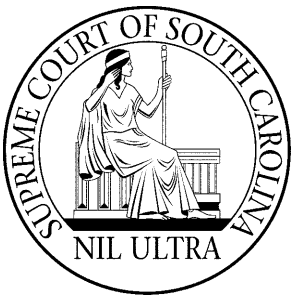

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 10, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Wilson, Michael J. Antoniak, Jr., Marsha L. Antoniak, Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie Calhoun, Cynthia Gary, Robert Wayne Gary, Eugene P. Lawton, Jr., Jeanette Norman, James Robert Shirley, Robert W. Spires, Crystal Spires Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin Franklin Wofford, Jr., and Rebecca Hammond Wofford, Petitioners,

v.

Laura B. Willis and Jesse A. Dantice, individually and as agents and/or brokers for Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Company of America, Allied Property and Casualty Insurance Company, Peerless Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Foremost Insurance Company, Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Company of America, Allied Property and Casualty Insurance Company, Peerless Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, Foremost Insurance Company, and Laurie Williams, Defendants,

Of Whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are the Respondents,

and

Of Whom Laurie Williams is Petitioner.

Appellate Case No. 2016-001512

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 27879
Heard December 13, 2018 – Filed April 10, 2019

REVERSED AND REMANDED

Thomas E. Hite, Jr. and Anne Marie Hempy, both of Hite and Stone, Attorneys at Law, of Abbeville; Jane H. Merrill, of Hawthorne Merrill Law, LLC, of Greenwood; and Leslie A. Bailey, Public Justice, of Oakland, California, for Petitioners.

C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Robert C. Calamari, of Nelson Mullins Riley & Scarborough, LLP, of Myrtle Beach, for Respondents.

CHIEF JUSTICE BEATTY: The question before this Court is whether arbitration should be enforced against nonsignatories to a contract containing an arbitration clause. The circuit court denied the motion to compel arbitration. The court of appeals reversed and remanded, holding equitable estoppel should be applied to enforce arbitration against the nonsignatories. *Wilson v. Willis*, 416 S.C.

395, 786 S.E.2d 571 (Ct. App. 2016). We now reverse and remand for further proceedings, finding the circuit court properly denied the motion to compel arbitration.

I. FACTUAL/PROCEDURAL HISTORY

This appeal arises out of fourteen lawsuits brought by various plaintiffs against (1) Laura Willis, an insurance agent; (2) Jesse Dantice, the insurance broker who hired Willis and made her the agent in charge of the insurance office; (3) their insurance agency, Southern Risk Insurance Services, LLC (Southern Risk), and (4) six insurance companies for which their office sold policies (the Insurers). The plaintiffs in the lawsuits were Willis's customers (the Insureds) and other insurance agents (the Agents) in competition with Willis and Southern Risk.

The Insureds filed twelve of the lawsuits, asserting claims against Willis, Dantice, and Southern Risk for, *inter alia*, violations of the Unfair Trade Practices Act (UTPA), common law unfair trade practices, fraud, and conversion. They also named the Insurers as defendants on a respondeat superior theory of liability for failing to adequately supervise or audit Willis and Southern Risk.

In general, the Insureds alleged (1) Willis engaged in fraudulent conduct, including forging insurance documents, taking cash payments, and converting the payments to her own use, resulting in the Insureds having either no coverage or reduced coverage; (2) Willis and the other defendants engaged in unfair and illegal tactics in an effort to "corner the retail insurance market" in Abbeville County; and (3) the defendants had a duty to investigate, train, and supervise Willis, "especially after she was fined, publicly reprimanded, and placed on probation for dishonesty by the South Carolina Insurance Commission in October 2011," or, in the alternative, Willis and/or Dantice acted with the express or implied permission of the other defendants.

The Agents—Richard Wilson and James Robert Shirley—filed the two remaining lawsuits. The Agents alleged Willis engaged in illegal business practices that effectively blocked them from the local market, resulting in a substantial loss of clients and revenue. They further asserted that Dantice, Southern Risk, and the Insurers had a duty to properly investigate, train, and supervise Willis, and also alleged the defendants either engaged in a civil conspiracy with Willis to destroy the businesses of other agents or failed to detect and stop Willis's wrongdoing. The Agents' claims included statutory and common law unfair trade practices,

conspiracy, and tortious interference with existing and prospective contractual relations.

In their answers, the Insurers denied the majority of the substantive claims. None of the Insurers asserted the actions were subject to arbitration. Subsequently, however, three of the Insurers—Peerless Insurance Co., Montgomery Insurance Co., and Safeco Insurance Co. (hereinafter, Respondents)—filed motions to compel arbitration and dismiss the lawsuits. In support of their motions, Respondents asserted an arbitration clause contained in a 2010 agency contract (the Agency Agreement)[1] entered into by Respondents with Southern Risk should be enforced against the nonsignatory Insureds and Agents (collectively, Petitioners) on the theories that Petitioners were third-party beneficiaries to the contract or were equitably estopped from asserting their nonparty status. Respondents indicated the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1–16 (2009), applied to the Agency Agreement and enforcement of its arbitration clause, as well as state law.

Respondents asserted equitable estoppel should preclude Petitioners' assertion of their nonsignatory status because Petitioners' claims were premised on duties that would not exist but for the Agency Agreement Respondents had with Southern Risk. Respondents maintained the Agency Agreement contained a broad provision requiring the parties to arbitrate any claims arising "in connection with the interpretation of th[e] Agreement, its performance or nonperformance." Based on the foregoing, they argued the nonsignatory Petitioners were bound by the arbitration clause contained in the Agency Agreement between Respondents and Southern Risk.

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[1] The arbitration provision relied on by Respondents is located in paragraph 12.A of the Agency Agreement between Southern Risk and Respondents:

> If any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance, its termination, the figures and calculations used or any nonpayment of accounts, the parties will make efforts to meet and settle their dispute in good faith informally. If the parties cannot agree on a written settlement to the dispute within 30 days after it arises, or within a longer period agreed upon by the parties in writing, then the matter in controversy, upon request of either party, will be settled by arbitration . . . .

The circuit court denied the motions to compel arbitration. In concluding Respondents were not entitled to arbitration, the circuit court made the following findings: (1) there was no evidence of a valid contract requiring arbitration because the Agency Agreement was never signed by Southern Risk or, alternatively, the unsigned agreement was invalid because it violated the Statute of Frauds; (2) the arbitration clause was narrow in scope and inapplicable on its face to Petitioners' claims because the claims had no relation to and were not "in connection with the performance of the Agency Agreement," which, instead, controlled only the business relationship between Southern Risk and the Insurers, not the relationship between the Insureds and the Insurers; (3) the doctrine of equitable estoppel should not be used to enforce the arbitration clause against nonsignatories (i.e., Petitioners), as there was "absolutely no evidence whatsoever" they had consistently maintained the provisions of the Agency Agreement between Southern Risk and Respondents should be enforced to benefit them, they never sought any direct benefits from the Agency Agreement, and their claims against Respondents did not hinge on any rights found in the Agency Agreement but instead were grounded in principles recognized under South Carolina law; (4) South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers; and (5) Respondents waived any right to arbitration by delaying the assertion of their motion. The circuit court denied Respondents' joint motion for reconsideration, which, *inter alia*, argued Petitioners were seeking to invoke the provisions of the Agency Agreement for Petitioners' direct benefit, contrary to the circuit court's finding, so Petitioners should be subject to the arbitration clause in the Agency Agreement, despite their status as nonsignatories.

The court of appeals reversed and remanded, concluding the circuit court erred in failing to grant Respondents' motions to compel arbitration. The court of appeals held, in relevant part, that (1) the Agency Agreement (as well as its arbitration clause) was enforceable, despite the lack of Southern Risk's signature on the contract, because a contract accepted and acted on by the other party is enforceable, and the Agency Agreement did not violate the Statute of Frauds because the contract was for an indefinite term and, thus, could be performed within one year; (2) the arbitration provision was sufficiently broad to encompass the claims alleged; (3) Petitioners were equitably estopped from arguing that their status as nonsignatories to the Agency Agreement precluded enforcement of the arbitration provision because their "complaints seek to benefit from enforcement of other provisions in the 2010 Agency Agreement"; (4) claims such as fraudulent conduct and misrepresentation were not the types of illegal and outrageous acts that were

considered unforeseeable to a reasonable consumer in the context of normal business dealings; and (5) Respondents did not waive their right to compel arbitration.

This Court has granted (1) a joint petition for a writ of certiorari filed by Petitioners (the Insureds and Agents), and (2) a separate petition filed by Laurie Williams (individually, Petitioner Williams).[2]

II. STANDARD OF REVIEW

Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court. *See Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (stating a determination of whether a claim is subject to arbitration is reviewed de novo); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012) (applying the de novo standard to a nonsignatory). Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings. *Aiken*, 373 S.C. at 148, 644 S.E.2d at 707; *accord* C*hassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

III. LAW/ANALYSIS

Petitioners herein[3] contend the court of appeals erred in enforcing the arbitration clause in the Agency Agreement between Southern Risk and Respondents, where they were neither parties nor signatories to the contract and seek no benefits under the contract, and the claims are not within the scope of the Agency

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[2] Petitioner Williams became involved in this case after she was in an accident with one of the Insureds (Cynthia Gary).

[3] Petitioner Williams has filed a brief that joins in the issues presented by the remaining Petitioners, but also asserts two distinct questions of her own regarding a statutory arbitration exemption found in S.C. Code Ann. § 15-48-10(b)(4) (2005) and waiver. For simplicity, any references to "Petitioners" shall include Petitioner Williams to the extent she has incorporated their arguments.

Agreement's arbitration clause and bear no significant relationship to the Agency Agreement.

Petitioners assert the court of appeals applied the presumption in favor of arbitration to the threshold question of whether the arbitration clause binds them as nonsignatories, and this was inappropriate because arbitration is strictly a matter of consent, and the presumption applies only to an analysis of the scope of an agreement. Petitioners further assert the court of appeals erroneously concluded the arbitration provision could be enforced against them based solely on an equitable estoppel theory, where Petitioners were unaware of the Agency Agreement, have never sought to obtain any direct benefit under that contract, and seek only to vindicate their rights under South Carolina law.[4]

The FAA applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise.[5] *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The purpose of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). A party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement. *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494 (Tex. App. 2011).

The consideration of contract validity is normally addressed applying general principles of state law governing the formation of contracts. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA."). "State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, recoverability, and enforceability of all contracts generally." *Id.*; *see also* 9 U.S.C.A. § 2 (stating a written provision for arbitration in any contract involving interstate commerce "shall

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[4] Petitioners have effectively abandoned any challenge to the findings by the court of appeals that the contract between Southern Risk and Respondents was not invalid due to either (a) the lack of Southern Risk's signature or (b) the Statute of Frauds, and that Petitioners' claims do not involve outrageous conduct that would not be subject to arbitration. In addition, Petitioners (with the exception of Petitioner Williams) do not contest the court of appeals' finding that Respondents' delay in seeking arbitration did not constitute waiver.

[5] Application of the FAA has not been disputed in the appeal before this Court.

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). "A state law that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies." *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (recognizing that arbitration under the FAA "is a matter of consent, not coercion" (citation omitted)); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

The consideration of scope is evaluated under the "federal substantive law of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and noting "[t]he effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act").

"[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement." *Carr*, 337 S.W.3d at 496 (emphasis added). "Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." *Id.*

Moreover, because arbitration, while favored, exists solely by agreement of the parties, a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate. *Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ("Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises."); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098,

1103–04 (9th Cir. 2006) (noting "the general rule that a nonsignatory is not bound by an arbitration clause").

In the current matter, it is undisputed that Petitioners are nonsignatories to the arbitration agreement. Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law.[6] *See Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, 630–31, 630 n.5 (2009) (observing state law is applicable to determine which contracts are binding under section 2 of the FAA, and traditional principles of state law may permit a contract to be enforced by or against nonparties to a contract through theories of assumption, piercing the corporate veil, and estoppel, among others); *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1355 n.1 (11th Cir. 2017) (citing *Arthur Andersen LLP* and noting state, not federal, law controls the analysis of equitable estoppel issues in the arbitration context); *Walker v. Collyer*, 9 N.E.3d 854, 858–59 (Mass. App. Ct. 2014) (relying on *Arthur Andersen LLP* and stating traditional principles of state contract law determine whether nonsignatories can be compelled to arbitrate).

South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel. *Malloy v. Thompson*, 409 S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014);[7] *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 289, 733 S.E.2d 597, 601 (Ct. App. 2012) (discussing federal decisions setting forth five theories that could provide a basis to bind nonsignatories to arbitration agreements). These theories have also been applied extensively in the federal courts. *See, e.g.*, *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir.

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[6] The parties acknowledged during oral arguments before this Court that state law governs whether nonsignatories may be bound by arbitration agreements.

[7] In *Malloy*, this Court noted that, in addition to the five theories enumerated above, some federal courts have also recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled into arbitration as a nonsignatory. *Malloy*, 409 S.C. at 562, 762 S.E.2d at 692 (citing *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003)). *But see Comer*, 436 F.3d at 1102 ("A third party beneficiary might in certain circumstances have the power to sue under a contract; it certainly cannot be *bound* to a contract it did not sign or otherwise assent to.").

1995) (enumerating five traditional theories for binding nonsignatories to arbitration clauses).

The court of appeals held the theory of equitable estoppel precluded Petitioners from asserting their nonsignatory status here and compelled them to submit their claims to arbitration. *Wilson v. Willis*, 416 S.C. 395, 418, 786 S.E.2d 571, 583 (Ct. App. 2016). In doing so, the court of appeals cited the framework for invoking equitable estoppel that has been utilized in the arbitration context by the federal courts and adopted by some state courts. *Id.* at 417, 786 S.E.2d at 582. This framework, often referred to as the direct benefits test, was utilized in a prior court of appeals decision, *Pearson*, which applied the federal test as set forth in *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000).[8] Both *Pearson* and the Fourth Circuit decision were cited for guidance by the court of appeals in the current matter, which was necessitated by the scarcity of state precedent in this regard. *See generally Wilson*, 416 S.C. at 416–18, 786 S.E.2d at 582–83.

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[8] To the extent the decision in *Pearson* indicates federal, rather than state, law is controlling on whether equitable estoppel can bind nonsignatories, we take this opportunity to clarify that state law controls, per *Andersen*. Some jurisdictions have elected, as a matter of state law, to expressly adopt the federal test for equitable estoppel to promote consistency among state and federal courts in cases subject to the FAA. *See In re Kellogg Brown & Root*, 166 S.W.3d 732, 739 (Tex. 2005) (recognizing it is important for federal and state law to be as consistent as possible because federal and state courts have concurrent jurisdiction to enforce the FAA; the court stated its decision to apply the direct benefits test for equitable estoppel "rests on state law, but [] is informed by persuasive and well-reasoned federal precedent"); *see also Belzberg v. Verus Invs. Holdings Inc.*, 999 N.E.2d 1130, 1133 (N.Y. 2013) (observing "[s]ome New York courts have relied on the direct benefits estoppel theory, derived from federal case law, to abrogate the general rule against binding nonsignatories"). Although some jurisdictions have adopted the federal test, discrepancies among jurisdictions remain on the subject of equitable estoppel. *See generally* Matthew Berg, *Equitable Estoppel to Compel Arbitration in New York: A Doctrine to Prevent Inequity*, 13 Cardozo J. of Conflict Resol. 169, 174 (2011) (observing "there are considerable disagreements over equitable estoppel theory within each particular state, among the states, and between the states and the federal government").

Under direct benefits estoppel, "[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.'" *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper Co.*, 206 F.3d at 418). "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*."[9] *Id.* (quoting *Int'l Paper Co.*, 206 F.3d at 418).

Stated another way, "[u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . ."[10] *Belzberg v. Verus Invs. Holdings Inc.*, 999 N.E.2d 1130, 1134 (N.Y. 2013).

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[9] Petitioners assert, as an alternative argument on appeal, that the traditional state test for equitable estoppel enumerates six factors for consideration, and they further argue the traditional state test has not been met here because they have not engaged in false or misleading conduct that caused injury to Respondents, nor have Respondents claimed they lacked knowledge of the facts in question, relied upon the conduct of Petitioners, and suffered a prejudicial change of position. The traditional test referenced by Petitioners has been analyzed most often in non-arbitration cases. *See, e.g.*, *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 799 S.E.2d 912 (2017); *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007); *but see Zabinski*, 346 S.C. at 589, 553 S.E.2d at 114 (citing the six-part test in an arbitration case). We find this assertion is not properly before the Court, as the parties and both courts below focused their discussions on whether the direct benefits test for estoppel had been met. Consequently, we also apply the direct benefits test and express no opinion on Petitioner's alternative argument. *See Malloy*, 409 S.C. at 561, 762 S.E.2d at 692 (stating it is axiomatic that an issue cannot be raised for the first time on appeal).

[10] Direct benefits estoppel is distinguishable from a second theory of estoppel that has been discussed in some federal decisions and which applies when a nonsignatory is attempting to compel arbitration *against a signatory* to the contract containing the arbitration clause. *See generally Thomson-CSF*, 64 F.3d at 779. The theory compels a signatory to arbitrate with a nonsignatory due to the close relationship of the parties and the fact that the claims were founded in and intertwined with the underlying contractual obligations. *Id.*

The court of appeals found the prior South Carolina decision applying the direct benefits estoppel framework, *Pearson*, was analogous. In *Pearson*, an anesthesiologist (Dr. Pearson) was equitably estopped from asserting that, as a nonsignatory, he was not bound by an arbitration clause contained in a contract between a hospital and a medical professional placement company (Locum). *Pearson*, 400 S.C. at 296–97, 733 S.E.2d at 605. The court of appeals found Dr. Pearson received a benefit from the hospital's contract with Locum and should not be able to disclaim the arbitration agreement contained therein, where he was able to work at the hospital and receive payment for his work and, if not for the contract, Dr. Pearson would have had to make separate arrangements with the hospital to work there. *Id.* The court of appeals further noted that Dr. Pearson raised a claim for breach of contract against the defendants, not just Locum. *Id.* at 297, 733 S.E.2d at 605. Consequently, the court observed, Dr. Pearson was "seeking either to receive damages under Locum and the Hospital's contract, or to hold the Hospital accountable under his and Locum's contract." *Id.*

Citing the analysis in *Pearson*, the court of appeals reasoned here that, "although the Insureds and Agents [Petitioners] admittedly did not see the 2010 Agency Agreement prior to bringing this action, this does not control our inquiry because the allegations in the complaints necessarily depend upon the terms, authority, and duties created and imposed by that agreement." *Wilson*, 416 S.C. at 417, 786 S.E.2d at 582. In other words, the court stated, while Petitioners "do not expressly rely upon other provisions in the 2010 Agency Agreement," they rely upon the relationship the contract established between Respondents and Southern Risk to assert their claims. *Id.* at 417–18, 786 S.E.2d at 582–83. The court stated the duties Petitioners contend Respondents allegedly breached arose from the Agency Agreement, so Petitioners received a "direct benefit" from that contract. *Id.* at 418, 786 S.E.2d at 583. As a result, the court of appeals held, Petitioners were "equitably estopped from arguing their status as nonsignatories precludes enforcement of the arbitration provision where their complaints seek to benefit from the enforcement of other provisions in the 2010 Agency Agreement." *Id.*

Petitioners contend the Agency Agreement, by its own terms, applied only to the individual Insurers and to Southern Risk, the parties to the contract. Petitioners point out that they have not alleged a claim for breach of contract, and they were not even aware of the existence of the contract between Respondents and Southern Risk until Respondents decided to seek arbitration nearly a year into the litigation. Petitioners maintain the "sole basis" of the court of appeals' ruling that they could be subject to the arbitration clause as nonsignatories was the court of appeals' reliance

on the doctrine of equitable estoppel and its finding they were seeking direct benefits under the contract.

We agree with Petitioners that the circumstances in *Pearson* are distinguishable. Unlike Dr. Pearson, Petitioners did not embrace the Agency Agreement during the life of the contract and then, during litigation, attempt to repudiate the arbitration clause in the contract. It is undisputed that Petitioners were never aware of the existence of the contract until they brought their tort actions against Respondents. General principles of South Carolina law form the basis for most of Petitioners' claims. For example, Petitioners' allegation that Respondents possibly conspired with Willis and others to commit fraud is misconduct that does not arise from the contract. To hold otherwise would arguably allow Respondents to commit unfair trade practices and conspire to destroy the businesses of other insurance agencies while shielding themselves from the possibility of a jury trial with an arbitration clause agreed to only by the conspiring parties.

Respondents and the court of appeals appear to rely on the fact that some of the claims asserted by Petitioners, concerning the failure to issue policies and the principle of respondeat superior, would not have arisen in the absence of the Agency Agreement between Southern Risk and Respondents. However, direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen "but for" a contract's existence:

> When a claim depends on the contract's existence and cannot stand independently—that is, the alleged liability "arises solely from the contract or must be determined by reference to it"—equity prevents a person from avoiding the arbitration clause that was part of that agreement. But "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law," direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract *or would not have arisen "but for" the contract's existence*.

Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 637 (Tex. 2018) (emphasis added) (footnotes omitted).

It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. *Belzberg*, 999 N.E.2d at 1134. A benefit is direct if it flows directly from the agreement. *Id.*; *see also MAG Portfolio Consult, GMBH v. Merlin Biomed*

Grp. LLC, 268 F.3d 58, 61 (2d Cir. 2001) (stating direct benefits estoppel requires that a nonsignatory knowingly accept the benefits of an agreement with an arbitration clause in order to be bound by an arbitration clause).

In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself. *MAG Portfolio Consult*, 268 F.3d at 61; *accord Belzberg*, 999 N.E.2d at 1134; *cf. Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1172 (11th Cir. 2011) (observing that, under Georgia law, a plaintiff's claims must be directly, not just indirectly, based on the contract containing the arbitration clause for equitable estoppel to compel arbitration of those claims); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740–41 (Tex. 2005) (stating that, under direct benefits estoppel, although a nonsignatory's claim may relate to a contract containing an arbitration provision, that relationship does not, in itself, bind the nonsignatory to arbitration, and a nonsignatory plaintiff cannot be compelled to arbitrate on the sole ground that, but for the contract containing the arbitration provision, it would have no basis to sue; rather, a nonsignatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision).

Although the distinction between direct and indirect benefits is not always readily discernable, a few examples help illustrate its application in the estoppel context. As noted above, in the South Carolina case of *Pearson*, Dr. Pearson clearly received a direct benefit from the hospital's contract with another entity because Dr. Pearson was able to work at the hospital and receive payment for his work due to the contract containing the arbitration clause. *Pearson*, 400 S.C. at 296–97, 733 S.E.2d at 605. In addition, where plaintiffs sue and seek relief based on contracts containing arbitration clauses, courts have applied equitable estoppel. *See generally Int'l Paper Co.*, 206 F.3d at 417–18 (applying equitable estoppel and holding the nonsignatory plaintiff could not bring claims to enforce the guarantees and warranties issued by the defendant in a contract with another party without complying with an arbitration provision contained in that contract).

In *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060 (2d Cir. 1993), the United States Court of Appeals for the Second Circuit held that a nonsignatory entity, which knowingly used a trade name pursuant to an agreement that it received but did not object to, was estopped from relying on its nonsignatory status to avoid the agreement's arbitration clause. In another decision from the Second Circuit, the court found nonsignatory boat owners to a contract under which

they received significantly lower insurance rates and the ability to sail under the French flag had received direct benefits from the contract and, therefore, could not avoid the contract's arbitration provision. *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. 1999).

In our view, Petitioners have not knowingly exploited and received a direct benefit from the Agency Agreement. As originally found by the circuit court, the Agency Agreement executed by Southern Risk and the Insurers was purely for the benefit of the parties to the contract in outlining their business relationships and the rights of the parties to the Agency Agreement. Petitioners have not attempted to procure any direct benefit from the Agency Agreement itself while attempting to avoid its arbitration provision. Moreover, Respondents have not argued that the Agency Agreement, by its express terms, was applicable to other parties, or that customers of Southern Risk knew when they purchased their insurance policies that any claims of fraud, unfair trade practices, etc., would be subjected to an arbitration provision in an agreement between other parties.

Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly. *See Hirsch v. Amper Fin. Servs., LLC*, 71 A.3d 849, 852 (N.J. 2013) (observing equitable estoppel should be used sparingly to compel arbitration and noting it "is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration"); 28 Am. Jur. 2d *Estoppel and Waiver* § 29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstances). We decline to impose it on Petitioners, a group that includes not only customers of Southern Risk, but also competing agents and an individual injured by a customer who purchased a policy from Southern Risk. Considerations of equity do not warrant estopping such attenuated individuals from asserting their nonsignatory status.

Having found Petitioners should not be compelled to arbitrate their claims based on equitable estoppel, we need not address the parties' remaining questions. *See Earthscapes Unlimited, Inc. v. Ulbrich,* 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) (holding an appellate court need not address remaining issues on appeal when disposition of a prior issue is dispositive).

IV. CONCLUSION

We conclude equitable estoppel should not be applied to compel the nonsignatory Petitioners to arbitrate their claims. Accordingly, we reverse the decision of the court of appeals and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven, Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of Vinton Willis Tucker, Respondents.

Appellate Case No. 2016-000096

Appeal From York County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5638
Heard March 15, 2018 – Filed April 10, 2019

AFFIRMED

Syretta R. Anderson, of Anderson Law Firm, of Rock Hill, for Appellant.

B. Michael Brackett, of Moses & Brackett, PC, of Columbia, for Respondents.

MCDONALD, J: In this action challenging the validity of a will, Vinton Willis Tucker's (Decedent's) niece, Carol DeHaven, contends the circuit court erred in affirming the probate court's order granting summary judgment in favor of Ben R. Smith (Nephew) and Margaret P. Kelly (Niece) (collectively, Respondents).

DeHaven argues summary judgment was improper because she presented sufficient evidence to the probate court of both undue influence and the existence of a confidential or fiduciary relationship, thus establishing a presumption of invalidity. We affirm.

Facts and Procedural History

Respondents are the children of Decedent's sister-in-law, who was the sister of Decedent's wife, Edith Pursley Tucker (Wife). After Wife died, her family remained close to Decedent.

In November 2011, Decedent was hospitalized at Carolinas Medical Center for ten days due to "injuries in a large part of his body." According to Niece, hospital doctors indicated Decedent's injuries were inconsistent with a fall, which his caregiver, Brenda Snow, reported as the cause of his injuries. On December 13, 2011, Decedent moved to Westminster Towers in Rock Hill. When he was admitted, a social worker noted Decedent's family shared information seeking to prohibit the former caregiver, Snow, from visiting Decedent.[1]

On January 14, 2012, a physical therapist became concerned when she was unable to wake Decedent. She was eventually able to rouse him, but he was groggy. EMS transported Decedent to Piedmont Medical Center, where doctors diagnosed him with a 7.7 cm distal abdominal aneurysm.

Emergency room physician Jason Ratterree located the aneurysm and explained the condition to Decedent on the evening of January 14th. As to Decedent's mental condition, Dr. Ratterree noted Decedent was "oriented in time, place, and person. Grossly appropriate mood and affect." When asked in his deposition what this notation meant, Dr. Ratterree replied, "He was totally normal. . . . He knew where he was at that time and did not appear to be having any abnormal behavior and was conversational with me."

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[1] Niece testified that when Decedent was hospitalized in November, his doctors and nurses believed his injuries were the result of "some kind of abuse," rather than a fall. Although no charges were filed against Snow, doctors were concerned about Decedent returning to his home because they believed Snow was abusing him.

Niece testified in her deposition that Decedent sought to make a new will that same evening, after he learned of the aneurysm. Niece recalled Decedent took the news of the aneurysm quite seriously because he "had always been a very healthy person." After the doctor discussed the diagnosis and left the hospital room, Decedent asked Niece to write a will for him and inquired whether she would "be willing to put it down on paper the way he wanted it." Niece acted as scrivener for the will, which Decedent dictated to her in the presence of two witnesses. The two witnesses confirmed that Decedent raised the subject of a new will and Niece wrote down the terms as Decedent requested and according to his instructions.

Decedent remained at Piedmont Medical Center until January 20, 2012, when he returned to Westminster Towers. On February 8, 2012, he executed a durable power of attorney for health care naming Niece as his primary decision maker. A social worker from Westminster Towers testified there had been issues with a previous healthcare power of attorney Decedent signed while hospitalized; thus, he executed the February 2012 document.

Decedent passed away on May 12, 2012. On May 17, 2012, the probate court granted Respondents' application for informal probate and appointment of personal representatives. On the application, Respondents listed the date of the execution of the will as January 14, 2012 (the Will). They listed twelve nieces and nephews, including themselves, as the Will's named devisees. A niece from Decedent's side of the family, Margaret Dudley, and two nephews, Wayne Scott and Kevin Scott, were listed in the application for informal probate as intestate heirs who were not devisees named in the Will.

On May 10, 2013, Mary Jean Tucker Swiger, Decedent's sister, petitioned the probate court for formal testacy and appointment and sought to set aside the informal probate, claiming Respondents initiated the request for informal probate with an invalid will. Swiger further asserted Respondents had exerted undue influence upon Decedent and sought removal of Respondents as co-personal representatives of Decedent's estate. In the petition, Carol DeHaven, Swiger's daughter, is listed as a successor-in-interest.

Respondents answered and counterclaimed for formal testacy and appointment based upon the terms of the Will. Respondents admitted Swiger was Decedent's

sole-surviving sibling but denied that "status as a sole surviving sibling itself establishes standing."

Swiger sought a temporary order to restrain Respondents from acting as personal representatives of Decedent's estate. Swiger also requested Respondents be required to post a bond. The probate court denied Swiger's motion for a temporary restraining order but granted her motion for a restricted bank account in lieu of bond.
Respondents moved for partial summary judgment, arguing no genuine issue of material fact existed to support Swiger's claims of undue influence, fraud, or lack of jurisdiction. Respondents further asserted the Will was executed with the appropriate formalities.

At the summary judgment hearing, Respondents moved to substitute DeHaven as a petitioner in the case so the caption would read "Swiger by her attorney-in-fact Carol DeHaven" due to Swiger's mental incapacity. Petitioner consented, and the probate court granted the motion to substitute. After the probate court granted Respondents' motion for partial summary judgment, DeHaven appealed to the circuit court, which affirmed the probate court.

Respondents moved to dismiss DeHaven's appeal to this court, arguing DeHaven, acting as Swiger's attorney-in-fact, engaged in the unauthorized practice of law by filing the appeal. Respondents also claimed the notice of appeal was defective because DeHaven failed to include the probate court's order with the filing of the notice. DeHaven filed a return, asserting she had the authority to appeal on behalf of Swiger, who is now deceased,[2] as her "legal representative" because the probate court allowed her to substitute for Swiger. This court denied the motion to dismiss but ordered DeHaven to retain counsel. Counsel for DeHaven filed a notice of appearance on May 3, 2016.

On May 4, 2016, Respondents again moved to dismiss the appeal, arguing DeHaven lacked standing to prosecute the appeal because DeHaven's status as Swiger's "attorney-in-fact" terminated upon Swiger's death, and DeHaven had not provided any information indicating a personal representative had been appointed, an executor had been appointed, or a probate estate had been opened. This court

[2] Swiger passed away on October 6, 2015.

denied the motion to dismiss but ruled Respondents could raise the standing issue during briefing.

Standard of Review

"An action to contest a will is an action at law, and in such cases reviewing courts will not disturb the probate court's findings of fact unless a review of the record discloses no evidence to support them." *Hairston v. McMillan*, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010).

"In reviewing the grant of [a] summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCP." *In re Estate of Smith*, 419 S.C. 111, 116, 796 S.E.2d 158, 160 (Ct. App. 2016) (second alteration by court) (quoting *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438–39 (2003)).

> Rule 56(c) states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Id. (citation omitted). "[I]n cases requiring a heightened burden of proof . . . the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009). "Since the standard of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003).

I. Standing

Respondents argue this court lacks jurisdiction because DeHaven, who filed the notice of appeal, lacked authority or standing to prosecute the matter. We disagree.

Appeals from the probate court are governed by the South Carolina Probate Code. *See Dorn v. Cohen*, 421 S.C. 517, 520, 809 S.E.2d 53, 54 (2017) (per curiam) (holding the court of appeals erred in applying the general appellate jurisdiction statute to determine the immediate appealability of an interlocutory or intermediate order because the probate code governs appeals from the probate court). The South Carolina Probate Code allows a person "interested" in a final order of a probate court, including intestate heirs, to appeal to the circuit court. *See* S.C. Code Ann. § 62-1-308(a) (Supp. 2018) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303."); S.C. Code Ann. § 62-1-201(23) (Supp. 2018) (defining "interested person" to include heirs and "persons having priority for appointment as personal representative and other fiduciaries representing interested persons"); S.C. Code Ann. § 62-1-201(20) (Supp. 2018) ("'Heirs' means those persons . . . who are entitled under the statute of intestate succession to the property of a decedent.").

DeHaven is Decedent's niece through Swiger, his sister. Therefore, the Probate Code affords DeHaven standing in her own right to pursue this appeal because she is an intestate heir of Decedent and, therefore, an "interested person." *See* S.C. Code Ann. § 62-2-103(3) (Supp. 2018) (providing for intestate succession where there is no surviving spouse, issue, or parent "to the issue of the parents or either of them by representation"); S.C. Code Ann. § 62-2-103(4) (Supp. 2018) ("[I]f there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent. . . ."). Swiger died on October 6, 2015, after the probate court granted summary judgment. However, DeHaven was listed as a successor-in-interest in Swiger's petition to the probate court, and upon the consent motion of the parties at the summary judgment hearing, the probate court amended the case caption to list DeHaven as a party through Swiger due to Swiger's mental incapacitation. Thus, we find DeHaven has standing to pursue this appeal.

II. Undue Influence

"Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity." S.C. Code Ann. § 62-3-407 (Supp. 2018). "Undue influence must be shown by unmistakable and convincing evidence, which is usually circumstantial." *Russell*, 353 S.C. at 217, 578 S.E.2d at 333. "In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear upon the testamentary act.'" *Id.* at 219, 578 S.E.2d at 335 (quoting *Mock v. Dowling*, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976)).

"A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *In re Estate of Cumbee*, 333 S.C. 664, 671, 511 S.E.2d 390, 394 (Ct. App. 1999). To send the issue of undue influence to the jury, the contestant must show more than general influence—"there [must be] additional evidence that such influence was actually utilized." *Howard v. Nasser*, 364 S.C. 279, 289, 613 S.E.2d 64, 69 (Ct. App. 2005) (quoting *Mock*, 266 S.C. at 277, 222 S.E.2d at 774).

"The influence necessary to void a will must amount to force and coercion." *Wilson v. Dallas*, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013). "The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf." *Russell*, 353 S.C. at 217, 578 S.E.2d at 333. "In order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice." *In re Estate of Cumbee*, 333 S.C. at 671, 511 S.E.2d at 394. "If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some provision of it will not be undue influence." *Howard*, 364 S.C. at 289, 613 S.E.2d at 69 (quoting *In re Last Will & Testament of Smoak*, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985)).

"Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." *Russell*, 353 S.C. at 217, 578 S.E.2d at 333. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *In re Estate of Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394 (quoting *Brown v. Pearson*,

326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)). "The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence." *Hairston*, 387 S.C. at 447, 692 S.E.2d at 553 (citation omitted). However, "although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will." *Howard*, 364 S.C. at 288, 613 S.E.2d at 68–69.

> To summarize, "[w]here the contestants introduce testimony raising a presumption of undue influence by a beneficiary sustaining a confidential or fiduciary relation toward the testator, the issue should be submitted to the jury, as where, *in addition to* the factor of confidential relations, there *also* appear the further facts of an unnatural disposition making the person charged with the undue influence chief beneficiary, and that such person generally dominated the testatrix."

Id. at 289, 613 S.E.2d at 69 (alteration by court) (quoting *Moorer v. Bull*, 212 S.C. 146, 149, 46 S.E.2d 681, 682 (1948) (emphasis added)).

Initially, we note the probate court's finding of testamentary capacity was not challenged; therefore, it is the law of the case. *See Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

We acknowledge DeHaven's argument that the record contains conflicting inferences regarding Decedent's wishes, but we find such conflicting wishes related to the former caregiver, Snow—not DeHaven or Decedent's blood relatives. Decedent executed the Will on January 14, 2012. Thereafter, on February 5, 2012, Marcy Thomas, Decedent's social worker, reported:

> [Decedent] spoke at length about nieces and nephews and his will. He understands that they want to be included in his will. He said "this is why they are not in my will." He clearly stated that he "loved his 'little girl' very much

> and she took good care of him" and he "wanted her to have the money he designated her to have in his will." [Decedent] stated how upset he was when one nephew came and asked for his money to be divided evenly.

Thomas opined Decedent was "having a very cognitively clear afternoon" the day they had this discussion, which occurred almost three weeks after the execution of the Will. But, there is no evidence that Decedent attempted to change his will at any point after its January 14th execution, despite this cognitive clarity. Therefore, we find the circuit court correctly affirmed the probate court's grant of summary judgment because DeHaven failed to provide more than a scintilla of evidence to establish undue influence was exerted upon Decedent *when he executed the Will*. *See Russell*, 353 S.C. at 219, 578 S.E.2d at 335 ("In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear upon the testamentary act.'" (alteration by court) (quoting *Mock*, 266 S.C. at 277, 222 S.E.2d at 774)).

Decedent had numerous nieces and nephews—those on his wife's side of the family, who are devisees under the Will, and those on his side, whom he chose not to include. In their interrogatory responses, Respondents claimed Decedent did not even want his side of the family to be notified of his death. Although this conversation did not identify which specific nieces and nephews Decedent sought to exclude, other evidence in the record established Respondents were not among the disinherited group of relatives from Decedent's own side of the family.

Nephew believed any statement by Decedent that he wanted to give his money to "his little girl," likely referred to Snow, the former caregiver. Niece knew Snow was included in Decedent's prior will and stated Decedent told her he wanted to "look after" Snow. However, Nephew testified Decedent's attorney told Nephew to destroy the prior will due to the conflict of interest presented by Snow's involvement and her influence over Decedent, along with the abuse concerns raised upon Decedent's admission to Carolinas Medical Center.

The only evidence DeHaven provided to suggest the words in the Will were not Decedent's own was the testimony of Dr. James Jewell, a physician at Decedent's nursing home who indicated he would "be surprised that given the situation . . . that these words would be [Decedent's]." He clarified, "It would depend on the

person themselves, whether they were legalese oriented in that way. I'm not saying that they wouldn't necessarily understand what was here." Dr. Jewell admitted he did not remember Decedent well and had visited Decedent only two or three times. Dr. Jewell further testified it was unlikely he had formally assessed Decedent's mental status.

Significantly, DeHaven did not set forth any evidence that Respondents restricted visitation with respect to her side of the family. The evidence in the record reflects Respondents sought only to prohibit Snow from visiting Decedent, and there is no evidence that Snow ever attempted to visit or contact Decedent while he lived at Westminster Towers. *Contra In re Estate of Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394 (noting the record contained evidence of undue influence where although testator had access to visitors, her son admitted he monitored her conversations with her other son via a baby monitor and testator created hand signals to communicate with her visitors); *Byrd v. Byrd*, 279 S.C. 425, 429, 308 S.E.2d 788, 790 (1983) (finding evidence of undue influence where "[t]here was also evidence of a purpose and design . . . to restrict the visits and to prevent communications between the testator and his children prior to and following the date of the execution of the will"). DeHaven provided no proof of actual restricted visitation nor evidence to establish how any alleged restricted visitation could have influenced Decedent's execution of the Will.

Similarly, there is scant evidence in the record suggesting family members from DeHaven's side of the family ever attempted to visit Decedent during any alleged restrictive period. For example, in their interrogatory responses, Respondents explained:

> When [Decedent] received notice from Margaret Dudley [, Decedent's niece on his side of the family,] that she and others were planning to visit during their travel to Florida, [Decedent] requested that he not be left alone with them because they were only interested in his money. He stated that these relatives only visited with him in years past so that they would have a free place to stay when they went to Florida.

The record contains no indication as to when (if ever) any unsuccessful attempted visit took place. Even when viewed in the light most favorable to DeHaven, this interrogatory response constitutes, at most, a mere scintilla of evidence of restricted visitation—and suggests Decedent himself sought the restriction. This is insufficient for a claim of undue influence to survive a properly supported summary judgment motion. *See Russell*, 353 S.C. at 218, 578 S.E.2d at 334 (recognizing a party arguing undue influence must provide more than a scintilla of evidence to survive a summary judgment motion).

Viewing the evidence in the light most favorable to DeHaven, a confidential or fiduciary relationship did exist between Decedent and Respondents because Niece held Decedent's healthcare power of attorney and Nephew held Decedent's power of attorney. *See M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below." (quoting *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004))); *In re Estate of Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394 (finding son had a fiduciary relationship with his mother, the testator, because he had her power of attorney and managed all of her finances, including keeping her checkbook).[3] However, sufficient evidence exists to rebut any presumption of undue influence created by the existence of these fiduciary relationships. Nephew was not present when the Will was dictated and drafted, and the healthcare power of attorney naming Niece is dated February 8, 2012—three weeks after the execution of the Will. A social worker from Westminster Towers met with Decedent frequently, without family members present, and Decedent could have shared any concerns

[3] Respondents assert Dehaven's argument as to the rebuttable presumption presented by a "confidential or fiduciary relationship" is unpreserved. We find the question is preserved because the probate court's order addressed the undue influence argument at length, noting Decedent never expressed concerns to the disinterested third parties to whom he had unfettered access "about Respondents' treatment of him or about the powers of attorney he executed naming Respondents as his agents." Further, the probate court addressed the question of rebuttable presumptions in the context of undue influence as well as the unwillingness of courts to "impose upon beneficiaries who occupy such a position of trust the burden of proving an absence of improper influence . . . ."

with her during their discussions. In fact, Decedent told the social worker on January 3, 2012, less than two weeks before the execution of the Will, that although he and his family disagreed about whether he should return home, he knew his family wanted to help him. Finally, while it appears Respondents were involved in determining Decedent's living arrangements, there is no evidence in the record that the powers of attorney were ever otherwise utilized. *See In re Estate of Anderson*, 381 S.C. 568, 575, 674 S.E.2d 176, 180 (Ct. App. 2009) (finding no undue influence existed when grandsons had a fiduciary relationship with testator by way of power of attorney but there was no evidence the powers of attorney were utilized). Even if Respondents had some influence over Decedent's disposition of his estate, such influence did not amount to undue influence because Decedent had the testamentary capacity to dispose of his estate, and DeHaven failed to provide sufficient evidence that Decedent's will was in any way restrained or overcome. *See Howard*, 364 S.C. at 289, 613 S.E.2d at 69 ("If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some provision of it will not be undue influence." (quoting *In re Last Will & Testament of Smoak*, 286 S.C. at 424, 334 S.E.2d at 809)).

Conclusion

Based on the foregoing, the summary judgment orders of the probate court and circuit court are

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

IN RE: Deborah Dereede Living Trust dated December 18, 2013, Hugh Dereede and Tyre Dealer Network Consultants, Inc., Respondents,

v.

Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 18, 2013 and Michael Fehily, as a qualified beneficiary of the Deborah Dereede Living Trust dated December 18, 2013, Defendants,

Of whom Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 18, 2013, is the Appellant.

Appellate Case No. 2016-001921

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5639
Heard December 6, 2018 – Filed April 10, 2019

AFFIRMED IN PART AND DISMISSED IN PART

Desa Ballard and Harvey M. Watson, III, both of Ballard & Watson, Attorneys at Law, of West Columbia; and Peter John Nosal and Thomas Carroll Jeter, III, both of Nosal & Jeter, LLP, of Fort Mill, all for Appellant.

John P. Gettys, Jr. and Daniel Joseph Ballou, both of Morton & Gettys, LLC, of Rock Hill, for Respondents.

HILL, J.: After a bench trial, the trial court ruled that Courtney Feely Karp breached her fiduciary duty as Trustee of a trust created by her late mother by not timely distributing certain trust proceeds to Hugh Dereede (Hugh), Karp's stepfather, and to Tyre Dealer Network Consultants, Inc. (Tyre), Hugh's company. The trial court also awarded Hugh attorney's fees and held Karp personally liable for the verdict. Karp appeals these rulings, which we now affirm.

I.

Some eight months before her death, Deborah Dereede (Deborah), Karp's mother, executed a revocable trust. She named herself trustee and designated Karp as successor trustee. The only asset in the trust was a home located in Lake Wylie, South Carolina, which Deborah put on the market for sale a few months later. Several months after Deborah's death, Karp sold the house, netting $356,242.86.

This appeal turns on the following trust provision:

> As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 WHISPERING PINES DR., LAKE WYLIE, SC 29710. The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to TYRE DEALER NETWORK CONSULTANTS, INC. Said promissory note, at the time of the execution of my Trust, is in the amount of $250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEREEDE, outright and free of trust. The other one-half of the remaining net sales proceeds

> shall be distributed in accordance with the Articles that follow.

After the sale of the house closed, Hugh demanded immediate payment of his and Tyre's share of the proceeds. Karp, who was also the personal representative of Deborah's estate, believed she could not distribute the proceeds until she was certain of the net assets of the trust and the estate, and the time for creditor's claims had expired. Hugh would not be delayed, however, and filed this action in the probate court seeking a declaratory judgment for immediate payment. After procedural sparring, Karp removed the case to circuit court. She continued to refuse Hugh's distribution request but now also claimed that, by suing her, Hugh and Tyre had triggered the trust's no-contest clause thereby forfeiting their right to the proceeds. In the event of such a forfeiture, the disputed monies would go to Karp and her siblings as remainder beneficiaries.

Ten months into the litigation, Karp appointed, with Hugh's consent, Catherine H. Kennedy as trust protector as contemplated by the trust. Kennedy filed a report concluding Karp was justified in waiting on any creditor's claims to clear before making any trust distributions and that the issues of whether Karp exercised good faith in invoking the no contest clause and whether probable cause supported Hugh and Tyre's claims should be decided by the court.

Karp and Hugh testified at the bench trial. Karp called Kennedy as a witness, while Hugh presented S. Alan Medlin as his expert. The trial court ruled (1) Karp breached her fiduciary duty by not timely distributing the house sale proceeds to Tyre and Hugh; (2) Hugh had probable cause to bring this action, and therefore the no contest clause did not apply; (3) because Tyre was a creditor, the no contest clause was inapplicable to it; and (4) Tyre and Hugh were entitled to attorney's fees and costs from Karp.

II.

Because a breach of fiduciary duty claim can be legal or equitable, *see Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (stating "an action alleging a breach of fiduciary duty is an action at law," but also that "a breach of fiduciary duty may sound in equity if the relief sought is equitable"), we look to the main purpose of the action to define our scope of review. *Id.* at 16, 690 S.E.2d at 773

("Characterization of an action as equitable or legal depends on the . . . main purpose in bringing the action." (internal quotation and citations omitted)). Here, the main purpose is to enforce an alleged unconditional duty to pay a beneficiary. Actions involving trusts are almost always equitable, but there is an exception that applies here: an action against a trustee under an alleged immediate and unconditional obligation to pay money to a beneficiary is a legal action. 4 Scott & Ascher on Trusts § 24.2.1 at 1660 (5th ed. 2007); Restatement (Second) of Trusts § 198(1) (Am. Law Inst. 1959); *see also* S.C. Code Ann. § 62-7-1001 cmt. (Supp. 2018) (noting only traditional remedy at law for breach of trust was limited to suits to enforce obligations to pay money and deliver chattels, otherwise, remedies for breach of trust were "exclusively equitable"). We must affirm the verdict in a legal action tried by a judge alone if any evidence reasonably supports it. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

Although *Verenes* involved the right to a jury trial rather than standards of review, its holding rested on a conclusion that the main purpose of the damages action against the trustee there was equitable, as it sought the classic equitable remedies of restitution and disgorgement. 387 S.C. at 17, 690 S.E.2d at 773–74. Based on the complaint here, and the historical classification of suits seeking enforcement of a trustee's obligation to pay money as legal actions—as recognized in the comment to section 62-7-1001 quoted above—we hold that this is an action at law rather than equity. We acknowledge it is possible that after *Verenes* this action's main purpose could be classified as the equitable remedy of specific performance. If so, our scope of review would expand to de novo, and we may find the facts based on our view of the evidence. *See* S.C. Const. art. V, § 5; *see also Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). However, expanding the scope of review would not change our decision in this appeal.

III.

A. Breach of Trust/Fiduciary Duty

The South Carolina Trust Code describes the duties of trustees and mandates that a trustee "shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries . . . ." S.C. Code Ann. § 62-7-801 (Supp. 2018). The Code also imposes a duty of loyalty on the Trustee. S.C. Code Ann. § 62-7-802(a) (Supp. 2018) ("A trustee shall administer the trust solely in the

interests of the beneficiaries."). Where, as here, a trust has two or more beneficiaries, the duty of loyalty includes a duty to "act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." S.C. Code Ann. § 62-7-803 (Supp. 2018). The Code also incorporates the common law of trusts and principles of equity to the extent they supplement its provisions. S.C. Code Ann. § 62-7-106 (Supp. 2018).

A breach of trust is simply a "violation by a trustee of a duty the trustee owes to a beneficiary . . . ." S.C. Code Ann. § 62-7-1001(a) (Supp. 2018); *see also* Restatement (Second) of Trusts § 201 (Am. Law Inst. 1959); Restatement (Third) of Trusts § 93 (Am. Law Inst. 2012); 4 Scott & Ascher on Trusts, § 24.5.

The trust instrument has been likened to a map on which the settlor has set the course the trustee must faithfully follow, and from which the trustee departs at his peril. *Rodgers v. Herron*, 226 S.C. 317, 330, 85 S.E.2d 104, 110 (1954); *Womack v. Austin*, 1 S.C. 421, 438 (1870); *see* Restatement (Third) of Trusts § 73, cmt. (c) (Am. Law Inst. 2007) ("A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust." (quoting Bogert, *The Law of Trusts and Trustees* § 541 (rev. 2d ed. 1993))).

As the trial court noted, Karp's duty to execute Deborah's intent expressed in Article 6, Section 4 in distributing the proceeds was absolute, not discretionary. *See Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 389 (1986) ("The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act, and is discretionary when the trustee may refrain from exercising it.").

We agree with the trial court that the trust's directive that Karp sell the house and distribute the proceeds "as soon as practicable" to Tyre and Hugh did not permit Karp to wait until she could ascertain the liquidity of the estate and the extent of any creditors' claims. Such a delay is common and often required in the probate of a person's estate, but as Medlin testified, the rules are different for trust administration. Medlin acknowledged Karp's position was understandable and not one of bad faith, for § 62-3-505(a)(3) makes revocable trust assets subject to probate claims if the probate estate is insufficient to pay its creditors. But, as Medlin emphasized, Karp risked no personal liability by following Deborah's intent to expedite distribution of the house sale proceeds, as the Trust Code insulated her and allowed creditors to

follow the money and recover against the distributee. *See* S.C. Code Ann. § 62-7-604(b) (Supp. 2018). Medlin also noted in his affidavit that a personal representative or trustee is only liable to non-beneficiaries if they are personally at fault. *See* S.C. Code Ann. § 62-3-808 (Supp. 2018); S.C. Code Ann. § 62-7-1010(b) (Supp. 2018); *see also* S.C. Code Ann. § 62-7-1002 (Supp. 2018) (stating trustee only liable to beneficiaries for breach of fiduciary duty).

Karp attempted to justify her delay by pointing to the possibility that Deborah could have, without Karp's knowledge, changed the terms of the trust by exercising her testamentary power of appointment by will or codicil. Even if we accept Karp's premise, the trust provides that if the trustee receives no notice of such a will or codicil within six months of Deborah's death, the trustee may distribute the trust "as though this power of appointment had not been exercised." Because Karp's delay far exceeded this six month window, her continued withholding of trust distributions in reliance on a potential revision of the trust was untenable.

There is no evidence Karp acted in bad faith. While a Trustee is duty-bound to act in good faith, good faith alone will not excuse a breach of trust. Once it is determined the trustee has failed to carry out the express terms of a trust, good faith "counts for nothing" in the breach of trust calculus. *Rollins v. May*, 473 F. Supp. 358, 365 (D.S.C. 1978); *see* 4 Scott & Ascher, § 24.5 ("A trustee who does the best it can, does, however, commit a breach of trust if the trustee's best is not good enough.").

The trial court's factual findings concerning Karp's breach of trust are supported by evidence, and we decline to disturb them. *See Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 775.

B. The No-Contest Provision of the Trust

We likewise affirm the trial court's finding that Hugh had probable cause to bring this action, rendering the no contest provision inoperable. *See* S.C. Code Ann. § 62-7-605 (Supp. 2018) ("A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings."); *see also* Restatement (Third) of Property, *Wills* § 8.5 cmt. (c) (Am. Law Inst. 2003) ("Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the

challenge would be successful."). This again is a factual matter we are bound to uphold if supported by any evidence. *See Townes Assocs*, 266 S.C. at 86, 221 S.E.2d at 775. Professor Medlin's testimony, together with Deborah's intent as expressed in Article 6, Section 4 of the trust, demonstrates that Hugh acted reasonably in pursuing this action and there was a high probability he would prevail.

C. Tyre's Status: Beneficiary or Creditor?

Karp insists the trial court erred in treating Tyre as both a creditor and a beneficiary. She claims Tyre cannot be both (Medlin disagreed). In Karp's view, Tyre was a creditor, and therefore, she could not be liable to Tyre for breach of trust, a cause of action only available to beneficiaries. But this argument leads to a cul-de-sac, for even if Tyre was a creditor, it would not affect Karp's liability for breach of trust to Hugh due to her lack of timely distribution to him, nor would it affect our holding that probable cause existed for this lawsuit. Assuming Tyre was a creditor, the no contest clause would not bind it. If Tyre was a beneficiary, the no contest clause would not apply because Tyre had the same probable cause as Hugh to challenge Karp's actions. A good argument could be made that Tyre was a beneficiary according to the Trust Code, which includes within the definition of beneficiary any person that "has a present or future beneficial interest in a trust . . . ." S.C. Code Ann. § 62-7-103(2)(A) (Supp. 2018). We explain all of this to demonstrate that Karp's argument may be disposed of by one of the great appellate truths: "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

D. Karp's Personal Liability

Karp contends the trial court erred by making her liable in both her capacity as trustee, and personally. We conclude the trial court did not err.

A trustee is liable to the beneficiaries for a breach of trust. § 62-7-1002. This liability is personal, and the trustee must pay any damages from his own funds. *See* Restatement (Third) of Trusts § 100 cmt. a (Am. Law Inst. 2012) ("This Section addresses the measure of a trustee's personal liability for a breach of trust.").

Karp argues section 62-7-1010 protects her from personal liability unless she was personally at fault. This section, however, applies only to a trustee's liability to third parties and does not affect the trustee's personal liability to beneficiaries for breach of trust. *See* South Carolina Trust Code Article 7, Part 10, General Comment

("Sections 62-7-1010 through 62-7-1013 address trustee relations with persons other than beneficiaries."). Section 1010 does, though, highlight that Karp had little risk of personal liability to third party creditors of Deborah's probate estate for promptly distributing the house sale proceeds as directed by the trust.

Although Karp acted in good faith, a trustee is nevertheless personally liable for breach of trust. *See Crayton v. Fowler*, 140 S.C. 517, 519, 139 S.E. 161, 161 (1927) ("[I]t is clear under the law and the facts of the case that he must be held personally responsible for said loss. It is a general rule of law that when a trustee departs from the directions contained in the trust instrument he is liable for any loss occasioned, irrespective of good faith or his best judgment."); *see also Hogg v. Walker*, 622 A.2d 648, 653 (Del. 1993) ("A trustee's liability for a breach of trust is personal in character with all the consequences and incidents of personal liability."); *In re Wills of Jacobs*, 370 S.E.2d 860, 865 (N.C. Ct. App. 1988) ("General common law principles hold that a trustee's breach of trust subjects him to personal liability."); 90A C.J.S. *Trusts* § 343.

E. Award of Attorney's Fees to Hugh

Karp next claims error in the award of attorney's fees. The Trust Code empowers trial courts to order attorney's fees in trust administration cases "as justice may require." S.C. Code Ann. § 62-7-1004 (Supp. 2018). We must affirm a trial court's fee award if any evidence supports it. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). The trial court's comprehensive written attorney's fee award tracked the criteria of *Baron Data Systems v. Loter*, 297 S.C. 382, 384–85, 377 S.E.2d 296, 297 (1989), and its factual conclusions are well anchored by the record.

F. The Trust Protector and Subject Matter Jurisdiction

Karp contends the trial court lacked subject matter jurisdiction over this action because the trust gives exclusive jurisdiction to the trust protector to resolve any disputes.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (internal quotations omitted). Whether a court has subject matter jurisdiction is a question of law we review de

novo. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

A trust protector is defined as "a person, committee of persons or entity who is or who are designated as a trust protector whose appointment is provided for in the trust instrument." S.C. Code Ann. § 62-7-103(27) (Supp. 2018). "The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons." S.C. Code Ann. § 62-7-818 (Supp. 2018). There is no case law interpreting the role of trust protectors in South Carolina or their effect, if any, on subject matter jurisdiction.

The parties designated Kennedy as Trust Protector. Article 3, Section 8(h) of the Trust states, "The Trust Protector *may* unilaterally resolve any dispute, claim or conflict" between beneficiaries and the Trustee. (emphasis added). In the event the trust protector elects to resolve such disputes, the "resolution shall be binding on all parties to [the] Trust and shall not be subject to review." Additionally, Section 8(h) declares:

> No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution . . . . The Trust Protector *may* submit the claim or dispute for mediation and/or binding arbitration. Subsequent to his or her review, the Trust Protector *may* give any claimant the authority to file and maintain an action in a court of law. . . . Whenever a dispute, conflict, or claim involves an interpretation or construction of [the] Trust Agreement, the Trust Protector *may* file an action in a court of competent jurisdiction for the interpretation and construction of such Trust Agreement, or *may* instruct [the] Trustee to do so.

(emphasis added).

The plain language of the trust shows Deborah intended a trust protector could, under certain circumstances, have binding authority to resolve disputes like the one that triggered this lawsuit. It is not necessary for us to detail these circumstances,

because none of them exist here. By way of example, the trust protector provision arguably requires that any dispute be first presented to the trust protector before a lawsuit can be filed. Yet here the trust protector was not appointed until months after filing. Likewise, the trust protector provision states the trust protector may unilaterally resolve disputes, submit the dispute to mediation or arbitration, file a lawsuit to resolve the dispute, allow a claimant to file suit, or instruct the trustee to file suit. Here, Kennedy in her report not only declined to resolve the dispute but encouraged Karp to seek judicial resolution.

Whatever the contours of the trust protector's authority, we hold that under the circumstances here they do not extend to stripping the trial court of subject matter jurisdiction. Probate Courts and Circuit Courts are specifically empowered to hear trust administration disputes. *See* S.C. Code Ann. § 62-7-201 (Supp. 2018).

IV.

We therefore affirm the ruling of the trial court. Our decision and its underlying reasoning would be the same even if we had reviewed this appeal de novo and found the facts based on our own view of the greater weight of the evidence. Finally, we dismiss Karp's appeal of the denial of her summary judgment motion. *See, e.g.*, *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("[T]he denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits.").

Accordingly, the trial court's order is

AFFIRMED IN PART AND DISMISSED IN PART.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robin Johnson and CQI Pharmacy Services, LLC,
Respondents,

v.

Robert Little and CQI Oncology/Infusion Services, LLC,
Appellants.

Appellate Case No. 2016-001689

Appeal From Anderson County
Ellis B. Drew, Jr., Master-in-Equity
Steven C. Kirven, Master-in-Equity

Opinion No. 5640
Heard December 6, 2018 – Filed April 10, 2019

AFFIRMED AS MODIFIED

James McKinley Robinson, of Robinson Law Firm, of Easley, for Appellants.

Timothy G. Quinn, and Natalie Joan Quinn, both of Quinn & Hardy, of Columbia, for Respondents.

KONDUROS, J.: In this breach of contract action for the sale of a business, Robert Little and his company, CQI Oncology/Infusion Services, LLC, appeal the findings of the Master-in-Equity arguing the master erred (1) by finding Little

breached the contract with Robin Johnson and her company, CQI Pharmacy Services, LLC; (2) by requiring he indemnify Johnson against claims arising from the sale of business assets; (3) in granting damages in the amount of $50,000; (4) in granting judgment on a theory of successor liability; and (5) in granting judgment against Little individually. We affirm as modified.

FACTS/PROCEDURAL HISTORY

The two companies in this case were intertwined. Johnson and Little both worked as an employee at each other's company, but they were the sole owners of their respective companies. Both Johnson and Little were authorized signatories for the other's business checking account. In late March and early April 2013, Johnson paid invoices from vendors in the amount of $25,568.59 out of the CQI Oncology account, Little's company. Shortly after, on April 15, 2013, Johnson removed Little as an authorized signatory on CQI Pharmacy's—her company's—checking account. Johnson immediately informed Little of this through a letter. Little subsequently removed Johnson as an authorized signatory on CQI Oncology's—his company's—checking account, which caused the checks used to pay the vendor invoices to fail.

On May 9, 2013, Little entered into a Purchase and Sale Agreement with Johnson in which Little agreed to sell certain assets of his company to Johnson for the purchase price of $30,000. The contract provided the sale would include "all contracts, files, clients lists, contacts, and vendor lists." The contract noted "[t]he seller represents and warrants that the Property is free and clear of any liens or encumbrances and that the [s]eller has rightful title to the Property." The contract also contained an indemnity clause that stated "[s]eller agrees that he will defend, indemnify and hold purchaser harmless from any and all actions, causes of action, claims and or demands which arise or are asserted as arising from [s]eller's conduct prior to closing."

Johnson filed suit against Little on October 2, 2013, alleging breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraud, and violation of the South Carolina Unfair Trade Practices Act. Little moved to dismiss, and the master denied the motion. The matter was tried without a jury by the master. The master found for Johnson and awarded damages in the

amount of $50,000. Little filed a motion for reconsideration, which the master denied following a hearing.[1] This appeal followed.

STANDARD OF REVIEW

"Our scope of review for a case heard by a [m]aster-in-[e]quity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). "An action for breach of contract seeking money damages is an action at law." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (quoting *McCall v. IKON,* 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008)). "In an action at law, 'we will affirm the master's factual findings if there is any evidence in the record which reasonably supports them.'" *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006) (quoting *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101-02, 552 S.E.2d 778, 781 (Ct. App. 2001)). "In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law." *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006).

LAW/ANALYSIS

I. Breach of Contract

Little argues the master erred in finding he breached the contract. He contends because the invoices were issued to Johnson and the contract contained no provision requiring him to pay the invoices, he was not liable for them and therefore did not breach the contract with Johnson. We disagree.

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015) (quoting *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012)). "The general rule is that for a breach of contract the [breaching

[1] The Hon. Ellis B. Drew, Jr. presided over the case and signed the order deciding the case. The Hon. Steven C. Kirven signed the order denying the motion for reconsideration.

party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* (alteration by court) (quoting *Kemper*, 399 S.C. at 492, 732 S.E.2d at 209).

The parties do not dispute the contract between them is valid. Thus, we look at the second element to see whether Little breached the contract. The contract provides "[s]eller represents and warrants that the Property is free and clear of any liens or encumbrances and that the [s]eller has rightful title to the Property." "An encumbrance is a right or interest in the land granted 'which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.'" *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428-29 (2000) (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)). *Black's Law Dictionary* defines an encumbrance as "[a] claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest." *Encumbrance*, *Black's Law Dictionary* (10th ed. 2014). Here, the outstanding invoices constituted an encumbrance on the property. Little argues the invoices did not belong to his business but rather to Johnson's because her name was on the invoices. However, Johnson testified she had worked as an employee at Little's company for over twenty years and she placed the order in her capacity as Little's employee. Andrea Fisher, a former employee of Little, corroborated this. Fisher testified medical supply companies sent the invoices and the products were for Little's company.

Prior to the signing of the contract, Johnson paid the last invoices for Little's company using money from Little's company checking account. Johnson then removed Little as an authorized signatory of her business's checking account. In turn, Little removed Johnson from his business's checking account. However, Little may have also retracted the checks Johnson had used to pay for the invoices. He testified twice he put a stop payment on the checks, but he backtracked during later testimony.

Whether Little personally stopped the checks or not, they were retracted, and therefore, the invoices were not paid before the date of the contract between Johnson and Little. We find this constitutes a breach of contract as the assets were encumbered at the time the parties formed the contract. As a result of the breach, Johnson was not able to do business with the vendors until the invoices were paid.

The record implies Johnson personally paid the invoices so she could continue doing business with the vendors. The amount Johnson paid to the vendors satisfies the damages element for a breach of contract claim. Because the record contains evidence Little breached the contract by either retracting the invoice checks or allowing them to be retracted, which allowed an encumbrance to exist on the date the parties formed the contract, the master did not err in finding Little breached the contract. Accordingly, we affirm the master as to this issue.

II. Indemnification

Little argues because the invoices were issued to Johnson, he had no duty to indemnify her. We disagree.

"Our courts 'have consistently defined indemnity as that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 646-47, 819 S.E.2d 166, 170 (Ct. App. 2018) (quoting *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003)). "A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Id* at 647, 819 S.E.2d at 170 (quoting *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999)). "Typically, courts will construe an indemnification contract 'in accordance with the rules for the construction of contracts generally.'" *Id.* (quoting *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993)).

The indemnification clause in the contract states "[s]eller agrees that he will defend, indemnify and hold purchaser harmless from any and all actions, causes of action, claims and or demands which arise or are asserted as arising from [s]eller's conduct prior to closing." Little's sole argument on indemnity is because the invoices were issued to Johnson, the claims did not arise from his conduct. However, as stated in the previous section, the invoices were issued to Johnson in her capacity as an employee of Little. Both Johnson and Fisher testified the inventory was purchased for Little's company. Therefore, because the evidence supports the invoices arose from Little's company, the master did not err in finding Little must indemnify Johnson. Accordingly, that finding is affirmed.

III. Damages

Little argues the master erred in granting an additional $30,000 for the indemnification claim in addition to the $20,000 for the invoices. We agree.

"The general rule is that for a breach of contract[,] the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Hotel & Motel Holdings*, 414 S.C. at 652, 780 S.E.2d at 272 (second alteration by court) (quoting *Kemper*, 399 S.C. at 492, 732 S.E.2d at 209). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." *Coggins*, 386 S.C. at 48, 686 S.E.2d at 202 (quoting *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990)).

In explaining his damages award, the master provided:

> At any rate, I'm going to award the plaintiff the sum of $20,000.00 for non-payment of invoices. I'll also award her the $30,000.00 because in the contract, under the indemnity agreement, he was to hold the purchaser harmless of any and all claims arising out of the contract prior to closing.

An award of $50,000 places Johnson in a better position than she would have been in had the breach not occurred. Johnson did not argue she was unable to obtain any of Little's contracts, files, clients lists, contacts, or vendor lists. The sole breach consisted of the invoices she needed to pay so the vendors would continue doing business with her company. Therefore, we reduce Johnson's award to the total amount of the invoices, which Johnson listed as $25,568.59 in her complaint.

IV. Successor Liability

Little contends that because Johnson's company could not be held liable under a theory of successor liability for Little's company debts, his company should not be held liable for Johnson's company debts. We disagree.

> In the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully denying creditor claims.

Walton v. Mazda of Rock Hill, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008).

We find this argument to be a red herring. The master did not grant relief on a theory of successor liability, and it was not discussed at trial. The theory of successor liability does not fit into the facts of the case. Thus, we find this argument lacks merit. *See* Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

V. Individual Judgment

Little argues the master erred in finding him individually liable because under section 33-44-303 of the South Carolina Code (2006), all liabilities rest solely with the company and not with him individually. We disagree.

Section 33-44-303 provides:

> Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

§ 33-44-303(a).

The comment to section 33-44-303 provides:

> A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.

§ 33-44-303 cmt.

"Therefore, as a matter of law, a manager of a limited liability company can wrongfully interfere with his company's contracts and be held individually liable for his acts." *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 606, 753 S.E.2d 840, 845 (2012).

We find the master did not err in entering judgment against Little individually in addition to his company. The contract provided it was entered into "by and between Robert Little individually and CQI Oncology/Infusion Services, LLC." Furthermore, the contract is signed by Little both as an individual and in his capacity as the sole member and manager of the LLC.

Little testified, "I put a stop payment immediately on them, the checks, and it took them several weeks to put them back into the account." When asked if he informed Johnson the checks had been stopped, he testified, "I didn't put a stop payment on any checks. I just went and had her name removed from the checking account. I didn't put a stop payment on the checks." Regardless of whether Little stopped payment on the checks or simply removed Johnson from the account, his actions caused the vendors to not be paid. This constitutes wrongful interference with his company's contracts. Because Little was a party to the contract as an individual and his actions caused the contract to be breached, the master did not err in holding him individually liable. Accordingly, the master's decision is affirmed.

CONCLUSION

We find the master did not err in finding Little breached the contract by either retracting the invoice checks or allowing them to be retracted. Additionally, because the evidence supports that the invoices were the responsibility of Little's company, we affirm the master's finding Little must indemnify Johnson. Furthermore, we find Little's successor liability argument lacks any merit and decline to address it. As to Little's individual liability, we find Little was a party to the contract as an individual and his actions caused the contract to be breached. Therefore, the master did not err in holding him individually liable. Finally, the master erred in granting Johnson $50,000, and we reduce the award to $25,568.59 to reflect the amount Johnson paid to vendors. Accordingly, the master's order is

AFFIRMED AS MODIFIED.

MCDONALD and HILL, JJ., concur.