injury Claims, Which are Excluded Under the SCUAA.**

5. **The Trial Court Properly Found that Belleville Waived Its Right to Compel Arbitration in this Matter.**

STATEMENT OF FACTS

On or about January 12, 2019, the Plaintiffs' daughter, Shekia Jamison Pough, was killed in an automobile accident. *See Complaint* at ¶11. Distraught, Plaintiffs were faced with arranging a funeral and related services for the burial of their daughter and selected Defendant Robert Bethea, III, d/b/a Bethea's Funeral Home and Defendant Belleville—the cemetery ("Appellant").

On or about January 16, 2019, Respondent LaDonna Rowland ("Rowland") signed a *"Cemetery Interment Rights, Merchandise and Services Purchase/Security Agreement"* ("*Interment Agreement*") with Belleville. *See Interment Agreement.* The *Interment Agreement* was not signed by an Authorized Representative of Belleville. *See Id.* The *Interment Agreement* also was not signed by Plaintiff Reid. *See Id.*

The *Interment Agreement* consisted of a form entirely prepared for and kept wholly in the possession of Belleville. By contrast, prior to this unfortunate transaction between the Plaintiffs and Belleville, Rowland had never seen the *Interment Agreement.*

The *Interment Agreement* contained the following arbitration provision towards the bottom-half of the one-page document:

> 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.

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

	Outer Burial Container	
	____ Category I*	
	____ Category II**	
1	Interment and Recording Fee Sat	1595.00
	Processing Fee	95.00
	Other	
	Sales Tax	124.40
	(a) Total Cash Price (Including Sales Tax)	$3816.00

(d) Finance Charge — 0 —
(e) Total of Payments (c + d) — 0 —
(f) Deferred Payment Price (a + d) $3868.00

Remarks: 1 Bl. Nud. Olc. and Memorial 2nd Sheka Pul 1/12/18

* 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	(c) $ 0	(a+d) $ 3868

Your payment schedule will be:

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

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 PURCHASER'S 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 Widdeman No. ____

Interment Agreement.

The funeral for Plaintiffs' daughter was held on Saturday, January 19, 2019, at Belleville. Robert Bethea was the funeral director for the funeral. Following the funeral service at the cemetery, 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. 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, the gravesite was not big enough to fit the

casket. Additionally, the gravesite was not properly prepared for interment as the gravesite was filled with water. *Deposition of Robert Bethea, III*, at pp. 23-25.

Notwithstanding the problems with the gravesite, Belleville attempted to inter Plaintiffs' daughters' vault/casket anyway, leading Plaintiff Reid and other family members to observe the casket of their loved one left 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 had sustained damage. Since Belleville did not have proper staffing or equipment at the cemetery to inter the Plaintiffs' daughter, the vault/casket was moved to a shed. *Deposition of Robert Bethea, III*, at pp. 45-46; *See Exhibit C to Plaintiffs' Memorandum in Opposition to Defendant Belleville Memorial Gardens of SC, Inc.'s Motion to Dismiss/Compel Arbitration.* Eventually, later that night, the casket was taken back to the funeral home. Plaintiffs' daughter was ultimately interred the following day.

STATEMENT OF THE CASE

The Plaintiffs brought this action against the Defendants arising out of the events described above 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; (6) Negligent Misrepresentation; (7) Outrage/Intentional Infliction of Emotional Distress; and (8) Civil Conspiracy. See *Complaint.*

Belleville filed an Answer on August 13, 2019, essentially denying the allegations of the Complaint and asserting numerous affirmative defenses.[1] See *Answer of Belleville Memorial Gardens of SC, Inc. d/b/a Belleville Memorial Gardens, LLC.* Additionally, Belleville served written discovery requests on Plaintiffs on September 11, 2019. See *Belleville's Interrogatories to the Plaintiffs; Belleville's R4P to the Plaintiffs.* Plaintiffs served responses to these discovery requests on January 20, 2020. See *Plaintiffs' Answers to Belleville's Interrogatories; Plaintiff's Responses to Belleville's Request for Production.*

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. The deposition of Defendant Bethea was taken on August 10, 2020.

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[1] It is important to note that Belleville failed to reserve its right to compel arbitration in its Answer.

Over a year after originally answering the Complaint, Belleville filed a Motion to Dismiss/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. *See Belleville's Motion to Dismiss and Compel Arbitration.* The Circuit Court denied Belleville's motion and from that Order, Belleville appeals.

ARGUMENT

1. Standard of Review

S.C. Code Ann. § 15-48-200(a) states that an appeal may be taken from an order denying an application to compel arbitration. "Arbitrability determinations are subject to de novo review." *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014); *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); *Rhodes*, 374 S.C. at 125-26, 647 S.E.2d at 250-51. The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration. *See Dean*, 408 S.C. at 379, 759 S.E.2d at 731 (citations omitted); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001).

Rowland would also note that this Court can affirm the Trial Court's Order based on any findings in the record. Rule 220(c), *SCRAP.*

2. The Trial Court Properly Found the Purported Arbitration Provision in the Interment Agreement is Unconscionable Under South Carolina Law and is, therefore, Unenforceable.

Belleville's first argument is that Trial Court's determination that the Interment Agreement is unconscionable is not supported by any evidence in the Record. That interpretation of the evidence is disingenuous at best. As the Trial Court properly concluded, Rowland, the mother of the deceased, was in a vulnerable position when dealing with Belleville. The transaction occurred only a few days after Rowland's daughter's death and to

suggest she was not in a vulnerable position contradicts not only the facts in evidence but also common sense and human decency. As to the assertion that the purported arbitration provision was not small and was obvious, a mere glance at the actual portion of the Interment Agreement (*infra* Statement of Facts) indicates otherwise. As such, Belleville's argument that no facts support the Trial Court's conclusion is erroneous.

Even if the Trial Court erred in determining that the Interment Agreement is unconscionable as a whole, which Rowland contends it is, it is obvious that the purported arbitration provision clearly is unconscionable. "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007) (citing S.C. Code Ann. § 36-2-302(1)). "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, 644 S.E.2d at 668 (**emphasis** added). Here, the purported arbitration provision is unconscionable because Rowland lacked a meaningful choice in entering the Interment Agreement and because the arbitration provision contains oppressive, one-sided terms.

a. There Was an Absence of Meaningful Choice

At the time Rowland entered the Interment Agreement, she lacked a meaningful choice regarding the arbitration clause. "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, 644 S.E.2d at 669. The South Carolina Supreme Court has instructed

courts to consider the following factors when evaluating whether a party lacked a meaningful choice in agreeing to a purported arbitration provision:

> (1) the nature of the injuries suffered by the plaintiff;
>
> (2) whether the plaintiff is a substantial business concern;
>
> (3) the relative disparity in the parties' bargaining power;
>
> (4) the parties' relative sophistication;
>
> (5) whether there is an element of surprise in the inclusion of the challenged clause; and
>
> (6) the conspicuousness of the clause.

Id. Here, the above factors weigh heavily in favor of the finding that Rowland lacked a meaningful choice in purportedly agreeing to the arbitration provision. First, the injuries alleged in this case encompass personal injuries, which are non-commercial in nature. Specifically, Rowland alleges emotional distress resulting from the negligence, fraudulent acts and outrageous conduct of Belleville in carrying out the burial of her 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 Fin. Corp.*, 373 S.C. 144, 150, 644 S.E.2d, 705, 708 (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 cases support the conclusion 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, 689 S.E.2d 602 (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.").

Additionally, it is noteworthy that the South Carolina Uniform Arbitration Act 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, 759 S.E.2d 727, 732 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). The personal injury exclusion under the SCUAA is further discussed *supra* § 4 of this Brief.

Second, Rowland was not a substantial business concern to Belleville, as Rowland's purchase for burial services was not a significant or repeated purchase to Belleville. There is no evidence Rowland had personally ever done business with Belleville before. In fact, 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. *Deposition of LaDonna Rowland* at pp. 27-28.

Third, there was a clear disparity in bargaining power between Rowland and Belleville in entering the Interment Agreement. The Interment Agreement was a typical adhesion contract in that it was a "standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson* at 26-27, 644 S.E.2d at 669. Furthermore, Rowland was an unsophisticated party compared to Belleville, as there is no evidence she

ever personally entered an agreement like the one at issue. Compounding those obvious inequities is the fact that Rowland was forced to enter the Interment Agreement only days after losing her daughter. Rowland, grieve-stricken due to the sudden and unexpected death of her daughter, was more vulnerable than a typical contracting party.[2] This vulnerability contributed to her lack of a meaningful choice in entering the Interment Agreement. In fact, when asked why she chose Defendant Bethea to serve as the funeral director for her daughter's funeral, Plaintiff Rowland testified that she was so upset from her daughter's death that she "chose the first person [she could] think of." *Deposition of LaDonna Rowland* at pp. 22-23. It was this same sense of urgency that ultimately led her to the enter the Interment Agreement on Belleville's terms without the opportunity to consult an attorney. Ultimately, the circumstances in which Rowland entered the Interment Agreement were such that she had no meaningful bargaining power and was forced to enter the Interment Agreement in order to ensure the timely burial of her beloved daughter.

b. Oppressive and One-sided Terms

The purported arbitration provision in the Interment Agreement is oppressive and one-sided in that the provision is so vague and broad that it purports to bind Rowland to arbitration for "**ANY**" claim she may have against Belleville, even those unrelated to the Agreement itself. *See Interment Agreement.* The provision appears to bar any statutory remedies Rowland may have. Meanwhile, the provision, by its plain language, only applies to claims of Rowland, not to claims Belleville may have against Rowland. Thus, while the arbitration provision requires Rowland to waive her right to a jury trial and bind herself to

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[2] By comparison to similarly positioned parties in other reported cases, Rowland is the extreme example of a "vulnerable" party.

arbitrate all claims, Belleville did not give up any of its judicial remedies. The fact that Belleville seemingly reserved **all** judicial remedies it might have while limiting **all** judicial and statutory remedies Plaintiffs might have is oppressive and one-sided. *See Simpson*, at 32, 644 S.E.2d at 672 (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).

Therefore, the Trial Court was correct in determining that the Interment Agreement was unconscionable. Alternatively, even if the Interment Agreement as a whole is not unconscionable, the purported Arbitration Provision most certainly is unconscionable.

3. The Trial Court Properly Found the Interment Agreement's Purported Arbitration Provision Fails to Comply with the SCUAA's Notice Provisions and is, therefore, Unenforceable.

Belleville's next argument is that despite the arbitration provision's technical lackings, it should still be enforced against Rowland based on her actual notice of the arbitration clause. *See Initial Brief of Appellant* at pp. 11-14. The South Carolina Uniform Arbitration Act ("SCUAA") provides as follows:

> 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, 553 S.E.2d 110, 114 (2001); *see also Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 476 S.E.2d 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).

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. The arbitration provision blended-in with the rest of the Interment Agreement, which contained a combination of tables, check boxes and other fine print. *See Interment Agreement.* Given that the arbitration provision was inconspicuous and did not comply with the SCUAA, it did not properly notify Rowland of the significance of the provision or the constitutional rights she was purportedly agreeing to forego. *See Simpson*, 323 S.C. at 27-28, 644 S.E.2d at 670 (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). Thus, because the arbitration clause fails to meet the statutory notice rules under the SCUAA, and because South Carolina courts have required strict compliance with the SCUAA to form an enforceable arbitration clause, the Trial Court did not err in denying Belleville's motion to compel arbitration.

Belleville appears to concede that its arbitration clause was not in compliance with the SCUAA. Instead, Belleville contends that Rowland should not be "let off the hook" because of the technical failings of its purported arbitration provision. Belleville's lone argument in support of this position is that Rowland had actual notice of the arbitration provision and that trumps that provision's obvious failings. The Trial Court noted that no case can be found that supports that contention and Belleville admits as much in its Brief. *See Initial Brief of Appellant* at pp. 13-14. Nevertheless, Belleville argues the arbitration provision should not

be invalidated because Plaintiff Rowland had "actual notice" of the provision, and now must show "'actual prejudice' before a waiver is found." *See Initial Brief of Appellant* at p. 13. In support of this "notice-prejudice rule," Belleville cites to *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 831 S.E.2d 406 (2019) and *Derrick v. Moore*, 426 S.C. 531, 828 S.E.2d 68 (Ct. App. 2019); however, these cases are inapplicable to the case at bar. Most notably, *Neumayer* did not apply the notice-prejudice rule in the context of the SCUAA and, furthermore, the reasons for applying the notice-prejudice rule in that case—protecting insurance benefits to innocent third party claimants—are not present in this case. *See Neumayer*, at 272, 831 S.E.2d at 41. As for *Derrick*, that case involved an issue of actual prejudice in the context of waiver of an otherwise enforceable arbitration clause; *Derrick* did not consider a prejudice standard in the context of an arbitration clause which failed to meet the statutory requirements of the SCUAA.

Belleville has not, and cannot, cite a single case applying the "notice-prejudice rule" in the context of an arbitration provision failing to meet the requirements of S.C. Code Ann. § 15-48-10(a). To the contrary, one of the cases Belleville does cite, *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001), strongly indicates that a party's "actual notice" of an arbitration provision is immaterial to its enforceability when the requirements of S.C. Code Ann. § 15-48-10(a) are not met. *Zabinski* involved a dispute arising from a partnership agreement that contained an arbitration provision that did not comply with S.C. Code Ann. § 15-48-10(a). Ironically, the party in *Zabinski* attempting to avoid arbitration was the same party whose attorney drafted the defective arbitration clause. *Id.* at 586, 553 S.E.2d at 114. There is no indication from the case that the party seeking to avoid the arbitration agreement did not have actual notice of the provision, especially since his own attorney prepared the

provision. Notwithstanding this fact, the 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, 553 S.E.2d at 117. While the Court went on to hold that the arbitration provision was still enforceable because the contract involved interstate commerce, and thus, was subject to the FAA, *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 the technical notice requirements of the S.C. Code Ann. § 15-48-10(a) and is not subject to the FAA. Id.

For the foregoing reasons, the Trial Court correctly determined that the Interment Agreement's purported arbitration provision's technical lackings were not excused by Rowland's tacit understanding that the clause was inserted into an unconscionable adhesion contract forced upon her at a terrible time in her life. As such, the determination of the Trial Court on this issue should be affirmed on appeal.

4. The Trial Court Properly Found the Purported Arbitration Provision is Unenforceable Because Rowland is Bringing Personal Injury Claims, Which are Excluded Under the SCUAA.

As previously discussed above, the South Carolina Uniform Arbitration Act 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, 759 S.E.2d 727, 732 n.6 (2014). Since Rowland's claims in this action encompass personal injuries, arbitration is not permitted.

Belleville contends that the Trial Court erred in finding Respondent's claims fall within the "personal injury" exclusion of the South Carolina Uniform Arbitration Act, because

if the exclusion includes claims of physical and non-physical injuries, "then no cause of action is arbitrable under SCUAA." *See Initial Brief of Appellant* at p. 15. Belleville goes on to argue that such a result "would be absurd and defeat the plain legislative intention of facilitating the arbitration of disputes." *Id.* In South Carolina, it is an axiomatic principle of statutory construction that "[w]here [a] statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *In Re Vincent J.*, 333 S.C. 233, 509 S.E.2d 262 (1998)). This is because "what a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). When plain and unambiguous, statutory terms "must be applied according to their literal meaning." *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003).

The SCUAA personal injury exclusion states: "This chapter however shall not apply to: . . . (4) Any claim arising out of personal injury, based on contract or tort . . . ." S.C. Code Ann. § 15-48-10(b)(4). By its plain language, the SCUAA does not apply to any personal injury claim, so long as that claim arises under contract or tort. Had the General Assembly intended for personal injury claims emanating from non-physical injury to fall within the realm of arbitrable claims, it was free to use the term "physical personal injury" when drafting the SCUAA exclusions. Indeed, the General Assembly demonstrated its ability to provide limiting principles to the personal injury exception, as it limited the exception to claims arising from "contract or tort." Instead, the General Assembly's use of the broader term "personal injury," when given its plain and unambiguous meaning, includes any claim of injury, physical or

otherwise, to the person. And given such plain and unambiguous meaning, this Court need not, and cannot, resort to the legislative intent analysis suggested by Belleville.

Additionally, the "absurd" result reached by Belleville—i.e., that if there is no physical injury limitation under the personal injury exception, then no claim is arbitrable—is unfounded. As just one example refuting that contention, this Court has held that the SCUAA is applicable to claims arising from marriage between spouses. *See e.g., Swentor v. Swentor*, 336 S.C. 472, 477-78, 520 S.E.2d 330, 333 (Ct. App. 1999) (finding "[b]y its terms . . . the Arbitration Act governs agreements to arbitrate equitable apportionment claims or other claims arising from a marriage, given that such agreements are not excluded by the Arbitration Act.").

Next, Belleville appears to argue that the Trial Court's reading of the personal injury exclusion is too expansive, and that it was error to interpret the exception "farther than it was intended to apply." *See Initial Brief of Appellant* at pp. 15. As argued above, the Trial Court properly applied the plain, unambiguous meaning of the term "personal injury." The Trial Court cannot, and did not, deviate from this plain meaning. Moreover, even if this Court were to consider Belleville's legislative intent argument, Belleville's brief is devoid of support (other than its unfounded, "absurd" result) for its argument that the legislative intent behind the personal injury exception was anything other than the plain meaning applied by the Trial Court.

Finally, Belleville argues that *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014) and *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) support its contention that the personal injury exception does not apply to non-physical personal injury, because the personal injuries in those cases were physical in nature. Belleville further

argues that the absence of a case applying the personal injury exclusion outside of cases of physical injury is evidence of the exclusion not applying to non-physical personal injury. This argument is unpersuasive, however, because the lack of non-physical personal injuries in those cases does not preclude non-physical personal injuries from falling within the personal injury exclusion. The courts in *Dean* and *Timms* did not hold that non-physical injuries fall outside of the personal injury exclusion. Moreover, the absence of case law explicitly applying the personal injury exclusion to non-physical injury does not prove that non-physical injuries fall outside of the personal injury exclusion. Indeed, just as there is no case law explicitly applying the personal injury exclusion to non-physical injury, there is also no case law limiting the exclusion to physical personal injuries.

Therefore, the Trial Court did not err in applying SCUAA's personal injury exception to Respondent's claims, as the Trial Court applied the plain and unambiguous meaning of the statute, which includes any personal injury claims.

5. The Trial Court Properly Found that Belleville Waived Its Right to Compel Arbitration in this Matter.

Belleville contends that it did not waive its right to compel arbitration against Rowland. *See Initial Brief of Appellant* at pp. 16-19. The right to arbitration can be waived if an undue burden is caused by the delay in demanding arbitration. *See Sentry Eng'g. Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985). The question as to what constitutes waiver depends on the facts of each case. *See Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 417 S.E.2d 622 (Ct. App. 1992). "Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). "Waiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of a contract, but attempts

to meet all issues raised in litigation between it and another party to the agreement." Sentry Eng'g, 287 S.C. at 352, 338 S.E.2d at 634 (citing Germany v. River Terminal Ry. Co., 477 F.2d 546, 547 (6th Cir. 1973)).

In this case, there is no doubt that Belleville waived its right to compel arbitration. As reflected in Belleville's Answer, it failed to specifically reserve its right to compel arbitration or otherwise move to compel arbitration at the outset. See *Answer of Belleville Memorial Gardens of SC, Inc. d/b/a Belleville Memorial Gardens, LLC.* In Sentry, the Court noted that "at all times [Sentry] sought to enforce its right to arbitrate under the contract; it is clear it had no intention to waive the right, and no waiver is shown." 287 S.C. at 351, 538 S.E.2d at 634. That is not the case here as Belleville (1) failed to reserve its right to arbitrate, and (2) waited ***thirteen (13) months*** after originally answering the complaint to move to compel arbitration. During that interval, as discussed previously in this Brief, Belleville served discovery requests on Rowland and the parties participated in numerous depositions. Obviously, the time, expense and attorneys' fees expended by Rowland in participating in those activities over the course of 13 months prejudiced Rowland substantially.

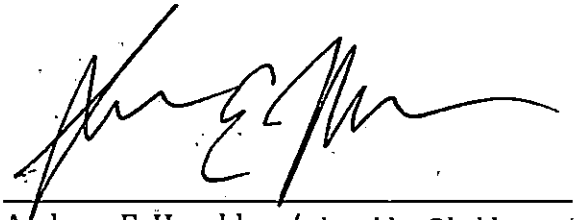
In Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999), the Trial Court found that the Plaintiff's demand for arbitration would have created an undue burden for the defendant because the defendants were forced to answer discovery, pay attorney fees, and participate in numerous hearings. The Court of Appeals, in affirming the determination of the Trial Court, held that the Hortons were prejudiced due to this delay and that arbitration, after such lengthy discovery, permitted the Plaintiff to "test the water before taking the swim." 336 S.C. at 666, 521 S.E.2d at 753

Applying the rationale from *Sentry* and *Liberty*, the Trial Court properly held that Belleville waived its right to compel arbitration of Rowland's claims. Belleville failed to timely assert its right to arbitration, or otherwise inform Rowland that it was reserving that right, and engaged in discovery primarily initiated by Belleville. One of Belleville's primary arguments against waiver is that it participated in discovery in an attempt to determine whether Rowland appreciated the purported arbitration provision in the Interment Agreement—this is a perfect example of a party impermissibly "testing the waters before taking the swim," as was cautioned against in *Liberty*. *See Initial Brief of Appellant* at p. 17. Belleville appears to argue that it needed to undertake discovery to determine whether its arbitration clause was enforceable and, thus, it has not waived its right to arbitrate. *See Initial Brief of Appellant* at p. 17. However, Belleville's discovery is not so limited, as the vast majority of its interrogatories, requests for production, and questions posed at Respondents' depositions went to the facts and substantive claims of Respondents. *See* Respondents' Answers to Interrogatories, Responses to Requests for Production, and Deposition transcripts of Respondents.

As such, the Trial Court properly considered all important factors in arriving at the determination that Belleville waived its right to arbitration. *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013).

CONCLUSION

Therefore, for the above stated reasons, the Trial Court did not err in denying Appellant Belleville's motion to compel arbitration, and Respondents respectfully asks this honorable Court to affirm the decision of the Trial Court.



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June 22, 2021

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.

PROOF OF SERVICE AS TO THE INITIAL BRIEF OF RESPONDENT

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rules 208(a)(2) and 262(b), *SCACR*, I have served the ***Initial Brief of Respondent*** in this matter on all counsel of record by mailing a copy, United States Mail, postage prepaid, on June 22, 2021, to the following addresses:

Stephen D. Porter
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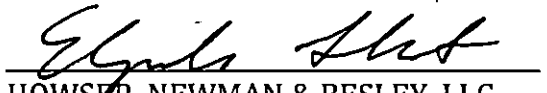

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June 22, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Reid & Rowland v. Bethea, et al.*
C/A No.: 2019-CP-38-786
Appellate Case No.: 2021-336

Dear Ms. Kitchings:

Enclosed for filing are an original and two (2) copies each of the following documents in the above-captioned action:

- *Initial Brief of Respondent*;
- *Proof of Service* with respect to the Initial Brief;
- *Respondent's Designation of Matter to be Included in the Record on Appeal*; and
- *Proof of Service* with respect to the Designation.

Please return the filed copies via the enclosed envelope.

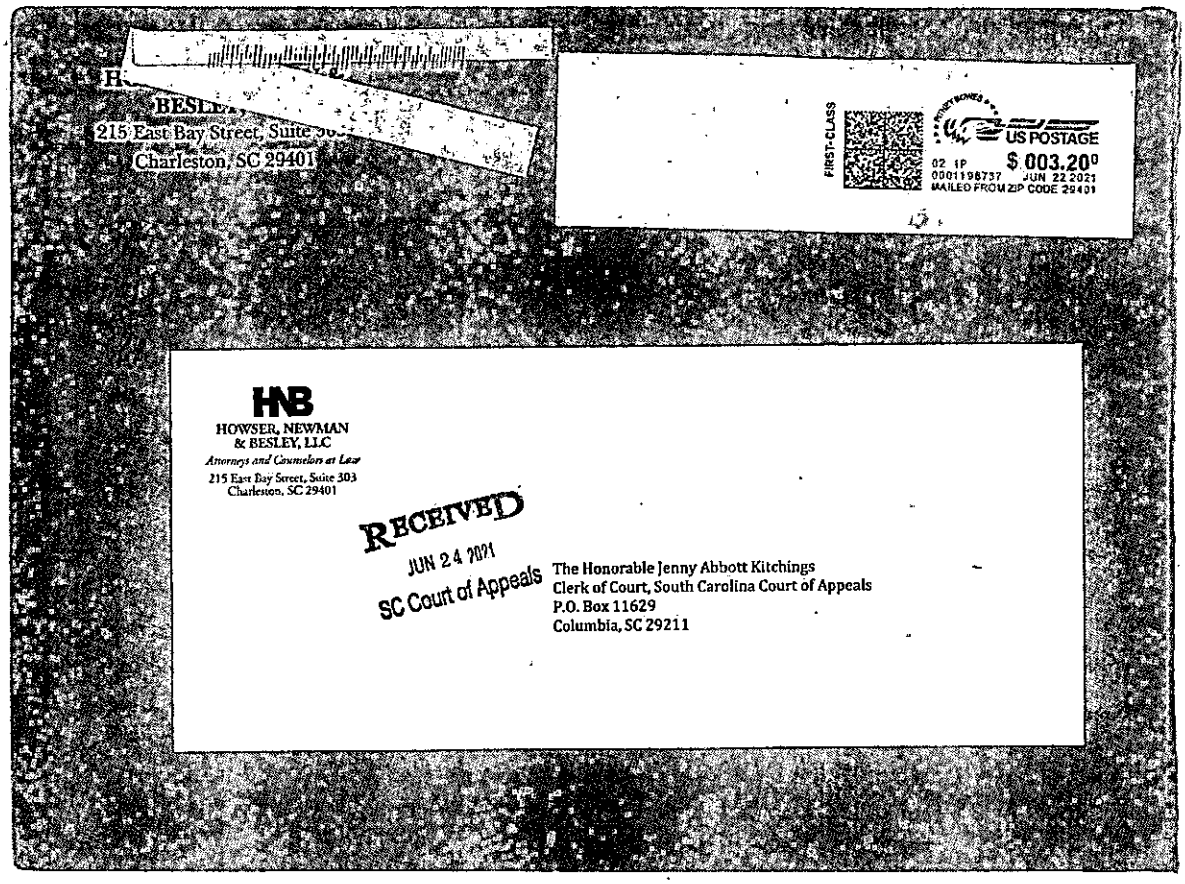
By copy of this letter, I am serving all parties to the appeal with copies of each of the above-described documents via their attorneys of record. Thank you for your assistance in this matter and please do not hesitate to contact me with any questions or concerns.

Regards,

Andrew E. Haselden

AEH/elh

cc: Stephen D. Porter, Esquire
Kevin Maroney, Esquire



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SC Court of Appeals

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