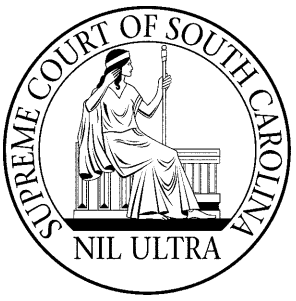

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
October 3, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth B. Jenkins, Respondent,

v.

Benjamin Scott Few and Few Farms, Inc., Petitioners.

Appellate Case No. 2011-188648

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 27174
Heard September 20, 2012 – Filed October 3, 2012

DISMISSED AS IMPROVIDENTLY GRANTED

Robert C. Childs, III, and J. Falkner Wilkes, both of Greenville, for Petitioners.

Fred W. Suggs, III, of Roe Cassidy Coates and Price, of Greenville, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina Park Associates, LLC, and Republic-Charleston, LLC, for itself and on behalf of Carolina Park Associates, LLC, Appellants,

v.

Benedict T. Marino, Douglas H. Dittrick, John Chalsty, MDC of Charleston, LLC, and CDM of Charleston, LLC, Respondents.

Appellate Case No. 2011-193286

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 27175
Heard May 23, 2012 – Filed October 3, 2012

AFFIRMED

Richard S. Rosen, Elizabeth Janelle Palmer, and Alice F. Paylor, all of Rosen Rosen & Hagood, of Charleston, for Appellants.

Carl Everette Pierce, II and Joseph C. Wilson, IV, both of Pierce Herns Sloan & McLeod, of Charleston, Molly Hughes Cherry, of Nexsen Pruet, of Charleston, and George Trenholm Walker, of Pratt-Thomas Walker, of Charleston, for Respondents .

ACTING CHIEF JUSTICE PLEICONES: Carolina Park Associates, LLC, lost its interest in a parcel of real property through foreclosure. At the foreclosure sale, an affiliate of one of Carolina Park Associates' members purchased the property. Appellant Republic-Charleston, the managing member of Carolina Park Associates, contends that the circuit court erred when it dismissed claims seeking to impose a constructive trust in the property and when it cancelled a lis pendens filed by Appellants.[1] We affirm.

FACTS

In 1987, CDM of Charleston, LLC (CDM) purchased Carolina Park, a large mixed-use real estate development in Mt. Pleasant, South Carolina (the Property). CDM is owned by trusts and partnerships formed by the individual Respondents, Benedict Marino, Douglas Dittrick, and John Chalsty. MDC of Charleston, LLC (MDC), also owned by trusts and partnerships affiliated with the individual Respondents, together with Appellant Republic-Charleston, LLC (Republic), formed Carolina Park Associates, LLC (Carolina Park). Each held a 50 percent interest, with Republic as the managing member. Carolina Park's sole purpose was to purchase and develop the Property. Carolina Park purchased the Property from CDM for $3 million cash and a $22 million promissory note secured by a second mortgage on the Property. A first mortgage was held by NBSC and later sold to Palmetto Debt Holding Group, LLC (Palmetto Debt).

Carolina Park defaulted on its mortgages, and Palmetto Debt initiated foreclosure proceedings in 2009. In March 2010, Carolina Park and its lenders, Palmetto Debt and CDM, entered a foreclosure consent order, which recognized CDM's right to credit bid[2] the amount of its second mortgage on the Property at the foreclosure sale.

At some point, CDM located an entity interested in participating in the development of the Property, Grove Land Investors, LLC (Grove Land). Grove Land agreed to contribute $32 million to CDM in exchange for being admitted as

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[1] Additional allegations, such as breach of contract, are not involved in this appeal.
[2] A credit bid permits a bidder who holds a mortgage on the property to substitute the value of the mortgage in place of cash at the foreclosure sale.

controlling majority member, conditioned on CDM's ability to acquire the Property through the foreclosure.

In July 2010, the foreclosure sale took place. CDM was the only bidder. It purchased the Property for $50 million, paying $28 million to redeem the Palmetto Debt mortgage and credit bidding its $22 million second mortgage. The foreclosure was neither opposed by any party, including Carolina Park and Republic, nor appealed.

Thereafter, Republic initiated this suit in its own behalf and derivatively on behalf of Carolina Park against CDM, the holder of the second mortgage and purchaser at the foreclosure sale, MDC, Republic's partner in Carolina Park, and the individual principals of CDM and MDC. Republic alleged, among other things, that MDC violated its duty of good faith and fair dealing to Carolina Park by usurping its corporate opportunity. Appellants contend that CDM is liable for MDC's acts because it exercised dominion and control over MDC. Appellants seek a constructive trust on the Property, an injunction preventing CDM from encumbering or disposing of the Property, and consequential damages. Appellants also filed a lis pendens on the Property.

CDM moved to cancel the lis pendens and to dismiss. The circuit court granted the motion to dismiss in part, finding that Appellants had failed to state facts sufficient to support their claim for a constructive trust on the Property or for injunctive relief preventing encumbrance or disposition of the Property, and granted the motion to cancel the lis pendens. In order to protect Appellants' interests, the circuit court ordered CDM to provide a semiannual accounting and details of the financial position of all CDM partners. Appellants appealed, seeking reinstatement of their claims for a constructive trust over the Property itself rather than over the proceeds derived therefrom, and seeking reinstatement of the lis pendens.

ISSUES

1. Did the circuit court err when it dismissed the causes of action seeking to impose a constructive trust on the Property?
2. Did the circuit court err when it canceled the lis pendens?

DISCUSSION

In reviewing a motion to dismiss, this Court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). A ruling dismissing a complaint for failure to state facts sufficient to constitute a cause of action must be based solely on allegations set forth in the complaint. *Id.* "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory," dismissal is improper. *Id.* "Questions of law may be decided with no particular deference to the trial court." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

I. Constructive Trust

Appellants argue that the circuit court erred when it dismissed the causes of action seeking to impose a constructive trust on the Property. We find that the constructive trust action was properly dismissed because Appellants have failed to allege circumstances under which it would be inequitable to permit CDM to retain title to the Property. We therefore affirm.

An action to declare a constructive trust is in equity, and a reviewing court may find facts in accordance with its own view of the evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987). "A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title." *Id.* at 529, 354 S.E.2d at 560. It "results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Id.* "It is resorted to by equity to vindicate right and justice or frustrate fraud." *Whitmire v. Adams*, 273 S.C. 453, 457, 257 S.E.2d 160, 163 (1979). In addition, the standard of proof is high, in that "to establish a constructive trust, the evidence must be clear, definite, and unequivocal." *Lollis*, 291 S.C. at 530, 354 S.E.2d at 561; *see Whitmire*, 273 S.C. at 458-61, 257 S.E.2d at 163-65.

In this case, Appellants allege that Respondents usurped a corporate opportunity by finding a new investor willing to advance funds toward the purchase of the Property and not giving Carolina Park an opportunity to negotiate with that investor to finance the Property in cooperation with Carolina Park. Appellants do not dispute that Grove Land contributed $32 million cash at the time of the

foreclosure sale or that Carolina Park itself was unable to locate a new investor or a lender willing to refinance the existing first mortgage.

Appellants have not advanced any argument explaining why Grove Land would have been interested in providing additional financing to Carolina Park rather than acquiring its interest in the Property through foreclosure. Working with Carolina Park would have required Grove Land to leave Carolina Park with some interest in the Property, whereas acquiring the Property with CDM through foreclosure would give Grove Land a greater equity stake in the Property and venture. By the same token, Grove Land was well aware of the existence of Carolina Park, since Grove Land's participation in the venture with CDM was conditioned on CDM's ability to obtain the Property at the foreclosure sale.

Moreover, at foreclosure, the Property sold for $28 million cash plus the $22 million credit bid. Appellants have not sought a constructive trust for a part interest in the Property. Rather, they assert that Carolina Park is the beneficial owner of the entire Property and seek to have the Property transferred or conveyed to Carolina Park. They ignore the $28 million contributed by Grove Land and reject the circuit court's finding that they have an adequate remedy for any injury through a money judgment or a constructive trust over the profits of the development. Alternatively, Appellants suggest that they are primarily interested in retaining some control over development of the Property through the constructive trust action and lis pendens rather than obtaining outright ownership of the Property. In effect, they acknowledge that imposing a constructive trust on the entire Property would be inequitable to CDM and the Grove Land investors.

We conclude that, taken as a whole and in the light most favorable to Appellants, the allegations simply fail the equitable test that "the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title." *Lollis*, *supra*. The allegations do not present circumstances in which there is a need to resort to this equitable remedy in order "to vindicate right and justice or frustrate fraud." *Whitmire*, *supra*.

Even if Appellants had alleged circumstances more clearly reflecting a loss directly attributable to Respondents' activities, equitable relief is unnecessary when an adequate remedy for money damages is available at law. *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250, 251 (1939); *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 61, 544 S.E.2d 675, 678 (2007) ("[E]quitable relief is generally available where there is no adequate remedy at law . . . ."); *see also*

Whitmire, supra, at 458, 257 S.E.2d at 163 ("This liberality [in permitting use of parol evidence] is counterbalanced by the rigid standard of proof which equity decrees as a prerequisite to the establishment of a constructive trust."). In this case, Appellants pled money damages in the alternative and have stated no reason why this relief is inadequate other than that they will be unable to participate in the development of the Property.

Thus, we affirm the circuit court's ruling on the ground that Appellants have failed to state a claim for imposition of a constructive trust as they have failed to state facts showing that the circumstances under which the Property was acquired make it inequitable that it should be retained by CDM.

II. Lis Pendens

Appellants argue that the circuit court erred when it cancelled the lis pendens they had filed on the Property. They argue that, even if the circuit court correctly dismissed their claim for a constructive trust over the Property, the statute governing lis pendens does not permit a court to cancel one until the action it is filed in connection with has ended. We disagree.

South Carolina Code Ann. § 15-11-10 (Supp. 2004) authorizes the filing of a Notice of Pendency of Action, or lis pendens, in relevant part as follows:

> In an action affecting the title to real property the plaintiff . . . may file . . . a notice of the pendency of the action, ...

"Since the filing of a lis pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required." *Pond Place Partners, Inc. v. Poole*, 351 S.C.1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002). Thus, a lis pendens is permitted only when the action actually "affect[s] the title to real property." *See id*. at 18, 567 S.E.2d at 890.

With regard to a court's cancellation of a lis pendens, S.C. Code Ann. § 15-11-40 (2003) states, in relevant part, that

> The court in which the action was commenced, in its discretion at any time after the action is settled, discontinued, or abated . . . , on application of a person aggrieved and on good cause shown . . . , may order the notice authorized by this chapter to be cancelled . . . .

The statute permits a court to cancel a lis pendens "authorized by this chapter" "at any time after the action is settled, discontinued, or abated." By implication, a lis pendens that meets the statutory requirement for filing may not be canceled during the pendency of litigation. However, if the court finds that the lis pendens does not "affect[] the title to real property" as required under § 15-11-10, the lis pendens is not authorized by the statute and the statute does not limit the court's power to cancel it.

Because Appellants have failed to state a claim for a constructive trust, they have no claim affecting the title to real property and the lis pendens is not "authorized by this chapter." We therefore affirm the cancellation of the lis pendens.

CONCLUSION

Appellants have failed to state a claim for which imposition of a constructive trust would be an appropriate remedy because the facts alleged, even viewed in the light most favorable to them, do not present circumstances in which an equitable remedy is required or needed. Moreover, because dismissal of the claims seeking to impose a constructive trust on the Property was proper, cancellation of the lis pendens was proper.

AFFIRMED.

BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jason Ervin Black, Petitioner.

Appellate Case No. 2010-173048

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Pickens County
John C. Few, Circuit Court Judge

Opinion No. 27176
Heard June 7, 2012 – Filed October 3, 2012

AFFIRMED

Appellate Defender Breen Richard Stevens, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Robert Mills Ariail, of Greenville, Respondent.

JUSTICE BEATTY: Jason Ervin Black (Petitioner) appeals his convictions for criminal sexual conduct (CSC) with a minor in the first degree and committing a lewd act upon a minor. Petitioner contends the trial court committed reversible error in allowing the State to impeach his defense witness with two manslaughter convictions that were more than ten years old because their introduction violated Rules 404 and 609 of the South Carolina Rules of Evidence (SCRE), and the error was not harmless beyond a reasonable doubt. We affirm.

I. FACTS

Petitioner was charged with the above offenses as the result of an alleged encounter that occurred with A.T. (the Minor) at the home of Petitioner's friend and neighbor, Richard Bush, on May 6, 2006. Petitioner was then 26 and the Minor was 15.

At trial in June 2007, the Minor asserted that she went to Bush's one-bedroom trailer on the evening of May 6, 2006 and that she and Petitioner had consensual sex in the bedroom while Bush remained in the living room watching TV. Petitioner acknowledged that he and the Minor were at Bush's home on May 6, 2006, but he denied the Minor's allegations of sexual misconduct and maintained they had just watched TV together until she left later that evening with a friend. Bush corroborated Petitioner's version of events, stating all three of them had remained in the living room watching TV until the Minor left with a friend who came by and picked her up. Bush was the only witness for the defense other than Petitioner.

Prior to the State's cross examination of Bush, a bench conference was held regarding the State's request to use Bush's prior convictions for impeachment purposes. Bush was sentenced in Florida on March 12, 1987 to a total of twenty-two years in prison for two counts of manslaughter and one count of "shooting/throwing a deadly missile."[1] Bush was given concurrent prison

[1] The specific provision regarding the deadly missile offense was not identified at trial, but we note that Florida law makes it a crime to shoot at or into, or to throw a deadly missile (a stone or other hard object that could cause serious bodily harm or death) at or within, a home, building, vehicle, plane, or other area described in the statute. Fla. Stat. Ann. § 790.19 (2007).

sentences of fifteen years on each count of manslaughter and a consecutive seven years on shooting/throwing a deadly missile. He was released from confinement by Florida authorities on March 1, 1993, after serving approximately six years of his twenty-two year sentence.

The trial court ruled Bush's 1987 Florida convictions could be used for impeachment purposes. Thereafter, the State impeached Bush by asking about his prior convictions, which Bush acknowledged.

Petitioner was convicted of CSC with a minor in the first degree and committing a lewd act upon a minor, and he was given concurrent prison sentences of twenty years and fifteen years, respectively. The Court of Appeals affirmed pursuant to Rule 220, SCACR. *State v. Black*, Op. No. 2010-UP-370 (S.C. Ct. App. filed July 19, 2010). This Court granted a petition for a writ of certiorari.

II. STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001); *see also State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001) ("The admission of evidence concerning past convictions for impeachment purposes remains within the trial judge's discretion, provided the judge conducts the analysis mandated by the evidence rules and case law.").

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (citation omitted). To warrant reversal, an error must result in prejudice to the appealing party. *State v. Commander*, 396 S.C. 254, 721 S.E.2d 413 (2011).

III. LAW/ANALYSIS

On appeal, Petitioner contends the trial court erred in allowing the State to use the two Florida manslaughter convictions to impeach Bush, his only corroborating defense witness, because their admission violated Rules 404 and 609, SCRE. Petitioner asserts the convictions were presumptively inadmissible because they were more than ten years old and, thus, remote, and the State bore the burden of establishing facts and circumstances to substantially overcome that presumption, citing *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). Petitioner asserts the evidence that his corroborating witness had been convicted of manslaughter two decades earlier was not probative of truthfulness and, under Rule 609(b), the convictions were not properly admitted to impeach his witness's credibility. Petitioner further contends the error was not harmless beyond a reasonable doubt.[2] We agree that the admission of the manslaughter convictions was improper; however, for reasons to be discussed, we believe the error was harmless.

A. Impeachment of Witness with Prior Convictions

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. In contrast, the general rule on impeaching a witness's credibility is that a witness, other than the accused, may be impeached with a prior conviction that carries a sentence of more than one year.[3] *See* Rule 609(a)(1), SCRE (stating "evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403,[4] if the crime was punishable by death or

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[2] Petitioner raises no issue on appeal concerning the missile offense, so it is not addressed here except in the context of harmless error.

[3] Crimes involving dishonesty or false statement may be admitted for impeachment purposes regardless of the punishment. Rule 609(a)(2), SCRE.

[4] Rule 403, SCRE provides relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an

imprisonment in excess of one year under the law under which the witness was convicted").

Rule 609(b), however, contains a time limit that establishes a presumption against the admissibility of remote convictions, i.e., those more than ten years old, for impeachment unless the trial court expressly finds the probative value of the conviction "substantially outweighs" its prejudicial effect. *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005). The rule provides in relevant part:

> **(b) Time Limit.** Evidence of a conviction under this rule *is not admissible* if a period of *more than ten years* has elapsed since the date of the conviction or *of the release* of the witness from the confinement imposed for that conviction, *whichever is the later date*, *unless* the court determines, in the interests of justice, that *the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect*.

Rule 609(b), SCRE (emphasis added). The State bears the burden of establishing sufficient facts and circumstances to overcome the presumption against the admissibility of remote convictions. *State v. Bryant*, 369 S.C. 511, 633 S.E.2d 152 (2006); *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

The standard in Rule 609(b) pertaining to *remote* convictions is higher than the standard of Rule 609(a)(1), by which certain convictions that are not more than ten years old are admissible if their probative value simply "outweighs," rather than "substantially outweighs," their prejudicial effect. *Compare* Rule 609(a)(1) *with* Rule 609(b); *see also United States v. Cavender*, 578 F.2d 528, 531 (4th Cir. 1978) (observing this distinction). As is stated in the Senate Report on the Rules of Evidence, "It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances." *Clay v. State*, 725 S.E.2d 260, 273 (Ga. 2012) (discussing the federal rule, upon which many state provisions are based) (quoting U.S. Code Cong. & Admin. News, 93d Cong., 2d Sess. at p. 7062 (1974)); *see also Cavender*, 578 F.2d at 532 n.8 (noting the presence of the cautionary language in the Senate Report and observing that the trial court's

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improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

discretionary balancing power should be exercised "in a very limited way" (citation omitted)).

This Court has stated that federal cases are persuasive since our rule is based on the federal rule, and we have noted that "[t]he Fourth Circuit has explicitly held that evidence of remote convictions should only be admitted for impeachment purposes 'in exceptional circumstances.'" *Colf*, 337 S.C. at 626, 525 S.E.2d at 248 (quoting *Cavender*, 578 F.2d at 530).

In performing the balancing test required by Rule 609(b), the trial court shall determine whether the probative value of the conviction substantially outweighs the prejudice of its admission after carefully balancing the interests involved and articulating for the record the specific facts and circumstances supporting its decision. *Colf*, 337 S.C. at 629, 525 S.E.2d at 249. Thus, the trial court must state not only whether the probative value of the prior conviction substantially outweighs the prejudicial effect, but also *why*. *Bryant*, 369 S.C. at 516-17, 633 S.E.2d at 155.

This Court has enumerated at least five factors that a trial court should consider in determining, in the interests of justice, whether the probative value of a prior conviction substantially outweighs its prejudicial effect: (1) the impeachment value of the prior crime, (2) the point in time of the conviction and the witness's subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248 (citing the Fourth Circuit's analysis in *United States v. Cavender*, 578 F.2d 528 (4th Cir. 1978) and *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981)).

Colf involved the impeachment of a defendant, so some of these factors must, as a practical matter, be adjusted for this particular case, which involves the convictions of a non-defendant. *See id.* ("These factors are not exclusive," and "trial courts should exercise their discretion in light of the facts and circumstances of each particular case.").

Bush's prior convictions date from March 1987, and he was released from confinement in March 1993. The trial in this matter occurred in June 2007, some twenty years after his convictions and more than fourteen years after his release. Thus, it is undisputed that Bush's manslaughter convictions were remote as more

than ten years had elapsed since his release from confinement, and the convictions were presumptively inadmissible under Rule 609(b), SCRE.

The trial court acknowledged that it needed to determine, pursuant to Rule 609(b), whether or not the probative value of the remote convictions substantially outweighed their prejudicial effect. The State argued the convictions were admissible "because the crimes are so heinous that they show a character flaw that should be brought out [to] the jury so they can determine whether or not to believe this man under oath. Anybody who would kill two people is not as trustworthy as a car thief." The State also argued the convictions pertained to a witness, not the defendant, so "[w]e are not impinging on the Defendant's rights. We are talking about bringing all the matters to the jury's attention so they can evaluate his credibility one way or another."

The trial court concluded the State could use the convictions to impeach Bush, noting "a charge of manslaughter has a very high impeachment value." The court stated that, although the convictions were remote, given the seriousness of the crimes, Bush's actual time served seemed relatively short. In this regard, the court noted that, under South Carolina law, Bush likely would have faced a longer sentence and that if Florida authorities had required Bush to serve the sentences as originally given, then Bush "would have been released well within the ten-year time limit." The court stated that, based on this reasoning, the remoteness of the convictions was "diminished a little and it's almost like it's not as remote."

The trial court remarked that the similarities between the past crime and the crime charged was a factor that was more relevant in cases concerning the impeachment of a defendant and the crimes were not similar, in any event. The trial court found the witness's testimony was "critical," stating if Bush's "testimony is true, then it means that this crime could not have even happened at all. . . . That, of course, makes . . . his credibility essential." The trial court concluded after "weighing those factors" that "the probative value of the convictions substantially outweigh[ed] their prejudicial effect."

Although the trial court cited the correct standard and attempted to perform a balancing test, we believe the trial court failed to adequately assess the probative value of the remote convictions before balancing the probative value of the convictions with their prejudicial effect. In addition, we disagree with the court's application of several of the pertinent factors in applying the balancing test. In our

view, the first two factors, the impeachment value of the prior convictions and the witness's subsequent history, do not weigh in favor of admissibility in this case. The manslaughter offenses, while crimes of violence, are not crimes of dishonesty or untruthfulness that directly impact the witness's veracity. In addition, there is no evidence the witness has been convicted of any additional crimes since his release from confinement some fourteen years prior to trial. We agree with the trial court that the third factor, the similarity of the conduct, is of no consequence here. The fourth and fifth factors, which overlap somewhat, concern the witness's credibility, which was important in this case. However, this, in itself, is not determinative of admissibility. The admission of the remote convictions was certainly prejudicial, and considering all of the circumstances, the State has not met its high burden of establishing that the prejudicial effect of the convictions was *substantially outweighed* by their probative value.

The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility. *See Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007) ("To have probative value, evidence must have a tendency to prove the proposition for which it is offered."); *Hopkins v. State*, 639 So. 2d 1247, 1252-53 (Miss. 1993) (observing the State must first show the prior conviction has probative value on the issue of the witness's propensity for truthfulness, as this is the issue with respect to which the prior conviction must be relevant if it is to be admissible, and this threshold burden should be met before the trial court engages in a balancing test (citation omitted)). The tendency to impact credibility, in turn, determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness. 33A Federal Procedure, Lawyers Edition § 80:176 (2003).

"Under the Rule, the pivotal issue of the probative value of a conviction turns largely on a consideration of the nature of the conviction itself." *Cavender*, 578 F.2d at 534. "This follows because the purpose of impeachment is not 'to show that the [witness] who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him . . . .'" *Id.* (citation omitted). "Accordingly, in general it is a conviction which bears on 'whether jurors ought to believe' the witness or party that qualifies for impeachment purposes." *Id.*

"The crimes which are generally spoken of as meeting this test of giving a basis for an inference of a 'propensity to lie' and which 'bear directly on whether jurors ought to believe him' are those which 'rest on dishonest conduct,' *Gordon v. United States*, [383 F.2d 936, 940 (D.C. Cir. 1967)], or carry 'a tinge of falsification,' *United States v. Ortega*, [561 F.2d 803, 806 (9th Cir. 1977)], or involve '"some element of deceit, untruthfulness, or falsification,"' *United States v. Thompson* [559 F.2d 552, 554 (9th Cir. 1977)]." *Id.*

A rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not. *See Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) ("In common human experience acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . . . The nearness or remoteness of the prior conviction is also a factor of no small importance." (footnote omitted)); *see also State v. Redmond*, 803 N.W.2d 112, 122-23 (Iowa 2011) (recognizing that violent crimes and remote crimes have less probative value than those involving dishonesty; the court stated counsel may attempt to show a witness's testimony is unpersuasive in a number of ways besides prior conviction evidence, such as showing bias, a motive to lie, or flaws in the witness's perception).

In the current appeal, the trial court stated the manslaughter convictions had "a very high impeachment value," but we note that "[t]he impeachment value of crimes that involve deception is higher than crimes that involve violence, and the latter have a higher potential for prejudice." *Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992) (en banc) (citing *United States v. Jackson*, 627 F.2d 1198, 1210 (D.C. Cir. 1980)). Although the convictions arguably raise a concern as to Bush's general character, it is more narrowly his propensity for telling the truth, i.e., his credibility, that is properly placed at issue under Rule 609(b). The rule allows impeachment of a witness only as to his or her credibility, not as to all aspects of the witness's character. *See State v. Ross*, 405 S.E.2d 158, 165 (N.C. 1991) (In applying the "critical balancing process [of Rule 609(b)] it is important to remember that the only legitimate purpose for introducing evidence of past convictions is to *impeach the witness's credibility*," not the witness's general

character, and "[t]he use of this rule is necessarily limited by that focus." (citation omitted)).

The manslaughter convictions, while crimes of violence, are not particularly probative of the specific trait of truthfulness; consequently, their impeachment value is limited.[5] *See Lenard v. Argento*, 699 F.2d 874, 895 (7th Cir. 1983) (noting remote convictions should be admitted only under very rare and exceptional circumstances and holding the witness's remote voluntary manslaughter conviction was unrelated to his truth-telling capabilities and was properly barred as impeachment evidence); *United States v. Johnson*, 47 F. Supp. 2d 1329, 1331-32 (D. Utah 1999) (holding attempted manslaughter is a crime of violence, not a crime of dishonesty or false statement, so it does not directly involve veracity and has only "a limited amount of probativeness as to honesty"); *Gov't of Virgin Islands v. Solis*, 475 F. Supp. 542, 543 (D. V.I. 1979) (holding the trial court did not err in excluding evidence of the victim's conviction for involuntary manslaughter that was more than ten years old as the crime "has no bearing on the issue of truthfulness or untruthfulness"; the court stated "Rule 609 countenances the use of prior convictions when those prior convictions involve some element of deceit, untruthfulness or falsification which would tend to show that an accused or a witness would be likely to testify untruthfully"); *Mason v. State*, 756 P.2d 612, 614

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[5] Petitioner concedes that Rule 609 abandons the "moral turpitude" standard, but asserts "it should nevertheless be noted that manslaughter was not considered a crime of moral turpitude and was inadmissible to impeach the credibility of a witness," citing *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) ("In South Carolina, manslaughter is not a crime of moral turpitude."). In *Mitchell*, this Court found error in the trial court allowing the State to impeach the defendant's credibility with evidence of his prior New York manslaughter conviction on the basis the conviction did not relate to a crime involving moral turpitude. *Id.* at 189-90, 379 S.E.2d at 125. This Court has stated that the moral turpitude test is no longer relevant under a Rule 609 analysis. *See, e.g., Green v. State*, 338 S.C. 428, 432, 527 S.E.2d 98, 100 (2000) ("[T]he new evidentiary rule removes the necessity of determining whether a crime is one of moral turpitude.").

(Okla. Crim. App. 1988) (stating manslaughter is not a crime involving dishonesty or untruthfulness).[6]

In this case, the trial court did not relate any specific facts or circumstances, other than the mere existence of the convictions, that made them particularly probative of Bush's credibility.[7] In *State v. Ellerbee*, 721 S.E.2d 296, 298 (N.C. Ct. App. 2012), the State impeached the defendant's witness with a prior conviction for manslaughter that was outside the ten-year window of Rule 609(b); the witness was convicted in 1986 and released in 1991 (a relatively short time-span, as in this case). Although it ultimately relied upon a harmless error analysis, the North Carolina Court of Appeals held the admission of the manslaughter conviction was error because "the trial court did not make any findings as to the specific facts and circumstances regarding the probative value of this conviction." *Id.* at 298-99; *cf. State v. Howard*, 396 S.C. 173, 180-81, 720 S.E.2d 511, 515 (Ct. App. 2011) ("While the trial court discussed the importance of credibility in this case, the court

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[6] In general, many serious crimes, even those involving violence, do not directly impact a witness's veracity. *See generally Cavender*, 578 F.2d at 534 n.19 ("Many crimes, [] while perhaps causing the average man to shun their perpetrator, do not upon analysis support the inference that the person who committed them has a specific proclivity for lying on the witness stand." (citation omitted)); *State v. Bryant*, 369 S.C. 511, 517-18, 633 S.E.2d 152, 155-56 (2006) (observing "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness," and also that "Petitioner's prior firearms convictions had nothing to do with Petitioner's credibility"); *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) (holding remote convictions for housebreaking and grand larceny were properly excluded under the ten-year limit of Rule 609(b) as the State failed to show why the ten-year limit should be overridden; the court stated the offenses were not generally considered probative of truthfulness); *see also* 1 McCormick on Evidence § 42, at 189-90 (6th ed. 2006) (stating federal courts and most state courts do not classify violent offenses such as robbery and possession of a weapon as crimes of dishonesty or falsity).

[7] The State argued the prior manslaughter convictions were admissible, despite their remoteness, because they involve "heinous crimes," but this does not address their probative value on the issue of veracity. There is no blanket exemption from the ten-year rule of Rule 609(b) for convictions of "heinous crimes" such as murder or manslaughter.

failed to state how Howard's prior ABHANs were probative of his credibility. The trial court instead focused on Howard's character, which does not affect the impeachment value of his prior crimes.").

The trial court's comments on the length of time Bush had actually served in prison on the Florida convictions and its reasoning that Bush would have come within the ten-year window *if* he had received or served a longer sentence under South Carolina law are not persuasive. The plain language of Rule 609(a)(1) speaks in terms of "the law under which the witness was convicted," thus we believe South Carolina's possible treatment of the offense is not relevant in this context. Moreover, the plain language of subsection (b) refers expressly to the date of a party's release from confinement, without any qualifying language. It is undisputed that Bush had been released from confinement more than fourteen years prior to this trial, and his convictions were already twenty years old. Thus, despite the short time served on his sentence, the rationale behind the rule—that the more time that has elapsed since the person's confinement, the less relevant is the fact of the prior confinement—is still served.

A line must always be drawn somewhere, and to disregard the rule's time limit on remote convictions based on such suppositions would vitiate the entire purpose of the rule, which is to settle the question how old a conviction must be to be presumptively prejudicial and inadmissible. *See United States v. Nguyen*, 542 F.3d 275, 281 (1st Cir. 2008) (stating "Rule 609(b) draws a bright line test at ten years–and whenever the law draws a line, some events will fall on the 'other' side," and if the lines are redrawn based on the vagaries of every case or if the bright-line rule is abandoned entirely in favor of an insistence on considering the equities in each and every individual case, this "would create an arguably greater problem" in terms of maintaining "the efficient administration of justice and the . . . predictability of results"); *United States v. Beahm*, 664 F.2d 414, 418 (4th Cir. 1981) (finding it was immaterial if the remote conviction was "only" eleven years old because "[t]he Rule provides for no distinctions between convictions of more recent 'vintage' and older ones" as "[s]uch distinctions would vitiate the very purpose of the Rule, which is to settle the question of how old a conviction must be for its admission presumptively to" be of prejudice, and the government must meet "the heavy burden of rebutting the presumption").

This is particularly true in light of the absence of information of Bush's subsequent history since the convictions. *Cf. State v. Caruthers*, 676 S.W.2d 935,

941 (Tenn. 1984) (observing remote convictions over ten years old have been determined to be admissible where there has been a continuing course of criminal conduct that is probative of credibility).

The genesis of the rule's ten-year provision was the belief that after ten years, the probative value of the conviction with respect to a person's credibility has diminished to the point where it should no longer be admissible; however, a provision was added allowing admissibility where exceptional circumstances have been demonstrated. *See State v. Russell*, 16 P.3d 664, 671 (Wash. Ct. App. 2001) (explaining that "convictions over ten years old generally do not have much probative value," and instead of banning all convictions more than ten years old, the rule provides remote convictions may be admitted in very limited and compelling circumstances (citation omitted)).

We recognize the trial court's finding that Bush's credibility was important. However, the manslaughter convictions impact Bush's character not his veracity. Nevertheless, the importance of Bush's credibility is not singularly determinative. *See State v. Green*, 29 P.3d 271, 275 (Ariz. 2001) ("The state argues that because this case boils down to 'he said, she said,' the probative value of the prior convictions is great enough to carry the burden. We find this argument unpersuasive. There are many cases in which the testimony of one witness is pitted against another. To allow the admission of remote felonies in every such 'swearing contest' would be to effectively defeat the policy that severely limits their use.").

In this case, the State did not meet its heavy burden of demonstrating that the prejudicial effect of the remote manslaughter convictions was *substantially* outweighed by their probative value. As a result, the trial court erred in allowing the State to use Bush's remote convictions for impeachment purposes.

B. Harmless Error

Having found the admission of the remote manslaughter convictions was error, this Court must next consider whether their admission was, nevertheless, harmless beyond a reasonable doubt.

An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. *State v. Bryant*, 369 S.C. 511, 633

S.E.2d 152 (2006); *see also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained); *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." (citing *Chapman v. California,* 386 U.S. 18 (1967))).

"In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998); *see also State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (listing these factors for assessing harmless error, as taken from *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). *Van Arsdall* involved a Confrontation Clause violation caused by the erroneous exclusion of evidence of a prosecution witness's bias. In *State v. Holmes*, this Court specifically adopted the factors articulated in *Van Arsdall* for assessing harmless error and held these factors shall likewise apply for any error concerning witness credibility. *State v. Holmes*, 320 S.C. 259, 265, 464 S.E.2d 334, 337 (1995) ("While the harmless error ruling in *Van Arsdall* dealt specifically with witness bias, we hold that the *Van Arsdall* factors apply with equal force in determining a harmless error violation relating to any issue of witness credibility.").

On appeal, Petitioner has argued the trial court "commit[ted] reversible error by allowing the State to impeach [his] corroborating witness with two Florida manslaughter convictions from 1987." However, the State also impeached Petitioner's witness with a 1987 conviction for shooting/throwing a deadly missile. This conviction occurred at the same time as the manslaughter convictions and ostensibly arose from the same set of facts. Since Petitioner does not challenge the use of this conviction to impeach Bush's credibility, this ruling, right or wrong, becomes the law of the case. *See, e.g., Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011) (stating an unchallenged ruling, right or wrong, becomes the law of the case); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) (observing where the appealing party does not challenge a ruling, it

becomes the law of the case and will not be considered by this Court); *see also* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Bush's unchallenged prior conviction for shooting/throwing a deadly missile involves a serious felony offense, for which Bush was given a consecutive sentence of seven years in prison.[8] We find the jury's knowledge of this conviction unquestionably established the fact that Bush was a former convict, and it would have similarly diminished the jury's view of his character. *Cf. Mason v. State*, 756 P.2d 612 (Okla. Crim. App. 1988) (holding the erroneous admission of a prior manslaughter conviction was harmless error where the witness was already impeached by other evidence of prior convictions).

We disagree with the dissent's conclusion that the error here could not be deemed harmless based on application of the *Van Arsdall* factors. The Supreme Court noted in its decision that the factors were not exclusive; further, it gave no indication that any single factor was dispositive. *See Van Arsdall*, 475 U.S. at 684 ("Whether such an error is harmless in a particular case *depends upon a host of factors*, all readily accessible to reviewing courts." (emphasis added)). The Court observed that it had "repeatedly reaffirmed the principle" that a conviction should not be set aside if a reviewing court may say, on the whole record, that the error was harmless beyond a reasonable doubt, as a defendant is entitled to a fair trial, not a perfect one. *Id.* at 681.

In the current appeal, we believe a review of the entire record indicates the error was harmless under the circumstances. In addition to the fact that Bush's credibility had already been significantly compromised by the revelation that he was a former convict, we note, in considering the overall strength of the State's case, that Petitioner's *own* credibility was seriously impeached at trial as well by testimony that he had a criminal record that included two prior offenses for CSC with a minor. In addition, an investigator with the Pickens County Sheriff's Department testified that he had contacted Petitioner before the incident alleged here and specifically warned him that the Minor was only 15 years old. Petitioner

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[8] This offense is identified as a felony in the second degree. Under Florida law a felony in the second degree carries a sentence of up to fifteen years, Fla. Stat. Ann. § 775.082(3)(c) (Supp. 2012), which equals the fifteen-year sentence Bush actually received on his manslaughter convictions.

acknowledged this conversation and conceded that he knew having a relationship with a 15-year-old could get him in "trouble."

It was undisputed that the Minor was at Bush's home to visit Petitioner the night of the incident, and there was evidence at trial that conflicted with that of Bush and Petitioner and that corroborated the Minor's version of events. For example, despite Petitioner's and Bush's testimony that the Minor never left the confines of the living room, the Minor was able to describe some of the contents of Bush's bedroom, where she maintained Petitioner had taken her to have sex. Moreover, there was corroborating evidence from Candie Hudson, who picked up the Minor from Bush's home around 11:00 p.m., that she saw blood on the Minor's underwear after they returned to Candie's home, that she helped the Minor wash the garment, and that the Minor asked to borrow another pair from her. There has been no allegation any limitation was placed on the parties' ability to conduct cross-examination. Considering the foregoing and all of the other evidence adduced at trial, we find the admission of the additional impeachment evidence against Bush could not reasonably have affected the jury's result in this case and we deem the error harmless beyond any reasonable doubt.

IV. CONCLUSION

Rule 609(b) imposes a high standard for the admissibility of remote convictions. We conclude the factual findings and legal analysis the trial court relied upon do not demonstrate that the probative value of the remote manslaughter convictions substantially outweighed their prejudicial effect. Consequently, we hold the trial court abused its discretion in admitting these convictions. However, Petitioner does not challenge on appeal the trial court's admission of the defense witness's prior conviction for shooting/throwing a deadly missile, and this conviction was also used to impeach the witness. Since its admission is now the law of the case, we find any error in the admission of the two remote manslaughter convictions was harmless as the defense witness's character was similarly diminished by the admission of the unchallenged conviction for shooting/throwing a deadly missile, and the record as a whole indicates the error could not reasonably have impacted the result reached in this case.

AFFIRMED.

TOAL, C.J., and KITTREDGE, J., concur. PLEICONES, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. I agree with the majority that the Court of Appeals erred in affirming the trial court's decision to allow Bush, petitioner's only witness, to be impeached by two remote manslaughter convictions. I disagree, however, with the majority's conclusion that this improper impeachment was harmless error.

The test for determining whether an error involving a witness's credibility[9] is harmless is derived from *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). *See State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995); *State v. Gadsden*, 314 S.C. 229, 442 S.E.2d 594 (1994). The first inquiry is into the importance of the witness's testimony to the proponent's case, then whether the witness's testimony was cumulative and whether other evidence contradicts or corroborates this witness's testimony, and finally we look to the strength of the State's case. Here, the case was largely a credibility contest between petitioner and the victim, a classic "he said, she said" contest without any physical evidence. Bush was the only other person present at the time of the alleged incident, and his testimony was critical to petitioner's defense. While I agree that under some circumstances an error in permitting a witness to be impeached by prior convictions can be deemed harmless in light of another unobjected-to impeachment, I do not find those circumstances present here. *Compare e.g. State v. McFarlane,* 279 S.C. 327, 306 S.E.2d 611(1983)(in lewd act prosecution, defendant's erroneous impeachment with manslaughter harmless in light of proper impeachment with second degree rape conviction).

In my opinion, the erroneous impeachment of Bush by the two manslaughter convictions cannot be deemed harmless because he was also impeached by a weapons offense. *State v. Holmes*, *supra*. I would reverse the decision of the Court of Appeals, and remand the case for a new trial.

HEARN, J., concurs.

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[9] The issue is whether the court improperly permitted Bush's credibility to be impeached by his prior conviction under Rule 609, SCRE, yet the majority at times treats the question as one of character impeachment. *See* Rule 608, SCRE. I do not agree that Rule 608 is relevant to our analysis or decision here.

The Supreme Court of South Carolina

In the Matter of Charles V.B. Cushman, III, Respondent.

Appellate Case No. 2012-213015

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Carrie Hall Tanner, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Ms. Tanner shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Tanner may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Carrie Hall Tanner, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Carrie Hall Tanner, Esquire, has been duly appointed by

this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Tanner's office.

Ms. Tanner's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
September 27, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William F. Pearson, M.D.,	Respondent,
v.	
Hilton Head Hospital a/k/a Hilton Head Health System, L.P., Tenet Healthsystem Medical, Inc., Tenet Physician Services-Hilton Head, Inc. and LocumTenens.com, LLC,	Defendants,
Of whom Hilton Head Hospital a/k/a Hilton Head Health System, L.P., Tenet Healthsystem Medical, Inc. are the	Appellants.

Appeal From Beaufort County
Marvin H. Dukes, III, Special Circuit Court Judge

Opinion No. 5036
Heard May 9, 2012 – Filed October 3, 2012

REVERSED

C. Mitchell Brown and Sue Erwin Harper, both of Columbia, for Appellants.

Anne Louise Peterson-Hutto, of Charleston, for Respondent.

KONDUROS, J.: Hilton Head Hospital a/k/a Hilton Head Health System, L.P.; Tenet HealthSystem Medical, Inc.; and Tenet Physician Services-Hilton Head, Inc. (collectively the Hospital) appeal the circuit court's denial of its motion to compel arbitration against Dr. William F. Pearson. It contends because the circuit court granted a co-defendant's motion to compel, the court also should have granted the Hospital's motion because the claims are intertwined and based upon the same facts. It further argues because Dr. Pearson has received the benefit of the contract between it and the co-defendant, which contains an arbitration clause, and because it received a benefit under Dr. Pearson and the co-defendant's contract, which also contained an arbitration clause, he should be forced to arbitrate with it when his causes of action against the Hospital included breach of contract. We reverse.

FACTS/PROCEDURAL HISTORY

LocumTenens.com, LLC (Locum) is an online medical professional placement corporation, headquartered in Georgia, that recruits medical professionals online and through electronic mail and places them throughout the United States, particularly in South Carolina. The Hospital and Locum entered into a contract in 2006 in which Locum would place temporary physicians at the Hospital to work as independent contractors. In 2007, Locum entered into a contract with Dr. Pearson to place him at the Hospital as an anesthesiologist for forty days in July, August, and September of 2007.

The contract between the Hospital and Locum provided, "Any controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto shall be resolved by binding arbitration in accordance with the Commercial Arbitration Rules for the American Arbitration Association . . ." The contract between Dr. Pearson and Locum contained the same clause.

On August 27, 2007, Dr. Pearson was the anesthesiologist on call at the Hospital when complications occurred in a delivery of twins. The Hospital and Locums fired Dr. Pearson on August 28, 2007. Dr. Pearson filed a complaint on August 28, 2009, against the Hospital and Locum requesting relief under the South Carolina Payment of Wages Act and alleging retaliatory discharge, defamation, and breach of contract. On October 22, 2009, the Hospital filed a motion to compel arbitration. On December 8, 2009, Locum also filed a motion to compel arbitration. The circuit court granted Locum's motion to compel arbitration but denied the Hospital's motion to compel arbitration. The court stated the contract between Locum and the Hospital was a general one, not specific to Dr. Pearson and predated the contract between Locum and Dr. Pearson. It found Dr. Pearson did not sign an agreement with the Hospital to arbitrate any claims arising out of their relationship. The court found the case of International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000), unpersuasive as it involved only one contract. This appeal followed.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

The Hospital contends the circuit court erred in denying its motion to compel arbitration because (1) Dr. Pearson's claims fall within the arbitration agreement he signed with Locum; (2) federal law recognizes the right to compel non-signatories to arbitrate and for non-signatories to compel signatories to arbitrate; (3) Dr. Pearson is relying on the terms in the agreement between Locum and the Hospital and Dr. Pearson sought to benefit from it; and (4) the Hospital is a third-party beneficiary to Dr. Pearson and Locum's contract. We agree.

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id. However, "[a]rbitration rests on the agreement of the parties . . . . A party cannot be compelled to arbitrate a particular dispute unless his agreement expressly encompasses the subject matter of the dispute." Simmons v. Lucas & Stubbs Assocs., 283 S.C. 326, 332-33, 322 S.E.2d 467, 470 (Ct. App. 1984). However, "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." Id. at 597, 553 S.E.2d at 118-19.

"Unless the parties have contracted to the contrary, the [Federal Arbitration Act (FAA)] applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). "The United States Supreme Court has

held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117.

"Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) (citation and internal quotation marks omitted). "While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" Id. (quoting Fisser v. Int'l Bank, 282 F.2d 231, 233 (2d Cir. 1960)) (alterations by court). "Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." Id. South Carolina has recognized "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration." S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990)). The rule in the Fourth Circuit is that "a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001).

"Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co., 206 F.3d at 416-17. A parent company has been forced to arbitrate even though not a party to the agreement when the subsidiary was a party to the agreement under a

theory of equitable estoppel. Id. at 417 (quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993) (holding that because claims against nonsignatory parent were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims); Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp., 659 F.2d 836, 840-41 (7th Cir. 1981) (finding signatory equitably estopped from repudiating arbitration clause in agreement on which suit against nonsignatory was based)). "Moreover, the Second Circuit recently noted that it had recognized that five theories 'aris[ing] out of common law principles of contract and agency law' could provide a basis 'for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.'" Id. (citing Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995); Bel-Ray Co. v. Chemrite (Pty) Ltd., 181 F.3d 435, 440-43 (3d Cir. 1999); Amoco Transport Co. v. Bugsier Reederei & Bergungs, A.G. (In re Oil Spill by the "Amoco Cadiz"), 659 F.2d 789, 795-96 (7th Cir. 1981)) (alteration by court).

"[S]tate law determines questions 'concerning the validity, revocability, or enforceability of contracts generally,' . . . but the Federal Arbitration Act, 9 U.S.C. § 2 (1994), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforced by 9 U.S.C. §§ 201-08 (1994), 'create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" Id. at 417 n.4 (quoting Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). "These statutes constitute a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Id. (citation and quotation marks omitted). Because the determination of whether a nonsignatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question. Id.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." Id. at 417-18 (citation and quotation marks omitted).

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

Id. at 418 (emphasis added). "'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'" Id. (quoting Avila Grp., Inc. v. Norma J. of Cal., 426 F. Supp. 537, 542 (S.D.N.Y. 1977)) (alteration by court).

"A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (citing Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, 1064 (2d Cir. 1993) (holding nonsignatory bound to arbitrate when it knew of the arbitration agreement and "knowingly accepted the benefits of" that agreement)) (comparing Hughes Masonry Co., 659 F.2d at 838-39 ("[I]t would be manifestly inequitable to permit Hughes to both claim that J.A.[a nonsignatory] is liable to Hughes for its failure to perform the contractual duties described in the [arbitration agreement] and at the same time deny that J.A. is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause.") (alterations by court)).

> Some courts have, at a nonsignatory's instance, required a signatory of an arbitration agreement to

> arbitrate with the nonsignatory because of "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations."

Id. at 418 n.6 (quoting Sunkist, 10 F.3d at 757) (alterations by court). The International Paper Co. court recognized that the Second Circuit has held that "a 'close relationship' and 'intimate [ ]' factual connection provide no independent basis to require a nonsignatory of an arbitration agreement to arbitrate with a signatory, and therefore that a nonsignatory cannot be bound without receiving a 'direct benefit' from or pursuing a 'claim . . . integrally related to the contract containing the arbitration clause.'" Id. (quoting Thomson-CSF, 64 F.3d at 778-80) (alterations by court). The court determined it did not need to reach that question "because International Paper clearly does seek a 'direct benefit' from the Wood-Schwabedissen agreement and makes a 'claim . . . integrally related to' that contract." Id. (alteration by court).

In Jackson v. Iris.com, the court summarized International Paper Co.:

> International Paper bought an industrial saw from Wood Systems, a distributor. The saw was manufactured by Schwabedissen pursuant to a contract between Wood Systems and Schwabedissen containing an arbitration clause. International Paper was not a signatory to the contract. The industrial saw was defective, and International Paper sued Schwabedissen for breach of the terms and warranties of the contract. The Fourth Circuit found that International Paper was equitably estopped from denying the applicability of the arbitration clause to its claims against Schwabedissen because

> International Paper could not both accept the contract's benefits (the warranty provisions) and, at the same time, reject the contract's burdens (the arbitration provisions).

524 F. Supp. 2d 742, 750 (E.D.Va. 2007) (citing Int'l Paper Co., 206 F.3d at 414, 416-19).

"Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001) (citing Tencara Shipyard, 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). The Third Circuit has noted:

> many of these cases resemble the third party beneficiary cases. In Tencara Shipyard, for example, the non-signatory was the intended third party beneficiary of the contract containing the arbitration clause. The two theories of liability are, however, distinct. Under the third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis.

Id. at 200 n.7.

In E.I. DuPont de Nemours & Co., the court was troubled

> that a close examination of the Amended Complaint reveals that, at bottom, DuPont's claims against the subsidiary, Rhodia Fiber, arise, at least in part, from the underlying Agreement. Parenthetically, it is difficult to decipher exactly what DuPont claims each appellant has done giving rise to liability because in its Amended Complaint DuPont lumps them together as "the Rhodia Group," just as in the Complaint, it lumped them together as "RP."

Id. at 200-01. The court further noted:

> The Amended Complaint does not allege only that Rhodia, the parent, breached its oral agreement to provide loan guarantees to its subsidiary. If this were DuPont's only claim in this case, the Amended Complaint would have named one, and only one, defendant-Rhodia. Instead, the Amended Complaint also named Rhodia Fiber, the subsidiary, as a defendant because, DuPont alleges, Rhodia Fiber breached its oral promise to DuPont that it would continue to abide by its obligations in the Agreement, i.e., securing loan guarantees for the joint venture. To the extent that DuPont presses a claim against Rhodia Fiber for breaching its oral commitment to perform under the Agreement, DuPont alleges a claim which can well be argued (a) embraces the underlying Agreement and (b) requires proof that Rhodia Fiber ultimately breached the underlying Agreement. The question, then, is whether having alleged that it entered into a separate oral agreement with Rhodia Fiber binding Rhodia Fiber to the very obligations it

undertook in the Agreement, DuPont is now equitably estopped from avoiding another provision of the Agreement, i.e., the arbitration clause. This is a close call.

On the one hand, we must be careful about disregarding the corporate form and treating a non-signatory like a signatory. On the other hand, by alleging, albeit by virtue of a separate oral agreement, that Rhodia Fiber failed to secure loan guarantees, DuPont's claim against Rhodia Fiber implicates, at least in part, the very Agreement which DuPont repudiates to avoid arbitration. It is, however, that separate oral agreement that saves the day for DuPont because, wholly apart from whether Rhodia Fiber breached the Agreement, what is at the core of this case is the conduct and the statements of appellants' representative in January of 1998.

With reference to the second theory of equitable estoppel, appellants rely on a series of cases in which signatories were held to arbitrate related claims against parent companies who were not signatories to the arbitration clause. In each of these cases, a signatory was bound to arbitrate claims brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations. . . . Appellants recognize that these cases bind a signatory not a non-signatory to arbitration, but argue that this is a distinction without a difference. They are wrong.

Id. at 201-02.

The court noted that the Second Circuit had rejected the "distinction without a difference" argument:

> "As these cases indicate, the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. As the district court pointed out, however, '[t]he situation here is inverse: E & S, as signatory, seeks to compel Thomson, a non-signatory.' While E & S suggests that this is a non-distinction, the nature of arbitration makes it important. Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so. In the line of cases discussed above, the courts held that the parties were estopped from avoiding arbitration because they had entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves. Thomson, however, cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson indicate a willingness to arbitrate with E & S. Therefore, the district court properly determined these estoppel cases to be inapposite and insufficient justification for binding Thomson to an agreement that it never signed."

Id. at 202 (quoting Thomson-CSF, S.A., 64 F.3d at 779) (alteration by court). The court found "[t]he distinction between signatories and non-signatories is important to ensure that short of piercing the corporate veil, a court does not

ignore the corporate form of a non-signatory based solely on the interrelatedness of the claims alleged." Id. A non-signatory cannot be "required to arbitrate unless its conduct falls within one of the accepted principles of agency or contract law that permit doing so." Id. "In sum, the thrust of the claims in the Amended Complaint are far enough removed from the Agreement such that DuPont should not be equitably estopped from repudiating the arbitration clause contained in the Agreement." Id.

In Ellen v. A.C. Schultes of Maryland, Inc., 615 S.E.2d 729, 733 (N.C. Ct. App. 2005), the court found

> plaintiffs are not seeking any direct benefits from the contracts containing the relevant arbitration clause, nor are they asserting any rights arising under the ACCU–AC Schultes contracts. Neither plaintiffs' allegations of unfair and deceptive trade practices nor plaintiffs' allegations of tortious interference depend upon the contracts containing the arbitration clause. Both of the claims are dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law.

The court determined "because plaintiffs are not seeking a direct benefit from the provisions of the ACCU–AC Schultes contracts, we conclude that the doctrine of equitable estoppel cannot be used to force plaintiffs to arbitrate their individual claims[, and] the trial court did not err in denying defendants' motions to compel arbitration." Id.

A South Carolina district court has noted the Eleventh Circuit's position on the ways nonsignatories could compel arbitration against signatories:

> Existing case law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written

> agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005) (quoting MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)) (emphases added by court).

"[A] party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.'" Jackson, 524 F. Supp. 2d at 749 (quoting Hughes Masonry Co., 659 F.2d at 839). When "a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a 'direct benefit' from a contract containing an arbitration clause." Id. at 749-50 (citing Int'l Paper Co., 206 F.3d at 417-18; Am. Bankers Ins. Group v. Long, 453 F.3d 623, 628 (4th Cir. 2006); R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 162 (4th Cir. 2004); Tencara Shipyard S.P.A., 170 F.3d at 353 (holding non-signatory was estopped from denying applicability of arbitration clause when nonsignatory received "direct benefits" from contract including lowered insurance rates and the ability to sail under the French flag)).

In Jackson, the court found:

> Jackson seeks to have his cake and eat it too. Iris paid G*Town $550,000 pursuant to the G*Town Contract. No other sums were paid by Iris. G*Town then paid $450,000 to ATA, Jackson's undisputed agent. ATA then paid $150,000 to Jackson and $75,000 to Elliot. Jackson concedes that he retained the $150,000 payment. The $150,000 ultimately retained by Jackson was a "direct benefit" of the G*Town Contract executed by Iris and G*town. Pursuant to the test outlined by the Fourth Circuit, Jackson is therefore equitably estopped from denying the applicability of the arbitration clause, even though, allegedly, neither he nor his agents signed the G*Town Contract. Iris' $150,000 payment to Jackson, albeit indirect, was intended to be partial consideration for his performance in Africa pursuant to the G*Town Contract. It would be inequitable to permit Jackson to retain the direct benefits of the G*Town Contract (the $150,000 paid by Iris) while, at the same time, permitting him to deny the contract's burdens (the arbitration provision).

Id. at 750 (citations and footnote omitted).

The Hospital argues that Dr. Pearson is bound by the arbitration clause both as a nonsignatory to the Hospital and Locum's agreement and as a signatory to his and Locum's agreement. Although some courts have been more inclined to compel arbitration when the person or entity to be compelled was a signatory because they actually consented to arbitration, the Fourth Circuit has recognized the right to compel a nonsignatory.

Here, looking at Dr. Pearson as a nonsignatory in the contract between Locum and the Hospital, he received a benefit due to the contract, in that he was able to work at the Hospital and receive payment for his work. If not for that contract, then Dr. Pearson would have had to make separate arrangements with the Hospital in order to work there. He knowingly accepted benefits of the contract between the Hospital and Locum. Accordingly, Dr. Pearson benefitted from that contract and should not be able to disclaim the arbitration agreement contained in it.

Additionally, looking at the Hospital as a nonsignatory in the contract between Dr. Pearson and Locum, Dr. Pearson has to rely on his contract or the Hospital's to have a breach of contract action against the Hospital. Because both of those contracts have arbitration clauses, he should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions. Dr. Pearson's contract stated that the Hospital was the client.

Further, in Dr. Pearson's complaint, he makes no distinction between the Hospital and Locum. He lumps them together as defendants and states they are jointly and severally liable. Additionally, the lawsuit arose against Locum and the Hospital from the same set of facts. Further, he raises a cause of action for breach of contract against the defendants, not just Locum. Accordingly, he is seeking either to receive damages under Locum and the Hospital's contract, or to hold the Hospital accountable under his and Locum's contract. Therefore, he is either seeking a benefit under the Hospital's contract or attempting to hold the Hospital accountable under his.

Lastly, the contract between Locum and Dr. Pearson further states that "[a]ny controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement . . . shall be resolved by binding arbitration." The causes of action against the Hospital arose as a result of Dr. Pearson's being placed there by Locum, which was the purpose of the contract. Based on all the forgoing, the circuit court's denial of the Hospital's motion to compel arbitration is

REVERSED.

PIEPER and GEATHERS, JJ., concur.