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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.

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. Respondent's brief does not comply with Rule 208(b), SCACR.

Respondent's brief contains a "Statement of Facts" section that is not delineated among Rule 208(b)(1)(A)-(F). Respondent's Brief, pp. 2-4. Respondent included this section despite Rule 208(b)(2), which requires Respondent's brief to conform to the requirements of Rule 208(b)(1)(A)-(F). Rule 208(b)(2), SCACR. The "Statement of Facts" section also includes contested matters that have not been adjudicated by a trier of fact. Rule 208(b)(1)(C), SCACR ("The statement [of the case] shall not contain contested matters…."). Belleville will file a Motion to Strike this portion of Respondent's brief.

II. Respondent mischaracterizes or misunderstands Appellant's argument. Appellant argued that the internment contract and the arbitral provision within it is conscionable.

Contrary to Respondent's contention, Belleville did not argue that the lower court's determination was unsupported by any evidence in the Record. Respondent's Brief, p. 7. Belleville did point out the dearth of evidentiary support for several statements made by the lower court in its order. Belleville's Brief, pp. 8-10. But Belleville ultimately argued that there is no lack of mutuality of remedy, so the internment contract (which Belleville acknowledges is an adhesion contract) should not be considered oppressive and, therefore, should not be considered unconscionable. Id., pp. 9-10 (citing One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 65, 791 S.E.2d 286, 294 (2016) (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)). Belleville's first issue statement makes this clear. Belleville's Brief, p. 5. Belleville focused on the lack of mutuality of remedy because this is the ultimate basis

of the lower court's order. Belleville's Brief, pp. 9-10 (explaining that adhesion contracts are not per se unconscionable and that courts should focus on whether the arbitration provision seeks to achieve an unbiased decision by a neutral decision maker).

Respondent never really addresses Belleville's argument on this point, let alone the case law Belleville cited in support. Respondent's Brief, pp. 11-12. In what must have been prompted by Respondent's recognition of the persuasiveness of Belleville's argument, Respondent makes one counterfactual statement: "The provision appears to bar any statutory remedies Rowland may have." Id., p. 11. Respondent cannot legitimately believe this statement: "**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) (underlining added). No one can construe this language to exclude Respondent's statutory remedies from the arbitral forum. No one other than Respondent even attempts to do so. Belleville's Brief, p. 10; Order, pp. 9-10.

Although unnecessary to resolve this appeal, Belleville is compelled to point out a few more of Respondent's mischaracterizations. Respondent states: "Rowland, the mother of the deceased, was in a vulnerable position when dealing with Belleville…[because] [t]he transaction took place 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." Respondent's Brief, pp. 7-8. Despite the self-righteous indignation and vitriol, Respondent does not reference any "facts in evidence", such as—for example—Respondent's

testimony. Respondent's Brief, pp. 7-8. That is what Belleville pointed out in its brief. Belleville's Brief, pp. 8-9. And though appeals to "common sense" and "human decency" might have some rhetorical effect somewhere else, such entreaties are insufficient to carry Respondent's burden of proof in a court of law. See Young v. S.C. Dep't of Health & Env't Control, 383 S.C. 452, 459, 680 S.E.2d 784, 788 (Ct. App. 2009) (citing Hoffman v. Greenville Cty., 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963) ("The burden of proof is upon the party who by the pleadings has the affirmative on the issue.")).

Finally, Respondent again makes a counterfactual statement: "[A] mere glance at the actual portion of the Internment Agreement indicates [it was small and was not obvious]." Respondent's Brief, p. 8. Belleville encourages this Court to review the arbitration provision and, notwithstanding the graininess and blurriness of the *copy*, consider what Belleville actually wrote in its brief: "[T]he 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." Belleville's Brief, p. 9. This Court will agree that the font is not small and is bigger than the font in other parts of the internment contract and that the font is bolded and in all capital letters. Mere counterfactual declarations do not change the facts.

III. Respondent never explains why she needed underlining to have notice of something that she was already aware of.

Respondent states that Belleville "*appears* to concede that its arbitration clause was not in compliance with the SCUAA". Respondent's Brief, p. 13 (emphasis added). There is no uncertainty, however. Belleville *expressly* argued this in front of the lower court and in the Brief submitted to this Court. Belleville's Brief, p. 13. Respondent also argues that the cases relied upon by Belleville do not directly support its argument. Respondent's Brief, pp. 13-15. Belleville never

claimed they did and, in fact, made clear that they did not. Belleville's Brief, p. 13. Whereas Belleville acknowledged that no case directly supports its contention, Respondent does not expressly acknowledge that no case directly supports its counter argument, either. Respondent's Brief, pp. 12-15.

Respondent insinuates that Belleville did not cite Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) because "it 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." Respondent's Brief, p. 14. But Respondent does not even attempt to counter Belleville's argument against reading Zabinski in this way. Belleville's Brief, p. 14 (the party in Zabinski only had constructive notice, not actual notice).

Finally, Respondent had actual notice of the meaning of the arbitration provision and, therefore, understood that all her claims would be resolved in the arbitral forum. Belleville's Brief, pp. 12-13. Respondent never attempts to explain why she needed underlining to have notice of something that she was already aware of. Respondent's Brief, pp. 12-15. Instead, Respondent states that "the Internment Agreement's purported arbitration provision's technical lackings [sic] were not excused by [Respondent's] tacit understanding that the clause was inserted into an unconscionable adhesion contract forced upon her at a terrible time in her life." Id., p. 15. This counterfactual jeremiad is contradicted by Respondent herself. The arbitration clause was not "inserted". It was part of a "standard form contract offered on a take-it-or-leave-it basis…." Id., p. 10 (internal citation and quotation marks omitted). And Respondent's narrative of events does not change the fact that she knew and understood what she was signing when she signed it, notwithstanding an absence of underlining.

IV. **Respondent cites one case only and that case is inapplicable**.

Respondent cites one case in support of her argument opposing Belleville's position on the applicability of SCUAA's personal injury claim exception. Respondent's Brief, p. 17. Respondent proclaims that Swentor v. Swentor shows that the personal injury exception does not preclude arbitration in all cases if the exception is read to include both physical and nonphysical damages. Id. Per Respondent, this is because Swentor v. Swentor "held that the SCUAA is applicable to claims arising from marriage between spouses." Respondent's Brief, p. 17 (citing Swentor v. Swentor, 336 S.C. 472, 477-78, 520 S.E.2d 330, 333 (Ct. App. 1999)).

Respondent misunderstands what Swentor decided. Swentor states that SCUAA "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." Swentor v. Swentor, 336 S.C. 472, 477–78, 520 S.E.2d 330, 333 (emphasis added). SCUAA only has exceptions for arbitration agreements or provisions that preclude the applicability of SCUAA, arbitration agreements between employers and employees in certain circumstances, and pre-agreements between a member of the public and a professional, such as a lawyer or a doctor. Id., 336 S.C. 472, 477, 520 S.E.2d 330, 333 (citing S.C. Code Ann. §15-48-10(b)(1)-(3)). Because Swentor involved an agreement to arbitrate marital property issues, and such an agreement is not one of the types of agreements that SCUAA excludes, SCUAA governed the Swentor's agreement. Id., 336 S.C. 472, 481, 520 S.E.2d 330, 335 ("In this case, the parties simply agreed to submit all property issues to arbitration."). Swentor did not involve personal injury claims brought in circuit court after signing an internment contract that contains an arbitration provision. Swentor did not involve claims involving physical or non-physical injuries to the person. Id. Swentor is inapplicable to this case.

Finally, Respondent argues that "the absence of cases explicitly applying the personal injury exclusion to non-physical injury does not prove that non-physical injuries fall outside of the personal injury exclusion." Respondent's Brief, p. 18. Belleville never made that argument. Belleville's Brief, pp. 14-16. Belleville argued that the case law it cites "*indicate[s]* that section 15-48-10(b)(4) applies to claims that seek damages for physical injuries." Id., p. 16 (emphasis and alteration added).

Belleville does agree with Respondent on one thing, however. "[T]here is no case law explicitly applying the personal injury exclusion to non-physical injury, [and] there is [] no case law limiting the exclusion to physical personal injuries." Respondent's Brief, p. 18. That is one reason why Belleville has appealed this case to this Court.

V. There is no set rule that determines what constitutes a waiver of the right to arbitrate; the question is answered on the facts of each case.

Respondent suggests that Belleville had to "reserve" its right to arbitrate in its Answer to Respondent's Complaint or otherwise move "at the outset" to compel arbitration. Respondent's Brief, p. 19. But Respondent does not cite any cases that contain this proposition as a holding. Id. And the governing statute and case law indicate the opposite. Section 15-48-20 does not contain a time limit. S.C. Code Ann. §15-48-20. And a waiver of the right to arbitrate depends on the facts of each case, not a predetermined time limit. Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 258, 743 S.E.2d 868, 872 (Ct. App. 2013) (citation omitted). In fact, there is no set rule that determines what constitutes a waiver. Id. Instead, the length of time between the commencement of the action and the motion to compel arbitration is just one of the factors a Court considers when determining the issue. Id. (citation omitted). Belleville discusses each factor in its brief. Belleville's Brief, pp. 16-19.

Respondent relies on Liberty Builders, Inc. v. Horton to support the existence of a waiver, but that case is distinguishable. The party seeking to compel arbitration had litigated the case and engaged in "procedural maneuvering" for two and a half years before making its motion. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 667, 521 S.E.2d 749, 754 (Ct. App. 1999). And the parties had "[o]n approximately forty occasions…over the years [] sought assistance from the Court including but not limited to motions to amend, compel, dismiss, add parties and to restore under SCRCP 40(j)." Id., 336 S.C. 658, 666, 521 S.E.2d 749, 753. The Court found that "[t]he delays in resolving these issues and the attorney fees incurred by [the party opposing arbitration] during this lengthy litigation were sufficient to support the circuit judge's finding of prejudice." Id. This "delay in demanding arbitration until the litigation was nearly complete not only prejudiced…but enabled [the movant] to 'test the water before taking the swim.'" Id., 336 S.C. 658, 666, 521 S.E.2d 749, 753–54 (citation omitted). The movant in Liberty could have moved to compel arbitration right away too. Id., 336 S.C. 658, 667, 521 S.E.2d 749, 754. In this case, Belleville did not avail itself of the Court prior to the motion to compel, did not engage in extensive discovery, and did not wait until litigation was nearly complete before seeking to compel arbitration. Belleville's Brief, pp. 16-19. Belleville could not move to compel arbitration right away, either. Id. Liberty does not apply here.

Respondent suggests that Belleville should have informed her that it wanted to reserve its right to arbitrate. Respondent's Brief, p. 20. This assertion is not supported by case law. Id. And in our adversarial system, such a pronouncement seems naïve. Respondent, relying on the Sentry case, also suggests that addressing all issues in the Complaint should constitute a waiver. Id., pp. 19-20 (citing Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985)). Respondent misunderstands the quote from Sentry. It should be read this

way: "[W]aiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of a contract, but [may be inferred from] attempts to meet all issues raised in litigation between it and another party to the agreement." Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 351, 338 S.E.2d 631, 634. And, again, there is no set rule that determines what constitutes a waiver of the right to arbitrate. Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 258, 743 S.E.2d 868, 872.

Finally, Belleville engaged in, at most, four discovery actions. Belleville's Brief, p. 17. This level of activity is not "a perfect example of a party impermissibly 'testing the waters before taking a swim,' as was cautioned in Liberty." Respondent's Brief, p. 20. Forty instances of asking a Court for assistance do not compare to, at most, two depositions, one set of Requests for Production, and one set of Interrogatories, not one of which involved a Court. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 666, 521 S.E.2d 749, 753; Belleville's Brief, p. 17. If Liberty involved a party wading into the shallows, Belleville did no more than dip its toe in the water, which it was compelled to do under the unique facts in this case. Belleville's Brief, pp. 16-19

CONCLUSION

Respondent's efforts have helped demonstrate the errors of the lower court. The internment contract and the arbitration provision within it are not unconscionable. Respondent's actual notice renders the lack of underlining in the arbitration provision irrelevant. The personal injury exception does not bar application of South Carolina's Arbitration Act. And Belleville did not waive its right to arbitrate. This Court should revere the lower court's ruling, and order Respondent to proceed to the arbitral forum.

Respectfully submitted,

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Of whom LaDonna Rowland is.....Respondent,

v.

Robert Bethea, III d/b/a Bethea's Funeral Home, Bethea Funeral Home, LLC, d/b/a Bethea's Funeral Homes, Belleville Memorial Gardens of SC, Inc. d/b/a Belleville Memorial Gardens, LLC, Crestlawn Memorial Cemetery of SC, Inc. d/b/a Crestlawn Memorial Gardens, and Crestlawn Memorial Gardens, LLC,

Of whom Belleville Memorial Gardens of SC, Inc. d/b/a Belleville Memorial Gardens, LLC is.....Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant by depositing copies of it in the United States Mail, postage prepaid, on July 2, 2021, addressed to attorneys of record, Jeffrey Ian Silverberg (P.O. Box 12159, Columbia, SC 29201), Benjamin D. McCoy, Andrew E. Haselden, Andrew L. Hethington (Howser, Newman & Besley, LLC, 215 East Bay Street, Suite 303, Charleston, SC 29401), Jerry L. Finney (The Finney Law Firm, Inc., 2117 Park Street, Columbia, SC 29201), as well as Luther J. Battiste, III (Johnson, Toal & Battiste, PA, 1615 Barnwell Street

& P.O. Box 1431, Columbia, SC 29202). Mr. Battiste does not represent parties involved in the Appeal. Copies were then emailed to LaDonna Rowland's attorneys, per the South Carolina Supreme Court's Amended March 4, 2021 Order.

July 2, 2021
Columbia, SC

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